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Scrutinizing Polygamy: Utah's *Brown v. Buhman* and British Columbia's Reference re: Section 293

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SCRUTINIZING POLYGAMY: UTAH'S *BROWN V. BUHMAN* AND BRITISH COLUMBIA'S *REFERENCE RE: SECTION 293*

Maura I. Strassberg*

ABSTRACT

In Brown v. Buhman, the recent challenge to the Utah law criminalizing polygamy brought by the stars of the reality television show Sister Wives, a federal district court determined both that strict scrutiny was required and that strict scrutiny could not be satisfied. A significant factor in this result was the state's failure to mount a strong defense of the law, assuming that it could rely on long standing polygamy precedents such as the United States Supreme Court decision in Reynolds v. United States and more recent Tenth Circuit and Utah Supreme Court decisions to justify limiting scrutiny to rational basis and to provide legitimate reasons for the criminalization of polygamy. However, the State could have taken advantage of a then just released Canadian opinion, Reference re: Section 293 of the Criminal Code of Canada (Reference), to explain the real and expansive harms of polygamy. The Reference court undertook an exhaustive examination of the impact of polygamy on women, on children, on men, and on society, utilizing empirical evidence, expert reports, personal anecdotes, and a wide range of "Brandeis Brief" materials. This Article argues that the broad range of social and individual harms of polygamy identified in Reference provide a compelling state interest sufficient to withstand the strict scrutiny deemed necessary by Brown.

The Article also argues that the Utah statute cannot properly be understood to be a "religious gerrymander" requiring strict scrutiny. The Brown court's determination that the Utah statute only targeted religiously motivated polygamy was based on its improper segregation of the statute's coverage of licensed bigamy and polygamy, which the court acknowledged covered both religiously and nonreligiously motivated marriages, from the statute's coverage of unlicensed ceremonial polygamous marriages and

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polygamous marital cohabitation, which the court saw as only religiously motivated. The Article goes on to show that the real target of the Utah statute are the multiple marital relationships present in all polygamy and not the religious motivation for polygamy undeniably present in much of the actual Mormon Fundamentalist polygamy practiced in Utah. The Article additionally argues that the heightened scrutiny called for by the Brown court under the Smith hybrid analysis is also not justified.

Finally, the Article briefly considers how a statute that only criminalizes religiously motivated polygamy might be justified, based on the way in which polygamous religious communities funnel teenage girls into polygamous marriages by ensuring that they never have the chance to develop sufficient autonomy to truly choose for themselves, not unlike the way the Amish in Yoder sought to limit their children's education to prevent them from having either the desire or ability to live anything but an agrarian life. This Article suggests that confronting the autonomy-destroying impact of religiously motivated practices, such as polygamy, might force reconsideration of both Yoder and the limits of free exercise.

INTRODUCTION	1817
I. WHAT ARE THE HARMS OF POLYGAMY?	1821
A. <i>The Harms Identified in Reynolds, Potter, Green, and Holm</i> ..	1821
1. <i>Harm to Society</i>	1823
2. <i>Despotic Government</i>	1825
3. <i>Maintaining the Network of Laws Governing Monogamy</i>	1828
4. <i>Marriage Fraud</i>	1830
5. <i>Misuse of Government Benefits</i>	1831
6. <i>Protecting Women and Children from Abuse</i>	1831
B. <i>The Harms Identified in the British Columbia Reference</i>	1834
1. <i>The Cruel Arithmetic of Polygamy</i>	1836
2. <i>Harm to Polygynous Wives and Women in General</i>	1837
3. <i>Harm to Children of Polygynous Families</i>	1838
4. <i>General Social Harms</i>	1839
5. <i>Scrutiny of the Infringements to Liberty and Freedom of Religion</i>	1841
6. <i>Summary</i>	1842
II. NEITHER STRICT NOR HEIGHTENED SCRUTINY OF THE UTAH BIGAMY LAW WAS JUSTIFIED IN <i>BROWN</i>	1843
A. <i>Strict Scrutiny of Polygamy Law Under Hialeah's Free Exercise Analysis</i>	1844

1. <i>Federal Precursors to the Utah Statute</i>	1844
2. <i>History and State Interpretation of Utah's Current Bigamy Statute</i>	1845
3. <i>Hialeah</i>	1849
4. <i>Free Exercise Challenges to the Utah Bigamy Statute Before Brown</i>	1851
5. <i>Brown's Hialeah Analysis of the Utah Bigamy Statute</i>	1852
a. <i>Divide and Conquer</i>	1853
b. <i>Cohabitation is Cohabitation</i>	1855
c. <i>Purports to Marry</i>	1860
d. <i>Selective and Minimal Prosecution</i>	1863
B. <i>Heightened Scrutiny Under Smith's Hybrid Rights Analysis</i> ..	1867
III. CRIMINALIZATION OF POLYGAMY CAN SURVIVE STRICT SCRUTINY	1869
A. <i>Would the Utah Bigamy Statute Be Viewed as Narrowly Tailored?</i>	1870
B. <i>Religious Polygamy Has Its Own Unique Harms</i>	1871
CONCLUSION	1876

INTRODUCTION

The constitutionality of criminalizing¹ polygamy was once an easy decision for the courts. In 1879, the United States Supreme Court confined its substantive discussion of polygamy to two paragraphs in *Reynolds v. United States*,² and the Court has never seriously reconsidered the conclusions it reached.³ However, modern readers of *Reynolds* find the Court's conclusory and vague claims about the negative effects of polygamy on social order and political organization⁴ unconvincing and tainted by the Court's disparaging association of polygamy with "Asiatic and . . . African people."⁵ As same-sex

¹ This Article addresses only the issue of criminalizing the practice of polygamy, which would have to be resolved in favor of decriminalization before the issue of legal recognition could be raised.

² 98 U.S. 145 (1879).

³ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993); *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990).

⁴ 98 U.S. at 165–66 (“[A]ccording as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people . . . rests. . . . [P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.”).

⁵ *Id.* at 164.

relationships have become decriminalized⁶ and legally recognized,⁷ many have also found it difficult to understand why and how polygamy could continue to be criminalized. With the ground appearing to shift under what had previously been unquestioned rejection of polygamy, two recent major court decisions have tackled the issue head-on and have come out on opposite sides of the question.

In Canada, the British Columbia Supreme Court, addressing a constitutional reference to the court by the government of British Columbia, upheld the continued criminalization of polygamy under the Canadian Charter of Rights and Freedoms (Charter).⁸ The trial in *Reference re: Section 293 of the Criminal Code of Canada (Reference)*, under Canadian law,⁹ was able to be brought in the absence of a “case or controversy.”¹⁰ It involved forty-two days of hearings,¹¹ ninety affidavits and expert reports,¹² and “Brandeis Brief materials . . . compris[ing] several hundred legal and social science articles, books and DVDs.”¹³ Under Canadian law, limits on a right protected by the Charter must be justified by a purpose that is “pressing and substantial.”¹⁴ As such, a large part of the decision in *Reference* was concerned with identifying the harms of polygamy and determining whether they were pressing and substantial.¹⁵ In 2011, the court issued a comprehensive 228-page opinion setting out the psychological, sociological, and political impacts of polygamy, finding that this was an objective that was pressing and substantial¹⁶ and

⁶ *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

⁷ *E.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (requiring the federal government to recognize same-sex marriages in certain states); *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014) (holding Virginia’s ban on same-sex marriages unconstitutional); *Kitchen v. Herbert*, 755 F.3d 1193, 1229–30 (10th Cir. 2014) (holding Utah’s ban on same-sex marriages unconstitutional).

⁸ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, paras. 15–16 (Can.) [hereinafter *Reference*].

⁹ *See* Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 1 (Can.) (allowing the government to refer constitutional questions to the courts).

¹⁰ U.S. CONST. art. III, §§ 1–2; *see also* *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) (“[W]hen the subject is submitted to it by a party who asserts his rights in the form prescribed by law . . . [i]t then becomes a case . . .”).

¹¹ *Reference*, 2011 BCSC 1588, at 2.

¹² *Id.* para. 28.

¹³ *Id.* para. 32.

¹⁴ *Id.* paras. 1271–1273.

¹⁵ *Id.* para. 5 (“[T]his case is essentially about harm; more specifically, Parliament’s reasoned apprehension of harm arising out of the practice of polygamy.”); *id.* paras. 1279–1282 (setting out the positions of the parties regarding the pressing and substantial quality of the alleged harms).

¹⁶ *Id.* paras. 1331–1333.

concluding that the law was consistent with the Charter, despite the way in which it infringed upon liberty and freedom of religion.¹⁷

In the United States, in a case brought by the reality TV stars of *Sister Wives*, Kody Brown and his four wives (Meri, Janelle, Christine, and Robyn) and litigated by Professor Jonathan Turley of George Washington University Law School, the United States District Court for the District of Utah found Utah's criminalization of polygamy unconstitutional.¹⁸ *Brown v. Buhman* was decided on summary judgment based on twenty-two undisputed facts¹⁹ with the State failing to submit any admissible evidence on the social harms of polygamy and largely failing to substantively oppose the constitutional claims.²⁰ In its long and complex 2013 opinion in *Brown*, the Utah federal court held that parts of Utah's criminal bigamy statute²¹ failed to pass either strict, heightened, or rational basis scrutiny.²² The court upheld the statute insofar as it prohibited multiple legal marriages but struck down the statute's application to a practice of polygamy that involved multiple religious marriages for which legal recognition was not sought.²³

Although the focus of this Article is not on the comparative advantages or disadvantages of a constitutional reference versus a case or controversy approach, it is notable that the presence of an adversarial "case" in *Brown* failed to produce the expected full exploration of the issues; it was not equally litigated on both sides. In contrast, the law in *Reference* was both strongly defended and attacked: the Attorneys General of British Columbia and Canada took the position that the polygamy law was constitutional, an 'Amicus' appointed by the court opposed the law,²⁴ and eleven groups were granted Interested Person status,²⁵ four of whom opposed the law and seven of whom supported it.²⁶ The impact of the incomplete litigation in *Brown* was significant; the court failed to appreciate the extent of the harm sought to be

¹⁷ *Id.* para. 1359.

¹⁸ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1190 (D. Utah 2013).

¹⁹ *Id.* at 1178–80.

²⁰ *Id.* at 1176–77.

²¹ UTAH CODE ANN. § 76-7-101 (West 2004), *invalidated in part by Brown*, 947 F. Supp. 2d 1170. Utah does not distinguish between bigamy and polygamy in its criminal code.

²² *Brown*, 947 F. Supp. 2d at 1221–23.

²³ *Id.* at 1234.

²⁴ *Reference*, 2011 BCSC 1588, para. 18 (Can.).

²⁵ *Id.* para. 21. Interested Person status corresponds more closely to what would be termed an amicus in a United States court.

²⁶ *Id.* paras. 21–22.

avoided by criminalizing polygamy. At the same time, this failure can also be traced to the vague justifications given for criminalizing polygamy in cases that preceded *Brown*, starting with *Reynolds* and ending more recently with one Tenth Circuit and two Utah Supreme Court cases upholding Utah's polygamy law against constitutional attack: *Potter v. Murray City*²⁷ in 1985, *State v. Green*²⁸ in 2004, and *State v. Holm*²⁹ in 2006.

The failure to appreciate the harm of polygamy had an impact on all phases and levels of the constitutional scrutiny in *Brown*. It allowed the court to claim a crucial distinction between polygamy understood as multiple legally recognized marriages and polygamy understood as multiple nonlegally recognized marital relationships. As a result, the *Brown* court held that the decision in *Reynolds* was controlling *only* as to legally recognized polygamy because the facts of *Reynolds* did not involve multiple nonlegally recognized marital relationships.³⁰ *Brown* therefore upheld the Utah polygamy law insofar as it prohibits multiple legal marriages without engaging in any scrutiny, even as the court suggested that this prohibition too was unjustified.³¹ This then left the court free to subject the law's prohibition against entering into multiple unrecognized marital relationships by itself to a rigorous, contemporary constitutional analysis. However, it was exactly this isolation of non-legally recognized polygamy from legally recognized polygamy that allowed the court in *Brown* to justify strict scrutiny of the law as an impermissible "religious gerrymander" under the free exercise analysis set out in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.³² Later in the opinion, the court's isolation of nonlegally recognized polygamy from legally recognized polygamy made it possible to dismiss the most significant state interest in the prohibition of polygamy, protecting monogamous marriage, as not even a rational basis,³³ let alone a compelling one,³⁴ for criminalizing multiple legally unrecognized marital relationships.

²⁷ 760 F.2d 1065 (10th Cir. 1985) (holding that a police officer's termination of employment due to his practice of polygamy did not violate his right to free exercise of religion).

²⁸ 99 P.3d 820 (Utah 2004).

²⁹ 137 P.3d 726 (Utah 2006).

³⁰ *Brown v. Buhman*, 947 F.Supp. 2d 1170, 1190 (D. Utah 2013).

³¹ *Id.* at 1189 ("Reynolds is not, or should no longer be considered, good law . . .").

³² 508 U.S. 520 (1993) (finding a law to be operationally non-neutral and not of general applicability because the prohibition of animal slaughter contained so many exemptions that in the end it only targeted a particular religion's practice of animal sacrifice).

³³ *Brown*, 947 F. Supp. 2d at 1222–25.

³⁴ *Id.* at 1217–22.

However, with the deeper understanding of the negative social and political consequences of polygamy *Reference* provides, it becomes clear that tolerating polygamous relationships is no less problematic than recognizing them as legal marriages. Indeed, as has been the case with the move from decriminalizing same-sex relationships to recognizing same-sex marriage, tolerance may well be a step toward legal recognition. If *Reynolds* can be rehabilitated by this modern understanding of the social and political impacts of polygamy versus monogamy, then all three of the moves that allowed the *Brown* court to conclude that parts of the Utah polygamy law were unconstitutional will be foreclosed. Not only should the law not be subjected to strict scrutiny, but it should survive even if it is so scrutinized.

This Article will begin by identifying the state interests articulated in *Reynolds*, *Potter*, *Green*, and *Holm* and will explain why they are vulnerable to varying levels of scrutiny, including the level applied in *Brown*. It will then summarize the findings of the court in *Reference* that reveal more clearly the harms of polygamy, as well as its inverse relationship to monogamy. This will create a foundation for an analysis and critique of the reasoning in *Brown*, both as to its findings that strict scrutiny was justified and its holding that there was no state interest sufficient to justify the law's application to legally unrecognized polygamous marriages.

I. WHAT ARE THE HARMS OF POLYGAMY?

A. *The Harms Identified in Reynolds, Potter, Green, and Holm*

The *Reynolds* decision begins with a *Glucksberg*-like³⁵ account of the history of the social repudiation of polygamy. It is here that we find the infamous statement, “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.”³⁶ For the court in *Brown*, this statement cast everything the *Reynolds* Court had to say about polygamy under the shadow of “Orientalism,”³⁷ a term coined by Professor Edward Said to describe “an ideology of racial

³⁵ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (setting out an analytic method for fundamental rights that first requires a historical review of whether the alleged right is “deeply rooted in this Nation’s history” (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)) (internal quotation mark omitted)).

³⁶ *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

³⁷ *Brown*, 947 F. Supp. 2d at 1182.

inferiority . . . which . . . denigrates [Middle Eastern, African, and Asian cultures] as socially and racially inferior”³⁸ to the West. Consequently, the court dismissed the social harm identified by the *Reynolds* Court as nothing more than “introducing a practice perceived to be characteristic of non-European people—or non-white races—into white American society.”³⁹ Viewing *Reynolds* as finding polygamy harmful merely because it was a non-Western practice⁴⁰ undermined even what the *Brown* court saw as its most limited holding, that prohibiting legal recognition of religiously motivated polygamous marriage was constitutional.⁴¹ Nonetheless, *Brown* felt compelled to follow *Reynolds* as to this form of polygamy because the Supreme Court has continued to cite *Reynolds* approvingly, even as its free exercise jurisprudence has evolved.⁴²

If all the Supreme Court was saying in *Reynolds* was that polygamy is bad because it is a practice of racially inferior others, then I would agree with *Brown* that *Reynolds* should be tossed in the waste bin of history. However, *Reynolds* makes more substantive arguments about the harms of polygamy. The substantive points made by the Court are as follows: (1) polygamy is “an offence against society,”⁴³ (2) society is built upon marriage,⁴⁴ (3) marriage creates “social relations and social obligation and duties, with which government is necessarily required to deal,”⁴⁵ (4) the “principles on which the government . . . rests” correlate with whether monogamy or polygamy is allowed,⁴⁶ (5) “polygamy leads to the patriarchal principle . . . which . . . fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy,”⁴⁷ and (6) “an exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it.”⁴⁸

³⁸ *Id.* (citing EDWARD. W. SAID, ORIENTALISM 14–15, 92–110 (1979)).

³⁹ *Id.* at 1188.

⁴⁰ See also *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890) (expressing even more blatant Orientalist views toward polygamy by describing it as “a return to barbarism” and “contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world”).

⁴¹ *Brown*, 947 F. Supp. 2d at 1189.

⁴² *Id.*

⁴³ *Reynolds v. United States*, 98 U.S. 145, 165 (1879).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 165–66.

⁴⁷ *Id.* at 166.

⁴⁸ *Id.*

Two distinct state interests can be identified here. First, propositions 1–3 and 6 address the effects of polygamy on “society.” The Court suggests that marriage is a foundation of society; that it creates social relations, obligation, and duties that the government must deal with; and that even allowing polygamy to be practiced by a limited and isolated group within a monogamous society will have a negative impact on society. Propositions 4 and 5 identify what may be a different harm of polygamy: despotic and repressive government arises from polygamy while monogamy produces democratic- and liberty-enhancing government.

1. Harm to Society

The problem with the claim that polygamy is harmful to society is that we have no idea in what way this is the case. We can see that the obvious social relations, obligations, and duties created by marriage are spousal, parental, familial, and governmental. Furthermore, we can see that legislation will be necessary to protect these relationships, to secure individual rights and welfare, to maintain social harmony, and to enhance the potential contributions of families to society and nation. Thus, laws covering marriage rights and obligations, parental rights and obligation, inheritance laws, public support and education, and a host of other topics are needed. Polygamy might create different social relations, obligations, and duties that would require different legislation to address. However, what is missing here is how allowing polygamy to exist will “disturb the social condition” of the monogamous society around it.⁴⁹ Similar vague implications of harm to monogamous society can be found in subsequent polygamy opinions. *Potter* states without further explanation that “[m]onogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built.”⁵⁰ *Green* briefly mentions “the State’s interest in regulating marriage as an important social unit”⁵¹ but provides no further explanation about why varying the form of the social unit would implicate state interests. *Holm* says a bit more:

Our State’s commitment to monogamous unions is a recognition that decisions made by individuals as to how to structure even the most personal of relationships are capable of dramatically affecting public life.

⁴⁹ *Id.*

⁵⁰ *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985).

⁵¹ *State v. Green*, 99 P.3d 820, 830 (Utah 2004).

....

Moreover, marital relationships serve as the building blocks of our society. The State must be able to assert some level of control over those relationships to ensure the smooth operation of laws and further the proliferation of social unions our society deems beneficial while discouraging those deemed harmful. The people of this State have declared monogamy a beneficial marital form and have also declared polygamous relationships harmful.⁵²

Despite more words, *Holm* also does not explain how polygamy is harmful to “public life” or society.

The district court in *Potter* did make one significant point that echoes the *Reynolds* Court’s claim that a polygamous group within a monogamous society would eventually negatively impact the monogamous society, an argument that was also significant to the *Reference* court. In response to a claim that an exemption from the law regarding polygamy only for those practicing religious polygamy would have a minimal impact, the court reasoned that, given the “increasingly broad scope” of religious belief, “[t]he gate would be open by the developing trend of decision to everyone who might desire more than one wife at a time on the basis of his own particular religious belief.”⁵³ Here, the negative impact is on monogamy itself. Given an opportunity, the district court suggests that many men might choose polygamy over monogamy. However, in the absence of a reason why the state has a strong interest in preserving monogamy or why the choice of polygamy would lead to specific harmful consequences, this possibility on its own fails to justify criminalizing polygamy.

While a preference for monogamy over polygamy, due to its possible relationship to liberty and democracy, might be sufficient to withstand the most minimal rational basis review,⁵⁴ this would not be the case if the more rigorous rational basis review we have seen applied to prohibitions against same-sex marriage were to be applied. In same-sex marriage cases, states were

⁵² State v. Holm, 137 P.3d 726, 743–44 (Utah 2006).

⁵³ Potter v. Murray City, 585 F. Supp. 1126, 1139 (D. Utah 1984); accord MARCI A. HAMILTON, GOD VS. THE GAVEL 60–62 (rev. 2d ed. 2014) (describing how religious exemptions for childhood vaccinations “spur[ed] claims for nonreligious exemptions, and a breakdown in the purpose of the law in the first place”).

⁵⁴ E.g., Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) (speculating about reasons the legislature might have required a new prescription from an ophthalmologist or optometrist before an optician could duplicate or replace eyeglass lenses and finding the possibility of such reasons sufficient to address equal protection concerns).

required to do more than claim that society would be harmed by same-sex marriage. They had to identify specific harms and show a possible connection between the prohibited practice and these harms.⁵⁵ When they were unable to explain how same-sex marriage would lead to harms, such as undermining heterosexual marriage or harming children, legal prohibitions against same-sex marriage were found to fail “rational” basis scrutiny.⁵⁶ If criminal laws against polygamy are evaluated under the more rigorous rational basis scrutiny seen in sexual orientation cases such as *Romer v. Evans*,⁵⁷ states will need to both be more specific about the harms to society avoided and offer more support for claims that these harms will actually arise.

2. *Despotic Government*

The second claim made by the *Reynolds* Court, that polygamy produces despotic government, is more specific than the harm to society claim. Furthermore, avoiding despotism would certainly seem to be an important, if not compelling, state interest allowing prohibitions on polygamy to potentially survive heightened or strict scrutiny. Indeed, it could be argued that this interest was understood as so compelling and crucial that Congress felt it necessary to clarify, in connection with the entrance of Utah, New Mexico, and Arizona into the Union, that state power over marriage could never include the power to allow polygamy.⁵⁸ However, it is not obviously true that polygamy

⁵⁵ *E.g.*, *De Leon v. Perry*, 975 F. Supp. 2d 632, 652 (W.D. Tex. 2014) (finding the Texas ban on same-sex marriage unconstitutional under rational basis review).

⁵⁶ *Id.* at 652–54.

⁵⁷ 517 U.S. 620, 635 (1996) (requiring the state to specify objectives for a Colorado constitutional amendment that repealed and prohibited state and local laws barring discrimination based on sexual orientation and finding that the specified objectives, freedom of association of landlords and employers and conservation of resources to fight discrimination against other groups, were not credibly related to the much broader amendment).

⁵⁸ Congress made it a condition of the admission of the states of Utah, New Mexico, and Arizona to the Union that polygamy be forever prohibited. *State v. Holm*, 137 P.3d 726, 739 (Utah 2006); *id.* at 757 (Nehring, J., concurring). In *Potter*, the defendant argued that the bigamy law was forced upon the state through the requirement that Utah’s constitution prohibit polygamy. *Potter*, 585 F. Supp. at 1136–37. The defendant also argued that this violated the equal footing doctrine, requiring that “each state is ‘equal in power, dignity, and authority,’ and that a state’s sovereign power may not be constitutionally diminished by any conditions in the acts under which the State was admitted to the Union,” and he further argued that “any conditions imposed by Congress ‘would not operate to restrict the State’s legislative power in respect of any matter which was not plainly within the regulating power of Congress.’” *Potter v. Murray City*, 760 F.2d 1065, 1067 (10th Cir. 1985) (quoting *Coyle v. Smith*, 221 U.S. 559, 567, 573–74 (1911)). The *Potter* court assumed “*arguendo*” that these conditions did violate the equal footing doctrine but found that since the state of Utah had not attempted to change its laws about polygamy, its power had not been diminished, and therefore the challenge to the bigamy law on this basis “lack[ed] merit.” *Id.* at 1067–68. One need not assume that the equal

does produce despotic government, and the *Reynolds* Court had no way to prove that it did. The Court credited this insight to Professor Francis Lieber, a German educated immigrant who is considered the “founder of American political science,”⁵⁹ but whom we might today view more as a political or anthropological philosopher. His ideas were initially influenced by Georg W.F. Hegel’s social and political philosophy⁶⁰ and were somewhat derivative of Hegel’s work.⁶¹ Both Hegel and Lieber relied upon account of societies outside of Europe that preceded the development of anthropological methods of objective observation and analysis and were undoubtedly tainted by racism.⁶²

There are two main problems with using this potential state interest to justify criminalizing polygamy. First, the relationship between family structure and political form remains fundamentally speculative rather than empirical. Indeed, my own attempt to construct a more modern philosophical-anthropological-psychological analysis that can trace a necessary relationship between monogamy and liberal democracy and between polygamy and despotism along the grounds argued by Lieber and Hegel suffers from this flaw. I summarize my account briefly here to demonstrate that the nature of these arguments makes them both difficult to understand and perhaps impossible to empirically prove.

[T]he contributions of the monogamous family to the modern liberal state can be seen as three-fold: 1) within the monogamous family children are nurtured to become individuals even as the individuality of their parents is reinforced and further developed; 2) the monogamous family provides a relatively weak hold on its members, both grown children and marital partners, and has little social utility beyond developing individuals and providing for their most particular needs, thus requiring the existence of a separate public sphere where individuality can be recognized as a universal quality of others that must be protected by the rule of law rather than by love; and

footing doctrine was violated, however, if all states’ power over marriage is limited to monogamous marriage because polygamous marriage undermines the preconditions of our national political structure.

⁵⁹ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1187 (D. Utah 2013) (quoting EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS; A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 155 (1988)) (internal quotation mark omitted).

⁶⁰ Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1523 (1997) (showing that Lieber’s attendance at German universities overlapped not only with lecture series given by Hegel but the growing influence of his thought).

⁶¹ *Id.* at 1523 n.120.

⁶² *Id.* at 1534 n.196 (noting that Hegel relied on Jesuit missionary accounts of Chinese government and familial relations and that, while his accounts were skewed by racism, there was a kernel of truth to the claim that Chinese family relationships were patriarchal and the government was despotic).

3) monogamous marriage teaches autonomous individuals that social unity is the true experience of individuality by making the transcendent experience of romantic love inextricably tied to a legal institution of marriage made possible by a state defined by the rule of law.

....

... [P]olygamous marriages operate[] to devalue and repress the individuality of all family members, promote[] the significance of kinship ties in a way which prevent[s] notions of abstract equality and common state citizenship, institutionalize[s] the expanded family as the greater political structure, and socialize[s] its adherents to accept personal, hierarchical rule as the model for the exercise of governmental power.⁶³

In truth, it is hard to imagine a court using an analysis like this to justify criminalizing polygamy.

The reality is that not only have such relationships between family structure and political structure not yet been proven by empirical social sciences, it is not clear that this is something that will ever be possible. The complexity of the causal relationships from individual psychology to social organization at the level of a nation is far beyond at least our current social science capacities. Perhaps for this reason, none of the subsequent cases of *Potter*, *Green*, or *Holm* identified democracy versus despotism as a relevant state interest in criminalizing polygamy. Scholarly testimony in *Reference* did touch upon the possibility that monogamy “which represents a kind of sexual egalitarianism, may have created the conditions for the emergence of democracy and political equality, including women’s equality.”⁶⁴ However, the *Reference* court

⁶³ Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 474, 487 (2003); see also Strassberg, *supra* note 60, at 1518–23 (filling out Lieber’s analysis of polygamy and the patriarchal principle); *id.* at 1532–36 (explaining Hegel’s theory of the relationship between polygamy and despotism); *id.* at 1536–56 (developing a modern Hegelian theory of the relationship between monogamy and liberal democracy); *id.* at 1576–94 (applying a revised gender-neutral theory to evaluate nineteenth-century Mormon polygamy).

⁶⁴ *Reference*, 2011 BCSC 1588, para. 167 (Can.) (quoting the introductory summary of the report of Dr. Joseph Henrich, Associate Professor in the Psychology and Economics Departments at the University of British Columbia). The court went on to quote extensively from Dr. Henrich’s report, which stated:

Monogamy may foster the emergence of democratic governance and female equality by:

- Imposing the same rules on the king and peasant (each can only have one wife), which established a first foothold on the principles of equality among men.

concluded that it was not possible to say definitively that monogamy either was or is essential to democracy.⁶⁵ However, it is worth noting that no one has disproved the connection between monogamy and a democratic, rights based state either. The stakes may simply be larger than we can prove. Considering this potential state interest from the perspective of different levels of scrutiny, it may be that it could survive rational basis review. Whether it is philosophical, historical, or even statistical analysis that suggests a connection, it may be that a legislature could rationally rely on such scholarship to ban polygamy. However, if heightened or strict scrutiny were to be applied, the speculative nature of this harm might well ensure that it would not survive scrutiny.

3. *Maintaining the Network of Laws Governing Monogamy*

The *Potter* court made no reference to a state interest in preventing despotism but instead argued as follows: Utah “has established a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage.”⁶⁶ Subsequent to *Potter*, the Supreme Court of Utah adopted this as a compelling state interest as well, describing it as an interest “in maintaining its network of laws.”⁶⁷ However, the fact that Utah has had a *strong* interest in monogamy as reflected in its laws both protecting and relying upon monogamy does not make “maintaining” this network of laws a legitimate, important, or even compelling

-
- Reducing the competition for females, which decreases the tendency for males to tightly control their wives and daughters—that is, imposing monogamy (on males and females) reduces patriarchal motivations in males by reducing competition for females, which may in turn permit more egalitarianism in the household.
 - Dissipating the pool of unmarried males that were previously harnessed by rulers in wars of aggression.

Id.; see also *id.* para. 164 (noting the testimony of Dr. Scheidel “that it is plausible . . . that [socially imposed universal monogamy] has been a contributing factor to . . . western development”). Quoting the testimony of Professor John Witte, Jr., Professor and Director of the Center for the Study of Law and Religion at Emory University, the court observed that the “mutuality inherent in the dyadic structure . . . produces children who are habituated . . . to the norms of citizenship . . . [who] [a]re capable of seeing how authority and liberty can properly be balanced, how equality and charity can properly be balanced,” and that this structure is thought to be “the first school of justice.” *Id.* para. 174.

⁶⁵ See *id.* paras. 534, 536 (noting that these conclusions were “more speculative and could not be as thoroughly supported by empirical evidence”).

⁶⁶ *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (quoting *Potter v. Murray City*, 585 F. Supp. 1126, 1138 (D. Utah 1984)).

⁶⁷ See *State v. Green*, 99 P.3d 820, 830 (Utah 2004).

state interest. Indeed, this argument seems to fall within the fallacy of assuming that what is the case ought to be the case. Indeed, this very same argument either was⁶⁸ or could easily have been made to oppose same-sex marriage, which also required state laws to be adapted to situations not at issue for different-sex marriages, and arguments of this sort did not even survive rational basis review.⁶⁹ It might be that such an interest would be sufficient to survive a true rational basis evaluation, if that is what were appropriate for polygamy prohibitions. However, a mere interest in not being bothered to adjust a great many laws to accommodate polygamists would not seem sufficient to justify burdening their more fundamental individual rights and thus would not be viewed as an important or compelling state interest.

However, there is also a further problem with maintaining the “network of laws” as a state interest. If we look at the district court opinion in *Potter*, which first articulated this state interest later adopted by the Tenth Circuit, we find the following statements justifying the State’s *choice* of monogamy as the basis of its regulation of marriage: “In exercising that right, the state ‘represent[s] the collective expression of moral aspirations’ and there is ‘an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.’”⁷⁰ Since *Lawrence v. Texas* held that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,”⁷¹ a default to majority morality as a justification for a criminal law such as Utah’s bigamy law has been seen as problematic, if not illegitimate. Nor do the facts in *Brown* fall within any of the possible limits set out in *Lawrence*,⁷² as Kody Brown was only seeking to avoid criminal prosecution for his religious marriages, not legal recognition of them.

⁶⁸ The claim that the state had a legitimate interest in maintaining the “tradition” of different-sex marriage was one of the state interests offered, unsuccessfully, to oppose recognition of same-sex marriage. *See, e.g., De Leon v. Perry*, 975 F. Supp. 2d 632, 655–56 (W.D. Tex. 2014). It was never entirely clear what “tradition” meant, but it could have been understood to mean that the state had an interest in not having to adjust a complicated system of law to cover same-sex couples.

⁶⁹ *Id.*

⁷⁰ *Potter*, 585 F. Supp. at 1138 (alteration in original) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring)).

⁷¹ 539 U.S. 538, 577 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

⁷² *Id.* at 578 (“The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

Ultimately, the problem with the “network of laws” state interest is that it fails both to explain the value of monogamy to the state and why allowing polygamy would undermine this.

4. *Marriage Fraud*

The *Green* decision articulated three new state interests. First, “prohibiting bigamy implicates the State’s interest in preventing the perpetration of marriage fraud.”⁷³ The problem with this state interest is not that it is not clear or important but rather that it has no application to the modern practice of polygamy at issue in *Green*. Utah’s bigamy statute addresses two distinct phenomena: entering into a legal marriage that is in fact void because of a prior existing legal marriage (bigamy) and entering into multiple concurrent marital relationships with the full knowledge of all persons (polygamy).⁷⁴ Prior to the decision in *Reynolds*, Mormon polygamists did commit bigamy because they attempted to legally marry multiple wives. While there was no secret about the existence of other wives, there may have been a fraudulent aspect to creating an appearance to each wife that their marriage was also legally recognized. After *Reynolds*, Mormon polygamists eschewed more than one legal marriage at a time. This left only the doubly fraudulent as bigamists because their entrance into what appeared to be a legal marriage depended upon the new spouse being unaware of both the existence of a legal wife and the void status of their own marriage to the bigamist.⁷⁵ Intentional polygamists, such as Mormon Fundamentalists, have no need to commit fraud on anyone, as long as they avoid seeking legal recognition for more than one marriage. As a result, the state interest in preventing the perpetration of marriage fraud is not really relevant to the polygamous marriages at issue in *Green*.

⁷³ State v. Green, 99 P.3d 820, 830 (Utah 2004).

⁷⁴ See *id.* at 825 (“A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.” (quoting UTAH CODE ANN. § 76-7-101(1) (West 2003))).

⁷⁵ The only possible fraud present in polygamy might be if it involved a marital solemnization ceremony that suggested a legally recognized marriage would result and multiple spouses believed this to be true, despite not having participated in the acquisition of a marriage license. For example, the wedding vows quoted in *State v. Holm* included the words “lawful and wedded wife, and . . . lawful and wedded husband.” 137 P.3d 726, 736 (Utah 2006). However, there is no reason to think that either party thought a legal marriage would in fact result. See *id.* at 759 n.1 (Durham, C.J., concurring in part and dissenting in part). More importantly, there is no reason to assume such fraud is necessarily a feature of intentional polygamy.

5. *Misuse of Government Benefits*

A new state interest identified in *Green* was the state's "interest in preventing the misuse of government benefits associated with marital status."⁷⁶ However, we are not told by *Green* what this misuse is or how it is connected to polygamy. There is simply no support given for the claim that "prohibiting bigamy implicates th[is] State[] interest."⁷⁷

Three years later, the majority opinion in *Holm* did not mention this state interest at all in justifying the prohibition on polygamy.⁷⁸ The dissents in *Holm* and *Brown* considered this state interest and dismissed it as unfounded. Taking this language to refer to the collection of cash welfare benefits as unmarried parents by nonlegally married polygamous wives,⁷⁹ they argued that since these "wives" were not and could not be legally married to the father of their children, no fraud is involved in claiming benefits as unmarried.⁸⁰

6. *Protecting Women and Children from Abuse*

The *Green* court found that the most important state interest implicated in criminalizing polygamy was to "protect[] vulnerable individuals from exploitation and abuse."⁸¹ Citing a student note, the *Green* court stated that "[t]he practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support."⁸² The *Green* court noted in a footnote that the facts in *Green* itself illustrate this abuse, as Green was convicted of criminal nonsupport and rape

⁷⁶ *Green*, 99 P.3d at 830.

⁷⁷ *See id.*

⁷⁸ *See Holm*, 137 P.3d at 743–45 (scrutinizing the criminalization of polygamy given the substantive due process rights established by *Lawrence* but failing to mention preventing misuse of government benefits as a state interest justifying the law).

⁷⁹ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1219 (D. Utah 2013).

⁸⁰ Allegations of substantial cash assistance going to "unmarried" polygamous wives and their children have largely been debunked. *See* Brooke Adams, *Facts Don't Fit Claims of FLDS Welfare Fraud*, SALT LAKE TRIB. (Jan. 4, 2009, 6:49 PM), http://www.sltrib.com/news/ci_11368343 (quoting Curt Stewart, spokesman for the Utah Department of Workforce Services, as saying that they are not finding rampant welfare fraud in the polygamous community).

⁸¹ *Green*, 99 P.3d at 830.

⁸² *Id.* (citing Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 239–45 (2001)).

of a child in addition to bigamy.⁸³ Similarly, the *Holm* decision repeated the above quote in its substantive due process review of the bigamy law and noted that Holm was a polygamist also convicted of unlawful sexual conduct with a minor.⁸⁴ The *Green* court, not the *Holm* court, added the argument that since “the closed nature of polygamous communities makes obtaining evidence of and prosecuting these crimes challenging,”⁸⁵ prosecuting the polygamy “that provides a favorable environment in which crimes of physical and sexual abuse can thrive”⁸⁶ is a reasonable strategy to protect women and children.⁸⁷ Thus, in both *Green* and *Holm*, this state interest was sufficient to survive rational basis scrutiny. The court in *Brown* subjected this state interest to all three levels of scrutiny, and not only did it find that this state interest was unable to survive strict or heightened scrutiny, it also found that it could not survive rational basis scrutiny,⁸⁸ in direct contrast to *Green* and *Holm*. However, the argument was the same, regardless of the scrutiny applied. This calls into question whether the court in *Brown* truly applied a lower level of scrutiny here at all.

Looking more closely at the scrutiny of this state interest in *Brown*, it appears that the summary and largely uncontested nature of the proceedings in *Brown* had the largest impact here. The *Brown* court stated that although he was “aware of the many reports that circulate implying ‘the possibility that other criminal conduct may accompany the act of bigamy,’”⁸⁹ “Defendant provided no competent evidence appropriate for summary judgment that could influence the court’s consideration.”⁹⁰ However, it is not clear that the state would have been able to submit evidence of the abuse of children and women in polygamous families that went beyond anecdotal evidence arising out of either specific prosecutions or reports of ex-community members about their own experiences and observations.

⁸³ *Id.* n.14. The court also cited *State v. Kingston*, 46 P.3d 761 (Utah Ct. App. 2002), as an additional example, where the court of appeals affirmed the conviction of a polygamist for incest and sexual conduct with a sixteen-year-old.

⁸⁴ *State v. Holm*, 137 P.3d 726, 730, 744 (Utah 2006).

⁸⁵ *Green*, 99 P.3d at 830.

⁸⁶ *Id.* (quoting *Vazquez*, *supra* note 82, at 243) (internal quotation mark omitted).

⁸⁷ *Id.* (concluding that the interest in protecting women and children for exploitation and abuse is a “legitimate, if not compelling, interest[] of the State”).

⁸⁸ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1221–25 (D. Utah 2013).

⁸⁹ *Id.* at 1220–21 (footnote omitted) (quoting *Holm*, 137 P.3d at 775 (Durham, C.J., concurring in part and dissenting in part)).

⁹⁰ *Id.* at 1220 n.64.

In the absence of available evidence of either a statistical correlation or causal relationship between polygamy and such abuse,⁹¹ criminalizing polygamy can only be a very rough method of trying to prevent such abuse, which makes it impossible to meet the strict and heightened scrutiny requirements that the means be “narrowly tailored” to achieve the state objective. Thus, the *Brown* court argued that the criminalization of polygamy has not been shown to be “a necessary tool for the state’s attacks of such harms.”⁹² The State defended the law criminalizing polygamy alone as necessary to address this abuse because evidence of such abuse is difficult to obtain in the insular and tightly controlled polygamous communities. It is easier to find evidence of bigamy, as polygamists are quite open about their domestic arrangements within the community. Once a charge of bigamy has been made, the State is in a better position “to gather the evidence required to prosecute those engaged in more specific crimes.”⁹³ The *Brown* court noted, however, that Utah has specific laws that target incest, sexual conduct with minors, domestic abuse, kidnapping, etc.⁹⁴ and that there was no evidence to suggest that the state had ever been unable to bring such a specific charge in a case also involving polygamy.⁹⁵ Indeed, the *Brown* court argued that the criminalization of religious cohabitation through the bigamy statute actually impaired the State’s ability to prosecute abuse,⁹⁶ noting that the insular and isolated nature of some of the more abusive polygamous practitioners was itself a response to the historical criminal prosecution of polygamists⁹⁷ that resulted in mass arrests of fathers and mothers and traumatic separation of parents from children.⁹⁸

⁹¹ See *Holm*, 137 P.3d at 774 (Durham, C.J., concurring in part and dissenting in part).

⁹² *Brown*, 947 F. Supp. 2d at 1220 (quoting *Holm*, 137 P.3d at 774 (Durham, C.J., concurring in part and dissenting in part)).

⁹³ *Id.* (quoting *Holm*, 137 P.3d at 775 (Durham, C.J., concurring in part and dissenting in part)).

⁹⁴ *Id.* at 1221.

⁹⁵ *Id.* at 1220.

⁹⁶ *Id.* at 1221; see also JANET BENNION, POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM 4 (2012) (noting that criminalization “makes it easier for abusive polygamists to thrive in isolated, rural regions”); *id.* at 6 (recounting the testimony that decriminalization would “increase the possibility that women and children living in polygamous structures could get help”).

⁹⁷ *Brown*, 947 F. Supp. 2d at 1221.

⁹⁸ See BENNION, *supra* note 96, at 27 (describing the 1953 Short Creek Raid, in which 31 men and 9 women were arrested, and 263 children were put into state custody).

B. The Harms Identified in the British Columbia Reference

The *Brown* court found that the harms of polygamy identified in *Reynolds*, *Potter*, *Green*, and *Holm* could not survive rational basis, heightened, or strict scrutiny. In large part this was because the only credible harm of polygamy that was identified was a possible association of abuse of women and children with polygamy; however, the evidence of a connection between abuse and polygamy seemed to be anecdotal at best. Whether this possible connection should have been found insufficient to justify the law under rational basis scrutiny is arguable, but it is certainly less so for heightened or strict scrutiny. To survive the strict and heightened scrutiny requirement that the polygamy law be narrowly tailored to prevent the harms of polygamy, the State needed to show that there were specific harms that were more than tangentially connected to polygamy. However, no prior opinion had gone beyond vague claims about a relationship between forms of marriage and society, and the State of Utah largely rested its arguments on these prior opinions. The court in *Reference* remedies these failures by identifying wide ranging, inherent harms of polygamy that make blanket criminalization the only effective way to avoid these harms.

The *Reference* court identified the pressing and substantial objectives of the Canadian statute criminalizing polygamy as “the prevention of harm to women, to children and to society”⁹⁹ and “the preservation of monogamous marriage.”¹⁰⁰ Ultimately, the court found that there was an inverse relationship between polygamy and monogamy¹⁰¹: monogamy benefits women, children, and society in precisely all the ways polygamy harms them.¹⁰² Furthermore, in light of the court’s finding that decriminalization of polygamy would result in a non-trivial increase in the practice of polygamy in Canada,¹⁰³ decriminalization would directly threaten the practice of monogamy itself.¹⁰⁴ This in turn would erode the benefits of monogamy to individuals and society, even as it expanded the harms of polygamy to individuals and society.

The findings of the court concerning the harms of polygamy were based on empirically grounded expert testimony as well as both positive and negative

⁹⁹ *Reference*, 2011 BCSC 1588, para. 1331 (Can.).

¹⁰⁰ *Id.* para. 1332.

¹⁰¹ *Id.* para. 885.

¹⁰² *Id.* para. 883.

¹⁰³ *Id.* para. 576.

¹⁰⁴ *Id.* para. 1343.

personal accounts from individuals who had lived in polygamous households.¹⁰⁵ The three main expert witnesses providing evidence of the harms of polygamy, benefits of monogamy, or both, were Dr. Joseph Henrich, an evolutionary psychologist¹⁰⁶ who conducted “an extensive review of the academic literature on polygyny in the sciences and social sciences”¹⁰⁷ for the reference; Dr. Shoshana Grossbard, an economist¹⁰⁸ with a special expertise in the economic effects of polygyny, who presented economic analyses of polygyny using data collected by others,¹⁰⁹ and Dr. Rose McDermott,¹¹⁰ a political scientist who engaged in both a review of the academic literature on polygyny and produced an original statistical analysis undertaken specifically for the reference.¹¹¹ Dr. McDermott’s work is also the subject of a separate article in this Issue. Dr. McDermott’s statistical analysis was based on a unique dataset, WomanStats Project Database, with ten years of data about women and children from 171 countries along with separate data on their nation states.¹¹²

Dr. McDermott’s statistical analysis demonstrated that “the harms of polygyny do not depend upon a particular regional, religious or cultural context. They can be generalized, and they can be expected to occur wherever polygyny exists.”¹¹³ The court noted that the “convergence of the evidence on the question of harm, from high level predictions based on human evolutionary psychology, to the recurring harms identified in intra-cultural and cross-cultural studies, to the ‘on the ground’ evidence of polygyny in contemporary North America . . . [is] striking.”¹¹⁴ The court concluded that

¹⁰⁵ *Id.* paras. 487–491.

¹⁰⁶ Dr. Joseph Henrich is “an Associate Professor in the Psychology and Economics Departments at the University of British Columbia. He also holds a prestigious Tier 1 Canada Research Chair in Culture, Cognition and Evolution,” and he “was qualified as an expert in psychology, particularly evolutionary psychology, in economics and in anthropology, as well as in the interdisciplinary field of culture, cognition and co-evolution.” *Id.* para. 495.

¹⁰⁷ *Id.* para. 496.

¹⁰⁸ Dr. Grossbard is a Professor of Economics at San Diego State University. *Id.* para. 588.

¹⁰⁹ *Id.* paras. 589–590.

¹¹⁰ “Dr. Rose McDermott is a Professor of Political Science at Brown University. She also holds an M.A. in Experimental Social Psychology from Stanford University.” *Id.* para. 580.

¹¹¹ *Id.* paras. 609–612 (describing the work of Dr. Rose McDermott); *see also* Rose McDermott & Jonathan Cowden, *Polygyny and Violence Against Women*, 64 EMORY L.J. 1767 (2015).

¹¹² *Reference*, 2011 BCSC 1588, paras. 613–615 (describing Dr. McDermott’s WomanStats Project Database and another database).

¹¹³ *Id.* para. 624.

¹¹⁴ *Id.* para. 492.

the harms of polygyny are “endemic [and] . . . inherent.”¹¹⁵ They “are not simply the product of individual misconduct; they arise inevitably out of the practice.”¹¹⁶ As a result, not only did the evidence show “a reasoned apprehension of harm”¹¹⁷ sufficient to meet the Canadian legal standard for criminalizing an activity,¹¹⁸ the court found that it also met a higher standard of “demonstrat[ing] ‘concrete evidence’ of harm.”¹¹⁹

1. *The Cruel Arithmetic of Polygamy*

Any understanding of the harms arising from polygamy must begin with an appreciation of the “‘cruel arithmetic’ of polygamy”¹²⁰: “when some men are able to have multiple wives simultaneously, other men will be unable to find wives.”¹²¹ In particular, it is likely to be low-status men who will be most likely to be unable to marry,¹²² as they will be the least attractive marriage partners to potential wives and their families.¹²³

A simple model of a polygynous society developed by Dr. Henrich shows how even a low level of polygamy leads to a considerable pool of unmarried men:

Imagine a society of 40 adults, 20 males and 20 females . . . Suppose those 20 males vary from the unemployed high-school drop outs to CEOs, or billionaires . . . Let’s assume that the twelve men with the highest status marry 12 of the 20 women in monogamous marriages. Then, the top five men (25% of the population) all take a second wife, and the top two (10%) take a third wife. Finally, the top guy takes a fourth wife. This means that of all marriages, 58% are monogamous. Only men in the to [sic] 10% of status or wealth married more than two women. The most wives anyone has is four.

¹¹⁵ *Id.* para. 1045.

¹¹⁶ *Id.*

¹¹⁷ *Id.* para. 772.

¹¹⁸ *See id.*

¹¹⁹ *Id.* para. 1044; *see also id.* para. 792 (finding that positive witness accounts could not withstand “the overwhelming weight of the evidence that polygyny has harmful consequences for both the individuals involved and the societies of which they are a part”).

¹²⁰ *Id.* para. 1333.

¹²¹ *Id.* para. 505.

¹²² *Id.*

¹²³ *Id.* paras. 500, 555.

The degree of polygynous marriage is not extreme in cross-cultural perspective . . . but it creates a pool of unmarried men equal to 40% of the male population.¹²⁴

Dr. McDermott found that “polygyny causes the proportion of young unmarried men [to unmarried women] to be high, up to a ratio of 150 men to 100 women.”¹²⁵

2. *Harm to Polygynous Wives and Women in General*

The harm to women from polygamy begins with the fact that polygamy causes greater competition between men for wives, which “creates pressure to recruit increasingly younger brides into the marriage market.”¹²⁶ In polygynous societies, women are more likely to “marry[] before age 18, or be[] ‘promised’ in marriage prior to age 18.”¹²⁷ At the same time, these polygynous wives will have more children than monogamous wives.¹²⁸ The harmful effects of “early sexual activity, pregnancies and childbirth [and] . . . [s]hortened inter-birth intervals”¹²⁹ include health impacts such as a greater likelihood of dying in childbirth and living a shorter life.¹³⁰ Early marriage also means that the socioeconomic development of polygynous wives is limited¹³¹ as a result of less education,¹³² lower literacy levels, and less participation in the labor force.¹³³

The competition for wives also “causes men (as fathers, husbands and brothers) to seek to exercise more control over the choices of women, increasing gender inequality and undermining female autonomy and rights. This is exacerbated by larger age disparities between husbands and wives.”¹³⁴ Women become “viewed as commodities.”¹³⁵ This control and commodification is reflected in numerous effects on women, widely ranging

¹²⁴ *Id.* para. 505 (omissions in original).

¹²⁵ *Id.* para. 586.

¹²⁶ *Id.* para. 779.

¹²⁷ *Id.* para. 499; *see also id.* paras. 523–533, 621.

¹²⁸ *Id.* para. 621.

¹²⁹ *Id.* para. 784.

¹³⁰ *Id.* para. 782.

¹³¹ *Id.* paras. 621, 784.

¹³² *Id.* paras. 622, 789.

¹³³ *Id.* para. 533.

¹³⁴ *Id.* para. 779.

¹³⁵ *Id.* para. 532.

from a lack of reproductive autonomy,¹³⁶ leading to higher fertility,¹³⁷ lower levels of divorce,¹³⁸ and greater levels of domestic violence,¹³⁹ sex trafficking, genital mutilation,¹⁴⁰ and “discrimination under the law.”¹⁴¹ In addition, women in polygynous relationships also have to deal with “co-wife conflict,”¹⁴² high rates of marital dissatisfaction and low levels of self-esteem,¹⁴³ inadequate financial support “as resources may be inequitably divided or simply insufficient,”¹⁴⁴ and “higher rates of depressive disorders and other mental health issues.”¹⁴⁵

3. *Harm to Children of Polygynous Families*

Children, too, were found by the court to have worse outcomes in polygamous families because polygamy causes men to “reduce investment in wives and offspring as they spread their resources more thinly across larger families and increasingly channel those resources into obtaining more wives.”¹⁴⁶ The court found that harm to children included the following:

higher infant mortality . . . more emotional, behavioural and physical problems, as well as lower educational achievement . . . [arising out of] higher levels of conflict, emotional stress and tension in polygynous families . . . inability of fathers to give sufficient affection and disciplinary attention to all of their children [and] . . . enhanced risk of psychological and physical abuse and neglect.¹⁴⁷

Lack of educational opportunities due to limited financial resources are not limited to girls but also affect boys in polygynous families.¹⁴⁸

For young men and boys, “[t]he sex ratio imbalance inherent in polygyny means that young men are forced out of polygamous communities to sustain

¹³⁶ *Id.* para. 782.

¹³⁷ *Id.* para. 621.

¹³⁸ *Id.* paras. 532–533.

¹³⁹ *Id.* paras. 584, 621.

¹⁴⁰ *Id.* para. 621.

¹⁴¹ *Id.* para. 622.

¹⁴² *Id.* para. 584.

¹⁴³ *Id.* para. 782.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; *see also id.* paras. 603, 607–608, 696, 699–700, 780.

¹⁴⁶ *Id.* para. 779.

¹⁴⁷ *Id.* para. 783; *see also id.* para. 603.

¹⁴⁸ *Id.* para. 621.

the ability of senior men to accumulate more wives. These young men and boys often receive limited education . . . few life skills and little social support.”¹⁴⁹ As a result, these young men and boys achieve lower levels of employment.¹⁵⁰

4. *General Social Harms*

Many of the individual impacts of polygyny on women, men, and children can also be seen to have larger social consequences. We have seen that the cruel arithmetic of polygamy creates a pool of unmarried men, who are likely low status. In highly polygynous closed communities, this results in “[u]p to half of the boys . . . [being] ejected from their communities.”¹⁵¹ Considering that these boys are minimally educated but must support themselves, they are likely to become either an economic burden or drag on the society they end up in. To the extent that this pool of men cannot be dumped on a non-polygynous society but would remain within their original polygynous society, they are “incentivized to take substantial risks so they can eventually participate in the mating and marriage market.”¹⁵² Statistically, this can be shown to take the form of increased levels of violence, crime, and other antisocial behaviors.¹⁵³ On a larger social level, Dr. Henrich more speculatively predicted that the pool of unmarried men could lead to greater military aggression towards other communities or nations.¹⁵⁴ This aggression could arise from a perceived need to prevent competition for existing unmarried women from men outside the community or as providing a source of new potential wives or resources that would allow the acquisition of wives. Alternatively, war may simply be a way for rulers to direct the antisocial tendencies of these men outside the community, while at the same time reducing their numbers through casualties.¹⁵⁵ These speculations were supported to some extent by Dr. McDermott’s findings that “[s]tates with higher levels of polygyny spend more money per capita on defence, particularly on arms expenditures.”¹⁵⁶ This leads

¹⁴⁹ *Id.* para. 785.

¹⁵⁰ *Id.* para. 586.

¹⁵¹ *Id.* paras. 586, 789.

¹⁵² *Id.* para. 505.

¹⁵³ *Id.* paras. 499, 507–516, 587, 787.

¹⁵⁴ *Id.* paras. 534, 536.

¹⁵⁵ *Id.* para. 536.

¹⁵⁶ *Id.* para. 621.

to less spending on “domestic infrastructure and projects geared toward health and education.”¹⁵⁷

Polygynous societies will have greater levels of familial poverty.¹⁵⁸ This is due to a number of factors. Women’s ability to support their children is reduced due to high fertility¹⁵⁹ and minimal education.¹⁶⁰ Furthermore, the gender inequality that is associated with polygyny is not only a harm to individuals but harmful to society itself.¹⁶¹ At the same time, men’s investment in their wives and children is reduced as described above.¹⁶² Societies where basic needs are not met do not have the human resources necessary to grow and may also be less stable politically, requiring more authoritarian government.¹⁶³ Dr. McDermott’s analysis showed that “[s]tates with higher levels of polygyny display fewer political rights and civil liberties for both men and women than those with less polygyny.”¹⁶⁴ Theoretical economic models using data from highly polygynous states showed that the imposition of monogamy would increase per capita GDP because men “save and invest in production and consumption” instead of saving for and investing in additional wives.¹⁶⁵

Finally, the court in *Reference* found polygamy harmful to society because it directly threatens the practice of monogamy, even in a country such as Canada.¹⁶⁶ This could occur in four ways. First, the court found that decriminalizing polygamy would make immigration to Canada by polygamists from other countries more attractive.¹⁶⁷ Second, decriminalization would allow those already in Canada who are familiar with and comfortable with the practice to take it up.¹⁶⁸ Third, decriminalization would remove a brake on the natural tilt of human beings “towards a polygynous mating system.”¹⁶⁹ Fourth, the increased fertility of polygamous wives will cause the population of those

¹⁵⁷ *Id.* para. 790.

¹⁵⁸ *Id.* para. 787.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* para. 789.

¹⁶¹ *Id.* para. 787.

¹⁶² *See supra* note 146 and accompanying text.

¹⁶³ *Reference*, 2011 BCSC 1588, para. 787.

¹⁶⁴ *Id.* para. 621.

¹⁶⁵ *Id.* para. 535.

¹⁶⁶ *Cf. Potter v. Murray City*, 585 F. Supp. 1126, 1139–40 (D. Utah 1984) (arguing that should polygamy be decriminalized, and perhaps even legally recognized, it would be difficult to contain).

¹⁶⁷ *Reference*, 2011 BCSC 1588, paras. 556, 558, 560, 567–568, 570, 573, 1317.

¹⁶⁸ *Id.* para. 575.

¹⁶⁹ *Id.* paras. 500–501, 575, 1304.

raised in polygamy to increase faster than the population of those raised in monogamy.¹⁷⁰ As the practice of polygamy increases, the benefits of monogamy decrease. The court found the specific benefits of monogamy to be as follows:

[E]xclusive and enduring monogamous marriage is the best way to ensure paternal certainty and joint parental investment in children. It best ensures that men and women are treated with equal dignity and respect, and that husbands and wives (or same sex couples), and parents and children, provide each other with mutual support, protection and edification through their lifetimes.¹⁷¹

5. *Scrutiny of the Infringements to Liberty and Freedom of Religion*

In considering the constitutional challenge to the polygamy law based on its infringement of liberty¹⁷² and freedom of religion¹⁷³ interests guaranteed by the Canadian Charter, the breadth and the depth of the demonstrated harms of polygamy played a significant role in the court's analysis. With regard to the liberty interest, the court dismissed claims that the law criminalizing polygamy was overbroad,¹⁷⁴ arbitrary,¹⁷⁵ or grossly disproportional.¹⁷⁶ As a result, the court found that it did not constitute a deprivation of liberty inconsistent with principles of fundamental justice.¹⁷⁷

Addressing the freedom of religion infringement,¹⁷⁸ the court found the law criminalizing polygamy furthered the goal of limiting the harms of polygamy by preventing a non-trivial increase in the incidence of polygamy.¹⁷⁹ The fact that there had been very few prosecutions under the law did not suggest otherwise to the court. The lack of prosecutions could result from enforcement

¹⁷⁰ *Id.* paras. 555, 621, 649.

¹⁷¹ *Id.* para. 884.

¹⁷² *Id.* paras. 1113–1134.

¹⁷³ *Id.* paras. 1093, 1096–1098 (holding that prohibiting polygamy breaches 2(a) of the Charter).

¹⁷⁴ *Id.* paras. 1190–1195 (dismissing claims that criminalization of polygamous unions that do not involve abuse is overbroad due to the many other harms of polygamy); *id.* para. 1144 (dismissing claims that existing criminal laws narrowly targeting specific abuses are sufficient to prevent the harms that might arise from polygamy since the harms of polygamy go well beyond criminal spousal or child abuse).

¹⁷⁵ *Id.* para. 1209. The court did find that the law was arbitrary as it punished minors between the ages of 12 and 17 who might be polygamous wives. *Id.* paras. 1199–1203.

¹⁷⁶ *Id.* paras. 1213–1223.

¹⁷⁷ *Id.* paras. 1177, 1266.

¹⁷⁸ This required the court to answer the questions: “i. Is the limit rationally connected to the purpose? ii. Does the limit minimally impair the *Charter* right? iii. Is the law proportionate in its effect?” *Id.* para. 1273.

¹⁷⁹ *Id.* para. 1336.

priorities or actually show the effectiveness of the law in deterring polygamy.¹⁸⁰ In finding that the law minimally impairs religious freedom, the court stated:

When one accepts that there is a reasoned apprehension that polygamy is inevitably associated with sundry harms, and that these harms are not simply isolated to criminal adherents like Warren Jeffs but inhere in the institution itself, the *Amicus*' complaint that there are less sweeping means of achieving the government's objective falls away. And it most certainly does when one considers the positive objective of the measure, the protection and preservation of monogamous marriage. For that, there can be no alternative to the outright prohibition of that which is fundamentally anathema to the institution. In the context of this objective, there is no such thing as so-called "good polygamy."¹⁸¹

Finally, the court considered whether the criminalization of polygamy satisfied the proportionality test, which required weighing the deleterious effects of the law on religious freedom against the salutary effects of the law on its objectives.¹⁸² The court found that the law did result in a significant interference with religious beliefs for fundamentalist Mormons,¹⁸³ causing them either to avoid a crucial religious practice or to suffer isolation and insularity to avoid prosecution.¹⁸⁴ On the salutary side, the court listed "advanc[ing] the institution of monogamous marriage, . . . protect[ing] against the many harms . . . of polygamy,"¹⁸⁵ and "further[ing] Canada's international human rights obligations."¹⁸⁶ Thus, the court concluded that, as applied to persons who marry into polygamy at age eighteen or older, the law criminalizing polygamy is consistent with the Canadian Charter of Rights and Freedoms.

6. Summary

No conclusion about strict, heightened, or rational basis scrutiny of the Utah bigamy law can be made on the basis of the constitutional analysis in *Reference*, as it was operating both with a different criminal law and under a

¹⁸⁰ *Id.* paras. 1337–1339.

¹⁸¹ *Id.* para. 1343.

¹⁸² *Id.* paras. 1346, 1350.

¹⁸³ *Id.* para. 1348.

¹⁸⁴ *Id.* para. 1349.

¹⁸⁵ *Id.* para. 1350.

¹⁸⁶ *Id.* para. 1351.

distinctly Canadian standard of constitutional review. However, the more detailed and empirically supported harms of polygamy articulated there should be more than sufficient to pass ordinary rational basis scrutiny. The overbreadth arguments made in *Reference* were largely identical to those made in *Brown*¹⁸⁷ but were strongly countered by the exceedingly broad harmful impacts of polygamy. Thus, there is reason to think that the Utah bigamy law could pass heightened or strict scrutiny as well. However, the viability of the law would be greatly increased if strict or heightened scrutiny was not found to be appropriate. Thus, the second half of this Article turns to the arguments made in *Brown* to justify strict and heightened scrutiny.

II. NEITHER STRICT NOR HEIGHTENED SCRUTINY OF THE UTAH BIGAMY LAW WAS JUSTIFIED IN *BROWN*

After the first episode of TLC's reality television show *Sister Wives* aired, Utah state officials started a criminal investigation of the Brown family featured in the show, consisting of Kody Brown and his wives Meri, Janelle, Christine, and Robyn. The Browns are members of the Apostolic United Brethren, who believe that "polygamy is a core religious practice."¹⁸⁸ Although the Browns moved to Nevada to avoid a possible prosecution, Utah officials continued the investigation. As a result, the Browns filed an action in the United States District Court for the District of Utah challenging the constitutionality of Utah's statute criminalizing polygamy on multiple grounds, including under the Free Exercise Clause, the *Smith* Hybrid Rights Analysis framework, and the Due Process Clause.¹⁸⁹ After the Browns moved for summary judgment, it does not appear that the State mounted a strong defense, as the court noted that it was "intrigued by the sheer lack of response in

¹⁸⁷ Compare *id.* paras. 1142–1145 (summarizing arguments that the Canadian statute was overbroad because it prohibits polygamous relationships between consenting adults, penalizes coerced spouses the same as coercing spouses, penalizes beneficial polygamous relationships, and fails to address the actual abusive harms, which are in any event already addressed by other criminal statutes), with *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1219–21 (D. Utah 2013) (finding Utah statute not narrowly tailored because there was no evidence of a causal relationship between polygamy and sexual abuse and financial neglect of children and other criminal statutes are sufficient to address these abuses).

¹⁸⁸ *Brown*, 947 F. Supp. 2d at 1178 & n.5.

¹⁸⁹ *Id.* at 1776. The investigation was closed after the constitutional challenge was filed, and the State then sought to dismiss the case for mootness, thus avoiding the constitutional review of the statute. However, while the current prosecutor assured the court that he would not prosecute the Browns unless he were to find that they also committed a collateral crime, such as child or spousal abuse, he could not assure the court that a future prosecutor would not seek to charge the Browns for their polygamy. *Id.* at 1179.

Defendant's filing to Plaintiffs seven detailed constitutional claims."¹⁹⁰ The court granted summary judgment to the Browns, finding the bigamy statute unconstitutional as applied to Brown's religious polygamous marriage under strict scrutiny, heightened scrutiny, or rational basis scrutiny.

A. Strict Scrutiny of Polygamy Law Under Hialeah's Free Exercise Analysis

1. Federal Precursors to the Utah Statute

The first polygamy statute covering United States territories was enacted by Congress in 1862 and made it a crime for a person with a living spouse to marry another.¹⁹¹ There is no question that it was motivated by the otherwise legal polygamous marriages being then celebrated by the Mormon Church.¹⁹² George Reynolds was prosecuted under this law for entering into a licensed marriage with a second wife.¹⁹³ When Mormon polygamists attempted to evade the statute by legally marrying multiple wives simultaneously or by not obtaining marriage licenses for multiple wives married in religious ceremonies, the statute was amended in 1887 to cover both simultaneous marriages and cohabitation with more than one woman.¹⁹⁴ There is some disagreement about the purpose of adding cohabitation to the statute. *Brown* contends that it was added because common law marriage was recognized in the Utah Territory, and therefore a religious ceremony followed by cohabitation would have created multiple legal marriages.¹⁹⁵ However, in *Cannon v. United States*,¹⁹⁶ the United States Supreme Court suggested that cohabitation was included within the polygamy statute because “[b]igamy and polygamy might fail of proof, for want of direct evidence of any marriage, but cohabitation with more than one woman . . . was susceptible of the proof here given . . . the exhibition of all the indicia of a marriage, a household, and a family, twice repeated.”¹⁹⁷

In the absence of a license and legal solemnization of the marriage, evidence of a “marriage” might be difficult to obtain. Furthermore, a three-year statute of limitations would further limit prosecution even if proof of marriage

¹⁹⁰ *Id.* at 1176–77.

¹⁹¹ Morrill Anti-Bigamy Act, ch. 126, § 1, 12 Stat. 501, 501 (1862) (repealed 1910).

¹⁹² *Brown*, 947 F. Supp. 2d at 1205–06.

¹⁹³ *Reynolds v. United States*, 98 U.S. 145, 148 (1879).

¹⁹⁴ Edmunds Anti-Polygamy Act of 1882, ch. 47, § 3, 22 Stat. 30, 31 (repealed 1910).

¹⁹⁵ *Brown*, 947 F. Supp. 2d at 1205–06.

¹⁹⁶ 116 U.S. 55 (1885) (upholding the conviction of a man for cohabiting with multiple women despite no proof of sexual intercourse), *vacated*, 118 U.S. 355 (1886).

¹⁹⁷ *Id.* at 75.

were possible. Cohabitation, however, would be ongoing and publicly observable. Thus, Congress made “polygamy a continuous offense . . . [w]hether marriage took place or not, the pretense of marriage—the living, to all intents and purposes, so far as the public could see, as husband and wife—a holding out of that relationship to the world,—were the evils sought to be eradicated.”¹⁹⁸

Indeed, *Cannon* held that “cohabitation” in the statute did not even require proof that “he and the two women, or either of them, occupied the same bed or slept in the same room, or that he had sexual intercourse with either of them” as long as “he lived in the same house with the two women, and ate at their respective tables one-third of his time or thereabouts, and held them out to the world, by his language or conduct, or both, as his wives.”¹⁹⁹ The Court was quite clear that there were other possible meanings of cohabitation that required sexual intercourse, such as adulterous cohabitation: “It is the practice of unlawful cohabitation with more than one woman that is aimed at—a cohabitation classed with polygamy and having its outward semblance . . . not . . . meretricious, unmarital intercourse with more than one woman.”²⁰⁰

2. *History and State Interpretation of Utah’s Current Bigamy Statute*

The Mormon Church renounced polygamy as a religious practice in 1890, paving the way for Utah to be admitted to the Union as a state.²⁰¹ Still concerned with the possibility that polygamy would be legalized by the state legislature after statehood, the Utah Enabling Act conditioned admission upon the prohibition of “polygamous or plural marriages.”²⁰² This language was then included within the Utah Constitution and is known as the “irrevocable ordinance.”²⁰³ In addition, the Utah Constitution provided that a territorial statute criminalizing polygamy and unlawful cohabitation would continue to be in force.²⁰⁴ Criminalization of both polygamy (understood as marrying another while having a spouse still living) and cohabitation (understood as living

¹⁹⁸ See *United States v. Cannon*, 7 P. 369, 374 (Utah 1885).

¹⁹⁹ *Cannon*, 116 U.S. at 71.

²⁰⁰ *Id.* at 72.

²⁰¹ Strassberg, *supra* note 60, at 1504 n.5.

²⁰² ch. 138, § 3, 28 Stat. 107, 108 (1894).

²⁰³ *State v. Holm*, 137 P.3d 726, 738 (Utah 2006).

²⁰⁴ UTAH CONST. art. III; see also *State v. Norman*, 52 P. 986, 990–91 (Utah 1898) (holding that the language should not be interpreted to exclude offenses covered beyond just polygamy).

together as husband and wife) continued under various statutes²⁰⁵ until 1973, when the statute was rewritten in its present form: “A person is guilty of bigamy when, knowing that he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.”²⁰⁶ To follow the analysis below, it will be helpful to list and distinguish the various marital forms covered by the statute:

1. **Fraudulent bigamy**, additional “legal” marriage by a legally married person with a person who is unaware both of the first legal spouse and the void status of their own marriage, is covered under the “purports to marry” language.
2. **Legal polygamy**, attempted multiple legal marriages without any fraud to the marriage partners, is covered under the “purports to marry” language.
3. **Polygamous marriages**, ceremonial marriages to multiple spouses without seeking legal recognition of more than one marriage, is covered under the “purports to marry” language.
4. **Polygamous cohabitation**, multiple marital relationships, is covered under the “cohabits” language.

In *State v. Green*, the Utah Supreme Court addressed the meaning of cohabitation in the course of holding that it was not unconstitutionally vague.²⁰⁷ Green was a Fundamentalist Mormon polygamist who did not attempt to legally marry more than one wife at a time; he would divorce the wife he was legally married to before getting a license and entering into a legal marriage with another wife.²⁰⁸ Some wives he never legally married but instead married in an unlicensed religious ceremony.²⁰⁹ The State alleged that Green had cohabited with four women while legally married to a fifth and thus sought to bring his conduct under the cohabitation prong of the bigamy statute.²¹⁰ In support of his as-applied vagueness challenge, Green alleged that the statute failed to make clear “how often he could legally reside with and have sexual contact with the women,”²¹¹ in effect suggesting that had he had

²⁰⁵ *State v. Barlow*, 153 P.2d 647, 651–52 (Utah 1944) (holding that the prohibition of cohabitation was not unconstitutionally vague).

²⁰⁶ UTAH CODE ANN. § 76-7-101(1) (West 2004).

²⁰⁷ 99 P.3d 820, 832 (Utah 2004).

²⁰⁸ *Id.* at 822.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 823.

²¹¹ *Id.* at 831.

less sexual contact or spent less time at home, he might have avoided being viewed as cohabiting. The *Green* court found that Green had clearly engaged in bigamous cohabitation because his conduct “produced precisely the situation that bigamy statutes aim to prevent—all the indicia of marriage repeated more than once.”²¹² This closely follows the language used in *Cannon* to interpret the federal statute.²¹³ The “indicia” relied upon in *Green* to show cohabitation did not include the religious marriage ceremonies.²¹⁴

In *State v. Holm*, the Utah Supreme Court was called upon to interpret the meaning of “purports to marry” in the 1973 bigamy statute. Holm was, like Green, a member of the Fundamentalist Church of Jesus Christ of Latter-day Saints.²¹⁵ After legally marrying Suzie Stubbs, he entered into a religious marriage with Wendy Holm.²¹⁶ Later, at the age of thirty-two, he entered into a religious marriage with sixteen-year old Ruth Stubbs, the sister of Suzie.²¹⁷ By shortly after her eighteenth birthday, Ruth had borne two children.²¹⁸ Holm was arrested and charged with both bigamy and unlawful sexual conduct with a sixteen- or seventeen-year-old.²¹⁹ The jury special verdict form showed that Holm was found “guilty of bigamy both because he ‘purported to marry Ruth Stubbs’ and because he had ‘cohabited with Ruth Stubbs.’”²²⁰

²¹² *Id.* at 831–32 (“[Green] referred to each of these women as a wife, regardless of whether a licensed marriage existed. The women likewise considered themselves Green’s wives and adopted his surname. Green spent nights with each woman on a rotating schedule and succeeded in impregnating these four women eighteen times The children born of these associations also use the Green surname. Together, Green and the women undertook spousal and parental obligations. . . . [T]hey shared a group of mobile homes, ‘Green Haven,’ that possessed common areas for the entire family’s use.”).

²¹³ See *supra* note 198 and accompanying text.

²¹⁴ Green’s prosecution for cohabitation rather than for purporting to marry by either invalid licensed marriages or unlicensed ceremonial marriages was dictated by the facts in his case. He had sequentially legally married and then divorced three of the five wives named in the indictment. 99 P.3d at 822 n.4. Of the two nonlegal religious marriage ceremonies that could have come under the purport to marry language, at least one took place outside of Utah, *State v. Green*, 108 P.3d 710, 713 (Utah 2005), and both were outside the four year statute of limitations for felonies, see UTAH CODE ANN. § 76-1-302 (LexisNexis 1999), by the time of the 2000 indictment. See *Green*, 99 P.3d at 822 n.4, 823; see also *State v. Ishaque*, 711 A.2d 416, 418 (N.J. Super. Ct. Law Div. 1997) (“[C]ourts have consistently ruled that they are without jurisdiction to prosecute a defendant for a bigamous marriage solemnized in another state.”).

²¹⁵ *State v. Holm*, 137 P.3d 726, 730 (Utah 2006).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 731.

²²⁰ *Id.* at 731–32.

To uphold Holm's conviction, the court needed to find only that his conduct fell within one of the two prongs of the bigamy statute.²²¹ The court upheld the conviction under the "purports to marry" prong.²²² This first involved dismissing Holm's statutory argument that the "purports to marry" language was meant to refer only to attempts to legally marry more than one person at a time (marital forms 1 and 2 above), which would have excluded Holm's multiple religious marriages.²²³ The *Holm* court distinguished attempted second legal marriages (marital forms 1 and 2 above) from second marriages not seeking legal recognition ("a second marriage (however defined)")²²⁴ (marital form 3 above) and both of these from cohabitation ("cohabitation alone")²²⁵ (marital form 4 above). An attempted legal marriage would require both a license and a solemnization ceremony under Utah law.²²⁶ A marriage not seeking legal recognition would be entered into by participation in a solemnization ceremony without having procured a marriage license:

But while a marriage license represents a contract between the State and the individuals entering into matrimony, the license itself is typically of secondary importance to the participants in a wedding ceremony. The crux of marriage in our society, perhaps especially a religious marriage, is not so much the license as the solemnization, viewed in its broadest terms as the steps, whether ritualistic or not, by which two individuals commit themselves to undertake a marital relationship.²²⁷

In the absence of a license, the solemnization would not be a legal solemnization, but it would nonetheless evidence the parties' intent to enter into a marital relationship or "marriage."

The court then found that the word "marriage" was not limited in meaning to legal marriage, as dictionary definitions for such words as bigamy and polygamy describe them as including both a legal marriage and a marriage to someone else.²²⁸ Thus the court concluded that "the plain meaning of the term

²²¹ *Id.* at 732 ("Due to the nature of the special verdict form, on appeal Holm must convince this court that both prongs of Utah's bigamy statute have been inappropriately applied in his case.").

²²² *Id.* at 737.

²²³ *Id.* at 732.

²²⁴ *Id.* at 735.

²²⁵ *Id.*

²²⁶ See UTAH CODE ANN. § 30-1-7 (West 2014) (requiring a state license for solemnization of a marriage).

²²⁷ *Holm*, 137 P.3d at 737.

²²⁸ *Id.* at 733.

‘marry,’ . . . supports our conclusion that it encompasses both marriages that are legally recognized and those that are not.”²²⁹ Furthermore, the *Holm* court noted that the inclusion of cohabitation as bigamy itself revealed the legislature’s intent to extend bigamy beyond attempts to enter into multiple legal marriages. In applying its construction of “purports to marry” as including “claiming to marry”²³⁰ “without claiming any legal recognition of the marital relationship”²³¹ to the facts of Holm’s relationship to Stubbs, the *Holm* court found that the solemnization ceremony that Holms and Stubbs participated in was “in every material respect, indistinguishable from a marriage ceremony to which this State grants legal recognition on a daily basis.”²³²

Thus, under *Green* and *Holm*, the bigamy statute would apply to three distinct factual situations: attempting to legally marry someone while already legally married to another (marital forms 1 and 2 covered under purporting to marry), ceremonially marrying someone while already legally married to another (marital form 3, also covered under purporting to marry), and cohabiting as husband and wife with someone while already legally married to another (marital form 4, covered under cohabiting).

3. Hialeah

Brown’s determination that the bigamy statute should be subject to strict scrutiny²³³ arose out of a free exercise analysis under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*. In *Hialeah*, the Supreme Court evaluated several ordinances prohibiting and regulating animal sacrifices passed in response to the establishment of a Santeria Church.²³⁴ The Santeria religion engages in animal sacrifice as part of its rituals, after which the animal is often but not always eaten.²³⁵ While *Employment Division v. Smith*²³⁶ had found that “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of

²²⁹ *Id.* at 734.

²³⁰ *Id.* at 736.

²³¹ *Id.*

²³² *Id.* at 737; *see also id.* at 736 (describing the ceremony and vows, the white “wedding dress” worn by Stubbs, and her characterization of the ceremony “as a marriage”).

²³³ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1217 (D. Utah 2013).

²³⁴ 508 U.S. 520, 525–26 (1993).

²³⁵ *Id.* at 525.

²³⁶ 494 U.S. 872 (1990) (holding that a law prohibiting the use of peyote did not unconstitutionally infringe upon the free exercise rights of Native Americans who use peyote in religious rituals).

burdening a particular religious practice,”²³⁷ *Hialeah* established the opposite rule: a law that is not neutral and of general applicability “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”²³⁸

Neutrality will be absent when “the object of a law is to infringe upon or restrict practices because of their religious motivation.”²³⁹ When a law is facially neutral, it is necessary to look at “the effect of a law in its real operation”²⁴⁰ to determine its object. At the same time, citing two polygamy cases, the Supreme Court noted that an adverse impact on a religious practice is not necessarily evidence that the religion has been targeted because “a social harm may have been a legitimate concern of government for reasons quite apart from discrimination.”²⁴¹ In evaluating the ordinances in light of the stated public objectives of avoiding health risks, emotional injury to children, protecting animals from cruel and unnecessary killing, and confining animal slaughter to areas zoned for it, the Court found them to produce a “religious gerrymander.”²⁴² “[F]ew if any killings of animals are prohibited other than Santeria sacrifice . . . although . . . killings that are no more necessary or humane in almost all other circumstances are unpunished.”²⁴³ In addition, more religious conduct was prohibited than was necessary to advance the stated government objectives²⁴⁴ as more narrowly tailored regulations addressing conditions, treatment, and methods of slaughter would have directly addressed the city’s objectives. In finding the ordinances not to be neutral, Justice Kennedy and Justice Stevens also found relevant historical evidence surrounding the enactment of the ordinances showing animosity towards Santeria, including the events that triggered the ordinances and statements made by the city council.²⁴⁵

²³⁷ See *Hialeah*, 508 U.S. at 531 (citing *Smith*, 494 U.S. 872).

²³⁸ *Id.* at 531–32.

²³⁹ *Id.* at 533.

²⁴⁰ *Id.* at 535.

²⁴¹ *Id.* The Court cited *Davis v. Beason*, 133 U.S. 333 (1890), where the Court previously held that mere membership in the Mormon Church, which at the time was still performing polygamous marriages, was a legitimate basis for denying an applicant the right to vote, and *Reynolds v. United States*, 98 U.S. 145 (1879). *Hialeah*, 508 U.S. at 535.

²⁴² *Hialeah*, 508 U.S. at 535 (quoting *Walz v. Tax Comm’n of the City of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)) (internal quotation marks omitted).

²⁴³ *Id.* at 536.

²⁴⁴ *Id.* at 538.

²⁴⁵ *Id.* at 540–41 (plurality opinion).

In addition, a law burdening religion must be generally applicable; it “cannot in a selective manner impose burdens only on conduct motivated by religious belief.”²⁴⁶ It cannot “target or single out” religious conduct.²⁴⁷ To determine whether the animal sacrifice ordinances were generally applicable, the Supreme Court looked to see whether they were underinclusive relative to their stated objectives.²⁴⁸ The Court found these ordinances underinclusive with regard to all four of the objectives, failing to regulate nonreligious killings of animals to address these concerns.²⁴⁹ Thus, it concluded that they were “a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.”²⁵⁰

Once a law is found to be not neutral or not of general application, strict scrutiny is called for: “a law restrictive of religious practice must advance ‘interests of the highest order’ and must be narrowly tailored in pursuit of those interests.”²⁵¹ The Court stated that both the overinclusiveness and underinclusiveness of the ordinances showed that it was not narrowly tailored. In addition, the underinclusiveness of the ordinances revealed that the interests sought to be advanced were not of the highest order or compelling, as a compelling interest would be more rigorously advanced.²⁵²

4. *Free Exercise Challenges to the Utah Bigamy Statute Before Brown*

In both *Green* and *Holm*, the Utah Supreme Court had considered a free exercise challenge to the Utah bigamy law in the context of prosecutions of Mormon fundamentalist polygamists. Applying the *Hialeah* analysis, the court concluded that the statute was operationally neutral and generally applicable.²⁵³ The Utah Supreme Court justified its determination that the bigamy statute was operationally neutral by noting that the bigamy statute “contains no exemptions that would restrict the practical application of the

²⁴⁶ *Id.* at 543 (majority opinion).

²⁴⁷ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (finding promissory estoppel was a law of general applicability that could be used to force a newspaper to pay damages for breaking a confidentiality promise without offending the First Amendment). *Cohen* was cited by *Hialeah* as an example of the principle of general applicability. 508 U.S. at 543.

²⁴⁸ *Hialeah*, 508 U.S. at 543.

²⁴⁹ *Id.* at 543–46.

²⁵⁰ *Id.* at 545 (alteration in original) (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in judgment)) (internal quotation mark omitted).

²⁵¹ *Id.* at 546 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

²⁵² *Id.* at 546–47.

²⁵³ *State v. Holm*, 137 P.3d 726, 742 (Utah 2006) (following *Green*’s free exercise analysis); *State v. Green*, 99 P.3d 820, 827–28 (Utah 2004).

statute only to [religious] polygamists. In fact, the last reported decision of a prosecution under the current bigamy statute in our state courts involved a man who committed bigamy for non-religious reasons.”²⁵⁴ In the case referred to, *State v. Geer*,²⁵⁵ the defendant was charged with “purport[ing] to marry another person” while “knowing [that] he . . . has a wife.”²⁵⁶ The case involved typical fraudulent bigamy (marital form 1), in which a man purported to legally marry a woman who was unaware that he was already legally married to another woman.²⁵⁷ There was no evidence of any religious motivation in the case of Geer’s multiple marriages; indeed, Geer unsuccessfully attempted to challenge his conviction on the ground that the State of Utah “selectively prosecutes only those bigamists who practice bigamy for other than religious reasons.”²⁵⁸

By mentioning *Geer* as proof that Utah’s bigamy statute operated to punish nonreligious bigamy, we can see that the *Green* court’s operational neutrality analysis considered the bigamy statute as a whole. Rather than limiting its analysis strictly to the cohabitation prong *Green* was prosecuted under, it looked at the operational impact of both prongs and saw that while the cohabitation prong reached a religious polygamist in *Green*, the purport to marry prong in another case had reached a nonreligious polygamist.

5. *Brown’s Hialeah Analysis of the Utah Bigamy Statute*

The *Brown* court found that the bigamy statute was “neither operationally neutral nor generally applicable.”²⁵⁹ I will offer three criticisms of this result. First, I will argue that the *Brown* court treated a single statute as if it were two separate statutes, which allowed it to improperly find that part of the bigamy statute was not operationally neutral. Second, I will argue that even as divided by the *Brown* court, all parts of the statute are operationally neutral. The third argument is one I have already made in large part above, that even if the statute were not operationally neutral, it would survive strict scrutiny.

²⁵⁴ *Green*, 99 P.3d at 827.

²⁵⁵ 765 P.2d 1 (Utah Ct. App. 1988).

²⁵⁶ UTAH CODE ANN. § 76-7-101(1) (West 2004).

²⁵⁷ *Geer*, 765 P.2d at 2.

²⁵⁸ *Id.* at 3.

²⁵⁹ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1217 (D. Utah 2013).

a. *Divide and Conquer*

The first step in the *Brown* court's analysis was to reorganize the three targets of the statute as interpreted by the Utah Supreme Court in *Green* and *Holm* into what it saw as only two distinct targets. The first target, which fell within the purports to marry language, covers ineffective attempts to enter into multiple legal marriages, which the court called "actual bigamy"²⁶⁰ (marital form 1 above) and "actual polygamy"²⁶¹ (marital form 2 above). An example of actual bigamy would be the *Geer* case, in which no religious motivation was behind the multiple marriages.²⁶² An example of actual polygamy would be the *Reynolds* case, in which the multiple marriages were religiously motivated.²⁶³ The second target of the statute according to the *Brown* court, which fell under both the purports to marry and cohabitation language, was what the *Brown* court called "religious cohabitation."²⁶⁴ The *Brown* court defined "religious cohabitation" variously throughout the opinion as "to practice polygamy [through private 'spiritual' marriages not licensed or otherwise sanctioned by the state]"²⁶⁵ and "choosing 'to enter into a relationship that [they know] would not be legally recognized as marriage, [they use] religious terminology to describe the relationship . . . [including] marriage and husband and wife [which] happens to coincide with the terminology used by the state to describe the legal status of married persons.'"²⁶⁶ Examples of religious cohabitation would be *Green* (marital form 4 above) and *Holm* (marital form 3 above).

The second step in the *Brown* court's analysis was to evaluate these two broader targets separately for purposes of the operational neutrality analysis,²⁶⁷ rather than evaluate the statute as a whole as the court in *Green* and *Holm* had done. The *Brown* court found the "actual bigamy" and "actual polygamy" target of the statute to be operationally neutral because the presence or absence of religious motivation was not determinative of the offense.²⁶⁸ At the same time, removing "actual bigamy," the nonreligiously motivated multiple legal

²⁶⁰ *Id.* at 1209.

²⁶¹ *Id.* at 1190.

²⁶² *Geer*, 765 P.2d at 3.

²⁶³ *Reynolds v. United States*, 98 U.S. 145, 161 (1879).

²⁶⁴ *Brown*, 947 F. Supp. 2d at 1198.

²⁶⁵ *Id.* at 1181.

²⁶⁶ *Id.* at 1197 (first two alterations in original) (quoting *State v. Holm*, 137 P.3d 726, 773 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part)) (some internal quotation marks omitted).

²⁶⁷ *Id.* at 1203–05.

²⁶⁸ *Id.* at 1209.

marriages found in *Geer*, left religious cohabitation as, in the view of the *Brown* court,²⁶⁹ the only remaining target of the statute.

If, on the other hand, religious cohabitation is understood as a target along with nonreligious bigamy, then what the *Brown* court was willing to see as the operational neutrality of the “actual bigamy” and “actual polygamy” target would have extended over all the targets of the statute. Indeed, one might ask why the *Brown* court was justified in lumping together actual bigamy and actual polygamy in one operational neutrality analysis of the purports to marry language, while removing cases of religious cohabitation also covered by the purports to marry language. Why not separate out actual bigamy from a combined target of actual polygamy and religious cohabitation, all of which the *Brown* court saw as religiously motivated? The reason is fairly obvious: either the *Brown* court would have to find that *Reynolds* controlled and the statute did not violate the Free Exercise Clause, or it would have to strike down *Reynolds*.²⁷⁰ The latter would have allowed for the possibility of legal recognition of religiously motivated polygamous marriages in Utah.

Furthermore, there is no justification given by the *Brown* court for its refusal to undertake the operational neutrality analysis of the bigamy statute as a whole, in which all the possible targets of both the purports to marry and cohabitation language would be evaluated together, as had the courts in *Green* and *Holm*. When this is done, actual prosecutions of both religious and nonreligiously motivated conduct can be shown.

Hialeah itself can offer no justification for the approach taken in *Brown*. In *Hialeah*, the Supreme Court was faced with four separate ordinances²⁷¹ that it first evaluated individually,²⁷² finding that three of them operated to create a “religious gerrymander.”²⁷³ It was necessary to look at both the exemptions and prohibitions within each ordinance to evaluate its neutrality. The lack of operational neutrality for each of these three was revealed by exemptions

²⁶⁹ This is not the case, however, as I argue below. See *infra* Parts II.A.5.b–c.

²⁷⁰ The court made it more than clear that it thought that *Reynolds* should in fact be struck down, but backed away from doing so. *Brown*, 947 F. Supp. 2d at 1188–89, 1204 n.49.

²⁷¹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 526–28 (1993) (discussing Ordinance 87-40, incorporating Florida’s animal cruelty laws; Ordinance 87-52, defining sacrifice as unnecessary killing of an animal in a ritual not primarily for food consumption; Ordinance 87-71, making it unlawful to sacrifice animals in City of Hialeah; and Ordinance 87-72, defining slaughter and prohibiting it outside areas not zoned for this purpose).

²⁷² *Id.* at 535–40.

²⁷³ *Id.* at 535 (quoting *Walz v. Tax Comm’n of the City of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)) (internal quotation marks omitted).

within each ordinance that left Santeria animal sacrifice the sole possible target of each.²⁷⁴ This does not justify the *Brown* court's approach of splitting up a single statute into three targets and then evaluating two together and one separately for operational neutrality. In addition, the fourth ordinance, on its own, appeared to apply to nonreligious conduct,²⁷⁵ but the Court determined that "the four substantive ordinances may be treated as a group for neutrality purposes" because the neutral one was enacted on the same day and in response to the same event, the opening of a Santeria Church, as the other three.²⁷⁶ If anything, the eventual treatment by the Court of the four ordinances as if they were one suggests that a single statute should at least be seen as a totality. Indeed, actual bigamy, actual polygamy, and religious cohabitation (marital forms 1, 2, 3, and 4 above) have been a combined target of single statutes since the 1887 Edmunds Act.²⁷⁷

b. Cohabitation is Cohabitation

To find that the statute was not operationally neutral in its targeting of religious cohabitation, the *Brown* court needed to show that while religious cohabitation is prohibited by the statute, "secular"²⁷⁸ cohabitation is not so prohibited. It did this by identifying secular cohabitation with adulterous cohabitation. Adulterous cohabitation consists of persons "outside the community of those who practice polygamy for religious reasons"²⁷⁹ who live together when at least one of them is legally married to a third party. It is cohabitation by virtue of the fact that they "live together 'as if' they are married in the sense that they share a household and a sexually intimate relationship."²⁸⁰ The court noted that while adulterous cohabitation also falls within the separate crime of adultery,²⁸¹ it has not been prosecuted as a crime under that statute since 1928 and has never been prosecuted as polygamous cohabitation under the bigamy statute.²⁸² Of course, the latter is because both

²⁷⁴ *Id.* at 537 ("A pattern of exemptions parallels the pattern of narrow prohibitions.").

²⁷⁵ *Id.* at 539–40.

²⁷⁶ *Id.* at 540.

²⁷⁷ See *supra* note 194 and accompanying text.

²⁷⁸ See *Hialeah*, 508 U.S. at 542 ("[T]he texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings . . .").

²⁷⁹ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1210 (D. Utah 2013) (quoting *State v. Holm*, 137 P.3d 726, 772 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part)).

²⁸⁰ *Id.* (quoting *Holm*, 137 P.3d at 771–72 (Durham, C.J., concurring in part and dissenting in part)).

²⁸¹ UTAH CODE ANN. § 76-7-103(1) (West 2004) ("A married person commits adultery when he voluntarily has sexual intercourse with a person other than his spouse.").

²⁸² *Brown*, 947 F. Supp. 2d at 1210.

federal and Utah state courts had consistently interpreted the word cohabitation in a polygamy statute as a reference to something other than mere adulterous cohabitation.²⁸³ The exclusion of adulterous cohabitation from the Utah bigamy statute led the *Brown* court to conclude that, in the language of *Hialeah*, “few if any [cohabitations] are prohibited other than [religious cohabitations].”²⁸⁴ Thus, the *Brown* court concluded that the bigamy statute was not operationally neutral because it targeted only religious cohabitation and not nonreligiously motivated or secular cohabitation, such as adultery.

The problem with this conclusion is that the real distinction consistently made by courts construing this word, as used in a criminal polygamy law since *Cannon*, has been between marital cohabitation, which was the target of the polygamy laws, and mere sexual cohabitation, which was the target of adultery and fornication laws. Indeed, the *Cannon* Court had found that proof of a sexual relationship was not necessary to prove the public offense of living and presenting oneself as married. Under the current Utah bigamy statute, the “indicia” of marital cohabitation are likely to be the same elements required by Utah’s “common law” marriage statute.²⁸⁵ Although in a bigamy or polygamy situation, one of the common law marriage elements—legal capacity to enter into a marriage—will never be present; all the remaining elements—the capacity to contract; the existence of a consensual contract; cohabitation; the assumption of marital duties, rights, and obligations; and a uniform reputation as married or as husband and wife²⁸⁶—can be present. The fact that cohabitation itself is just one of several essential factors that must be shown to find “marriage”²⁸⁷ suggests that the word cohabitation in the common law marriage statute is meant narrowly²⁸⁸ as “sexual cohabitation,” meaning

²⁸³ See *supra* note 279.

²⁸⁴ *Brown*, 947 F. Supp. 2d at 1210 (alterations in original) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 536 (1993)) (internal quotation marks omitted).

²⁸⁵ UTAH CODE ANN. § 30-1-4.5 (West 2014) (addressing validity of marriage not solemnized).

²⁸⁶ *Id.*

²⁸⁷ *Whyte v. Blair*, 885 P.2d 791, 795 (Utah 1994) (holding that evidence of reputation, cohabitation, and assumptions of marital obligations were insufficient without evidence of consent, which could be shown by a written agreement; witness evidence of an oral agreement; joint banking or joint credit accounts; joint ownership of property; use of a man’s name by a woman, children, or both of the relationship; filing joint tax returns; stating they are married in formal documents, such as deeds and wills; and telling third parties they are married).

²⁸⁸ See *Haddow v. Haddow*, 707 P.2d 669, 671–72 (Utah 1985) (noting that “the term ‘cohabitation’ does not lend itself to a universal definition that is applicable in all settings” and that “[t]o some extent, the meaning of the term depends upon the context in which it is used,” and interpreting a divorce decree requiring payment of half the equity in the marital home if the ex-wife “cohabit[ed]” to require “common residency and sexual contact”).

“common residency[,] . . . sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time” and “sexual conduct[, which] means participation in a relatively permanent sexual relationship akin to that generally existing between husband and wife.”²⁸⁹

In contrast, when the court in *Green* found that cohabitation under the bigamy statute had occurred, it carefully mentioned facts that covered all of the five relevant elements of common law marriage. Common residency was established by the fact that Green and the women “shared a group of mobile homes.”²⁹⁰ Permanent sexual relationship was shown by the fact that “Green spent nights with each woman on a rotating schedule.”²⁹¹ A consensual contract was found by the fact that both the women and their children adopted the Green surname.²⁹² Assumption of marital duties, rights, and obligations was also shown to be present: “Together, Green and the women undertook spousal and parental obligations.”²⁹³ Facts mentioned in *Green* showing uniform reputation as married or as husband and wife included Green “refer[ring] to each of these woman as a wife . . . [and] [t]he woman likewise considered themselves Green’s wives,”²⁹⁴ and the fact that “[b]etween 1988 and 2001, Green appeared on various television shows with the women, consistently referring to the women as his wives, and the women likewise acknowledged spousal relationships.”²⁹⁵ Thus, the *Green* decision can be understood to define cohabitation in the bigamy statute as marital cohabitation, which includes sexual cohabitation but requires considerable additional proof.

None of the indicia mentioned by the *Green* court included either the religious ceremonies Green and his wives had participated in or the religious motivation for their unlicensed marriages. The *Brown* court found these omissions to be misleading because “the most important factor of such plural cohabitations in Utah” is “their religious nature.”²⁹⁶ However, the question is not whether the religious nature of polygamous cohabitations in Utah is

²⁸⁹ *Id.* at 672; *see also* Richards v. Brown, 274 P.3d 911, 913–14 (Utah 2012) (describing the trial court’s finding that cohabitation ceased *no later* than when one party moved out of the shared home, implying that it could have occurred four years earlier when, after six years together, the parties ceased sexual relations).

²⁹⁰ State v. Green, 99 P.3d 820, 832 (Utah 2004).

²⁹¹ *Id.* at 831.

²⁹² *Id.* at 831–32.

²⁹³ *Id.* at 832.

²⁹⁴ *Id.* at 831.

²⁹⁵ *Id.* at 823.

²⁹⁶ Brown v. Buhman, 947 F. Supp. 2d 1170, 1211 (D. Utah 2013).

important to the participants, but rather whether this is important to the State. I would argue that the crucial feature of these cohabitations is that they are marital rather than merely sexual in nature. Once it is understood that the target of the statute is marital cohabitation, the question under *Hiialeah* becomes whether the statute targets only religious marital cohabitation or whether it also targets secular marital cohabitation, thereby showing that the religious or secular quality of the marital cohabitation is irrelevant.

The Utah common law marriage statute described above sets out the features of a secular marital cohabitation. For example, the *Holm* court cited the Utah case *Whyte v. Blair*²⁹⁷ to demonstrate how “cohabitation alone”²⁹⁸ (meaning marital cohabitation without a marriage ceremony rather than sexual cohabitation alone) can produce a “marital relationship”²⁹⁹ that could be viewed as marriage under the common law statute. Whyte had sought to have a court recognize the relationship he had with a woman he was living with as a common law marriage so that he could be considered a “family member[.]” under her insurance policy.³⁰⁰ The facts showed an unlicensed, unsolemnized³⁰¹ relationship that did not seem to involve religious cohabitation. Such “marital relationships” or “marriages” can come to exist without a religious or secular solemnization ceremony, as may have been the case in *Whyte* itself. However, in the absence of such a ceremony, *Whyte* emphasized the importance of establishing the element of consent to marry in other ways,³⁰² providing a nonexhaustive list of what other evidence might show consent. This ranged from a written agreement or evidence showing an oral agreement to enter into a marital relationship to

maintenance of joint banking and credit accounts; purchase and joint ownership of property; the use of the man’s surname by the woman and/or the children of the union; the filing of joint tax returns; speaking of each other in the presence of third parties as being married; and declaring the relationship in documents executed by them while living together, such as deeds, wills, and other formal instruments.³⁰³

²⁹⁷ 885 P.2d 791 (Utah 1994).

²⁹⁸ *State v. Holm*, 137 P.3d 726, 735 (Utah 2006).

²⁹⁹ *Id.* (quoting *Whyte*, 885 P.2d at 793).

³⁰⁰ *Whyte*, 885 P.2d at 792.

³⁰¹ *Id.*

³⁰² *Id.* at 795.

³⁰³ *Id.*

The emphasis on showing consent to marry reflects the statute's requirement that the marriage "arise[] out of a contract."³⁰⁴ Evidence of such a contract is necessary to establish that the parties intended to create a relationship binding on the parties even after they no longer desire it to exist and to show that they intended to enjoy the benefits and take on the obligations that civil law provides for marriage. An unlicensed religious solemnization would satisfy the requirement for consent to marry under the common law marriage statute because, whatever its religious significance, the language of such ceremonies is also the language of contract. But this is hardly the only way to make such a contract. Creation of an express civil contract without the involvement of religion or other conduct that evidences the creation of such a contract, as described above, will suffice. Thus, in *Green*, it was possible to show the existence of marital relationships without reference to the religious ceremonies that had in fact occurred. Indeed, in *Green*, one of these marital relationships was judicially declared to be a legally recognized common law marriage,³⁰⁵ thus making the other marital relationships unlawful cohabitation under the bigamy statute.

We can see that both religious marital relationships and nonreligious marital relationships can be found to be common law marriages under the Utah common law marriage statute. However, it must also be the case that secular cohabitation while legally married to another would produce a conviction under the cohabitation language of the Utah bigamy statute. Although no such actual prosecution or conviction can be shown in Utah, there is no reason to believe that the law would not apply to a proper case. Suppose a polygamist who had legally married both his first and second wives in his country of origin were to immigrate to the United States with his second wife and settle in Utah. Let us assume that this polygamous marriage was not based on any religious mandate, but rather was simply a culturally accepted marital practice.³⁰⁶ Concealing his first marriage from immigration authorities, he presented his second wife as his legal wife and engaged in conduct that would satisfy the common law marriage statute, except for the fact that he would not have capacity to be married to the second wife because Utah would legally

³⁰⁴ UTAH CODE ANN. § 30-1-4.5(1) (West 2014).

³⁰⁵ *State v. Green*, 99 P.3d 820, 833–34 (Utah 2004) (finding the State's use of the common law or "unsolemnized marriage statute" to establish Green's legal marriage to one woman while cohabiting with four others as appropriate).

³⁰⁶ See Penelope E. Andrews, "Big Love"? *The Recognition of Customary Marriages in South Africa*, 64 WASH. & LEE L. REV. 1483, 1493–95 (2007) (describing South Africa's Recognition of Customary Marriages Act, which recognizes polygamous marriages performed according to indigenous law).

recognize the first marriage as prior. If Utah officials were to learn about the existence of the first wife, they could prosecute this polygamist under the cohabitation prong of the bigamy statute. The cohabitation prong of the Utah statute is therefore operationally neutral because the cohabitation that is sufficient to “show all the indicia of marriage” is not limited to cohabitation undertaken subsequent to a religious marriage ceremony. The fact that most known polygamists in Utah are Mormon Fundamentalists, and the State has not had an opportunity to prosecute a nonreligiously motivated polygamist under the cohabitation language, is simply an accident of Utah’s history and current population. As Utah becomes more diverse,³⁰⁷ this may change, but it need not do so for the bigamy statute to be understood as operationally neutral.

c. Purports to Marry

The *Brown* court also found that the purports to marry language in the Utah bigamy statute, insofar as it referred to unlicensed, solemnized marriages rather than licensed, solemnized marriages, also targeted only religious marriage.³⁰⁸ In particular, the *Brown* court found this to be established by the discussion in *Holm* of the importance of the religious solemnization ceremony to the determination that Holm had purported to marry an additional wife.³⁰⁹ When the *Holm* court subsequently held “that Holm’s behavior is within the ambit of our bigamy statute’s ‘purports to marry’ prong,”³¹⁰ from this the *Brown* court concluded that “it is the intention of the individuals to be religiously married . . . that, for the *Holm* majority, constituted a key consideration in whether the Statute had been violated.”³¹¹

However, before the *Holm* court concluded that the purport to marry language had been violated, it indicated that “Holm and Stubbs [had both] formed a marital bond and commenced a marital relationship.”³¹² The *Holm* court described the religious ceremony as “the steps . . . by which two

³⁰⁷ It is estimated that there are currently “at least 15,000 African refugees in Utah.” Elaine Jarvik, *Africans Pull Together in Utah, 8,000 Miles from Homeland*, DESERET NEWS (Aug. 8, 2010, 8:18 PM MDT), <http://www.deseretnews.com/article/700054903/Africans-pull-together-in-Utah-8000-miles-from-homeland.htm>.

³⁰⁸ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1226–34 (D. Utah 2013) (holding that the only constitutional application of the purports to marry language is to criminalize multiple attempted legal marriages).

³⁰⁹ *State v. Holm*, 137 P.3d 726, 737 (Utah 2006).

³¹⁰ *Id.*

³¹¹ *Brown*, 947 F. Supp. 2d at 1212.

³¹² *Holm*, 137 P.3d at 737.

individuals commit themselves to undertake a marital relationship.”³¹³ Indeed, from the perspective of the state, what is important about such religious ceremonies is simply that they also create a civil marital contract. It is for this reason that religious solemnizations are permitted, with a license, to act as the solemnization for legally recognized civil marriages. It is not the religious character of religious solemnization that has legal significance or effect. If it were, laws allowing religious solemnization to substitute for secular solemnization would themselves violate the Establishment Clause. Thus, it was precisely *not* the religious nature of the religious solemnization ceremony in *Holm* that created the marital bond.

Furthermore, there is no reason why polygamous marriages could not arise out of purporting to marry through unlicensed secular solemnization ceremonies. It just happens to be the case that unlicensed solemnization ceremonies are most often religious in nature. This is because, as we understand the marital bond, it must be binding upon the parties who enter into it. This requires the involvement of a power greater than the parties themselves. The only two possibilities for such a power are the state³¹⁴ and God. In the absence of a license, the state officers who are empowered to conduct secular solemnization ceremonies are not likely to be willing to do so. Thus, there may have been no opportunity for the State of Utah to prosecute a polygamy case involving a second secularly solemnized but unlicensed marriage. However, one could imagine the possibility of a corrupt state official who might choose for monetary or other reasons to pretend to legally marry a couple in the absence of a license. In contrast, there are religious leaders who are actually willing to conduct a religious solemnization ceremony without a license.³¹⁵ Prior to the legal recognition of same-sex marriage, many same-sex couples participated in religious solemnization ceremonies. Widows and widowers on social security have sometimes avoided the reduction in benefits a legal marriage would produce by participating in a religious solemnization ceremony without getting a marriage license.³¹⁶ Thus, as a practical matter, religious solemnization ceremonies are the usual route taken by those who seek

³¹³ *Id.*

³¹⁴ In marital cohabitation, the bond is created by “consent” to what amounts to a marital contract, which the state will enforce if the parties have the capacity to marry through the common law marriage statute. *See supra* notes 302–05 and accompanying text.

³¹⁵ *See Holm*, 137 P.2d at 736 (describing Warren Jeffs, an official of the FLDS Church, who conducted the ceremony and strangely included in the vows that each was to become the “lawful and wedded” spouse of the other).

³¹⁶ I know of one such case from my own personal knowledge.

to create a bond that justifies them in entering into an actual, real-world marital relationship in the absence of being able to or wanting to obtain a license. However, just because virtually all cases of unlicensed solemnization involve religious solemnization does not mean that the bigamy statute is operationally non-neutral. The prohibition on purporting to marry someone while legally married to another would apply to an unlicensed marriage solemnized by secular officials. Indeed, Utah has a law that makes it a crime to knowingly solemnize a marriage prohibited by law, with or without a license.³¹⁷ It applies to both the secular officials and the religious leaders who are authorized by law to solemnize marriages, but practically speaking will rarely if ever be violated by secular officials. It is not discrimination by the state if only the religious choose to violate a law that both religious and nonreligious people can violate.

Finally, the requirement that, in addition to this moment of binding commitment, the parties must actually establish by their conduct a marital relationship in order to purport to marry,³¹⁸ shows again that it is not the religious implications of even a religious ceremony that are legally significant. For example, imagine that two people engage in a religious ceremony that from the perspective of their religion resulted in what the religion called a marriage, but it was only to be acted on after the death of both. Then, imagine that the two people then immediately go their separate ways and engage in no conduct (including consummation) during their lifetime that is typical of married couples. In such a case, we could say that something of only religious significance had occurred and a merely religious marriage had been created, which the law cannot seek to regulate. What the law can regulate is the nonreligious aspect of marriage, in which the conduct of the parties toward each other and toward those outside of the marriage is affected. As the Supreme Court said in *Reynolds*, marriage may be “a sacred obligation,” but it is also a “civil contract” out of which “spring social relations and social obligations and duties, with which government is necessarily required to deal.”³¹⁹ It was for this reason that the *Holm* court considered the subsequent cohabitation (in the narrow sense) of Holm and Stubbs—they lived in a house together and “‘regularly’ engaged in sexual intercourse”³²⁰—in addition to the ceremony to establish that they purported to marry. This ensured that their religious marriage ceremony was meant to be followed by the actual creation

³¹⁷ UTAH CODE ANN. § 30-1-15(2) (West 2014).

³¹⁸ *Holm*, 137 P.2d at 737.

³¹⁹ *Reynolds v. United States*, 98 U.S. 145, 165 (1879).

³²⁰ *Holm*, 137 P.3d at 731.

of a relationship and life together that would be identical to a legal marriage. Thus, *Holm* establishes that in order for someone to violate the bigamy statute by purporting to marry another, it is necessary to insure that the religious ceremony is meant to have an impact in the secular world. It is this intention rather than the religious intention that the statute seeks to reach. This is consistent with what the Court in *Reynolds* described as the “rightful purposes of civil government for its officers to interfere when principles break out into overt acts.”³²¹

Thus, the application of the purports to marry language to unlicensed religiously solemnized marriages is not operationally non-neutral for three reasons. First, it is the civil contract created by saying “I do” in a religious marriage ceremony that is viewed as creating the crucial marital bond. Second, unlicensed secular solemnizations that created a marital bond would be equally problematic under the statute. Third, it is the intention to engage in marital conduct in the real world that is the true target of the purport to marry language. The presence or absence of religious meaning to either the ceremony or the subsequent marital conduct is of no significance to the statute.

d. Selective and Minimal Prosecution

The *Brown* court made one additional argument for the bigamy statute’s operational non-neutrality, based on “the State’s explicit ‘policy of selective prosecution.’”³²² As applied to religiously motivated polygamy, the Utah bigamy statute prohibits all such marriages and marital cohabitations. The State of Utah simultaneously reserves the right to prosecute any conduct that falls within the statute but has for the most part chosen to only prosecute religiously motivated polygamy if a marriage with a girl under eighteen years

³²¹ *Reynolds*, 98 U.S. at 163.

³²² *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1216 (D. Utah 2013) (quoting *Holm*, 137 P.3d at 775 (Durham, C.J., concurring in part and dissenting in part)).

of age has occurred.³²³ *Holm* was an example of this kind of prosecution.³²⁴ *Green* might also be seen as an example of this, as *Green* had originally married one of his wives as a thirteen-year-old, even though all his wives were of age for the period he was charged with bigamy.³²⁵ On the other hand, the *Brown* court viewed *Green*'s prosecution as motivated by his open discussion of his polygamy in the media.³²⁶ The threatened prosecution of *Brown* illustrated both possibilities. *Brown* made his family the subject of a nationwide reality television show, thus motivating a prosecutor to consider charging him. However, none of *Brown*'s wives were underage at the time of marriage and the prosecutor dropped the investigation of *Brown* while the constitutional challenge was pending. In conjunction with dropping the case, the prosecutor swore that he would not prosecute bigamy unless it occurred "in the conjunction with another crime or a person under the age of [eighteen] was a party."³²⁷ It was not clear whether this decision was motivated by the policy of limited prosecution or whether it was an attempt to moot the constitutional challenge. But the prosecutor also said that another prosecutor who did not adhere to the under-eighteen policy could seek charges against *Brown* under the statute.³²⁸ Finally, the *Brown* court suggested that reserving the right to prosecute bigamy alone really allowed the state to address other crimes associated with polygamy, such as child abuse and domestic violence, which are hard to obtain evidence of in the isolated and closed polygamous communities without having evidence of those crimes.³²⁹ The result, the *Brown* court argued was "apparently limitless prosecutorial discretion by individual

³²³ *Id.* at 1215–16. There is no question that Utah has some ambivalence about its bigamy law as it applies to polygamy. In 1953, Arizona attempted to enforce its previous bigamy law by a mass arrest of polygamists in the community of Short Creek. The men and women were arrested, and children were taken into state custody. The result was a public relations nightmare for the state and weakened the appetite of the state to confront religious polygamists using its criminal law. See Neil J. Young, *Short Creek's Long Legacy*, SLATE (Apr. 16, 2008, 1:15 P.M.), http://www.slate.com/articles/life/faithbased/2008/04/short_creeks_long_legacy.html (describing the public backlash to the raid).

Changing sexual mores and attitudes toward the role of the criminal law regarding premarital sex, divorce, and adultery also weakened moral condemnations of polygamy, and the Supreme Court's decision in *Lawrence v. Texas* holding criminalization of homosexuality unconstitutional undermined moral justifications for the criminalization of polygamy.

³²⁴ *Holm*, 137 P.3d at 730.

³²⁵ *State v. Green*, 108 P.3d 710, 713 (Utah 2005).

³²⁶ *Brown*, 947 F. Supp. 2d at 1216.

³²⁷ *Id.* at 1179.

³²⁸ *Id.*

³²⁹ *Id.* at 1216.

State officials . . . to decide whether and when (and against whom) to enforce the cohabitation prong of the Statute.”³³⁰

The *Brown* court concluded that this limitless prosecutorial discretion regarding religious cohabitation under the bigamy statute is “fatal to any claim to general applicability”³³¹ under *Hialeah*. However, we have already seen that the bigamy statute is generally applicable to both the religious and nonreligious. Furthermore, the more limited enforcement of the law against specifically religious polygamists shows the opposite of religious targeting. If anything, the state, through this policy, eases the burden of the criminal law on religiously motivated conduct. Indeed, in *Geer*, the nonreligious defendant charged with attempted multiple legal marriages claimed that the state selectively prosecuted only nonreligious bigamists.³³² The nature of the selective prosecution in this case simply fails to show that the government is “in a selective manner impos[ing] burdens only on conduct motivated by religious belief.”³³³ Thus, the strict scrutiny the *Brown* court applied to the Utah bigamy statute is unjustified.

There may also be other explanations for the selective prosecution that has occurred that are not constitutionally suspect. As we saw in Part I above, it has not been easy for courts to articulate and justify their position that polygamy is an offense against society. The harms described above range from very specific impacts on individuals in polygamous families to the broad social impacts of a pool of low status unmarried men, discrimination against women, and an excess of resources devoted to acquiring wives. These harms may even include an impact on the potential for democratic governance. Avoiding these broad impacts of polygamy can be seen as protecting important foundations upon which our society rests. Such foundational interests are not interests that the state typically takes a conscious part in furthering. Thus, the State of Utah may not fully understand the importance of its commitment to monogamy.³³⁴

The state may also have limited its prosecution out of a concern that the criminalization of polygamy might be found unconstitutional. Since *Lawrence*, it has not been clear that the moral objections that may have once been thought

³³⁰ *Id.* at 1217.

³³¹ *Id.* at 1216.

³³² *State v. Geer*, 765 P.2d 1, 3 (Utah Ct. App. 1988).

³³³ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993).

³³⁴ Indeed, as shown in the discussion of the compelling state interests established in *Green* and found inadequate by *Brown*, see *supra* Parts I.A.3–6, Utah has never identified any such foundational interest in monogamy versus polygamy.

to justify criminalizing polygamy would suffice. This would explain why the state only enforces the law when other “associated” crimes are present and then relies on crimes associated with polygamy to justify the criminalization of polygamy alone. However, if, as I argue here should be the case, Utah’s criminalization of polygamy in all its forms can be confirmed to be constitutional, the state may be empowered to step up its prosecutorial efforts.

There is also another important reason why the state has minimally enforced the law. Because polygamy in Utah involves childbearing so importantly, prosecuting fathers and mothers for entering into polygamous marriages means taking parents away from their children. Utah closely observed the extreme negatives of prosecution that came from Arizona’s 1953 raid of the polygamous town of Short Creek, on the border between Utah and Arizona, resulting in putting 236 children into state custody.³³⁵ There are innocent victims of polygamy who can be greatly harmed by prosecution. This individual suffering is immediate and is therefore easily recognized by prosecutors in a way that the foundational harms of polygamy are not. Thus, the exercise of prosecutorial discretion with regard polygamists may reflect an attempt to weigh the harm of prosecution to the children of polygamy against the harm to the children of polygamy itself. This also explains the state’s particular willingness to prosecute polygamy when harm to the children is already clearly present.

In light of all these factors, it is not surprising that prosecutors are ambivalent at best about actually enforcing the bigamy statute against polygamists. The failure of the state to both fully recognize what the primary compelling state and national interest is in criminalizing polygamy and prioritize prosecution as a way to advance that interest does not mean either that these interests do not exist or that statutory criminalization of polygamy itself does not serve an important deterrent purpose.³³⁶ It was ultimately sufficient to convince the Mormon Church to repudiate polygamy as a religious practice, and it has been sufficient to largely restrain any natural tendencies we may have towards polygamy or at least reshape them into what we hope are less socially harmful practices, such as divorce and remarriage.³³⁷

³³⁵ See BENNION, *supra* note 96, at 27; *see also* Young, *supra* note 323.

³³⁶ *Accord Reference*, 2011 BCSC 1588, paras. 1337–1338 (Can.) (emphasizing the deterrent effect of the law on those who take the rule of law seriously and rejecting arguments against the law based on the “miniscule number of prosecutions over the provision’s 120 year history”).

³³⁷ Divorce is certainly recognized as harmful to children and women, but it does not have the broader harmful social effects of polygamy described above.

B. Heightened Scrutiny Under Smith's Hybrid Rights Analysis

The *Brown* court also applied heightened scrutiny to the Utah bigamy statute under the hybrid rights approach set out in *Employment Division v. Smith*.³³⁸ In *Smith*, the Supreme Court held that, despite the substantial burden placed on religious practices of Native Americans by a law making use of peyote a crime, the law would only be subjected to rational basis scrutiny because it was generally applicable.³³⁹ To reconcile the result in *Smith* with such previous free exercise cases as *Wisconsin v. Yoder*, in which a generally applicable state high school attendance law was given strict scrutiny as applied to the Amish,³⁴⁰ Justice Scalia set out an alternative approach for generally applicable laws that burden both religious practice and another fundamental right.³⁴¹ In *Yoder*, parental rights regarding the raising of children were also burdened.³⁴² In such “hybrid rights” cases, heightened scrutiny would be justified.³⁴³ The Court in *Smith* did not indicate what kind of showing was required with regard to the additional fundamental right burdened. Would the scrutiny sought have to be separately and fully justified by the additional burden or would a burden insufficient to justify strict scrutiny on its own be combined with a free exercise burden similarly insufficient on its own to produce a burden justifying heightened scrutiny? Clearly there are problems with both approaches, as Justice Souter pointed out in his *Hialeah* concurrence: if what hybrid analysis requires is the former, then the Free Exercise analysis becomes irrelevant, and if it merely requires that latter, then “the hybrid exception would probably be so vast as to swallow the *Smith* rule.”³⁴⁴

The *Brown* court followed the Tenth Circuit’s determination that the hybrid rights analysis “at least requires a colorable showing of infringement of recognized and specific constitutional rights.”³⁴⁵ Under this standard, the *Brown* court found that there were five additional fundamental rights sufficiently burdened by the bigamy law as applied to religious polygamy to justify heightened scrutiny: freedom of association, freedom of speech, and the

³³⁸ 494 U.S. 872 (1990).

³³⁹ *Id.* at 879–81.

³⁴⁰ 406 U.S. 205 (1972).

³⁴¹ *Smith*, 494 U.S. at 881–82.

³⁴² 406 U.S. at 209.

³⁴³ *Smith*, 494 U.S. at 881.

³⁴⁴ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in judgment).

³⁴⁵ *Swanson v. Guthrie Indep. Sch. Dist. No. I–L*, 135 F.3d. 694, 700 (10th Cir. 1998).

rights protected by the Establishment Clause and Equal Protection Clauses including substantive due process rights.³⁴⁶ However, there was no analysis whatsoever in the opinion of *Brown*'s freedom of association, equal protection, free speech, or Establishment Clause claims to show that these were "colorable" claims. This seems largely to be due to the fact that when the case was decided upon summary judgment, the State failed to respond to the detailed arguments on these constitutional claims made by the plaintiffs in their motion for summary judgment.³⁴⁷ Thus, when the *Brown* court turned to the hybrid analysis, it seemed to rely on the unopposed status of these claims to conclude that they were at least "colorable."³⁴⁸ Given that "[s]ound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute,"³⁴⁹ it is difficult to give the *Brown* court's conclusory justification of heightened scrutiny much weight.

Furthermore, it is difficult to reconcile this conclusion with the *Brown* court's recognition that *Reynolds* is at least controlling as to the government's ability to criminalize attempts to enter into legally recognized polygamous marriages. All five of the fundamental rights claimed to be infringed by criminalizing multiple religious marriages or cohabitation could also be claimed to justify heightened scrutiny of the prohibition of legal recognition of religiously motivated polygamous marriages. Yet, in the very section of *Smith* in which the hybrid analysis was first set out, *Reynolds* was cited by Justice Scalia as a case that did not implicate the hybrid analysis: "There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls."³⁵⁰

As to the one constitutional claim that was fully argued, the substantive due process claim, the *Brown* court concluded that no fundamental right justifying

³⁴⁶ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1222 (D. Utah 2013).

³⁴⁷ *Id.* at 1176–77 ("The court was intrigued by the sheer lack of response in Defendant's filing to Plaintiffs' seven detailed constitutional claims.").

³⁴⁸ *Id.* at 1222 ("The court finds that each of Plaintiff's companion constitutional claims . . . each largely or entirely unopposed by Defendant (with the exception of the Substantive Due Process claim)—makes a 'colorable showing' . . .").

³⁴⁹ *Hialeah*, 508 U.S. at 572 (Souter, J. concurring in part and concurring in judgment) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978)).

³⁵⁰ *Emp't Div. v. Smith*, 494 U.S. 872, 882 (1990).

heightened scrutiny could be shown under *Washington v. Glucksberg*.³⁵¹ It then went on to find that, under Tenth Circuit precedent,³⁵² the sexual privacy rights recognized in *Lawrence v. Texas*, and possibly implicated by religious cohabitation, did not require more than rational basis review.³⁵³ Using this finding of minimal substantive due process rational basis review to ratchet up the free exercise analysis to heightened scrutiny demonstrates the potentially universal application of the hybrid analysis in any case involving a religious burden. Every criminal statute, if not every statute of any kind, can claim to be a violation of the substantive due process right to be free of arbitrary and irrational infringements on liberty and therefore be entitled to rational basis scrutiny. If this, plus a religious burden, is enough to trigger heightened scrutiny under the hybrid analysis, the effect is to almost return to the pre-*Smith* approach to free exercise claims, with the only change being heightened rather than strict scrutiny.

Finally, the *Brown* court went on to cursorily conclude that the Utah bigamy statute as applied to religious polygamy could not withstand heightened scrutiny based on its previous determination that the statute could not survive the strict scrutiny justified by its *Hialeah* operative non-neutrality holding.³⁵⁴ It cannot be the case that failure to survive strict scrutiny will necessarily result in failure to survive heightened scrutiny. *Brown* simply did not consider the nature of heightened scrutiny as compared to strict scrutiny or how such differences might impact the previous strict scrutiny analysis.

III. CRIMINALIZATION OF POLYGAMY CAN SURVIVE STRICT SCRUTINY

I have thus far presented an account of the harms of polygamy that should be sufficient to establish a compelling state interest in criminalizing polygamy. I have also argued that neither strict scrutiny nor heightened scrutiny of the Utah bigamy statute is actually justified. However, should strict scrutiny be justified, there are two remaining arguments that have not yet been considered.

³⁵¹ *Brown*, 947 F. Supp. 2d at 1197; see also *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that there was no substantive due process right to assisted suicide but establishing the standards required to demonstrate such a right).

³⁵² *Seegmiller v. Laverkin City*, 528 F.3d 762, 770–71(10th Cir. 2008) (finding that a police officer could be punished for having sexual relations during an out-of-town training conference with another police officer because there was no fundamental right to sexual privacy requiring heightened scrutiny).

³⁵³ *Brown*, 947 F. Supp. 2d at 1202.

³⁵⁴ *Id.* at 1222.

A. *Would the Utah Bigamy Statute Be Viewed as Narrowly Tailored?*

The *Brown* court argued that, in its application to unlicensed religious marriages and religious cohabitation, the statute is not narrowly tailored to advance even a compelling state interest.³⁵⁵ The *Brown* court essentially claimed that the statute is both overinclusive and underinclusive in relation to the ends it seeks to advance. It is overinclusive because “in the absence of any claim of legal marriage, neither participation in a religious ceremony nor cohabitation can plausibly be said to threaten marriage as a social or legal institution.”³⁵⁶ It is underinclusive because the state fails to prosecute adulterous cohabitation either under the bigamy statute or the adultery statute, and there is “no rational basis to distinguish between [adulterous cohabitation and religious cohabitation], not least with regard to the State interest in protecting the institution of marriage.”³⁵⁷ The *Brown* court’s distinctions make no more sense here than they did previously in the context of its operational non-neutrality analysis.³⁵⁸ The marital cohabitation targeted by the bigamy statute, including both religious and nonreligious cohabitation, is importantly different from adulterous cohabitation. Not only do such marital relationships implicate the same interests the state seeks to address and regulate in the context of licensed monogamous marriage, such as the protection of children born to the relationship, financial dependency, and joint property, but polygamous cohabitation has broader social impacts that adultery does not have, whether it is on the marriage prospects of others, the status of women and children, or the resources available for social and individual advancement. It is the real-world impact of polygamous marital cohabitation in these arenas that the state is compellingly interested in,³⁵⁹ and there is little difference in its interest, whether the relationship in question has been legally recognized or not.³⁶⁰ In criminalizing all multiple marital relationships, whether or not they claim legal status or are motivated by religion, the State addresses all the conduct that creates such social problems. Thus, the statute is not overinclusive in criminalizing polygamous cohabitation.

³⁵⁵ *Id.* at 1218.

³⁵⁶ *Id.* (quoting *State v. Holm*, 137 P.3d 726, 772 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part)) (internal quotation mark omitted).

³⁵⁷ *Id.* at 1224.

³⁵⁸ *See supra* Part II.A.5.b.

³⁵⁹ *Holm*, 137 P.3d at 743 (“[D]ecisions made by individuals as to how to structure even the most personal of relationships are capable of dramatically affecting public life.”).

³⁶⁰ *Id.* (“[T]he formation of relationships that are marital in nature is of great interest to this State, no matter what the participants in or the observers of that relationship venture to name the union.”).

The argument that the statute is underinclusive because it fails to target adulterous cohabitation assumes that the same harms of polygamy arise out of adulterous cohabitation as well: “Both scenarios . . . involve minors as the children born to women involved in such relationships, involve public conduct, and involve economic implications to [women] and children.”³⁶¹ Because the *Brown* court refused to acknowledge the possibility of nonreligious marital cohabitation, it lumped all nonreligious cohabitation under the label “adulterous” cohabitation. As result, for the *Brown* court, there is a type of adulterous cohabitation that is marital in nature and will produce all the same consequences and be of interest to the state in the same way. However, as discussed above,³⁶² this type of cohabitation will be captured under the cohabitation prong of the bigamy statute. The nonmarital adulterous cohabitation that is not prohibited by the bigamy statute is a different kind of relationship all together. With the advent of easily attainable divorce, adulterous cohabitation is not the only way to establish a new marital relationship. Today, one can get divorced and remarried. Access to contraceptives also means that adultery does not have to involve child bearing as a result of its sexual component. Thus, choosing to stay married yet engage in nonmarital adulterous cohabitation means that the relationship is more likely to just be about sex and companionship. Individuals who intend to include child bearing as part of their adulterous cohabitation are much more likely to enter into a marital relationship, which would then subject them to the bigamy law should they already be legally married to someone else. Thus, because the bigamy law reaches all multiple relationships that are marital in nature, it is not underinclusive.

If the bigamy law is neither over- nor underinclusive in its attempt to deter the harmful effects of multiple simultaneous marital relationships, then it is narrowly tailored to advance its ends. Indeed, if one accepts the harms to women, men, children, and society itself that polygamy inevitably brings, it is hard to imagine how a law criminalizing all forms of polygamy is not the only way to avoid these harms.

B. Religious Polygamy Has Its Own Unique Harms

I have argued that, contrary to the holding of *Brown*, the Utah bigamy statute should not be subject to strict or heightened scrutiny despite its impact

³⁶¹ *Brown*, 947 F. Supp. 2d at 1223–24 (alteration in original) (internal quotation marks omitted).

³⁶² See *supra* Part II.A.5.b.

on religious practice. Merely appreciating the harms of all polygamy in contrast to the benefits of monogamy, whether the polygamy arises out of multiple legally recognized marriages or multiple marital relationships created by religious ceremonies, secular ceremonies, or contractual consent, allows us to see both that it would make little sense for Utah to target only religiously motivated polygamy and even less sense to read the Utah bigamy statute as if it does so. Yet, I would also like to consider the possible strict scrutiny of the statute as it was interpreted by the *Brown* court, as non-neutral and targeting only religiously motivated polygamy. This requires finding a special harm arising out of religiously motivated polygamy that is not present in cultural polygamy.

It is a peculiar feature of the application of the polygamy law to Mormon Fundamentalist polygamy that the very feature that is most protected, the relationship of the practice to religious belief, may be what makes this particular form of polygamy particularly pernicious. In *Reference*, the Attorney General of British Columbia pointed out that there was something paradoxical about the claim of religious liberty in that case:

This case may be unique in the section 2(a) jurisprudence in that, because polygamy's harms are most obvious where there is the presence of an external, supposedly binding authority sanctioning it, *the religiosity of the practice itself exacerbates the harm*. The evidence that has emerged from expert and lay witnesses alike indicates that, the greater the religious fervor with which polygamy is intertwined, the more harmful it can expect to be. This is not so with any other case asserting a religious right to do something prohibited.³⁶³

To elaborate on the Attorney General's point, the greatest deprivation of *individual rights* arising from the practice of polygamy in the United States today is almost exclusively a feature of certain Mormon Fundamentalist polygamous communities.

Religion plays a crucial rule in the way this practice of polygamy is shaped. These communities fully embrace polygamy as a *mandatory* religious practice for both men and woman necessary to achieve eternal salvation.³⁶⁴ They also

³⁶³ *Reference*, 2011 BCSC 1588, para. 1081 (Can.).

³⁶⁴ See Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 382 (2003) (noting that, according to Mormon fundamentalist religious doctrine, women who refuse to enter into polygamy are damned to hell); see also *Reference*, 2011 BCSC 1588, para. 318 (observing that "plural marriage is essential to personal and family salvation" for members of the FLDS fundamentalist sect).

accept the authority of a divinely chosen religious leader, a “Prophet,” over all facets of life, including control over marriage partners.³⁶⁵ These religious beliefs form the scaffolding of isolated communities in which religious authorities have near total control of the familial, educational, social, economic, and governmental environment and use this control to organize community life to ensure that all within it conform to these religious beliefs.³⁶⁶ While religious power is buttressed by legal power, economic power, social power, and physical power, these real power structures are in turn always justified by the religious beliefs. It is this unique combination of religion and power that turns a belief in the religious value of polygamy into an actual practice of polygamy that can be extremely coercive.³⁶⁷

The coercive power of a community devoted to polygamy is further enhanced when those required to enter into the practice are least able to withstand such coercion. As discussed above, polygamy inevitably leads to younger ages of marriage for women.³⁶⁸ Some of the communities that practice religious polygamy target young teenage girls for entry into polygamous marriages.³⁶⁹ There are religious as well as practical explanations for why young women are targeted by religious polygamy. Religious doctrine postulates both a religious imperative and a religious payoff for maximizing reproduction by male adherents.³⁷⁰ Not only does this make participation in polygamy of all female members of the community essential, but it also makes bringing them into polygamous marriage at the earliest possible reproductive age most effective for achieving these religious goals.

³⁶⁵ *Fundamentalist Church of Jesus Christ of Latter-Day Saints*, SPLC, <http://www.splcenter.org/get-informed/intelligence-files/groups/fundamentalist-church-of-jesus-christ-of-latter-day-saints> (last visited May 17, 2015) (describing the repressive rule of Prophet Warren Jeffs).

³⁶⁶ BONNIE L. PETERS, FAMILY SUPPORT CTR., *THE PRIMER: A GUIDEBOOK FOR LAW ENFORCEMENT AND HUMAN SERVICES AGENCIES WHO OFFER ASSISTANCE TO FUNDAMENTALIST MORMON FAMILIES* 18 (2011), available at <http://www.familysupportcenter.org/Primer.pdf> (“It has been alleged that the FLDS church controls the police force, city council, city government, and elected officials.”); *id.* at 19 (noting that a church trust “owns most of the land, housing and businesses in the community”).

³⁶⁷ *Accord* Michah Gottlieb, *Are We All Protestants Now?*, JEWISH REV. BOOKS, Summer 2012, at 15, 17 (2012) (book review) (describing similar coercion in the context of ultra-Orthodox Jewish communities as a result of “their poor command of English and lack of secular education” and noting the paradox “that while the ultra-Orthodox justify their separatism by appealing to religious freedom, they use that freedom to restrict the freedom of their individual members”).

³⁶⁸ *See supra* Part I.B.2.

³⁶⁹ *Reference*, 2011 BCSC 1588, paras. 330, 649, 653 (Can.).

³⁷⁰ *See* Strassberg, *supra* note 60, at 1579.

Young teenage girls are also more easily pressured into such marriages than they might be at age eighteen or older. They are still under the control of their parents, and their age-related pliability is enhanced by familial, social, and religious indoctrination that makes polygamous marriage the only possible future they can both value and imagine. These two factors make young teenage girls the perfect polygamous wives.

Finally, ensuring that these young women do not have the opportunity to grow to adulthood and leave the community to marry, perhaps monogamously, allows polygamy to be a self-sustaining practice over time. Male polygamists cannot maximize their reproduction without a large pool of women to marry. So long as the community continues to funnel all its female children into polygamous reproduction, there is a possibility that the community can sustain its polygamous practices over multiple generations without having to expand the pool of potential wives through new recruits. So it is possible to see how religious belief can and has shaped a particularly coercive practice of underage polygamy.

However, this justification is complicated by the fact that some religiously polygamous communities, such as the Apostolic United Brethren (AUP), have backed away from both underage and arranged marriages,³⁷¹ perhaps due to a concern about prosecution or as a result of evolving attitudes and beliefs about the autonomy of women, or some combination of the two. Furthermore, many of these AUP community members are relatively integrated into mainstream civil society, living in non-polygamous towns and cities and having their children attend public school. This presents the possibility of a gentler form of religious polygamy that may not be coercive. Yet, it is not clear whether this gentler practice of religious polygamy is sustainable. As many as fifty percent of children may leave this sect as adults, producing a shrinking pool of potential polygamous wives.³⁷² At some point in time, the religious need of male members of the community to create expansive polygamous families could trump these progressive steps and require restructuring of both community life and the age of polygamous marriage to ensure capture of female children within the community as polygamous wives. Thus, as long as polygamy is a religious imperative, it may well force adherents to take steps to

³⁷¹ PETERS, *supra* note 366, at 11–12.

³⁷² *Id.* at 13. Contact with the non-polygamous world does, however, create the possibility of bringing new women into the community and polygamous marriage. For example, Kody Brown's first, third, and fourth wives came from within the Apostolic United Brethren polygamous families, while his second wife was not raised in a polygamous family. BENNION, *supra* note 96, at 183.

minimize the autonomy of women so as to maximize their entry into polygamous marriages. Thus, coercion and religious polygamy may well be particularly inextricable. Furthermore, the extra coercion provided by religion may be a key feature in the continued existence of polygamous communities.

The question which then arises is to what extent does free exercise jurisprudence allow consideration of the way in which religious belief can be combined with autonomy-denying and -destroying practices to render individuals incapable of asserting or exercising their rights to avoid participation in the religious practice? Certainly, many who criticize *Yoder v. Wisconsin*³⁷³ today focus on the rights of adolescents to an education that will make it possible for them to freely choose as adults whether to embrace the Amish lifestyle or reject it.³⁷⁴ The issue of children's rights is even more starkly drawn in the context of religious polygamy. Here, the exchange is not just an education for the romanticized agrarian life of the Amish³⁷⁵ but an exchange of education and freedom to choose monogamous marriage, a marriage partner and self-determination in matters of child-bearing for the very difficult life of a polygamous wife with a long period of childbearing, primary financial responsibility for a large family with little earning potential, and largely single parenting. Indeed, *Yoder* itself has contributed to the problem by allowing Mormon fundamentalist families to withdraw both boys and girls from school by age thirteen or fourteen, thus making it particularly difficult to provide these children with practical options to life within the community, let alone the psychological and intellectual tools to decide for themselves about polygamy. Reconsideration of *Yoder* in the context of religious polygamy will not be necessary so long as all polygamy is seen as socially harmful and laws criminalizing polygamy are understood as neutral and generally applicable, even when the practical reality in a particular state may be that polygamy is primarily chosen by those whose religion mandates it. However, should this practical reality be taken as confining the target of polygamy laws to religious polygamy, as *Brown* asserted, it may not be possible for the Court to avoid confronting *Yoder*.

³⁷³ 406 U.S. 205 (1972).

³⁷⁴ See HAMILTON, *supra* note 53, at 64 (criticizing *Yoder* for making Amish children “martyr[s] to their parents’ faith”); JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT 200 (2014) (“[I]s not schooling beyond the eighth grade a prerequisite for the information and self-confidence required for independent judgment?”).

³⁷⁵ HAMILTON, *supra* note 53, at 5–6 (describing *Yoder* as “a love letter to the Amish,” whom the Court saw as upstanding citizens and parents, and noting how more recently the Amish have been shown to have serious issues with alcoholism, violence, incest, and practices of shunning that punish rape victims).

CONCLUSION

American jurisprudence has long struggled to articulate the harms of polygamy, even as it has, until *Brown*, insisted that these harms were sufficient to overcome the burden on religious practice created by criminalizing polygamy. The apparent failure of the state interests thus far thought to be implicated by polygamy to survive the strict scrutiny applied in *Brown* gave some urgency to remedying this deficit. *Reference* provides this understanding of the considerable inherent harms of polygamy, backed by the best empirical data ever available on the social and individual impacts of polygamy. The “cruel arithmetic” of polygamy cannot help but produce deep repercussions on individuals, communities, and society in general. In light of this, it is difficult to credit *Brown*’s claim that only animus against a minority religious practice can explain the criminalization of unlicensed polygamous marriages and marital relationships. It is an accident of history that one religion chose to embrace as a fundamental practice a marital form antithetical to and destructive of the very social fabric that allowed the religion to emerge. The prohibition against polygamy is not about religion but about women and men and children and the kind of society they can live in. Once this is recognized, it is impossible to see the Utah bigamy statute as anything but a neutral and generally applicable law that happens to be operating in a state with a great disproportion of religious polygamists. Consequently, neither the strict scrutiny nor the heightened scrutiny applied in *Brown* is justified. At the same time, it is hard to imagine that the interests at stake in the choice between monogamy and polygamy are not sufficient to survive strict scrutiny, even if it were to be justified.