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FROM BIG LOVE TO THE BIG HOUSE: JUSTIFYING ANTI-POLYGAMY LAWS IN AN AGE OF EXPANDING RIGHTS

INTRODUCTION

In January 2009, Canadian authorities in Bountiful, British Columbia, arrested two leaders of separate sects of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (“FLDS”) on charges of polygamy.¹ Section 293 of Canada’s Criminal Code makes polygamy a crime.² The individual charges against the men were thrown out on technical grounds, but the litigation evolved into a constitutional question as to whether Canada’s criminal prohibition on polygamy was consistent with the guarantees of religious freedom, freedom of expression, freedom of association, liberty and security of person, and equality in the Canadian Charter of Rights and Freedoms (the “Charter”).³

The British Columbia Supreme Court entered its judgment on November 23, 2011, acknowledging that the case had produced “the most comprehensive judicial record on the subject ever produced.”⁴ Indeed, within the four corners of the Court’s 190-page opinion lies an impressive compilation of marriage theories, religious history, theology, apprehended harms of polygamy, and legal theories for why anti-polygamy laws violate human rights.⁵ The Court gathered an abundance of evidence with the objective of determining, among other things, whether polygamy poses a risk of harm,⁶ whether Section 293 unjustly discriminates based on religion,⁷ and whether Section 293’s implied mandate of monogamy represents impermissible government endorsement of mainstream Christianity.⁸ Even while acknowledging “non-trivial”

¹ *Canadian Polygamist Leaders Charged; Reaction Mixed*, RELIGION NEWS BLOG (Jan. 8, 2009), <http://www.religionnewsblog.com/23138/bountiful-polygamy-6>.

² Criminal Code, R.S.C. 1985, c. C-46, s. 293 (Can.).

³ *Polygamy Charges in Bountiful, B.C., Thrown Out*, CBC NEWS, <http://www.cbc.ca/news/canada/british-columbia/story/2009/09/23/bc-polygamy-charges-blackmore-oler-bountiful.html> (last updated Sept. 23, 2009); see Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.); Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 23, 1047 (Can.).

⁴ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 6.

⁵ See, e.g., *id.* paras. 341–56, 1079–82.

⁶ See *id.* paras. 5–6.

⁷ See *id.* para. 133.

⁸ See *id.* para. 131.

infringement on religious freedom,⁹ the Court concluded that the harms Parliament sought to avoid by enacting Section 293 made the law “justified in a free and democratic society.”¹⁰ The Court also found that the law was not a product of “religious animus on the part of Parliament” but was “prompted by largely secular concerns with perceived harms associated with the practice to women, children and society.”¹¹ Finally, the Court found that the criminal ban on polygamy did not generally infringe on the other constitutional rights invoked by the challengers.¹²

The international significance of the decision of the Supreme Court of British Columbia is yet to be seen. The depth of the record itself, coupled with the dearth of modern polygamy conflict of rights cases, surely qualifies it as a jurisprudential milestone. But it is difficult to predict the amount of weight Western courts—including the Canadian Supreme Court—will afford the reasoning of a Canadian provincial supreme court. Even when presented with a similar set of facts, each country faced with challenges to its anti-polygamy laws must apply its own standards and balancing tests. This Comment argues that, as Western courts are faced with modern challenges to anti-polygamy laws, solid foundations exist upon which these laws may be justified.

A. *Terms Defined*

It is useful at the outset to define terms that will be used throughout this Comment. “Polygamy” refers to the practice of having more than one spouse at one time.¹³ “Polygyny” and “polyandry” are encompassed by polygamy.¹⁴ “Polygyny” refers to the practice of having more than one wife at one time,¹⁵ and its counterpart “polyandry” refers to the practice of having more than one husband at one time.¹⁶ “Bigamy” refers to the crime of entering into another

⁹ *Id.* para. 1098.

¹⁰ *Id.* para. 1352.

¹¹ *Id.* para. 1088.

¹² *See id.* paras. 1103, 1127, 1269. The Court concluded that Section 293 was overbroad in that it violated minors’ rights to “liberty and security of the person” as protected by § 7 of the Charter. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 7 (U.K.); Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1270. *But see id.* para. 1203 (holding that Section 293 is not overbroad as it applies to individuals over 18 years of age).

¹³ WEBSTER’S NEW WORLD COLLEGE DICTIONARY 1046 (Victoria Neufeldt & David B. Guralnik eds., Macmillan Gen. Reference 3d ed. 1997).

¹⁴ *See id.* at 1046–47.

¹⁵ *Id.* at 1047.

¹⁶ *Id.* at 1046.

legal marriage while one has a living spouse.¹⁷ This Comment uses the term “religious polygamist” to refer to one who practices polygamy under religious command or permission. “Polyamory” refers to participation in “more than one open romantic relationship at a time,” and generally does not carry religious connotations.¹⁸

B. The Prevalence of Modern Polygamy

The litigation that gave rise to the Supreme Court of British Columbia case dealt with the polygynous actions of members of the FLDS, a conservative faction of Mormons that broke away from the mainstream Mormon church in the 1920s and 1930s as a result of the church’s renunciation of polygyny—a practice that the mainstream Mormon church had publicly advocated from 1852 until 1890.¹⁹ Today, the FLDS is 10,000 members strong, and is concentrated in isolated communities in Utah, Arizona, and British Columbia.²⁰ An additional 40,000 fundamentalist Mormons who are not members of the FLDS live in North America, mostly in the Western United States.²¹ Members of the FLDS believe that polygyny is essential if they and their families are to reach the “highest degree of glory in heaven.”²² Additionally, they engage in a practice called “placement marriage”—wives are placed with husbands by church leaders, whom members believe are directed by divine revelation.²³

High-profile litigation involving fundamentalist Mormons in the United States, as well as the depictions of Mormon polygyny in popular culture, have begun to stoke a new discussion of the practice. In 2008, Texas authorities raided an FLDS compound and arrested the compound’s leader, Warren Jeffs.²⁴ Jeffs was convicted of “forcing two teenage girls into ‘spiritual marriage,’ and fathering a child with one of them when she was 15.”²⁵ At the trial, prosecutors played an audiotape of Jeffs sexually assaulting his twelve-

¹⁷ *Id.* at 137.

¹⁸ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 961 (11th ed. 2011). For further discussion of polyamory, see *infra* Introduction.B.

¹⁹ See Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 274, 303, 307.

²⁰ *Id.* paras. 311, 317.

²¹ See *id.* paras. 310–11.

²² *Id.* para. 318.

²³ *Id.* para. 320.

²⁴ Clayton Sandell & Christina Caron, *Polygamist Warren Jeffs Guilty of Child Rape*, ABC NEWS (Aug. 4, 2011), <http://abcnews.com/story?id=14228198>.

²⁵ *Id.*

year-old “spiritual wife.”²⁶ He sought appeal based in part on the claim that his religious rights were violated,²⁷ but his appeal was denied.²⁸

Meanwhile, in juxtaposition to the “secret compound” lifestyle of Jeffs, polygamist Kody Brown cheerfully co-stars, with his four wives and seventeen children, on the TLC reality show *Sister Wives*.²⁹ TLC promotes the show as a depiction of the Brown family “attempt[ing] to navigate life as a ‘normal’ family in a society that shuns their [polygamist] lifestyle.”³⁰ The show features disarmingly charming discussions between Brown and his family about teenage dating, hair styles, and even women’s rights.³¹ Brown filed a lawsuit against the State of Utah claiming that the state cannot punish polygamists for their own intimate conduct.³² The lawsuit against Utah was dismissed only when the state made it clear that it did not intend to pursue criminal charges.³³

Sister Wives is joined by HBO’s popular series *Big Love* in bringing religious polygamists (albeit, in *Big Love*’s case, fictional polygamists) to the public eye.³⁴ *Big Love*, which aired its final episode in March 2011, follows the life of a fundamentalist Mormon polygynist who, after being shunned from his religious compound at a young age, balances three wives and eight children while maintaining a small business and, ultimately, running for political office

²⁶ *Id.*

²⁷ Jim Forsyth, *Polygamist Leader Seeks New Trial, Says Rights Violated*, REUTERS, Sept. 7, 2011, available at <http://www.reuters.com/article/2011/09/08/us-jeffs-appeal-texas-idUSTRE7870EH20110908>. Jeffs also claims that evidence used in his first trial was seized illegally. *Id.*

²⁸ Lindsay Whitehurst, *Texas Court Dismisses Warren Jeffs’ Appeal*, SALT LAKE TRIB. (Mar. 29, 2012), <http://www.sltrib.com/sltrib/news/53817838-78/jeffs-court-appeal-texas.html.csp>.

²⁹ *What’s New with the Sister Wives*, TLC, <http://tlc.howstuffworks.com/tv/sister-wives/about-sister-wives.htm> (last visited Sept. 11, 2012).

³⁰ *Id.*

³¹ See *Sister Wives: Season 2, Episode 2 Teen Sex Talk*, IMDB, <http://www.imdb.com/title/tt2063465/> (last visited Sept. 16, 2012); Joyce Tang, *Sister Wives Season 2: Polygamy’s Strange Charm*, DAILY BEAST (Mar. 10, 2011), <http://www.thedailybeast.com/articles/2011/03/10/sister-wives-season-2-fundamentalist-polygamous-mormons-on-tlc.html>.

³² John Schwartz, *Polygamist, Under Scrutiny in Utah, Plans Suit To Challenge Law*, N.Y. TIMES, July 11, 2011, at A10.

³³ Brian Skoloff, *‘Sister Wives’ Lawsuit: No Bigamy Charges for Kody Brown and Wives*, HUFFINGTON POST (May 31, 2012), http://www.huffingtonpost.com/2012/06/01/sister-wives-bigamy-lawsuit-kody-brown_n_1561962.html.

³⁴ Stuart Levine, *‘Big Love’ Says Goodbye*, VARIETY (Oct. 28, 2010), <http://www.variety.com/article/VR1118026514>.

in Utah.³⁵ The series ran for five seasons, its fourth season attracting over five million viewers per episode.³⁶

Polygyny is sometimes practiced by Muslims and was, in fact, practiced by its founder, the Prophet Muhammad.³⁷ Contrary to the practice in the FLDS, polygyny in Islam is *permitted*, not *mandated*.³⁸ According to the Qur'an, a man may take up to four wives under certain conditions that are the subject of theological debate.³⁹ States with significant Muslim populations have taken a wide range of legal approaches to polygyny—from the outright prohibitions imposed by Turkey and Tunisia to the encouraging stance taken by Saudi Arabia.⁴⁰ It would seem that, at least in some countries, consent of the existing wives to the husband's marriage of a new wife is not required.⁴¹

As European countries welcome citizens from the south and east across their borders, practicing polygynists and their children, many of them Muslim, are integrating into Western societies.⁴² European countries faced with the choice of promoting religious tolerance or enforcing their laws often turn a blind eye to the practice.⁴³ While the United Kingdom will not recognize plural marriages that are contracted on its own soil, it does extend welfare benefits, including home subsidies, to the “spiritual wives” and children of polygamist patriarchs who contracted marriage abroad.⁴⁴ This leads some to argue that they are an unfair drain on the economy.⁴⁵ While official numbers are difficult to obtain, one estimate posits that approximately 1,000 polygamous unions exist in the U.K. today.⁴⁶

³⁵ *About the Show*, HBO, <http://www.hbo.com/big-love/index.html#big-love/about/index.html> (last visited Sept. 12, 2012); Levine, *supra* note 34.

³⁶ Levine, *supra* note 34.

³⁷ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 238 (Can.).

³⁸ *See id.*

³⁹ *See id.* paras. 242–49; THE HOLY QUR'AN 4:3 (Abdullah Yusuf Ali, trans., Sh. Muhammad Ashraf, 1990) (1934). Separate experts on Islam testified to different interpretations of the Qur'an's provisions for multiple wives. One concluded that polygyny was religiously disfavored, and the other disagreed, opining that the Qur'an's text on polygamy is open to different interpretations. Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras 242–49, 255.

⁴⁰ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 250–51, 255.

⁴¹ *See id.* paras. 252, 424.

⁴² *See Many Wives' Tales*, ECONOMIST, May 8, 2010, at 55, 55, available at <http://www.economist.com/node/16068972>; Shreela Flather, *Polygamy, Welfare Benefits and an Insidious Silence*, MAIL ONLINE (Sept. 16, 2011), <http://www.dailymail.co.uk/news/article-2037998/UK-immigration-Polygamy-welfare-benefits-insidious-silence.html>.

⁴³ *Many Wives' Tales*, *supra* note 42, at 55; Flather, *supra* note 42.

⁴⁴ *See* Flather, *supra* note 42.

⁴⁵ *E.g., id.*

⁴⁶ *Id.*

Even in the many European countries with outright bans on polygamy, polygamous families, most of them Muslims, have found a home. For instance, between 16,000 and 20,000 polygamous families have taken root in France.⁴⁷ And if the European Union expands eastward, it will increase its coverage of Muslims and polygamy. For example, Turkey legally prohibits polygamy, yet is home to approximately 187,000 women living in polygynous relationships.⁴⁸

While not as visible as Mormon or Muslim polygynists, smaller groups that practice polygamy, such as Wiccans and polyamorists, also have a stake in the discussion. Followers of Wicca, which comprises the largest fraction of the Pagan religious movement in the United States and Canada, believe that “all forms of consensual sexual and emotional ties into which adults freely enter are sacred or, at a minimum, potential routes to an encounter with the sacred.”⁴⁹ This may include relationships involving more than two adults.⁵⁰ Testimony by a Wiccan priest in the Supreme Court of British Columbia case suggests that at least some Wiccans would engage in polygamous relationships if they were not illegal.⁵¹

Polyamorists constitute a group whose common values are difficult to define or even discern.⁵² Indeed, the Supreme Court of British Columbia expressed doubt that they constituted a “discrete group,” and concluded that polyamory was “as varied in practice as the imagination of its practitioners.”⁵³ Their religious tenets seem either ambiguous or nonexistent, but some view consensual sex as sacred, and studies show that some commemorate their union by rite, ceremony, or contract.⁵⁴ Some polyamorists raise children together and “consider themselves a family unit.”⁵⁵ One scholar describes such a practice as “postmodern polygamy,” stating that “it could as easily encompass one woman with several male partners as it could one man with multiple female partners. It . . . includes . . . same-sex or bisexual relationships, neither of which is contemplated by traditional polygamy.”⁵⁶ Some researchers

⁴⁷ *Many Wives' Tales*, *supra* note 42, at 55.

⁴⁸ *Thousands of Polygamous Marriages in Turkey: Study*, EUBUSINESS (Jan. 18, 2011, 7:10 PM), <http://www.eubusiness.com/news-eu/turkey-women.863>.

⁴⁹ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 462, 466 (Can.).

⁵⁰ *Id.* para. 466.

⁵¹ *Id.* para. 467.

⁵² *See id.* para. 430 (characterizing a “precise definition” of polyamory as “elusive”).

⁵³ *Id.* para. 1094.

⁵⁴ *Id.* paras. 433, 447.

⁵⁵ *Id.* paras. 447, 452.

⁵⁶ Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 440–41 (2003).

estimate that over half a million polyamorous families reside in the United States.⁵⁷

C. *The Bases for Legal Challenges*

With the continuing expansion of religious and sexual rights in the West, various anti-polygamy laws on the books may soon become ripe for constitutional and human rights challenges. As a result of globalization and religious pluralism, the international community has come to place great value upon religious freedom.⁵⁸ At the same time, the past century has given way to robust sexual autonomy as Western governments have retreated from mandating sexual norms.⁵⁹ Given the large percentage of polygamists who engage in the practice for religious reasons, one could reasonably conclude that the current international ethos has given way to the perfect storm—a worldwide *Zeitgeist* in which polygamists will, at long last, find acceptance and even affirmation. But this has not been the case in the developed world.

Criminal laws against polygamy or bigamy exist in all fifty United States, as well as in the rest of North America, Europe, Oceania, and much of Asia, including China and Japan.⁶⁰ While these criminal laws are not actively prosecuted in most countries, they are enforced when polygamists seek to avail themselves of state benefits or when they compound their polygamy with coerced or underage marriages, statutory rape, child abuse, or social welfare fraud.⁶¹ Legal polygamy is generally confined to sub-Saharan Africa, the Middle East, and certain regions in Asia, most with majority Muslim populations.⁶²

Polygamists in the West, despite inhabiting a culture of religious and sexual liberty and permissiveness, continue to be shunned.⁶³ The meaning of polygamy's foray into popular culture must be viewed against the culture's perpetual discomfort with the institution. It might well not represent societal acceptance of polygamy, but rather a prurient kind of fascination that

⁵⁷ Jessica Bennett, *Only You. And You. And You.*, DAILY BEAST (July 28, 2009), <http://www.thedailybeast.com/newsweek/2009/07/28/only-you-and-you-and-you.html>.

⁵⁸ JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 220, 225 (2000).

⁵⁹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (discussing the erosion of the opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

⁶⁰ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 234 (Can.).

⁶¹ *Cf. id.* para. 333.

⁶² *Id.* para. 235. Polygamy may be legal in other parts of Africa under customary law. *Id.*

⁶³ See *What's New with the Sister Wives*, *supra* note 29.

audiences have concurrently extended toward, say, vampires and high-profile murder trials.⁶⁴ Far from creating a groundswell of support for polygamy, many continue to find the practice to be morally repugnant.⁶⁵

But justice does not sustain vague moral approbations. As U.S. and international law develop, many polygamists are recognizing that the traditional legal justifications for invalidating their ways of life are rapidly eroding.⁶⁶ The international community is quickly coming to a crossroads in forming a cogent law that either prohibits the practice altogether or allows polygamists to exercise their rights without fear of prosecution, and possibly with the same type of benefits that governments extend to monogamous heterosexual marriages, and, in some cases, homosexual marriages, domestic partnerships, and civil unions.⁶⁷ The difficulty lies in that no matter which way these laws cut, they will require the state to make a choice between competing fundamental rights claims. For the state to prohibit polygamy altogether would seem to violate the fundamental rights of religious polygamists to religious freedom, sexual autonomy, domestic privacy, and what international human rights instruments call religious and cultural “self-determination.”⁶⁸ But for the state to permit polygamy provides legal sanction to isolated religious communities to maintain havens of human trafficking, spousal oppression, child abuse, and social welfare fraud that violate the fundamental rights of women and children, and the fundamental role of government to protect the health, safety, and welfare of its citizens.⁶⁹ While it is important to recognize the significant rights at stake in the debate over polygamy, current anti-polygamy laws in the West can withstand the ongoing development of sexual liberties and religious rights.

Religious freedom challenges to anti-polygamy laws are unsatisfying. Even as the weight given to religious acts fluctuates in American, foreign, and

⁶⁴ See Alessandra Stanley, *No Pause in Pursuit of Justice (and Ratings)*, N.Y. TIMES, July 2, 2011, at C1; Didi Popovic, *Teen Phenomenon: “The Twilight Saga: Eclipse,”* EXAMINER.COM (Dec. 3, 2010), <http://www.examiner.com/article/teen-phenomenon-the-twilight-saga-eclipse>.

⁶⁵ See John Witte Jr., *Can America Still Bar Polygamy?*, CHRISTIANITY TODAY (May 23, 2008, 8:38 AM), <http://www.christianitytoday.com/ct/2008/mayweb-only/121-52.0.html>.

⁶⁶ See *id.*

⁶⁷ Cf. Strassberg, *supra* note 56, at 562–63 (discussing the potential impact of polygamous marriages on the modern liberal state).

⁶⁸ See Johan D. van der Vyver, *Limitations of Freedom of Religion or Belief: International Law Perspectives*, 19 EMORY INT’L L. REV. 499, 506, 525–26 (2005).

⁶⁹ See generally *Canadian Polygamist Leaders Charged; Reaction Mixed*, *supra* note 1 (describing the friction between polygamist communities and the Canadian government’s responsibility to prevent the exploitation of vulnerable people within the communities).

international courts, religious rights are not *per se* legal rights.⁷⁰ State marriage benefits should never be withheld on the basis of religious animus. But while laws that invidiously discriminate against religious faiths are generally invalid, monogamous marriages and basic marriage rights are the product of religiously neutral, non-discriminatory laws.⁷¹ Additionally, modern marriage regulations are decidedly secular and reflect legitimate policy goals and public welfare considerations.⁷²

Instead of fighting for official state recognition through religious freedom arguments, defenders of polygamy sometimes invoke fundamental sexual and privacy rights as a basis for simply being left alone.⁷³ But while American and Western laws generally forbid regulations on private and consensual sex, modern sexual rights have developed outside the context of intentional procreation of children and marriage.⁷⁴ Modern anti-polygamy laws represent valid policy considerations that, while in a limited context may abridge sexual liberty, more importantly serve the interests of public welfare. Polygamists' efforts would be better directed toward legislatures than courts of law.

This Comment first analyzes, claim by claim, the Supreme Court of British Columbia case and discusses its significance as a model to future polygamy law challenges in the West. The case illustrates that a powerful justification for anti-polygamy laws is that polygamy is inherently harmful to women, children, men, and society alike. Part II describes the documented and perceived harms that polygamy inflicts upon children, women, and society. Recognizing that anti-polygamy laws are most vulnerable to religious exercise challenges and liberty or privacy challenges, Parts III and IV cover the relevant law for each type of claim, respectively, and explain why an abridgement of these rights, in order to prohibit polygamy, is justified.

I. REFERENCE RE: SECTION 293

Unlike the United States, the Canadian justice system allows federal and provincial governments to submit "reference questions" to their respective courts in order to obtain advisory opinions.⁷⁵ Canadian advisory opinions have

⁷⁰ See van der Vyver, *supra* note 68, at 503.

⁷¹ See discussion *infra* Part III.B.

⁷² See discussion *infra* Part III.C.

⁷³ See Strassberg, *supra* note 56, at 549.

⁷⁴ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 568–71 (2003) (describing the history of certain sexual rights and practices).

⁷⁵ See, e.g., Supreme Court Act, R.S.C. 1985, c. S-26, s. 53 (Can.).

covered a wide range of issues, from same-sex marriage⁷⁶ to provincial secession.⁷⁷ The Canadian province of British Columbia, under this provision, asked the B.C. Supreme Court to declare whether Section 293 of the Criminal Code of Canada, which outlaws polygamy, was “consistent with the freedoms guaranteed to all Canadians by the Canadian Charter of Rights and Freedoms.”⁷⁸

The relevant portion of Section 293 provides:

(1) Every one who (a) practises or enters into or in any manner agrees or consents to practise or enter into (i) any form of polygamy, or (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage; or (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.⁷⁹

Challengers of the law claimed that Section 293 violates the Charter’s rights of freedom of religion, freedom of expression, freedom of association, liberty and security of the person, and equality.⁸⁰ British Columbia asserted that the law was a sound result of “Parliament’s reasoned apprehension of harm arising out of the practice of polygamy.”⁸¹ This Subpart analyzes the court’s reasoning as it addressed each of the challenger’s claims.

A. *Freedom of Religion*

Section 2(a) of the Charter guarantees “freedom of conscience and religion.”⁸² The challengers maintained that Section 293 violated Section 2(a) because it was passed as a result of religious animus,⁸³ its purpose was to mandate a practice intrinsically rooted in mainstream Christianity,⁸⁴ and it abridged religious liberty with respect to Mormons, Muslims, and Wiccans.⁸⁵

⁷⁶ See Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698 (Can.).

⁷⁷ See Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

⁷⁸ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1 (Can.).

⁷⁹ Criminal Code, R.S.C. 1985, c. C-46, s. 293 (Can.).

⁸⁰ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1047.

⁸¹ *Id.* para. 5.

⁸² Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 2(a) (U.K.).

⁸³ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1053.

⁸⁴ *Id.* para. 1054.

⁸⁵ *Id.* para. 1062.

British Columbia argued, to the contrary, that the law was directed to the “secular purpose of protecting women, children, and society from the harms of polygamy.”⁸⁶ It further argued that religiously-motivated practices that harm others do not fall under the protections granted by Section 2(a).⁸⁷

In addressing the question as to whether the criminal prohibition on polygamy was a result of religious animus, the court relied on the testimony of experts who spoke to the Greco-Roman origins of socially imposed universal monogamy as well as long-standing Western legal tradition of making polygamy an offense.⁸⁸ Polygamy, the court found, has traditionally been associated with various harms to women, children and society. Section 293 is not directed towards any particular religious group, but rather towards the prevention of those harms.⁸⁹ As to whether Section 293 mandated a religious practice, the court distinguished religious laws from laws embraced by religious people. “Socially imposed universal monogamy,” the court said, “while embraced by Christianity, had its roots in Greco-Roman society.”⁹⁰

The court did find, however, that Section 293 violates the religious liberty of the members of some religious groups.⁹¹ Regarding fundamentalist Mormons, some Muslims, and Wiccans, the court held that Section 293 “clearly interferes with the ability of individuals who sincerely hold these religious beliefs to act in accordance with them in a manner that is more than trivial or insubstantial.”⁹² Given this holding, the court was obligated to subject the law to the *Oakes* analysis to determine whether the limitation imposed by Section 293 could be, as provided by Section 1 of the Charter, “demonstrably justified in a free and democratic society.”⁹³

The *Oakes* analysis of Canadian law very closely resembles the “strict scrutiny” test often applied by American courts when laws infringe upon fundamental rights or discriminate based upon a “suspect class” like race,

⁸⁶ *Id.* para. 1056.

⁸⁷ *Id.* para. 1067.

⁸⁸ *See, e.g., id.* paras. 147–233.

⁸⁹ *Id.* paras. 1088–89.

⁹⁰ *Id.* para. 1088.

⁹¹ *Id.* para. 1098.

⁹² *Id.* para. 1093. The Court determined that polyamorists are not a “discrete group sharing truly common principles,” and, therefore, their rights under 2(a) are not infringed by Section 293. *Id.* para. 1094.

⁹³ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 1 (U.K.); Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1273–1357; *see* R. v. Oakes [1986] 1 S.C.R. 103, 138 (Can.).

nationality, or religion.⁹⁴ The *Oakes* analysis asks if the purpose for the limit imposed is “pressing and substantial” and demands that the law be rationally connected to its purpose, that it minimally impair the Charter right, and that it be proportionate in its effect.⁹⁵

The Court found that Section 293 passed the *Oakes* test with regard to the Charter’s Section 2(a) guarantee.⁹⁶ Both the prevention of harm to women, children, and society, and the preservation of monogamous marriage are pressing and substantial objectives, according to the court.⁹⁷

The court heard testimony regarding the steep rise of polygyny in France, between the end of World War II and 1993, resulting from a policy designed to attract immigrant labor.⁹⁸ The idea that a relaxation of *polygamy* policies caused *polygyny* to spread in France, a country much like Canada or the United States in terms of industrial modernity, convinced the court that polygamy could “plausibly increase in a non-trivial way if not criminalized,” satisfying the rational connection requirement.⁹⁹

The challengers argued that because constitutionally valid laws aimed at preventing the harms that may arise in particular polygamous unions already existed, there was a “disconnect between [Section] 293 and actual harm.”¹⁰⁰ The court responded by noting that “other discrete offences do not ‘occupy the field’ of harms associated with polygamy as an institution,” and that, even if they did, effective measures passed by the government cannot be discounted just because other measures are in place.¹⁰¹

Critical to the court’s view that Section 293 “minimally impairs religious freedom” was the court’s finding that the harms associated with polygamy “are not simply isolated to criminal adherents like Warren Jeffs but inhere in the institution itself.”¹⁰² Additionally, the court noted that the positive objective of

⁹⁴ See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry.”).

⁹⁵ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1273; *Oakes*, [1986] 1 S.C.R. at 138.

⁹⁶ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1352.

⁹⁷ *Id.* paras. 1330–31.

⁹⁸ *Id.* paras. 561–68.

⁹⁹ *Id.* para. 1336, 1339.

¹⁰⁰ *Id.* para. 1292.

¹⁰¹ *Id.* para. 1194; *accord id.* para. 1193.

¹⁰² *Id.* paras. 1341, 1343.

the measure—the protection and preservation of monogamous marriage—required the “outright prohibition of that which is fundamentally anathema to the institution.”¹⁰³

In examining the proportionality requirement, the court weighed the harmful effects of the law against its helpful effects. While accepting that Section 293 interferes with sincerely-held religious beliefs, the court again emphasized the law’s advancement of monogamous marriage, “a fundamental value in Western society from the earliest of times.”¹⁰⁴ The court also found “very significant” the law’s effect in furthering Canada’s international human rights obligations.¹⁰⁵ Having applied the *Oakes* analysis, the court declared that, to the extent Section 293 infringed on religious freedom guaranteed by the Charter, the harm was “demonstrably justified in a free and democratic society.”¹⁰⁶

B. Freedom of Expression

Section 2(c) of the Charter grants, among other freedoms, the freedom of expression.¹⁰⁷ A secular group promoting polyamory argued that Section 293 prevented polyamorists from performing secular ceremonies and celebrations meant to affirm the value and legitimacy of polygamous unions and to express love and commitment.¹⁰⁸ The court rejected this argument and held that expressive freedom does not include the formalization of a polygamous marriage.¹⁰⁹ It addressed this issue very briefly and seemed to accept British Columbia’s comparison of polyamorous marriage ceremonies to fraudulent contracts—they both involve “communicative component[s],” but not the kind deserving of legal protection.¹¹⁰

¹⁰³ *Id.* para. 1343.

¹⁰⁴ *Id.* para. 1350.

¹⁰⁵ *Id.* para. 1351.

¹⁰⁶ *Id.* para. 1352.

¹⁰⁷ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 2(c) (U.K.).

¹⁰⁸ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1100.

¹⁰⁹ *Id.* para. 1103.

¹¹⁰ *Id.* para. 1102.

C. *Freedom of Association*

Section 2(d) of the Charter guarantees the freedom of association.¹¹¹ Relying on Canadian precedent, the court held that Section 293 does not infringe upon this guarantee solely because it does not target the “associational nature” of polygamy.¹¹² Instead, the court said the law targets “harms perceived to be associated with the practice.”¹¹³ In doing so, the court was able to dodge thoughtful arguments put forth by the challengers.

The challengers’ argument listed several forms of conduct that could be characterized as polygamous, but that were not prohibited by the criminal law: serial monogamy, through divorce and remarriage; adultery; sexual promiscuity; having children with multiple partners; and the raising of children by more than two adults.¹¹⁴ Essentially, the challengers argued that the contractual formation of a polygamous family is based on consent to the consequences of the polygamous family relationship.¹¹⁵ The law’s defenders did not attempt to address this argument; British Columbia’s only position in this matter was that the challengers’ argument was moot because, it claimed, familial relationships are not a protected form of association under Canadian law.¹¹⁶ The court’s holding on this issue did little to address the arguments put forth by the challengers.

D. *Liberty and Security of the Person*

Section 7 of the Charter guarantees the “right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹¹⁷ The court determined that the threat of imprisonment for one’s choice of family arrangement constitutes a deprivation of liberty sufficient to invoke the question of whether the deprivation is in accordance with “the principles of fundamental justice.”¹¹⁸

¹¹¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 2(d) (U.K.).

¹¹² Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 1125–27 (quoting *Dunmore v. Ontario (A.G.)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, para. 18 (Can.)).

¹¹³ *Id.* para. 1126.

¹¹⁴ *Id.* para. 1108.

¹¹⁵ *See id.* para. 1109.

¹¹⁶ *Id.* para. 1110.

¹¹⁷ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 7 (U.K.).

¹¹⁸ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 1177–78.

The challengers contended that Section 293 constitutes an unlawful deprivation of liberty. They claimed that Section 293 is overbroad because it criminalizes every polygamous union, even those that are not harmful, and because laws targeting the “harms of criminal magnitude” that may arise in some polygamous relationships already existed.¹¹⁹ They contended that Section 293 is arbitrary because it purports to protect women and children, yet it criminalizes them if they enter into a polygamous union; it targets only polygamous unions when the harms sought to be avoided also affect children of non-polygamous families; and it “does not criminalize the [behavior] associated with multiple simultaneous conjugal relationships, only the agreement of the participants to treat the relationship as enduring.”¹²⁰ They contended that Section 293 is grossly disproportionate to legislative interests¹²¹ and argued that the law ignores the principle of recognizing consent as an affirmative defense to criminal liability—to the contrary, “the act of consenting is impliedly made an element of the offence.”¹²²

The court’s opinion that the evidence presented showed that polygamy may be inherently harmful proved critical in striking down the challengers’ claims.¹²³ The challengers’ claims, the court said, were based on two related premises: First, polygamy is not inherently harmful; and “second . . . consensual and harmless adult polygamous unions exist.”¹²⁴ But when one accepts that polygamy is “inherently harmful to the participants, to their offspring and to society generally,”¹²⁵ the challengers’ premises become untenable. As for the challengers’ “principle of consent” argument, when the harm of the act extends beyond the realm of the consenter(s)—that is, to children and to society—the court reasoned that the principle of consent would not apply.¹²⁶

¹¹⁹ *Id.* paras. 1143–44.

¹²⁰ *Id.* paras. 1151–53.

¹²¹ *Id.* paras. 1158–64.

¹²² *Id.* paras. 1167–70.

¹²³ The only portion of the law that the court held violated the Charter was Section 293’s application to children under 18. The court held that the application to children under 18 did not comport with the “principles of fundamental justice.” *Id.* para. 1357. It recommended that, since this was only “peripherally problematic,” the exclusion be read into the law. *Id.* para. 1361.

¹²⁴ *Id.* para. 1181.

¹²⁵ *Id.* para. 1182.

¹²⁶ *Id.* paras. 1184–85.

E. Equality

Section 15 of the Charter guarantees equal protection and equal benefit of the law.¹²⁷ The challengers claimed that Section 293 violates these guarantees because it discriminates on the grounds of religion and marital status. The government's prohibition on polygamy "ridicul[es]" the sincerely-held religious beliefs of Mormons, Muslims, and Wiccans, they claimed, and demeans them by treating polygamy differently from monogamy.¹²⁸ The court noted, and the challengers conceded, that the religious equality claim was essentially the same as the religious freedom claim.¹²⁹ The court ultimately rejected it on the same grounds.¹³⁰

More creatively, the challengers claimed that Section 293 unlawfully discriminated on the basis of marital status. Attempting to attract the level of legal protection given to enumerated classes like race, religion, and age, the challengers suggested that polygamy is on some level immutable.¹³¹ Polygamy, they claimed, is more immutable than a common law relationship because of the religious and social elements that drive it.¹³² That polygamists engage in the practice despite its criminalization, they argued, supports this claim.¹³³ The challengers' claim seemed to invoke a *spectrum* of immutability, an idea that seems contrary to the formal definition of the word: "unchangeable."¹³⁴ One would imagine that something is either changeable or not.

But the court did not have to address whether or to what extent polygamy is immutable. Consistent with its reasoning regarding the other Charter claims, the court found that because Parliament's purpose was to protect society from perceived harms associated with polygamy, there was no discriminatory, prejudicial, or stereotypical purpose; therefore, under Canadian precedent, Parliament did not violate the Charter's guarantee of equality.¹³⁵

¹²⁷ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 15 (U.K.).

¹²⁸ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 1230–31 (quoting I Closing Submission of the Amicus Curiae para. 242, Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (No. S-097767)) (internal quotation marks omitted).

¹²⁹ *Id.* paras. 1267–68.

¹³⁰ *Id.* paras. 1268–69.

¹³¹ *Id.* para. 1243.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See WEBSTER'S NEW WORLD COLLEGE DICTIONARY, *supra* note 13, at 675.

¹³⁵ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 1260–62.

F. *International Law Obligations*

Apart from the claims of the challengers, the court also considered Canada's obligations under international law. The court considered four treaties to which Canada is a state party¹³⁶: The International Covenant on Civil and Political Rights ("ICCPR"),¹³⁷ the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),¹³⁸ the Convention on the Rights of the Child ("CRC"),¹³⁹ and the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").¹⁴⁰ It also considered comments and recommendations of each treaty body that monitored state treaty compliance.¹⁴¹ Finally, the court examined anti-polygamy laws under customary international law and comparative law.¹⁴²

The court noted at the outset of its international law discussion that none of the relevant treaties explicitly addressed polygamy.¹⁴³ However, it found that the General Recommendations and concluding observations of the CEDAW Committee and the Human Rights Committee (which monitors compliance with the ICCPR) strongly condemned polygamy.¹⁴⁴ It found that the concluding observations of the Committee on the Rights of the Child identified polygamy as a "discriminatory custom and tradition."¹⁴⁵ The committee responsible for monitoring the ICESCR mentioned polygamy only briefly in concluding observations, but the court interpreted the comments to confirm an interpretation that polygamy violates ICESCR equality provisions.¹⁴⁶ The court concluded that the "consensus of these international treaty bodies is that the practice of polygamy violates various provisions of the treaties that Canada has ratified."¹⁴⁷

¹³⁶ *Id.* para. 801.

¹³⁷ International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹³⁸ International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, S. Treaty Doc. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR].

¹³⁹ Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

¹⁴⁰ Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

¹⁴¹ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 803.

¹⁴² *Id.* paras. 841–51.

¹⁴³ *Id.* para. 802.

¹⁴⁴ *Id.* paras. 815–19.

¹⁴⁵ *Id.* para. 824.

¹⁴⁶ *Id.* paras. 827–29; Comm. on Econ., Soc., & Cultural Rights, General Comment No. 14, para. 21, U.N. Doc. E.C./12/2000/4 (Aug. 11, 2000).

¹⁴⁷ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 839.

In its customary international law analysis, the court determined that, due to the prevalence of polygyny in Africa and the Middle East, there was no “consistent and uniform state practice,” and, therefore, no emerging customary law against polygamy.¹⁴⁸ The court’s comparative law analysis yielded mixed results. The court was not content that the evidence put forth by British Columbia—a small collection of court decisions and legislative acts spanning the globe—demonstrated a collective trend toward restricting polygamy,¹⁴⁹ but it recognized that “existing practices of individual comparable jurisdictions” that criminalized polygamy were relevant.¹⁵⁰

G. Application

The Supreme Court’s decision is useful to examine for international law purposes in several respects. First, Canada’s allowance for reference questions permitted the court to examine a conflict-of-rights issue as applied to its citizens in general, as opposed to one discrete person or group with standing to sue. This resulted in the participation of virtually every group of people whom the polygamy law could potentially injure. Ultimately, this produced a rich evidentiary record of testimony and amicus briefs from individuals and groups, both religious and secular, both pro- and anti-polygamy. The court’s opinion essentially places virtually all of the basic legal arguments for the decriminalization of polygamy on the proverbial table.

Second, the court’s discussion of whether international law, specifically United Nations charters and conventions, condemns polygamy,¹⁵¹ as well as Canada’s international law responsibilities pertaining to these documents, provides insight into how developed Western countries may interpret international law regarding polygamy.

Third, the opinion reveals the claims to which anti-polygamy laws are most susceptible. The court admitted that Section 293 infringed upon the religious rights of most persons who practiced polygamy for religious reasons, but found the abridgement of rights justified under Canada’s prescribed judicial analysis

¹⁴⁸ *Id.* paras. 842–43.

¹⁴⁹ *Id.* paras. 847–51. British Columbia and its *amici* pointed to a Benin decision to outlaw polygyny; the Australian Law Reform Commission’s 1992 refusal to grant legal status to polygynous relationships; France’s, Turkey’s, and Tunisia’s polygamy bans; decisions in Mauritius and the United States upholding polygamy bans; and an Indonesia court’s decision placing limits on legal polygamy. *Id.* para. 847.

¹⁵⁰ *Id.* para. 851.

¹⁵¹ *See supra* Part I.F.

for such situations.¹⁵² The court did little to address liberty claims besides falling back on evidence suggesting that polygamy is an inherently harmful institution.¹⁵³ The court's reasoning suggests that anti-polygamy laws are most vulnerable in states that guarantee freedom of religious exercise and liberty, especially when that liberty has been interpreted to encompass sexual liberty or privacy.

Finally, the court's reliance, for almost every claim, on the assumption that polygamy is inherently harmful indicates that this justification may be subject to attack wherever polygamy challenges are brought.¹⁵⁴ Generally speaking, and certainly within the context of U.S. law, laws that abridge fundamental human rights must be narrowly tailored. The assumption that polygamy is inherently harmful, if true, provides a cogent rebuttal to claims that anti-polygamy laws are overbroad. If it is determined to be false, governments will most likely be left to combat the perceived harms of polygamy on a case-by-case basis through other criminal laws targeting more discrete offenses such as abuse, rape, and human trafficking. While the Supreme Court of British Columbia compiled an impressive amount of evidence regarding the fundamental harms of polygamy, this subject carries great import, and is worth expanding upon.

II. THE HARMS OF POLYGAMY

As the British Columbia polygamy case illustrates, a cogent defense of general anti-polygamy laws on their face requires a finding, or at least a reasonable apprehension, that polygamy is an inherently harmful institution. The primary difficulty of mounting either a defense or challenge to anti-polygamy laws lies in defining the victim. When dealing with laws that truncate fundamental rights, one must have a clear and concise idea not only of the injuries that the legislature seeks to avoid, but also of whom the legislature is seeking to protect from injury.

The challengers in the British Columbia polygamy case argued that the perceived harms of polygamy are already illegal.¹⁵⁵ Imagine two polygamist families. If Jack, a polygamist, forces Jane, a minor, into a plural marriage, Jack could be liable for a host of crimes, including rape, statutory rape, child

¹⁵² See *supra* Part I.A.

¹⁵³ See *supra* Parts I.C–D.

¹⁵⁴ See *supra* Part I.G.

¹⁵⁵ See *supra* Part I.D.

abuse, and coercion. Meanwhile, John, whose wives had all reached the age of majority before consenting to marriage, should not have his fundamental liberties threatened because of something Jack did. Jane is a victim. John's wives are not. This line of thought does not deny that criminal conduct is often prevalent in polygamous unions. Rather, it asserts that any law that broadly prohibits polygamy can always be more focused on the harm rather than the perceived root of the harm. If this is the case, the law violates fundamental liberties without being narrowly tailored, and is therefore invalid.

Proponents of anti-polygamy laws believe that a victim can be defined more generally.¹⁵⁶ They agree that Jack should be criminally liable for all of the offenses that come with coercing a minor into marriage, and that John should be liable for none of these. But proponents differ with challengers in their belief that both Jack and John inflict harm by simply engaging in polygamy. This does not necessarily mean that proponents of anti-polygamy laws believe every wife or child of polygamy suffers concrete injury as result of polygamy. Rather, this line of thought asserts that polygamous behavior is generally harmful to society. Anti-polygamy laws face close scrutiny because they invoke fundamental religious and sexual rights. A cogent argument to uphold anti-polygamy laws, therefore, demands a showing that polygamy inherently harms the public.

This Part examines the evidence put forth to prove that polygamy is inherently harmful. It discusses the wide range of evidence put forth in the British Columbia polygamy case, as well as other evidence put forth by legal scholars. Some of the harms addressed in this Part admittedly may fall upon monogamous marriages as well. It is focused, however, not on whether harms occasionally arise, or even if the harms are common. Instead, it is concerned with whether these harms are *inherently* caused by polygamy—while presuming that monogamy is not inherently harmful and caters more directly to the good of men, women, children, and society. This Comment also argues that while polygamy may have different effects on different individuals, polygamy inherently causes harm to children and to society. Because polygamy causes inherent harm, it logically follows that its criminalization meets the narrowly tailored requirement needed for a state to infringe on fundamental rights.

¹⁵⁶ See *infra* Part II.A.

A. *Harms to Women*

While polygamy may inherently harm both adult women and young girls, the harms perceived and the interests invoked depend on the age and maturity of the female.¹⁵⁷ This Subpart focuses first on the harms done to adult women, and also discusses the benefits that have been alleged to occur. Harms to young girls are examined later in a Subpart devoted to how polygamy affects children. Also, it is important to note that this Subpart addresses *direct* harms to adult women engaged in polygynous relationships. Harms to women in general that arise as a result of the perpetuation of polygyny are addressed later. While the evidence shows that adult women in polygynous relationships are at high risk for harm, anti-polygamy laws that infringe on fundamental rights probably cannot be supported based on perceived harms to adult women alone.

Some of the difficulties facing a woman in a polygynous relationship have been documented since ancient times. Polygyny was widely practiced by the Hebrew fathers of the Old Testament, and some see this practice by “righteous men” as a religious validation for polygyny.¹⁵⁸ On the contrary, Old Testament narratives dealing with polygyny appear to read as cautionary tales, not as prescriptions.¹⁵⁹

While the chaos and tragedies wrought by polygyny run rampant through the Old Testament, perhaps the most timeless biblical example is the story of Abraham’s grandson Jacob.¹⁶⁰ Jacob married two sisters, Rachel and Leah. Jacob loved Rachel more than he loved Leah, but Leah bore many children while, for a long time, Rachel was barren. The competition between the sisters grew fierce. Rachel’s jealousy of Leah’s pregnancies drove her mad.¹⁶¹ But Jacob’s preference for Rachel left Leah so deprived that she was driven to pay a fee to Rachel in order to sleep with her husband.¹⁶² The union made Leah’s

¹⁵⁷ See Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 357, 368 (2003) (discussing why the analysis of women who enter into polygyny as adults is more complicated than an analysis of teenage girls).

¹⁵⁸ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 267–71 (Can.).

¹⁵⁹ See *id.* paras. 184–85.

¹⁶⁰ See *Genesis* 30:1–24.

¹⁶¹ See “[Rachel] became jealous of [Leah]. So she said to Jacob, ‘Give me children, or I’ll die!’” *Genesis* 30:1.

¹⁶² *Genesis* 30:14–16.

marriage solely about bearing children and drove Rachel to feelings of inadequacy.¹⁶³

The Bible story is merely anecdotal, but evidence suggests it reflects the realities of polygyny. Maura Strassberg cites a 1996 study of women who left polygynous relationships in Mormon fundamentalist communities who claimed, “the reality of polygyny was sex without emotional intimacy, intense loneliness and isolation, and feelings of jealousy.”¹⁶⁴ The addition of a new wife to the family led to feelings of “abandon[ment] . . . inadequacy[,] and low self-esteem” for established wives.¹⁶⁵ The study also showed that women engaged in Mormon polygynous relationships tended to bear large numbers of children: “78.3 percent of the plural wives had four or more children, 43.3 percent had seven or more children, and 18.3 percent had eleven or more.”¹⁶⁶ Other studies completed in FLDS communities found that plural wives are “told by their husbands and religious leaders that they must have as many children as possible.”¹⁶⁷

As Mormon plural wives bear more children, they become more dependent upon their husband, their “sister wives,” and their church network.¹⁶⁸ Divorce becomes impractical, because it would likely leave the women financially destitute, excommunicated, and alienated from their children.¹⁶⁹

Admittedly, studies of polygamy in the West, such as those addressing FLDS polygamy, have limited empirical value. Since polygamy is illegal in the West, those who practice it are generally very secretive.¹⁷⁰ But empirical research does exist from studies conducted in Africa, Asia, and other places where polygyny is practiced openly.¹⁷¹ Studies show that Muslim plural wives, like Western FLDS plural wives, show the same patterns of jealousy, competition, emotional distress, and depression.¹⁷² Compared to their monogamous counterparts, Muslim plural wives are more vulnerable to

¹⁶³ See *Genesis* 30:1–24.

¹⁶⁴ Strassberg, *supra* note 157, at 395.

¹⁶⁵ *Id.* at 397 (quoting IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 163 (1996)) (internal quotation marks omitted).

¹⁶⁶ *Id.* at 400.

¹⁶⁷ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 649 (Can.).

¹⁶⁸ Strassberg, *supra* note 157, at 400–01.

¹⁶⁹ See *id.* at 400–02.

¹⁷⁰ See Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 605 (testimony of Prof. Nicholas Bala).

¹⁷¹ See *id.*

¹⁷² *Id.* paras. 607–08 (testimonies of Drs. Dena Hassouneh and Susan Stickevers).

domestic violence, face a higher likelihood of contracting sexually transmitted diseases, and exhibit lower self-esteem.¹⁷³

Micro-level case studies comparing monogamous wives and plural wives in the same societies show comparable harms to the wives.¹⁷⁴ These studies showed an increase in age gaps between the husband and his wives, increased fertility rates in polygynous families, and an increased control by men over women, who tended to be viewed as commodities.¹⁷⁵

But despite the dangers polygyny may pose to women, one only needs to look to Kody Brown's *Sister Wives* family to see that some women enter into these relationships willingly and may even find fulfillment within them.¹⁷⁶ While Brown's family, unlike many other fundamentalist Mormons, does not practice polygyny in an isolated community, isolated polygynous communities are often home to women converts.¹⁷⁷ Strassberg reports:

[Converts] do not come into polygyny with misplaced monogamous fantasies. The reality of polygynous life is often better for them than the reality of failed monogamy already experienced. A shared husband is better than no husband at all [T]hey now have the opportunity to live their faith through polygyny in a way they simply could not make happen through monogamy. For convert women, polygyny is a way of life that they manipulate to substantially meet their own needs.¹⁷⁸

Natalie Zitting is a case in point. Zitting resides in the polygamous community of Colorado City, Arizona, where she teaches and coaches a girls' basketball team.¹⁷⁹ Colorado City was controlled by Warren Jeffs until his arrest, so there is ample reason to believe its practices resemble those of the Texas compound from which he was extracted by authorities.¹⁸⁰ Yet Zitting expresses her support for this polygamous lifestyle.¹⁸¹

¹⁷³ *Id.*

¹⁷⁴ *See id.* paras. 528–32 (testimony of Dr. Joseph Henrich). Dr. Henrich examined polygynous societies in Israel's Negev Desert, southeastern Turkey, southern Ethiopia, and Arnhem Land, Australia. *Id.* para. 528.

¹⁷⁵ *Id.* paras. 530, 532.

¹⁷⁶ *See supra* Introduction.B.

¹⁷⁷ *See generally* Strassberg, *supra* note 157 (discussing impacts on women in polygynous communities).

¹⁷⁸ *Id.* at 396.

¹⁷⁹ *Real Sports* (HBO television broadcast Oct. 18, 2011); *see* Ben Winslow, *Colorado City School Hopes Gym Can End Stigma*, DESERET NEWS (Mar. 2, 2008, 12:26 AM), <http://www.deseretnews.com/article/695257941/Colorado-City-school-hopes-gym-can-end-stigma.html?pg=all>.

¹⁸⁰ *See Polygamist Sect Leader Warren Jeffs Convicted in Texas*, BBC NEWS (Aug. 4, 2011), <http://www.bbc.co.uk/news/world-us-canada-14413855>.

¹⁸¹ *Real Sports* (HBO television broadcast Oct. 18, 2011), *supra* note 179; *see* Winslow, *supra* note 179.

Mary Batchelor grew up in a mainstream Mormon household in Utah, but decided in her late teens to move to an FLDS community and join a polygynous family.¹⁸² Days before her twenty-first birthday, she became the second wife in a polygynous relationship.¹⁸³ The other wife left three years into the marriage to become a vocal opponent of polygamy.¹⁸⁴ Batchelor now lives in a monogamous marriage, but hopes to one day “welcome another wife into her family.”¹⁸⁵ She denies ever being subjected to physical or sexual abuse, and claims that she was in “constant fear of prosecution under Utah’s anti-polygamy law.”¹⁸⁶

The point has been raised that perhaps even adult women who seem to enter into polygyny voluntarily are actually “only marginally less coerced than teenage [girls]” because of the isolated religious environment in which many of these women are raised.¹⁸⁷ If polygyny is always a result of coercion, then polygyny could arguably be deemed inherently harmful to women. But to assume that a strict religious upbringing robs an eighteen-year-old of adult autonomy is an unsatisfactory argument. One could see how this line of argument could devolve into attributing any unpopular ideas of religious youth to “brainwashing.” Additionally, this argument necessarily evokes the question of when, exactly, a young FLDS woman reaches the age of majority. Surely she may not be required to leave the community for an allotted period of time in order to exercise her autonomy. And if she remains in the community, she lives under the same “brainwashing” influences that formed the root of the original problem. Subject to isolated exceptions of extreme physical or psychological abuse, the government would be ill-advised to assume that adult women are coerced into polygynous marriages.

Strassberg also poses the idea that the laws against polygamy themselves are sources of the harm to polygynous women.¹⁸⁸ Criminal laws drive polygynists into isolated rural areas, away from the protection and the eye of

¹⁸² *Anti-Polygamy Law Frightening, Wife Says*, CBC NEWS, <http://www.cbc.ca/news/canada/british-columbia/story/2011/01/20/bc-polygamy-hearing-batchelor.html> (last updated Jan. 20, 2011).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Strassberg, *supra* note 157, at 392. It should be noted that Strassberg does not believe that this idea in and of itself validates a criminal ban on polygamy. *See id.* at 404 (“If the sole purpose of criminalizing adult polygamy is to protect women from choosing this kind of spiritual martyrdom, the justification for criminalizing adult polygamy seems weak indeed.”).

¹⁸⁸ *See id.* at 403.

the law, preventing women from leaving polygynous marriages.¹⁸⁹ They also deter women from leaving marriages for fear of prosecution.¹⁹⁰ There are a couple of problems with this argument. First, it assumes that the government should tailor its marriage laws to facilitate divorces. Second, and most importantly, it is premised on an untenable notion that the government should repeal laws that, if broken, would lead to an extra-burdensome evasion of law enforcement. One cannot simultaneously evade the law and demand its protection.

It is reasonable to believe that polyamory does not pose the same risk to plural wives as polygyny. But given the rarity and the incredibly broad definition of polyamory,¹⁹¹ evidence of its effect on women is scarce. Jealousy among polyamorous women (or men, for that matter) seems inevitable,¹⁹² and one would imagine that polyamorous women would be more at risk of sexually transmitted diseases than their monogamous counterparts. But there is no evidence of rampant sexism, spousal abuse, or commodification that seems so prevalent in polygynist marriages. At least one proponent of the decriminalization of polyamory admits, however, that the “coercive potential,” as well as the potential for “emotional, social and economic” abuse of partners may increase in polyamorous unions when they become larger than “three to four person[s].”¹⁹³

Even feminist thinkers like the legal scholar Drucilla Cornell appear to endorse unions that look very similar to polyamory. Cornell argues that a strictly monogamous system does not “treat women as free and equal persons” because it “mandate[s] . . . one particular scheme.”¹⁹⁴ Cornell claims that the government’s denial of recognition to all but monogamous relationships is “an illegitimate incorporation of moral or religious values into the basic institutions of a constitutional government.”¹⁹⁵ Presuming that “the government has no legitimate interest in monogamy,” Cornell calls for the government to “protect all lovers who choose to register in civil marriage, or some other form of domestic partnership,” including polygamy, polyandry and “multiple sexual relationships among women and among men.”¹⁹⁶

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *See supra* Introduction.B.

¹⁹² *See* Strassberg, *supra* note 157, at 415.

¹⁹³ *Id.* at 427.

¹⁹⁴ DRUCILLA CORNELL, AT THE HEART OF FREEDOM: FEMINISM, SEX & EQUALITY 27 (1998).

¹⁹⁵ *Id.* at 124–25.

¹⁹⁶ *Id.*

The realm of polygamy in the West encompasses vastly different lifestyles—from the strict and isolated world of religious polygynists, to the amorphous and mostly secular world of polyamory.¹⁹⁷ It is fair to conclude that polygyny is an exceptionally risky enterprise for an adult woman to undertake. It is also fair to conclude that some women find fulfillment without harm within its strictures. The effects of polyamory on women are, due to the rarity of these unions, less clear. Thoughtful observations have been made, however, of how polyamorous unions actually benefit some women.¹⁹⁸ While the research on polygamy hardly justifies its recognition as a policy choice, it also stops short of establishing a reasonable apprehension of inherent harm to consenting adult women. Unfortunately for supporters of polygamy, apprehension of inherent harm bears itself out in polygamy's effect on children and society.

B. Harms to Children

A discussion of polygamy purely in terms of individual free exercise or sexual rights ignores the fact that most of the parties to polygamous families are not consenting adults, but rather children who find themselves at the mercy of the marriage structure into which they were born. Of course, the same can be said for children born out of a monogamous marriage or a one-night stand—children can never choose the circumstances of their birth. This makes children especially vulnerable and provides governments with a compelling interest to invoke measures aimed at promoting child safety. While parents generally enjoy significant leeway in the methods they use for raising their children, their rights are by no means absolute and are certainly subject to government restrictions in the interest of child safety and welfare. If polygamy is inherently harmful to children, it is certainly within the government's power to criminalize it.

This Subpart discusses the harms to children that arise out of polygamy. Because girls often suffer injuries that are distinct from those suffered by boys, it addresses the harms inflicted on each gender separately. It concludes that it is reasonable to believe that polygamy is inherently harmful to children of both genders.

¹⁹⁷ Compare Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 274, 306–07 (Can.), with Bennett, *supra* note 57.

¹⁹⁸ Cf. Flather, *supra* note 42 (arguing that some women in polygynist families may receive more welfare benefits because they are treated by the state as single mothers).

1. *Harms to Girls*

Part II.A dealt specifically with harms to adult women who consent to polygamy. In reality, however, polygynous communities often fail to make distinctions between females who have reached the age of majority and those who have not.¹⁹⁹ Research shows that the tale of Warren Jeffs and his child brides is hardly an anomaly in polygynous communities.²⁰⁰ This portion of the Subpart examines harms to girls both in isolated religious polygynous communities and in polygynous societies globally, including child marriages, coercion, rape, trafficking, commodification, and deprivation of education.

The reality of fundamentalist Mormon polygyny is that:

[P]lural wives are often teenagers. In some polygynous communities, girls consistently marry between the ages of fourteen and sixteen. Typically, there is an age gap of twenty [years] or more between polygynous men and their teenage plural brides. Many of these marriages are arranged by family members and religious leaders.²⁰¹

As an illustration, Strassberg recounts the story of Mary Ann Kingston, a sixteen year-old girl from a religious community in which polygynous marriages were customary.²⁰² Mary Ann unwillingly became the fifteenth wife of her thirty-two year-old uncle at the behest of her mother and father.²⁰³ Her uncle/husband physically consummated the marriage with the consent of Mary Ann's mother, but without the consent of Mary Ann.²⁰⁴ Mary Ann attempted to seek shelter with her mother, but her mother reported her to Mary Ann's father, who drove her to an isolated family ranch and beat her until she passed out.²⁰⁵

The isolation inherent in these religious communities perpetuates the cycle of injustice. Minors who become child brides do so without the benefit of options that converts like Zitting and Batchelor enjoyed.²⁰⁶ Rather, these young girls live in a bubble amongst authority figures who teach them that their

¹⁹⁹ See Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 564 (citing concerns about females who were married at a young age).

²⁰⁰ See *supra* Introduction.B.

²⁰¹ Strassberg, *supra* note 157, at 366 (quoting D. Michael Quinn, *Plural Marriage and Mormon Fundamentalism*, in *FUNDAMENTALISMS AND SOCIETY: RECLAIMING THE SCIENCES, THE FAMILY, AND EDUCATION* 240, 259 (Martin E. Marty & R. Scott Appleby eds., 1993)) (internal quotation marks omitted).

²⁰² *Id.* at 367.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See *supra* Part II.A.

eternal fate rests upon their entry into plural marriages and bearing children.²⁰⁷ Growing up, they see the horrors visited upon girls who try to resist the will of parental and religious authorities.²⁰⁸ Many understand that their financial, familial, and community support, upon which their livelihood is staked, is dependent upon their obedience and submission.²⁰⁹ These girls are coerced into illegal marriages that often lack license, civil benefits, or legal protections.²¹⁰

To be sure, not all child brides enter polygyny unwillingly.²¹¹ Some minors give their consent, along with the consent of their parents, circumstances which, on their face, closely resemble those under which minors may enter into monogamous marriage in many jurisdictions.²¹² But the consent of a minor raised in a polygynous community, as a general matter, must be viewed with suspicion.²¹³ While entry into a polygynous marriage may not be quite a life or death decision, the evidence demonstrates that polygamous marriage is a lifelong commitment in which the health and safety of the minor will be at risk.

The comparatively low level of education of many of the girls in polygynous communities not only underscores the doubt that they are “mature minors” capable of consent, but serves as another harm young girls in polygynous communities often face.²¹⁴ It is not uncommon for polygynous families to forbid female education beyond junior high school.²¹⁵ Strassberg explains: “These girls are not expected to need any further education as it is assumed that they will shortly get married and begin having children.”²¹⁶ In the United States, parents have a constitutional freedom to limit their children’s education beyond the eighth grade.²¹⁷ Strassberg suggests, however, that some Mormon polygynist communities systematically encourage the higher

²⁰⁷ Strassberg, *supra* note 157, at 368.

²⁰⁸ *See id.* at 367–68.

²⁰⁹ *See id.* at 367.

²¹⁰ *See id.* at 369–70 (“One suspiciously coercive feature of Mormon fundamentalist plural marriages involving teenagers is that a good number of these marriages will never have a civil component.”).

²¹¹ *See id.* at 373–74 (describing 13-year-old Linda Kunz’s decision to join her mother as one of polygynist Tom Green’s wives as Kunz’s “choice”).

²¹² *See id.* at 374 (describing Linda Kunz’s mother, Beth Cook, as consenting to the marriage).

²¹³ *See* Application of Long Island Jewish Medical Center, 557 N.Y.S.2d 239, 243 (N.Y. Sup. Ct. 1990). (holding that the state as *parens patriae* may intervene against a minor’s wishes in a case where a minor Jehovah’s Witness tried to refuse a blood transfusion necessary to save his life)

²¹⁴ *See, e.g.,* People v. E.G. (In re: E.G.), 549 N.E.2d 322, 325, 327 (Ill. 1989) (holding that a minor found to be “mature” could refuse medical treatment).

²¹⁵ Strassberg, *supra* note 157, at 375.

²¹⁶ *Id.* at 375–76.

²¹⁷ *See* Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (holding that Amish parents could curtail their children’s formal education after the eighth grade to protect their religious practice).

education of males as they are cutting off the continued education of their female counterparts.²¹⁸ This dichotomy in educational opportunities contributes to an environment of gender inequality.²¹⁹ Studies of fundamentalist Mormon education in Canada, however, suggest that there is no gender disparity in educational shortcomings—both Mormon boys and Mormon girls are systematically removed from school before graduating from high school.²²⁰ Either way, the girls' lack of education is evident. The fact that this practice is not criminal does not make it innocuous, especially when the isolated community in question, unlike the Amish, is likely to be a haven for other crimes.²²¹

Following their early exits from the educational system, these girls fulfill their religious duties by marrying and bearing “as many children as possible.”²²² In fundamentalist Mormon communities, often “[i]t is the religious goal of and reward to the righteous man that he populate and rule an earthly and heavenly kingdom.”²²³ A study of ten separate polygynous Mormon communities in the United States revealed girls marry at “unusually young ages, sometimes between 14 and 16 years old, and usually become pregnant shortly after marriage.”²²⁴ Sometimes these girls, like Mary Anne Kingston, are forced to commit incest with close relatives, yielding children with genetic diseases and birth defects.²²⁵ Eyewitness accounts from former polygynous wives recount average marriage ages for girls to be “between 15 and 18,” and followed by “[r]egular, virtually annual, pregnancies.”²²⁶ While it is no rarity for a young monogamous teenager to marry and bear a child, “it seems unlikely that [monogamous teenage marriages] are entered into with the intent and purpose of immediate and successive pregnancies.”²²⁷ Strassberg points out that these pregnancies are occurring when girls' bodies are still attempting to grow: “The competing demands of pregnancy at this critical time can have

²¹⁸ Strassberg, *supra* note 157, at 376.

²¹⁹ *Id.*

²²⁰ See Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 727–35 (testimony of Brent Munro).

²²¹ See *Yoder*, 406 U.S. at 210–13 (describing the benefits of the Amish lifestyle).

²²² Strassberg, *supra* note 157, at 384.

²²³ *Id.*

²²⁴ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 649 (testimony of Andrea Moore-Emmett).

²²⁵ *Id.*

²²⁶ *Id.* at para. 653 (testimony of Laura Chapman); see also Strassberg, *supra* note 157, at 384 (“Many teenage plural wives . . . will become pregnant very soon after marriage and will begin a cycle of childbearing that can be as often as having one child a year.”).

²²⁷ Strassberg, *supra* note 157, at 385.

life-long health effects. Add to this the possibility of multiple teenage pregnancies, depending on precisely how young the girl is at the time of the plural marriage, and the threat to life and health is compounded.”²²⁸

Studies of polygynous communities globally have yielded similar results. A study comparing polygynous and monogamous relationships in the same societies showed that polygyny “drives down the age of first marriage for women and increases the age gap between husbands and wives [M]en marrying polygynously seemed to select younger girls as wives compared to monogamists.”²²⁹

A comparative study of states that allow polygyny and those that do not found that, in addition to being a haven for many of the harms found in the isolated Western communities, such as decreased marriage age for girls and lack of education, the risk of harm to girls is greater in polygynous states than in monogamous states.²³⁰ Among these harms were: A heightened difference in the occurrence of HIV infection, higher mortality rate, sex trafficking, female genital mutilation, and greater domestic violence.²³¹ As the Supreme Court of British Columbia found, many of the harms of polygyny “are not limited to particular cultures or geographic locations; they are universal.”²³²

2. *Harms to Boys*

While boys may be susceptible to some of the same harms that polygyny imposes upon girls, such as educational deficiencies or domestic violence, their unique injury lies in the “cruel arithmetic” inherent in the practice.²³³ While the mathematical impossibility of each man in a polygynous society finding a wife carries significant societal harms, it also causes individual tragedy in polygynous communities.

Before abandoning these teachings in 1890, the Mormon Church taught that plural marriage was deemed essential to celestial exaltation, but that only a minority of men were deemed righteous enough to enter into the celestial

²²⁸ *Id.* at 384–85.

²²⁹ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 530 (testimony of Dr. Henrich).

²³⁰ *See id.* paras. 616–23 (testimony of Dr. McDermott).

²³¹ *See id.* para. 621 (testimony of Dr. McDermott).

²³² *Id.* para. 788.

²³³ *Id.* para. 1282 (quoting 2 Closing Submission of the Amicus Curiae para. 622, Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (No. S-097767)) (internal quotation marks omitted).

kingdom.²³⁴ Consequently, only those deemed by Church leaders as the “most virtuous” were awarded wives.²³⁵ Fundamentalist Mormons have maintained these traditional teachings. Boys between thirteen and seventeen years old are, as a result, systematically abandoned by their parents and their communities if they are not deemed righteous enough for marriage.²³⁶ This is necessary to ensure a higher ratio of females to males so that the “more righteous” patriarchs may marry several women. The excommunicated boys are often referred to as the “Lost Boys” and may account for at least half of all boys born into polygynous communities.²³⁷ Having been raised in isolation by fundamentalist leaders, teachers, and parents, they are ill-equipped to adapt to the outside world.²³⁸ “The boys often have little education and find it difficult to cope They often become involved in drugs, alcohol or prostitution.”²³⁹ The societal implications, including the effects of creating pools of uneducated, unmarried men, will be discussed in further detail in the next Subpart. For present purposes it suffices to point out that many boys born into polygynous societies face a substantial risk of harm based solely on the perpetuation of the practice.

Outside the isolated community setting, cross-cultural studies have shown that “where the male’s role includes polygyny[,] . . . he does not contribute to childcare, regardless of women’s contribution to subsistence.”²⁴⁰ Additionally, whereas a monogamous father already has a wife, “the greater the polygyny within a society, the more men may be spending their effort seeking additional mates rather than investing in their . . . offspring.”²⁴¹

Paternal presence, or the lack of paternal presence, may affect boys more than girls. A recent study found that “adolescent boys engage in more delinquent behavior if there is no father figure in their lives[,]” while “[a]dolescent girls’ behavior is largely independent of the presence (or absence) of their fathers.”²⁴² The study distinguished having no father figure

²³⁴ *Id.* para. 270.

²³⁵ *See id.* para. 271.

²³⁶ *Id.* para. 653 (testimony of Laura Chapman).

²³⁷ *See id.* para. 586.

²³⁸ *Id.* para. 655 (testimony of Timothy Dunfield).

²³⁹ *Id.* para. 649 (testimony of Andrea Moore-Emmett).

²⁴⁰ Mary Maxwell Katz & Melvin J. Konner, *The Role of the Father: An Anthropological Perspective*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 175 (Michael E. Lamb ed., 2d ed. 1981).

²⁴¹ PETER B. GRAY & KERMYT G. ANDERSON, *FATHERHOOD: EVOLUTION AND HUMAN PATERNAL BEHAVIOR* 37–38 (2010).

²⁴² Deborah A. Cobb-Clark & Erdal Tekin, *Fathers and Youth’s Delinquent Behavior* 5 (Nat’l Bureau of Econ. Research, Working Paper No. 17507, 2011), available at <http://www.nber.org/papers/w17507>.

from having an uninvolved father figure and concluded that an increased chance of male delinquency does not flow from the latter.²⁴³ It did find, however, that the presence of an involved father figure often yields “beneficial effects.”²⁴⁴

An argument against polygamy cannot hinge on decreased paternal involvement. It would be incorrect to characterize lack of paternal involvement as unique to polygyny, and it may be difficult to equate other more severe harms with a trait that is common to many families. But the role of the father in polygyny does invoke some unique issues. The scores of Lost Boys cast out of communities are bereft of a father figure, precisely during their adolescent years when boys most need their fathers. But even for the fortunate boys deemed worthy to stay, the sheer size of polygynous families causes some boys to have little to no real relationship with their father.²⁴⁵

The harms to children discussed above do not represent an exhaustive list. Some hardships common to the children of monogamous parents may be amplified in a polygynous setting. For instance, economic hardships may be intensified when polygynous men support their multitude of children and uneducated wives while pouring resources into obtaining more wives.²⁴⁶ Children of polygyny tend to suffer more emotional, behavioral, and physical problems than their counterparts and are more likely to be the recipients of psychological and physical abuse and neglect.²⁴⁷

Exceptions may always be found. Not every girl will be trafficked for marriage without meaningful consent. Not every boy will be abandoned. But the risk to children that polygyny poses is too great to deny that children’s involuntary participation poses a substantial risk of harm. As the Supreme Court of British Columbia aptly stated:

[T]he risks of harm associated with [polygamy] extend beyond the immediate participants to those who are not in a position to give their consent. The children of a polygamous union . . . cannot consent to

²⁴³ *Id.* at 28.

²⁴⁴ *Id.* at 28–29.

²⁴⁵ *See* Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 667 (Can.) (listing testimonies of children of families with seventy-five, thirty-five and twenty children). Asked about her sons’ relationship with their father, one witness replied, “There aren’t enough hours in the day for him to father those children. . . . [T]hey didn’t spend any time with their dad [T]hat created a problem for my children. And they began to escalate their mischief to get an audience with their father.” *Id.*

²⁴⁶ *See id.* para. 779.

²⁴⁷ *Id.* para. 783.

their situation, which includes exposure to the increased risk of harms that flow from their parents' marital relationship.²⁴⁸

C. Harms to Society

When examining polygamy's harm to society, it is important to show a reasonable likelihood that if polygamy is legalized, it will spread. The Supreme Court of British Columbia considered this question and concluded that there was "a reasoned apprehension that polygamy would increase non-trivially if it were not prohibited."²⁴⁹ The court based its conclusion on evolutionary psychology and a particularly fascinating case study.²⁵⁰

At the trial, an expert in evolutionary psychology explained that polygyny allowed both men and women to follow their evolved mating strategies. While men and women have distinct mating strategies, they both tend towards polygyny.²⁵¹ Men, with minimal physical effort and commitment, can form multiple simultaneous pair-bonds and potentially "have thousands of offspring that they can decide to invest in, or not."²⁵² While women are physically limited in the amount of offspring they can produce, they benefit from seeking pair-bonds with men with the wealth, status, and skills that will make them best able to invest in the offspring.²⁵³ Polygyny satisfies both of these strategies because it allows men to form simultaneous pair-bonds while allowing more women access to the high-status men.²⁵⁴

The expert then explained that culturally transmitted social norms, such as monogamous marriage, curb mating psychology to some extent.²⁵⁵ Compliance with social norms works because of a "carrot and stick" effect: Conformers to societal norms are rewarded, while violators are punished.²⁵⁶ Rates of infidelity, divorce, and prostitution belie the idea that social norms can void original mating patterns, but it is clear that mating patterns are influenced by marriage patterns.²⁵⁷

²⁴⁸ *Id.* para. 1184.

²⁴⁹ *Id.* para. 576.

²⁵⁰ *Id.* paras. 500–03.

²⁵¹ *Id.* para. 500 (testimony of Dr. Joseph Heinrich).

²⁵² *Id.* para. 500.

²⁵³ *Id.*

²⁵⁴ *Id.* para. 501.

²⁵⁵ *Id.* para. 502.

²⁵⁶ *Id.*

²⁵⁷ *See id.* para. 503.

In testimony, the expert discussed why he believed polygyny could spread if it was legalized. He capped his discussion by describing a survey he conducts with his students:

I give [the women] a choice: You're in love with two men. One is a billionaire, he already has one wife and he wants you to be his second wife. You'll be a billionaire; you will have your own island . . . And then compare him—just a regular guy, identical in every way, but you will just be his first wife. And then the question to the women is what is the probability . . . that you would be willing to go with the billionaire, and I was surprised that 70 percent of my female . . . undergraduates said they either would go with the billionaire, with a 75 percent or a hundred percent chance they'd marry the billionaire.²⁵⁸

The expert elaborated that the prevalence of serial monogamy—in this case, high-status men divorcing older women in order to marry younger women—was evidence that the psychology of polygyny still exists.²⁵⁹ “[I]n a polygynous society they would just add a younger wife,” he said. “It’s a lot more convenient; you can still live with your children.”²⁶⁰

The court also took as instructive a French case study involving a relaxation of anti-polygamy laws. After World War II, the French government attempted to remedy a shortage of immigrant labor by permitting the immigration of polygynous families from Africa.²⁶¹ By the 1990s, more than 200,000 people in France lived in polygynous families.²⁶² The resulting harms were strikingly similar to the perceived harms discussed above. With a majority concentrated in “enclaves and the poorer suburbs of Paris,” concerns were raised with respect to poor living conditions, wife competition, spousal neglect, coerced marriage, and access to healthcare and government benefits.²⁶³ In 1993, following protests from African women’s advocacy groups, France ended this policy.²⁶⁴

While legalizing polygamy may certainly ignite its spread, turning a blind eye to it may have similar effects. Officially, polygamy in the United Kingdom is a crime, but politicians have asserted that immigrant Muslims have been

²⁵⁸ *Id.* para. 555.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* para. 562.

²⁶² *Id.* para. 563.

²⁶³ *Id.* para. 563–64.

²⁶⁴ *Id.* para. 565–66.

taking advantage of the government's ambivalence towards the practice by moving their polygynous families there from the Middle East.²⁶⁵ And polygyny does not always stop with the fathers' generation. Even some British-born Muslims have now taken to marrying multiple wives.²⁶⁶ These examples suggest that one need not wait for the tide of social opinion to turn to see an increase in polygyny. Government-permitted polygamy—whether de jure or de facto—may attract polygynist immigrants.

Before delving into the more specific societal harms, it is important to emphasize that this Comment is not addressing a temporary legitimization or allowance of polygamy. The option of a French solution—permitting polygamy for a time until it gets out of hand—is not a feasible option. When a temporary allowance is at issue, an argument that the problem will not grow in the foreseeable future may be permissible. But addressing the issue as a permanent policy change demands that governments take into account the potential and the likelihood that certain harms could occur over a long period of time. This distinction is not particularly relevant when discussing the harms imposed on individuals, but it is certainly germane to a discussion regarding harms to societies as a whole. Given the scientific evidence and actual case studies, it is reasonable to believe that the effects of polygamy may eventually bear themselves out in developed societies.

One of the most significant ways in which polygyny may affect a society is its creation of a large pool of unmarried men. This result would be consistent with the principles of evolutionary psychology discussed in the British Columbia polygamy case.²⁶⁷ If monogamy becomes less prevalent, its power to shape mating patterns could be significantly diminished.²⁶⁸ In societies with roughly equal gender proportions, it is not unreasonable to anticipate that men of higher status will amass a disproportionate number of wives, leaving a pool of low-status or low-income unmarried men.

Several harms would likely result from this outcome. Studies show that marriage makes men less likely to commit crime by as much as thirty-five percent.²⁶⁹ Additionally, violent crimes in past and present societies have been statistically linked to male-heavy gender disparities. In China, for instance, sex

²⁶⁵ *Politicians 'Ignoring' Polygamy*, BBC NEWS (Feb. 20, 2009), <http://news.bbc.co.uk/2/hi/7900779.stm>.

²⁶⁶ *Id.*

²⁶⁷ *See supra* Part II.C.

²⁶⁸ *See supra* Part II.C.

²⁶⁹ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 509.

ratios have been rising due to paternal preference for male children in a country with a one-child policy.²⁷⁰ Wives pregnant with girls will often seek abortions in hopes that one day they will be able to bear male offspring.²⁷¹ According to one recent report, twenty-five million men in China are unable to find wives due to the shortage of women.²⁷² In the period between 1988 and 2004, a study showed that a 0.01 increase in sex ratio was associated with a three percent increase in property and violent crimes.²⁷³ In India, districts with male-heavy disparities had “much higher murder rates than could be predicted purely by an increase in the number of ‘average males.’”²⁷⁴

As the numbers of women in a society diminish, they are at greater risk of becoming commodities in a sort of capitalist marriage market, where the well-off may use their resources to accumulate wives. This has been the case thus far in polygynous cultures,²⁷⁵ and societies in which both polygyny and monogamy are practiced bear out the same results—men, realizing the increased value of their wives, attempt to increase control over them by marrying them while they are young and impregnating them.²⁷⁶

Other studies point to other societal harms that may result from polygyny. As polygyny increases, “the discrepancy between law and practice concerning women’s equality also increases,” and “states with higher levels of polygyny spend more money per capita on defence, particularly on arms expenditures; and . . . display fewer political rights and civil liberties for both men and women than those [states] with less polygyny.”²⁷⁷ As seen with immigrant Muslim polygynists in the United Kingdom, polygyny is linked to social welfare fraud.²⁷⁸ The high levels of poverty associated with polygamy and its large family sizes drain government aid programs and may exacerbate fraud.²⁷⁹ The comparatively low level of education prevalent in polygynous

²⁷⁰ *Id.* para. 514.

²⁷¹ See Sherry Karabin, *Infanticide, Abortion Responsible for 60 Million Girls Missing in Asia*, FOX NEWS (June 13, 2007), <http://www.foxnews.com/story/0,2933,281722,00.html>.

²⁷² *See id.*

²⁷³ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 515.

²⁷⁴ *Id.* para. 516.

²⁷⁵ *Id.* para. 595.

²⁷⁶ *See id.* para. 532.

²⁷⁷ *Id.* para. 621.

²⁷⁸ See Flather, *supra* note 42.

²⁷⁹ See Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 760, 787; Flather, *supra* note 42.

communities produces uneducated citizens who face difficulty living independent lives outside of the community.²⁸⁰

Finally, in addition to being associated with various societal harms, the legitimization or allowance of polygamy may undermine the public goods of marriage. Since the classical period, highly regarded thinkers have praised the societal goods that flow from monogamous marriage. Both Aristotle and Saint Thomas Aquinas spoke of monogamous marriage as essential to an ordered society. It was seen to introduce children to the “norms of citizenship,” as well as to the idea of “how authority and liberty can properly be balanced.”²⁸¹ Saint Augustine extolled the virtues of Christian marriage and believed that an ordered domestic life would lead to ordered civic life.²⁸² Despite the sweeping changes of the Protestant Reformation, Protestant theologians continued to view monogamous marriage as the “natural foundation of civil society and political authority, and an indispensable agent of social order and communal cohesion of the state.”²⁸³ Enlightenment thinkers emphasized that monogamous marriage best ensured that men and women were treated with equal dignity and respect, and that husband, wives, and children provided each other with mutual support.²⁸⁴

Besides its role as the foundation of civil society, monogamous marriage has always served an essential public service. “[M]arriage is there to discharge essential goods for the human species and essential goods for human society,” said John Witte during the British Columbia case.²⁸⁵ Within the bounds of monogamous marriage lie the means of transmission of wealth and the procreation, nurture, and education of children for civil life.²⁸⁶ In this sense, said Witte, marriage is a public function “in which the state and society are

²⁸⁰ See *supra* Part II.B.1.

²⁸¹ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 174 (quoting the testimony of John Witte, Jr.).

²⁸² See St. Augustine, *City of God*, in 2 NICENE AND POST-NICENE FATHERS 298 (Philip Schaff ed., Marcus Dods trans., Hendrickson Publisher 1995) (1887) (extolling the virtues of Christian marriage); 6 SAINT AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS* 193 (E.H. Warrington ed., William Chase Greene trans., Harvard Univ. Press 1969) (c. 410-430 C.E.) (noting that “it follows clearly enough that domestic peace ministers to civic peace”); see also JOHN WITTE JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* 66 (2d ed. 2012).

²⁸³ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 203–04.

²⁸⁴ *Id.* para. 209.

²⁸⁵ *Id.* para. 227 (testimony of John Witte Jr.).

²⁸⁶ *Id.*

deeply interested.”²⁸⁷ Natural rights and duties are built into the institution of marriage, and its terms “can’t be renegotiated.”²⁸⁸

After over 2500 years of broad, general acceptance in the West, the last half-century has witnessed a severe shift in how the West has cast these “natural rights and duties.”²⁸⁹ Witte illustrates how the “new reality of marriage as a terminal sexual contract”²⁹⁰ has given way to high numbers of divorces and out-of-wedlock births.²⁹¹ By redefining the purpose of marriage, the public goods of marriage have to some extent been lessened or undermined. Polygamy—be it polygyny, polyandry, or polyamory—may not only work to redefine the purpose of marriage, but alter its monogamous structure altogether. It further chips away at a monogamous tradition that relatively disparate minds have, for thousands of years, agreed to be essential to a flourishing society.²⁹²

To characterize polygamy as purely private conduct ignores the stake society has in choosing its mating and child-rearing structures. Evolutionary biology and past attempts to relax national anti-polygamy laws support a reasonable apprehension that polygyny will spread if polygamy is legalized. Polygyny harms society by depriving a large pool of men of eligible wives, promoting the commodification of women, and inducing poverty, crime, and social fraud. Legalized polygamy also discourages monogamy, an institution long-recognized by the Western tradition as a source of public good. It is certainly reasonable to conclude that polygamy poses a great risk of inherent harm to society.

The preceding discussion of the harms and victims of polygamy in no way represents an exhaustive list. Some claim, for instance, that polygamy is also harmful to adult men who engage in it because of its tendency to inflame lusts and its deprivation of “the essential bond[s] of mutuality” that should inhere in marriage.²⁹³ But evidence of the harms listed leads to the conclusion that

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* See generally WITTE, *supra* note 282, at 2–8.

²⁹⁰ WITTE, *supra* note 282, at 315 (“The early Enlightenment ideals of marriage as a permanent contractual union designed for the sake of mutual love . . . are slowly giving way to a new reality of marriage as a ‘terminal sexual contract’ designed for the gratification of the individual parties.” (quoting CAROLE PATEMAN, *THE SEXUAL CONTRACT* 74–75, 156–88 (Stanford Univ. Press 1988) (1988) (identifying marriage as a sexual contract))).

²⁹¹ See *id.* at 321.

²⁹² See *supra* text accompanying notes 281–84.

²⁹³ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 232.

polygamy is extremely likely to cause harm to women, children, and society. In the case of an adult woman, it may be reasonable to respect her religious and sexual autonomy in her choice of relationship structure, despite the high risk involved. But, short of legislation, society has no such opportunity to consent. And children, of whom it may be said face the greatest risk of harm, have no say in the matter. The accumulation and severity of the harms that have been shown to accompany polygamy justify a finding of “inherent harm” essential to overriding the rights and claims of polygamists. Part I of this Comment illustrated how a finding of inherent harm overrode religious freedom claims in Canada. Part III analyzes how United States and international courts may treat a religious freedom challenge to polygamy.

III. POLYGAMY AND RELIGIOUS FREEDOM

As this Comment and the British Columbia polygamy case have demonstrated, polygamy, and especially polygyny, is often inspired by sincere acts of religious exercise by Mormons, Muslims, Wiccans, and others.²⁹⁴ Religious polygamists have much to gain by succeeding on a religious freedom challenge. A ruling that anti-polygamy laws violate religious rights would essentially mean that a government would not only have to allow polygamy, but extend to polygamists the same benefits it extends to monogamous couples. This Part examines Western religious freedom law as it relates to polygamy. It then turns to both the foundations of Western monogamy as well as the current state of marriage law to explain why monogamous marriage regimes are neither the offspring of religious discrimination nor a modern exercise in religious discrimination. This Part concludes that anti-polygamy laws are a permissible limit on religious exercise.

A. *Religious Freedom Law*

Both United States and international law grant broad religious freedom and religious rights provisions. This Subpart examines American case law and international law and concludes that, given the harm inherent in polygamy, states are within their police power to prohibit the practice.

²⁹⁴ See *supra* Introduction.B.

1. *United States Law*

In a series of late nineteenth-century cases, the United States Supreme Court explicitly upheld federal laws prohibiting polygamy, but whether its reasoning can withstand modern precedent is a matter of debate. In *Reynolds v. United States*, the Court upheld a federal statute that made bigamy a crime.²⁹⁵ *Reynolds* dealt with criminal charges against a Mormon who was engaged in a polygamous relationship,²⁹⁶ and posed the question of “whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land.”²⁹⁷ In issuing a resounding “No,” the Court addressed both general criminal conduct that might fall under the umbrella of religion (i.e., “human sacrifices”), as well as polygamy specifically.²⁹⁸

Part of the Court’s justification was rooted in English common law and ecclesiastical law, and the language that it used on this front would no doubt today be viewed as both isolationist and sociologically false: “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 of African people.”²⁹⁹ This idea that anti-polygamy laws could not be justified because the West and civilized society were built on a tradition of monogamy was echoed in some of the Court’s other polygamy cases, including *Davis v. Beason*³⁰⁰ and *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*.³⁰¹

Even laws protecting traditional marriage norms, which the Court largely relied on in the polygamy cases, have been deemed unconstitutional under the Constitution’s Equal Protection and Due Process Clauses.³⁰² The idea that

²⁹⁵ 98 U.S. 145, 168 (1878).

²⁹⁶ *Id.* at 161.

²⁹⁷ *Id.* at 162.

²⁹⁸ *Id.* at 166; *accord id.* 166–68.

²⁹⁹ *Id.* at 164.

³⁰⁰ 133 U.S. 333, 341 (1890) (“[P]olygamy [is a] crime[] by the laws of all civilized and Christian countries. . . . [It] tend[s] to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment.”).

³⁰¹ 136 U.S. 1, 48 (1890) (“[P]olygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world.”).

³⁰² See *Loving v. Virginia*, 388 U.S. 1, 10–12 (1967) (holding that statutes which prevent marriages between persons solely because of racial classifications violate the Equal Protection and Due Process clauses, instead of upholding such laws based on traditional notions of marriage).

adherence to the Western tradition alone will support anti-polygamy laws in the face of a religious exercise claim is not viable.

The *Reynolds* decision was also grounded in the idea that the First Amendment protects only opinions, not actions.³⁰³ The *Reynolds* Court worried that a rule to the contrary would forbid the government from interfering in religiously motivated extreme acts, such as human sacrifice.³⁰⁴ But the Court in *Cantwell v. Connecticut* explicitly disposed of the beliefs/act distinction when it announced, “the [First] Amendment embraces two concepts, freedom to believe and freedom to act.”³⁰⁵ *Cantwell* reduced the government’s power to restrict religious acts to non-discriminatory time, place, and manner regulations and regulations imposed to “safeguard the peace, good order and comfort of the community”³⁰⁶ The distinction between beliefs and acts, upon which *Reynolds* stood, is therefore no longer viable.

But another tenet of the Court’s opinion rested on a sociological justification that is still relevant. The Court emphasized the public aspect of the marriage contract and justified government regulation based on how marriage formations shape society:

Marriage [is] . . . a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. . . . [I]t is within the legitimate scope of the power of every civil government to determine whether polygamy³⁰⁷ or monogamy shall be the law of social life under its dominion.

As discussed in Part II.C, the idea that household formations affect societies has carried legitimacy for over 2500 years in the West. Additionally, the idea that governments, especially state governments, carry broad discretion in the formation of marriage laws continues through modern United States jurisprudence, even when state marriage laws are struck down. In *Loving v.*

³⁰³ See *Reynolds*, 98 U.S. at 164 (quoting Letter from Thomas Jefferson, President of the United States, to Nehemiah Dodge et al., the Danbury Baptist Ass’n (Jan. 1, 1802)).

³⁰⁴ *Reynolds*, 98 U.S. at 166.

³⁰⁵ 310 U.S. 296, 303 (1940).

³⁰⁶ *Id.* at 304.

³⁰⁷ *Reynolds*, 98 U.S. at 165–66. Witte described the Court’s nineteenth century polygamy opinions as part “historical,” part “prudential,” and part “sociological.” Witte, *supra* note 65.

Virginia, for instance, while striking down a marriage law that violated the Equal Protection Clause by prohibiting mixed-race marriage, the Court was quick to emphasize that this concept still holds true.³⁰⁸

It should also be noted that the United States Supreme Court anticipated the individual harms in *Reynolds* that the Supreme Court of British Columbia found dispositive in the polygamy case. The accused in *Reynolds* asked the Court to address a seemingly impassioned jury charge from the trial court. Prior to deliberation, the trial court cautioned the jury to “consider . . . the consequences to the innocent victims of this delusion. . . . These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply”³⁰⁹ The Court considered the jury charge appropriate because it called attention to the “peculiar character” of polygamy.³¹⁰ The harm to its victims was much of the reasoning behind the federal law.³¹¹

Reynolds remains good law and is the Court’s most significant polygamy opinion, though subsequent federal laws also bear on polygamy.³¹² The Mann Act, which makes it a federal crime to engage in the interstate trafficking of females for immoral purposes,³¹³ was the basis of a criminal charge against Mormon polygamists who trafficked plural wives across state lines. The Court in *Cleveland v. United States* relied on the *Reynolds* holding to strike down the polygamists’ free exercise defense.³¹⁴ While stopping short of criminalizing polygamy, the Defense of Marriage Act defines “marriage,” for federal purposes, as “only a legal union between one man and one woman.”³¹⁵ In 2008, the Senate introduced the Victims of Polygamy Assistance Act, citing the growth in United States’s polygamous communities, which established a Department of Justice task force to “formulate effective responses to the

³⁰⁸ 388 U.S. 1, 7 (1967) (“[M]arriage is a social relation subject to the State’s police power.” (citation omitted)).

³⁰⁹ *Reynolds*, 98 U.S. at 167–68.

³¹⁰ *Id.* at 168.

³¹¹ *See id.*

³¹² *See Romer v. Evans*, 517 U.S. 620, 650 (1996) (Scalia, J., dissenting) (“The proposition that polygamy can be criminalized . . . remains good law.”).

³¹³ 18 U.S.C. §§ 2421–2424 (1910).

³¹⁴ 329 U.S. 14, 20 (1946) (“But it has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy.” (citing *Reynolds*, 98 U.S. 145)).

³¹⁵ 1 U.S.C. § 7 (1996).

unique set of crimes committed by polygamist organizations.”³¹⁶ The Court has not ruled on the constitutionality of these statutes or proposals.

Religious exercise challenges to state anti-polygamy laws do sometimes arise in lower courts, however, and are subject to the Supreme Court’s shifting religious exercise jurisprudence. Since *Reynolds*, the Court has wavered in the amount of protection it grants religious acts that run afoul of local, state, or federal law.³¹⁷ But in 1990, in *Employment Division v. Smith*, the Court dispensed with the heightened protections offered by earlier cases and held that the right of free exercise alone does not relieve an individual of the obligation to comply with a ““valid and neutral law of general applicability””³¹⁸ In the aftermath of *Smith*, the Court has continued to strike down state laws targeting specific religious groups,³¹⁹ but the general rule is that as long as a law is applied neutrally and is generally applicable, “petitioners . . . must seek redress in the legislatures, not the courts.”³²⁰

In 2004, the Utah Supreme Court, in *State v. Green*, applied both *Reynolds* and *Smith* to the First Amendment free exercise claim of a man charged with four counts of bigamy.³²¹ Applying the neutrality standards of *Smith*, the Court held that because Utah’s bigamy law was neutral and generally applicable, it did not violate the free exercise clause.³²² More importantly, the Court found it significant that, for years, the United States Supreme Court had been citing *Reynolds* as the basis for justifying religious exercise limits in the name of the public welfare.³²³ This is important not just as support that *Reynolds* remains good law, but also because of what it signals about the institution of polygamy. After over a century of free exercise litigation, hemming and hawing over what

³¹⁶ Victims of Polygamy Assistance Act of 2008, S.3313, §§ 2(1), 110th Congress, (2d Sess. 2008) (noting the growth of polygamous communities in the United States); *id.* §§ 3(a), 3(b)(1) (creating the task force to address criminal activities of polygamist communities).

³¹⁷ See *Cantwell*, 310 U.S. at 303 (holding that the First Amendment grants the right to act on one’s religious belief, though this right may be subject to some limitations); see also *Sherbert v. Verner*, 374 U.S. 398, 406, 408–09 (1963) (holding that a burden on religious exercise may only be justified in the pursuit of a compelling state interest).

³¹⁸ 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

³¹⁹ See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (striking down on free exercise grounds a law that targeted followers of Santeria for penalties for the ritual slaughter of animals).

³²⁰ WITTE, *supra* note 58, at 140.

³²¹ 99 P.3d 820, 822, 825 (Utah 2004). The Utah Supreme Court equated bigamy with polygamy. *Id.* at 825.

³²² *Id.* at 826.

³²³ *Id.* at 825–26.

kinds of religious practices the government may proscribe in the name of public welfare, *Reynolds* has remained a benchmark for the type of conduct that may be prohibited. In other words, the Court has viewed polygamy as so contrary to the public welfare that it appears its mere existence has become a justification for limits on free exercise.

Proponents of polygamy in the United States face a difficult challenge if they choose to rely on free exercise claims. A showing of religious discrimination, however, would increase their chances of prevailing. Under the *Smith* regime, laws that “infringe upon or restrict parties *because* of their religious motivation” are not considered neutral and are subject to stricter scrutiny.³²⁴ The British Columbia Supreme Court’s *Oakes* analysis functions similarly to a strict scrutiny regime, and its findings of inherent harm associated with polygamy suggest that, even under a strict scrutiny regime, a government could be well within its police powers to prohibit polygamy.³²⁵ Nevertheless, it would be a wise strategic move for religious polygamists to establish some sort of discriminatory motive behind anti-polygamy laws, like the challengers in the British Columbia polygamy case did. One way to establish this would be to prove that monogamy in the West is and has been “inextricably bound up with mainstream Christianity.”³²⁶ Following an examination of the relevant international law, this Subpart will address that claim.

2. *International Law*

In upholding Section 293, the Supreme Court of British Columbia considered its international obligations under CEDAW, ICCPR, CRC and ICESCR.³²⁷ The ICCPR provides a robust defense for international religious freedom.³²⁸ Polygamists’ religious claims would be greatly strengthened by a finding that the religious freedom provisions of the ICCPR protect their practice.

Article 18.1 of the ICCPR provides, “[e]veryone shall have the right to freedom of thought, conscience and religion.”³²⁹ This right includes the right to

³²⁴ *Hialeah*, 508 U.S. at 533 (emphasis added).

³²⁵ See *supra* Part I.A.

³²⁶ See Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 131 (Can.).

³²⁷ See *supra* text accompanying notes 136–47.

³²⁸ See ICCPR, *supra* note 137, art. 18. The CRC also discusses religious freedoms, but does not expand on the basic freedoms provided by the ICCPR. CRC, *supra* note 139, art. 14.

³²⁹ ICCPR, *supra* note 137, art. 18, para. 1.

“manifest . . . religion . . . in worship, observance, practice and teaching.”³³⁰ This right is restricted by Article 18.3, which allows for limitations that are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”³³¹ Taken together, 18.1 and 18.3 provide an absolute freedom of belief and a qualified freedom of manifesting that belief.³³² The question then becomes whether manifesting religious belief through polygamy is protected by the ICCPR’s religious freedom provisions.

Different approaches exist for determining what constitutes a legitimate limitation on religious freedom in an international human rights context. The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, drafted in 1984 by the International Commission of Jurists and the United Nations Center for Human Rights, propose that “in resolving conflicts between different rights and freedoms protected by the [ICCPR], ‘weight should be afforded to rights’” considered inviolable under the ICCPR.³³³ Under this theory, a religious freedom defense of polygamy may have difficulty withstanding the virtually unlimited provisions of gender equality and child protection found in the ICCPR.³³⁴

Another approach to conflicts-of-rights situations would be to grant equal importance to all human rights and grant each right insofar as it does not encroach upon other human rights.³³⁵ This approach is not tenable, however, because it will sometimes force governments to grant more weight to one right over the other in a given analysis. For instance, polygamy is inherently harmful to children, and the ICCPR grants children the right of state protection.³³⁶ Does this mean that the state should allow religious polygamy only insofar as it does not infringe on children’s rights (in which case, polygamy can never be permitted), or does it mean that the state should grant child protection only insofar as it does not infringe on manifestation of religious beliefs (in which

³³⁰ *Id.*

³³¹ *Id.* art.18, para. 3.

³³² *See* van der Vyver, *supra* note 68, 501, 503.

³³³ *Id.* at 506–07 (quoting United Nations, Econ. & Soc. Council, Comm’n on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1984/4, Annex (Sept. 28, 1994)) [hereinafter Siracusa Principles].

³³⁴ *See* ICCPR, *supra* note 137, arts. 3, 24.

³³⁵ Van der Vyver, *supra* note 68, at 507.

³³⁶ *See* ICCPR, *supra* note 137, art. 24.

case, polygamy should always be permitted)?³³⁷ One sees how this “equality of rights” approach may still require courts to give preference to one right over another.

Johan D. van der Vyver advances a workable approach to conflicts of rights in international law that mirrors the approach often taken by constitutional governments. Van der Vyver says, “In probably every constitutional system there is in fact a certain basic *Grundnorm*, determined by the historical circumstances and political structure of the country concerned, which permeates the entire spectrum of rights protected”³³⁸ For instance, says van der Vyver, the fundamental norm for Germany is human dignity; for Canada, equal protection; for South Africa, human dignity, equality, and freedom (in that order).³³⁹ Constitutions or bills of rights may generally be either egalitarian or libertarian in nature, and governments will prioritize rights accordingly.³⁴⁰ For example, laws targeting hate speech are more likely to be struck down in a libertarian constitutional system but are more likely to be upheld in an egalitarian constitutional system.³⁴¹

International human rights instruments, such as the ICCPR, seem to give preference to egalitarian principles.³⁴² The ICCPR proclaims that, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”³⁴³ Despite the ICCPR’s religious freedom provisions, the Human Rights Committee, which monitors compliance with the ICCPR, had the following to say about polygamy: “[E]quality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women Consequently, it should be abolished wherever it continues to exist.”³⁴⁴ Van der Vyver says that the norm derived from the directives of international human rights instruments, including the ICCPR, is that “freedom of religion may never be exercised in a

³³⁷ See van der Vyver, *supra* note 68, at 507 (making a similar comparison between a Jehovah’s Witness right to evangelize door-to-door and an individual’s right to privacy).

³³⁸ *Id.* at 508; see also *id.* at 508 n.44 (defining “Grundnorm” as “Fundamental Norm”).

³³⁹ *Id.*

³⁴⁰ See *id.*

³⁴¹ See *id.*

³⁴² *Id.*

³⁴³ ICCPR, *supra* note 137, pmb1.

³⁴⁴ Human Rights Committee, General Comment No. 28: Equality of Rights Between Men and Women (Article 3), para. 24, U.N. Doc. CCPR/C/21/Rev. 1/Add.10 (Mar. 29, 2000).

manner that would violate human dignity,” and that human dignity violations can never be justified by religious rationales.³⁴⁵

Criminalization of polygamy may be justified even under a narrow view of when a government may outlaw a religious practice under international human rights instruments. “Limitations imposed . . . to protect public safety, order, health, or morals or fundamental rights of others must be proportional to the contingency that prompted the limitation.”³⁴⁶ But if one takes the premise that polygamy is *inherently* harmful to society, established in Part II and found to be true by the Supreme Court of British Columbia, a criminalization of the practice is surely proportional.³⁴⁷

Since international human rights instruments do not address polygamy, and since customary international law does not require a state to prohibit polygamy, the Supreme Court of British Columbia interpreted international law through interpretations of its “more general provisions.”³⁴⁸ Finding that the treaty bodies for CEDAW, ICCPR, CRC and ICESCR have all, to different extents, condemned polygamy, the court found that “Canada has obligations to take all appropriate measures to eliminate polygamy.”³⁴⁹ The Court’s decision is consistent with the “egalitarian” nature of international human rights instruments—since polygamy violates the equal rights and dignity of women and children, it cannot be justified simply because it is religiously motivated.

As with U.S. law, however, international law is unlikely to abide by a prohibition that is discriminatory in nature. For instance, the Siracusa Principles stipulate that laws limiting any of the rights and freedoms granted by the ICCPR, besides meeting necessity and proportionality requirements, must not sanction discrimination against any group.³⁵⁰ As with a defense of religious polygamy in the United States, a showing of a deep-seated discrimination in marriage law would provide at least a solid basis for an

³⁴⁵ Van der Vyver, *supra* note 68, at 509.

³⁴⁶ *Id.* at 511–12 (2005); *see also* X & Church of Scientology v. Sweden, App. No. 7805/77, 16 Eur. Comm’n H.R. Dec. & Rep. 68, 73 (1997) (holding that the “necessity” test requires the assessment of various factors, including the nature of the right involved, the degree of interference, the nature of the public interest and the degree to which it requires protection in the circumstances of the case).

³⁴⁷ *See* Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1182 (Can.) (holding that there is a reasoned basis for the apprehension that polygamy is inherently harmful to society generally).

³⁴⁸ *Id.* para. 802.

³⁴⁹ *Id.* para. 839.

³⁵⁰ Van der Vyver, *supra* note 68, at 509 (citing Siracusa Principles, *supra* note 333, para. 10(d)).

international claim. But the next two Subparts show why monogamy is not bound up with Christianity and, therefore, not discriminatory.

B. The Roots of Marriage Law

A showing of religious discrimination will go a long way in providing religious polygamists with the highest level of scrutiny possible. By portraying monogamy as a practice “bound up with mainstream Christianity,”³⁵¹ religious polygamists may strengthen their religious rights claims. If monogamy is a Christian institution put in place to achieve Christian objectives, the argument goes, its merits are based on nothing but a “might makes right” rationale—that Catholicism and Protestantism have reigned in the West for centuries by suppressing the rights of religious minorities. But while it is true that different sects of Christianity have informed various marriage customs and laws that have ebbed and flowed over the centuries, the Western tradition of prescribing monogamous marriage and punishing polygamy began in the pre-Christian era.

In his *Laws*, Plato linked marriage to civics by advising young men that, when choosing a wife, they should consider the city’s good, and not only their own preferences.³⁵² He emphasized the human need for dyadic love as a way for humans to “draw[] the two halves of [their] original nature back together and tries to make one out of two and to heal the wound in human nature.”³⁵³ He praised the household’s division of labor and resources and recognized monogamous marriage as “foundational to any republic.”³⁵⁴ His student Aristotle also extolled the marital bond as both politically and socially expedient and added an emphasis on the importance of blood ties between children and parents.³⁵⁵ Additionally, the Roman Stoics, in particular the influential Stoic moralist Musonius Rufus and his student Hierocles, viewed the monogamous household as “essential for civilization.”³⁵⁶ They extolled monogamy’s “sharing of . . . persons, properties, and pursuits.”³⁵⁷

³⁵¹ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 131.

³⁵² Plato, *Laws* 6.773b, in *THE COLLECTED DIALOGUES OF PLATO 1350* (Edith Hamilton & Huntington Cairns eds., Lane Cooper et al. trans., Princeton Univ. Press 1989) (c. 355–347 B.C.E.); see also WITTE, *supra* note 282, at 18.

³⁵³ PLATO, SYMPOSIUM 191d, at 24 (Christopher Gill trans., Penguin Books 1999) (c. 385–380 B.C.E.); see also WITTE, *supra* note 282, at 18–19.

³⁵⁴ WITTE, *supra* note 282, at 29.

³⁵⁵ *Id.* at 19–20.

³⁵⁶ *Id.* at 21 (quoting JUDITH EVANS GRUBBS, *LAW AND FAMILY IN LATE ANTIQUITY: THE EMPEROR CONSTANTINE’S MARRIAGE LEGISLATION* 59 (1995)) (internal quotation marks omitted).

³⁵⁷ *Id.* at 30.

Classical Roman law “distilled these ideas about marriage and defined its basic legal form and valid formation.”³⁵⁸ It valued mutual consent of the spouses and marital property rights.³⁵⁹ While concubinage occurred, it was discouraged, and men were mostly forbidden from naming their concubines in their last wills and testaments.³⁶⁰ Roman law banned polygamy and, as the culture developed, began punishing it.³⁶¹ All this took place before the Christianization of the Roman Empire in the fourth century.³⁶²

The Christian tradition later drew upon the natural logic and language developed by these pre-Christian classical sources in forming its marriage customs and laws. While eschewing many other classical practices like sodomy, pedophilia, prostitution, and infanticide,³⁶³ as well as forming marriage theories unique to various Christian theologies, the idea of the monogamous household, with its rights and duties, its protections and responsibilities, took hold amongst Christians—and they flourished.

A good idea adopted by Christians does not a worse idea make. And policy rooted in pagan culture cannot be inherently Christian. The claim that monogamous marriage represents an unwarranted government imposition of Christian values is unfounded.

C. The Secularization of Modern Marriage Law

Even under the assumption that monogamy is not an inherently Christian institution, it may be possible for polygamists to claim that the state of modern marriage law is so riddled with mainstream Christian ideas and norms that its application acts as the functional equivalent of discrimination. To be sure, marriage law in the West has been influenced greatly by various Christian theologies, and Western law is not entirely devoid of uniquely Christian values. But modern marriage law is now largely informed by policy considerations designed to meet the demands of secular societies.

Following the Classical period and prior to the Enlightenment, many Western marriage laws and customs had been subject to ecclesiastical

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 25, 30.

³⁶⁰ *Id.* at 26–27.

³⁶¹ *Id.* at 27.

³⁶² *See id.* at 28.

³⁶³ *Id.* at 30.

influence, oversight and intervention.³⁶⁴ The marriage contract equated to a “natural, social, and spiritual association” for the good of the community.³⁶⁵ Witte compares the pre-Enlightenment marriage agreement to an “adhesion contract”—one was free to decline to sign the dotted line, but negotiating the terms was out of the question.³⁶⁶ This changed during the Enlightenment.

Enlightenment thinkers espoused the goods of monogamy and the harms of polygamy on non-biblical, rational grounds.³⁶⁷ Henry Home, a leading Scottish Enlightenment philosopher listed several evils of polygamy. Among them were the degradation of women and the resulting pool of unmarried males, which was contradictory to the natural order since there were equal numbers of men and women in the world.³⁶⁸ Monogamy, on the other hand, was “instituted by nature” and promotes human preservation by simultaneously acting as an outlet for sexual desire and a nurturing institution for children.³⁶⁹ Monogamous marriage promotes natural gender equality and the effective procreation through fidelity.³⁷⁰

English and American common law on marriage is largely based on the ideas of Home and other Enlightenment thinkers.³⁷¹ The disestablishment of religion in America “made direct appeals to the Bible and to Christian theology an insufficient ground by itself for cogent legal arguments.”³⁷² So, contrary to any argument that modern marriage law is too wrapped up in Christianity, common marriage law exists as it does today precisely because it has moved *away* from religious rationales. The Enlightenment’s focus on personal liberty and equality led to sweeping reforms of marriage and family law, including laws targeting wife abuse, encouraging education reform, and promoting child support,³⁷³ areas in which the Church had taken a hands-off approach.

As Enlightenment ideals of individualism and liberty have evolved, marriage law continues to move further away from the “adhesion contract” put forth by religious models. This new, more private form of contract has allowed individuals to overcome government barriers to marriage, such as bans on

³⁶⁴ *See id.* at 291.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *See id.*

³⁶⁸ *Id.* at 292–93.

³⁶⁹ *Id.* at 292 (citation omitted); *accord id.*

³⁷⁰ *Id.* at 294.

³⁷¹ *See id.* at 291.

³⁷² *Id.* at 301.

³⁷³ *Id.* at 310.

interracial marriage and prohibitions on prisoner marriages.³⁷⁴ It has led to an increased recognition and emphasis on marriage and family privacy.³⁷⁵ It has led to increased rights for married women, including the right to contraception, the right to an abortion without the consent of her husband, and increased rights to property that she holds in common with her husband.³⁷⁶ It has led to government-recognized same-sex marriage in several countries and States.³⁷⁷ Finally, modern marriage laws inspired by the Enlightenment have made it easier than ever for either partner to obtain a divorce, a practice that was both highly cumbersome and highly discouraged under ecclesiastically influenced marriage law.³⁷⁸

Modern marriage and family laws, while still grounded in the classical concept of monogamy, have been largely removed from the religious laws and customs that informed them prior to the Enlightenment. While many in the West still attach a hearty religious significance to the institution of marriage, modern reforms have been informed by principles of liberty, privacy, and equality rather than by tenets of theology.³⁷⁹ As some founders of the Enlightenment realized, a defense of monogamy does not require Christian underpinnings.³⁸⁰ Governments' refusal to allow polygamy does not equate to religious discrimination, but merely recognizes the high risk of harm that inheres in polygamy. Religious exercise challenges to current anti-polygamy laws should fail.

IV. POLYGAMY AND SEXUAL LIBERTY

Not every polygamist craves government recognition and benefits. Some, like *Sister Wives'* Kody Brown, just want to be left alone to their private conduct.³⁸¹ Like the challengers in the British Columbia polygamy case, they question why governments cannot rely on criminal laws already on the books that seem to target many of the alleged harms of polygamy, like laws against

³⁷⁴ *Id.* at 316.

³⁷⁵ *Id.* at 316–17.

³⁷⁶ *Id.*

³⁷⁷ *See Countries Where Gay Marriage Is Legal: Netherlands, Argentina & More*, DAILY BEAST (May 9, 2012), <http://www.thedailybeast.com/articles/2012/05/09/countries-where-gay-marriage-is-legal-netherlands-argentina-more.html>; Michael Pearson, *Maryland Senate Approves Same-Sex Marriage Bill*, CNN (Feb. 23, 2012), http://articles.cnn.com/2012-02-23/us/us_maryland-same-sex-marriage.

³⁷⁸ *See* WITTE, *supra* note 282, at 318.

³⁷⁹ *Id.* at 315.

³⁸⁰ *See id.* at 291.

³⁸¹ Schwartz, *supra* note 32.

statutory rape, exploitation, human trafficking, and assault.³⁸² Additionally, they may argue, if individuals can legally have uncommitted sex with anyone else they want with impunity, it makes little sense for the government to punish those who actually commit time and resources to their sex partners and offspring.

This Part examines United States and international law as it relates to sexual liberty and proposes a distinction between polygamy and legally-protected promiscuity that allows for current sexual liberties to coexist with anti-polygamy laws.

A. *United States Law*: Lawrence v. Texas

*Lawrence v. Texas*³⁸³ is the current leading case for American polygamists challenging anti-polygamy laws under liberty claims.³⁸⁴ In *Lawrence*, the Court struck down a Texas statute that criminalized homosexual conduct and announced that the state could not regulate homosexual behavior between two consenting adults.³⁸⁵ Regulation of this sort would compromise an individual's fundamental right to privacy established in *Griswold v. Connecticut* and its constitutional progeny.³⁸⁶

The Court has rejected arguments stemming from tradition and morality, and more specifically, overruled an opinion that was grounded in it. Asserting that "laws and traditions in the past half century are of most relevance," the Court rejected its earlier holding in *Bowers v. Hardwick*³⁸⁷ that intimate homosexual conduct could be criminalized based on a "[c]ondemnation of . . . practices . . . firmly rooted in Judeo-Christian moral and ethical standards."³⁸⁸ It declared that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."³⁸⁹

³⁸² See Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1144 (Can.).

³⁸³ 539 U.S. 558 (2003).

³⁸⁴ See Schwartz, *supra* note 32.

³⁸⁵ *Lawrence*, 539 U.S. at 578 ("The case does involve two adults who, with full and mutual consent from each other, engage in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their destiny by making their private sexual conduct a crime.")

³⁸⁶ 381 U.S. 479, 485 (1965); see also *Roe v. Wade*, 410 U.S. 113, 153 (1973) (upholding a woman's right to privacy in deciding whether to undergo an abortion).

³⁸⁷ *Lawrence*, 539 U.S. at 571, 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

³⁸⁸ *Id.* at 571.

³⁸⁹ *Id.* at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

Justice Scalia, in his dissent, warned that the Court's ruling created a slippery slope which would lead to the invalidation of laws against all sorts of sexual conduct, including polygamy.³⁹⁰ While subsequent litigation has proven Scalia's words prescient in some sense, one could attribute his dire predictions to rhetorical exaggeration, as *Lawrence* seemed to distinguish marriage from sexual liberty.³⁹¹ Additionally, the Court was clear that the sexual conduct at hand was consensual, not harmful.³⁹² Because the case involved a law targeted at homosexuals, the prospect of producing offspring was not raised except when discussing privacy precedent as it relates to abortion.³⁹³ Nevertheless, the *Lawrence* Court's establishment of a fundamental right to privacy in intimate conduct provides a plausible line of attack for polygamists who want to keep their conduct purely that—private.

B. *International Law*

Parts I and III noted that the treaty bodies responsible for monitoring various international human rights instruments have all condemned polygamy even though its prohibition conflicts with certain human rights, like religion. But other international law instruments, such as the European Convention on Human Rights,³⁹⁴ have been interpreted by European courts to provide robust sexual and privacy rights.³⁹⁵ Though all members of the European Union currently ban polygamy, Western polygamists seeking liberty rather than recognition may try to persuade European courts that Article 8 of the Convention prevents the government from interfering with polygamous unions. Given the prevalence and growth of polygamous Muslims across Europe, this scenario is not unlikely. A finding for polygamists in European courts could have significant comparative law implications.

According to the European Court of Human Rights ("ECHR"), an individual's private sexual conduct falls within Article 8.2 of the Convention, which prohibits government interference with private life unless it has

³⁹⁰ *Id.* at 590 (Scalia, J., dissenting).

³⁹¹ *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in the judgment) (explaining that since the Texas statute at issue was not aimed at protecting traditional marriage, there was no state interest to carry it past rational basis review).

³⁹² *Lawrence*, 539 U.S. at 578.

³⁹³ *See id.* at 565.

³⁹⁴ European Convention on Human Rights and Fundamental Freedoms, *opened for signature* April 11, 1950, 213 U.N.T.S. 221, C.E.T.S. No. 5.

³⁹⁵ *See discussion infra* Part IV.B.

“particularly serious reasons.”³⁹⁶ In this sense, the weight of protection placed on the privacy of intimate conduct in Europe is very similar to the weight of protection given in the United States. The similarity is supported by the fact that the United States Supreme Court, in *Lawrence*, used the ECHR’s ruling in *Dudgeon v. United Kingdom* to justify overturning precedent and declaring “certain intimate conduct” a fundamental liberty.³⁹⁷

ECHR case law on polygamy is light. In 2003, in upholding the decision of the Turkish government to dissolve a political party that promoted the application of sharia law to groups of Turkish Muslims, the court, in dicta, recognized a state’s right to prohibit polygamy for the good of the public order and the “values of democracy for Convention purposes.”³⁹⁸ The case did not address Article 8, but has been cited by the European Parliament to support the position that polygamy is contrary to the gender equality provisions of the Convention.³⁹⁹ In 2010, the ECHR, holding that laws prohibiting religious marriages that are not first performed civilly do not violate Article 8, recognized that a legitimate aim of the law was to prevent polygamy.⁴⁰⁰

European Union directives and resolutions support the idea that polygamy should be banned in favor of women’s and children’s rights. Its directive on the right to family reunification justified the “possible taking of restrictive measures against applications for family reunification of polygamous households.”⁴⁰¹ Claiming to observe the principles of Article 8,⁴⁰² the directive mandates that member states not authorize the family reunification of a plural spouse from a polygamous marriage.⁴⁰³ It also grants member states the right to limit the reunification of children from plural spouses.⁴⁰⁴ The European Parliament’s resolution on women’s immigration calls for member states to

³⁹⁶ See App. No. 7525/76, 45 Eur. Ct. H.R. (ser. A) 21, para. 52 (1981) (holding that the European Convention on Human Rights precluded the criminalization of male homosexual acts in England, Wales, and Ireland).

³⁹⁷ *Lawrence*, 539 U.S. at 562, 573.

³⁹⁸ *Refah Partisi v. Turkey* (No. 2), App. No. 41340/98, 37 Eur. H.R. Rep. 1, para. 128 (2003).

³⁹⁹ European Commission, Answer given by Mr. Frattini on Behalf of the Commission, E-0196/2007 (Mar. 14, 2007).

⁴⁰⁰ *Yigit v. Turkey*, App. No. 3976/05, 53 Eur. H.R. Rep. 25, para. 81 (2010).

⁴⁰¹ Directive 2003/86/EC, of the Council of the European Union of 22 September 2003 on the Right to Family Reunification, 2003 O.J. (L 251) 12, 13.

⁴⁰² *Id.* at 13.

⁴⁰³ *Id.* at 15.

⁴⁰⁴ *Id.*

uphold the illegality of polygamy in the name of women's rights.⁴⁰⁵ While Article 8 had been interpreted to embody a broad scope of privacy rights, it is difficult to believe that a regional government that calls upon its members to encourage fathers to engage in household chores in the name of gender equality⁴⁰⁶ would succumb to polygamists' arguments that Article 8 would allow polygamy.

Perhaps the best counter to a gender equality justification would be a consent defense: a claim that an act may not be criminalized if the victim consented to the act.⁴⁰⁷ As Part II.A demonstrated, a wife's consent to join in a polygynous relationship is not altogether uncommon. The Supreme Court of British Columbia did not decide whether female consent in the case of polygyny would void the otherwise criminal act.⁴⁰⁸ To do so would be to decide that the plural wife was the only victim. If polygamy is inherently harmful to children and society, a consent defense would not be satisfied merely by the consent of one victim.⁴⁰⁹

Still, the difficult question remains of how a government may criminalize polygamy while not only permitting, but providing, constitutional protection to promiscuity. The increase of children born to single mothers could plausibly be characterized as a perpetuator of gender inequality, as well as a bane upon society.⁴¹⁰ A rationale for distinguishing these scenarios would strengthen the justification of anti-polygamy laws in an age of expanding rights.

C. Distinguishing Between Polygamy and Promiscuity

The quandary raised by the relevant law is how one may distinguish between promiscuity, which is generally protected, while at the same time criminalizing private polygamous conduct. It may seem strange to prosecute a man or a woman with multiple sex partners just because he or she decides to make lifelong marital commitments to all of his or her sex partners and all of his or her offspring. But the right of sexual liberty has developed largely

⁴⁰⁵ European Parliament Resolution on Women's Immigration: The Role and Place of Immigrant Women in the European Union, 2006/2010(INI), 2006 O.J. (C 313) 118, 123.

⁴⁰⁶ See European Parliament Resolution on a Roadmap for Equality Between Women and Men, para. 12, 2006/2132(INI) (2006).

⁴⁰⁷ See Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1184 (Can.).

⁴⁰⁸ See *id.*

⁴⁰⁹ See *id.*

⁴¹⁰ Jason DeParle & Sabrina Tavernise, *Unwed Mothers Now a Majority Before Age of 30*, N.Y. TIMES, Feb. 18, 2012, at A1.

outside the context of child-rearing and household development.⁴¹¹ In an age of readily available birth control and other prophylactic measures, family planning efforts are more likely to be successful. While promiscuity may not be in the public interest itself, its natural consequences, including unwanted children and sexually transmitted diseases, may be substantially mitigated by modern technology. As a result, and because of the intensely private nature of sexual conduct, it may be reasonably argued that promiscuity in general does not reach the critical level of harm to justify government intrusion. Even in the tragic case of an unwanted child, remedies such as adoption are available to lessen the harm.

Polygamy, on the other hand, deals specifically in household arrangements and child-rearing. Polygamous unions are generally formed with the intent to bear children—indeed, one of the primary reasons for their existence within certain beliefs systems is their conduciveness to expanded procreative possibilities.⁴¹² Children are faced with the harms inherent in their families' structures and lifestyles.⁴¹³

Western democracies are replete with fundamental rights that, if exercised carelessly, may cause great harm. The right to free speech does not depend on speech being innocuous.⁴¹⁴ The right to bear arms persists despite scores of tragic gun accidents.⁴¹⁵ Some rights are deemed too important to be subject to perpetual government regulation.

But this does not preclude governments from drawing distinct lines that spell out clear limits to fundamental rights. One may exercise free speech rights until he, for example, defames, defrauds, or incites violence. One may exercise his right to bear arms to the point that he commits murder or is negligent. And one is free to exercise his sexual liberty until it manifests as polygamy. In this sense, anti-polygamy laws fall with the other narrow exceptions to fundamental rights—on the other side of the line.

⁴¹¹ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (describing the historical roots of some facets of sexual liberty).

⁴¹² See *supra* Part II.A–C.

⁴¹³ See Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1184.

⁴¹⁴ See generally *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (discussing exceptions to the First Amendment's protection of speech).

⁴¹⁵ See Simon Rogers, *Gun Homicides and Gun Ownership Listed by Country*, GUARDIAN DATA BLOG (July 22, 2012, 8:01 AM), <http://www.guardian.co.uk/news/datablog/2012/jul/22/gun-homicides-ownership-world-list>.

CONCLUSION

Given the increasing presence of polygamy in the West, as well as the expansive religious and sexual freedoms that have emerged over the past decades, it makes perfect sense for polygamists to challenge anti-polygamy laws. The Supreme Court of British Columbia's recent decision upholding the constitutionality of its federal anti-polygamy law addressed a wide range of arguments both for and against the law. Its decision, based largely on international religious and sexual rights, provides a useful model for Western courts that may face this issue in the future.

Evidence shows that polygamy causes unique and inherent harms wherever it is practiced. While it may violate personal autonomy principles to prevent a consenting woman from entering into a plural marriage, legal authorities must recognize that polygamy harms not only women, but children and society as well. Given these harms, courts are faced with a conflict-of-rights situation—outlawing polygamy surely infringes on sexual and, often, religious rights, but permitting it inflicts harms on scores of third parties.

United States and international law place great importance on religious freedom, but that freedom is not unqualified. The United States Supreme Court, in nineteenth century cases that remain Court precedent, held that polygamy did not comport with First Amendment religious freedom. Its current view, that religious exercise does not trump neutral and generally applicable laws, presents a formidable challenge for proponents of religious polygamy. Though international human rights instruments do not address polygamy, the statements of its treaty bodies make clear that polygamy is not a favored practice even in light of the religious freedoms granted by the instruments. While a showing of religious discrimination would support polygamists' cases in both United States and international law, the pre-Christian institution of monogamy in the West, as well as the secularization of modern marriage law, show that monogamy is not rooted in any one religion, and severely detracts from the idea that monogamy perpetuates religious discrimination.

While sexual rights have recently been subject to great expansion across the West, there is no indication that this expansion includes the right to form polygamous unions. These rights have developed outside the context of marriage regulation, and the statements of international bodies continuing to denounce polygamy run counter to any arguments that these sexual rights should be interpreted to encompass polygamy. While individuals are now free

from government intrusion into their sexual lives, polygamy presents unique harms that distinguish it from run-of-the-mill promiscuity.

The harms flowing from polygamy are too evident to ignore and too serious to allow to occur under the guise of fundamental rights. As the Supreme Court of British Columbia correctly recognized, anti-polygamy laws *do* infringe on fundamental rights. But while government has a duty to uphold the individual rights of its citizens, it has an even greater duty to protect its citizens from harm. This precept rings especially true when a practice places children, society's most vulnerable citizens, at great risk. The Western tradition has, for centuries, understood polygamy to be a source of harm. Though the question of polygamy invokes important personal rights, societies would be unwise to expose themselves and future generations to these harms.

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