William & Mary Bill of Rights Journal

Volume 8 (1999-2000)
Issue 2

Article 9

February 2000

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Todd M. Gillett, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 Wm. & Mary Bill Rts. J. 497 (2000), https://scholarship.law.wm.edu/wmborj/vol8/iss2/9

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THE ABSOLUTION OF REYNOLDS: THE CONSTITUTIONALITY OF RELIGIOUS POLYGAMY[1]

The ancient practice of polygamy became prevalent in parts of the United States in the mid-nineteenth century, when the Mormon Church canonized the doctrine of polygamy and encouraged its practice among its members. Today, there are nearly 40,000 polygamists in the United States, mostly living in Utah. The Supreme Court has ruled on polygamy several times in decisions and dicta, each time finding it to be unconstitutional within the United States. In Reynolds v. United States, *a 1878 decision upholding a statute that criminalized polygamy, the Court introduced the belief/action distinction that controls religious First Amendment doctrine today. This Note discusses the history of religious polygamy and argues that the Court should reexamine its previous rulings and should declare the practice of religious polygamy constitutional under the Free Exercise Clause of the First Amendment and the right to privacy within a marriage.*

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INTRODUCTION

Outside of a few states, most Americans do not consider polygamy to be a controversial topic. Although most people logically assume that, somewhere in the world, people practice polygamy, they usually consider the concept of plural marriage to be beyond the "accepted norms of [American] society."[2] However, people still practice polygamy, albeit illegally, in certain areas of the United States. One study estimates that there are between 20,000 and 40,000 polygamists "living mostly in Utah and surrounding border communities."[3] If the figures in the 40,000 range are accurate, as another report claims, polygamists would account for two percent of the population of Utah.[4] This statistic would represent a tenfold increase over the last fifty years in the number of polygamists residing in the state.[5] Although polygamy is technically illegal in the state of Utah, banned forever by the state's

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[1] The correct term for the form of plural marriage discussed in this Note "is 'polygyny' (meaning 'many women'). 'Polygamy' literally means 'having many spouses'." *Preface to* JOHN CAIRNCROSS, AFTER POLYGAMY WAS MADE A SIN: THE SOCIAL HISTORY OF CHRISTIAN POLYGAMY, at x n.1 (1974).

[2] LENORE J. WEITZMAN, THE MARRIAGE CONTRACT 205 (1981).

[3] John Heliprin, *Hatch Joins Leavitt in Game of Twister over Polygamy Issues*, SALT LAKE TRIB., Aug. 29, 1998, at A1, *available in* 1998 WL 4069847.

[4] *See* James Brooke, *Utah Struggles with Revival of Polygamy*, N.Y. TIMES, Aug. 23, 1998, at A12.

[5] *See id.*

constitution,[6] officials have not enforced anti-polygamy laws in recent years.[7] The issue of polygamy recently became noteworthy when local police arrested a member of the Kingston clan, a fundamentalist Mormon sect adhering to a belief in polygamy, for beating his sixteen-year-old daughter.[8] According to authorities, John Daniel Kingston attacked the girl to punish her for leaving a "7-month marriage to her uncle—who already purportedly had 14 wives."[9] Kingston pled no contest to a charge of third-degree felony child abuse and was given a minimal sentence.[10]

The police also arrested the girl's uncle, David Ortell Kingston and charged him with one count of sexual abuse and two counts of incest.[11] Despite pre-trial testimony indicating that he had many wives,[12] the police did not charge Kingston with polygamy and the trial judge refused to allow any testimony concerning Kingston's extra marriages during the trial.[13] During sentencing, however, Judge David Young addressed the issue, stating that to ignore it would be "sort of like saying that we can ignore the 5,000-pound elephant in the living room."[14] Yet, the judge spoke of Kingston not as a wicked predator, but as a victim of his family's teachings.[15] The

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[6] *See* UTAH CONST. art. III, § 1 ("[P]olygamous or plural marriages are forever prohibited.").

[7] *See* RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 1, 199-207 (1986).

[8] *See* Jennifer Gallagher & Susan Snyder, *Ex-Members Recount Lives of Torment in Polygamous Sect*, SALT LAKE TRIB., June 16, 1998, at B5, *available in* 1998 WL 4058788.

[9] *Id.*

[10] The judge "sentenced Kingston to serve up to 5 years in prison but placed him on probation with the conditions that he serve 28 weeks in jail, pay $2,700 in fines, and complete anger-management counseling. . . . The judge said Kingston could receive work-release privileges in two weeks, upon a recommendation from his probation officer." Ray Rivera, *Polygamist Gets Jail Time for Beating His Daughter*, SALT LAKE TRIB., June 30, 1999, at A1, *available in* 1999 WL 3367784. For an editorial expressing outrage over the leniency of the sentence, see *The Kingston Sentences*, SALT LAKE TRIB., July 14, 1999, at A12, *available in* 1999 WL 3369866 ("Surely society has an interest in protecting 16-year-old women from being forced into arranged marriages with much older men, particularly incestuous ones . . . .").

[11] *See Polygamist Arraigned on Incest Charges* (last modified Aug. 20, 1998) <http://www.idahonews.com/082098/THE_WEST/24294.htm>.

[12] *See id.*

[13] *See* Julie Cart, *Incest Trial Sheds Light on Polygamy in Utah*, L.A. TIMES, June 4, 1999, at A3, *available in* 1999 WL 2165125.

[14] Hannah Wolfson, *Kingston Sentence: 10 Years*, AP, PROVO DAILY HERALD, July 10, 1999, at A1.

[15] *See* Ray Rivera, *Judge Gives Kingston Maximum Sentence, Denounces Incest*, SALT LAKE TRIB., July 10, 1999, *available in* LEXIS, News Library, Curnws File [hereinafter, Rivera, *Judge*] ("Mr. Kingston has been a victim of some misguided family instruction and teaching. . . . But your family is wrong . . . [and] you have lacked the judgment to recognize that mistaken illegal doctrine that you have followed.").

judge's show of sympathy, small as it was, is not uncommon in Utah, a state that historically has grappled with the problem of polygamy.

Although the Utah Constitution explicitly states that "polygamous or plural marriages are forever prohibited,"[16] officials have not prosecuted known offenders.[17] Despite the fact that two Utahans have been arrested this year and charged with the crime of bigamy,[18] which prohibits all plural marriages, thousands of polygamists currently reside within the state.[19] Some jurisdictions within the state refuse to prosecute polygamists, even when citizens make few attempts to hide their marital status.[20] Some law enforcement officials reason that "in an age when sex between consenting adults is not considered a crime, there is no political will to enforce 19th-century anti-polygamy laws."[21] Scott Burns, the Iron County, Utah Attorney, stated, "If polygamists are not breaking other laws, we won't prosecute .... They're pretty independent. They just want to be left alone."[22]

In fact, some members of the Utah political leadership appear ambivalent about the topic of polygamy. After Kingston's arrest, Utah Governor Mike Leavitt, himself a descendant of polygamist settlers, said that polygamy might be protected under the

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[16] UTAH CONST. art. III, § 1.

[17] The last major attempt to prosecute polygamists within the United States was the raid on a fundamentalist Mormon enclave in the town of Short Creek, Arizona, on July 26, 1953. The affair, which cost the state $600,000, was a public relations nightmare. Two hundred sixty-three children of accused polygamists became wards of the state after their fathers were arrested. Eventually, all the children were returned to their parents. In Utah, officials have not attempted to prosecute a person criminally for polygamy since 1960. *See* VAN WAGONER, *supra* note 7, at 199-207.

[18] *See* Paul Foy, *'Law-Abiding' Disabled Vet Charged in Bigamy Case*, DESERET NEWS (Salt Lake City), May 22,1999, at B5, *available in* 1999 WL 17593069.

[19] *See Utah Polygamists Estimated at 25,000*, AP, Apr. 24, 1999, available in 1999 WL 15642106 (quoting a Utah Attorney General's report estimating the current number of polygamists in the state to be 25,000).

[20] *See* Ray Rivera & Greg Burton, *Green and His Wives May Face Bigamy Charges*, SALT LAKE TRIB., July 16, 1999, at A5, *available in* 1999 WL 3370207 (stating that the Utah County Attorney refuses to prosecute a known polygamist currently sitting on the Eagle Mountain City Council).

[21] Dawn House, *Prosecution of Plural Marriage a Thorny Issue for Courts; Prosecuting Polygamy is No Easy Matter*, SALT LAKE TRIB., June 28, 1998, at J6, *available in* 1998 WL 4060698.

[22] *Id.* Mr. Burns also has referred to polygamy as a crime that although "technically criminal," has become "accepted and immune from prosecution in Utah." Dan Harrie, *Iron County Drops Charges Against 3 Arrested at Horse Race*, SALT LAKE TRIB., Oct. 8, 1991, at B1, *available in* 1991 WL 5232872. Mr. Burns' district, Iron County, has a unique place in the history of polygamy; it is the site of the grave of Edward Meeks Dalton, "claimed to be the only person in U.S. history who was killed for practicing polygamy." Steve Law, *Town's Fading Headstone's Keep History Alive*, SALT LAKE TRIB., Dec. 3, 1996, at A1, *available in* 1996 WL 13844240. Dalton's headstone reads, "Here lies the victim of a nation's blunder." *Id.*

Free Exercise Clause of the First Amendment.[23] A week later, he retracted this statements.[24] Instead of seeking to purge polygamy from the state, the Utah legislature recently declined to grant $750,000 "to investigate and combat crimes within isolated polygamist communities."[25] However, the bill's sponsor, state senator Ron Allen, has asserted that the money would have been used to prosecute fraud and child abuse in polygamous townships, not polygamy itself.[26] Allen contends that passing legislation burdening polygamists is difficult because "some [Utah] lawmakers 'have a romantic attachment to polygamy without recognizing its legal or criminal ramifications.'"[27]

Senator Orrin Hatch of Utah, the chairman of the Senate Judiciary Committee, when questioned about the potential constitutionality of polygamy, said, "I don't think the Constitution is clear. I think the constitutional law is clear. ... The Constitution is ambiguous with regard to this. It provides for religious freedom."[28] Although this sounds like political doublespeak, Hatch has a point. While the Constitution does not explicitly give the government the power to ban the practice of polygamy as a religious doctrine, the Supreme Court has stated repeatedly that polygamy is illegal within the United States.[29] When one explores the Court's reasoning in its cases concerning polygamy, one notices that its arguments are based on outdated principles that are inapplicable today.

This Note has four parts. Part I details the history of polygamy, with a special focus on the history of the Mormon Church. Part II examines the current state of polygamy in the United States. Part III reviews case law, examining the record to

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[23] *See* Judy Fahys, *Prosecuting Polygamists Not a Priority*, SALT LAKE TRIB., July 24, 1998, at A1, *available in* 1998 WL 4064441. Ironically, Juab County Attorney David O. Leavitt, Governor Levitt's brother, might soon prosecute a local polygamist who has discussed his lifestyle on Dateline NBC and other talk shows. *See* Rivera & Burton, *supra* note 20.

[24] *See* Ray Rivera, *"I Do Not Condone Polygamy," Leavitt Says*, SALT LAKE TRIB., Aug. 21, 1998, at A5, *available in* 1998 WL 4065525.

[25] Dan Harrie, *Feds Reject Grant for Ex-Polygamists*, SALT LAKE TRIB., Oct. 13, 1999, at D3, *available in* 1999 WL 33831331 [hereinafter Harrie, *Feds*].

[26] *See* Dan Harrie, *Zolman Zealous in Cause to Raze Polygamy Ban*, SALT LAKE TRIB., Mar. 23, 1999, at B1, *available in* 1999 WL 3353000 [hereinafter Harrie, *Zolman*] (stating that the money would have gone "to investigate and prosecute child and sex abuse, incest and welfare fraud"); *see also* Harrie, *Feds*, *supra* note 25, at D3 (quoting Allen on the purpose of the bill: "'I don't want to get involved with the politics of polygamy. . . . This approach is not about the persecution of consenting adults. It's about the prosecution of fraudulent and abusive adults wherever they might be.'").

[27] Harrie, *Zolman*, *supra* note 26, at B1.

[28] Heliprin, *supra* note 3, at A1. Like Leavitt, Hatch also has polygamous ancestors. *See* Greg Burton, *Pioneers, Polygamy, Politics, Entwined in Hatch's Roots*, SALT LAKE TRIB., Sept. 6, 1999, *available in* LEXIS, News Library, Curnws File (noting that Hatch's great-grandfather had three wives).

[29] *See infra* notes 105-90 and accompanying text.

find arguments for the legalization of the practice of polygamy. Part IV concludes by arguing for the constitutionality of religious polygamy.

I. THE HISTORY OF POLYGAMY

When the media discusses polygamy, it often characterizes the practice as either a joke or a male fantasy. In a humorous piece in the *Salt Lake Tribune*, intended to introduce Egyptian visitors to Utah, columnist Robert Kirby wrote, "While some Utah men have harems, the practice here is called 'polygamy.' And the only eunuchs we have are in the state Legislature."[30] In a column in the *London Times*, Alan Coren, informing readers of the benefits of becoming a Muslim, stated that while "you will be in a position to take advantage of whatever you think polygamy may have to offer, . . . I should not advise this for anyone who has difficulty remembering anniversaries."[31]

While newspaper humorists cannot be expected to take polygamy seriously, the mainstream television media also refuses to examine polygamy in a solemn manner. On October 17, 1997, the ABC news program *20/20* began a report on polygamy with the blurb, "What kind of woman would be willing and happy to share her husband? And how does one man satisfy their needs? John Stossel takes you into a world that some men dream about and others call home."[32]

A. *Polygamy in the Judeo-Christian Tradition*

Although most Americans have forgotten, polygamy was a widespread practice for many years. According to the Old Testament, the Biblical figures Abraham and David both had multiple wives, and King Solomon had "700 wives and 300 concubines."[33] Although the Catholic Church forbade polygamy,[34] early Jewish law technically permitted the practice among male believers.[35] Social custom, however,

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[30] Robert Kirby, *Three Important Peoples Inhabit This Fair State*, SALT LAKE TRIB., Apr. 9, 1998, at B1, *available in* 1998 WL 4047299.

[31] Alan Coren, *Alan Coren's Column*, THE TIMES (London), Jan. 2, 1998, at 16, *available in* 1998 WL 4807858.

[32] *20/20: Man and Wives—A Look at Polygamous Marriages in the U.S.* (ABC television broadcast, Oct. 17, 1997), *transcript available in* 1997 WL 15387180.

[33] Peggy Fletcher Stack, *Why Do People Practice Polygamy; Around the World: Globally, Polygamy is Common Place*, SALT LAKE TRIB., Sept. 20, 1998, at A1, *available in* 1998 WL 4073342 [hereinafter Stack, *Why*].

[34] *See* CAIRNCROSS, *supra* note 1, at 1-2.

[35] *See* Michael Gold, *Adultery: Revisiting the Seventh Commandment*, MOMENT, Feb. 28, 1998, at 34, *available in* 1998 WL 11393028.

prescribed that a man only take one wife throughout talmudic times.[36]

Eastern European Jews did not ban polygamy until the tenth century, when Rabbenu Gershom forbade the practice for a thousand years.[37] According to reports, Gershom reasoned that "Jews were so persecuted by so many nations that allowing polygamy only made it worse."[38] Although Gershom expected the ban to last until the Apocalypse, the prohibition actually expired in 1987.[39]

B. *The Republic of Saints*

Historically, polygamy was not a widespread practice amongst Western European Christians. The most well-known attempt to create a polygamous community in Christian Europe occurred in Münster, Germany.[40] In February of 1534, a group of Anabaptists[41] seized control of the city.[42] Believing that the creation of a pure state would hasten the return of Christ, the Anabaptists expelled all "non-believers" from the town, cut ties with the official government of the land, and christened their new kingdom the "Republic of the Saints."[43] The state was short-lived, however, as both Catholics and Lutherans, fearing a spread of the Münsterites' radical theology, laid siege to the town and finally overran it on June 24, 1535.[44]

In 1534, the Münsterites' leader, John of Leyden declared polygamy to be the law of their domain.[45] John, considered a king by his followers, justified this action by reminding his people of the existence of such marriages in the Old Testament and the need to increase the Anabaptist population.[46] During the period from June 1534 to the Republic's destruction in 1535, the Anabaptists practiced polygamy, believing it to be the "ideal form of marriage."[47]

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[36] *See id.* (noting that the word for the second wife, joined in a polygamous marriage was "tzara, meaning trouble").

[37] *See id.*

[38] *Id.*

[39] *See id.*

[40] *See* CAIRNCROSS, *supra* note 1, at 1-30.

[41] Founded in the sixteenth century, Anabaptists are a Protestant sect believing in adult baptism. Rather than attempting to reform the Catholic Church, early Anabaptists sought to form their own system of worship, basing it on what they believed to be the original church of the Apostles. Current Anabaptist denominations include the Mennonites and the Amish. *See* 1 THE NEW ENCYCLOPAEDIA BRITANNICA 363 (15th ed. 1993).

[42] *See* CAIRNCROSS, *supra* note 1, at 5.

[43] *See id.* at 5-6.

[44] *See id.* at 20.

[45] *See* John D. Roth, *The Mennonites' Dirty Little Secret: What Christians Should Learn from Menno Simons and How He Rescued the Anabaptist Movement*, CHRISTIANITY TODAY, Oct. 7, 1996, at 44, *available in* 1996 WL 9031360.

[46] *See* CAIRNCROSS, *supra* note 1, at 7.

[47] *Id.* at 1.

It is impossible to measure accurately the effect of polygamy on the "Republic of the Saints." Some historians argue that the Münsterites created a "reign of terror" within the city walls.[48] They believe that the doctrine of polygamy created a situation akin to "free love," very different from the Münsterites' original Puritan intentions.[49]

Author John Cairncross states that this conclusion resulted from the personal bias of medieval Catholic historians.[50] He claims that the Münsterites actually retained strict Puritanical laws against fornication and adultery throughout the Republic's existence, ensuring that sexuality could not be expressed outside of a legal marriage.[51] Cairncross also notes that contemporary reports indicated that the women of Münster, far from feeling displeased by a law allowing men to marry multiple women but allowing them to marry only one man, took an active role in defending their small community against invaders.[52] Whatever the reality of life within Münster's walls, the Republic of the Saints was destroyed by its enemies. No sizeable Christian sect would adopt polygamy as a practice until the Mormon Church, 300 years later and a continent away.

C. *The Mormon Church*

1. Beginnings

On April 6, 1830, Joseph Smith, Jr., a twenty-four-year-old farmer, founded the religious community that became the Church of Jesus Christ of Latter-day Saints.[53] Smith's followers, the Mormons, believed he had translated a second holy testament of the Christian God from golden plates revealed to him by the angel Moroni.[54] According to Mormon doctrine, this text, the *Book of Mormon*, was "comparable to the Bible," and Smith was a prophet of God.[55]

Elements within Mormon theology espoused by Smith as well as the Prophet's actions created conflict with the United States government early in the church's existence. Like the ill-fated Republic of the Saints, Mormon theology centered around the creation of a new Zion in the midst of Babylon, "the larger unregenerated

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[48] *See id.* at 22-28 (detailing accounts of the executions of most of John of Leyden's enemies and some of his wives).

[49] *See id.* (giving contemporary accounts of debauchery).

[50] *See id.* at 24.

[51] *See id.* at 25.

[52] *See id.* at 20. One must remember that this was an age when women were characterized as being "'made for either marriage or for whoredom.'" *Id.* at 7 (quoting Martin Luther).

[53] *See* VAN WAGONER, *supra* note 7, at 1.

[54] *See Introduction to* BOOK OF MORMON (Church of Jesus Christ of Latter-day Saints 1981) (1830).

[55] *Id.*

society."[56] Although the Mormons pledged their allegiance to the United States government, they sought to "apply heavenly guidelines on earth despite legal technicalities."[57]

Because the apostle Paul admonished Christians to settle disputes amongst their brothers rather than going before outsiders, the Mormons created their own ecclesiastical courts to resolve conflicts between members.[58] After a revelation from God on April 7, 1842, Smith ordered the creation of a parliamentary organization called the Council of Fifty.[59] Because the Council's duty was to act as "the political arm of the Kingdom of God when the Lord finally established his kingdom on the earth,"[60] the Council had no power until the Second Coming and eventually ceased to exist.[61]

Most disturbing of all for non-Mormons, however, was a provision in the city charter for the Mormon settlement of Nauvoo, Illinois, that established "an independent militia of which Smith was the head."[62] Because of this provision and the church's previous actions, many Americans feared that the Mormons had created a dictatorial quasi-theocracy within American borders, complete with its own court, government, and army.[63]

2. Doctrinal Polygamy

Polygamy was not an essential characteristic of Mormon belief in the church's earliest days. The *Book of Mormon* explicitly criticizes the practice[64] and an 1835

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[56] EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, at xiii (1988). According to Smith's followers:

> Zion was the ideal of a more just society predicated on a new economic order, social equality, and sacred covenants. Zion was the New Jerusalem that would prepare the earth for the imminent Second Coming. Zion was the hope for a new social relationship of which the family, as redefined under a patriarchal system, was a microcosm. Zion was thus a rejection of existing social and economic mores because these defined Babylon, the society that Mormonism was called to transform, or at least live apart from.

Id. at xii-xiii.

[57] VAN WAGONER, *supra* note 7, at 8.

[58] *See* FIRMAGE & MANGRUM, *supra* note 56, at 13 (citing 1 *Cor.* 6:1-8).

[59] *See id.* at 6.

[60] *Id.* at 7.

[61] *See id.*

[62] Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1324 (1998).

[63] *See id.*

[64] *See Jacob* 1:15 (Book of Mormon) ("And now it came to pass that the people of Nephi, . . . began to grow hard in their hearts, and indulge themselves somewhat in wicked

"Article of Marriage," attributed to Smith, declared monogamy to be the official doctrine of the church.[65] Yet, Smith practiced polygamy and, in 1839, he met with his closest associates, encouraging them to do likewise.[66] In 1842, Smith wrote the doctrine of polygamy that would become church law in 1852:[67]

> "Prepare thy heart to receive and obey the instructions which I am about to give unto you; for all those who have this law revealed unto them must obey the same . . . . If any man espouse a virgin, and desires to espouse another, and if the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then he is justified; he cannot commit adultery with that that belongeth to him and to no one else."[68]

After the church canonized the doctrine of polygamy in 1852, Mormon leaders encouraged members to enter into polygamous marriages.[69] While men could marry as many women as they wished under this doctrine, women could have only one husband.[70] However, Elizabeth Harmer-Dionne, in her commentary on Mormon polygamy and the Supreme Court, states that this was in keeping with the patriarchal view of the Mormon Church, in which the salvation of a woman depended upon her husband:

> The Prophet Joseph Smith explicitly taught that a man would progress through eternity in proportion to the magnitude of his posterity on earth and that polygamy was a central part of the pursuit of godhood. More wives ensured both increased progeny and greater future glory. Men who rejected the practice of polygamy not only forfeited godhood, but were damned. Accordingly, the salvation of women depended on their union with a righteous—by definition, polygamous—man.[71]

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practices, such as like unto David of old desiring many wives and concubines, and also Solomon, his son.").

[65] *See* VAN WAGONER, *supra* note 7, at 6 ("Inasmuch as this church of Christ has been reproached with the crime of fornication, and polygamy; we declare that we believe, that one man should have one wife; and one woman, but one husband, except in case of death, when either is at liberty to marry again.").

[66] *See* JESSIE L. EMBRY, MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE 7 (Publications in Mormon Studies Vol. 1, 1987).

[67] *See id.* at 6-8.

[68] *Id.* at 6 (quoting DOCTRINES AND COVENANTS 132:1-3, 61).

[69] *See id.* at 8.

[70] *See* CAIRNCROSS, *supra* note 1, at 177 (noting that Mormon polygamy was based upon the "Old Testament Model," advocating multiple partners for the males and "strict fidelity" on the part of the wives).

[71] Harmer-Dionne, *supra* note 62, at 1320 (citations omitted).

Although Mormon women were second to their husbands in their theology's celestial structure, the plural wives actually achieved a greater measure of equality than many of their non-Mormon counterparts. The Mormons encouraged wives to be self-sufficient, allowing them to work as telegraph operators, teachers, and even business managers.[72] After 1870, Mormon wives even had the right to vote, which was unusual at a time "when feminine suffrage smacked of lunacy."[73] Congress passed a measure granting voting rights to female citizens in the territories, believing that the "downtrodden women of Salt Lake City would seize the opportunity to regain their liberty."[74] Instead, satisfied with their plight and loyal to their people, Mormon women used their new power to elect Mormon candidates.[75]

Already seen by many as a threat due to their exclusive nature, the Mormon practice of polygamy provoked the ire of powerful organizations, including the eastern media establishment[76] and the Republican Party, which linked the issue of polygamy with that of slavery.[77] In 1862, Congress passed the Morrill Act,[78] which "prohibited plural marriage in the [United States] territories, disincorporated the [Mormon] Church, and restricted the Church's ownership of property to $50,000."[79]

In 1890, after numerous arrests and court battles, the Mormon Church officially disavowed the practice of polygamy, ordering its followers to "'refrain from contracting any marriages forbidden by the law of the land.'"[80] Although the church did not punish those who continued to live in polygamous relationships after the 1890 ban, Mormon officials "simply allowed the practice to die out and sanctioned no new marriages."[81] In 1896, Utah was admitted into the United States, only after the

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[72] *See* CAIRNCROSS, *supra* note 1, at 191.

[73] *Id.* at 192.

[74] *Id.*

[75] *See id.*

[76] The eastern press published many articles about the Mormons, hoping to sell magazines through stories of their debauched lifestyle. Of course, many of these articles were probably false. *See* VAN WAGONER, *supra* note 7, at 89. For examples of 1850s articles and illustrations about the Mormons by Eastern magazines, see GARY L. BUNKER & DAVIS BITTON, THE MORMON GRAPHIC IMAGE, 1834-1914, at 16-30 (1983).

[77] *See* CONG. GLOBE, 36th Cong., 1st Sess. 1410 (1860) (statement of Rep. Branch) (noting that in the 1856 elections, the Republican party characterized slavery and polygamy as "the twin relic[s] of barbarism"); FIRMAGE & MANGRUM, *supra* note 56, at 129-30 (noting that southern legislators often fought to keep polygamy legal, fearing that a federal prohibition on polygamy in the territories would set a precedent for a similar abolition of slavery).

[78] Morrill Act, ch. 126, 12 Stat. 501 (1862).

[79] EMBRY, *supra* note 66, at 8.

[80] *Id.* at 12 (quoting Willford Woodruff, Official Declaration 1).

[81] *Id.* at 16.

United States Congress ordered that the state's constitution contain a provision that banned polygamy.[82]

II. THE CURRENT STATE OF POLYGAMY

Despite the church's prohibition on polygamy, the practice has not disappeared from Utah, the epicenter of the Mormon Church. Mormon fundamentalists (unrecognized offshoots of the mother church) continue the practice. Like Mormon marriages in the nineteenth century, which were unrecognized in the eyes of the United States government,[83] most modern polygamists perform marriage rituals in secret.[84] Therefore, modern polygamy is unrecognizable facially from simple cohabitation. As a result, it is rarely prosecuted. Recently, Reed Richards, a chief deputy for the Utah Attorney General's office, stated that while polygamy was against the state constitution, that, by itself, "does not make it a crime."[85] According to Richards, if the state was to "prosecute for polygamy, then [it] also [would] have to prosecute for adultery. I think that would be very difficult."[86]

However, the fundamentalist Mormons are not the only Christian groups to espouse polygamist beliefs. Another polygamist group, the Biblical Patriarchal Christian Fellowship of God's Free Men and Women, also resides in Salt Lake City.[87] The group's founder and leader, Joe Butt, claims to have three wives and 1400 members in his congregation.[88] Butt admits, however, that most of the 1400 members are linked to the ministry only through his websites.[89] In Africa, where polygamist marriages have been practiced in tribes for generations, the Anglican church has acknowledged that polygamist marriages still exist amongst its members.[90] One South African Anglican archbishop recently went so far as to say that "polygamy in

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[82] *See* Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894); *see also* JEAN BICKMORE WHITE, THE UTAH STATE CONSTITUTION: A REFERENCE GUIDE 57 (1998).

[83] *See* FIRMAGE & MANGRUM, *supra* note 56, at 149 (citing United States v. Miles, 103 U.S. 304, 307 (1880) ("[T]he [Mormon] ceremony is performed in secret, and the person who officiates is under a sacred obligation not to disclose the names of the parties to it.")).

[84] *See* Ros Davidson, *The Dictator in the House*, SALON.COM (July 29, 1998) <http://www.salon.com/mwt/hot/1998/07/29hot.html> [hereinafter Davidson, *Dictator*] (describing a modern polygamous marriage ritual occurring at a local McDonald's restaurant).

[85] Jeffrey P. Haney, *Polygamy Is Not a Crime, State Attorney Says*, DESERET NEWS (Salt Lake City), Nov. 17, 1998, at B4, *available in* 1998 WL 20804782.

[86] *Id.*

[87] *See* Peg McEntee, *Why Do People Practice Polygamy? Polygamists Cite Theological Roots*, SALT LAKE TRIB., Sept. 20, 1998, at A1, *available in* 1998 WL 4073389.

[88] *See id.*

[89] *See id.*

[90] *See* Stack, *Why*, *supra* note 33, at A1.

parts of Africa genuinely has features of both faithfulness and righteousness."[91] In 1998, fearing that sanctions had hurt recruitment, the church also lifted a "100-year-old ban on permitting polygamists to join the church."[92]

Strangely, some polygamous marriages in America are perfectly legal. Native Americans are allowed to marry according to their customs as long as they "'are members of a tribe recognized and treated with as such by the United States government.'"[93] If a tribe has a recognized custom of polygamy a Native American of that tribe may enter into such a polygamous marriage, even if it conflicts with state law.[94] The preceding scenario is true even when the marriage involves a Native American and a person entirely of another race.[95]

Islam allows the practice of polygamy, permitting a husband to have multiple wives as long as he can "'treat them with equal fairness.'"[96] The tradition of Islamic polygamy dates back to the Prophet Mohammad, who had many wives.[97] While practicing men may take more than one wife in times of peace, some believe that Islamic polygamy was only meant to be practiced in times of crisis. For example, after a war, an Islamic man could take a widow as an additional wife. That way, the Islamic practice of polygamy would be used "to help widows and orphans and not to satisfy one's lust."[98]

Estimates suggest that, although relatively few polygamous families exist, up to "a third of the world's population belongs to a community that allows [polygamy]."[99] One reason for the rarity of the practice is the cost of maintaining a polygamous family. In Islam, a man may take up to four wives, as long as he is able to support all of them.[100] Yet, even in a society that condones polygamy, "only 10 to 25 percent

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[91] *Id.*

[92] Peggy Fletcher Stack, *Utah Bishop Heads to World Conference*, SALT LAKE TRIB., July 18, 1998, at C1, *available in* 1998 WL 4063553.

[93] Hallowell v. Commons, 210 F. 793, 800 (8th Cir. 1914) (quoting Ortley v. Ross, 110 N.W. 982, 983 (Neb. 1907)).

[94] *See id.*

[95] *See* 52 AM. JUR. 2D Marriage § 98 (1970). While it is difficult to find examples of polygamous tribal marriages today, historic examples are numerous. The Blackfeet tribe of the western United States practiced polygamy for generations. Because the male population often was decimated by warfare, the female population of the Blackfeet often outnumbered the male. Polygamy maintained the Blackfeet social order based on the tribe's concept of marriage, allowing several females to marry a single male. *See* WALTER MCCLINTOCK, THE OLD NORTH TRAIL 185-91 (1992).

[96] ASHGAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 22 (1992) (quoting THE KORAN 4:3).

[97] *See* Phillip K. Hitti, *Mohammed*, in 19 ENCYCLOPEDIA AMERICANA 314, 315 (Int'l Ed. 1999).

[98] ENGINEER, *supra* note 96, at 104.

[99] Stack, *Why*, *supra* note 33, at A1.

[100] *See id.*

of men actually practice it, and most have only two wives," according to Israeli anthropologist Joseph Ginat.[101]

While polygamy is still a rarity, it does exist in today's world. With advances in transportation and technology, the world's borders have become more porous. Islam, a religion in which polygamy is rare but not outlawed, has an estimated six million practitioners in the United States and is growing rapidly.[102] According to current figures, the polygamous population of Utah is also growing.[103] Polygamy may very well be a permanent part of underground American culture and likely will grow as time passes.[104]

III. COURT DECISIONS

A. Reynolds v. United States

1. Background—The Morrill Act

In order to understand the first Supreme Court decision on polygamy, *Reynolds v. United States*,[105] one must understand the climate of hostility that existed between the American government and the Mormon Church when the case was decided in 1878. In 1862, Congress passed a bill that Vermont Congressman Justin Morrill drafted to "punish and prevent the Practice of Polygamy in the Territories of the United States . . . and [to disapprove] and [annul] certain Acts of the Legislative Assembly of the Territory of Utah."[106] The Morrill Act made polygamy punishable by "fines of up to five hundred dollars and imprisonment for as much as five years."[107] The Act also contained provisions aimed "at the [Mormon] church's corporate structure and economic power."[108] Apparently, the majority of Congress feared the church structure itself and the personal power of Brigham Young, Smith's successor as President of the Mormon Church.[109] During the 1860 Congressional

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[101] *Id.*

[102] *See* Marc Ramirez, *Islam on the Rise: Muslim in America*, SEATTLE TIMES, Jan. 24, 1999, at A1, *available in* 1999 WL 6253234.

[103] *See* Brooke, *supra* note 4, at A12.

[104] *See* Joe Costanzo, *Polygamy Here to Stay, Scholar Says*, DESERET NEWS (Salt Lake City), Mar. 23, 1999, at B5, *available in* 1999 WL 13868575 (stating the opinion of Joseph Ginat, an anthropologist who claims that American polygamy will continue as the children of polygamists adopt the practice and attract new followers).

[105] 98 U.S. 145 (1878).

[106] Morrill Act, ch. 126, 12 Stat. 501 (1862).

[107] FIRMAGE & MANGRUM, *supra* note 56, at 131.

[108] *Id.* at 132.

[109] *See id.* at 35.

debates, Representative John McClernand of Illinois stated his opinion of Young and his followers, echoing the popular sentiment of the day:

> "The government of these Mormons is hierarchy concentrated in one man, who exerts an absolute temporal and spiritual power over his followers. He thinks for them; and they obey him from a dread of his temporal and spiritual power. . . . The government is an artfully-contrived one. It combines all the incentives which can appeal to the passions of bad men. It concedes to the sensual many wives; to the military adventurer the distinctions of military position; and to the priest abundant tithes and perfect impunity to the civil authority. . . . There is not now so absolute a hierarch living or reigning in any other quarter of the globe. The civil authorities kept up there by this Government are powerless—a mere mockery."[110]

Despite McClernand's strong distaste for the Mormons and their practices,[111] his speech was not entirely inaccurate. The few federal officials in Utah during the 1860s "felt powerless, lost in a hostile sea of Mormons whose way of life they were challenging."[112] In 1865, Utah Governor James Doty appealed to the Secretary of State, claiming that the Mormons had created their own "shadow government" that coexisted with the officially sanctioned territorial government.[113] Nonetheless, due to the power of the Mormon Church in Utah and the Civil War raging throughout the

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[110] *Id.* at 132 (quoting CONG. GLOBE, 36th Cong., 1st Sess. 1514 (1860) (statement of Rep. John A. McClernand)).

[111] In the same speech, McClernand characterized the Mormons as bandits, unfit for induction into American society, and referred to the practice of polygamy as a "crying evil," descended from the Biblical villains Lamech and Cain. *See* CONG. GLOBE, 36th Cong., 1st Sess. 1514 (1860) (statement of Rep. John A. McClernand).

[112] FIRMAGE & MANGRUM, *supra* note 56, at 139.

[113] *See id.* at 140. Doty's letter stated:

> "[T]he leaders of 'the church' under the Territorial laws, have the appointment, and control in fact through its members, of all the civil and militia officers not appointed by the President of the United States. In addition, the same party, in 1861 formed an independent government in the 'State of Deseret' whose boundaries include Utah and portions of Idaho and Arizona. This form of government is preserved by annual elections of all the state officers; the legislature being composed of the same men who are elected to the Territorial legislature, and who, in a Resolution, re-enact the same laws for the 'State' which have been enacted for the Territory of Utah."

Id. (quoting letter of James Doty to the Secretary of State).

nation, the federal government did not enforce the Morrill Act when it was enacted.[114] Abraham Lincoln, having signed the Act, "reportedly compared the Mormon Church to a log he had encountered as a farmer that was 'too hard to split, too wet to burn and too heavy to move, so we plowed around it.'"[115] Lincoln then told his listeners to "go back and tell Brigham Young that if he will let me alone, I will let him alone."[116] If this statement is true, the President of the United States apparently spoke of the Prophet of the Mormon Church as a man of equal power.

2. Reynolds

According to accounts of Mormon historians, the prosecution in *Reynolds* began with a deal between the United States government and the Mormon Church. Although the church had found ways around the Morrill Act,[117] Mormon historians claim that both the church and the government decided to use a "test case in which both the federal judiciary and the church presidency hoped to determine the constitutionality of the anti-polygamy statute."[118] According to this account, George Reynolds, Brigham Young's personal secretary, "agreed to test the statute and cooperate in his prosecution in return for the government's agreement not to seek a harsh punishment."[119]

In 1874, the Utah territorial court tried and convicted Reynolds.[120] However, the Utah Supreme Court overturned his conviction because the grand jury had been chosen according to federal rather than state guidelines.[121] Despite his acquittal, Reynolds' polygamous behavior was a matter of public record, and officials arrested him again in October 1875.[122] This time, his conviction stood until it reached the United States Supreme Court.[123]

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[114] *See* R. Collin Mangrum, *The Falling Star of Free Exercise: Free Exercise and Substantive Due Process Entitlement Claims in* City of Boerne v. Flores, 31 CREIGHTON L. REV. 693, 719 (1998).

[115] FIRMAGE & MANGRUM, *supra* note 56, at 139.

[116] *Id.*

[117] *See id.* at 151 (stating that, because of the Act's three-year statute of limitations, the church sent members "out of the country on three-year missions immediately after their polygamous marriages").

[118] *Id.*

[119] *Id.*

[120] *See* VAN WAGONER, *supra* note 7, at 111.

[121] *See* United States v. Reynolds, 1 Utah 226 (Utah 1875).

[122] *See* FIRMAGE & MANGRUM, *supra* note 56, at 152.

[123] *See id.* at 151-52; *see also* United States v. Reynolds, 1 Utah 319 (Utah 1876).

3. The Decision

The Court's decision in *Reynolds* is essential to today's Free Exercise cases. Reynolds claimed that the Free Exercise Clause of the First Amendment protected his right to practice polygamy as a tenet of his religion.[124] The First Amendment to the Constitution guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[125] In order to decide if the Act's ban on polygamy impeded the free exercise of religion, the Court stated that it had to look outside the Constitution to define the term "religion."[126] In order to accomplish this task, the Court examined the "history of the times in the midst of which the provision was adopted" to determine the nature of the "religious freedom which has been guaranteed."[127] The Court focused on the words of Thomas Jefferson's *Declaration of Religious Freedom*, written in response to the state's current laws against heresy:

> In the preamble of this act . . . religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.[128]

Later, the Court cited Thomas Jefferson's statement that, in regards to the separation of Church and State, the "legislative powers of the government reach actions only, and not opinions . . . ."[129] Using Jefferson as its authority, the Court declared that while the Free Exercise Clause deprived "Congress . . . of all legislative power over mere opinion, . . . [it] was left free to reach actions which were in violation of social duties or subversive of good order."[130]

Having determined that Congress was free to regulate "subversive" activities performed in the name of religion, the Court turned its attention to the practice of polygamy. The Court's first sentence on the subject succinctly expressed its

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[124] *See* Reynolds v. United States, 98 U.S. 145, 162 (1879).
[125] U.S. CONST. amend. I.
[126] *See Reynolds*, 98 U.S. at 162.
[127] *Id.*
[128] *Id.* at 163 (citations omitted).
[129] *Id.* at 164.
[130] *Id.*

viewpoint: "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people."[131] The Court stated that "from the earliest history of England polygamy has been treated as an offence against society."[132]

In an effort to prove that polygamy caused actual harm, the Court also offered the opinion of Professor Francis Lieber, "a prominent intellectual and founder of American political science,"[133] who said that "'polygamy leads to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism.'"[134] The Court concluded that "to permit [the practice] would be to make the professed doctrines of religious belief superior to the law of the land."[135] The Court theorized that if all religious activities were tolerated, the government might not have the power to stop religious leaders who wished to commit a ceremonial human sacrifice or widows who wished to commit *Suttee*, the religious act of a throwing oneself on a husband's funeral pyre.[136]

While *Reynolds* is an important precedent, expressing the belief/action distinction for the first time, the reasoning behind the Court's arguments against polygamy is suspect. The Court claimed that the practice of plural marriage had always been "odious," yet "never quite explained *why* [it] was a threat to the public well-being."[137] The Mormons of Utah were prosperous, and the women were more independent than many women on the East Coast.[138] In passing judgment on polygamy, however, the Supreme Court failed to acknowledge any beneficial aspects of the practice.

In retrospect, much of the discussion in *Reynolds* mirrored the anti-polygamy sentiment prevalent at the time. In the 1860 congressional debates, Roger A. Pryor noted that giving Mormons protection under the rubric of the freedom of religion clause would "'avail to cover any abomination which affects a religious character. It will suffice for the protection of... Suttee, as well as polygamy.'"[139] The decision in *Reynolds* declared that allowing polygamy would permit both ritual murder and the practice of *Suttee*.[140]

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[131] *Id.*

[132] *Id.*

[133] FIRMAGE & MANGRUM, *supra* note 56, at 155.

[134] *Reynolds*, 98 U.S. at 166 (quoting Professor Francis Lieber).

[135] *Id.* at 166-67.

[136] *See id.* at 166.

[137] Orma Linford, *The Mormons and the Law: The Polygamy Cases: Part I*, 9 UTAH L. REV. 308, 341 (1964) [hereinafter Linford, *Part I*].

[138] *See* VAN WAGONER, *supra* note 7, at 103.

[139] FIRMAGE & MANGRUM, *supra* note 56, at 134 (quoting CONG. GLOBE, 36th Cong., 1st Sess. 1496 (1860) (statement of Rep. Roger A. Pryor)).

[140] *See Reynolds*, 98 U.S. at 166.

The Court also found polygamy illegal because it led to patriarchy, which "'fetters the people in stationary despotism.'"[141] Professor Lieber offered this statement as if it were an actual harm caused by the practice of polygamy. The Court failed to mention that Professor Lieber, besides his account of polygamy, had written another tract on Mormonism itself. In his judgment, Mormon theology was "characterized by 'vulgarity,' 'cheating,' 'jugglery,' 'knavery,' 'foulness,' and as bearing 'poisonous fruits.'"[142]

Behind its legal sophistication, the majority opinion in *Reynolds* displayed a disdain for the Mormon church that bordered on contempt. The decision equated the church to the "Asiatic and . . . African people," who also practiced barbarous acts.[143] While the Court cited American and British societies as examples of good law, the Mormon society, practicing polygamy, was locked in "'stationary despotism.'"[144] Although the Court did not give the name of the despot in question, readers of the opinion probably recognized the figure as Brigham Young, holder of "'an absolute temporal and spiritual power.'"[145] While *Reynolds* influenced later decisions, it contained "the same undercurrent of hysteria that pervades" the remarks of the Justices' political contemporaries.[146]

B. Davis v. Beason

When the question of polygamy reached the Supreme Court again in 1890, the decisions and reasoning echoed that of *Reynolds*. In *Davis v. Beason*,[147] the Court upheld the conviction of an Idaho citizen who was denied the right to vote because of his affiliation with the Mormon Church.[148] In 1888, Idaho passed a provision, ordering all citizens who wished to vote to take an oath.[149] The oath, intended to

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[141] *Id.* (quoting Professor Lieber).

[142] Carol Weisbrod & Pamela Sheingorn, Reynolds v. United States: *Nineteenth-Century Forms of Marriage and the Status of Women*, 10 CONN. L. REV. 828, 851 n.126 (1978) (quoting Francis Lieber, *The Mormons; Shall Utah Be Admitted Into the Union?*, 5 PUTNAM'S MONTHLY 225, 233 (1855)).

[143] *Reynolds*, 98 U.S. at 164.

[144] *Id.* at 166 (quoting Professor Lieber).

[145] FIRMAGE & MANGRUM, *supra* note 56, at 132 (quoting CONG. GLOBE, 36th Cong., 1st Sess. 1514 (1860) (statement of John A. McClernand)).

[146] Linford, *Part I*, *supra* note 137, at 340-41.

[147] 133 U.S. 333 (1890).

[148] *See id.* at 334-35.

[149] The oath read:

> I do swear (or affirm) that I am a male citizen of the United States of the age of twenty-one years . . . that I have (or will have) actually resided in this Territory four months and in this county for thirty days . . . that I have never been convicted of treason, felony or bribery; that I am not registered or entitled to vote at any other place in this Territory; and I do further swear that I am not

disenfranchise Mormons, withheld voting privileges from anyone belonging to a group that practiced plural or "celestial marriage," Mormon terms for polygamy.[150] Police arrested Samuel Davis, the defendant, after he took the required oath.[151] Davis argued that, although he had been a member of the Mormon Church, he had resigned his church membership before taking the oath.[152] The Court did not consider this fact in its decision, choosing instead to decide Davis' fate on the basis of the statute's constitutionality.[153] The Court ruled that the statute was constitutional,

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> a bigamist or polygamist; that I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association, or which practises [sic] bigamy, polygamy or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise; that I do regard the Constitution of the United States, and the laws thereof, and the laws of this Territory, as interpreted by the courts, as the supreme laws of the land, the teachings of any order, organization or association to the contrary notwithstanding, so help me God.

Id. at 334.

[150] *See* VAN WAGONER, *supra* note 7, at 53 (explaining how polygamous wives would be sealed to their husband for eternity, staying with them in the afterlife). For a more colorful description of the concept of celestial marriage, see Ros Davidson, *Sins of the Father*, SALON.COM (July 28, 1998) *reprinted at Tapestry of Polygamy* <http://www.salon.com/mwt/hot/1998/07/28hot3.html> [hereinafter Davidson, *Sins*] ("Spiritually speaking, you're going to be with him [the husband] and have his children to populate other worlds, for eternity. Well what does it involve? He's going to have sex forever and ever and ever. And she's going to be pregnant forever and ever and ever. So this woman said, 'It's just one big eternal f***.'").

[151] *See Davis*, 133 U.S. at 335.

[152] *See* FIRMAGE & MANGRUM, *supra* note 56, at 234 (detailing the history of the case unmentioned in the Court's opinion).

[153] In its opinion, the Court stated:

> On this hearing we can only consider whether, these allegations being taken as true, an offence was committed of which the territorial court had jurisdiction to try the defendant. And on this point there can be no serious discussion or difference of opinion. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their

characterizing polygamy as an uncivilized and un-Christian practice.[154]

The language in the decision, as in *Reynolds*, was openly hostile toward Mormons and their beliefs. The Court characterized polygamy, in one statement, as destructive, disturbing, degrading, and debasing, without offering any evidence to support its claims.[155] More disturbing, however, was the effect of the Court's judgment. By allowing the government to disenfranchise voters because of their religious affiliation, the Court restricted the right to vote on the basis of belief.[156] Recognizing this problem, the modern Court declared this element of *Davis* void in 1996.[157]

C. Mormon Church v. United States

In addition to making polygamy a criminal offense, the Morrill Act of 1862 also revoked the Mormon Church's organizational charter and confiscated all of the church's real estate holdings in excess of $50,000.[158] In a proviso, the congressional majority noted that the sole purpose behind the confiscation of property was to end the church's practice of polygamy.[159] Even though officials did not enforce the statute immediately, the church hierarchy dissolved all the church's holdings and placed them in trusts held by individual church members.[160] After its 1862 passage, the church leaders openly advocated defying the Morrill Act, placing heavenly doctrine above the will of the federal government.[161]

> practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases.

Davis, 133 U.S. at 341-42.

[154] *See id.* at 341 ("Bigamy and polygamy are crimes by the laws of all civilized and Christian countries.").

[155] *See id.*

[156] *See* FIRMAGE & MANGRUM, *supra* note 56, at 234-35.

[157] *See* Romer v. Evans, 517 U.S. 620, 634 (1996).

[158] *See* Morrill Act, ch. 126, 12 Stat. 501 (1862).

[159] *See id.* The proviso reads:

> [T]his act shall be so limited and construed as not to . . . interfere with . . . the right "to worship God according to the dictates of conscience," but only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations, or other contrivances."

Id.

[160] *See* FIRMAGE & MANGRUM, *supra* note 56, at 252.

[161] *See* VAN WAGONER, *supra* note 7, at 113-14. John Taylor, president of the Mormon Church in 1880, sought to rally the faithful in defiance of United States interference, stating, "'Polygamy . . . is a divine institution. . . . The United States cannot abolish it. No nation on earth can prevent it, nor all the nations of the earth combined. I defy the United

In 1887, the government responded by passing the Edmunds-Tucker Act.[162] The Act contained a provision calling for all real properties of the church held in violation of the Morrill Act to be confiscated and sold to pay for public schooling in the territories.[163] In addition, the statute barred the church from using trust accounts to protect its property.[164]

In *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*,[165] the Court ruled on the constitutionality of the Edmunds-Tucker Act's confiscatory provisions.[166] Because territories were still under federal jurisdiction, the Court decided that Congress had the power to dissolve contracts existing between private entities and the territorial governments.[167] Further, the Court found that the assets of a charitable organization, once dissolved and having no rightful owner, would naturally escheat to the federal government.[168]

When identifying a reason for the dissolution of the church, the majority opinion reiterated the Court's previous attacks on polygamy. The Court claimed that, if the church held the property in question, it would use it to spread the Mormon doctrines, a "distinguishing feature[ ] of which is the practice of polygamy."[169] After characterizing the practice as offensive to the precepts of enlightened society,[170] the Court condemned the church for its promotion of the belief, authorizing Congress' retaliatory taking of Mormon property.[171] Although the question was not before the Court, the majority reiterated its conclusion that plural marriage was not a religious practice, "being against the enlightened sentiment of mankind."[172]

States. I will obey God.'" *Id.* at 114 (quoting SALT LAKE TRIB., Jan. 6, 1880).

[162] *See* Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887).

[163] *See id.* § 13.

[164] *See id.* § 26.

[165] 136 U.S. 1 (1890). Although no inferences should be made about the Justices' opinions of the Mormons outside of their written opinion, the Court in *Cleveland v. United States*, 329 U.S. 14 (1946), referred to this case by the shorter name, *Mormon Church v. United States*. This Note will follow the Court in *Cleveland's* lead.

[166] *See Mormon Church*, 136 U.S. at 42 (asking if Congress had the power to repeal the church's charter with the territory of Utah and whether the government could seize the church's property).

[167] *See id.* at 44 (stating that Congress' power to restrict the fundamental rights of citizens in the territories was limited only by the citizens' devotion to the Constitution and not by any specific provision).

[168] *See id.* at 59.

[169] *Id.* at 48.

[170] *See id.* (casting polygamy as "a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world").

[171] *See id.* at 49 ("The question, therefore, is whether the promotion of such a nefarious system and practice [as polygamy], so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself . . . .").

[172] *Id.* at 50. Additionally, the Court harkened back to the *Reynolds* opinion, equating the practice of polygamy with the sacrifice of babies by the ancient Britons, as well as to the

In a dissent signed by three of the justices, Chief Justice Fuller stated that the Constitution did not grant Congress absolute power over the territories.[173] While the legislature had the power to criminalize polygamy, the dissent claimed that it did not have the right to seize the property of individuals suspected of being polygamists.[174]

In this case, the Court allowed the federal government to seize an organization's property because of its espousal of an unpopular belief.[175] Because the confiscatory acts burdened the Mormons, who were an unpopular class of people because of the widespread disapproval of their actions, the legislation would be considered unconstitutional today.[176] The Court in *Reynolds*, citing Jefferson, noted that the First Amendment should create a "wall of separation between Church and State."[177] Yet, the majority in *Mormon Church* allowed the federal government to dissolve a church, an unprecedented event in American history.[178] After this ruling, the Court ordered a receiver to oversee the church's property, clearly violating the separation of church and state.[179]

D. Cleveland v. United States

After the Mormon Church banned "celestial marriage" in 1890, the practice dwindled among its former adherents.[180] Therefore, the issue of polygamy did not reach the Supreme Court again until 1946, in the case of *Cleveland v. United*

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practices of *Thuggee* and *Suttee*. *See id.* at 49-50.

[173] *See id.* at 67-68 (Fuller, C.J., dissenting) ("[A]bsolute power should never be conceded as belonging under our system of government to any one of its departments.").

[174] *See id.* (Fuller, C.J., dissenting) ("Congress has the power to extirpate polygamy . . . by the enactment of a criminal code directed to that end; but it is not authorized under the cover of that power to seize and confiscate the property of persons, individuals, or corporations, without office found, because they may have been guilty of criminal practices.").

[175] *See id.* at 48-49 (defining the church's offense as "preaching, upholding, promoting and defending" the practice of polygamy).

[176] *See* Romer v. Evans, 517 U.S. 620, 633 (1996) (overturning the provisions of *Davis* that penalized Mormons merely for advocating their belief).

[177] Reynolds v. United States, 98 U.S. 145, 164 (1879).

[178] *See* Orma Linford, *The Mormons and the Law: The Polygamy Cases: Part II*, 9 UTAH L. REV. 543, 581-82 (1965) [hereinafter Linford, *Part II*] (noting that the destruction of a church by the federal government had not happened before this instance and had not happened since).

[179] *See id.* at 581 ("'Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups . . . .'" (quoting Everson v. Board of Educ., 330 U.S. 1, 16 (1947))).

[180] *See* CAIRNCROSS, *supra* note 1, at 196 (noting that the United States government allowed Utah into the nation as a reward for the Mormons' acceptance of monogamous marriages).

States.[181] The defendants in *Cleveland* were members of a fundamentalist Mormon sect, convicted in the lower courts of transporting one of their respective plural wives across state lines for immoral purposes, namely cohabitation, in violation of the Mann Act.[182] The defendants argued that polygamy was "a form of marriage and . . . has as its object parenthood and the creation and maintenance of family life."[183]

The Court rejected this argument, choosing to echo the words of *Mormon Church*: "'The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.'"[184] Calling a polygamous household "a notorious example of promiscuity,"[185] the Court found the defendants guilty of violating the Mann Act.[186] One Justice, however, did not follow the opinion of the majority, which condemned the defendants for their "barbarous" practices. Justice Murphy agreed with the defendants, referring to polygamy as "one of the basic forms of marriage,"[187] more common "[h]istorically . . . [than] any other form."[188] His opinion was remarkable, because it was the first time that a Supreme Court Justice, confronted with the problem of polygamy, asked his colleagues to understand the people who practiced it:

> We must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. It is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice as immoral and substitute monogamy in its place. To these beliefs and mores I subscribe, but that does not alter the fact that polygyny is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such.[189]

Because Justice Murphy defined polygamy as a form of marriage, he did not agree with his colleagues that it constituted an immoral purpose under the Mann Act.[190]

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[181] 329 U.S. 14 (1946).
[182] *See id.* at 16.
[183] *Id.* at 17.
[184] *Id.* at 19 (quoting Mormon Church v. United States, 136 U.S. 1, 49 (1890)).
[185] *Id.*
[186] *See id.* at 20.
[187] *Id.* at 26 (Murphy, J., dissenting).
[188] *Id.* (Murphy, J., dissenting).
[189] *Id.* (Murphy, J., dissenting).
[190] *See id.* at 25 (Murphy, J., dissenting).

E. *Stare Decisis*

If the Supreme Court were to legalize polygamy, it would have to reexamine its prior rulings on polygamy in observance with the rule of stare decisis. Although ensuring continuity of the rule of law over time is a primary function of the Court, it finds it necessary sometimes to overrule a prior ruling if it is "so clearly . . . error that its enforcement . . . for that very reason [is] doomed."[191] When the Supreme Court chooses to reexamine a prior case, the justices utilize a series of considerations to test whether overruling the prior decision would be consistent with the rule of law and whether the costs of repealing the former decision would greatly outweigh those incurred due to its reaffirmation. In *Planned Parenthood v. Casey*,[192] Justice O'Connor, in examining a prior ruling, recommended asking

> whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[193]

Under these criteria, *Reynolds* is worthy of reassessment.

The first consideration noted in the test of stare decisis is whether the rule defies "practical workability."[194] Polygamy is a difficult crime to prosecute, being almost identical to simple cohabitation. Law enforcement officials do not have the money or the will to investigate people's consensual sexual habits.[195] In addition, if the police were successful in strictly enforcing bigamy laws, families would be broken up as "parents went to prison."[196] Because of the sheer numbers of polygamists

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[191] Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).

[192] 505 U.S. 833, 854 (1992).

[193] *Id.* at 854-55 (citations omitted).

[194] *Id.* at 854.

[195] When questioned about investigating charges of polygamy, Reed Richards, the chief deputy for the Utah Attorney General's office, wondered rhetorically, "Should we take investigators off the streets to try and take pictures of somebody in bedrooms and try to prove people have certain relationships?" Haney, *supra* note 85, at B4; *see also supra* note 17 and accompanying text.

[196] Polygamy: Living Outside of the Law, MSNBC (last visited Nov. 3, 1999) <http://www.msnbc.com/news/225749.asp?cp1=1>.

living in Utah and the chaos prosecutions would create,[197] maintaining the *Reynolds* holding does not appear practical.

The second consideration for stare decisis is whether the rule is so widely relied upon that overruling it would create a "special hardship."[198] Thousands of polygamous marriages exist currently without the state's consent.[199] Most polygamous marriages are legal in the sight of the practitioner's god, though they may have no value according to civil authority.[200] Allowing practitioners to continue to practice without fear of arrest would not harm society.

Furthermore, the prohibition of polygamy is merely a "remnant of abandoned doctrine,"[201] namely the United States' undeclared war on the Mormon Church. The Morrill Act, the piece of legislation at the heart of *Reynolds*, was an attack not only on polygamy, but also on the structure of the Mormon Church itself.[202] The oath that created the controversy of *Davis v. Beason* denied voting rights to anyone who agreed with Mormon theology.[203] The reasons for maintaining decisions intended primarily to deny Mormons their rights and freedoms are obscure.

Finally, in today's society, the facts in *Reynolds* are not looked upon in the same way as they were when the Court wrote that decision. In *Potter v. Murray City*,[204] a federal court in Utah upheld the prohibition of polygamy, following *Reynolds* as "the decision of the highest court of the land."[205] Even in following stare decisis, however, the court derided *Reynolds'* assumption that polygamy was as harmful to society as human sacrifice, its over-simplification of the belief/action analysis in Free Exercise claims, and its "seeming insensitivity in passing moral judgment on the sincerity of religious belief."[206] Because Americans no longer fear practices never imagined in the realm of Christendom, the decisions in *Reynolds* and its brethren appear ripe for review.

One possible strategy in redetermining the legality of polygamy would be to identify polygamists as a group, put their reasons for participating in that practice before the Court, and give an explanation for why the government should not be allowed to prohibit their behavior. To do this, one should examine current case law regarding the right to privacy.

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[197] *See id.* (noting the public outcry over the Short Creek raids).

[198] *Planned Parenthood*, 505 U.S. at 854.

[199] *See* Heliprin, *supra* note 3, at A1.

[200] *See supra* notes 56-57 and accompanying text.

[201] *Planned Parenthood*, 505 U.S. at 855.

[202] *See* FIRMAGE & MANGRUM, *supra* note 56, at 132.

[203] *See supra* notes 147-57 and accompanying text.

[204] 585 F. Supp. 1126 (D. Utah 1984), *aff'd*, 760 F.2d 1065 (10th Cir. 1985), *cert. denied*, 474 U.S. 849 (1985).

[205] *Id.* at 1141.

[206] *Id.*

F. Bowers v. Hardwick *and* Romer v. Evans

Polygamists are akin to homosexuals in one respect: the Court has stated that the government can outlaw their behavior. In *Bowers v. Hardwick*,[207] the Court decided that the state of Georgia could criminalize certain sexual activities.[208] In detailing the decision, the majority opinion conveyed the impression that the Court's only goal in the case was to deny constitutional protection to homosexual sodomy.[209] Justice Blackmun's dissent, however, noted correctly that the statute actually made all sodomy illegal, even when practiced by heterosexual couples.[210]

The decision in *Romer v. Evans*[211] destroyed some of the force *Bowers* once carried.[212] In *Romer*, the Court struck down an amendment to the Colorado state constitution that repealed any local statutes protecting citizens from discrimination on the basis of their homosexual relationships.[213] *Bowers* deemed homosexuality as a conduct that could be proscribed.[214] The Court in *Bowers* determined that such acts, like most activities, could be prohibited by the state simply on any rational basis, such as moral outrage.[215] *Romer* adopted the concept of homosexuals as a separate class of people defined by their sexual preference.[216] Besides making homosexuals a class, the Court acknowledged that anti-homosexual laws are often

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[207] 478 U.S. 186 (1986).

[208] *See id.* at 196 (stating that Georgia had the right to ban homosexual activities because they were immoral).

[209] *See id.* at 191 ("[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.").

[210] *See id.* at 200 (Blackmun, J., dissenting). The Georgia statute at issue provided that "a person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2(a) (1984).

[211] 517 U.S. 620 (1996).

[212] Whereas the potential demise of *Bowers* does not appear to be on the immediate horizon, it should be mentioned that, since the case was decided in 1986, six of the justices involved in the decision have stepped down. On November 23, 1998, the Georgia Supreme Court overturned the law at the heart of *Bowers*, claiming it "manifestly infringes upon a [Georgia] constitutional provision . . . which guarantees to the citizens of Georgia the right to privacy." However, the court overturned the law on state grounds, and the couple accused of committing sodomy in this instance was heterosexual. Associated Press, *Georgia Supreme Court Overturns Sodomy Law*, CNN (last modified Nov. 23, 1998) <http://cnn.com/US/9811/23/sodomy.law.ap/>.

[213] *See Romer*, 517 U.S. at 624.

[214] *See Bowers*, 478 U.S. at 196-97 (Burger, J., concurring) (characterizing the act of homosexual sodomy as historically prohibited and worse than rape).

[215] *See id.* at 196.

[216] *See Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (noting that courts generally cannot distinguish between people who commit homosexual acts and those who are of homosexual orientation).

motivated by hatred of the minority and required that all reasons used for discriminating against homosexuals meet a heightened standard of justification.[217]

The connection between homosexuality and polygamy was obvious, at least to Justice Scalia. In his dissent in *Romer*, Scalia used the potential legalization of polygamy as a worst-case scenario to deride the majority's opinion.[218] Arguing in favor of the Colorado amendment, Scalia claimed that citizens had the right to "consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals ."[219] Justice Scalia went further, arguing that, under the Court's rationale, polygamists could assert that they had been "singl[ed] out" by unfair laws and ask for their revocation.[220] Eventually, Scalia queried how the Court could believe that the "perceived social harm of polygamy" was a "'legitimate concern of government,' and the perceived social harm of homosexuality [was] not?"[221] If a polygamist were to have argued before the Court, he might very well have asked the same question.[222]

G. *The First Amendment:* Employment Division v. Smith *and* Church of the Lukumi Babalu Aye v. City of Hialeah.

In *Reynolds*, the Court decided that, while the United States government did not have the right to ban certain religious beliefs, the legislature could prohibit certain instances of religious conduct.[223] Under this rationale, the Court determined that Congress could prohibit the "odious" practice of polygamy.[224] Yet, in later decisions, the Court determined that citizens holding certain religious principles did not have to follow certain laws. For example, in *Wisconsin v. Yoder*,[225] the Court decided that an Amish family did not have to comply with a statute mandating children's school attendance until age sixteen.[226] While the state argued that it had a right to restrict

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[217] *See id.* at 634-35; *see also* Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997) (discussing the intent requirement now necessary to pass anti-homosexual legislation).

[218] *See Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

[219] *Id.* (Scalia, J., dissenting).

[220] *Id.* at 649 (Scalia, J., dissenting).

[221] *Id.* at 651 (Scalia, J., dissenting) (quoting Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 535 (1993)).

[222] Apparently, many homosexual rights activists feel the same way. *See* Katha Pollitt, *Polymaritally Perverse*, THE NATION, Oct. 4, 1999, *available in* 1999 WL 9307249. Some advocates of gay marriage believe that, for the practice to be legalized, polygamous marriages should also be allowed. Some have suggested that the legalization of polygamous unions would be "the price of gay marriage." *Id.*

[223] *See* Reynolds v. United States, 98 U.S. 145, 166 (1879).

[224] *See id.* at 164-65.

[225] 406 U.S. 205 (1972).

[226] *See id.* at 234-36.

religious action, the justices deferred to the Amish plaintiffs, allowing them to "survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose."[227] The Court in *Yoder* claimed that it based its decision on the free exercise of religion combined with the parents' right to educate their children.[228] Much of the majority opinion, however, was devoted to praising the Amish lifestyle, rather than providing legal analysis.[229] On the last page of the majority opinion, the Court went so far as to state that the Amish had proved the sincerity and values of their beliefs by a "convincing showing, one that probably few other religious groups or sects could make."[230]

In his dissent in *Yoder*, Justice Douglas acknowledged that the Court made an exception to *Reynolds* in this matter, ruling that the sincerity of views coupled with the beauty of the Amish lifestyle justified noncompliance with a state law.[231] Douglas noted that the Court in *Reynolds* did not protect the Mormon practice of polygamy, a segment of Mormon life arguably of equal import to the Amish tradition of child rearing.[232] Douglas acknowledged that, in *Reynolds*, behavior "which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions."[233] By expanding the protection granted by the Free Exercise Clause in this way, the Court weakened its prior holding considerably, "even promis[ing] that in time *Reynolds* will be overruled."[234]

In *Employment Division, Dept. of Human Resources v. Smith*,[235] the Court attempted to reconcile its decision in *Yoder* with *Reynolds*, making it more difficult for a plaintiff to succeed on a First Amendment Free Exercise claim. In *Smith*, an Oregon drug rehabilitation program fired two workers because they smoked peyote as part of a religious ceremony at a Native American Church.[236] The Court noted that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[237] The Court explained that the only instances in which "the First Amendment bars application of a neutral, generally applicable law to religiously

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[227] *Id.* at 235 n.22.

[228] *See id.* at 233.

[229] *See id.* at 235.

[230] *Id.* at 235-36.

[231] *See id.* at 246 (Douglas, J., dissenting) (arguing that the Amish should be treated as any other religious denomination and stating that "a religion is a religion irrespective of what the misdemeanor or felony records of its members might be.").

[232] *See id.* at 247 ("'It matters not that his belief [in polygamy] was a part of his professed religion: it was still belief, and belief only.'" (quoting *Reynolds*, 98 U.S. at 167 (Douglas, J., dissenting))).

[233] *Id.* (Douglas, J., dissenting).

[234] *Id.* (Douglas, J., dissenting).

[235] 494 U.S. 872 (1990).

[236] *See id.* at 874.

[237] *Id.* at 878-79.

motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[238] Justice Scalia, author of the majority opinion, stated that this "hybrid" test had always been used in Free Exercise cases, including *Yoder*.[239] Because the law at issue in *Smith*, a prohibition on the unauthorized possession of "controlled substance[s]",[240] was a neutral law that applied to all citizens, the Court accepted that plaintiffs could not claim protection from it solely under the First Amendment guarantee of Free Exercise.[241] In addition, Justice Scalia stated that evidence demonstrating the importance of the ritual to the plaintiffs should not be considered.[242] Although the Court in *Yoder* based its ruling in part on "the vital role that belief and daily conduct play" in Amish life,[243] Scalia announced that it was not the courts' role "to determine the place of a particular belief in a religion or the plausibility of a religious claim."[244]

In *Church of the Lukumi Babalu Aye v. City of Hialeah*,[245] the Court ruled that a town ordinance outlawing the unnecessary killing of animals, passed solely to stop a local Santeria church from slaughtering animals during its rituals, was unconstitutional.[246] The Court based its decision on the fact that the law was passed in response to the church's rituals and burdened "Santeria adherents but almost no others."[247] Because the law was neither neutral nor generally applicable to the population, the Court determined that the prohibition had to "advance 'interests of the highest order,'"[248] and had to be "narrowly tailored in pursuit of those interests."[249] Because the slaughter ordinance did not advance such interests and because the legislature passed it solely to burden the church, the Court found the provision unconstitutional.[250]

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[238] *Id.* at 881.

[239] *See id.* at 881 n.1 (claiming that the Court in *Yoder* based its decision on the Amish respondents' right to free exercise of religion combined with their right "to direct the religious upbringing of their children").

[240] *Id.* at 874 (citing OR. REV. STAT. § 475.992(4) (1987)).

[241] *See id.* at 878-79.

[242] *See id.* at 882.

[243] Wisconsin v. Yoder, 406 U.S. 205, 235 (1972).

[244] *Smith*, 494 U.S. at 887.

[245] 508 U.S. 520 (1993).

[246] *See id.* at 546-47.

[247] *Id.* at 536. The ordinance, intended to prohibit cruelty to animals, actually was a legal "gerrymander," making illegal only the ritual killing of animals that were not intended to be eaten. *See id.* at 536-37. As such, activities such as hunting, slaughtering for profit, and kosher rituals were protected, while the Santeria church's actions were not.

[248] *Id.* at 546 (quoting McDaniel v. Paty, 435 U.S. 618 (1978)).

[249] *Id.*

[250] *See id.* at 546-47.

Under the logic expressed in *Hialeah*, the *Reynolds* decision probably would be unconstitutional. Professor Garrett Epps argues that although the Morrill Act was neutral, applying equally to secular polygamists, the law obviously was passed to burden the Mormons unfairly.[251] Far from merely outlawing polygamy, the law also contained provisions aimed at the structure of the Mormon Church.[252]

In order to succeed in attacking the *Reynolds* decision today, a polygamist would have to use a hybrid attack, demonstrating that the prohibition of polygamy burdened his rights of Free Exercise and another constitutional right. Exactly what other rights could be used to constitute a successful hybrid is a matter of debate. In *Alabama and Coushatta Tribes v. Trustees of Big Sandee Independent School District*,[253] a district court held that a Native American student's right to wear his hair long in accordance with his religious customs was protected under both the freedom of speech and the free exercise of religion.[254] However, in *American Friends Service Committee v. Thornburgh*,[255] the appellants, members of a Quaker service organization, lost their case as a result of a weak hybrid situation. Having been charged with hiring illegal aliens in violation of work statutes, the Committee contended that the ordinances in question intruded upon their right to exercise their religion freely as well as their right to hire whom they wished.[256] The Court of Appeals for the Ninth Circuit dismissed this hybrid argument, finding that the right to hire was not a constitutional right protected under *Smith*.[257] The court concluded that the Supreme Court's decision in *Smith*, restricting successful Free Exercise claims to hybrid situations, would mean little "if an additional interest of such slight constitutional weight as 'the right to hire' were sufficient" to create a hybrid argument.[258] Apparently, in order for a constitutional right to create an effective hybrid, the additional right, in itself, must be considered to be fundamental.

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[251] *See* Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 597-98 (1998).

[252] *See supra* note 79 and accompanying text.

[253] 817 F. Supp. 1319 (E.D. Tex. 1993).

[254] *See id.* at 1333-34.

[255] 961 F.2d 1405 (9th Cir. 1991).

[256] The plaintiffs argued that they could "'neither discharge brothers and sisters whose religious beliefs preclude their producing proof of secular work authorization, nor refuse human beings work—thus depriving them of the means to feed and clothe themselves and their children simply because they may be strangers in our land.'" *Id.* at 1406 (quoting Appellant's Opening Brief at 2).

[257] *See id.* at 1408.

[258] *Id.*

H. *Right to Privacy*: Loving v. Virginia *and* Griswold v. Connecticut

If a polygamist attempted to argue a hybrid situation before the Supreme Court, he could state that laws against polygamy affect both his right of Free Exercise and the constitutional guarantee of privacy within a marriage. The constitutional basis for protecting marriage, however, is ambiguous.

In *Loving v. Virginia*,[259] a mixed-race couple, residing in Virginia, was indicted and convicted of violating the state's ban on interracial marriages.[260] The couple challenged the convictions, charging that the laws in question were unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[261] The Supreme Court agreed, determining that the laws were invalid because they proscribed certain conduct merely on the basis of race.[262] In addition, the Court decided that the right to marry was "one of the vital personal rights essential to the orderly pursuit of happiness by free men[,] ... fundamental to our very existence and survival."[263] Although the Court asserted that the right to marry was fundamental, it never fully explained its constitutional basis for such a proposition.

Current sentiment is that either the Fourteenth Amendment's guarantee of personal liberty or the orderly pursuit of happiness guaranteed by the Founders protects the right to marry.[264] The right to regulate marriage, however, remains the province of the states. Each state has the power to decide questions regarding a marriage's "inception, duration, status, conditions, and termination."[265] In fact, a marriage cannot exist without the consent of the state.[266] Theoretically, the state has the right to ban polygamous marriages.

Coinciding with the right to marry, however, is a right to privacy within the marital relationship. In *Griswold v. Connecticut*,[267] the Court overturned a state ban on the distribution of contraceptives.[268] Noting that such a restriction would make it illegal for married couples to obtain such products, the Court voided the regulation, stating that married couples had a fundamental right to privacy.[269] Rather than reading the right to marital privacy into a specific provision of the Constitution, the

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[259] 388 U.S. 1 (1967).

[260] *See id.* at 2-3.

[261] *See id.* at 2.

[262] *See id.* at 11.

[263] *Id.* at 12.

[264] *See* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1509 (1997).

[265] 52 AM. JUR. 2D *Marriage* § 9 (1970).

[266] *See id.*

[267] 381 U.S. 479 (1965).

[268] *See id.* at 485-86.

[269] *See id.*

Court declared that the right to privacy within marriage was "older than the Bill of Rights—older than our political parties, older than our school system."[270]

If *Griswold* were to be stretched to its furthest extent, the decision would permit polygamous relations within licensed marriages. If a citizen chose to live with one woman while married to another, the state would not have the right to interfere with the relationship without sending "police to search the sacred precincts of the marital bedrooms."[271] A First Amendment challenge to laws outlawing polygamy might combine the right to exercise one's religion freely and the right to privacy within marriage espoused in *Griswold.*

I. Current Law

The most recent cases involving polygamy failed to reach the United States Supreme Court. In *Sanderson v. Tryon*,[272] the Utah Supreme Court allowed a known polygamist to retain custody of her children in a custody dispute.[273] The parties in the matter had lived in a polygamous marriage between June 1975 and April 1982.[274] They had three children, but were never formally married according to state law.[275] Sanderson, the mother, took the children and entered another polygamous relationship.[276] Tyron, the father, abandoned polygamy as a practice and sought custody of the children.[277] While the court found that polygamy was evidence of Sanderson's "[m]oral character,"[278] moral character was only one factor the court considered in awarding custody.[279] The practice of polygamy was not enough by itself to make Sanderson an unfit parent.[280] Sanderson retained custody of the children.[281]

In *Potter v. Murray City*,[282] a police officer, dismissed because of his polygamous lifestyle, sued to be reinstated, arguing that the government's prohibition of polygamy violated his free exercise of religion.[283] In this matter, the Utah district court chose to follow *Reynolds*, stating that the government already had proscribed

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[270] *Id.* at 486.
[271] *Id.* at 485.
[272] 739 P.2d 623 (Utah 1987).
[273] *See id.* at 627.
[274] *See id.* at 624.
[275] *See id.*
[276] *See id.*
[277] *See id.*
[278] *Id.* at 627.
[279] *See id.*
[280] *See id.*
[281] *See id.*
[282] 585 F. Supp. 1126 (D. Utah 1984), *aff'd modified*, 760 F.2d 1065 (1985), *and cert. denied*, 474 U.S. 849 (1985).
[283] *See id.* at 1128.

the practice.[284] However, rather than characterizing the practice of polygamy as "barbarous," the Utah court determined that the government could ban polygamy to maintain the "system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage."[285]

The latest bout of prosecutions have yet to reach the appellate stage.[286] Yet, even these recent convictions indicate that polygamists do not face the same animus that their predecessors did.[287] Courts no longer use the word "barbarous" to describe the practice in their opinions. Also, the sheer existence of a polygamous marriage cannot be used as a reason for denying custody. Recently, the ACLU has committed its support to the Women's Religious Liberties Union, a group seeking the end of the harsh punishment for Utah bigamists.[288] Because of the controversy currently surrounding the issue, a hundred years after *Reynolds*, the time might be right for polygamy to reach the Supreme Court again.

Before concluding this Note by discussing the potential legality of polygamy, it is important to note that the practice, as performed in many areas, can be destructive. As previously noted, John Daniel Kingston, a member of a known polygamist sect called the Kingston group, was convicted of beating his 16-year-old daughter after she refused to remain his brother's fifteenth wife.[289] Because Fundamentalist Mormon theology commands men to have many children, wives in polygamous communities are expected to raise many children. Because the husband has to take care of many "families" at once and women are not expected to work, the women are encouraged by their church to go on welfare.[290] It can be a very distressing experience for some women, especially those who did not grow up in a polygamous community. One noted that while she had always thought of marriage as a

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[284] *See id.* at 1138.

[285] *Id.* at 1130.

[286] *See* Stephen Hunt, *Polygamist Asks for a New Trial*, SALT LAKE TRIB., June 15, 1999, at C2, *available in* LEXIS, News Library, Curnws File (stating that David Ortell Kingston, whose story is recounted *supra* notes 11-14 and accompanying text, plans to appeal).

[287] *See* Rivera, *Judge*, *supra* note 15.

[288] *See* Greg Burton, *ACLU to Join Polygamists in Bigamy Fight*, SALT LAKE TRIB., July 16, 1999, *available in* 1999 WL 3370117. However, the ACLU might be granting aid because the organization finds the polygamists' plight to be similar to that of gays and lesbians. The legal director of the ACLU's Utah chapter stated that "'[t]alking to [Utah's polygamists] is like talking to gays and lesbians who really want the right to . . . not live in fear because of whom they love. So certainly that kind of privacy expectation is something the ACLU is committed to protecting.'" *Id.*

[289] *See supra* notes 8-10 and accompanying text.

[290] *See* Tom Zoellner, *Polygamy on the Dole*, SALT LAKE TRIB., June 28, 1998, at A1, *available in* 1998 WL 4060743 (noting that one woman raised in a polygamous stronghold stated, "I know women wouldn't be having as many babies if it weren't for the welfare. . . . I remember being told that this was a work of God and it was up to the outside world to make us flourish.").

partnership, the practice of polygamy espoused by her Fundamentalist Mormon sect turned it "into a dictatorship."[291]

CONCLUSION

Under current First Amendment doctrine, the religious practice of polygamy should be considered a fundamental right under the Free Exercise Clause. All federal and state statutes specifically targeting the practice should be declared void or rewritten so as not to interfere with a polygamist's constitutional right of free exercise of religion.

Under the rulings in *Reynolds v. United States* and its progeny, the practice of polygamy cannot be justified under the Free Exercise Clause of the First Amendment. However, the Supreme Court polygamy cases are worthy of reconsideration under the test for stare decisis articulated in *Planned Parenthood v. Casey*[292] because they meet three of the test's criteria.[293] First, anti-polygamy rulings currently in force are the "remnant[s] of abandoned doctrine,"[294] the federal government's war against the Mormons.[295] The Morrill Act allowed not only penalties for the practice of polygamy, but also contained provisions dissolving the Mormon Church.[296] In the polygamy cases, the Court allowed the federal government to deprive Mormon citizens of their ability to vote[297] and disestablished their church[298] because Mormons believed in polygamy.[299] Today's Court holds that while certain beliefs might be considered harmful, professing them by itself cannot constitute a crime.[300] The Court

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[291] *See* Davidson, *Dictator*, *supra* note 84.

[292] *See* Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992).

[293] As noted earlier, the antipolygamy decisions also fail to meet the "practical workability" criterion. *See supra* notes 194-97 and accompanying text. However, because this argument is weaker than the others, it will not be advanced here. The important parts of the argument, involving the invasion of privacy, will be touched upon later.

[294] *Planned Parenthood*, 505 U.S. at 855.

[295] The Morrill Act, upheld as constitutional in both *Reynolds* and *Mormon Church*, was designed to "punish and prevent the Practice of Polygamy in the Territories." Morrill Act, ch. 126, 12 Stat. 501 (1862). The provisions in the act were aimed solely at the Mormon Church, due to its continued practice of polygamy. *See id.* § 2.

[296] *See* Linford, *Part II*, *supra* note 178, at 581-82 (noting that the destruction of a church was unprecedented in American history, because it was a direct government invasion into the affairs of a religious group).

[297] *See* Davis v. Beason, 133 U.S. 333 (1890), *overruled by*, Romer v. Evans, 517 U.S. 620 (1996).

[298] *See* Mormon Church v. United States, 136 U.S. 1 (1889).

[299] *See supra* notes 135-36 & 147-57 and accompanying text.

[300] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (per curiam) (holding that a Klansman could not be punished merely for advocating racist beliefs, despite the violence those views might cause).

already has nullified the *Davis* decision and would probably nullify the holding in *Mormon Church.* The *Reynolds* decision, denying religious protection to plural marriage, is almost the only remnant of a federal attack on Mormonism.

Second, the rulings in the Supreme Court polygamy cases should not stand, because the acceptance of alternative practices is such that the prohibitions cannot be justified.[301] In nearly a century, the United States has become a more ethnically diverse nation. The Court no longer abolishes religious practices because they are considered odious by the people of northern and western Europe.[302] Under the reasoning in *Hialeah* alone, the Court could not uphold a law designed solely to burden Mormons.[303] Thus, the Morrill Act, upheld in *Reynolds*, would not be constitutional.[304] Considering the Court's refusal to outlaw practices once considered barbarous,[305] the Court should reexamine the question of polygamy.

Finally, the test for stare decisis is satisfied because overruling the *Reynolds* decision would not create a special hardship.[306] People living in polygamous relationships do not gain benefits from the government due to their status. The existence of marriages that exist only in the eyes of God does not harm or burden society.

A polygamist should be given the ability to practice his form of marriage under the Free Exercise Clause of the First Amendment and the right to privacy within a marriage. Even though the Mormon Church officially renounced polygamy a century ago, a fundamentalist Mormon could still argue that the statutes prohibiting polygamy restrict his free exercise of his religion. The government could not argue that Mormonism does not require polygamy because, under current judicial doctrine, the centrality of a religious tenet in an individual's belief system is irrelevant.[307]

According to the Supreme Court, a religious belief does not excuse a citizen "from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[308] The laws against polygamy are neutral in that they ban the privilege for religious and secular polygamists alike. As such, these laws are valid if they do not interfere with another constitutional right.

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[301] *See* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).

[302] *See* Reynolds v. United States, 98 U.S. 145, 164 (1879).

[303] *See* Church of Lukumbi Babalu Aye v. City of Hialeah, 520, 532-33 (1993).

[304] *See supra* notes 231-34 and accompanying text.

[305] For example, in *Church of Lukumbi Babalu Aye v. City of Hialeah*, the Court upheld ceremonial animal slaughter. *See Church of Lukumbi Babalu Aye*, 508 U.S. at 524-25 (casting the sacrifice of animals involved in Santeria in a positive light).

[306] *See Casey*, 505 U.S. at 854.

[307] *See* Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds.").

[308] Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 881 (1990).

However, the Free Exercise Clause "bars application of a neutral, generally applicable law to religiously motivated action" if the action "involve[s] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[309] A neutral statute prohibiting the practice of polygamy interferes with a polygamist's constitutional right to privacy within his marriage.

In the United States, every citizen has a right to marry any member of the opposite sex of legal age that he or she chooses.[310] Under the Fourteenth Amendment, Americans are guaranteed the freedom "'to marry, establish a home and bring up children,'"[311] and all married couples have the right to privacy within that marriage.[312]

As practiced, religious polygamists have only one legal wife. Custom dictates that polygamists marry only once in a civil ceremony; all additional marriages exist only in the eyes of God.[313] According to the United States government, the marriages do not exist.

If a polygamous arrangement involves one lawful marriage, the husband and his "legal" wife are entitled to privacy as to their marital relations. In *Griswold*, the Court determined that the government did not have the right to invade a married couple's bedroom to search for proscribed contraceptives.[314] The prosecution of polygamy would demand greater intrusions into a couple's private world than the limited search supposed in *Griswold*. Before a charge could be filed, the police would have to examine the very structure of a couple's marital relationship. This search would encompass everything from the couple's sexual habits, to finances, to family structure, in order to determine if the husband was living with and maintaining more than one "wife." If the charges were true, the fact that the legal wife approved of the arrangement would be of no consequence to the government. If the charges were unsubstantiated, the government would have invaded the couple's privacy in an unconstitutional manner, invading the zone of marital privacy, in its search for improprieties. If the act of searching the bedroom for a condom can be considered intrusive, the surveillance necessary to prove a charge of polygamy would be worse.

Because current law destroys the religious polygamists' right to exercise their religion freely, as well as their right to privacy within marriage, the law should be declared invalid.[315] The government does not have a sufficient interest in banning

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[309] *Id.* at 881.

[310] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

[311] Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[312] *See Griswold*, 381 U.S. at 495.

[313] *See* Davidson, *Sins*, *supra* note 150.

[314] *See Griswold*, 381 U.S. at 485.

[315] *See* Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 881 (1990) (explaining that the First Amendment bars application of a "neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections").

polygamy to meet the stricter scrutiny triggered by a successful hybrid argument.[316]

The Court previously has upheld bans on certain sexual relations on the basis of moral turpitude. *Bowers v. Hardwick* upheld a state's right to prohibit sexual conduct that its populace found offensive.[317] However, current law does not define polygamy in terms of sexual activity, but rather defines it by the extra marriage itself.[318] The only person punished for engaging in polygamy is the husband, the person supposedly married to more than one person.[319] The law does not punish wives, because they technically are married only to one person. For this reason, the law is illogical, discriminating only against the husband in a mutual union.

In the end, the classification of polygamy as an extra marriage is as strange as characterizing homosexuality as an act. Polygamists do not continually engage in polygamist acts, but rather live in an arrangement known as polygamy. Under *Romer v. Evans*, therefore, polygamy should be characterized as a state of being, like the state of being a homosexual. In *Bowers*, the Court classified homosexuality as a group of activities that the state could ban for any rational purpose.[320] Under that decision's logic, homosexuality was an activity in which presumably anyone could engage. Yet, in *Romer v. Evans*, the Court held that the state could not deprive homosexuals of constitutional protection based on animus toward them as a class.[321] Any attempt by the legislature to discriminate against people because of their practices or beliefs would be met with heightened scrutiny.[322] The anti-polygamy laws in *Reynolds* and *Davis v. Beason* were based on hatred of the Mormon Church.[323] In 1888, Congress required the passage of anti-polygamy amendments for new territories as a condition of statehood in only four states, each of them a western state where Mormons might settle.[324] Under current logic, these laws would be unconstitutional because they directly target a minority group based on animus toward that group. Because the laws discriminate against a hated minority, the government would have to find reasons to ban the practice of polygamy beyond disgust with polygamists' behavior.

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[316] *See id.* at 881 n.1.

[317] *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

[318] *See* United States v. West, 27 P. 84 (Utah Terr. 1891) (claiming that polygamy required an extra marriage and not adultery).

[319] *But see* Rivera & Burton, *supra* note 20, at A5 (noting that one attorney general might press charges against an admitted polygamist and his wives, even though punishment could result in the children being made orphans).

[320] *See Bowers*, 478 U.S. at 197.

[321] *See* Romer v. Evans, 517 U.S. 620 (1996).

[322] *See id.* at 633.

[323] *See supra* notes 143-46 & 148-57 and accompanying text.

[324] *See Romer*, 517 U.S. at 648 (Scalia, J., dissenting) (listing Arizona, Utah, New Mexico, and Oklahoma as the states where polygamy was forcibly outlawed by the federal government).

Laws restricting polygamy do not uphold the sanctity of marriage. People who practice polygamy practice marriage as a civil sacrament in a lawful manner. The extra marriages do not cheapen the polygamists' respect for marriage as an institution or their marital responsibilities. Because each spouse consents to a polygamous relationship, it is not like adultery, an act that is still illegal in some states, including Utah.[325] While courts have said that adultery harms marital relations by causing emotional damage to the maligned spouse,[326] polygamist families are, by definition, not damaged by familial interaction between the husband and one of the "wives."

In addition, bans on polygamy do not protect children. Prosecutions of polygamists remove husbands from their families, leaving their children fatherless. After the raid on the polygamous town of Short Creek, Arizona, 263 children were made wards of the state.[327] If a polygamist is to remain safe from prosecution, he must abandon his polygamous families with the exception of a single wife, leaving those families without a father.[328]

A state can argue that it has a right to determine if polygamy or monogamy is the law of the land. American tax, social security, and other government agencies are based around the monogamous marital relationship. However, polygamous marriages, existing only in the eyes of God, are not registered as civil marriages. Members receive no benefits that are available to men and women joined by the civil authorities. The practice of polygamy does not harm the government infrastructure.

Polygamists should not be punished for deciding to enter into a living arrangement acceptable to both their god and their legal wife. This form of marriage is not a barbarous custom. It is, in the words of Justice Murphy, "like other forms of marriage, . . . a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears . . . . It must be recognized and treated as such."[329]

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[325] *See* Oliverson v. West Valley City, 875 F. Supp. 1465, 1474 (D. Utah 1995) (deciding that an adultery statute was constitutional).

[326] *See id.* at 1484 (noting that adultery creates emotional costs to both parties, destroys families, and spreads disease).

[327] *See* VAN WAGONER, *supra* note 7, at 199-207.

[328] During the nineteenth-century crackdown on polygamy, fathers were thrown in jail for attempting to contact their polygamous families. Therefore, polygamists could not legally provide for their wives and children. *See* FIRMAGE & MANGRUM, *supra* note 56 at 175-76.

[329] Cleveland v. United States, 329 U.S. at 14 (1946) (Murphy, J., dissenting).