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THE LOADSTONE ROCK: THE ROLE OF HARM IN THE CRIMINALIZATION OF PLURAL UNIONS

*Jonathan Turley**

ABSTRACT

In this Article, Professor Turley explores the concept of social harm in the context of two recent cases in the United States and Canada over the criminalization of polygamy. The cases not only resulted in sharply divergent conclusions in striking down and upholding such laws respectively, but they offered strikingly different views of the concept of harm in the regulation of private consensual relations. Professor Turley draws comparisons with the debate over morality laws between figures like Lord Patrick Devlin and H.L.A. Hart in the last century. Professor Turley argues that the legal moralism of figures like Devlin have returned in a different form as a type of “compulsive liberalism” that seeks limitations on speech and consensual conduct to combat sexism and other social ills. The alternative, advocated in this Article, is the adoption of a Millian approach to harm that requires a more concrete form of injury or harm to justify individual choice. In what he calls the “Loadstone Rock” of constitutional analysis, the definition of harm continues to dictate the outcome of the conflict between individual choice and social mores.

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It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way

INTRODUCTION

The recent federal decision² to strike down the criminalization of polygamous relationships in Utah was met with a mix of rejoicing and rage. What was an emancipating decision for thousands of plural families was denounced as the final descent into a moral abyss by others.³ Indeed, former Senator Rick Santorum⁴ and Associate Justice Antonin Scalia⁵ had previously warned that the decriminalization of homosexual relations would lead to a parade of horrors, including the decriminalization of polygamy. The relatively straightforward claims in *Brown v. Buhman* were overshadowed by such predictions of social and legal disintegration should we succeed.⁶ Underlying these statements is a more fundamental question about the basis for

¹ CHARLES DICKENS, *A TALE OF TWO CITIES* 1 (Andrew Sanders ed., Oxford Univ. Press rev. ed. 2008) (1859).

² The actual decision striking down the cohabitation language of the statute came in 2013, *see* *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013), but the final ruling (on the Section 1983 claim) was issued, in favor of the challengers, in 2014. *Brown v. Herbert*, 43 F. Supp. 3d 1229 (D. Utah 2014).

³ Jonathan Turley, Op-Ed., *In the “Sister Wives” Case, Morality Wins*, WASH. POST, Dec. 22, 2013, at B5, available at http://www.washingtonpost.com/opinions/thanks-to-the-sister-wives-lawsuit-we-have-one-less-morality-law-thats-a-good-thing/2013/12/20/3c419ba0-676d-11e3-a0b9-249bbb34602c_story.html.

⁴ Santorum responded to the ruling in *Brown* with the following tweet: “Some times I hate it when what I predict comes true”—referring to his 2003 claim that legalizing “consensual sex within your home” would lead to the legalization of polygamy and “undermine the fabric of our society.” *Excerpt from Santorum Interview*, ASSOCIATED PRESS, Apr. 23, 2003, available at http://usatoday30.usatoday.com/news/washington/2003-04-23-santorum-excerpt_x.htm; Rick Santorum, TWITTER (Dec. 15, 2013, 5:49 AM), <https://twitter.com/ricksantorum/status/412217738246258688> (last visited May 17, 2015).

⁵ *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (predicting that the decriminalization of homosexuality through the overturning of *Bowers v. Hardwick* would “effectively decree[] the end of all morals legislation,” including fornication, bigamy, adultery, adult incest, bestiality, and obscenity).

⁶ The only positive aspects to these articles often appeared to be predictions that we could not prevail in the case. “*Sister Wives’ Stars Sue Utah, Say Polygamy Ban Is Unconstitutional*,” ASSOCIATED PRESS, July 25, 2012, available at <http://www.foxnews.com/entertainment/2012/07/25/ister-wives-stars-sue-utah-say-polygamy-ban-is-unconstitutional/> (quoting a Stanford University Professor as predicting failure and noting that “[c]ontemporary law under the First Amendment regarding the exercise of religion is just not very friendly to the claims of polygamists”).

morality legislation in the United States.⁷ This question is made all the more interesting by the inapposite result reached by the Canadian Supreme Court in *Reference re: Section 293 of the Criminal Code of Canada* just a couple years earlier in a case out of Bountiful, British Columbia (hereinafter the *Bountiful* case or *Bountiful*).⁸ That case involved a cohabitation law that was upheld based on the presumption of harm, inherent in plural families, to women and children as well as to the institution of marriage generally. As lead counsel in *Brown v. Buhman* and one of the experts heard in the *Bountiful* case, the difference was striking. In one case, privacy prevailed; in the other, it was morality that shaped the outcome. It is a tale of two cases that rivals Dickens, and, for privacy advocates, these cases were truly the best and the worst of times.⁹

The *Brown* and *Bountiful* cases not only focus attention on the widely practiced tradition of polygamy around the world but also the notion of harm underlying criminal provisions. The sharply divergent approach to harm was the most salient difference in the analysis under the two cases. Canada has long followed a *modus vivendi* approach to liberalism that embraces diversity of opinions and values in a pluralistic society.¹⁰ However, that approach was shown to be limited in the context of plural relationships in the *Bountiful* case. Across the border, the United States District Court in Salt Lake City reached the diametrically opposite result with a strikingly similar statute to the one in British Columbia. Much of the difference is due to the question of harm and how it is addressed within the context of morality laws.

This Article will not address the question of whether there is a general right for consensual adults to live in a plural relationship. Cohabitation is a core privacy right that is normally protected between consenting adults.¹¹ Few people continue to argue that society has a right to regulate consensual sexual relations between adults, and it is quite common for people to have multiple

⁷ See Turley, *supra* note 3; Jonathan Turley, Op-Ed., *One Big, Happy Polygamous Family*, N.Y. TIMES, July 21, 2011, at A27, available at <http://www.nytimes.com/2011/07/21/opinion/21turley.html>.

⁸ I served as the legal expert supporting the challenge to the Canadian law. See *Reference re: Section 293 of the Criminal Code of Can.*, 2011 BCSC 1588, para. 256 (Can.) [hereinafter *Bountiful*].

⁹ This same conflict over the use of social harm as the basis for discriminatory laws is at the heart of the consolidated cases under review with the United States Supreme Court over same-sex marriage. See *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted* 135 S. Ct. 1040 (2015) (granting review of the Sixth Circuit decisions upholding Kentucky, Michigan, Ohio, and Tennessee marriage limitations).

¹⁰ See Alex Fielding, *When Rights Collide: Liberalism, Pluralism and Freedom of Religion in Canada*, 13 APPEAL 28 (2008).

¹¹ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

sexual partners today.¹² Indeed, from 1960 to 2006, the number of nonmarital cohabitants grew by more than 1,000%.¹³ Moreover, this Article will not explore whether polygamy is clearly a bona fide religious practice. Polygamy is an ancient religious-based practice that continues to be followed by millions around the world. Many polygamists follow the practice out of secular or personal reasons distinct from religious traditions.¹⁴ Given the historical, religious, and social foundation for plural relationships, courts like the one in the *Bountiful* decision have upheld criminalization based largely on the assumption of harm. These courts often assert that polygamy is inherently harmful on the basis of little more than anecdotal evidence or value-driven opinions. Indeed, the courts rarely consider the full array of polygamous relationships and focus not just on polygyny but the most extreme forms of polygyny.

The question of harm has long been at the heart of philosophical theories that attempt to define when a state may legitimately curtail or criminalize the conduct of its citizens. The most famous of such theories is the “Harm Principle” by John Stuart Mill, who believed that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”¹⁵ Mill’s harm principle is a foundation for many modern rights from privacy to association to speech. It is a particularly penetrating standard because it forces society to move beyond generalized notions of immorality or social harm to isolate specific harms caused by proscribed conduct. It posits that the burden rests with the

¹² Courts have recognized the new reality of large numbers of adults living together outside of marriage. For example, over four decades ago, the Supreme Court of California decided *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), which recognized the ability of such couples to have binding contracts. Indeed, studies show a very high percentage of “one-night stands” or single sexual encounters with lovers. Over forty-six percent of the sexual relations by responding individuals in one study proved to be one-time encounters with individuals. See EDWARD O. LAUMANN, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 172–225 (1994). Another study showed that 1,627 respondents reported 4,324 different sexual partners before they were nineteen years old and, of those 4,324, 1,506 (or 35.6%) were with one-time only partners. *Articles, Books and Other Writing*, Ian Ayres, <http://islandia.law.yale.edu/ayers/indexchron.htm> (last visited May 17, 2015) (scroll to “A Separate Crime of Reckless Sex” and select hyperlinks associated with relevant datasets). This study was cited and discussed in Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599 (2005); and in Christopher Shea, *Criminalizing Reckless Sex*, N.Y. TIMES, Dec. 12, 2004, § 6 (Magazine), at 62, available at <http://www.nytimes.com/2004/12/12/magazine/12CRIMINALIZING.html>.

¹³ NAT’L MARRIAGE PROJECT, *THE STATE OF OUR UNIONS 2007: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 19–20 & fig.7 (2007), <http://stateofourunions.org/pdfs/SOOU2007.pdf>.

¹⁴ Jane Tucker, Note, *Taming The Green-Eyed Monster: On the Need To Rethink Our Cultural Conception of Jealousy*, 25 YALE J.L. & FEMINISM 217, 223, 239 (2013).

¹⁵ JOHN STUART MILL, *ON LIBERTY* 23 (Boston, Ticknor & Fields 1863) (1859).

government not just to balance rights against harm but also to establish the specific harm posed by the proscribed conduct. The scope of that harm for Mill is necessarily confined to actual as opposed to spiritual or moral harm. Otherwise, any law could be justified on a claim that the law codifies or protects morality. There is unquestionably a moral or normative element to many crimes like murder or rape. However, these crimes involve physical harm committed without consent.¹⁶ This Article focuses on consensual acts and relations of adults. These polygamists do not view themselves as harmed, but their relationships are being deemed harmful because they run against majoritarian values and sentiments.

In case after case, courts return to the question of harm: harm in interracial marriage,¹⁷ harm in same sex marriage,¹⁸ harm in plural marriage. While the first two claims were ultimately rejected, harm remains the magnetic focal point for modern analysis. It functions much like what Dickens called “The Loadstone Rock” in *A Tale of Two Cities*—the rock upon which inevitably all cases must break.¹⁹ It draws all analysis to the question of what is the harm of a consensual union that would justify criminal sanctions. While the criminalization of different forms of marriage—whether interracial, plural, or homosexual—was once based on open majoritarian moral judgments, modern cases and scholarship have tended to emphasize social harm. Modern jurisprudence—and sensibility—eschews direct moral dictates. This can create a thin veneer for what are really moral dictates. Normative or moral claims underlying criminal sanctions are sometimes justified on loose claims of social harm, such as the effect of certain acts in degrading or marginalizing particular groups. This nexus between social harm and criminal sanctions is placed into sharp relief when courts seek to satisfy tests for the constitutionality of the underlying laws. In the United States, the harm analysis is unavoidable,

¹⁶ Obviously, in cases of statutory rape, there is the legal absence of consent due to the age of the victim.

¹⁷ See, e.g., *Perez v. Lippold*, 198 P.2d 17, 25–27 (Cal. 1948) (discussing but ultimately rejecting respondent’s claims that state statutes barring interracial marriage “diminish[] race tension and prevent[] the birth of children who might become social problems”).

¹⁸ See, e.g., *Latta v. Otter*, 771 F.3d 456, 464–65, 469 (9th Cir. 2014) (rejecting defendants’ argument that “same-sex marriage will harm existing and especially future opposite-sex couples and their children because the message communicated by the social institution of marriage will be lost”); *Baskin v. Bogan*, 766 F.3d 648, 668 (7th Cir. 2014) (“[I]t is sufficiently implausible that allowing same-sex marriage would cause palpable harm to family, society, or civilization”), *cert. denied*, 135 S. Ct. 316 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1225 (10th Cir. 2014) (“We cannot embrace the contention that children raised by opposite-sex parents fare better than children raised by same-sex parents”), *cert. denied*, 135 S. Ct. 265 (2014).

¹⁹ DICKENS, *supra* note 1, at 233 (“The Loadstone Rock was drawing him, and he must sail on, until he struck. He knew of no rock; he saw hardly any danger.”).

regardless of the test applied, from strict scrutiny to intermediate scrutiny to rational basis standards. While the burden differs significantly, they all inevitably arrive at the Loadstone Rock of harm. Even the mere demand of a rational basis requires some nexus to a concrete harm—a linkage that was found missing in *Brown*. Moreover, a Millian view of harm suggests a broader use of “rational basis with bite,” which is often cited in animus jurisprudence in areas like equal protection.²⁰ If “the hallmark of animus jurisprudence is its focus on actual legislative *motive*,”²¹ the hallmark of harm analysis must be concrete injury to individuals or society at large.

In Part I, this Article explores the decisions in Canada and the United States on the criminalization of plural relationships—addressing harm in fundamentally different ways. Part II then explores the notion of harm as the basis for criminal laws. The discussion begins with the utilitarian work of Jeremy Bentham and the later work of John Stuart Mill. Mill’s harm principle illustrates how the Supreme Court took the wrong path in *Reynolds v. United States* in 1879 in its embrace of a broad notion of social harm to uphold the criminalization of polygamy.²² Mill’s work offers not only an objective basis for decriminalization of many of these areas but is better suited for the emerging privacy-based doctrines taking hold in the United States, Canada, and other nations. The division of opinions between the courts in Canada and the United States bares close resemblance to the famous Hart–Devlin debate over morality legislation. Under a Millian approach, harm to morality alone would not be a cognizable basis for state or federal laws. The discussion will then turn to the reemergence of a debate over the scope of government regulation of consensual choices. While figures like Lord Patrick Devlin once argued for such regulation to defend Christian morality, this Article will look at contemporary scholars who advance what this Article calls a “compulsive liberalism,” where harm is defined broadly to subsume consensual acts that foster discrimination or stereotypes. While the views of Mill and Hart were once a foundational principle for liberals, this new scholarship seems to channel many of Devlin’s assumptions about the right of society to force individuals to live according to majoritarian values. This includes arguments for limiting speech and other core freedoms. Part III then explores and critiques these divergent views on harm as they have been manifested in the

²⁰ *Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011).

²¹ *Bishop*, 760 F.3d at 1099.

²² 98 U.S. 145 (1879).

litigation over plural unions. The Article looks closely at the testimony of two scholars who testified in favor of criminalization in the *Bountiful* case: Professors Marci Hamilton and Rebecca Cook. For these scholars, harm is a vehicle for the protection of particular public values. Part III then explores harm as a limiting principle on governmental coercion in a Millian approach. The requirement of a causal relation to demonstrated harm is consistent with the Court's ruling in *Lawrence v. Texas*.²³ However, there remains some resilience in the use of public morality or values as a basis for criminal sanctions. We inevitably return to the concept of harm as the Loadstone Rock in determining how individual freedom and social values break in conflicts like plural unions. Ultimately, the Article argues for a Millian approach to harm that would not only resolve these cases in favor of individual choice but reinforce standards like the rational basis test in requiring tangible and direct social harm. These two cases present a perfect microcosm of this broader debate. Regardless of how you view the essence of these cases, what is clear is that all analytical roads lead to the Loadstone Rock of harm.

I. A TALE OF TWO CASES: THE *BOUNTIFUL* AND *BROWN* LITIGATION

The intriguing comparison between the *Bountiful* and *Brown* cases is due in large part to the similarity of the two underlying laws criminalizing cohabitation or plural relationships. Both Canada and the United States recognize privacy protections for consensual sexual relations between adults. However, both nations criminalized cohabitation, which swept across polygamy categories from polyamory to polyandry to polygyny. The broad language and general applicability of the laws magnified the importance of defining harm as part of the constitutional analysis. Despite the similarities in scope and language, it was the different approach to harm that produced divergent results.

Section 293 of the Criminal Code was enacted in 1890 in Canada and states as follows:

- Every one who
 - (a) practises or enters into or in any manner agrees or consents to practise or enter into
 - (i) any form of polygamy;

²³ 539 U.S. 558 (2003).

(ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage,

...

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.²⁴

The Canadian law was passed specifically to target Mormons in the late 1800s.²⁵ The law's enactment occurred at the height of anti-Mormon sentiments, which viewed Mormons as a group at odds with the very foundation of Western Civilization.²⁶

The Utah law was crafted in terms of “cohabitation” but had the same scope as the Canadian law. In the United States, four years after the Canadian law was enacted, Congress adopted the Utah Enabling Act of 1894 that conditioned the admission of the territory as a state on the prohibition of polygamy.²⁷ Within one year, the territory passed the Irrevocable Ordinance, as demanded, and the prohibition was included in Utah's 1895 Constitution.²⁸ Like the Canadian law, these measures were passed at the height of anti-Mormon sentiments in both countries.²⁹ The modern cohabitation statute was passed in 1873. Utah law states that “[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.”³⁰ One distinguishing factor is that the Canadian law draws the distinction between bigamy and polygamy—a point of common confusion in

²⁴ Criminal Code, R.S.C. 1985, c. C-46, s. 293(1) (Can.), available at <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html>.

²⁵ *Bountiful*, 2011 BCSC 1588, para. 983 (Can.) (“Recall that the law in Canada was prompted in part by a concern that the bigamy prohibition was not sufficiently broad to capture Mormon plural marriage.”).

²⁶ See generally TERRY L. GIVENS, *THE VIPER ON THE HEARTH: MORMONS, MYTHS, AND THE CONSTRUCTION OF HERESY* 23, 130–37 (1997) (discussing how Mormons became the “handy, ready-made Other” for nineteenth-century society and politics).

²⁷ Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894) (“First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited.”).

²⁸ *Soc’y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 928 (Utah 1993).

²⁹ See SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002); Elijah L. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion*, 28 W. NEW ENG. L. REV. 257 (2006); Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 710–20 (2001).

³⁰ UTAH CODE ANN. § 76-7-101(1) (West 2004), *invalidated in part by* *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

the United States. Bigamy generally applies to cases where someone holds multiple marriage licenses, while polygamy goes more broadly to having a plural family or to cohabitation.³¹ Section 290 of the Canadian Criminal Code confines bigamy to a charge of a married person who then participates in a marriage ceremony with another person. Otherwise, the two provisions sweep broadly into cohabitation or “conjugal unions” associated with plural relationships even when the participants do not secure multiple marriage licenses.

While it is not necessary to go into an exhaustive treatment of both cases, it is useful to critique the different approaches—and conclusions—of the courts on the issue of harm.

A. *The Bountiful Litigation*

The *Bountiful* case began with the arrests of James Oler and Winston Blackmore for polygamy. James Oler was the bishop of the Canadian Fundamentalist Latter-day Saints (FLDS) and associated with Warren Jeffs,³² who was later convicted in the United States of polygamy-related charges.³³ In 2002, Winston Blackmore was excommunicated from the FLDS, which led to a split among the polygamists in Bountiful.³⁴ Both were arrested. However, in January 2009, the charges were dropped due to irregularities in the selection of the prosecutors.³⁵ In 2014, both men were again charged with polygamy for over two decades. The charges alleged multiple marriages, sexual abuse, and

³¹ See 11 AM. JUR. 2D *Bigamy* § 1 (2015); *Bigamy* 13 (Law Reform Comm’n of Can., Working Paper No. 42, 1985), available at <http://www.lareau-law.ca/LRCWP42.pdf> (“[P]olygamy consists in the maintaining of conjugal relations by more than two persons. When the result of such relations is to form a single matrimonial or family entity with the spouses, this is regarded as polygamous marriage. . . . The maintaining of more than one monogamous union by the same person corresponds with the popular notion of bigamy. . . . In legal terms, however, [polygamy and bigamy] have a more specific meaning. In particular bigamy, which is defined in relation to the legal institution of marriage, is distinguished from polygamy by the requirement of formal marital ties.”).

³² Lindsay Whitehurst, *Jailed Warren Jeffs Retakes FLDS Presidency*, SALT LAKE TRIB. (Feb. 24, 2011, 9:42 am), <http://www.sltrib.com/sltrib/home/51297760-76/jeffs-charges-president-warren.html>.

³³ *Jeffs v. State*, No. 03-10-00781-CR, 2012 WL 1660612 (Tex. App. May 10, 2012).

³⁴ Emiley Morgan, *Jeffs’ Appeal Goes Before Utah Supreme Court*, DESERET NEWS, Nov. 3, 2009, at B5, available at <http://www.deseretnews.com/article/705341547/Jeffs-appeal-goes-before-Utah-Supreme-Court.html>.

³⁵ *B.C. Polygamy Evidence Helps Warren Jeffs Conviction*, CBCNEWS (Aug. 11, 2011, 9:34 PM PT), <http://www.cbc.ca/news/canada/british-columbia/b-c-polygamy-evidence-helps-warren-jeffs-conviction-1.1083446>.

cross-border child trafficking. The polygamy counts accused Blackmore of having twenty-four marriages and Oler of having four wives.³⁶

After the 2009 charges were dropped, British Columbia's Attorney General sought the review of the constitutionality of the Polygamy Provision through a reference to the British Columbia Supreme Court.³⁷ The reference would involve American experts, including the author of this Article (on the side of decriminalization)³⁸ and Professors Marci Hamilton³⁹ and Rebecca Cook (in favor of continued criminalization).⁴⁰ From the outset, a number of salient elements in the case strengthened the arguments for decriminalization. The parties seeking decriminalization constituted consenting adults who were not accused of any abuse of spouses or children.⁴¹ Moreover, they included polyandrists (unions with one woman and multiple men) and polyamorists (involving often secular-based plural unions involving multiple couples),⁴² rather than exclusively polygynists like Blackmore or Oler.⁴³ Finally, the Attorney General accepted one threshold fact (which the court then used to frame its analysis): "the case against polygamy is all about harm. Absent harm, [the Attorney General] accepted that [Section] 293 would not survive scrutiny under the *Charter*."⁴⁴

My report to the British Columbia Supreme Court focused heavily on the question of harm and the lack of evidence—as opposed to opinion—regarding the presumed inherent injuries associated with plural relationships. While

³⁶ *Bountiful: Winston Blackmore, James Oler Polygamy Hearing Begins in Creston, B.C.*, CBCNEWS (Oct. 10, 2014, 12:26 AM PT), <http://www.cbc.ca/news/canada/british-columbia/bountiful-winston-blackmore-james-oler-polygamy-hearing-begins-in-creston-b-c-1.2793046>.

³⁷ This is a procedure that would be instantly rejected in the United States as a request for an advisory opinion, but it is permissible under Canadian law. Supreme Court Act, R.S.C. 1985, c. S-26, s. 53(1) (Can.), available at <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-s-26/latest/rsc-1985-c-s-26.html>.

³⁸ *Bountiful*, 2011 BCSC 1599, paras. 235, 256, 300, 335, 799, 835 (Can.) (discussing Turley testimony).

³⁹ *Id.* paras. 69, 301–302, 334 (discussing Hamilton testimony).

⁴⁰ *Id.* paras. 561, 602–603, 798–799, 804–806, 809, 812–814, 821, 823, 830, 837, 841, 845 (discussing Cook testimony).

⁴¹ *Id.* paras. 18–25.

⁴² *Id.* para. 960 (noting "five affidavits from polyandrous polyamorists in Canada").

⁴³ While Oler would be represented with other parties in the *Bountiful* case, Blackmore would not. *Id.* para. 23 ("Mr. Blackmore, on his own behalf and on behalf of his congregation, sought party status in the reference and an order for advance costs to allow him to retain and instruct counsel. Both applications were dismissed, and he was granted interested person status on the same terms as the others. In the end, Mr. Blackmore opted not to take part in the reference." (citation omitted)).

⁴⁴ *Id.* para. 2. This threshold decision was used by Bauman, however, to reject the framing premise of the challengers: "that this case is about a wholly unacceptable intrusion by the State into the most basic of rights guaranteed by the *Charter* - the freedom to practice one's religion, and to associate in family units with those whom one chooses." *Id.* para. 3.

Chief Justice Robert J. Bauman cited that testimony, he did not actually address the criticism of the absence of direct evidence of harm. Instead, Bauman ruled against decriminalization based on a sweeping presumption of inherent harm “to women, to children, to society and to the institution of monogamous marriage.”⁴⁵ Specifically, the court found that the following forms of harm supported the criminalization of plural relationships (the court’s language with respect to each of these harms is reflected in the text below):

- *Women*: Women in polygamous relationships are at an elevated risk of physical and psychological harm. They face higher rates of domestic violence and abuse, including sexual abuse. Competition for material and emotional access to a shared husband can lead to fractious co-wife relationships. These factors contribute to the higher rates of depressive disorders and other mental health issues that women in polygamous relationships face. They have more children, are more likely to die in childbirth and live shorter lives than their monogamous counterparts. They tend to have less autonomy, and report higher rates of marital dissatisfaction and lower levels of self-esteem. They also fare worse economically, as resources may be inequitably divided or simply insufficient.⁴⁶
- *Children*: Children in polygamous families face higher infant mortality, even controlling for economic status and other relevant variables. They tend to suffer more emotional, behavioural and physical problems, as well as lower educational achievement than children in monogamous families. These outcomes are likely the result of higher levels of conflict, emotional stress and tension in polygamous families. In particular, rivalry and jealousy among co-wives can cause significant emotional problems for their children. The inability of fathers to give sufficient affection and disciplinary attention to all of their children can further reduce children’s emotional security. Children are also at enhanced risk of psychological and physical abuse and neglect. Early marriage for girls is common, frequently to significantly older men. The resultant early sexual activity, pregnancies and childbirth have negative health implications for girls, and also significantly limit their socio-economic development. Shortened inter-birth intervals pose a heightened risk of various problems for both mother and child.⁴⁷
- *Society*: Polygamy has negative impacts on society flowing from the high fertility rates, large family size and poverty associated with the practice. It generates a class of largely poor, unmarried men who are

⁴⁵ *Id.* para. 5.

⁴⁶ *Id.* para. 8.

⁴⁷ *Id.* paras. 9–10.

statistically predisposed to violence and other anti-social behaviour. Polygamy also institutionalizes gender inequality. Patriarchal hierarchy and authoritarian control are common features of polygamous communities. Individuals in polygynous societies tend to have fewer civil liberties than their counterparts in societies which prohibit the practice. Polygamy's harm to society includes the critical fact that a great many of its individual harms are not specific to any particular religious, cultural or regional context. They can be generalized and expected to occur wherever polygamy exists.⁴⁸

The court described these families as inherently harmful despite noting that the conventional structure or definition of a family is changing dramatically in Canada. The court notably relied on the research of Dr. Zheng Wu, Chair of the Department of Sociology at the University of Victoria and Director of the University's Population Research Group. Wu laid out the data on the composition of Canadian families.⁴⁹ That data showed a steadily changing structure of such families away from the traditional model of a two-parent family. In 2006, 84.1% of Canadian families were "couple families"—down from roughly 89% in 1981.⁵⁰ The largest change in this category was "common-law couples," which Wu defined as unmarried cohabitation, and he placed conjugal unions in the same category.⁵¹ This group had grown from roughly 6% of "couple families" in 1981 to over 18% in 2006.⁵² These and other changes were part of what Wu described as the "gradual decline of marriage" and "the diversification of conjugal life" in Canada.⁵³ Wu detailed how common law marriages currently represent well over ten percent of families in every Canadian region, including 23.6% in Yukon, 27.5% in the Northwest Territories, 28.8% in Quebec, and 31.3% in Nunavut.⁵⁴ In total, some 15.5% of all Canadian families are composed of common law families.⁵⁵ The diversification of Canadian families, however, did not prompt the court to seriously question whether the Canadian law, and the supporting arguments for criminalization, were based on a facially narrow model of monogamous marriage.

⁴⁸ *Id.* paras. 13–14.

⁴⁹ *Id.* para. 471.

⁵⁰ *Id.*

⁵¹ *Id.* para. 472.

⁵² *Id.* para. 471.

⁵³ *Id.* para. 473 ("Dr. Wu refers to the gradual decline of marriage as a 'barometer' of the diversification of conjugal life.").

⁵⁴ *Id.* para. 476.

⁵⁵ *Id.*

The court's analysis was highly outcome determinative in focusing on the harm posed by the most extreme form of polygyny in the FLDS movement. The framing is curious since the court ruled that the statute did include the criminalization of polyandrous and polyamorous unions. Indeed, the court held that the law was sweeping in its application: "The offence is not directed at multi-party, unmarried relationships or common law cohabitation, but is directed at both polygyny and polyandry. It is also directed at multi-party same sex marriages."⁵⁶ The mix of anecdotal evidence (with references to literature and academic publications dealing with extreme polygynous unions)⁵⁷ produced a less-than-compelling factual foundation for the decision. Indeed, the court's own view that the law sweeps from polygyny to polyamory to plural same-sex marriage should have prompted a broader analysis of the evidence of abuse in each of these groups and, by extension, plural relationships as a whole. Instead, as do many of the advocates of continued criminalization, the court kept most of the opinion tightly focused on the more stereotypical and notorious polygyny cases. Thus, while refusing to interpret the law narrowly to apply only to abusive or even just polygynous cases, the court upheld the law against all groups by finding inherent abuses in all plural unions. The court did not even address the many polygynous families in Canada that have no record of any abuse or the ability of such families to have polygynous relationships without such abuse. The latter point raises the question of why the right to such a union is denied because it can be abused, while the same standard is not applied to monogamous unions.

The court's analysis of harm reveals four glaring, but all too common, methodological errors. First, it brushed over the need to show harm posed by non-polygynist plural unions by insisting that the relationships are poorly defined and rarely raised in Canadian cases.⁵⁸ Second, the court used past

⁵⁶ *Id.* para. 1037.

⁵⁷ *Id.* paras. 488–492. The court adopted a study of different books, including personal accounts, relating to plural families as evidence. *Id.* para. 490 ("To determine whether the correlations between polygyny and the harms identified in the literature can be generalized cross-culturally, one of the AG Canada's witnesses undertook a statistical analysis regarding polygyny and its relationship to a number of variables using data from 172 countries.").

⁵⁸ The court used the variety of relationships under polyamorist unions, for example, to dismiss their interests in decriminalization rather than acknowledge that the law sweeps across a broad range of unions. The court found the following:

Assuming that any particular polyamorous relationship is captured by s. 293 as I have interpreted it, I do not agree that the provision infringes their s. 2(a) rights. What evidence I have that suggests that polyamorists are a discrete group sharing truly common principles is scant.

abuse references from studies and literature like the Jeffs case in the United States⁵⁹ without establishing the base number of polygynist unions, let alone plural unions overall. Discussing individual cases like Jeffs's does not reveal the percentage of such abuses among plural families or establish that such extreme cases are indicative of the wider array of such families for the purposes of harm. There is little value to such studies without knowing the prevalence of the abuses within a defined class.⁶⁰ Third, the court created a false comparison since it did not look at the rate of abuses associated with monogamous marriages or non-married families despite the statistics showing a growing number of unions in the latter category as discussed in the Wu study. Obviously, there are a high number of cases of spousal and child abuse in monogamous unions,⁶¹ but the court did not explore the inherent risk of such abuse in those unions or suggest that monogamous unions might be properly outlawed in light of such cases. Indeed, traditional marriage used to be based on a principle of coverture, where a woman was viewed as an extension of her husband's interests and status.⁶² No one has suggested that such abusive principles or practices should result in the criminalization of monogamous marriage as a whole. Finally, and most importantly, the court assumed that whatever rate of abuse that had occurred in polygynist unions was the inherent and unchanging profile for this group. It ignored the effect of criminalization of plural unions, which forces families outside of the mainstream and into secretive compounds or communities.

As with much of the scholarship in this area, the court used acts that are already criminalized like child or spousal abuses to justify the general criminalization of a type of marriage. The harms identified by the court can be

Polyamory is, I conclude, a largely secular phenomenon, as varied in practice as the imagination of its practitioners.

Id. para. 1094.

⁵⁹ *Id.* paras. 327–331.

⁶⁰ Ironically, such figures are hard to establish because of the criminalization of these families, which have been forced largely underground by the threat of investigation and prosecution.

⁶¹ Indeed, some groups report that one out of every four women are victims of domestic abuse. *See, e.g., Domestic Violence: Statistics & Facts*, SAFE HORIZON, <http://www.safehorizon.org/page/domestic-violence-statistics--facts-52.html> (last visited May 17, 2015). Other groups put the number of children abused in homes in the United States at over 3 million annually. *See The Effects of Domestic Violence on Children*, DOMESTIC VIOLENCE ROUNDTABLE, <http://www.domesticviolenceroundtable.org/effect-on-children.html> (last visited May 17, 2015). Given the court's own presentation of the statistical dominance of monogamous families, the vast majority of such cases occur in conventional families. However, no one would suggest that they are indicative of the standard monogamous family or should be viewed as a basis for criminalizing monogamy.

⁶² *See* Jo Carrillo, *The M Word: From Partial Coverture to Skills-Based Fiduciary Duties in Marriage*, 22 HASTINGS WOMEN'S L.J. 257 (2011).

and are already addressed through the criminal code. The only harms not directly addressed in the criminal code are the more subjective claims of degradation of women or the threat to marriage as an institution. Those are precisely the harms that are the most problematic, from a constitutional perspective, in the imposition of majoritarian values on minority groups. Indeed, the decision vividly demonstrates the danger of such normative judgments as the basis for criminalizing consensual relations. While the court—and many advocates—claim that the purpose of the law was to protect women from subjugation,⁶³ it is a rather dubious claim given the fact that in the 1800s, women lacked the right to vote and other core rights.⁶⁴ The rehabilitation of these laws as an effort to advance the rights of women is rather implausible given the legal institutions maintaining discrimination against women during this period. At most, the laws were meant to criminalize alternative roles for women that departed from the conventional model of the time, including the lesser status imposed on women by the state. A more plausible view is that the original purposes of both the Canadian and U.S. laws reflected an anti-Mormon norm and were part of a campaign where the majority pursued an oppressed religious minority. Since such a purpose is now anathema, a new purpose has arisen to protect women, including women who are being protected against themselves in their desire to enter such nontraditional unions.

The court's narrow analysis and assumptions related to harm tend to magnify the ultimate (and true) justification for upholding the law to protect monogamous marriage and not just marriage:

When all is said, I suggest that the prohibition in s. 293 is directed in part at protecting the institution of monogamous marriage. And let me here recognize that we have come, in this century and in this country, to accept same-sex marriage as part of that institution. That is so, in part, because committed same-sex relationships celebrate all of the values we seek to preserve and advance in monogamous marriage.

The alarmist view expressed by some that the recognition of the legitimacy of same-sex marriage will lead to the legitimization of polygamy misses the whole point. . . . [T]he argument advanced by

⁶³ *Bountiful*, 2011 BCSC 1588, paras. 6, 352, 666.

⁶⁴ Indeed, early feminists denounced the institution of marriage at the time as enslaving and abusive toward women, including in the Seneca Falls Declaration. REPORT OF THE WOMAN'S RIGHTS CONVENTION 8–9 (Rochester, John Dick 1848) (“He has made her, if married, in the eye of the law, civilly dead. He has taken from her all right in property, even to the wages she earns.”).

many, that “in this day and age” when we have adopted expansive views of acceptable marriage units and common law living arrangements, the acceptance of polygamy, or at least the abandonment of its criminal prohibition, is the next logical step. This is said in the context of the sentiment often expressed that the “State has no business in the bedrooms of the Nation”. Here, I say it does when in defence of what it views is a critical institution - monogamous marriage - from attack by an institution - polygamy - which is said to be inevitably associated with serious harms.⁶⁵

This statement perfectly captures the outcome-determinative use of harm in the *Bountiful* opinion. The court ended up where many past cases like *Reynolds* began—with a largely conclusory view that marriage by definition cannot include plural unions of any kind. There was no exploration of what the inherent value of marriage is and how it is missing in these unions. As with same-sex marriage, most people would define the essence of marriage not numerically but emotionally as the loving bond between adults. Instead, the court simply pronounced that there can be no compatibility in the same way that courts once dismissed interracial and same-sex unions.⁶⁶ The conceptual bias is revealed by the court’s framing of the question as the government’s legitimate “defence of what it views is a critical institution - monogamous marriage - from attack by an institution - polygamy - which is said to be inevitably associated with serious harms.”⁶⁷ Polygamists believe that they are fighting for the institution of marriage rather than a different “institution” attacking marriage. If the court is to base its decision on the serious harm posed by plural unions to the institution of marriage, the court, at a minimum, should explain why the heterosexual element of the original definition of marriage is not controlling but the monogamous element continues to be controlling. Otherwise, “harm” is little more than a conclusory term used to mean any union that does not comply with majoritarian values. The harm analysis proved little more than a thin veil for the same normative rationale previously used to bar unpopular monogamous unions.

⁶⁵ *Bountiful*, 2011 BCSC 1588, paras. 1041–1042.

⁶⁶ *See, e.g.*, *Pace v. Alabama*, 106 U.S. 583 (1883); *cf. Turley, supra* note 7 (“Homosexuals and polygamists do have a common interest: the right to be left alone as consenting adults. . . . There is no spectrum of private consensual relations—there is just a right of privacy that protects all people so long as they do not harm others.”).

⁶⁷ *Bountiful*, 2011 BCSC 1588, para. 1042.

B. *The Brown Litigation*

The *Brown* litigation began with the airing of a new reality television show featuring a polygamous family in Utah, *Sister Wives*, on TLC.⁶⁸ Kody Brown is married to four women: Meri, Janelle, Christine, and Robyn. Kody's marriages to Meri, Janelle, and Christine all lasted over twenty years.⁶⁹ With the addition of his most recent wife, Robyn, Kody Brown has a total of seventeen children. The Browns are members of a religious group that believes polygamy is a core religious practice. While not part of the Church of Latter-day Saints (LDS), they share fundamentalist values derived from the LDS founders. They agreed to do the show as a way to show the public a different type of polygamous family in the wake of the Warren Jeffs trial. Not only were the Browns as appalled by Jeffs as were non-polygamists, their family was based on completely different values, including full incorporation in society, divorce, and equality of the sexes. Indeed, the Browns do not pressure their children to be polygamous, and the adults came from both monogamous and polygamous families. The success of the television program is based in no small part on the fact that it has many of the issues and concerns of traditional families. Their family is typical of many polygamous families in a number of respects. First, they have never been accused of any criminal act (despite years of intensive investigation). Second, they do not hold multiple marriage licenses. Kody Brown's marriage to his first wife, Meri, was a civil marriage, but his other three unions are based on their shared religious beliefs and constitute spiritually rather than legally defined unions. Most polygamous families have never sought multiple licenses, and their plural families are consensual relations adopted by the choice of the adults.

Like the *Bountiful* case, the controversy began with a criminal investigation.⁷⁰ After the airing of the pilot episode, Utah prosecutors publicly declared that the family was committing felonies each night on television and launched a criminal investigation to establish the basis for state charges.⁷¹ The basis for the investigation was section 76-7-101 of the Utah Code, which establishes that "[a] person is guilty of bigamy when, knowing he has a

⁶⁸ Complaint for Declaratory, Injunctive, and Other Relief at para. 22, *Brown v. Herbert*, 850 F. Supp. 2d 1240 (D. Utah 2012) [hereinafter Complaint].

⁶⁹ One of the wives, Meri, recently legally divorced Kody Brown but is still part of the plural relationship. *Sister Wives Star Meri: "I Initiated Divorce from Kody,"* FOX NEWS (Feb. 18, 2015), <http://www.foxnews.com/entertainment/2015/02/18/sister-wives-star-meri-decided-to-legally-divorce-kody/>.

⁷⁰ For the record, I also served as lead counsel during the two years of criminal investigation targeting the Brown family before I filed the challenge to the state law.

⁷¹ Complaint, *supra* note 68, para. 165.

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.”⁷² Obviously, the most problematic part of the law was not the prohibition on multiple marriage licenses but the criminalization of “cohabitation”—a term that encompasses a broad category of private relations in which a married person “purports to marry another person or cohabits with another person.”⁷³

While prosecutions under the statute have been rare, published cases in the last three decades only involve religious polygynists.⁷⁴ Utah governmental officials were aware of thousands of polygamist families in the state and regularly interact with such families as part of the “Safety Net” program and other governmental programs. Indeed, Utah governmental officials were aware that the Brown family was a plural or polygamist family for years before the first episode of *Sister Wives* aired on TLC.⁷⁵ The record is uncontested that it was the airing of the show that sparked the criminal investigation, an issue that would later raise free speech issues in addition to claims under equal protection, privacy, and other rights. One official connected to the investigation publicly stated the program made prosecution “easier.”⁷⁶ Prosecutors gave national interviews discussing the Brown family, their alleged crime of polygamy, and the public investigation. Years of criminal investigation, however, produced no evidence of a crime other than violation of the cohabitation law.⁷⁷ After a couple years of investigation and public comments from prosecutors, the family went to federal court to challenge the law itself.

The Browns originally sued Utah Governor Gary R. Herbert, Utah Attorney General Mark Shurtleff, and Utah County Attorney Jeffrey R. Buhman.⁷⁸ However, Herbert and Shurtleff were later released from the case after the court ruled that it was Buhman who had the most direct role in

⁷² UTAH CODE ANN. § 76-7-101(1) (West 2004), *invalidated in part by* Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013).

⁷³ *Id.*

⁷⁴ *See, e.g.,* State v. Jeffs, 243 P.3d 1250 (Utah 2010); State v. Green, 99 P.3d 820 (Utah 2004).

⁷⁵ Complaint, *supra* note 68, para. 21.

⁷⁶ Steven Nelson, “*Sister Wives*” Defeat Polygamy Law in Federal Court, U.S. NEWS & WORLD REP. (Dec. 16, 2013, 1:07 p.m. EST), <http://www.usnews.com/news/articles/2013/12/16/sister-wives-defeat-polygamy-law-in-federal-court>.

⁷⁷ Past prosecutions under the law have often been combined with prosecutions for child rape, welfare fraud, and other crimes.

⁷⁸ Brown v. Herbert, 850 F. Supp. 2d 1240 (D. Utah 2012).

investigating and prosecuting the family.⁷⁹ Over the course of litigation, it was established that the statute was the outgrowth of a long-standing effort to ban polygamy in the state, including a commitment to do so as a condition for achieving statehood.⁸⁰ The original purpose of the statute was to combat a practice considered immoral. The question of harm was raised repeatedly over the years of litigation at the trial level.⁸¹ The family, itself, presented a compelling and tangible example that plural marriages can be maintained without any abusive or criminal element. Indeed, the state helped establish that fact after years of a determined criminal investigation that failed to produce a single, even a minor, criminal act. The Browns were a happy family with thriving children. The plural relationship is entirely consensual, and the adults believe in the legal right of divorce—as shown recently with the divorce of

⁷⁹ Ironically, it would be Shurtleff and his successor in the Brown litigation, John Swallow, who would later be indicted rather than the Browns. Jonathan Turley, *Former Utah Attorneys General Swallow and Shurtleff Arrested*, JONATHAN TURLEY: RES IPSA LOQUITUR (“THE THING ITSELF SPEAKS”) (July 15, 2014), <http://jonathanturley.org/2014/07/15/former-utah-attorneys-general-swallow-and-shurtleff-arrested/>.

⁸⁰ See, e.g., Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894). The result is a curious conflict in the state constitution that is crafted to further the deep desire of religious freedom of the state’s founders while yielding to the demand to prohibit a core religious practice. Article III of the Utah Constitution provides as follows: “Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.” UTAH CONST. art. III, § 1.

⁸¹ Harm was also raised as a question of injury for the Browns in the litigation over standing. Jonathan Turley, *Federal Court Rules Sister Wives Case Can Go Forward*, JONATHAN TURLEY: RES IPSA LOQUITUR (“THE THING ITSELF SPEAKS”) (Feb. 3, 2012), <http://jonathanturley.org/2012/02/03/federal-court-rules-sister-wives-case-can-go-forward/>. Prior challenges to the state law had been dismissed on standing grounds. The state argued that, absent a prosecution, the family had no cognizable legal injury even though the law effectively defined their entire family as an ongoing criminal enterprise. The state also ignored the public statements made by prosecutors calling the family felons in public comments. The defendants submitted affidavits saying that there was no intent to prosecute the Browns and that such prosecutions were extremely rare. (Later, the State submitted an affidavit affirmatively promising not to prosecute the Browns in a mootness challenge.) The court rejected the challenge to standing. Despite finding the law “moribund,” the court ruled that the Browns had proven injury in individual and business affidavits submitted to the court showing concrete personal and financial harm. Judge Waddoups then added to the findings the following powerful statement:

As a final note, the court reiterates the Supreme Court’s comment that “when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society’s interest in having the statute challenged.” This interest is no more prominently displayed than in a case such as this, where government officials make public comments regarding the instigation of a criminal investigation in direct response to a party’s exercise of free-speech and then, seek to bar Plaintiffs’ access to the courts and *de facto* strip them of any opportunity to be heard. Such precedent would not create a simple slippery-slope, but an unfettered path towards government harassment and abuse.

Herbert, 850 F. Supp. 2d at 1255 (quoting *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)).

Meri, who initiated the legal proceeding.⁸² The State repeatedly raised generalized claims of abuse of women and children in oral argument and written papers that were challenged as unsupported and anecdotal.⁸³

It was the approach to the evidentiary basis for harm that distinguished the opinion from its Canadian counterpart. Unlike Chief Justice Bauman, Judge Waddoups refused to accept opinion or anecdotal evidence, consistent with long-standing legal principles governing constitutional claims.⁸⁴ The Browns repeatedly stated a willingness to have a trial on harm, and the court repeatedly pressed the State for concrete factual allegations of harm. The State could not do so. Even if such evidence could be produced, the family asked whether harm found in some plural unions could be enough to ban all such unions—a standard that is not applied to monogamous unions. There was no question—as shown by the Browns—that plural unions can occur between consenting adults without any form of abuse. As shown in the Canadian litigation, many arguments of harm were based on the work of advocates who found the very notion of polygyny to be a form of male dominance.⁸⁵ The court also diverged from its Canadian counterpart in refusing to artificially narrow its analysis to polygyny as opposed to the full range of plural unions criminalized under the law.⁸⁶ Not only did that full range further expose the lack of an evidentiary basis for harm to support the law, it highlighted how the law was being used to target unpopular religious practices and families.

Judge Waddoups's lengthy opinion explored both the history and law on the criminalization of plural unions. It stood in sharp contrast in its depth and objectivity to the Canadian decision. Where Chief Justice Bauman cites the *Reynolds* decision without acknowledging its racist and prejudicial content, Judge Waddoups takes *Reynolds* head on and strips bare the bias shown in the opinion:

⁸² See *supra* note 69. Meri was the only “wife” with a legal marriage certificate.

⁸³ When lead counsel Jerry Jansen told the court that the newspapers are filled with accounts of abuse, I offered to show a hundred-fold as many stories about monogamous families and asked if the court would consider that sufficient evidence to criminalize monogamous unions.

⁸⁴ Notably, courts routinely deny claims of the violation of constitutional rights on the basis that they are subjective or insufficiently quantifiable or “concrete.” See, e.g., *Laird v. Tatum*, 408 U.S. 1, 11, 26 (1972). Yet, courts like the one in *Bountiful* routinely allow states to make such subjective claims as to immoral or socially harmful conduct. Likewise, while the courts reject “anecdotal evidence and educated guesses” of the government to support regulations, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489–90 (1995), it is still considered proper to use anecdotal evidence as in *Bountiful* when supporting morality legislation on the basis of social harm.

⁸⁵ See *supra* Part I.A.

⁸⁶ See *Brown*, 947 F. Supp. 2d at 1197–1202.

The court notes that 133 years after *Reynolds*, non-Mormon counsel⁸⁷] for Plaintiffs have vigorously advanced arguments in favor of the right of religious polygamists to practice polygamy (through private “spiritual” marriages not licensed or otherwise sanctioned by the state, a relationship to which the court will refer as “religious cohabitation”) that would have perhaps delighted Mormon Apostles and polygamy apologists throughout the period from 1852 to approximately 1904. To state the obvious, the intervening years have witnessed a significant strengthening of numerous provisions of the Bill of Rights, and a practical and morally defensible identification of “penumbral” rights “of privacy and repose” emanating from those key provisions of the Bill of Rights, as the Supreme Court has over decades assumed a general posture that is less inclined to allow majoritarian coercion of unpopular or disliked minority groups, especially when blatant racism (as expressed through Orientalism/imperialism), religious prejudice, or some other constitutionally suspect motivation, can be discovered behind such legislation.⁸⁸

The court admitted to many months of introspection in finding this law to be unconstitutional⁸⁹ and further noted that “it is perhaps a bitter irony of the history at issue here that it is possible to view the LDS Church as playing the role of both victim and violator in the saga of religious polygamy in Utah (and America).”⁹⁰ Judge Waddoups had the integrity to ask “what exactly was the ‘social harm’” found in *Reynolds* and claimed by states like Utah.⁹¹ He found

⁸⁷ This appears to be a reference to myself as lead counsel. Ironically, however, my local counsel (and former student at George Washington Law School) Adam Alba is, in fact, a Mormon (as is Judge Waddoups). Both men, in my view, came to represent not just the best of the Utah Bar but examples of principle and courage.

⁸⁸ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1181–82 (D. Utah 2013) (footnotes omitted).

⁸⁹ Judge Waddoups acknowledged:

The proper outcome of this issue has weighed heavily on the court for many months as it has examined, analyzed, and re-analyzed the numerous legal, practical, moral, and ethical considerations and implications of today’s ruling. It would be an easy enough matter for the court to do as the Defendant urges and find against the Plaintiffs on the question of religious cohabitation under the Statute, defaulting simply to *Reynolds v. United States* without seriously addressing the much developed constitutional jurisprudence that now protects individuals from the criminal consequences intended by legislatures to apply to certain personal choices, though such legislatures may sincerely believe that such criminal sanctions are in the best interest of society. The court has concluded that this would not be the legally or morally responsible approach in this case given the current contours of the constitutional protections at issue.

Id. at 1181 (citation omitted).

⁹⁰ *Id.* at 1184 (footnote omitted).

⁹¹ *Id.* at 1186.

the inescapable truth to be that the “harm” found in *Reynolds*—that continues to be cited by advocates—was based on a prejudice against the moral choices of consenting adults in framing their lives and families along their values and faiths.

Judge Waddoups also stands in sharp contrast to the past decisions of the Utah Supreme Court, which are heavily laden with bias as vividly shown by an opinion of Utah Justice Ronald Nehring. In 2006, Nehring wrote an opinion that was as shocking as *Reynolds* in its open acknowledgement of personal animus or bias against polygamists.⁹² In rejecting a challenge to the law, Justice Nehring expanded the harm of polygamy to the damage done to the image of Utah and Mormons: “No matter how widely known the natural wonders of Utah may become, no matter the extent that our citizens earn acclaim for their achievements, in the public mind Utah will forever be shackled to the practice of polygamy.”⁹³ Nehring was remarkably frank in admitting that this hostility “has been present in [his] consciousness, and [he] suspect[s] has been a brooding presence . . . in the minds of [his] colleagues, from the moment [they] opened the parties’ briefs.”⁹⁴ Rather than overcome that prejudice, Nehring not only yielded to it but warned any Utah judge of the peril of being the first to recognize the rights of polygamists: “I have not been alone in speculating what the consequences might be were the highest court in the State of Utah the first in the nation to proclaim that polygamy enjoys constitutional protection.”⁹⁵ The Nehring opinion was a shocking display of personal prejudice and animus. However, he was at least honest, whereas past judges have cloaked their animus in more neutral or conclusory language.

⁹² *State v. Holm*, 137 P.3d 726, 752 (Utah 2006) (Nehring, J., concurring).

⁹³ *Id.* at 753.

⁹⁴ *Id.*

⁹⁵ *Id.* Like Judge Waddoups, however, there remain jurists in Utah who reject such open bias in analysis, including former Chief Justice Christine M. Durham, who wrote a masterful dissenting opinion that called out her colleagues for failing to afford a religious minority the protections of the state and federal constitutions. In *State v. Holm*, Durham wrote,

While some in society may feel that the institution of marriage is diminished when individuals consciously choose to avoid it, it is generally understood that the state is not entitled to criminally punish its citizens for making such a choice, even if they do so with multiple partners or with partners of the same sex.

Id. at 773 (Durham, C.J., concurring in part and dissenting in part). Like the two cases explored in this Article, these two justices, in a single decision, offer the best and the worst of analysis of harm in modern constitutional analysis.

Judge Waddoups not only overcame such bias but stripped bare such bias in his detailed constitutional analysis. At the time of *Reynolds*, the mere statement of the prejudice against Mormons for what the Court called an “odious” religion was enough to establish the harm.⁹⁶ Indeed, ten years later, the Court satisfied the same burden by declaring that Mormon practices constituted “a return to barbarism” that were “contrary to the spirit of Christianity.”⁹⁷ Judge Waddoups rejected the conclusory notion of harm as anathematic to modern legal principles.⁹⁸

Brown was particularly illuminating on the role and meaning of social harm because it involved a host of constitutional claims with different constitutional standards from strict scrutiny⁹⁹ to intermediate scrutiny¹⁰⁰ to rational basis analysis.¹⁰¹ Yet, even under the lowest rational basis test, the State was

⁹⁶ *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

⁹⁷ *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890).

⁹⁸ Judge Waddoups noted,

In other words, the social harm was introducing a practice perceived to be characteristic of non-European people—or non-white races—into white American society. “The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.” This observation in *Late Corp.*—unthinkable as part of the legal analysis in a modern Supreme Court decision given the significant (and appropriate) development in the interpretation of the protections afforded to religious minorities under both the Establishment Clause and the Free Exercise Clause in the latter half of the twentieth century, and racial minorities under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as also recognized in the latter half of the twentieth century—was only a reiteration of the definitive position already taken by the Supreme Court more than a decade earlier in *Reynolds*. Such an assessment arising from derisive societal views about race and ethnic origin prevalent in the United States at that time has no place in discourse about religious freedom, due process, equal protection or any other constitutional guarantee or right in the genuinely and intentionally racially and religiously pluralistic society that has been strengthened by the Supreme Court’s twentieth-century rights jurisprudence.

Brown v. Buhman, 947 F. Supp. 2d 1170, 1188 (D. Utah 2013) (footnotes and citations omitted) (quoting *Late Corp.*, 136 U.S. at 49).

⁹⁹ *See, e.g., id.* at 1190. Since the court found that the cohabitation language was “not operationally neutral or of general applicability because of its targeted effect on specifically religious cohabitation,” it found that the State could not show a compelling state interest and a narrowly tailored rule. *Id.*

¹⁰⁰ *Id.* The court also found that “*Smith*’s hybrid rights exception requires the court to apply a form of heightened scrutiny to Plaintiffs’ constitutional claims, including their Due Process claim, since each of those constitutional claims are ‘reinforced by Free Exercise Clause concerns,’ in light of the specifically religious nature of Plaintiffs’ cohabitation.” *Id.* (footnote omitted) (quoting *Emp’t Div. v. Smith*, 494 U.S. 872, 881 (1990)).

¹⁰¹ *Id.* (“Alternatively, following *Lawrence* and based on the arguments presented by Defendant in both his filings and at oral argument, the State of Utah has no rational basis under the Due Process Clause on which to prohibit the type of religious cohabitation at issue here . . .”).

required to show more than moral outrage or majoritarian values to justify the criminalization of consensual adult conduct. Indeed, the court noted that the abuses repeatedly raised by the State were already fully prosecutable under rape and abuse laws as well as laws governing welfare fraud.¹⁰² Moreover, the Court juxtaposed this weak rational basis for the law against “the deeper liberty interests at issue in the home and personal relationships.”¹⁰³

In the end, Judge Waddoups agreed that the state was violating the full gambit of rights raised in the Complaint.¹⁰⁴ The Browns argued that the court could simply strike the cohabitation language of the law and effectively leave the state with the same type of bigamy law of other states, criminalizing the possession of multiple marriage licenses. The court agreed and found that the cohabitation language was facially unconstitutional as a violation of the Free Exercise Clause of the First Amendment to the United States Constitution and as without a rational basis under the Due Process Clause of the Fourteenth Amendment.¹⁰⁵

II. COMPULSIVE LIBERALISM AND THE HARM PRINCIPLE

The *Bountiful* and *Brown* decisions offer sharp contrasts, not only in the manner in which they factored harm into constitutional analysis but also with respect to the kind and amount of evidence required to establish such harm. Chief Justice Bauman struggled to offer an objective analysis of harm and inevitably not only confined the key analysis to polygyny but fell back on the traditional normative “defense of marriage” arguments. Conversely, Judge Waddoups separated the normative from the objective harms associated with plural unions as a whole. The different treatment given to harm in the two opinions shows both the determinative role harm plays in such controversies

¹⁰² *Id.* at 1224–25 (rejecting the law as a rational basis for combatting welfare fraud since “it is ‘difficult to understand how those in polygamous relationships that are ineligible to receive legal sanction are committing welfare abuse when they seek benefits available to unmarried persons’” (quoting *State v. Holm*, 137 P.3d 726, 777 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part))).

¹⁰³ *Id.* at 1224.

¹⁰⁴ The court would reserve one count under 42 U.S.C. § 1983. In 2014, the court ruled that the Browns had succeeded in showing that state officials, and particularly Mr. Buhman, acted to deny protected constitutional rights ranging from free speech to free exercise to equal protection. The court further ordered the full recovery under the federal law, including attorneys’ fees and costs. See *Brown v. Herbert*, 43 F. Supp. 3d 1229 (D. Utah 2014); see also Jonathan Turley, *Federal Court Rules State Officials Violated the Constitutional Rights of the Brown Family in the Sister Wives Case*, JONATHAN TURLEY: RES IPSA LOQUITUR (“THE THING ITSELF SPEAKS”) (Aug. 27, 2014), <http://jonathanturley.org/2014/08/27/federal-court-rules-state-officials-violated-section-1983-in-sister-wives-case/> (linking to the Section 1983 opinion).

¹⁰⁵ *Brown*, 947 F. Supp. 2d at 1221–25.

and the lack of any consistent approach to defining harm in modern cases. Under the *Reynolds* and *Bountiful* analysis, harm becomes little more than the violation of majoritarian values. In *Brown*, the court strove for a more objective basis for harm. That foundation can be found in utilitarian theories like those put forward by Jeremy Bentham and, most clearly, in the later work of John Stuart Mill and his “Harm Principle.”

A. *John Stuart Mill and the Harm Principle*

Mill is widely associated with his foundational utilitarian theories and his refinement of the work of Jeremy Bentham on the proper basis and function of state action.¹⁰⁶ Bentham’s view of government as achieving “the greatest happiness of the greatest number”¹⁰⁷ was revolutionary at its time and opened up a wide array of programs designed to transform and not simply regulate society. Bentham also articulated a view of morality that was equally revolutionary. Indeed, it would still be considered revolutionary by many. Bentham believed that achieving the greatest good for the greatest number meant increasing the pleasures of citizens and that something was morally right if its consequences led to happiness or the absence of pain.¹⁰⁸ His “felicific calculus” was meant to maximize individual freedom by measuring the relative quantities of pleasure and pain resulting from different private and public actions.¹⁰⁹ Bentham resisted efforts to confine that individual pursuit and even questioned his own calculus in being able to measure pains and pleasures, admitting, “Tis in vain to talk of adding quantities which after the addition will continue distinct as they were before, one man’s happiness will never be another man’s happiness.”¹¹⁰ Bentham, however, viewed that as precisely the reason that society needed to minimize moral codes that dictated one set of moral values or actions over another.

¹⁰⁶ See J.S. MILL, UTILITARIANISM (Roger Crisp ed., Oxford Univ. Press 1998) (1863).

¹⁰⁷ JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 93 (F.C. Montague ed., London, Oxford Univ. Press 1891) (1776).

¹⁰⁸ OVERTON H. TAYLOR, A HISTORY OF ECONOMIC THOUGHT 120 (1960).

¹⁰⁹ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 29–30 (London, Oxford Univ. Press 1879) (1789) (measuring, “[t]o a person considered *by himself*, the value of pleasure or pain considered *by itself*, will be greater or less, according to the . . . following circumstances: 1. Its *intensity*. 2. Its *duration*. 3. Its *certainty*. . . . 4. Its *propinquity* or *remoteness*. . . . 5. Its *fecundity*. . . . 6. Its *purity*” as well as when considering “a *number* of persons” “its *extent*”).

¹¹⁰ Wesley C. Mitchell, *Bentham’s Felicific Calculus*, 33 POL. SCI. Q. 161, 167 (1918) (quoting 3 ÉLIE HALÉVY, RADICALISME PHILOSOPHIQUE 481 (1904)).

Benthamite theories remain attractive to privacy advocates, particularly those opposing morality legislation, due to its recognition of the inherent right of individuals to pursue pleasure in life. However, like harm, pleasure can be a precarious element to define. In what Frederick Schauer called “majoritarian hedonistic utilitarian[ism],”¹¹¹ John Ely defined the good of utilitarianism in terms of securing happiness or pleasure.¹¹² However, Ely left defining such “good” to the political process, which can loop society back to the problem of coerced majoritarian morality. It does little from an individual-rights approach if the majority continues to decide what are acceptable pleasures and what effectively become unacceptable pleasures. Bentham himself believed that such a good could be defined by seven inherent characteristics: intensity, duration, certainty, propinquity, fecundity, purity, and extent.¹¹³ Bentham suggests that an action is morally right to the extent that it results in greater happiness (or less pain), and conversely it is immoral to the extent that it leads to unhappiness (or more pain). His bold new view of morality certainly has continued relevance to many contemporary debates over lifestyles and nontraditional unions. It is a rejection of the role of society in generally dictating moral conduct. However, Bentham’s writings on the “sovereign masters” of pain and pleasure leave the defining “good” element of utilitarianism dangerously undefined. Indeed, Bentham questioned the ability of a legislature to know the essence of the good in the pursuit of pleasure, given the uncertainty and variety of such views of individuals.¹¹⁴ The definitional foundations of Bentham’s approach also runs into difficulty with the spiritual side of human action: the adoption of values and practices that transcend immediate satisfaction or pleasure. Mill saw Bentham’s writings as flawed by the omission of such “spiritual” motivations:

Man is conceived by Bentham as a being susceptible of pleasures and pains, and governed in all his conduct partly by the different modifications of self-interest, and the passions commonly classed as selfish, partly by sympathies, or occasionally antipathies, towards

¹¹¹ Frederick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653, 658 (1991).

¹¹² JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

¹¹³ BENTHAM, *supra* note 109, at 29–30.

¹¹⁴ *See id.* at 319 (“It is a standing topic of complaint, that a man knows too little of himself. Be it so: but is it so certain that the legislature must know more? It is plain, that of individuals the legislature can know nothing: concerning those points of conduct which depend upon the particular circumstances of each individual, it is plain, therefore, that he can determine nothing to advantage. It is only with respect to those broad lines of conduct in which all persons, or very large and permanent descriptions of persons, may be in a way to engage, that he can have any pretence for interfering . . .” (footnote omitted)).

other beings. And here Bentham's conception of human nature stops. . . .

Man is never recognized by him as a being capable of pursuing spiritual perfection as an end; of desiring, for its own sake, the conformity of his own character to his standard of excellence, without hope of good or fear of evil from other source than his own inward consciousness. Even in the more limited form of Conscience, this great fact of human nature escapes him. Nothing is more curious than the absence of recognition in any of his writings of the existence of conscience, as a thing distinct from philanthropy, from affection for God or man, and from self-interest in this world or the next.¹¹⁵

Privacy, free association, and free exercise are values that transcend the types of pleasures and pains that Bentham defined.¹¹⁶ Nevertheless, Bentham's view of pleasure did contain a type of harm qualifier as evidenced by his opposition to anti-sodomy laws.¹¹⁷ Despite his own dislike for homosexual relations, Bentham saw the laws as violating the principle of the greatest good for the greatest number since it denied pleasure to a group while adding social costs by criminalizing the conduct.¹¹⁸

Where Bentham sought to delineate pains and pleasures in defining the proper role of government, Mill approached the question of the legitimacy of governmental action by isolating harm as a defining element. Mill's classic description of the foundation for state power came in his work *On Liberty*:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can

¹¹⁵ JOHN STUART MILL, *Bentham*, in *ESSAYS ON ETHICS, RELIGION AND SOCIETY* 75, 94–95 (J.M. Robson ed., Univ. of Toronto Press 1969) (1838).

¹¹⁶ Indeed, critics often focus on more selfish or abusive elements of unpopular unions like plural relationships. At the same time, opinions like *Bountiful* largely ignore the spiritual elements of these unions. It is not simply the religious foundations for polygamy but also the more spiritual (but secular) connections described in polyamorous, polyandrous, or group-home relationships.

¹¹⁷ Jeremy Bentham, *An Essay on "Paederasty"* (1785), reprinted in *PHILOSOPHY AND SEX* 316 (Robert B. Baker & Kathleen J. Wininger eds., 4th ed. 2009).

¹¹⁸ William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1339 (2000) ("Because such laws deprived consenting adults of activities that were congenitally pleasurable to them, created opportunities for false accusations and extortion, and encouraged unproductive prejudices, their overall social costs greatly exceeded their benefits.").

be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.¹¹⁹

This harm principle offers a less subjective basis for governmental action—conditioning state action on a showing of harm. Indeed, in an age of regulation, addressing defined harms would become the touchstone for the society in seeking utilitarian solutions to social ills. However, Mill himself acknowledged that harm could itself be given an expansive meaning—a meaning that would defeat the limiting elements of the principle:

The distinction here pointed out between the part of a person's life which concerns only himself, and that which concerns others, many persons will refuse to admit. How (it may be asked) can any part of the conduct of a member of a society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least his near connections, and often far beyond them.¹²⁰

Mill clearly saw the Achilles' heel of any harm-based theory in the elastic interpretation of the term, particularly in the adoption of normative or moral harms to society. Notably, the harm principle was long embraced by liberal scholars as an answer to morality legislation. However, the notion of social harm has been reintroduced by feminist scholars in seeking the criminalization of pornography, plural relationships, and other targeted conduct.¹²¹

B. Social Harm and the Rise of Compulsive Liberalism

Where the harm principle was once the answer to conservative morality legislation, feminist scholars have embraced arguments based on majoritarian morality or values to seek to criminalize some forms of consensual conduct. These “bad choices” are consensual but still harmful in the view of these scholars. This trend in some scholarship, and legislative measures, can be called “compulsive liberalism”—an effort to compel the correct choices or conduct in society.¹²² Liberal scholars are increasingly answering Judge

¹¹⁹ MILL, *supra* note 15, at 23.

¹²⁰ *Id.* at 154.

¹²¹ See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

¹²² Professor Harcourt referred to this trend as “conservative liberalism” to capture the same ironic shift in legal theory. *Id.* at 116 (“The emergence of conservative liberalism represents the ironic culmination of a long debate between liberal theorists and their critics. It is ironic because it symbolizes a victory for both sides.

Waddoups's question of "what exactly was the 'social harm'" by citing perceived inequalities, objectification, or domination as harms. There is only a slight translational difference reflected in nineteenth-century cases like *Reynolds* and the twenty-first century work of some academics. Where the *Reynolds* Court referred to Christian values, it also cited the desire to combat a "patriarchal principle," which, "when applied to large communities, fetters the people in stationary despotism."¹²³ Now, such rationales for criminalization more often speak of subjugation and discrimination. Indeed, the experts in the *Bountiful* litigation returned to the evils of "patriarchal family structures" to support the prosecution of those with contrary values.¹²⁴ While advocates for new limitations on speech and conduct may view themselves as inherently distinct from the legal moralist of prior centuries, compulsive liberalism has returned society to a debate over the concept of social harm and the limitations of consensual conduct among adults.

In adopting broader expressions of harm, scholars are building on the illiberal theories of such figures as Lord Patrick Devlin. In his famous Maccabean Lecture at the British Academy in 1959, Lord Devlin argued that immorality alone is a social harm worthy of criminal sanctions. Legal moralism was opposed by such figures as H.L.A. Hart, who sought to distinguish between the legal and the moral while reinforcing the "rules of recognition" in constitutional process.¹²⁵ Indeed, legal moralism was once relegated to the dustbin of history by liberal scholars arguing against the criminalization of homosexuality, fornication, adultery, and other "social ills." Devlin voiced the view of law as dictating correct values—reinforced by the coercive power of the state:

Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral. Any immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does; this is what gives the law its *locus standi*.¹²⁶

It was clear to figures like Devlin that Mill's writings posed a threat to morality codes generally and that Mill did not consider moral injury to fall

Liberal theory prevails in the sense that the harm principle is hegemonic—if only in theory. The critics of 1960s liberalism prevail in the sense that morality gets enforced—if only under a liberal regime.”)

¹²³ *Reynolds v. United States*, 98 U.S. 145, 166 (1879).

¹²⁴ See *Bountiful*, 2011 BCSC 1588, paras. 271, 599 (Can.).

¹²⁵ H.L.A. HART, *THE CONCEPT OF LAW* 94–96 (2d ed. 1994).

¹²⁶ PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 15 (1965).

within the harms justifying state action. Another British jurist, Lord James Fitzjames Stephen in his book, *Liberty, Equality, Fraternity*, also criticized the key aspect to Mill's theories.¹²⁷ Stephen insisted "that there are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity."¹²⁸ Regardless of whether the "exemplary severity" is needed to advance a moral code like the prohibition on sodomy or a normative value like equality, the point of such writings is that the criminal code is a vehicle for shaping and maintaining a social code.

The broad treatment of social harm advanced by figures like Devlin echo in contemporary arguments by those seeking to curtail speech or consensual conduct. While not arguing for morality per se, feminist scholars have argued for the criminalization of conduct deemed subjugating or demeaning to women. In her book, *In Harm's Way: The Pornography Civil Rights Hearings* (with Andrea Dworkin), Catharine MacKinnon offers an excellent example of how the concept of harm can be expanded to cover consensual adult conduct in the area of pornography.¹²⁹ The title of the book, *In Harm's Way*, captures the new moral liberalism expressed in utilitarian terms.

Pornography constructs what a woman is in terms of its view of what men want sexually Pornography's world of equality is a harmonious and balanced place. Men and women are perfectly complementary and perfectly bipolar. . . . All the ways men love to take and violate women, women love to be taken and violated. . . .

. . . .

What pornography *does* goes beyond its content: It eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is its central dynamic; the illusion of freedom coming together with the reality of force is central to its working. . . .

[P]ornography is neither harmless fantasy nor a corrupt and confused misrepresentation of an otherwise neutral and healthy sexual situation. It institutionalizes the sexuality of male supremacy, fusing the erotization of dominance and submission with the social

¹²⁷ This criticism of Mill is explored by Professor Harcourt in his article on the harm principle. See Harcourt, *supra* note 121.

¹²⁸ JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 163 (New York, Holt & Williams 1873).

¹²⁹ *IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS* (Catharine A. MacKinnon & Andrea Dworkin eds., 1997).

construction of male and female. . . . Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is a sexual reality.¹³⁰

While assigning a host of social ills to the watching of pornography, MacKinnon's defense of anti-pornography legislation in Minneapolis and other cities disregards the consent or choice of women involved in pornography as not truly consensual but habitualized.¹³¹ Indeed, the statutory language negated even contractual consent as a defense between consenting adults. "Coercion into pornographic performance" is defined as "[c]oercing, intimidating or fraudulently inducing any person . . . into performing for pornography."¹³² However, among the types of proof that are statutorily barred as a defense are

[t]hat the person actually consented to a use of the performance that is changed into pornography; . . . [t]hat the person knew that the purpose of the acts or events in question was to make pornography; . . . [t]hat the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; . . . [t]hat no physical force, threats, or weapons were used in the making of the pornography; . . . [and t]hat the person was paid or otherwise compensated.¹³³

The law further states that a woman may file a complaint "as a woman acting against the subordination of women" with the office of equal opportunity.¹³⁴ That language was ultimately found unconstitutional in *American Booksellers Ass'n v. Hudnut* by the United States Court of Appeals for the Seventh Circuit. Judge Frank Easterbrook wrote for the court in saying that the statute was rife with content restrictions based on approved and disapproved images of women:

¹³⁰ Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 17-18 (1985) (footnote omitted).

¹³¹ The proposed law was adopted in three jurisdictions: Minneapolis, Minnesota; Indianapolis, Indiana; and Bellingham, Washington. See Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 app. A at 24-28 (1985).

¹³² *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (alteration and omission in original) (quoting INDIANAPOLIS, IN., CODE § 16-3(g)(5) (1984)).

¹³³ *Id.* (quoting INDIANAPOLIS, IN., CODE § 16-3(g)(5)).

¹³⁴ *Id.* at 326 (quoting INDIANAPOLIS, IN., CODE § 16-17(b)); see also *id.* ("A man, child, or transsexual also may protest trafficking 'but must prove injury in the same way that a woman is injured. . . .' Subsection (a) also provides, however, that 'any person claiming to be aggrieved' by trafficking, coercion, forcing, or assault may complain against the 'perpetrators.'" (omission in original) (quoting INDIANAPOLIS, IN., CODE § 16-17(b))).

Under the ordinance graphic sexually explicit speech is “pornography” or not depending on the perspective the author adopts. Speech that “subordinates” women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in “positions of servility or submission or display” is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an “approved” view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.¹³⁵

Professor MacKinnon has championed the view that society can choose a value and sanction actions based on alternative values. After all, MacKinnon asks, “[I]f a woman is subjected, why should it matter that the work has other value?”¹³⁶ For MacKinnon, there is an inherent truth to her view, and tolerance must be limited in shaping a society around such truths. It is one of two forms of liberalism, where tolerance is a vehicle for achieving social consensus rather than an objective in itself.¹³⁷ The view of tolerance as a vehicle stands in contrast to the alternative form of liberalism represented as *modus vivendi*, where society is not structured to achieve a particular truth but to allow everyone to seek their own truth, allowing for true pluralism of not just ideas but relationships.¹³⁸

¹³⁵ *Id.* at 328.

¹³⁶ CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 202 (1989).

¹³⁷ John Gray explained the two different views:

Liberalism contains two philosophies. In one, toleration is justified as a means to truth. In this view, toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity in the good life. The first conception supports an ideal of ultimate convergence on values, the latter an ideal of *modus vivendi*. Liberalism’s future lies in turning its face away from the ideal of rational consensus and looking instead to *modus vivendi*.

JOHN GRAY, TWO FACES OF LIBERALISM 105 (2000).

¹³⁸ The effort to criminalize pornography by scholars like MacKinnon would (and indeed has already) failed to satisfy a Millian standard of harm. More difficult questions arise for issues like prostitution, where some claim a closer nexus of the conduct to criminal acts. However, there remains a great deal of conflict in such arguments both statistically and legally. Statistically, prostitution runs into the same problem of how to measure the harm and more specifically the relevant group for analysis. There is a great deal of difference between “street walking” and the type of prostitution practiced in jurisdictions in Nevada and Europe, where prostitution is regulated and confined to businesses. There is also the continuing legal conflict in criminalizing consensual prostitution while protecting the same sexual acts as part of adult movies. Both are done for money and both acts are between relative strangers. Yet, one is a crime and one is a lawful industry. The conceptual

The view of liberalism as seeking to establish core truths or correct thinking is evident in the writings of various academics seeking limitations on free speech and free exercise. While the free exercise elements of the *Brown* and *Bountiful* cases predominate in public discussions, these cases also involve core free speech rights. This is particularly the case with the Browns, who were only put under criminal investigation when they went public with a television show featuring their plural family. These cases reflect a dangerous and growing trend in the West in curtailing speech rights in the interests of the same notions of social cohesion and, ironically, tolerance. Speech itself is being redefined according to whether it is viewed as socially harmful or permissible.

The attack on free speech is particularly evident in countries like Canada in the expanding use of hate-speech and antidiscrimination laws.¹³⁹ Free speech was once the very touchstone of liberalism with academics challenging, through their writings, a host of laws designed to limit the content of public and private discourse. However, a counter-movement began to grow in the late twentieth century as writers advocated the criminalization of speech deemed offensive, racist, hateful, or sexist. Advocates argued that speech had to be curtailed to guarantee tolerance—a logic rejected by many in the free speech community. However, hate crime and antidiscrimination laws expanded in various countries and, in Canada, human rights commissions were increasingly in the news for investigating people who wrote and said insulting things about religion, different races, or homosexuality.¹⁴⁰

conflict is precisely the type that Mill sought to avoid with a narrower definition of harm as the basis for criminal law. A case might still be made for the comprehensive criminalization of prostitution. There are documented harms and abuses in many cases. However, the case has to be made on the basis of conventional causation with provable harm tied directly to the practice as a whole. Once the compelled morality rationale is stripped away, such a debate can occur on the basis of demonstrable and measurable facts.

¹³⁹ See Jonathan Turley, *Just Say No to Blasphemy Laws*, USA TODAY, Oct. 19, 2009, at 11a; Jonathan Turley, Op-Ed., *Shut Up and Play Nice: How the Western World Is Limiting Free Speech*, WASH. POST, Oct. 12, 2012, http://www.washingtonpost.com/opinions/shut-up-and-play-nice-how-the-western-world-is-limiting-free-speech/2012/10/12/e0573bd4-116d-11e2-a16b-2c110031514a_story.html [hereinafter Turley, *Shut Up and Play Nice*]; Jonathan Turley, Op-Ed., *Speech Under Fire*, L.A. TIMES, Mar. 9, 2012, at A17, available at <http://articles.latimes.com/2012/mar/09/opinion/la-oe-turley-criminalizing-speech-20120309> [hereinafter Turley, *Speech Under Fire*]; Jonathan Turley, Op-Ed., *The Threat to French Free Speech Isn't Terrorism. It's the French*, WASH. POST, Jan. 11, 2015, at B1, available at http://www.washingtonpost.com/opinions/what-it-means-to-stand-with-charlie-hebdo/2015/01/08/ab416214-96e8-11e4-aabd-d0b93ff613d5_story.html [hereinafter Turley, *The Threat to French Free Speech*].

¹⁴⁰ The case emerging from Canada on the curtailment of free speech can only be described as alarming. See, e.g., Turley, *Speech Under Fire*, *supra* note 139 (“In Canada last year, comedian Guy Earle was found to have violated the human rights of a lesbian couple by making insulting comments at a nightclub.”); Jonathan Turley, *Oh Canada! Alberta Human Rights Commission Punishes and Censures Anti-Gay Speech*, JONATHAN

The crackdown on free speech was accelerated after 2005 when Muslims around the world burned churches and killed non-Muslims in response to the publication of Danish cartoons depicting the prophet Muhammad. While Western countries publicly professed fealty to free speech, there appeared a steady increase in prosecutions for speech deemed insulting or offensive to religious groups. This trend continued after a similar spasm of violence in 2012 with the release of a video called “Innocence of Muslims” on YouTube. In a telling statement at the time, U.N. Secretary General Ban Ki-moon warned that “when some people use this freedom of expression to provoke or humiliate some others’ values and beliefs, then this cannot be protected.”¹⁴¹ The statement captured perfectly the idea that tolerance is merely a vehicle for achieving a central truth in society rather than protecting the right to hold and voice different values. This was amplified shortly later, before the United Nations, by Australian Prime Minister Julia Gillard, who declared that “[o]ur tolerance must never extend to tolerating religious hatred.”¹⁴² The trend has continued even after the 2015 “Charlie Hebdo” massacre in Paris and the massive march in support of free speech in France.¹⁴³

While the United States has tended to resist the trend toward greater speech regulation that is evident in England, France, and Canada, nonetheless, the same sentiment has been voiced in courts in the United States.¹⁴⁴ From efforts to bar certain advertisements in subways¹⁴⁵ to calls for criminal investigations of speakers, there is a fundamental shift in the view of the role of free speech and more generally the meaning of tolerance in society. This shift is pushing these countries back to arguments long rejected in the curtailment of speech.

TURLEY: RES IPSA LOQUITUR (“THE THING ITSELF SPEAKS”) (June 9, 2008), <http://jonathanturley.org/2008/06/09/oh-canada-alberta-human-rights-commission-punishes-and-censures-anti-gay-speech/> (“The Alberta Human Rights Commission has punished Rev. Stephen Boission and the Concerned Christian Coalition for anti-gay speech, not only awarding damages but censuring future speech that the Commission deems inappropriate.”); Jonathan Turley, *Maclean’s Magazine Faces Speech Police in Canada*, JONATHAN TURLEY: RES IPSA LOQUITUR (“THE THING ITSELF SPEAKS”) (June 13, 2008), <http://jonathanturley.org/2008/06/13/macleans-magazine-faces-speech-police-in-canada/> (“The magazine is accused of hate speech and has had to answer for the publication of an article written by Mark Steyn entitled Why the Future Belongs to Islam.”).

¹⁴¹ Turley, *Shut Up and Play Nice*, *supra* note 139.

¹⁴² *Id.*

¹⁴³ Turley, *The Threat to French Free Speech*, *supra* note 139.

¹⁴⁴ One of the most infamous examples was a 2009 controversy involving a charge against a Muslim man who attacked an atheist marching in a Halloween parade as a “zombie Muhammed.” Turley, *Shut Up and Play Nice*, *supra* note 139. When the case was heard, Pennsylvania Judge Mark Martin chastised not the defendant but the victim, Ernie Perce, lecturing him that “our forefathers intended to use the First Amendment so we can speak with our mind, not to piss off other people and cultures—which is what you did.” *Id.*

¹⁴⁵ *Id.*

While earlier limitations were justified as fighting immorality, there is growing consensus to impose similar limitations to fight racism, sexism, or hate. Indeed, the Obama Administration shocked many in the free speech community with its early support of an international standard for the criminalization of speech long opposed by the United States.¹⁴⁶ The Administration supported the passage of a resolution in the U.N. Human Rights Council to create an international standard restricting some anti-religious speech.¹⁴⁷ Longtime advocates of an international blasphemy standard celebrated the victory as an alternative construction of a blasphemy law with the support of the United States.¹⁴⁸ These states had long criminalized anti-religious speech on the basis that it was an incitement to violence. At the time, “Egypt’s U.N. ambassador heralded the resolution as exposing the ‘true nature’ of free speech and recognizing that ‘freedom of expression has been sometimes misused’ to insult religion.”¹⁴⁹ Hillary Clinton, then Secretary of State, invited delegates to work on the international standard by referring to “sectarian clashes” that were not “fair game.”¹⁵⁰ Clinton called on countries to work together on the new international standard “to build those muscles” needed “to avoid a return to the old patterns of division.”¹⁵¹ Free speech, itself,

¹⁴⁶ Robert C. Blitt, *Defamation of Religion: Rumors of Its Death Are Greatly Exaggerated*, 62 CASE W. RES. L. REV. 347 (2011); Javaid Rehman & Stephanie E. Berry, *Is “Defamation of Religions” Passé? The United Nations, Organization of Islamic Cooperation, and Islamic State Practices: Lessons from Pakistan*, 44 GEO. WASH. INT’L L. REV. 431 (2012).

¹⁴⁷ The resolution, “Combating Intolerance, Negative Stereotyping, Stigmatization of, and Discrimination, Incitement to Violence and Violence Against Persons, Based on Religion or Belief,” was long sought by Muslim countries, which routinely arrest and even execute people for speech offending religion. Human Rights Council Res. 16/18, Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief, 16th Sess., Mar. 24, 2011, U.N. Doc. A/HRC/RES/16/18 (Apr. 12, 2011), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.18_en.pdf.

¹⁴⁸ Commentators agreed with this assessment. Blitt, *supra* note 146, at 377 (“By failing to decisively invalidate the chimera of defamation of religion, the UN has allowed the OIC to advocate its continued legality, including by openly asserting that implementation of Resolution 16/18 is one possible ‘alternative approach’ to achieving the end goal of shielding religious beliefs from criticism and insult.”); Rehman & Berry, *supra* note 146, at 433 (“Notwithstanding this apparent departure from explicit references to ‘defamation of religions’ in the UN, this Article identifies a continuing trend on the part of the OIC and its members towards the banning and criminalization of all forms of ‘defamation of religions’ and protecting and promoting analogous domestic anti-blasphemy laws.”); see also Caleb Holzaepfel, Comment, *Can I Say That?: How an International Blasphemy Law Pits the Freedom of Religion Against the Freedom of Speech*, 28 EMORY INT’L L. REV. 597, 633 (2014) (“These laws purport to adopt traditional Western standards of free speech, while simultaneously prosecuting actions that offend or oppress religious belief systems.”).

¹⁴⁹ Turley, *Shut Up and Play Nice*, *supra* note 139.

¹⁵⁰ *Id.*

¹⁵¹ Turley, *The Threat to French Free Speech*, *supra* note 139. The new rationale for speech limits has even deeper support in academia, where scholars have sought to draw distinctions between good and bad

had become the cause of social harms that could be curtailed not just domestically but internationally.

These rollbacks on free speech reflect a redefining sense of harm being embraced in the West. Canadian courts have been particularly receptive to that view of public morality as a foundation for criminal law. This was evident in *R. v. Butler*, where the Canadian Supreme Court laid out the standard for obscenity crimes as a reflection of majoritarian values.¹⁵² The decision of Justice Sopinka incorporated contemporary views of “public morality” into the legitimate exercise of criminal sanctions. This included three tests that redefined harm to simply reflect the majority’s shifting attitudes of what is socially or morally harmful. Under the “Community Standard of Tolerance” Test, the Court looks at whether the subject has violated society’s view of acceptable sexual representation.¹⁵³ A second “Degradation or Dehumanization” test looks at whether the material includes elements that are viewed as exploitative, demeaning, or “portray violence and cruelty in conjunction with sex.”¹⁵⁴ This degradation standard fits well with the arguments made against plural unions: the consent of the adult participants is material if they are deemed as making bad choices. The third test allows for “internal necessities” or an artistic defense based on any artistic or literary merit.¹⁵⁵ The case is illustrative of how modern courts eschew prior moralistic language but ultimately embrace the same concept of morality as a legitimate state interest. Sopinka rejected the 1868 standard of *R. v. Hicklin*,¹⁵⁶ which he viewed as outdated and potentially abusive in its effort “to advance a particular conception of morality.”¹⁵⁷ However, his tests still embrace the right to

speech. Perhaps the most striking example was the actions taken by Yale University Press, which in 2009 published a book about the Danish cartoons by Jytte Klausen entitled *THE CARTOONS THAT SHOOK THE WORLD*—but cut all of the cartoons because the cartoons were deemed offensive. See Statement by John Donatich, Director, Yale Univ. Press (Sept. 9, 2009), available at <http://yalepress.yale.edu/yupbooks/KlausenStatement.asp>.

¹⁵² *R. v. Butler*, [1992] 1 S.C.R. 452 (Can). The United States has also incorporated such community standards in its own obscenity standards beginning in the 1950s that seemed to invite moral judgments. See *Roth v. United States*, 354 U.S. 476, 489 (1957) (establishing standard of “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest?”). This standard invited a community to cast a judgment whether “material ha[s] a tendency to excite lustful thoughts.” *Id.* at 487 n.20.

¹⁵³ *R. v. Butler*, [1992] 1 S.C.R. at 476–78.

¹⁵⁴ *Id.* at 478–81 (quoting *R. v. Doug Rankine Co.*, (1983), 9 C.C.C. 3d 53, 70 (Can. Ont. Co. Ct.)).

¹⁵⁵ *Id.* at 481–83.

¹⁵⁶ [1868] 3 Q.B. 360.

¹⁵⁷ *R. v. Butler*, [1992] 1 S.C.R. at 492 (“The obscenity legislation and jurisprudence prior to the enactment of s. 163 were evidently concerned with prohibiting the ‘immoral influences’ of obscene publications and safeguarding the morals of individuals into whose hands such works could fall. The *Hicklin*

prosecute those who transgress majoritarian values, even if they are performing acts that are entirely consensual. While Sopinka insisted that “[t]o impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms,” he then concluded that the Parliament does have “the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society.”¹⁵⁸ The harm remains in the transgression of social values, including works viewed as degrading to women or other groups.

The compulsive liberalism scholarship has a disturbing overlap with prior writers like Lord Devlin and Lord Stephen in seeking to criminalize those who act in immoral ways in order to protect society. Even words that once represented freedom are converted to mean freedom from opposing or oppressive ideas. For example, it is telling that Lord Stephen would adopt the call of the French Revolution—Liberty, Equality, Fraternity—to support the concept of using state sanctions to force compliance with particular moral codes or social values.¹⁵⁹ It is still a rallying call today, even as the West curtails free speech and other components of “liberty” as part of a trend of compulsive liberalism.¹⁶⁰ It was ironically the same Robespierrian call¹⁶¹ heard in Dickens’ *A Tale of Two Cities* in the streets of Paris to vindicate the crimes committed during the period commonly referred to as “The Terror.”¹⁶²

III. THE HARM PRINCIPLE APPLIED TO PLURAL UNIONS

The polygamy cases fall on the very fault line between compulsive liberalism and libertarian theories over the function of criminal sanctions. Indeed, these cases reveal the striking similarities between the arguments used against Mill in the nineteenth century and the arguments now advanced by

philosophy posits that explicit sexual depictions, particularly outside the sanctioned contexts of marriage and procreation, threatened the morals or the fabric of society. In this sense, its dominant, if not exclusive, purpose was to advance a particular conception of morality. Any deviation from such morality was considered to be inherently undesirable, independently of any harm to society.” (citations omitted).

¹⁵⁸ *Id.* at 492–93.

¹⁵⁹ STEPHEN, *supra* note 128, at 163.

¹⁶⁰ See Turley, *The Threat to French Free Speech*, *supra* note 139.

¹⁶¹ It was Maximilien Robespierre who is credited with the phrase after his 1790 speech *On the Organization of the National Guard*. See John A. Lynn, *Toward an Army of Honor: The Moral Evolution of the French Army, 1789–1815*, 16 *FRENCH HIST. STUD.* 152, 155 (1989).

¹⁶² DICKENS, *supra* note 1, at 264 (“Liberty, equality, fraternity, or death;—the last, much the easiest to bestow, O Guillotine!”).

twenty-first century scholars and advocates. While figures like Devlin and Stephen spoke of the need to sanction immoral acts, the social harm today is more often expressed as fighting the subordination of women or marginalization of groups to curtail consensual conduct or free speech. This new compulsive liberalism was evident in the *Bountiful* case in the submissions of various experts insisting that plural unions had to remain criminal to protect women and children. Conversely, the *Brown* case suggests, as discussed below, that it is possible to incorporate Millian notions of harm to protect liberty under modern constitutional analysis. Those different approaches are explored further below.

A. *Harm as a Protection of Public Values*

The *Bountiful* litigation produced a unique mix of expert testimony on the harms associated with plural unions. Chief Justice Bauman placed that Loadstone Rock of modern analysis at the heart of his opinion: “I have concluded that this case is essentially about harm; more specifically, Parliament’s reasoned apprehension of harm arising out of the practice of polygamy. This includes harm to women, to children, to society and to the institution of monogamous marriage.”¹⁶³ Notably, Chief Justice Bauman insisted that such harm is secular, even though it includes protecting the “institution of monogamous marriage.”¹⁶⁴

While Chief Justice Bauman struggled to adopt a more modern analysis than simply upholding the law as combating immorality, he reached a conclusion very close to that of Devlin when Devlin opposed the recommendation of the Committee on Homosexual Offences and Prostitution

¹⁶³ *Bountiful*, 2011 BCSC 1588, para. 5 (Can.). The Tenth Circuit has previously stated that the institution of marriage could be supported as a monogamous tradition under state law: “Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built. In light of these fundamental values, the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.” *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (citation omitted).

¹⁶⁴ *Bountiful*, 2011 BCSC 1588, para. 5. The debate over the exclusivity of “marriage” (particularly in the same-sex-marriage debate) is heavily laden with morality rationales. I have long been an advocate of the use of “civil unions” as opposed to “marriage” as the operative term—a license that would be based on the contractual and legal relationship as opposed to the moral relationship. Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 59 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008); Jonathan Turley, Op-Ed., *How to End the Same-Sex Marriage Debate*, USA TODAY, April 3, 2006, at A15, available at http://usatoday30.usatoday.com/news/opinion/editorials/2006-04-02-faith-edit_x.htm.

in the “Wolfenden Report” to decriminalize private sexual relations between consenting adults.¹⁶⁵ While Bauman indicated that he would never support such a position, his logic that criminal laws can be upheld in defense of the institution of society was strikingly similar to that of Devlin. Devlin wrote,

The error of jurisprudence in the Wolfenden Report is caused by the search for some single principle to explain the division between crime and sin. The Report finds it in the principle that the criminal law exists *for the protection of individuals*; on this principle fornication in private between consenting adults is outside the law and thus it becomes logically indefensible to bring homosexuality between consenting adults in private within it. But the true principle is that the law *exists for the protection of society*. It does not discharge its function by protecting the individual from injury, annoyance, corruption, and exploitation; *the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together*. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.¹⁶⁶

Like Devlin, Bauman was convinced that plural unions cause harm regardless of whether particular unions are consensual and reveal no cognizable harm to the participants. It was the threat of its very existence to the fabric of marriage as an institution that Bauman saw as a credible basis for criminal sanctions. While Bauman did not claim that “a change in its morality is tantamount to the destruction of a society,”¹⁶⁷ the import of his ruling was that monogamous marriage is the foundation for society and that these consensual, plural unions cannot be tolerated. This is the type of tautological statement that offers little basis for retort—much, as Hart observed with regard to Devlin, like “Emperor Justinian’s statement that homosexuality was the cause of earthquakes.”¹⁶⁸

Bauman’s sweeping treatment of social harm was supported by two academics, Marci Hamilton and Rebecca Cook, who testified by affidavit, as I did, on the basis for criminalizing plural unions.¹⁶⁹ Their extensive testimony

¹⁶⁵ See THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (Stein & Day 1963) (1957).

¹⁶⁶ DEVLIN, *supra* note 126, at 22 (emphasis added).

¹⁶⁷ H.L.A. HART, LAW, LIBERTY AND MORALITY 51 (1963) (noting that Devlin would move from the defensible proposition that “*some* shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society” (footnote omitted)).

¹⁶⁸ *Id.* at 50.

¹⁶⁹ *Bountiful*, 2011 BCSC 1588, paras. 256, 798.

on issues like harm offers a solid foundation to explore the rationale in favor of criminalization both under U.S. and international law. I will address both separately, though they have considerable overlap on their treatment of harm under U.S. and international law, respectively.

1. *Professor Marci Hamilton and Harm Under U.S. Law*

Professor Hamilton supplied a detailed report to the court on her view that the criminalization of plural unions under polygamy laws does not contravene constitutional guarantees in the United States. Professor Hamilton relied repeatedly on *Reynolds v. United States* and other eighteenth-century cases.¹⁷⁰ The use of these cases is telling given their association with the period of not just enforced morality codes but open religious prejudice in the courts. To borrow a quote from *A Tale of Two Cities*, these cases are “echoes, from a distance, that rumbled menacingly in the corner all through this space of time.”¹⁷¹

As noted by Judge Waddoups, the Court’s decision in *Reynolds* is rife with open hostility for Mormons and minority groups.¹⁷² Professor Hamilton took a contrary view that while “[s]ome have tried to argue that the federal polygamy laws^[173] were solely a product of animus against the Church of Jesus Christ of Latter-Day Saints[,] . . . that is both an exaggeration and a mischaracterization.”¹⁷⁴ The *Brown* court’s view, however, is borne out by a

¹⁷⁰ 98 U.S. 145 (1879). In fairness to Professor Hamilton and others using *Reynolds*, it has not been overturned. Indeed, it was cited by Justice Scalia in *Employment Division v. Smith* in reference to the first time that the Court upheld the criminalization of polygamy. 494 U.S. 872, 879 (1990) (“[W]e rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. ‘Laws,’ we said, ‘are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.’” (omission in original) (quoting *Reynolds*, 98 U.S. at 166–67)).

¹⁷¹ DICKENS, *supra* note 1, at 205.

¹⁷² Indeed, some conservative legal experts have denounced the use of *Reynolds* as precedent due to its questionable analysis. See, e.g., Kenneth W. Starr, *Liberty and Equality Under the Religion Clauses of the First Amendment*, 1993 BYU L. REV. 1, 2 (criticizing those justices who invoke such antiquated precedent as *Reynolds v. United States*).

¹⁷³ If this is a reference to U.S. precedent, I am unclear what Professor Hamilton is referencing by “federal polygamy laws” since these laws were state laws. This could be a reference to federal rules barring polygamous families from admission into the United States. 8 U.S.C. § 1182(a)(10)(A) (2012). This is consistent with the current rule in Canada. See *Ali v. Canada* (1998), 154 F.T.R. 285.

¹⁷⁴ Report: United States History and Constitutional Doctrine Upholding Polygamy Laws Against Challenges by Religious Entities and Believers at 3, *Bountiful*, 2011 BCSC 1588 (No. S-097767), available at http://infosect.freeshell.org/infocult/Marci_A_Hamilton.pdf [hereinafter *Hamilton Report*] (citation omitted).

simple reading of *Reynolds*, which showed open animus toward this religious minority as well as other religious and racial minorities. The Court stated, for example, that “[p]olygamy 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.”¹⁷⁵ This was clearly false and shows a shocking lack of knowledge on the part of the Court. Indeed, polygamy was widely practiced in North America and was embraced by not just Mormons but some Protestants and Jews.¹⁷⁶ Nevertheless, Professor Hamilton quoted with approval the Court’s statement upholding “the universal law” against polygamy: “it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.”¹⁷⁷ While the First Amendment protects the free exercise of religion while prohibiting the establishment of religion, *Reynolds* treated the First Amendment as limited by the majoritarian hatred of polygamy. Undoubtedly, there were a plethora of religious practices that the Framers would have found

In addition to *Reynolds*, Professor Hamilton also quoted, with approval, the Court’s ruling in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States* to show that the Court had rejected the arguments of this “nefarious” church. *Id.* at 5. However, the full quote shows the Court, again, expressing open animus for the Mormons and polygamists from an expressly Christian perspective:

[It] is a matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of Latter-Day Saints, one of the distinguishing features of which is the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by Congress—notwithstanding all the efforts made to suppress this barbarous practice—the sect or community composing the Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching, upholding, promoting, and defending it. It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine, and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.

Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 48–49 (1890).

¹⁷⁵ *Reynolds*, 98 U.S. at 164.

¹⁷⁶ Expert Report Prepared for the Amicus Curiae by Jonathan Turley paras. 42–99, *Bountiful*, 2011 BCSC 1588 (No. S-097767), available at <https://jonathanturley.files.wordpress.com/2010/11/turley-affidavit.pdf> [hereinafter Turley Report]. Professor Hamilton later made the same factual representation, stating, “[T]he LDS Church was the only known organization that based its culture on the practice.” Hamilton Report, *supra* note 174, at 5. As noted in the text, polygamy was practiced by indigenous peoples and some European settlers long before the Mormons. It is also worth noting that Professor Hamilton appeared to agree that, at least with regards to the LDS, polygamy is not simply a religious but a cultural practice, as noted earlier in this Article.

¹⁷⁷ *Reynolds*, 98 U.S. at 165.

personally “odious.” However, that does not mean that the Constitution must be assumed to exclude such beliefs from protection in light of their preferences for “social life.”

Putting aside the flagrant bias expressed by the Court, *Reynolds* also foreshadowed the type of harm rationales that would later be used to justify limiting choice under a compulsive-liberalism approach. What is highly ironic is that at a time when women were still struggling to obtain basic rights in our society, the Court condemned plural unions for their dominant male roles. The Court stressed that “polygamy leads to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.”¹⁷⁸ Consistent with much of the scholarship in this area, the Court used the extreme form of polygyny to justify state action to combat the harm.¹⁷⁹ In the end, the *Reynolds* Court asserted that such harms fall squarely within the power of the government since “it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.”¹⁸⁰ Professor Hamilton relied on this authority despite the fact that this same logic could lead to the criminalization of all monogamous unions. Indeed, the view in *Reynolds* was later repeatedly rejected in *Loving v. Virginia* when the Court struck down discriminatory laws against mixed-race couples.¹⁸¹ Anti-miscegenation laws not only reflected the moral views of the majority; such laws were more common than the anti-sodomy laws around the country at the time of *Lawrence*.¹⁸²

¹⁷⁸ *Id.* at 166.

¹⁷⁹ *See id.* Indeed, the Court declared that “from the earliest history of England polygamy has been treated as an offence against society.” *Id.* at 164.

¹⁸⁰ *Id.* at 166.

¹⁸¹ 388 U.S. 1 (1967). Notably, *Reynolds* was handed down just four years before *Pace v. Alabama*, where the Court upheld Alabama’s anti-miscegenation statute (including a majority of Justices who signed on to the *Reynolds* decision). 106 U.S. 583 (1883). That decision was later overturned in *Loving*, in which the Supreme Court expressly denied the sweeping suggestion that marriage is anything the *Reynolds* majority says it is:

Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.

Loving, 388 U.S. at 12 (citation omitted) (quoting *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942)).

¹⁸² *See* J. Kelly Strader, *Lawrence’s Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 68 (2011) (“But if we took the opinion poll/electoral approach to criminalization, then the United States Supreme Court should not

Reynolds also contains another important element in the modern scholarship against plural unions, including that of Professor Hamilton. The Court expressly stated that it does not matter if some or even many plural unions exist without any of the harms described by the Court. The Court acknowledged that “[a]n 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.”¹⁸³ However, the Court promptly dismissed that fact because “there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.”¹⁸⁴

Professor Hamilton reinforced the *Reynolds* language with an equally sweeping assertion that refers to polygamy but again appears to be based on extreme polygyny sects:

The religiously motivated polygamy currently practiced in the United States and Canada by members of the breakaway fundamentalist Mormon sects also includes a strong correlation to child sex abuse, under-age “celestial” bigamist marriages, incest, statutory rape of both boys and girls, and even permanent expulsion of unwanted male children, known as “lost boys.”¹⁸⁵

However, the evidence offered for this statement is largely anecdotal, citing a relatively small collection of books focused on particular polygamist groups.¹⁸⁶ Professor Hamilton’s report is clearly correct about the occurrence of such abuses in some plural families. However, even among just polygynous families, it ignores thousands of such families that have never been the subject of criminal charges like the Browns.¹⁸⁷ There have been a very small number

have stricken down criminal bans on interracial marriage, for at the time of the decision in *Loving v. Virginia* 70 percent of the public favored such laws, and more states had anti-miscegenation statutes at the time of *Loving* than had same-sex sodomy laws at the time of *Lawrence*.”)

¹⁸³ *Reynolds*, 98 U.S. at 166.

¹⁸⁴ *Id.*

¹⁸⁵ Hamilton Report, *supra* note 174, at 4 n.7.

¹⁸⁶ *Id.*

¹⁸⁷ Once again, there is little question that abuses occurred in compounds of extremist sects like that of Warren Jeffs. However, scholarship often ignores the families like the Browns that are composed of consenting adults. Clearly, it is possible to have a plural union without abuses, but you would not know it from the factual basis for some academic work. Maura Strassberg, for example, also defends criminalization of polygamy by reference to the most extreme forms of polygyny:

Polygyny was also fundamentally inegalitarian; it was a practice designed to create a political and religious aristocracy. In a society with relatively equal numbers of men and women,

of cases of such prosecutions in the history of the United States.¹⁸⁸ The books cited by Professor Hamilton largely come from those cases or advocacy groups. This type of pseudo-empirical claim would be akin to saying that there is a strong correlation between the Catholic priesthood and child rape because of books detailing the small minority of priests found to have been pedophiles. Likewise, as in *Reynolds*, there is no consideration given in the Hamilton Report to the fact that nonreligious polygamy is also criminalized under this law or that conjugal unions, including those of polyamorists and polyandrists, are subject to prosecution.

The use of individual cases involving one extreme form of plural unions is typical of much of the scholarship in this area, as well as the ultimate decision of Chief Justice Bauman. Professor Hamilton has insisted that “polygamy rests, inevitably, on child abuse and neglect. The numbers simply cannot lie.”¹⁸⁹ However, this assertion is not based on any concrete numbers for plural unions as a whole or even data for the narrow category of polygyny that is the focus of Hamilton’s scholarship.¹⁹⁰ Moreover, there is no corresponding

polygyny gives some men significantly greater opportunities to reproduce than others because many wives for some men means no wives for others. Polygyny thus cannot begin without significant imbalances in political and economic power between men that can be exercised to force some men to delay or forego reproduction. Polygynous men, already selected for polygyny due to their social and economic potential, can further expand their power through control of greater human resources in the persons of their wives and children. In addition, when polygyny is a practice limited to those chosen to have religious authority and power in a culture where religion dominates public life, becoming polygynous opens the doors to the acquisition of even greater religious, economic and political power.

Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 362 (2003) (footnotes omitted). For discussion of such harms, see Jason D. Berkowitz, Comment, *Beneath the Veil of Mormonism: Uncovering the Truth About Polygamy in the United States and Canada*, 38 U. MIAMI INTER-AM. L. REV. 615, 638–39 (2007); Lauren C. Miele, Note, *Big Love or Big Problem: Should Polygamous Relationships Be a Factor in Determining Child Custody?*, 43 NEW ENG. L. REV. 105, 129–30 (2008); Samantha Slark, Study Note, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?*, 6 J.L. & FAM. STUD. 451, 455 (2004); 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, 233 (2001).

¹⁸⁸ See *Polygamy*, BBC, <http://www.bbc.co.uk/religion/religions/mormon/socialvalues/polygamy.shtml> (last updated Oct. 13, 2009) (“There are said to be over 30,000 people practising polygamy in Utah, Idaho, Montana and Arizona, who either regard themselves as preserving the original Mormon beliefs and customs, or have merely adopted polygamy as a desired way of life and not as part of the teachings of any church.”).

¹⁸⁹ See Marci Hamilton, *The Reality of Polygamy: Very Different From What’s Depicted on HBO’s “Big Love,”* FINDLAW (Mar. 23, 2006), <http://writ.news.findlaw.com/hamilton/20060323.html>.

¹⁹⁰ Indeed, the harm avoided by the criminalization of plural unions is often confined to the narrowest of groups in Hamilton’s scholarship, which focuses on the type of extreme compound groups like that of Warren Jeffs. By focusing on these extreme groups, Hamilton has established the causal connection between prosecution and risk avoidance. Marci Hamilton, *Prosecuting Polygamy in El Dorado*, HUFFINGTON POST

recognition of the even stronger basis to criminalize monogamy under this same logic. Monogamous families have consistently shown high rates of spousal and child abuse. In a report to Congress, The Fourth National Incidence Study of Child Abuse and Neglect (NIS-4) found as follows:

Using the stringent Harm Standard definition, more than 1.25 million children (an estimated 1,256,600 children) experienced maltreatment during the NIS-4 study year (2005–2006). This corresponds to one child in every 58 in the United States. A large percentage (44%, or an estimated total of 553,300) were abused, while most (61%, or an estimated total of 771,700) were neglected.¹⁹¹

Virtually all of these 1,256,600 children in the last recorded year were abused or neglected in monogamous families. Yet, those documented rates are never raised as evidence of the inherently abusive nature of monogamous unions. Even with millions of children abused in the last ten years in monogamous families, such rates of criminality would not be a legitimate basis for calling for a ban on monogamous unions. First, there are no real baseline figures to understand the percentage of abuse in monogamous families. Second, there is the danger of a false correlation between the institution and the incidents of abuse. It remains the classic concern of economics and statistics that correlation does not mean causation. A study by the United States Department of Justice found that from 1995 to 1996, “[n]early 25 percent of surveyed women and 7.6 percent of surveyed men said they were raped and/or physically assaulted by a current or former spouse, cohabiting partner, or dat[ing partner/acquaintance] at some time in their lifetime.”¹⁹² Just focusing on assault, approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner annually in the United States.¹⁹³ Despite the millions of citizens abused or neglected each year in monogamous families, no responsible academic would suggest that such criminal and abusive conduct

(May 25, 2011, 12:30 pm EDT), http://www.huffingtonpost.com/marci-hamilton/prosecuting-polygamy-in-e_b_95674.html (“If authorities (in TX, AZ, NV, and UT) had vigorously enforced the laws against polygamy, we would not have dangerous cults like the FLDS that are premised on extreme obedience of women and girls to domineering men and the disposal of teenage boys.”).

¹⁹¹ ANDREA J. SEDLAK ET AL., *FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 5* (2010), available at http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf. NIS-4 is a widely cited study by U.S. Department of Health and Human Services (DHHS), Administration for Children and Families (ACF), Office of Planning, Research, and Evaluation (OPRE), and the Children’s Bureau.

¹⁹² PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, NCJ 181867, *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY*, at iii, 1 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

¹⁹³ *Id.* at 10.

should be the basis for a ban on monogamous marriage. The validity of monogamous (and polygamous) marriage should turn on the right of consenting adults to engage in such unions absent such crimes. Otherwise, there is little ability to respond, let alone refute, such claims, as protecting the right to plural unions is synonymous with protecting “the child and spousal abuse that inevitably follow.”¹⁹⁴

Professor Hamilton further argued for the inherent right to criminalize plural unions as consistent with a state’s inherent power to combat the harm caused by “licentiousness.” The use of “licentious” highlights the new morality advanced in these arguments since it is a term defined by *Merriam-Webster* as “lacking legal or moral restraints” or “marked by disregard for strict rules of correctness.”¹⁹⁵ Hamilton relied, again, on early court cases that enforced morality laws. This reliance is a telling example of how new liberalism has come full circle in citing these once anathema decisions to support a new normative agenda. These laws ran the full spectrum of morality codes from criminalizing adultery, fornication, and homosexuality.¹⁹⁶ Indeed, under the logic of Professor Hamilton, society is free to criminalize homosexuality, as the Court did in *Bowers v. Hardwick*,¹⁹⁷ as licentious and immoral conduct. We have fortunately rejected that position—as shown in the decision in *Lawrence v. Texas*.¹⁹⁸ However, Professor Hamilton argued that the state has the inherent authority to criminalize licentiousness, noting with approval that past cases have “equated ‘licentiousness’ with a variety of illicit sex activities—adultery, child sex abuse, and polygamy or bigamy [and] incest.”¹⁹⁹ To support this

¹⁹⁴ Hamilton, *supra* note 190.

¹⁹⁵ *Licentious*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/licentious> (last visited May 17, 2015).

¹⁹⁶ See Jonathan Turley, *Of Lust and the Law*, WASH. POST., Sept. 5, 2004, at B01, *available at* <http://www.washingtonpost.com/wp-dyn/articles/A62581-2004Sep4.html>; Jonathan Turley, *The Scarlet Letter Lives On*, USA TODAY, Apr. 26, 2010, at 09a, *available at* http://usatoday30.usatoday.com/news/opinion/forum/2010-04-26-column26_ST_N.htm.

¹⁹⁷ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (“[R]espondent . . . insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁹⁸ 539 U.S. at 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

¹⁹⁹ Hamilton Report, *supra* note 174, at 6–7 (citations omitted). What is not mentioned is that it has also been used to crackdown on “licentious books,” see *Smith v. Turner*, 48 U.S. (7 How.) 283, 357–58 (1849); dismiss rape allegations on the basis of “licentious submissiveness” on the part of the victim, see *United States v. Nicholson*, 25 C.M.R. 3, 8 (C.M.A. 1957); prove “licentious and unchaste thoughts,” see *People v. Smittcamp*, 161 P.2d 983, 986 (Cal. Dist. Ct. App. 1945); charge “licentious language in presence of a female,” see *State v. Coffing*, 29 N.E.2d 615, 615 (Ind. App. 1892); and award a new trial on burglary charges

proposition, Professor Hamilton returned to the period during which Devlin and Stephen wrote their defense of criminalized morality codes—a time when incredibly abusive acts toward spouses and children were considered legitimate acts within monogamous unions. Yet, Hamilton argued, in light of these eighteenth-century cases, that licentiousness can encompass anything that is deemed “sexual immorality.”²⁰⁰

In fairness to Professor Hamilton, the enforcement of morality standards continued to be embraced by the Court into the twentieth century. For example, in *Cleveland v. United States*, the Court wrote that “[t]he establishment or maintenance of polygamous households is a notorious example of promiscuity. The permanent advertisement of their existence is an example of the sharp repercussions which they have in the community.”²⁰¹ This was precisely the type of argument rejected in the due process context in *Lawrence v. Texas*:

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. . . . For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”²⁰²

The “moral code” referenced by the Court is now more often expressed as “social harm,” though Hamilton is more honest in acknowledging that she believes consensual relations can be regulated in the same way as

because the witness was “a licentious, dissolute woman. . . . [with] lewd and lascivious habits and character,” see *Robinson v. State*, 53 Md. 151, 154 (1880); as well as a host of other acts or attributes.

²⁰⁰ Hamilton Report, *supra* note 174, at 7. The heavy reliance on such eighteenth-century cases and more ignores the fact that constitutional terms tend to evolve with society. In the U.S. Constitution, for example, what constitutes “cruel and unusual punishment” under the Eighth Amendment is gradually changing with society. See U.S. CONST. amend. VIII. In *Trop v. Dulles*, the Supreme Court recognized that “the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” 356 U.S. 86, 100–01 (1958) (footnote omitted) (discussing *Weems v. United States*, 217 U.S. 349 (1910)). Privacy interpretations have shown a similar expansion with society.

²⁰¹ 329 U.S. 14, 19 (1946).

²⁰² 539 U.S. at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

“licentiousness.” Certainly, if one accepts that moral judgments like licentiousness are cognizable harm, there are few limits on the majority in dictating the private relations of adults and families. The fact is that adultery and fornication statutes (once defended as punishing licentious and immoral conduct) are presumptively unconstitutional and rarely enforced. Indeed, as noted above, Professor Hamilton’s historical and legal analysis would suggest that states could criminalize homosexuality—which like polygamy has been historically treated as a crime and a “nefarious” practice. The same Justices who handed down *Reynolds* and *Pace* articulated this view most strongly in *Davis v. Beason*.²⁰³ Again, it is worth fully quoting this Court, which embraced the standard of licentiousness. As in the prior rulings, the Court emphasized the fact that Mormon practices of polygamy do not comport with its own Christian values and noted that it would no sooner decriminalize adultery (which is now, of course, effectively decriminalized):

However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.²⁰⁴

The Court in *Davis* made no pretense of its insistence on upholding Christian values against a hated “sect” and further equated both adultery and polygamy with human sacrifice as part of its licentiousness inquiry.²⁰⁵ The line between

²⁰³ 133 U.S. 333 (1890).

²⁰⁴ *Id.* at 342–43.

²⁰⁵ *Id.* at 343.

majoritarian morality code and social harm disappears in such logic as it does in the scholarship of Professor Hamilton and others.

2. *The Cook Testimony and Harm Under International Law*

Professor Rebecca Cook's testimony in *Bountiful* reflected the same translation of moral or normative values into claims of social harm.²⁰⁶ Cook argued that Canada is obligated to ban forms of polygamy. Cook dismissed arguments, including those of this author, that international principles support the decriminalization of such consensual arrangements that are based on religious, cultural, and personal values.²⁰⁷ For example, Article 17 of International Covenant on Civil and Political Rights (ICCPR) expressly protects the right of privacy and specifically condemns arbitrary laws that invade the homes of citizens:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.²⁰⁸

Cook dismissed such principles in the context of plural unions,²⁰⁹ even though they have been extended to protect homosexual unions.²¹⁰ Various international sources protect private decisions relating to sexual relationships and family.²¹¹

²⁰⁶ Expert Report Prepared for the Attorney General of Canada Regarding: "State Obligations to Eliminate Polygamy Under International Law" by Rebecca J. Cook, *Bountiful*, 2011 BCSC 1588 (Can.) (No. S-097767) [hereinafter Cook Report] (on file with the Emory Law Journal).

²⁰⁷ *Id.*

²⁰⁸ International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171, 177 (entered into force Mar. 23, 1976); *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 221, 230 (entered into force Aug. 11, 1955).

²⁰⁹ Cook Report, *supra* note 206, paras. 198–199.

²¹⁰ For example, in 1994, the Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the ICCPR, found a Tasmanian criminal provision on homosexuality to be a violation of Articles 2(1) and 17 of the Covenant. *See Toonen v. Australia*, Human Rights Comm., Comm. No. 488/1992, at 133, 134, 140, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

²¹¹ For example, Article 8 of the European Convention on Human Rights (ECHR) (formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*) mandates that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 208, art. 8; *see also* Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 8, 11, 17 (1993), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57827> (reviewing criminal laws that undermine free exercise).

To overcome such pluralistic principles, Cook (like Hamilton) turned to the eighteenth century as affirming the right of states to punish consenting adults for their private relations. Also, like Hamilton, Cook used the most extreme form of polygyny as a focus of her analysis rather than address the broad array of plural relationships. This is done despite the fact that the law extends to conjugal unions and most certainly includes plural relationships such as polyandry. The harm identified by Professor Cook is likewise based on how this narrowly defined group of polygynists presents a danger to the rights of women. She insisted that the “inherent wrongs” of polygyny motivating criminalization include opposition to “patriarchal structuring” of family life.²¹² Such structuring might, in Professor Cook’s view, “offend[] women’s dignity,”²¹³ even though it is a common structuring in North America and around the world in traditional families. Professor Cook also qualified any obligation stated under these international sources, arguing that “states *might well be* obligated to use the criminal law as an appropriate measure to eliminate [polygyny].”²¹⁴ Once again, this does not suggest any equal obligation to eliminate polyandry or polyamory. Moreover, it does not state a clear obligation, even in cases of polygyny, or the threshold showing of harm needed to justify such a law.²¹⁵ Since most plural unions in the United States and Canada are formed by consensual decisions of women, it is not clear whether their consent matters if the very existence of a plural relationship is deemed an “offense to women’s dignity.”²¹⁶ It is clear that these women are

²¹² Cook Report, *supra* note 206, para. 16.

²¹³ *Id.*

²¹⁴ *Id.* para. 18 (emphasis added).

²¹⁵ Cf. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213, 250 (2003) (“Where states allow polygamy but not polyandry (as per Islamic law), they violate the basic principle against sex discrimination contained in Article 16(1) of CEDAW.”).

²¹⁶ Professor Cook relied on such sources as a General Comment to the Equality of Rights Between Men and Women and a Recommendation from the Committee on the Elimination of Discrimination Against Women Committee on Equality of Marriage and Family Relations concerning the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). *But see* Dina Bogecho, *Putting It To Good Use: The International Covenant on Civil and Political Rights and Women’s Right to Reproductive Health*, 13 S. CAL. REV. L. & WOMEN’S STUD. 229, 265 (2004) (“[G]eneral comments and recommendations are not legally binding . . .”); Yakaré-Oulé Jansen, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 AKRON L. REV. 311, 321–22 (2007) (“As the committees are not judicial bodies and therefore cannot issue binding decisions, the recommendations are, at most, an authoritative interpretation of the rights embodied in the treaties.” (footnote omitted)). I agree with Professor Cook’s interpretation of Comment 14, which describes the disapproval expressed for polygamy in these sources, a view shared by other academics. *See, e.g.*, Harold Hongju Koh, *Why America Should Ratify the Women’s Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT’L L. 263, 273 (2002) (“[F]or example, the practice of polygamy is inconsistent with the CEDAW because it undermines women’s equality with men and

simply viewed as making bad choices; regardless of their consent or ability to leave, the relationship is viewed as inherently and presumptively harmful.

Professor Cook's notion of social harm is evident in her testimony that plural unions, under the criminal code, prevent a woman from being "subsumed within her husband's legal personality."²¹⁷ It is unclear not only how to define the harm but also how to shape the solution if the criminal code is to be used to fight against "[s]tereotypes of feminine dependence, fragility, and commercial naivety" and counter "stereotypes of masculine protective breadwinning and financial acumen."²¹⁸ Various aspects of monogamy, from treating marriage couples as a single entity for purposes of legal privilege to the adoption of a man's surname in marriage, could be viewed as subsuming

potentially fosters severe financial inequities."'). However, such sources do not require the court to continue to allow the criminalization of consensual relations of Canadians in their private lives. See Linda M. Keller, *The Convention on the Elimination of Discrimination Against Women: Evolution and (Non)implementation Worldwide*, 27 T. JEFFERSON L. REV. 35, 37 (2004) ("Article 18 specifically notes that states can indicate 'factors and difficulties affecting the degree of fulfillment of obligations'—implying that compliance is not really expected. When states' reports are considered, the Committee can merely offer suggestions and general recommendations."); cf. Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 169–70 (2006) (noting the United States did not ratify CEDAW and "[i]t is debatable whether formal treaty obligations commit the United States to a policy of prohibiting polygamy as part of the international effort against inequality"). Moreover, Cook's reliance on Comment 14 of the General Recommendation No. 21 from the CEDAW Committee on Equality of Marriage and Family Relations, see, e.g., Cook Report, *supra* note 206, paras. 189–190, ignores the countervailing principle contained in Comment 16: "[a] woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being." This includes the "same right freely to choose a spouse and to enter into marriage only with their free and full consent." Comm. on the Elimination of Discrimination Against Women, Rep. on its 13th Sess., Jan. 17–Feb. 4, 1994, ¶ 16, U.N. Doc. A/49/38; GAOR, 49th Sess., Supp. No. 38 (Apr. 12, 1994), available at <http://www.un.org/documents/ga/docs/49/plenary/a49-38.htm>. If Canada were to decriminalize consensual plural unions (while continuing to prosecute coerced or abusive relationships), women would be guaranteed the same rights as called for under Comment 16.

²¹⁷ Cook Report, *supra* note 206, para. 27.

²¹⁸ *Id.* The Human Rights Commission did condemn polygamy in General Comment No. 28 on Equality of Rights between Men and Women in a brief and highly generalized statement: "It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with the principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist." Human Rights Comm., CCPR General Comment No. 28, Article 3 (The Equality of Rights Between Men and Women), 68th Sess., Mar. 29, 2000, U.N. Doc. CCPR/C/21/Rev.1/Add.10, para. 24 (2000), available at <http://www.refworld.org/docid/45139c9b4.html>. One must first note that General Comment No. 28 uses the general reference of polygamy as opposed to polygyny. It is unclear if the authors meant to include polyandry, for example, as violating the dignity of women or more generally polyamory. It would be inconceivable that such a generalized and brief statement would be treated as requiring states to criminalize polygamy, particularly given the fact that polygamy is widely and openly practiced in many states. Second, the affirmative statement that a practice should be "abolished" does not necessarily mean polygamists should be prosecuted. A state can officially oppose polygamy while recognizing that it is a practice that can be consensually entered into by adults as a matter of free will.

women. Moreover, while Professor Cook stated that “[n]ormative systems that permit polygyny continue to rely on sex as a central axis in the distribution of marital rights and obligations,”²¹⁹ the same criticism can be levied against polyamorous, polyandrous, and some monogamous unions. Many traditional monogamous families treat women on some level as “procreators” and deny women choice in “determin[ing] the number and spacing of children.”²²⁰ Indeed, traditional Catholic families often follow the Church’s admonitions against contraception—as do other faiths. While Cook warned of “the centrality of motherhood (thereby creating fatherhood) [that] is evident in some of the religious and customary norms governing marriage among Islamic and African communities,”²²¹ many monogamous unions are clearly based on the same “centrality of motherhood” despite following other religions.

In the end, Professor Cook was willing to concede that “[i]n some contexts, polygyny can undoubtedly serve a beneficial function for some women and children” and “the degree to which individual experiences of plural families can differ.”²²² This is precisely the issue raised with regard to Professor Hamilton’s testimony: whether the court should ignore the fact that it is possible to have plural unions that are not harmful or otherwise abusive. I believe that must be the starting point of any analysis. We do not define free speech rights, for example, by focusing on the use of speech to commit crimes. Rather, we recognize that free speech can be used in unpopular but harmless ways. Otherwise, we could ban monogamous marriages based on the fact that millions of such unions produce spousal or child abuse every year in North America.

There are a great variety of plural unions in North America, and Cook acknowledged “[e]merging ethnographic work in Bountiful, British Columbia, suggest[ing] that collaboration is common among co-wives, though feelings of competition and jealousy are also present.”²²³ Indeed, as noted by Professor Shayna Sigma,

[a]bsent any other harms, it is unclear why adult women should not be [allowed to enter into a plural marriage], provided they are well-informed about the decision, offered the opportunity to choose

²¹⁹ Cook Report, *supra* note 206, para. 29.

²²⁰ *Id.* para. 33.

²²¹ *Id.* para. 34.

²²² *Id.* paras. 39–40. Indeed, she noted later that “commentators argue that in certain circumstances, polygyny may increase family wealth.” *Id.* para. 57.

²²³ *Id.* para. 45.

alternatives, and provided an opportunity to leave polygamy if they so desire. . . .

. . . .

. . . [T]here is no evidence that polygamy per se creates abuse or neglect. Having sister wives can be a support network. The status of senior wives versus junior wives and the relationships among these women vary between cultures. In fact, by banding together, women sometimes wield more power to change their husband's problematic behavior.²²⁴

The fact that these unions can be viewed so differently exposes the subjectivity of the social harm used to support criminal sanctions. There is a danger, as with same-sex marriage controversies, in “the use of relationships as a legal proxy for societal evils, as it leads to unmerited persecution and perpetuates prejudice.”²²⁵ Indeed, the success of the television program *Sister Wives* is in part due to the revelation for many viewers that a polygamous family can have strong if not dominant women. The Brown women include “sister wives” who were either raised in monogamous families or actually came from prior monogamous marriages. As noted earlier, they believe in the legal right of divorce and have utilized divorce options in the past, including a recent divorce from Kody Brown.²²⁶ Their children are given the full choice not to adopt a polygamous lifestyle for themselves. In fact, some of the older children have indicated that they want a monogamous marriage for themselves, while others indicate that they would prefer a polygamous marriage. Moreover, the majority of Brown women work and pool their wealth and resources—a relationship that they value over a monogamous union or living as a single mother.

In both the *Brown* and *Bountiful* cases, laws were defended by generalized arguments often citing the insularity and unpopularity of polygamists, particularly when highlighting cases involving compound polygamous communities like that of Warren Jeffs. While it is true that there have been isolated and closed compounds of polygynists, it also appears true that the criminalization of polygamy is a contributor to such isolation.²²⁷ It is rather circular to cite the insularity of such families as the basis for criminalization

²²⁴ Sigman, *supra* note 216, at 172–73 (footnote omitted).

²²⁵ Jaime M. Gher, *Polygamy And Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 599 (2008).

²²⁶ See *supra* note 69.

²²⁷ That obviously does not include such cases as Warren Jeffs, who was hiding rape, child abuse, and other criminal acts.

when the criminalization compels insularity.²²⁸ However, many families like the Brown family in Utah are not insulated. The adults work outside of the community of polygamists and have monogamous coworkers and friends.

The reliance of Professor Cook (as with Professor Hamilton) on *Reynolds v. United States*²²⁹ captured the true content of the social harm connected to plural unions. Beneath Cook's insistence that Canada is obligated to take "all appropriate measures" to eliminate polygyny is a moral judgment as to the correctness of these plural relationships.²³⁰ If the harm were composed of "prejudices and practices that are based upon the inferiority of women and on their stereotyped roles,"²³¹ a great variety of religious and social practices would appear to warrant (if not demand) criminal sanctions, from the criminalization of pornography to the restriction of magazines like Playboy.²³² To use general principles against any norms and practices that support or encourage "discrimination against women" is to allow the criminalization of centuries of human institutions and norms.²³³ There are a great variety of

²²⁸ This type of circular logic was evident in *State v. Green*, 99 P.3d 820 (Utah 2004), where the Utah Supreme Court noted not only that were abuses common in polygamous families but also that "the closed nature of polygamous communities makes obtaining evidence of and prosecuting these crimes challenging." *Id.* at 830. The court seems oblivious to fact that those efforts to prosecute are an obvious motivation to close families off from society and try to hide any indication of a plural family.

²²⁹ Cook Report, *supra* note 206, para. 101.

²³⁰ *Id.* paras. 18–19, 119, 134.

²³¹ *Id.* para. 136.

²³² Related arguments have uniformly failed in the United States, where courts allow consenting adults to buy pornography and engage in stereotyping of women. *See, e.g.*, *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (striking down an Indianapolis Ordinance banning pornography as a form of discrimination against women and noting that "[t]he Constitution forbids the state to declare one perspective right and silence opponents").

²³³ It is equally unsupportable, in my view, to cite as authority a CEDAW Concluding Observation as compelling criminalization of polygamy. Cook Report, *supra* note 206, para. 171. There is a great difference between a stated concern and an international obligation. The Concluding Observation was expressed as a concern over

the prevalence of a patriarchal ideology in the State party with firmly entrenched stereotypes and the persistence of deep-rooted adverse cultural norms, customs and traditions, including forced and early marriage, polygamy . . . that discriminate against women, result in limitations to women's educational and employment opportunities and constitute serious obstacles to women's enjoyment of their human rights.

Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Timor-Leste, 44th Sess., July 20–Aug. 7, 2009, U.N. Doc. CEDAW/C/TLS/CO/1, para. 27 (Aug. 7, 2009), *available at* <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW.C.TLS.CO.1.pdf>. Many of us would agree with this list of offensive practices, but part of a woman's enjoyment of her human rights is to be able to make a choice, including a choice between a singular or plural relationship. It would be a dangerous practice to use a general principle to convert nondiscriminatory principles into criminal prohibitions.

matters that could be viewed as “customs and practices which constitute discrimination against women.”²³⁴ This, according to Professor Cook, includes traditions and views that “essentialize women’s reproductive capacity.”²³⁵ From arranged marriages to dowry systems, such an approach would obligate states to criminalize large segments of their societies.

B. Harm As a Limiting Principle To Protect Individual Choice

The expert testimony in *Bountiful* captures vividly the broadening of social harm to encompass consensual conduct viewed inimical to social values and mores. It also reveals an outcome-determinative structure to the analysis that excludes alternative perspectives on the meaning of morality or consent in family structures. As shown below, this methodological bias can be traced from some of the original polygamy cases to more recent cases. However, there are also emerging cases that seek a more neutral analytical approach and notably a narrower definition of social harm in the review of criminal sanctions for consensual conduct.

While Professors Hamilton and Cook offered impressive and well-researched positions in the *Bountiful* litigation, they (like the Court) tended to exclude any recognition of alternative views of morality or equality from the perspective of plural families. There is an inherent false dichotomy here: monogamy as moral and polygamy as immoral or, alternatively, monogamy as consensual and polygamy as coercive. In the discussion of the majoritarian tradition of monogamy as an institution, there is little effort to explore polygamy as a moral lifestyle. Judge Walker raised an analogous question in his historic decision striking down the California bar on same-sex marriage. As critics of the ban on same-sex marriage have noted, morality advocates uniformly fail “to address arguments about the morality of same-sex sexual acts and the moral character of lesbians, gay men, and bisexuals.”²³⁶ It is often the signature of such analysis that the morality of the majoritarian position is well articulated while the alleged immorality of the minority position is left as facially obvious. Hart captured the inherent danger of such analysis, saying that “[t]he greatest of the dangers . . . was not that in fact the majority might use their power to oppress a minority, but that, with the spread of democratic ideas, it might come to be thought unobjectionable that they

²³⁴ *Id.* para. 163 (internal quotation mark omitted).

²³⁵ *Id.* para. 167.

²³⁶ Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 503–04 (2001).

should do so.”²³⁷ Hart’s point is that majoritarian presumptions of harm could become a new “truth” that shapes opinions—both for individuals and courts.

The presumption of harm was evident in the second recorded polygamy prosecution in Utah. In that case, it was the Black rather than the Brown family, but the basis for the claims of criminality was strikingly similar. *In re Black* involved the children of Vera and Leonard Black, a polygamous Mormon couple living along the border of Utah and Arizona.²³⁸ While the Blacks lived in the Utah section of Short Creek, the Governor of Arizona had arranged a massive raid on their town to rescue the women and children of the fundamentalist Mormon families.²³⁹ Vera was the second of Leonard’s three wives, and their marriage was purely spiritual without multiple marriage licenses. The public authorities in Utah filed a neglect petition against the Blacks after the raid. However, despite a full trial, the state failed to convince a court that the Blacks’ children were inadequately clothed and fed. Nevertheless, the judge found the children legally neglected and ordered their removal on the grounds that the parents persistently violated the law prohibiting polygamy.²⁴⁰ The disconnect between the evidence of harm and the conviction was captured in two findings:

16. That there was no evidence that any of the children were destitute and without proper sustenance, clothing or medical care.

17. That the home of Leonard Black and Vera Johnson Black at Short Creek, Utah, *is an immoral environment for the rearing of* said children.²⁴¹

The court held that the children were abused because the family structure was deemed immoral and thus by definition harmful.²⁴² The court quoted the Supreme Court decision in *Davis v. Beason* at length to drive home that immoral acts are by definition harmful acts. Indeed, the quotation from *Davis Reynolds*) an amplification of the law as a reflection of true Christian morality:

²³⁷ HART, *supra* note 167, at 77–78.

²³⁸ 283 P.2d 887 (Utah 1955).

²³⁹ *Id.* at 888.

²⁴⁰ *Id.* at 891.

²⁴¹ *Id.*

²⁴² The decision included such curious findings as “Mr. Black gave strange testimony and such as a monogamous husband would not likely give. He testified that he doesn’t remember when he married any of his 3 wives.” *Id.* at 896.

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the *common sense of mankind*. If they are crimes, then to *teach, advise, and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal, and proper subjects of punishment, as aiding and abetting crime are in all other cases. . . .* It was never intended or supposed that the [first] amendment could be invoked as a *protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society. . . .* Probably never before in the history of this country *has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.*²⁴³

In 1955, the Supreme Court of Utah upheld the removal of the Black family children.²⁴⁴ It has remained on the books like *Reynolds* and *Davis*, despite the openly biased and hostile sentiments of the language. Moreover, today, citizens are entirely protected in living their lives in open denial of the idea that “there should be any marriage tie” and in advocating “promiscuous

²⁴³ *Id.* at 903–05 (quoting *Davis v. Beason*, 133 U.S. 333, 341–43 (1890)). The *Davis* Court continued its dismissal of religious freedom claims from a faith that it called a “*cultus*” practice. *Davis*, 133 U.S. at 342. Despite the fact that the practice was that of consenting adults and was ancient in origin, the Court scoffed at such minority religious views as akin to human sacrifice:

There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretence that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States.

Id. at 343.

²⁴⁴ *In re Black*, 283 P.2d at 891–92.

intercourse of the sexes, as prompted by the passions of its members.”²⁴⁵ The concept of presumptive harm from immoral acts is no longer considered within the realm of legitimate rationales. However, listed by this same court, the other values of combating the degradation of women and promiscuity (though Professor Hamilton uses “licentiousness”) are still advanced as facially valid types of social harm.

The signature of these early cases is the threshold assumption that monogamy is the natural form of marital unions and that departure from that tradition is presumptively harmful. That same bias was evident in cases like *Potter v. Murray City*, where the Tenth Circuit declared in 1985 that “[m]onogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built. In light of these fundamental values, the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.”²⁴⁶ The court laid bare the outcome-determinative logic of these cases. “Society” (by which it is referring simply to the majority) has selected monogamy as fitting its “fundamental values” and serving as the bedrock for its concept of a correct family.²⁴⁷

The foundation for a more Millian definition of harm has already been laid in cases outside of polygamy challenges. In constitutional cases involving such questions as same-sex marriage, generalized conclusions are no longer

²⁴⁵ *Id.* at 904 (quoting *Davis*, 133 U.S. at 343). Notably, this same line appears in 1890 in *Davis v. Beason*. The passage reveals the same Devlin logic discussed above in the imposition of a moral code in curtailment of free exercise:

However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretence that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States.

Davis, 133 U.S. at 342–43. The same line was quoted as late as 1922 in *McMasters v. State*, 207 P. 566, 568 (Okla. Crim. App. 1922).

²⁴⁶ 760 F.2d 1065, 1070 (10th Cir. 1985) (citations omitted).

²⁴⁷ *Id.*; see also *State v. Holm*, 137 P.3d 726, 744 (Utah 2006) (“[M]arital 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.”).

considered a viable showing of harm, as evidenced in recent rulings striking down state prohibitions.²⁴⁸ Some of the same arguments, including the harm to children being raised by same-sex parents, were routinely rejected as unsupported and unsupportable.²⁴⁹ They failed to support the criminalization of homosexual relations. This same lack of a nexus was identified in the *Brown* case where the state “provided academic discussion about ‘social harms’ arising from religious cohabitation” that Judge Waddoups rejected as facially inadequate to support criminalization of a consensual union.²⁵⁰ The State could offer little more than the Supreme Court offered in *Reynolds* when it simply dismissed polygamy as an “odious” social harm.²⁵¹

The *Brown* court explored “social harm” and correctly identified the claim of the state as basically a refashioning of the moral condemnation of the *Reynolds* Court. Judge Waddoups noted that the Court was clear that the real “social harm” was the view that the “Mormons were degrading the morals of the country through their religious practices, such as polygamy, which, the Supreme Court declared, constituted ‘a return to barbarism’ and were ‘contrary to the spirit of Christianity.’”²⁵² It was not enough to cite academic works that argue that “polygamy leads to the patriarchal principle”—a claim fraught with subjectivity.²⁵³

²⁴⁸ See *supra* note 18.

²⁴⁹ See, e.g., *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir.) (“Because the Proponents’ arguments are based on overbroad generalizations about same-sex parents, and because there is no link between banning same-sex marriage and promoting optimal childrearing, this aim cannot support the Virginia Marriage Laws.”), *cert. denied*, 135 S. Ct. 308 (2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014) (“Defendants have not provided any evidentiary support for their assertion that denying marriage to same-sex couples positively affects childrearing.”); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1214 (D. Utah 2013) (“[T]he State has not shown any effect of the availability of same-sex marriage on the number of children raised by either opposite-sex or same-sex partners.”), *aff’d*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014).

²⁵⁰ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1177 (D. Utah 2013).

²⁵¹ *Reynolds v. United States*, 98 U.S. 145, 164 (1879); see also Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 341 (1964) (discussing lack of definition of social harm in *Reynolds*); Todd M. Gillett, Note, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 WM & MARY BILL RTS. J. 497, 513 (2000) (same).

²⁵² *Brown*, 947 F. Supp. 2d at 1187 (quoting Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890)).

²⁵³ See *Reynolds*, 98 U.S. at 166. Former Utah Chief Justice Durham also exposed the weak evidentiary foundation for claims of social harm in *Green*. In *State v. Holm*, she noted that the majority

was content to rely on assertions in a student law review piece that polygamy was frequently related to other criminal conduct, together with two local cases, including the case of *Green* himself. However, reviewing this assessment in light of the heightened scrutiny I believe is called for here, I cannot conclude that the restriction that the bigamy law places on the religious freedom of all those who, for religious reasons, live with more than one woman is necessary to

Mill's Harm Principle represents a bright-line rule against the inclusion of moral or majoritarian values as the basis for social harm.²⁵⁴ The role of harm is to limit the range of legitimate regulation of individual choices and relations. This applies with equal force to dictating (on the pain of prosecution) "correct" choices for women to make so as not to be degraded or marginalized. To return to Mill:

His own good, either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. . . .

. . . .

But there is a sphere of action in which society as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation. . . . This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. . . . Secondly, the

further the state's interest in this regard. Upon closer review, the student Note is unconvincing. The State has provided no evidence of a causal relationship or even a strong correlation between the practice of polygamy whether religiously motivated or not, and the offenses of "incest, sexual assault, statutory rape, and failure to pay child support." Moreover, even assuming such a correlation did exist, neither the record nor the recent history of prosecutions of alleged polygamists warrants the conclusion that [the Statute] is a necessary tool for the state's attacks of such harms.

State v. Holm, 137 P.3d 726, 774 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part) (footnotes and citations omitted).

²⁵⁴ See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 240–58 (1977); 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 173–75 (1988); HART, *supra* note 167, at 77–78; THOMAS NAGEL, EQUALITY AND PARTIALITY 165–66 (1991).

principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.²⁵⁵

Mill's words seem particularly prophetic in the context of the *Bountiful* case. His view of harm limiting government power fits perfectly with a pluralistic society based on notions of tolerance and liberty. However, since the 1960s, emerging movements to protect different groups led to an expansion of the view of social harm.²⁵⁶ As these collective notions of social interest and social harm increased, there was a move away from the individualized notions of rights and harm contained in the writings of Mill and others. For Mill, the harm principle guaranteed maximum freedom and choice—the realization of self-expression of “man as a progressive being.”²⁵⁷

That view has deeper resonance today with modern constitutional analysis.²⁵⁸ Cases related to privacy and equal protection often speak in terms

²⁵⁵ MILL, *supra* note 15, at 23, 27–28.

²⁵⁶ Professor Harcourt observed:

Looking at the historical shifts in the debate through the lens of legal semiotics, however, offers an important insight: the ideological shift of the harm principle over the past twenty years reflects a natural tilt in the original, simple harm principle—a *natural tilt that favors a finding of harm*. By returning to the original, simple statement of the harm principle in the 1960s, the progressives opened the door to the proliferation of harm arguments and brought about the collapse of the harm principle.

Harcourt, *supra* note 121, at 186.

²⁵⁷ MILL, *supra* note 15, at 25.

²⁵⁸ The Court's recent decision in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), offers an interesting variation in dealing religious rights under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2012)). In that case, the state offered generalized notions of harm posed by a prisoner wearing a beard in observation of his Muslim faith. The Court voted 9–0 that such statements of harm must offer a concrete nexus between the specific conduct and the concrete harm stated by the prison. RLUIPA was passed after its sister law, the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the applicability of the Act to the States and States' subdivisions). RFRA was passed “in order to provide very broad protection for religious liberty.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). RFRA followed the ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990), undermining

strikingly similar to those used by Mill and Bentham. These rights are viewed as instrumental in persons establishing the personal relations and fulfillment that they seek in their private lives and families. For example, when the Court has discussed the institution of marriage, it has emphasized how marriage is tied to a deep individual right of intimacy and family relations. This discussion is not limited to the institution itself but also extends to the protection of the right of individuals to enjoy the conditions of marriage. Thus, in 1967, the freedom to marry people of another race was linked to “one of the vital personal rights essential to the orderly pursuit of happiness by free men.”²⁵⁹ The intimate or familial relationships of adults are at the center of the associational rights protected by the Constitution.²⁶⁰ The *Lawrence* decision contains some of the strongest language separating harm from morality—reinforcing the nexus between privacy interests and individual choice:

The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to

claims over incidental burdens of free exercise under generally applicable laws. Applying the statutory standard, the Court rejected claims of harm to security in having short beards in the type of analysis that placed the burden on the government. However, this more Millian notion of harm is found in the statutory language.

²⁵⁹ *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see also* *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (recognizing a fundamental interest in familial organization in the home); *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965) (recognizing a fundamental right of marital privacy over questions of procreation).

²⁶⁰ *See* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (explaining that a unifying principle of its prior cases is the degree of intimacy between the adults in a relationship or group: “they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship”). Nor does this protected relationship exist solely in cases of blood relation and legal marriage. *See, e.g.,* *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844–46 (1977) (concluding that foster children have an intimate relationship with their foster parents and balancing that liberty interest with the state’s role in creating the relationship); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending *Griswold*’s protected liberty interest in contraception to unmarried individuals). The Supreme Court’s holding in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) is not contrary to this principle. *Boraas* concerned the state’s authority to limit cohabitation of multiple unrelated people in the context of zoning; the case does not establish the state’s power to criminalize unmarried cohabitation across the entirety of its jurisdiction, which is one of the precise consequences of the Utah statute in this case.

enforce these views on the whole society through operation of the criminal law.²⁶¹

While child or spousal abuse is obviously a cognizable harm (and a compelling basis for a law when a close nexus is established), protecting the institution of marriage, as defined by majoritarian morality, is not tied to a Millian harm that would make it a compelling or rational basis for criminalization.²⁶² The purpose of the Utah statute was originally stated to be, and publicly defended as, strictly moral and religious—it criminalizes polygamy because society considers it immoral.²⁶³ As the Court noted in *Lawrence*, “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.”²⁶⁴

Under *Lawrence*, “moral opposition” is an invalid interest even under rational basis review. *Lawrence* is applicable to intimate adult sexual behavior that is private and noncommercial in nature; the application of a demanding rational basis analysis is triggered by the state’s encroachment into activity that is closely linked to familial organizations and romantic relationships. Indeed, the earlier case set aside by *Lawrence* offered the very rationales advanced by scholars in support of criminalized morality codes. In *Bowers v. Hardwick*, the

²⁶¹ *Lawrence v. Texas*, 539 U.S. 558, 571 (2003). As such, the decision can be viewed as based on the harm principle. See Mark Strasser, *Lawrence, Mill, and Same-Sex Relationships: On Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285, 291 n.37 (2006).

²⁶² Indeed, the same conclusory basis is evident in the analysis regarding any legitimate governmental purpose under intermediate scrutiny. Once again, such analysis circles back to simply majoritarian bias or values. That was evident in Justice Alito’s dissent in *Windsor*. While Alito took the Justice Department to task for “really seeking to have the Court resolve a debate between two competing views of marriage,” his solution was to treat the division of values and religious beliefs as its own self-affirming justification. *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). There was a similar division of opinion on interracial marriage. Alito’s dissent would have been equally applicable in *Loving*.

²⁶³ Moral disapproval is obvious in the Supreme Court’s prior rulings on anti-polygamy laws. See *Cleveland v. United States*, 329 U.S. 14, 19 (1946) (“The establishment or maintenance of polygamous households is a notorious example of promiscuity.”). To the extent *Cleveland* did rely on moral justifications, *Lawrence* and other more recent cases have overruled it.

²⁶⁴ *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). Notably, even were moral disapproval of sexual promiscuity accepted as a legitimate government interest, the anti-bigamy statute at issue here addresses that interest differently for married and unmarried persons and thus falls squarely into the holding of *Eisenstadt v. Baird*, where the Court struck down a Massachusetts law that prohibited the sale of contraceptives to unmarried couples. 405 U.S. at 444. Declining to reach the issue of whether the law infringed on a fundamental right and thus required strict scrutiny, *id.* at 447 n.7, the Court applied rational basis under the Equal Protection Clause and found that there was no “ground of difference that rationally explains the different treatment accorded married and unmarried persons.” *Id.* at 447. “[W]hatever the rights of the individual to access to contraceptives may be,” the Court held, “the rights must be the same for the unmarried and the married alike.” *Id.* at 453.

Court upheld by a 5-to-4 vote Georgia's anti-sodomy statute as an exercise of the fundamental right of states to declare what is "immoral and unacceptable."²⁶⁵ In his concurrence, Chief Justice Burger laid bare the religious foundations for such laws and said that Georgia was merely advancing "Judeo-Christian moral and ethical standards" governing society as shown by a "millennia of moral teaching."²⁶⁶ *Lawrence* not only overturned that decision but its underlying notion of social harm.

This view of criminal codes reinforcing morality codes continued long after *Hardwick*. In the *Holm* decision, the Utah Supreme Court's explanation of the protection-of-marriage interest focused on the state's participation in legal marriages and the legislature's preference for monogamy for creating "the building blocks of our society."²⁶⁷ In essence, the court concluded that "the public nature of polygamists' attempts to extralegally redefine the acceptable parameters of a fundamental social institution like marriage" distinguished the statute from the law at issue in *Lawrence*.²⁶⁸ However, plural religious marriage is, itself, a purely private living arrangement, centered around the home. Indeed, plural unions tend to be more insular and less public than monogamous marriage. It is not protecting a particular form of loving union but the right to such loving unions that motivates modern jurisprudence.²⁶⁹ Moreover, the existence of a right should not depend on whether the beneficiaries will enjoy the right publicly or privately.

Some courts have used the nexus between harm and sanction as a determinative analytical factor. The Pennsylvania Supreme Court offered an example of how Millian theory could be applied. In *Commonwealth v. Bonadio*, the court cited *On Liberty* in striking down a law criminalizing "deviate" sexual relations:

With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct *does not harm others*. "No harm to the secular interests of the community is

²⁶⁵ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 539 U.S. 558.

²⁶⁶ *Id.* at 196–97 (Burger, C.J., concurring).

²⁶⁷ *State v. Holm*, 137 P.3d 726, 744 (Utah 2006).

²⁶⁸ *Id.* at 744.

²⁶⁹ *See, e.g., Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012) ("For generations, moral disapproval has been taken as an adequate basis for legislation But, speaking directly of same-sex preferences, *Lawrence* ruled that moral disapproval alone cannot justify legislation discriminating on this basis.").

involved in atypical sex practice in private between consenting adult partners.” Many issues that are considered to be matters of morals are subject to debate, and no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority. Indeed, what is considered to be “moral” changes with the times and is dependent upon societal background. Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals. Enactment of the Voluntary Deviate Sexual Intercourse Statute, despite the fact that it provides punishment for what many believe to be abhorrent crimes against nature and perceived sins against God, is not properly in the realm of the temporal police power.²⁷⁰

Such cases represent a legal trend running opposite to the compulsive-liberalism scholarship. There is a natural progression toward a Millian view of harm as protecting individual choice and expression. As the Court stated in *Casey*, “Our obligation is to define the liberty of all, not to mandate our own moral code.”²⁷¹ The distinction drawn by the Court in *Casey* should exclude moral harm from the protection of criminal law. It should also protect acts that the majority may find perverse. As Mill stated, society should be based on limitations of government to maximize individual freedom: “liberty of tastes and pursuits . . . of doing as we like; subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.”²⁷² Harm under Mill is not an elastic principle allowing expansive government regulation of private conduct but a principle that protects the foundational belief that “[o]ver himself, over his own body and mind, the individual is sovereign.”²⁷³

The Millian view of harm should reinforce a more substantive interpretation of what constitutes a rational basis for state action under constitutional law—requiring more tangible and direct statements of harm. In his stinging dissent in *Lawrence*, Justice Scalia objected to the “unheard-of form of rational-basis review” that underlaid the majority’s decision.²⁷⁴ However, the alternative standard allowed for highly generalized and conclusory claims of social harm to be made in support of criminal laws—

²⁷⁰ 415 A.2d 47, 50 (Pa. 1980) (quoting MODEL PENAL CODE § 207.5 cmt. (Tentative Draft No. 4 1955)).

²⁷¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992).

²⁷² MILL, *supra* note 15, at 28.

²⁷³ *Id.* at 23.

²⁷⁴ *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

allowing judges to impose moral codes with largely instinctive or emotive rationales. It is certainly true that the Court did not apply the type of *Glucksberg* two-step test for a rational basis test.²⁷⁵ However, that test is often outcome determinative on such questions and is viewed as highly flawed in asking a court to first define a right and then ask whether the right is “deeply rooted in this Nation’s history and tradition.”²⁷⁶ It is a test that readily reinforces morality codes and harkens back to Burger’s reliance on authority reaching back to the very beginnings of the Judeo-Christian values. While the Court should have been clearer in rejecting this test and in expressly applying an alternative rational basis test, it was not creating a new test as much as following a line of cases closer to its analysis under the Equal Protection Clause case of *Romer v. Evans*.²⁷⁷ In that case, the Court made the threshold judgment that the basis for a law did not fall within the realm of legitimate governmental purposes and was instead “born of animosity toward the class of persons affected.”²⁷⁸ As noted by Professor Randy E. Barnett, “bare moral disapproval” was no longer enough.²⁷⁹ That has an obvious Millian appeal to those who want a closer nexus between harm and state sanctions.

The animus jurisprudence, however, is itself limited from a Millian perspective since it initially focuses on the motivation of legislators rather than requiring a consistent showing of concrete harm to justify criminal sanctions.²⁸⁰ To be sure, it discards the often outcome-determinative requirement that the state only show how conduct “negat[ed] ‘any reasonably conceivable state of facts that could provide a rational basis for the

²⁷⁵ The first step of the *Glucksberg* two-step test is determining whether the right is so “fundamental” that it is “deeply rooted in this Nation’s history and tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)) (internal quotation marks omitted). In *Lawrence*, however, “nowhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right.’” 539 U.S. at 586 (Scalia, J., dissenting).

²⁷⁶ *Washington*, 521 U.S. at 721 (quoting *Moore*, 431 U.S. at 503) (internal quotation marks omitted).

²⁷⁷ 517 U.S. 620 (1996).

²⁷⁸ *Id.* at 634; see also *Lawrence*, 539 U.S. at 574 (quoting *Romer*, 517 U.S. at 634).

²⁷⁹ Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1495 (2008).

²⁸⁰ Obviously, in dealing with the criminalization of plural families, there is ample evidence of such animus. Indeed, the Tenth Circuit’s recent description of polygamy in *Bishop* mirrors the earlier discussion in *Brown* of the prejudice of the Mormons as “ready-made Other[s].” *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1183 n.15 (D. Utah 2013); see also *Bishop v. Smith*, 760 F.3d 1070, 1100 (10th Cir.) (“On the weaker end of the continuum, a legislative motive may be to simply exclude a particular group from one’s community for no reason other than an ‘irrational prejudice’ harbored against that group. In this sense, animus may be present where the lawmaking authority is motivated solely by the urge to call one group ‘other,’ to separate those persons from the rest of the community (i.e., an ‘us versus them’ legal construct).” (citation omitted)), *cert. denied*, 135 S. Ct. 271 (2014).

classification.”²⁸¹ It also relieves courts of having to follow “the various post-hoc rationalizations that *could* conceivably have justified the laws.”²⁸² Yet, while animus often underlies criminal morality codes, Mill suggested a state should have to shoulder this burden, even without a showing of animus, to limit the liberties of citizens.

In the post-*Lawrence* world, the Millian notion of harm remains a contentious matter with some courts. Thus, in *Williams v. Morgan*, the Eleventh Circuit upheld a statute criminalizing the sale of sex toys after ruling that “public morality survives as a rational basis for legislation even after *Lawrence*.”²⁸³ The court insisted that, even though the Court overruled *Bowers*, “[t]he principle that ‘[t]he law . . . is constantly based on notions of morality,’ was not announced for the first time in *Bowers* and remains in force today.”²⁸⁴ The court cited its own ruling that homosexuals could be barred from adoptions as proof that “public morality likely remains a constitutionally rational basis for legislation.”²⁸⁵ The voice of Devlin can be heard clearly in such cases. To yield to the worst of puns, when it comes to post-*Lawrence* decisions, the Devlin appears in the details of morality codes.

CONCLUSION

As shown by both the *Brown* and *Bountiful* cases, there is general agreement that, as Chief Justice Bauman stated, these cases are “essentially about harm.” However, as we have seen, there is little agreement on the meaning of harm for the purposes of analysis. Ultimately, Chief Justice Bauman accepted that the social-harm claims without a compelling basis of empirical data on harm either from polygamy in general or even the more narrow focus of extreme polygyny groups.²⁸⁶ The implications of such an approach are obvious. As harm is expanded, government authority over private

²⁸¹ Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

²⁸² *Bishop*, 760 F.3d at 1099.

²⁸³ 478 F.3d 1316, 1323 (11th Cir. 2007).

²⁸⁴ *Id.* (second alteration and omission in original) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

²⁸⁵ *Id.*

²⁸⁶ The court did rely on the research of Dr. Rose McDermott, who surveyed the literature in the area and studied the descriptions and findings of the negative impact of polygyny. *Bountiful*, 2011 BCSC 1588, para. 581 (Can.). There were also findings based on the work of academics such as the economic analysis of Dr. Shoshana Grossbard. *Id.* para. 588. However, these studies do not establish the type of baseline data discussed above in drawing correlation between plural unions and the abuses or harms detailed in the literature of the area.

relations expands commensurately. By defining plural unions as inherently abusive, families can be prosecuted simply for their status as polygamists without any specific showing of harm or injury.

Over a century of philosophical debate seems to play out in these cases regarding the range of legitimate government action over consensual adult conduct. Indeed, the voices of not just Mill but Devlin and Hart can be heard in the arguments over the right to criminalize actions that are deemed threatening to public institutions and social mores. It is a debate that many thought had been resolved in favor consensual rights and freedom of choice. The irony is that the greatest shift back toward the position of Devlin has come from a new liberalism that seeks to punish bad choices expressed in family structures, speech, or entertainment. While modern advocates may speak more of fighting patriarchy than defending Christianity, the premise remains the same: the notion that society can sanction consensual choices deemed degrading or discriminatory by the majority. With the expansion of the notion of harm comes the contraction of freedom that Mill most feared:

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.²⁸⁷

There is no denying that this approach favors a more libertarian outcome and certainly runs heavily against what I have referred to as “compulsive liberalism.” The concept of Millian harm leaves less room for governmental regulation of consensual relationships and, by extension, less ability to dictate “good choices” in society. While standards like the rational basis test often rest on claims of social harm, these standards fail to require a close nexus between the proscribed conduct and a showing of concrete harm. The requirement of specific and provable harm would have an obvious impact on the last relics of morality codes such as criminal fornication and adultery statutes—laws that are currently on the books in the various states but rarely enforced. Not only have these laws had no demonstrable impact on conduct, they are considered

²⁸⁷ MILL, *supra* note 15, at 28–29.

moribund.²⁸⁸ These laws are already presumptively unconstitutional and would fail to meet a harm-based test.

A Millian definition of harm favors a bright-line rule that protects core rights of free exercise as well as free speech and free association. It is not, however, the invitation to immorality that some have suggested in the public debate. Rather, it allows for different moral codes to flourish within a pluralistic society. Indeed, it would be a triumph for morality in the truest sense since it allows people to pursue their own moral codes and paths rather than yield to the moral codes of their neighbors. When such majoritarian codes were routinely enforced in the nineteenth century, they did not create a more moral society but only the appearance of such a society. It was a coerced or compelled morality—the very antithesis for principles of free choice and self-determination. That is why the decisions in *Bountiful* and *Brown* were less about polygamy than they were about privacy.

The “Loadstone Rock” of harm in constitutional analysis holds both the greatest promise and greatest danger for liberty interests in the United States and Canada. The rejection of the Millian view in the *Bountiful* decision and the adoption of that view in *Brown* embody that sharp contrast. However, for those of us who see Millian harm as a key to realizing true freedoms of religion, speech, and association, cases like *Brown* hold not just an ideal but also an inevitable direction for society. The great irony of compulsive liberalism is the notion of the oppressed rising as the new oppressors. While Devlin’s direct moral-superiority language is no longer considered appropriate, it has been replaced with a new moralism citing the abuse of status and dignity of different groups. There is an underlying belief that criminal law remains an instrument in achieving correct values and correct decisions. Even with the rise of compulsive liberalism in scholarship, however, there remains a natural progression toward individual choice and freedom. In *Brown*, individual choice prevailed over those who wanted to use criminal law to protect social institutions. Despite the longstanding hatred and rage directed at plural families, the court heard the voices of those who only asked to be left alone to pursue their own moral course and relations. The Browns did not prevail by finding counsel or a court who agreed with their choices but rather people who agreed with their right to make such choices. Despite the calls for greater limits on speech and consensual conduct, the decision suggests that there may still be a Millian line that can be drawn to preserve individual freedom and make each

²⁸⁸ See Turley, *supra* note 3; *supra* note 196 and accompanying text.

man and woman the “guardian” of their own values. It is the same optimism expressed by Sydney Carton in *A Tale of Two Cities*, even as he was on his way to the guillotine in the natural progression of liberty:

I see Barsad, and Cly, Defarge, The Vengeance, the Juryman, the Judge, long ranks of the new oppressors who have risen on the destruction of the old, perishing by this retributive instrument, before it shall cease out of its present use. I see a beautiful city and a brilliant people rising from this abyss, and, in their struggles to be truly free, in their triumphs and defeats, through long years to come, I see the evil of this time and of the previous time of which this is the natural birth, gradually making expiation for itself and wearing out.²⁸⁹

²⁸⁹ DICKENS, *supra* note 1, at 360.