EMORY | LAW

Emory Law Journal

Volume 64
Issue 6 *Paper Symposium — Polygamous Unions? Charting the Contours of Marriage Law's Frontier*

Article 11

2015

L¿Amour for Four: Polygyny, Polyamory, and the State¿s Compelling Economic Interest in Normative Monogamy

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L'AMOUR FOR FOUR: POLYGYNY, POLYAMORY, AND THE STATE'S COMPELLING ECONOMIC INTEREST IN NORMATIVE MONOGAMY

ABSTRACT

Some Americans are changing the way they pair up, but others aren't satisfied with pairs. In the last few years, while voters, legislatures, and judiciaries have expanded marriage in favor of same-sex couples, some are hoping for expansion in a different dimension. These Americans, instead of concerning themselves with gender restrictions, want to remove numerical restrictions on marriage currently imposed by states. These people call themselves polyamorists, and they are seeking rights for their multiple-partner relationships. Of course, polygamy is nothing new for the human species. Some scientists believe that polygamy is actually the most natural human relationship, and history is littered with a variety of approaches to polygamous relations. Only in recent centuries has society's preference for monogamy developed, yet that preference has proven robust, as most Western governments vehemently support monogamy as the only marital option.

This Comment explores polygyny and polyamory in the United States and walks through the traditional legal, political, and sociological arguments for and against polygamy. While most polygamy throughout the world stems from cultural or religious bases, this Comment primarily focuses on freely entered-into polygamy. The traditional human rights arguments against cultural- and religious-based polygamy do not necessarily apply to coercion-free polyamory. While some claim the absence of coercion leaves the state without a compelling reason to ban polygamous marriage, this Comment disagrees and finds several compelling reasons for states to favor monogamy.

Alarmingly, in the face of challenges by would-be polygamous couples, states are unable to articulate exactly what interest they have in normative monogamy. Attorneys defending states' polygamy laws usually rely on historical or administrative reasons, essentially claiming that monogamy should hold because that's what we have always done, and it would be too hard to change. These typical arguments sell monogamy short. This Comment proposes other, more dynamic reasons that states should continue to support normative monogamy, reasons that have thus far been ignored by the legal

world. Normative monogamy plays a far greater role in the development of Western society than states have argued. In fact, social science research shows that normative monogamy makes members of society more productive by encouraging long-term investments instead of short-term, mating-focused expenditures of resources. This natural shift in priorities among the monogamous has led to radical advancement in societies that practice normative monogamy. Monogamy's contribution to society has been largely ignored by the legal world and unargued before courts deciding the merits of laws proscribing polygamy; yet normative monogamy's role in the advancement of society is the single most compelling interest that states have. This Comment advances that previously ignored interest.

INTRODUCTION

> Terisa Greenan and her boyfriend, Matt, are enjoying a rare day of Seattle sun, sharing a beet carpaccio on the patio of a local restaurant. Matt holds Terisa's hand, as his 6-year-old son squeezes in between the couple to give Terisa a kiss. His mother, Vera, looks over and smiles; she's there with her boyfriend, Larry. Suddenly it starts to rain, and the group must move inside. In the process, they rearrange themselves: Matt's hand touches Vera's leg. Terisa gives Larry a kiss. The child, seemingly unconcerned, puts his arms around his mother and digs into his meal.
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> Terisa and Matt and Vera and Larry—along with Scott, who's also at this dinner—are not swingers, per se; they aren't pursuing casual sex. Nor are they polygamists of the sort portrayed on HBO's *Big Love*; they aren't religious, and they don't have multiple wives. But they do believe in "ethical nonmonogamy," or engaging in loving, intimate relationships with more than one person—based upon the knowledge and consent of everyone involved. They are polyamorous, to use the term of art applied to multiple-partner families like theirs, and they wouldn't want to live any other way.[1]

Terisa, Matt, Vera, Larry, and Scott are hardly alone in eschewing monogamy for polygamy. While polygamy is virtually nonexistent in modern mainstream Western culture, the majority of cultures on earth today still practice polygamy.[2] Even in the United States, polygamy may be more common than one might think. A recent study from the University of Michigan found that approximately four percent of the adult population participates in consensually nonmonogamous relationships.[3] This means that there may be 10 to 12 million polyamorists[4] in the United States,[5] which is enough of a

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[1] Jessica Bennett, *Polyamory: The Next Sexual Revolution?*, NEWSWEEK (July 28, 2009, 8:00 PM), http://www.newsweek.com/polyamory-next-sexual-revolution-82053.

[2] George Peter Murdock, *World Ethnographic Sample*, 59 AM. ANTHROPOLOGIST 664, 686 & tbl.2 (1957) ("[M]onogamy is characteristic of about 24 percent of the world's societies, polyandry of 1 percent, and polygyny of 75 percent . . . ."). Amongst primates, monogamy may be even more rare. One study has found that only three percent of primate species are monogamous. *See* Agustin Fuentes, *Re-Evaluating Primate Monogamy*, 100 AM. ANTHROPOLOGIST 890, 900 (1998).

[3] *See* Terri D. Conley et al., *The Fewer the Merrier?: Assessing Stigma Surrounding Consensually Non-monogamous Romantic Relationships*, 13 ANALYSES SOC. ISSUES & PUB. POL'Y 1, 3 & n.1, 12 (2013) (conducting a study of 1,101 sample participants where forty-seven "identified [themselves] as currently engaging in a consensual nonmonogamous relationship").

[4] Polyamory is a subset of polygamy involving multiple males and multiple females. This is to be contrasted with polygyny, which involves multiple females but only one male. For further analysis of the differences between polyamory and polygyny, see *infra* Part I.

[5] Olga Khazan, *Multiple Lovers, Without Jealousy*, ATLANTIC (July 21, 2014), http://www.theatlantic.com/features/archive/2014/07/multiple-lovers-no-jealousy/374697/. Finding an accurate

population to lead University of Michigan researchers to conclude that polyamorists' "sheer numerical size . . . suggests the potential to start a social movement for civil rights."[6]

In actuality, the push for polygamist rights in the United States has been underway for more than a century. In 1879, the United States Supreme Court unanimously affirmed the criminal conviction of a practicing polygamist in *Reynolds v. United States*, declaring polygamy to be "odious."[7] In *Reynolds*, Chief Justice Morrison Waite described the West's long history of criminalizing polygamy, dating back to the statute of James I in the Eleventh Century, declaring, "From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society."[8] Since that time, federal courts have consistently rejected constitutional challenges to polygamy laws.[9]

However, the nineteenth-century Supreme Court cases upholding laws banning polygamy also would have upheld now-arcane laws restricting marriage on divorce and gender bases. For example, in the 1885 case of *Murphy v. Ramsey*, the Supreme Court upheld the denial of voting privileges to polygamists under the Edmunds Act.[10] But in doing so, the Court uses language indicating a much narrower view of marriage:

> [N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and

number of polyamorous relationships in the United States has proven to be a difficult task for researchers, due in part to the newness and fluidity of the concept. Other research has suggested that the number is far smaller, at perhaps 500,000 in the United States. *See* Bennett, *supra* note 1.

6 Conley et al., *supra* note 3, at 3.

7 98 U.S. 145, 164 (1879).

8 *Id.* at 165.

9 *See, e.g.*, Davis v. Beason, 133 U.S. 333, 334, 341 (1890) (unanimously rejecting a First Amendment challenge to a law requiring voters to swear they were not bigamists or polygamists by stating that "[f]ew crimes are more pernicious to the best interests of society" than polygamy); Murphy v. Ramsey, 114 U.S. 15, 35, 37 (1885) (rejecting challenge to law prohibiting cohabitating polygamists from voting); Potter v. Murray City, 760 F.2d 1065, 1070–72 (10th Cir. 1985) (holding that Utah is justified in banning plural marriage because of its compelling interest in protecting monogamous marriage); *see also* Romer v. Evans, 517 U.S. 620, 650 (1996) (Scalia, J., dissenting) ("[T]he proposition that polygamy can be criminalized . . . remains good law."); *cf.* Brown v. Buhman, 947 F. Supp. 2d 1170, 1217–18 (D. Utah 2013) (holding that Utah "has an important interest in regulating marriage, but only insofar as marriage is understood as a legal status," thus overturning Utah's criminalizing of polygamy (quoting State v. Holm, 137 P.3d 726, 771 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part)) (internal quotation mark omitted)).

10 114 U.S. at 35, 37.

> one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[11]

Despite the *Murphy* Court's sanctioning of legislation requiring "union[s] for life," we now conceive of divorce as being something akin to a fundamental right.[12] And, despite *Murphy*'s statement that marriage is between "one man and one woman,"[13] nearly all legal prognosticators agree that the Supreme Court will soon declare same-sex marriage to be a right.[14] Are *Murphy*'s statements condemning polygamy bound to suffer the same fate? This Comment attempts to answer that question by exploring polygamy and polygamy laws in the United States.

An interesting, yet often overlooked, group of American polygamists consists of those who seek relationships not because of religious or cultural reasons but because of a personal desire to have a nonmonogamous relationship. The bulk of American polygamy law is intertwined with the First Amendment's Establishment Clause rationale and polygamy's base presence in several faiths. In *Reynolds* and *Murphy*, for example, the polygamy law challengers were Mormons.[15] In fact, many nineteenth-century polygamy laws, including the Edmunds Act, were targeted at members of the Mormon Church.[16] Today, the usual polygamy tale involves not only Mormons but also Islamic and African immigrants who carried their polygamous marriages with them.[17] Thus, most laypersons (and most legal scholars, according to one

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[11] *Id.* at 45.

[12] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 372, 382–83 (1971) (holding that the Due Process Clause guarantees ability to dissolve marriages without regard to ability to pay for fees and costs associated with divorce proceedings). *See generally* LESLIE JOAN HARRIS, JUNE CARBONE & LEE E. TEITELBAUM, FAMILY LAW 270 (5th ed. 2014) ("In the 20-year period between 1965 and 1985, every state passed legislation recognizing some form of no-fault ground for divorce.").

[13] 114 U.S. at 45.

[14] *See, e.g.*, 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 (2001) (citing various scholars who agree that same-sex marriage is a right).

[15] *See* 98 U.S. 145, 164 (1879); *see also Murphy*, 114 U.S. at 28.

[16] Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 127–34 (2006). For an additional overview on this point, see generally Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854–1887*, 13 YALE J.L. & FEMINISM 29 (2001); Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1319–40 (1998).

[17] *See* Sealing, *supra* note 14, at 692–94.

professor)[18] assume the discussion about polygamy interests only those whose religion teaches polygamy, all of whom live on the fringe of society, far away from most good, law-abiding, taxpaying citizens.

But, as Terisa, Matt, Vera, Larry, and Scott show, many polygamous relationships are developing not through culturally or religiously engrained teachings but through natural feelings of love for multiple persons.[19] Yet most discussions on the legality of polygamous marriages are based solely on the Free Exercise Clause and result from polygamy's historic ties to religion.[20] This Comment claims that the most worthy challenge to monogamy laws will come from coercion-free polygamous arrangements.

To arrive at this conclusion, this Comment must first consider conventional legal arguments about religious-based polygyny. Part I of this Comment defines and analyzes the various types of polygamous relationships, as well as the law's historic treatment of those relationships in America, and will briefly review the scant literature on the rights of polygamous individuals and groups.

Part II then considers the state's interest in regulating religious-based polygamy. It will also outline the state's most compelling interest in regulating marriage, namely to protect potential victims from harm. The flood of information over the past two decades presents a new compelling state interest with regard to religious-based polygamy, enough to seemingly defeat any Free Exercise Clause challenge. Part II concludes, however, that the harm present in religious-based polygamy, which is used as the basis to defeat these free exercise claims, is different from the potential harm in coercion-free polyamory.

Part III seeks to determine whether states have a compelling interest in restricting marriage to two people even in the absence of coercion. In undertaking this analysis, this Comment looks to relevant social science to consider the prudence of favoring monogamy. Ultimately, Part III determines

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[18] Sigman, *supra* note 16, at 102 ("Everything judges, legislators, policymakers, and legal scholars think they know about polygamy is based on faulty assumptions and presumptions, conceptions and misconceptions.").

[19] *See* Bennett, *supra* note 1.

[20] The debate on religion-based polygamy will be discussed in Part II and mainly involves competing concepts of the right to freely exercise one's religion and the state's compelling interest in mandating two-person marriages. However, as will be discussed in Part II, the state also has a compelling interest in preventing potential coercion and harm to women and children that is ever-present in religious-based polygamy. For this reason, this Comment argues that the coercion-free structure of polyamory will have a better chance at overturning polygamy laws in the future.

that, even without the coercion frequently found in religious-based polygamy, states still have compelling reasons to favor monogamy and disallow polygamy. The strongest of these reasons is the strong link between economic productivity and normative monogamy.

Part IV then takes up the task of determining how the law should analyze polygamy that is free from coercion and religious interests. This Part explores constitutional law sources to determine how a challenge to a state's polygamy ban might proceed. In addition, Part IV looks at states' cohabitation laws that seek to prohibit polygamous couples from living together despite marital status. This Comment then concludes by suggesting that proponents of legalized polygamy would be best served pursuing their objectives in the legislative arena, rather than the judicial arena. Even then, normative monogamy's influence on productivity and societal progress cannot be ignored as a compelling interest in maintaining the relationship structure.

I. POLYAMORY DELINEATED FROM POLYGYNY

Before undertaking an analysis of the legal differences between the various forms of polygamy, it is necessary to actually define those forms. Given the shifting interests the government may have in banning a certain type of plural marriage, understanding the construction of certain arrangements becomes an essential prerequisite to our study. Moreover, the academic study of plural marriage is quite new, and therefore different scholars have used different words to describe plural arrangements. Thus, this Part seeks to clarify the terms used in the later Parts of this Comment.

"Polygamy" is the broad word that encompasses all arrangements of marriage between more than two persons at the same time.[21] Historically, jurists have lumped most instances of plural marriage into the category of "polygamy" and treated them essentially the same under the law. "Polygyny" is the paradigmatic construction of polygamy in Western culture, describing the arrangement of a man having two or more wives.[22] Polygyny is exponentially more common than other forms of polygamy and has been rationalized by some as based on gender differences in the procreation

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21 JOHN WITTE, JR., THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY 26–27 (2015).

22 *Id.* at 28 (explaining the etymology of polygyny as coming "from the Greek *poly* for many and *gyne* for wife or woman"). Subsets of polygyny are bigamy, which means marriage to two persons; trigamy, meaning marriage to three persons; etc. *Id.* "Polygyny" is to be compared with "polyandry," which is the historically rare instance of a woman having two or more husbands. *Id.* at 26–28.

process.[23] Regardless of rationale, history shows that polygyny, a man taking multiple wives, is the most common form of polygamy.[24]

"Polyamory," on the other hand, describes all manner of plural spousal and sexual arrangements.[25] The way its advocates use the term today, "polyamory" means the practice "of having more than one sexual [or, for some, romantic] loving relationships at the same time, with the full knowledge and consent of all partners involved."[26] Terisa, Matt, Vera, Larry, and Scott's relationship, as described in the Introduction, is an example of the modern polyamorous relationship. Polyamorous relationships are between three or more knowing and consenting persons, with the full group participating in romantic relations together, or just a subset of the group engaging in romantic relations.[27]

The practice of polygyny has been criticized for centuries and for a myriad of reasons. Despite Thomas Aquinas's acknowledgement of the natural place of polygyny, he argued against its practice because of its harmful effects on women and children.[28] "'This is not marriage, but servitude,' said Aquinas."[29] It betrayed the fidelity and mutuality of marriage and altered the fundamental bond between children and parents.[30] Later scholars added to the list of polygyny critiques, including biblical,[31] equality,[32] and feminist[33] arguments for monogamy. The essential thread in polygyny's historical criticism has been its unjust and unequal result of treating women as something less than men. When polygyny becomes the dominant model of marriage in a society,

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[23] *See id.* at 192. Thomas Aquinas believed that, because men bond with children only if they are certain of their paternity, polygyny but not polyandry was a natural form of procreation. *Id.* at 170–76.

[24] *See* Sarah L. Eichenberger, Note, *When for Better is for Worse: Immigration Law's Gendered Impact on Foreign Polygamous Marriage*, 61 DUKE L.J. 1067 (2012) (discussing the various constituencies of polygamy). Indeed, most of the religious-based polygamy occurs in the polygyny form. "An estimated 5.8 percent of Hindu marriages are polygamous, and an estimated 5.7 percent of Muslim marriages are polygamous." *Id.* at 1069 n.12.

[25] WITTE, *supra* note 21, at 27.

[26] Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1479 (2011) (alteration in original) (quoting Hadar Aviram, *Make Love, Not Law: Perceptions of the Marriage Equality Struggle Among Polyamorous Activists*, 7 J. BISEXUALITY 261, 264 (2008)).

[27] *Id.*

[28] WITTE, *supra* note 21, at 170–71.

[29] *Id.* at 173.

[30] *Id.*

[31] *Id.* at 255. Calvinist jurist Theodore Beza declared polygamy to violate God's commandments against adultery, theft, false testimony, and coveting at once. *Id.*

[32] *Id.* at 455. English philosopher John Locke said that polygyny violated the natural-born equality of men and women. *Id.*

[33] *Id.* at 371. Eighteenth-century women's rights advocate Mary Wollstonecraft said that polygyny forced women to compete with other women, especially younger women, for the love of their husbands. *Id.*

undesirable results occur that harm women and children. This is especially concerning when women have no alternative choice in their marital arrangements, a concern that continues with polygyny in America today.[34]

Polyamory, on the other hand, is largely seen to be free of the traditional concerns of polygyny because of its participants' choice to engage in the practice for reasons other than religion or culture.[35] Polyamory is very much the modern descendent of the 1960s and 1970s Free Love movement, which opposed marriage as a form of social and financial bondage.[36] This movement declared that marriage was a natural organization that should be outside the scope of legal regulation, advocating instead for a new structure to accomplish both love and propagation of the human race.[37] Thus, the Free Love movement sought to break from government's mandate of monogamous marriage because of concerns for both equality and love.

Modern-day polyamory is justified by the same basic thinking. One advocate claims that polyamory governs itself by five main principles: "self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions and activities such as jealousy."[38] Just as the leaders of the Free Love movement viewed marriage as producing unequal

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[34] See *infra* Part II for a discussion of polygyny's practice and regulation in the United States.

[35] *Compare* Libby Copeland, *Is Polygamy Really So Awful?*, SLATE (Jan. 30, 2012, 5:18 PM), http://www.slate.com/articles/double_x/doublex/2012/01/the_problem_with_polygamy.html (disapproving of polygyny as a societal tool of inequality), *with* Libby Copeland, *Making Love and Trouble: The Surprisingly Women-Friendly Roots of Modern Polyamory*, SLATE (Mar. 12, 2012, 12:51 PM), http://www.slate.com/articles/double_x/doublex/2012/03/polyamory_and_its_surprisingly_woman_friendly_roots_.html (approving of polyamory as a tool of feminist empowerment). The logic behind this Comment's assumption, that religious- and cultural-based polygyny have elevated risks of coercion, is based on the fluid notion of marital choice. Polygynous religions and cultures do not provide women with a choice between polygyny and monogamy. Instead, women refusing to participate in polygyny often have no monogamous option without leaving their religion or culture. These pressures subtly coerce women into accepting polygyny and the potential human rights abuses that accompany polygyny because these women value their religion or culture more than monogamy. These pressures are not felt by women engaging in polyamory, and thus this Comment considers polyamory to be less coercive than polygyny.

[36] *See generally* Alexandra Murray, Note, *Marriage—The Peculiar Institution: An Exploration of Marriage and the Women's Rights Movement in the 19th Century*, 16 UCLA WOMEN'S L.J. 137, 151–56 (2007) (describing the ideas of the Free Lovers in the nineteenth century).

[37] *Id.* at 153–56. Victoria Woodhull, one of the leaders of the Free Love movement, declared that marriage would be superseded "in the near future, by some kind of socialistic arrangement" because marriage was the equivalent of slavery *Id.* at 153–54. Woodhull also believed that child rearing should be the responsibility of the state instead of women. *Id.* at 154.

[38] Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 283 (2004).

rights for women in the mode of slavery,[39] polyamorists promote their relationships' endorsement of values like consent and self-determination. In a way, polyamory is the result that Free Love movement leaders would have constructed in the nineteenth century as a model of equality and love.

There has been far less written about polyamorous relationships for two reasons. First, there simply are not the inherent human rights concerns for women that are present in polygyny.[40] Modern practitioners of polyamory choose that relationship because of their desire for its tenets. They choose polyamory for their love of multiple persons, not to meet the expectations of society or the rules of a deity. Therefore, there is less concern for the rights of these polyamory choosers, and thus their situation is written about less in academic literature and popular media.

Second, practitioners of polyamory have yet to push for extensive legal rights. In the vein of the Free Love movement, polyamorists are weary of the necessity of marriage as an institution. Those who are married have a single spouse, and the couple participates either individually or collectively with others in a romantic relationship, with full knowledge and consent, but they do not marry the other participants in the relationship, at least not in a legally recognized way.[41] Thus, so long as participants in polyamorous relationships are not petitioning the state for recognition of their relationship as a marriage, and the state is not pursuing criminal actions against polyamorous participants, then polyamory is in a sort of legal holding pattern, just waiting for its chance to land.[42]

But polyamory could see its challenge in court in the coming years,[43] and it is easy to imagine the potential scenarios. Taking the polyamorous relationship from the Introduction as an example, there are several reasons one or more

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[39] Murray, *supra* note 36, at 153–54 (quoting free-love leader Victoria Woodhull as comparing marriage to slavery and predicting the downfall of marriage in the same way that "thinkers" predicted the downfall of slavery during the civil war).

[40] *See supra* note 35.

[41] *Cf.* Angi Becker Stevens, *My Two Husbands*, SALON (Aug. 4, 2013, 8:00 PM EDT), http://www.salon.com/2013/08/05/my_two_husbands/ (describing the author's polyamorous relationship with her husband of seventeen years and her boyfriend of two years and noting that the author plans a non-legal wedding ceremony with her boyfriend in the future).

[42] *But see infra* Part IV.C (discussing cohabitation laws).

[43] In a Canadian challenge to polygamy laws, many motions came not from polygyny groups, but from polyamorous groups. Andrew Brown, *Is Monogamy the Root of all Equality?*, GUARDIAN (July 26, 2010, 7.00 EDT), http://www.theguardian.com/commentisfree/andrewbrown/2010/jul/26/religion-polygamy-monogamy-psychology-crime.

members may sue for recognition of rights from the state. First, what if one of the five members died without a will? Would Washington's intestate succession laws recognize one of the deceased's partners? Or would the deceased's property go to some relative? In the former scenario, a non-inheriting partner may decide to sue for recognition of beneficiary rights. In the latter scenario, any or all of the partners may sue for recognition of beneficiary rights. Either would result in the state needing to decide whether the polyamorous partner qualified as an eligible relationship for beneficiary rights. Second, if Vera dies, who gets custody of Vera's son? Perhaps one of the men in the relationship is the son's biological father, but that father would still need to take legal action to obtain custody. Third, what if none of the men are the son's biological father? Would one of the people in the relationship be the best custodian of the son in the eyes of the court? Fourth, what if a child-services agency decides that the polyamorous home is not a suitable venue for raising a child? Surely, then, the polyamorous participants would sue to regain custody of their son. More and more examples exist, such as employment benefits and health insurance benefits, as well as the possibility of the state pursuing criminal sanctions under anti-polygamy laws. The stage is therefore set for a legal challenge to the state's right to regulate the numerosity aspect of marriage for polyamorous relationships.

II. RELIGIOUS-BASED POLYGYNY IN THE UNITED STATES

The state's first inclination, upon legal challenge by a polyamorous group seeking legal recognition, may be to argue the case as though polyamory is indistinguishable from traditional polygyny. This would be a mistake, for the reasons discussed below. This Part explains why polyamory and polygyny require two different analyses by the courts. To arrive at this understanding, this Part begins in section A by examining Mormon challenges to polygamy laws, which have been the emblematic challenges to polygamy in the United States. Section B then considers the more recent trend of practicing polygamists immigrating to the United States and maintaining their polygamy. Section C briefly touches on the legal issues that these types of polygyny raise, primarily examining the state's human rights concerns in banning polygyny. Section C then espouses this Comment's opinion that human rights concerns should trump any Free Exercise Clause concerns and that the state should continue to prevent cultural- and religious-based polygyny in furtherance of concerns for women and children. This point dovetails with the conclusion that polygamy laws would face a very different challenge, with potentially different

results, from coercion-free polyamory marriage, which will be discussed in Parts III and IV.

A. Historical Context: Mormon Polygyny

As briefly discussed in the Introduction, the Mormon Church's former practice of polygyny as a dogmatic church doctrine underscores polygamy law in the United States. The United States' treatment and opinion of Mormons, both collectively and individually, were and are a driving force behind the banishment of plural marriage across the country and should thus be discussed as part of the greater narrative on the future of plural marriage.

Joseph Smith, the man who started the Mormon Church, taught that mankind could achieve godhood through their posterity on earth and that polygyny was a central part of the pursuit of godhood.[44] Men who rejected polygyny, by contrast, were forfeiting godhood and allowing damnation.[45] Mormons initially practiced polygyny in secret, until Brigham Young adopted polygyny as part of the Church's scriptural canon in 1852.[46] Following the Mormon Church's public acknowledgement of its stance on polygyny, significant persecution occurred.[47] In 1856, the newly formed Republican Party ran on a platform of eradicating the "twin relics of barbarism": polygamy and slavery.[48] In the following decades, Congress passed a series of bills targeted at ending the Mormon practice of polygyny.[49]

It is against this backdrop that the United States Supreme Court decided *Reynolds v. United States* and *Murphy v. Ramsey*, which were briefly discussed in the Introduction to this Comment. In *Reynolds*, Brigham Young's personal secretary, George Reynolds, agreed to challenge the Morrill Anti-Bigamy Act.[50] In the challenge, Reynolds testified that he engaged in plural marriage because it was the "Law of the Lord," an affirmative obligation to please God.[51] Nevertheless, Reynolds was twice convicted,[52] and the Supreme Court

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[44] WITTE, *supra* note 21, at 430; Harmer-Dionne, *supra* note 16, at 1320.

[45] Harmer-Dionne, *supra* note 16, at 1320.

[46] WITTE, *supra* note 21, at 430; Harmer-Dionne, *supra* note 16, at 1320–21.

[47] WITTE, *supra* note 21, at 430–31; Harmer-Dionne, *supra* note 16, at 1322–23.

[48] Harmer-Dionne, *supra* note 16, at 1322.

[49] WITTE, *supra* note 21, at 430–31; Harmer-Dionne, *supra* note 16, at 1322–23.

[50] Emily J. Duncan, Article, *The Positive Effects of Legalized Polygamy: "Love Is a Many Splendored Thing*," 15 DUKE J. GENDER L. & POL'Y 315, 318 (2008); Harmer-Dionne, *supra* note 16, at 1325.

[51] Harmer-Dionne, *supra* note 16, at 1325.

[52] The initial conviction was overturned on jury irregularities. *Id.*

affirmed Reynolds's conviction for bigamy.[53] The Supreme Court based its decision on the dichotomy between religious beliefs and religious action, with the Free Exercise Clause protecting the former but not the latter.[54] Reynolds had the right to believe in polygamy but not the right to act on that belief.[55] The Court said it also could have affirmed Reynolds's conviction because of the West's historical adverseness to polygamy and polygamy's "deleterious moral effects."[56]

Following *Reynolds*, Congress enacted even tougher laws targeted at Mormon polygyny.[57] One of these was the Edmunds Act, which sought to keep Mormon polygamists from voting.[58] This Act was upheld in *Murphy*.[59] In 1890, following several decades of legal battles and persecution, the Mormon Church finally declared its intention to abandon polygyny[60] and expelled its remaining polygamists from its Church Council in 1906.[61]

What began as the practice of an outsider group in pre-statehood Utah eventually became notorious enough to warrant the attention of the government, which eventually quashed the Mormon practice of polygyny.[62] But polygyny continued in the West through an even more remote outsider group: Mormon Fundamentalists.[63] Fundamentalists have adhered to Joseph Smith's teachings on polygyny in the face of polygamy laws and persecution, and they have carried the somewhat-dim torch of polygyny over the last century.[64] There are an estimated 30,000 to 100,000 Fundamentalists living in North America[65] who attempt to quietly live their lives in devotion to God. Quiet, at least until 2006, when polygamist leader Warren Jeffs was arrested in

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53 *Id.*

54 *Id.* at 1301–02.

55 *Id.* at 1302.

56 *Id.*

57 *Id.* at 1326.

58 *Id.*

59 *Id.* at 1326 n.260.

60 WITTE, *supra* note 21, at 436–37; Harmer-Dionne, *supra* note 16, at 1331–33.

61 WITTE, *supra* note 21, at 436–47; Harmer-Dionne, *supra* note 16, at 1334–35; *see also* Harmer-Dionne, *supra* note 16, at 1331–35 (describing the Mormon Church's process over the next decades of expelling polygamists from its membership).

62 Kirk Johnson, *Leader of Polygamist Mormon Sect is Arrested in Nevada*, N.Y. TIMES, Aug. 30, 2006, at A12, *available at* http://www.nytimes.com/2006/08/30/us/30polygamy.html.

63 WITTE, *supra* note 21, at 437.

64 Johnson, *supra* note 62.

65 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, 617 (2007).

Arizona.[66] Jeffs spent four months on the FBI's most-wanted list and was suspected of several rape offenses, committing sexual acts with minors, and several fleeing-authorities offenses.[67] Jeffs was eventually convicted of sexually abusing two minors, one of whom he fathered a child with, and is currently serving a life sentence.[68] Jeffs's capture and trial raised public awareness of polygamy in the United States to a level not seen in the previous 100 years.[69]

This discussion of the Mormon Church's history with polygyny is important because it shapes the discussion of the merits of monogamy and polygamy.[70] The world's history is littered with examples of outsiders being treated poorly, for a variety of reasons that are beyond the scope of this Comment. Nevertheless, it is important to recognize that, to many Americans, polygamy and Mormonism are insuperably connected. Therefore, when people (or juries) hear about a polygamist, they think of the tales of Warren Jeffs and odd people living in shut-off communities in the West.[71] And the most compelling concern inherent to these marital structures is the women and children, who are likely not getting a fair shake at life. The public thinks the women are there through something less than free will, and the children are living in chaos.

Cases like *State v. Green* only further these stereotypes of modern-day Fundamentalist Mormon polygamists.[72] *Green* was decided by the Utah Supreme Court in 2004 after the conviction of Tom Green for polygamy with nine wives and first-degree felony rape for marrying and impregnating a wife when she was thirteen years old.[73] Green's twenty-five children were destitute and living largely on social welfare.[74] Green's appeal centered on his free exercise religious rights, but the Utah Supreme Court found the polygamy

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66 Johnson, *supra* note 62.

67 *Id.*

68 *Warren Jeffs Hospitalized, Polygamist Sect Leader Moved to Galveston*, HUFFINGTON POST (Mar. 17, 2014, 11:59 AM EDT), *available at* http://www.huffingtonpost.com/2014/03/17/warren-jeffs-hospitalized_n_4979316.html.

69 Johnson, *supra* note 62.

70 *See* David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 61–74 (1997) (finding that Mormons encountered majoritarian scrutiny even before they engaged in polygamy). It is entirely possible that courts resisted Mormon polygamy because they were skeptical of Mormons in general.

71 *See* Johnson, *supra* note 62.

72 99 P.3d 820, 834 (Utah 2004).

73 *Id.* at 822, 830 n.14.

74 *Id.* at 822–23.

statute to be neutral and generally applicable.[75] Most importantly, however, the court found that Utah had an "interest in protecting vulnerable individuals from exploitation and abuse."[76] In addition, the court upheld the polygamy laws on the basis of deterring other crimes, finding that polygamy coincides with violence against women and children, and with incest, sexual assault, and statutory battery.[77] Cases like *Green* paint a picture of American polygamy in bleak colors, full of victims and short on freedom and love.

Most people have the same reaction to polygyny: that it's not "normal." Nearly all Americans grew up far removed from Mormon Fundamentalist compounds and therefore were raised in cultures accepting of only monogamy.[78] Trying to imagine the experience of a child raised in a house with one father, multiple wives of the father, and multiple half-siblings is difficult for anyone with a monogamist background. This sympathy for the children, along with some innate suspicion of the men propagating this structure, leads to some rather harsh feelings about polygamy in general. The result is a bleak view of polygamy by mainstream America, as shown by a recent Gallup poll that only fourteen percent of Americans find polygamy to be "morally acceptable."[79]

These visceral feelings about Mormons practicing polygyny bleed over into our feelings about polygamy in general. We cannot separate our feelings about the possibly coerced women growing up with the expectation of joining a polygamous commune from our feelings about the idea of multiple partners loving each other. We cannot separate our feelings about children growing up in a complex marital environment from the idea of valuing love above societal expectations. We cannot separate our feelings about Warren Jeffs marrying and impregnating teenagers across the country[80] from the idea of coercion-less, multi-partner relationship arrangements. The story of polygyny in America is

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[75] *Id.* at 825, 827.

[76] *Id.* at 830.

[77] *Id.*

[78] *See* Rebecca Riffkin, *New Record Highs in Moral Acceptability*, GALLUP (May 30, 2014), http://www.gallup.com/poll/170789/new-record-highs-moral-acceptability.aspx. Polygamy was rated as one of the most unacceptable categories.

[79] *Id.* This negative view of polygamy, however, may be changing. The popularity of television shows such as *Sister Wives* and *Big Love* suggest that mainstream society is at least curious about polygamy. At the very least, these shows humanize polygamists. This new attention has slightly shifted polling numbers on the matter. While fourteen percent of respondents to the 2014 Gallup poll agreed with polygamy, that number has increased in recent years, up from five percent in a 2006 Gallup poll. *Id.*

[80] *See* text accompanying notes 66–69.

therefore thoroughly intertwined with the story of coercion and Mormonism.[81] Unraveling these threads will be complex, but necessary.

B. The State's Compelling Human Rights Interests

Oddly enough, the rise of stories like Warren Jeffs's and Tom Green's has given states the most compelling interest in prohibiting polygyny, making the already-clear constitutionality of polygamy bans even stronger.[82] It is without question that a central function of government is to protect its citizens' basic human rights.[83] These human rights include the right to enter into marriage without coercion,[84] the right to not be held in servitude,[85] and the right to general security.[86] In fact, one could think of government's greatest interest being that which coincides with the interests of the public at large: the safety of the public both collectively and individually. This is why the government's police power is so legally potent.

Yet the state's interest in protecting its citizens' human rights often conflicts with free exercise rights under the Constitution. How, then, are these competing concepts weighed? Today's model of constitutional law is dominated by the balancing of rights.[87] Dean T. Alexander Aleinikoff, in his well-respected 1987 Article *Constitutional Law in the Age of Balancing*, charted the "balancing" method of constitutional reasoning and its dominance as a way to adjudicate constitutional issues.[88] The most common dichotomy of

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[81] A more recent American polygyny story concerns immigration of practicing polygynists. Despite its lack of attention relative to Mormon polygyny, there may be more immigrant polygynists than Mormon polygynists in America today. Eichenberger, *supra* note 24, at 1068. The legal treatment of immigrant polygyny deserves separate analysis from Mormon polygyny and is beyond the scope of this Comment. For a thought-provoking synopsis of why Mormon polygyny receives significantly greater media and legal attention than immigrant polygyny, see Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 288 (2010) (tracing mainstream disdain of Mormon polygyny to "race treason").

[82] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943–44, 946, 981 (1987) (describing constitutional-interest balancing's widespread growth in the middle decades of the twentieth century); *see also* text accompanying notes 66–77.

[83] *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958) (discussing the general objectives of the criminal justice system); *see also* Tennessee v. Garner, 471 U.S. 1, 9 (1985) (explaining the "governmental interests in effective law enforcement").

[84] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 16 (Dec. 10, 1948).

[85] *Id.* at art. 4.

[86] *Id.* at art. 3.

[87] Aleinikoff, *supra* note 82, at 943–44 (describing balancing's widespread growth in the middle decades of the twentieth century).

[88] *Id.* at 948–52.

interests to be balanced is between individual interests and governmental interests,[89] often contemplating First Amendment individual rights.[90] The government's interests, which may or may not be grounded in the Constitution, are typically couched in terms of administrative efficiency or public interests.[91] Dean Aleinikoff ultimately disapproves of the Court's use of balancing to solve constitutional conflicts, but the Court appears committed to the utilization of balancing.[92] This commitment is evident in the Court's history of deciding polygamy cases.

The commitment dates back to *Reynolds*, in which the Supreme Court balanced the polygamist's religious interest in polygamy against the state's interest in regulating marriage and social life, though the Court never called their analysis balancing.[93] This balancing is shown by the Court's first analysis of the polygamist's religious rights followed by the analysis of the state's interest in monogamy and then stating that permitting religious beliefs to trump monogamy law "would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect permit every citizen to become a law unto himself."[94]

This practice of constitutional balancing becomes clearer when considering the totality of the government's efforts to stifle Mormonism. The governmental interests that became the subject of Supreme Court decisions involved criminalizing polygamy,[95] restricting polygamists' ability to vote,[96] and requiring voters to swear that they were not engaging in polygamy.[97] Regulating the family unit and voting are major state interests.[98] But imagine a law that prohibited Mormons from proselytizing. Under the *Reynolds* test, proselytizing is not regulating ideas, but action—the vocalization of beliefs and attempted conversion of others—and should therefore be subject to state regulation.[99] But it is doubtful that the Supreme Court would have seen the requisite governmental interest in limiting the Mormons First Amendment

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89 *Id.* at 946, 981.
90 *Id.* at 947.
91 *Id.*
92 *Id.*
93 Reynolds v. United States, 98 U.S. 145, 162–65 (1879).
94 *Id.* at 167.
95 *Id.*
96 Murphy v. Ramsey, 114 U.S. 15, 17 (1885).
97 Davis v. Beason, 133 U.S. 333 (1890).
98 *See Murphy*, 114 U.S. at 45.
99 *Reynolds*, 98 U.S. at 167.

rights. Thus, the Court naturally balances the interests of individuals against the interests of the government.

An even more compelling state interest exists in the arena of plural marriage regulation that was not included in *Reynolds*. While the Court had yet to develop a cohesive theory on human rights when *Reynolds* was decided in 1879,[100] today's governmental interest in protecting its citizens from harm is significant. The government's interest in protecting women and children whose living conditions in polygynous relationships have been exposed, in popular media and through criminal investigations, has greatly increased in a way that is much more robust than the Court's historical approach to assessing interests in *Reynolds*.[101] In that way, the government's stance against coerced polygyny is even stronger today than in the days of *Reynolds*.

The Supreme Court of Utah acknowledged these new interests in its 2004 case of *State v. Green*, which was discussed in section A of this Part.[102] "Most importantly, Utah's bigamy statute serves the State's interest in protecting vulnerable individuals from exploitation and abuse."[103] The court noted that "the closed nature of polygamous communities" makes it "challenging" to uncover these abuses, which makes regulation of the communities even more compelling.[104]

As the media pays more attention to the vulnerable women and children in Mormon polygynous communities, the state's interest in protecting its citizens grows stronger. Media attention to this aspect of polygyny was scant until personal-interest stories began in 1998 with the Kingstons in rural Utah.[105] The media swarmed to the Kingston story of a fifteen-year-old girl named Jane, who was forced to marry her uncle and was beaten when she tried to escape the marriage.[106] Media attention ultimately reached a crescendo in 2006 with Warren Jeffs's arrest.[107]

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100 *Id.*

101 *See* notes 66–77 and accompanying text.

102 99 P.3d 820 (Utah 2004); *see also* discussion at text accompanying *supra* notes 72–77.

103 99 P.3d at 830.

104 *Id.*

105 *See* Amos N. Guiora, *Protecting the Unprotected: Religious Extremism and Child Endangerment*, 12 J.L. & FAM. STUD. 391, 403 (2010).

106 *Id.*

107 *See* discussion in text accompanying notes 66–69.

These vulnerability concerns were not yet recognized thirty years ago, when the Tenth Circuit upheld Utah's bigamy laws in *Potter v. Murray City*.[108] There, the court rooted Utah's interest in preventing plural marriage in general morality concerns[109] and administrative concerns[110] but did not mention vulnerable women or children. The then-unrealized conditions of women and children in these communities were not even necessary for the court to find rational relationship to a governmental interest, but today, the state's interest in protecting its citizens from harm would meet even the highest burden.

The knowledge that some polygynous communities coerce their women into marrying and committing incest makes the constitutional argument for regulation of religious-based polygyny entirely stronger than when *Potter* was decided by the district court thirty years ago.[111] Even if the meaning of the Free Exercise Clause has expanded during these last decades, it could not have expanded more than our knowledge of the harms suffered by the vulnerable women and children living in polygyny.[112]

Many advocates for rights to polygamy under the Free Exercise Clause ignore human rights concerns in their entirety. Dean Keith E. Sealing of Widener School of Law, for example, wrote a 2001 Article in favor of polygamists' constitutional right to plural marriage in which he declared that states have "no compelling government interest in prohibiting polygamy."[113] But in his analysis seeking to reject various potential interests, Sealing skips over vulnerability concerns, as though none exist.[114] Sealing contents himself

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[108] 760 F.2d 1065 (10th Cir. 1985).

[109] *Id.* at 1069 (noting that the "state has an undeniable interest in insuring that its rules of domestic relations reflect widely held values of its people" (citing Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring in the judgment)).

[110] *Id.* at 1070 ("[Utah's] vast and convoluted network of other laws clearly establish[es] its compelling state interest in . . . monogamy as opposed to plural marriage." (quoting Potter v. Murray City, 585 F. Supp. 1126, 1138 (D. Utah 1984))).

[111] *See id.* at 1065.

[112] *See* Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010) (describing a vulnerability theory within the context of American equality concepts); *see also* Rose McDermott, Op-Ed., *Polygamy: More Common Than You Think*, WALL ST. J., Apr. 1, 2011, at A13, *available at* http://www.wsj.com/articles/SB10001424052748703806304576234551596322690 ("According to the information I have helped to collect in the Womanstats database, women in polygynous communities get married younger, have more children, have higher rates of HIV infection than men, sustain more domestic violence, succumb to more female genital mutilation and sex trafficking, and are more likely to die in childbirth. Their life expectancy is also shorter than that of their monogamous sisters. In addition, their children, both boys and girls, are less likely to receive both primary and secondary education.").

[113] Sealing, *supra* note 14, at 695.

[114] *See id.* at 754–57.

with rejecting state administrative interests, such as property interests and workers' compensation benefits for plural spouses, as the only possible interests a state may have in rejecting plural marriage.[115] But, as the world saw a few years before Sealing's Article, a fifteen-year-old girl was forced to become her uncle's fifteenth wife and then beaten when she tried to escape the marriage.[116] This episode and many other instances of abuse received extensive media attention,[117] yet were entirely ignored by Sealing.[118]

There must be limits to the free exercise of religion. The risk that women and children are being subjected to real harm is a compelling interest that should give the government sufficient grounds for continuing to reject religion- and culture-based polygyny. There are enough instances of polygyny-rooted violence to demonstrate some type of cause-and-effect relationship.[119] The government should respond to these continual reports of harm and coercion by enacting even tougher laws to protect the victims currently walled off from society. The compelling interest in protecting our most vulnerable should hold up to even the most exacting judicial scrutiny.[120]

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[115] *Id.*

[116] Guiora, *supra* note 105, at 403.

[117] *See, e.g.*, James Brooke, *Utah Struggles with a Revival of Polygamy*, N.Y. TIMES, Aug. 23, 1998, at 12, *available at* http://www.nytimes.com/1998/08/23/world/utah-struggles-with-a-revival-of-polygamy.html (describing Kingston abuse); Julie Cart, *Incest Trial Sheds Light on Polygamy in Utah*, L.A. TIMES, June 4, 1999, at 3, *available at* http://articles.latimes.com/1999/jun/04/news/mn-44037 (describing Kingston trial); Duncan Campbell, *Mormon Found Guilty of Sex with Niece*, GUARDIAN (June 4, 1999, 21.08 EDT), http://www.theguardian.com/world/1999/jun/05/duncancampbell (describing Kingston trial); Bruce Frankel, *Lifting the Veil: Ex-Plural Wife Rowenna Erickson Attacks an Enduring Utah Institution: Polygamy*, PEOPLE, June 21, 1999, at 125, *available at* http://www.people.com/people/archive/article/0,,20128539,00.html (describing Kingston and other instances of Mormon polygamy abuse of women and children). News of Tom Green's practice of polygamy, giving rise to the prosecution in *State v. Green*, discussed *supra* at notes 72–77, 102–04, had also received significant media attention as Green had given extensive public interviews about his practice of polygyny. Sigman, *supra* note 16, at 181.

[118] Professor Sealing is not alone in overlooking vulnerability and coercion issues on the path to wholehearted endorsement of polygyny. *See also* Stephanie Forbes, Comment, *"Why Just Have One?": An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause*, 39 HOUS. L. REV. 1517, 1541–46 (2003) (commenting that women in polygynous families are better off because they "have more free time than other women" and that children in polygynous families are happy because they "are never without a play group," while dismissing evidence of incest and coercion on the grounds that polygamists "do not advocate" incest or coercion).

[119] *See infra* Part III.B.

[120] It could be argued, however, that polygamy laws are not narrowly tailored to addressing the state's coercion and vulnerability interests and thus should fail under strict scrutiny. After all, monogamy produces situations in which a spouse can be harmed, yet the government still allows marriage. This would be a valid argument but for the setting in which religious-based polygyny is practiced. Mormon Fundamentalist polygyny is practiced in walled-off compounds, areas in which police presence is virtually nonexistent. For example, Jane, the girl forced to marry her own uncle, had to walk seven miles to get to the nearest telephone to report

But this is where our story of religious- and cultural-based polygyny ends and where our story of Terisa, Matt, Vera, Larry, and Scott[121] picks up. This Part has shown that the government's best argument against polygyny is that polygyny endangers women and children, but this argument does not apply to people like Terisa and Vera, who have entered these relationships voluntarily and knowingly and can leave them without fear of violence. Other arguments for the government's interests in regulating marriage, like Dean Sealing's convincing contention that governments would be able to handle the administrative side of polygamy,[122] may also be suspect when applied to a coercion- and violence-free polygamous group. Does the government have an interest in prohibiting polyamorous marriage? Is there something about monogamy that merits its continued monopoly in our society?

III. THE STATE'S COMPELLING INTEREST IN BANNING POLYAMORY

If the state has an interest in banning polyamory, then there must be something good about normative monogamy that we wish to encourage. Alternatively, if there is no rational basis for maintaining monogamy, then laws banning polyamory cannot withstand judicial scrutiny. In this sense, monogamy and polyamory must be analyzed together. While some may claim that legalizing polyamory would have no impact on monogamy, this Comment argues otherwise. True, monogamous couples would not be forced to engage in polyamory, but the potential harms of polyamory discussed in this section do not require unanimous participation. Rather, it is the abandonment of normative monogamy as a society-wide practice that would bring about significant harms to social progress. Thus, the argument against polyamory is the argument for normative monogamy.

An underlying assumption is that a shift in both the law and social norms of marriage would alter human behavior. A societal shift toward polyamory would therefore mean a shift away from normative monogamy. In theory, as polyamory gains acceptance in the West, more people would be tempted to practice it. This means that monogamy would have to decrease on an aggregate

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her beatings to the police. Guiora, *supra* note 105, at 403. A narrowly tailored law seeking to protect women and children by making beatings and forced marriage illegal would not be adequate, for the simple fact that these are already laws, and are not protecting women and children in polygynous homes. The high potential for violence in religious-based polygyny leaves the state with no alternative that would effectively meet the state's interest in protecting these women and children.

121 *See supra* Introduction.

122 Sealing, *supra* note 14, at 754–57.

level. Therefore, adoption of polyamory would impact our society in a deep and meaningful way, a way that should be fully contemplated before we change the laws of marriage.

If there is anything to be learned from *Reynolds*, it is that Western cultures feel very strongly that monogamy should be the basis for society's families. While the fact that the nation's majority felt strongly about something may have passed for a compelling state interest in the nineteenth century, today's courts feel differently. The majority's collective moral compass can no longer trump the individual rights of those pursuing choices contrary to those morals.[123]

The origin of the West's preference for monogamy continues to confound social scientists. In August 2013, a team of social scientists released a report finding that monogamy occurs because of males' desire to protect their offspring from other males.[124] That same week, however, a team of zoologists from Cambridge University released a report in direct conflict with the infanticide theory, finding no correlation between infanticide and monogamy.[125] The Cambridge zoologists instead found that monogamy develops where females live in low-density environments, out of a need for resource defense.[126] The direct conflict between these two studies only highlights the vast and unproven nature of monogamy's development.[127]

If we do not understand why our society developed into a monogamous marital structure, how can we possibly have an interest in maintaining monogamy? Doesn't this prove a de facto lack of rationale for laws enforcing monogamy? Despite the lack of theoretical basis for the origins of monogamy, social science has made progress in understanding monogamy's role in today's society. Social science in this area has developed significantly since the days of

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123 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (striking down laws criminalizing sodomy as violating the challengers' liberty interests as protected by the Fourteenth Amendment); *see also* Michael J. Perry, *Why Excluding Same-Sex Couples from Civil Marriage Violates the Constitutional Law of the United States*, 2014 U. ILL. L. REV. 1887, 1907 (2014) (concluding that lawmakers lack the constitutional ability to legislate on the basis of same-sex marriage's perceived immorality).

124 *See* Christopher Opie et al., *Male Infanticide Leads to Social Monogamy in Primates*, 110 PNAS 13328 (2013).

125 *See* D. Lukas & T.H. Clutton-Brock, *The Evolution of Social Monogamy in Mammals*, 341 SCIENCE 526, 527 (2013).

126 *Id.* at 528 & fig.2.

127 *See* Belinda Luscombe, *What Drove Man to Monogamy: It Wasn't Love*, TIME (July 30, 2013), http://healthland.time.com/2013/07/30/the-reason-for-monogamy-researchers-disagree/ (showing the conflict between the Opie and Lukas studies).

Reynolds, such that traditional thinking on monogamy might not pass constitutional muster in today's courts. Nevertheless, new theories on the foundational basis of marriage institutions still support the state's interest in maintaining monogamy as the basis of marriage law. This interest—an economic interest—will be discussed after reviewing some other potential state interests.

A. The Weak Interest: Existence of Laws Premised upon Monogamy

In *Potter*, the Tenth Circuit found that Utah had a state interest in banning polygamy because of the state's "vast and convoluted network of other laws . . . based exclusively upon the practice of monogamy as opposed to plural marriage."[128] Then, in a footnote, the Tenth Circuit listed the other laws that would be changed should monogamy be abandoned, such as intestacy laws and a law encouraging premarital counseling.[129] Thus, Utah's adoption of monogamy as the marital base is a form of self-authenticating law, according to the Tenth Circuit.[130]

The absurdity of this interest hardly deserves explanation. State laws inherently combine to create a cohesive governance system. The existence of one law informs the legislature's creation of others. Yet the constitutionality of a law cannot possibly be based on the legislature's reliance on the law in creating other laws. If it could, legislatures could trump all individual rights by merely relying on an otherwise-unconstitutional law in setting up a "vast and convoluted network of other laws." Segregation was also integrated into networks of other laws, yet the presence of those other laws did not trump equal rights interests. Surely marriage laws are also capable of adapting to change.

B. The Unknown Interest: Polygamy's Link to Crime

In Part II.B, this Comment found that the state's compelling interest in protecting vulnerable women and children in polygnist communities exceeded individual free exercise rights. Courts considering the issue since this problem was exposed in the 1990s have concurred, finding protection of the vulnerable to be the "most important[]" state interest, according to the Utah Supreme

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

[129] *Id.* at 1070 n.8.

[130] *See id.* at 1070.

Court in *Green*.[131] The *Green* court found that "[t]he practice of polygamy . . . often coincides with crimes . . . [such as] incest, sexual assault, statutory rape, and failure to pay child support."[132] But *Green* couched this interest in the state police force's "challenging" task of policing closed polygamous communities.[133] This leads to the question of whether open, coercion-free polyamorous relationships also lead to crime.

A recent study shows that institutionalized monogamy reduces both crime and social problems and that polygamy does indeed lead to greater crime across society.[134] In that study, a team led by Joseph Henrich of the University of British Columbia found that cultures permitting polygamy see intra-sexual competition, which leads to greater levels of crime, violence, poverty, and gender inequality.[135] Polygyny results in large numbers of unmarried men, and those men are compelled to engage in crime for resources and women.[136] Institutional monogamy, on the other hand, provides a more egalitarian distribution of women, thus reducing intra-sexual competition. In turn, males in monogamous societies are less likely to engage in crime.[137]

This is important research because courts currently concern themselves only with abuse within polygyny communities. Professor Henrich's team, however, has found that instances of polygamy actually increase crime rates for those who are not even practicing polygamy, namely men left without a spouse.[138] This logic could be extended to modern-day polygamy as a legitimate interest for states maintaining monogamous marriage laws.

On the other hand, modern-day, coercion-free polyamory may not implicate Henrich's societal concerns. The root of polygamy's crime inducement is the large pool of unmarried men.[139] Yet, as we saw in the introductory example of Terisa, Matt, Vera, Larry, and Scott, today's polyamory does not necessarily create a gender-gap disparity. It is therefore possible that the criminal concerns that accompany polygyny do not necessarily implicate crime in gender-equal polyamory, since a theoretical

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

132 *Id.*

133 *Id.*

134 Joseph Henrich, Robert Boyd & Peter J. Richerson, *The Puzzle of Monogamous Marriage*, 367 PHIL. TRANSACTIONS ROYAL SOC'Y B 657 (2012).

135 *Id.* at 660–62.

136 *Id.* at 662.

137 *Id.* at 661.

138 *Id.* at 660–62.

139 *See id.* at 660.

society with polyamorous groupings would not inherently create a pool of unmarried men.

Then again, we do not know how wholesale governmental endorsement of polyamory would impact the marital balance of the genders. Perhaps polyamory would bring with it increased competition amongst men to secure the most desirable mates, therefore making the acquisition of resources once again important, which, as Henrich's team saw, leads to criminal activity. Or maybe polyamory would reduce men's need to compete among each other because the risk of being left spouseless in a polyamorous society would decrease. More research is necessary to determine the exact root of Henrich's findings. Ultimately, an argument could be made that states have an interest in maintaining monogamy until research determines the exact effects of polyamory on crime.[140]

C. The Strong Interest: Nurturing Intra-Household Relationships

One of the state's strongest interests in regulating marriage is the protection of children.[141] While polyamory does not feature the same types of concerns for women that are present in polygyny, some of the concerns for children are still present.[142] While the women involved in polyamorous relationships engage in polyamory of their own free will,[143] the children do not enjoy such a choice. The state, therefore, has the role of protecting the children.

Social science has shown that children may be at risk even in polyamorous households.[144] Homes with unrelated persons have a correlation with abuse, violence, and homicide.[145] In fact, children are more likely to be abused and neglected in a home with an unrelated adult than children in a home with two natural parents.[146] Social scientists believe the reason for this violence against

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[140] *See also* Sigman, *supra* note 16, at 163 ("The social science scholarship on polygamy paints a complex picture about the practice and therefore efforts to regulate it.").

[141] *See* State v. Green, 99 P.3d 820, 830 (Utah 2004); Ashby Jones, *Why Do We Need the State's Permission to Get Married Anyway?*, WALL ST. J.L. BLOG (Jan. 14, 2010, 6:01 PM ET), http://blogs.wsj.com/law/2010/01/14/why-do-we-need-to-ask-the-state-for-permission-to-get-married-anyway/.

[142] *See* Henrich et al., *supra* note 134, at 665.

[143] Julie Bindel, *Rebranding Polyamory Does Women No Favours*, GUARDIAN (Aug. 26, 2013, 9.26 EDT), http://www.theguardian.com/commentisfree/2013/aug/26/polyamory-no-favours-for-women.

[144] *See* Henrich et al., *supra* note 134, at 664–65.

[145] *Id.*

[146] Martin Daly & Margo Wilson, *Discriminative Parental Solicitude: A Biological Perspective*, 42 J. MARRIAGE & FAM. 277, 282 (1980) ("[C]hildren living with one natural and one stepparent were 2.2 to 6.9

unrelated children to stem from evolutionary biology, with some innate compulsion for humans to protect their progeny.[147] The risk, therefore, in polyamorous households is that the increased number of unrelated adults may lead to abuse and neglect of children.[148]

Unfortunately, children are at risk in a much greater way than abuse or neglect. Stepmothers are more than twice as likely as genetic mothers to kill their stepchildren.[149] Even more concerning, children living with an unrelated adult are substantially more likely to die "accidentally."[150] These staggering studies show that children face a very real threat of death when unrelated adults are present in their homes.[151] Recent research from a team of University of Ottawa psychologists also found that related parents are twice as likely to identify potential hazards to children when compared to unrelated adults.[152]

Children, too, have a biological reaction to the presence of unrelated or distantly related adults in the household.[153] One study found that children in homes with closely related relatives only had very low levels of cortisol, a stress hormone.[154] But the study showed that children with stepparents and half siblings in their homes had the highest recorded levels of cortisol.[155] This means that children have a biological reaction that causes stress when living with unrelated adults.[156] Something deep within our conscience is wary of the motives of unrelated adults living with children.[157]

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times . . . as likely to be abused as children living with two natural parents, and 1.1 to 4.1 times as likely to be neglected." (citation omitted)).

147 *Id.* at 279.

148 Henrich et al., *supra* note 134, at 665.

149 Viviana A. Weekes-Shackelford & Todd K. Shackelford, *Methods of Filicide: Stepparents and Genetic Parents Kill Differently*, 19 VIOLENCE & VICTIMS 75, 78 (2004) (finding that stepmothers have a filicide rate of 20.6 children per million children, compared with 8.6 children per million children for genetic mothers).

150 Henrich et al., *supra* note 134, at 665 (finding that children living with an unrelated adult "are between 15 and 77 times more likely to die 'accidentally'"). The wide variance found in this study only goes to show how little we know about this scarcely researched topic.

151 *Id.*

152 Emma L. Thompson et al., *Reasoning and Relatedness*, 36 EVOLUTION & HUM. BEHAV. 38, 40 (2015).

153 Henrich et al., *supra* note 134, at 665.

154 *Id.* (citing Mark V. Flinn, Carol V. Ward & Robert J. Noone, *Hormones and the Human Family*, *in* HANDBOOK OF EVOLUTIONARY PSYCHOLOGY 552 (David M. Buss ed., 2005)).

155 *Id.*

156 *Id.*

157 *See Children at Higher Risk in Nontraditional Homes*, ASSOCIATED PRESS, Nov. 18, 2007, *available at* http://www.nbcnews.com/id/21838575/ns/health-childrens_health/t/children-higher-risk-nontraditional-homes/.

This is not to say that all adults are incapable of properly caring for an unrelated child. Clearly, if that were the case, then the government would have a compelling reason to entirely forbid adoption and other laws that allow unrelated adults to care for children. Rather, these statistics show that society should appreciate the positive benefits of monogamy on children's lives.[158] Social science shows that our children will be safer in homes without unrelated adults,[159] so the government's interest in protecting children therefore extends to laws that give children the greatest possible chance to be raised in safe, monogamous homes. To ignore these studies showing legitimate risks of abuse, neglect, and homicide is to ignore children themselves in favor of our desires to have relationships with multiple persons.[160] Certainly a state's interest in protecting children allows for a state preference for limiting marriage to two persons.[161]

Moreover, there is evidence from social science that polyamorous households may not be as conflict-free as we would expect from the short tale of Terisa, Matt, Vera, Larry, and Scott in the Introduction.[162] A recent anthropological look at polygamous societies found no evidence of relationships between co-spouses that could be categorized as "harmonious."[163] Instead, the study found significant disputes between the co-spouses in polygamous homes.[164] This cuts against the notion that polyamorous relationships create an ideal marital form by suggesting that innate senses of jealousy are not so easily removed from the relationship paradigm.[165] This risk of opening the door to increased intra-household conflict becomes even more concerning when the possibility of multiple children from different subsets of parents enters the fray, leaving children exposed as the victims as adults settle their disputes.[166] With all of this potential for upheaval in the household, states surely have an interest in maintaining the relatively safe societal construct of the monogamous household.[167]

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158 *See* Henrich et al., *supra* note 134, at 665.

159 *Id.*

160 *Id.*

161 *See* Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (noting the state's authority to protect the welfare of children).

162 *See* William Jankowiak, Monika Sudakov & Benjamin C. Wilreker, *Co-Wife Conflict and Co-operation*, 44 ETHNOLOGY 81, 91 tbl.1 (2005).

163 *Id.*

164 *Id.*

165 *See id.*

166 *See* Henrich et al., *supra* note 134, at 665.

167 *Id.*

D. The Strongest Interest: Normative Monogamy as an Economic Stimulant

The strongest argument for maintaining monogamy-based restrictions on marriage is one that has yet to be considered by any court considering a challenge to polygamy laws: monogamy's impact on overall citizen productivity.[168] The government's interest in advancing the collective prosperity of its citizenry has long been acknowledged.[169] While the state's exact interest in advancing commercial interests of its populace has been debated since the founding of the nation,[170] it is now clear that the government can act to further economic goals.[171] In some respects, this commercial interest is a necessary competitive process, wherein governments compete against other governments to achieve prosperity and growth.[172] This competition has been evident at the local and state levels, in economic development pursuits,[173] and the international level, with cold war economic maneuvers and trade embargos.[174] In other respects, the government's commercial interest stems from naturally occurring market failures, such as an interest in correcting externalities or providing public goods.[175] Regardless of the basis, the government's interest in enabling and promoting commerce is strong.[176]

Social science research has found that polygamy results in harmful economic consequences in the form of diminished per capita gross domestic

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[168] *Id.* at 658.

[169] *See* Richard W. Miller, *The Interest of the Governed and the Interests of Humanity: The Moral Importance of Borders*, 90 B.U. L. REV. 1785, 1791 (2010) ("[S]overeign citizenries typically devote energy and attention, take risks, and make sacrifices in a collective project of advancing prosperity and justice in their territory.").

[170] *See* THE FEDERALIST NO. 11 (Alexander Hamilton) (arguing for uniform regulations over commerce to increase the nation's ability to trade with European countries).

[171] *See About Commerce: Mission Statement*, U.S. DEP'T COM., http://www.commerce.gov/page/about-commerce#mission (last updated Apr. 7, 2015, 11:59 AM) (describing its mission to make businesses more innovative and competitive) [hereinafter *Mission Statement*].

[172] N. Gregory Mankiw, *Competition is Healthy for Governments, Too*, N.Y. TIMES, Apr. 15, 2012, at BU5, *available at* http://www.nytimes.com/2012/04/15/business/competition-is-good-for-governments-too-economic-view.html.

[173] *See generally* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996) (describing the "intense interstate competition for economic activity" for attracting business relocations).

[174] *Russia vs. USA: Economic Cold War*, COUNCIL ON HEMISPHERIC AFF. (Sept. 17, 2012), http://www.coha.org/russia-vs-usa-economic-cold-war/.

[175] *See generally* HENRY N. BUTLER, CHRISTOPHER R. DRAHOZAL & JOANNA SHEPHERD, ECONOMIC ANALYSIS FOR LAWYERS 125–29 (3d ed. 2014) (providing an overview of the ways government responds to market failures).

[176] *Mission Statement*, *supra* note 171.

product.[177] Economist Michèle Tertilt, formerly of Stanford University and now at the University of Mannheim, has found that societies that impose monogamy on its citizens enjoy a 170% increase in per capita output.[178] According to Professor Tertilt, this significant surge in citizen productivity is because monogamy causes men to save their financial resources more than men practicing polygamy.[179] In monogamous societies, men cannot invest in obtaining additional wives, so instead they have fewer children and use their resources in more productive ways.[180]

Professor Joseph Henrich and his team have built on these findings to show that normative monogamy results in men's increased focus on child rearing.[181] While men in polygamous societies invest their resources in obtaining more long-term mates, men in monogamous societies have been found to channel efforts into their families, which Professor Henrich notes to be more "reliable economic productivity."[182] This investment in childrearing not only improves "offspring quality"[183] but also has been found to improve child health outcomes.[184]

Evidence from biological science confirms the status of the male mind in prioritizing between mate-seeking and childrearing activities.[185] A team of Harvard University anthropologists has found that men experience a drop in testosterone levels when they get married and again when they have a child.[186] High levels of testosterone have been found to lead to risky behavior in men, stemming from pressure to acquire resources in an attempt to attract mates.[187] Yet contrary to the typical testosterone drop following marriage and child birth in monogamous relationships, men in polygamous relationships do not experience the same reaction.[188] In fact, one study suggests that polygamous

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177 *See* Michèle Tertilt, *Polygyny, Fertility, and Savings*, 113 J. POL. ECON. 1341, 1342 (2005).

178 *Id.* at 1343.

179 *Id.* at 1363.

180 Henrich et al., *supra* note 134, at 664.

181 *Id.* at 665–66.

182 *Id.* at 666.

183 *Id.*

184 *Id.*

185 *See* Peter B. Gray et al., *Marriage and Fatherhood Are Associated with Lower Testosterone in Males*, 23 EVOLUTION & HUM. BEHAV. 193, 199 (2002).

186 *Id.*

187 Coren L. Apicella et al., *Testosterone and Financial Risk Preferences*, 29 EVOLUTION & HUM. BEHAV. 384, 387–88 (2008).

188 Peter B. Gray, *Marriage, Parenting, and Testosterone Variation Among Kenyan Swahili Men*, 122 AM. J. PHYSICAL ANTHROPOLOGY 279, 282 (2003).

men actually experience even higher testosterone levels.[189] This phenomenon is likely because polygamous men are still involved in the active process of mate-seeking and therefore participating in risky, testosterone-fueled behavior.[190] Thus, men in polygamous relationships are biologically dissuaded from engaging in societally desirable childrearing and long-term financial investment.

This is a substantial finding that should topple the theory upon which polyamory is built. Despite being labeled as an externality-free marital arrangement,[191] polyamory may actually cause significant societal costs that result in economic stagnation.[192] Men that would otherwise turn their attention and resources toward productive means would instead remain focused on mate-seeking processes, engaging in risky—and sometimes criminal[193]—behavior along the way. If Professor Tertilt's research is accurate, then a broad shift in the United States towards polyamory could result in a momentous drop in per capita gross domestic product.[194]

The state's interest in maintaining economic advantages should not be taken lightly.[195] From a development anthropological level, the social norms a society adopts affect the very success of that society.[196] In fact, Professor Henrich has theorized that Europe's adoption of normative monogamy may have led to Europe's relative developmental success because of monogamy's encouragement of productivity.[197] The benefits of monogamy—including investments in education, offspring, and business opportunities—may have even contributed to the Industrial Revolution.[198]

If Professor Henrich is correct, then many innovations we enjoy today may exist because of normative monogamy. Imagine a world where Henry Ford focused his efforts on wooing women instead of automobiles or where Thomas Edison invested in short-term projects rather than his many innovations. Would the option of taking additional wives have changed their incentives? What

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189 *Id.*

190 Apicella et al., *supra* note 187, at 387–88.

191 Bill Muehlenberg, *Islam and Polygamy*, CULTURE WATCH (May 10, 2009, 2:00 PM), http://billmuehlenberg.com/2009/10/05/islam-and-polygamy/.

192 Tertilt, *supra* note 177, at 1342.

193 *See supra* Part III.B.

194 Tertilt, *supra* note 177, at 1342.

195 *Mission Statement*, *supra* note 171.

196 *See* Henrich et al., *supra* note 134, at 666.

197 *Id.*

198 *Id.*

future innovations might not occur if our society shifts to endorse polyamory? The social norms that have led to unprecedented progress as a society should therefore be given enormous deference in the face of a constitutional challenge.[199]

Yet courts considering challenges to polygamy laws have ignored this vital role of monogamy.[200] Moreover, legal scholars addressing the legality of the state's interest in regulating monogamy have essentially skipped over the research from the other social sciences.[201] Most concerning of all, the very lawyers representing states in polygamy law challenges are not even arguing for the benefits of normative monogamy discussed in this Part.[202] This analytical exclusion should cease, and courts should instead recognize the economic benefits that normative monogamy has bestowed upon our nation.

IV. STANDARD AND TEST FOR STATE BANS OF POLYAMORY

Once the state's interest in regulating polyamory is established, we still must conduct a constitutional analysis to determine the appropriate legal test to apply to those polygamy laws. The balancing analysis[203] for polyamory becomes lighter on both sides of the ledger, in comparison with the analysis of religious-based polygyny. On the state-interest side, the most important interest of protecting the vulnerable from abuse[204] is no longer a valid concern because of the lack of coercion. In polyamory, women join a nonmonogamous relationship because they want to, not because their religion or culture coerces them. And, on the individual-interest side, challengers to polygamy laws can no longer cite the Free Exercise Clause in support. This changes the necessary analysis completely. This Part will show that, because there is no longer an argument of a constitutional right to enter into plural marriage, polygamy laws

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199 Of course, findings that polyamory may lead to societal inefficiencies do not necessarily end the constitutional analysis. Social science, after all, does not amount to indisputable proof. But the social science findings discussed in this Part should suffice to withstand judicial scrutiny, which is discussed in Part IV. Finding indisputable proof is not required of states under constitutional analysis. If it were, no law could be upheld. Instead, the social science rationale discussed in this Part need only be credible to qualify as a state interest.

200 *See, e.g.*, Murphy v. Ramsey, 114 U.S. 15 (1885); State v. Green, 99 P.3d 820 (Utah 2004).

201 *See* Sealing, *supra* note 14, at 754–57.

202 *See, e.g.*, Defendant's Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment at 7–11, Brown v. Buhman, 947 F. Supp. 2d 1170 (2013) (No. 2:11-CV-00652), 2012 WL 10172971 [hereinafter Defendant's Reply Memorandum] (limiting the state's arguments to historical and administrative reasons).

203 *See supra* Part II.B.

204 *Green*, 99 P.3d at 830.

would likely need to pass only rational basis review under the Equal Protection Clause, unless the challengers can implicate another constitutional right. Section A begins by explaining why *Reynolds* should not, in any way, control a polyamory challenge to polygamy laws. Section B then searches for the correct constitutional analysis for polygamous restrictions on marriage. Section C finally takes a brief look at cohabitation laws, as opposed to marriage laws, to see if that analysis differs at all.

A. Why Reynolds *Should Not Control Polyamory*

The United States Supreme Court has yet to hear a nonreligious case challenging a state's polygamy laws. If, and when, it does, the Court will need to find some guidance in case law to start their analysis. They may well be tempted to rely on *Reynolds*,[205] which is still good law and holds that individuals do not have a right to plural marriage.[206] This would seem to make for a good starting point, but it is not. The bases on which the Waite Court decided *Reynolds* would have little applicability to a coercion-free polyamory challenge. This section walks through those bases in an effort to show that *Reynolds* makes for a poor guidepost.

First and foremost, *Reynolds* was decided with a bias against Mormons, which has been shown by historians.[207] Professor David L. Chambers of the University of Michigan Law School has written about Mormons' persecution from the "earliest years" of the church, even before they embraced polygyny.[208] The main reason for mainstream America's resistance of Mormons, according to Professor Chambers, was the perceived threat to "Protestant hegemony."[209] Upon arriving in Utah, Mormons quickly gained political control of the nearby governments, and Brigham Young rose to territorial governor.[210] The Protestant establishment grew to fear Mormons as a group, and that fear adapted into hostility and violence.[211] It was the Mormons' practice of polygyny, however, that gave the mainstream majority the

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[205] Reynolds v. United States, 98 U.S. 145 (1879). For discussion of *Reynolds*, see *supra* Introduction and Part II.

[206] Romer v. Evans, 517 U.S. 620, 649–50 (1996) (Scalia, J., dissenting) ("[T]he proposition that polygamy can be criminalized . . . remains good law.").

[207] *See, e.g.*, Ertman, *supra* note 81, at 288 (showing how government leaders during the days of *Reynolds* thought of Mormons as "race traitors").

[208] Chambers, *supra* note 70, at 61–74.

[209] *Id.* at 62.

[210] *Id.* at 62–63.

[211] *Id.* at 63.

articulable reason to hate the Mormons, and it was polygyny that became the focal point for fear and hostility towards Mormons.[212] *Reynolds*, therefore, must be viewed as a rejection of Mormonism as much as a rejection of polygamy.[213]

Second, Chief Justice Waite decided *Reynolds* on the declaration that polygamy is a historical abomination among civilized cultures.[214] But our understanding of polygamy's history has developed since 1879, and the historical-abomination argument is no longer a valid argument. Ignoring Chief Justice Waite's comment about polygyny's suitability among African and Asiatic people,[215] the Court's morality concerns would not apply to a polyamorous challenge to polygamy laws. The Court is essentially saying that monogamy is what we have always done.[216] This is no longer thought to be a compelling reason for making law. If it were, then most of the progress made since 1879 would have been defeated at the Supreme Court level.[217] State laws, even at the lowest level of scrutiny, require some legitimate interest, and *Reynolds* did not espouse any real interest in declaring polygamy to be an abomination.[218]

The combination of these two flaws in *Reynolds* makes the case of little use in modern Free Exercise Clause analysis but of no use in a nonreligious challenge. If you remove the historical aversion to Mormonism and require the state to proffer a legitimate state interest in its polygamy laws, then *Reynolds* stands for an empty *ipse dixit* holding that the West has always been monogamous.[219] Consider a modern-day challenge from a polyamorous

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212 *Id.*

213 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, 230 (2001) ("The tone of the *Reynolds* opinion reflected contemporaneous prejudicial sentiment felt throughout the United States toward polygamy.").

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

215 *Id.*

216 *Id.*

217 For example, in 1878, interracial marriage was vilified by the mainstream Protestant majority. *See* Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858 (1878). Five years after *Reynolds*, the Supreme Court upheld Alabama's anti-miscegenation statute in *Pace v. Alabama*, 106 U.S. 583 (1883). This precedent, of course, did not keep the law from progressing over time, and the Supreme Court ultimately reversed *Pace* in *Loving v. Virginia*, 388 U.S. 1 (1967).

218 Vazquez, *supra* note 213, at 229 ("This section of [*Reynolds*] lacked substantive legal reasoning and references to viable public policy justifications. Instead, it cast polygamy in such prejudicial light as to imbue subsequent, suspect opinions with the appearance of reasoned support.").

219 It is possible, however, that lower courts may still be required to follow *Reynolds*'s reasoning-free holding when applied to nonreligious polygamy. In a recent same-sex marriage decision, the Sixth Circuit

person. A free-minded person choosing non-monogamy for nonreligious reasons is so far removed from Brigham Young's personal secretary. The polyamorist of today shares no motivations or interests with a Mormon, other than desiring an outcome of plural marriage. Thus, a polyamory challenge to monogamy deserves fresh analysis.

B. Potential Polyamory Challenges to Polygamy Laws

How should a polyamory challenge to polygamy laws go about its legal analysis, if not relying on Mormon-based polygamy case law? Polygamy laws restrict marriage, and therefore the correct model for analyzing a polyamory challenge to polygamy laws is following the analysis of other challenges to marriage restrictions. Following this line of precedent would give the court a starting point for analysis. The problem here, however, is the current uncertainty in the law based on divergent opinions on constitutional rights of same-sex couples. Indeed, 2014 saw five different courts of appeals consider constitutional challenges to restrictions on same-sex marriage,[220] with the Supreme Court granting certiorari in one of them (four challenges were mounted on the Sixth Circuit opinion, and the Court granted the petitions and consolidating the cases for hearing).[221] Four of the five appellate cases granted the same-sex couples the right to marry, but they did so on different grounds.[222] Thus, until the Supreme Court issues guidance on the correct

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noted that Supreme Court holdings are binding, even if subsequent Supreme Court language appears to cast doubt on the validity of the prior case:

> Just two scenarios, then, permit us to ignore a Supreme Court decision, whatever its form: when the Court has overruled the decision by name . . . or when the Court has overruled the decision by outcome . . . . Any other approach returns us to a world in which the lower courts may anticipatorily overrule all manner of Supreme Court decisions based on counting-to-five predictions, perceived trajectories in the caselaw, or, worst of all, new appointments to the Court.

DeBoer v. Snyder, 772 F.3d 388, 401 (6th Cir. 2014). Thus, reversing *Reynolds*, or at least updating it with modern-day reasoning, may require direct action from the Supreme Court. On the other hand, lower courts could distinguish *Reynolds* from a polyamorous challenge by finding that *Reynolds* applied only to polygyny and not polyamory.

220 *See* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015); Baskin v. Bogan, 766 F.3d 648, 654 (7th Cir. 2014); Latta v. Otter, 771 F.3d 456, 464 (9th Cir. 2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352, 368 (4th Cir. 2014).

221 *See* Bourke v. Beshear, 135 S. Ct. 1041 (2015) (mem.); DeBoer v. Snyder, 135 S. Ct. 1040 (2015) (mem.); Tanco v. Haslam, 135 S. Ct. 1040 (2015) (mem.); Obergefell v. Hodges, 135 S. Ct. 1039, 1040 (2015) (mem.).

222 *DeBoer*, 772 F.3d at 402 ("Four courts of appeals thus far have recognized a constitutional right to same-sex marriage. They agree on one thing: the result. But they reach that outcome in many ways, often more than one way in the same decision.").

analysis of the constitutionality of marriage restrictions later in this Term, the analysis of a potential plural-marriage challenge is left questioned. This section searches for the correct analysis by evaluating the challenge methods of past marriage restrictions.

1. Fundamental Right

The starting point for our analysis of the constitutionality of bans on coercion-free polyamory is whether the polyamorous have a fundamental right to marry multiple persons. While the United States Supreme Court has, from time to time, recognized a fundamental right to marry, the basis of this right is under-theorized, and therefore it is difficult to extrapolate in gauging the right's applicability to various marriage restrictions.[223] This lack of foundation is likely the reason for the varied results among the courts of appeals in 2014 in determining a fundamental right to same-sex marriage.[224] Until the Supreme Court clarifies the nature of the fundamental right to marriage, it is likely that courts would only further the confusion over the right should a polyamorous challenge to polygamy laws come forward.

Loving v. Virginia, the case that struck down Virginia's anti-miscegenation law, set the stage for the notion of a fundamental right to marry.[225] While basing the opinion primarily on Virginia's unconstitutional racial classifications,[226] the *Loving* Court also inserted language that acknowledged some right to marriage. Chief Justice Warren, writing for the majority, said that "[t]he freedom to marry has long been recognized as one of the vital personal rights" that was "fundamental to our very existence and survival."[227] Despite Chief Justice Warren's attempt to tie this signal of a fundamental right to marry back to Virginia's suspect racial classifications, he never explains the root of the right.[228]

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[223] *See* Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1386 (2010) (finding that the notion of a fundamental right to marry suffers from confusion because "both the rationale for that right and its structure have remained unclear").

[224] *Compare Bostic*, 760 F.3d at 376 ("[W]e conclude that the fundamental right to marry encompasses the right to same-sex marriage . . . ."), *with DeBoer*, 772 F.3d at 421 (finding no fundamental right to same-sex marriage).

[225] 388 U.S. 1 (1967).

[226] *Id.* at 11.

[227] *Id.* at 12.

[228] Professors Tebbe and Widiss have written that *Loving*'s language about the fundamental right to marry is "probably best understood as a hybrid" between "evenhandedness and autonomy." Tebbe & Widiss, *supra* note 223, at 1388.

A decade later, the Burger Court cited to *Loving* as granting an equal-protection-based fundamental right to marriage in *Zablocki v. Redhail*, a case that invalidated a state law requiring fathers who owed child support to get a court order before marrying.[229] In *Zablocki*, Justice Thurgood Marshall's majority opinion used *Loving*, along with some dicta from older cases on the importance of marriage,[230] to cement the notion that restrictions on marriage require the court's strict scrutiny.[231] Interestingly, however, Justice Marshall went on to limit the applicability of strict scrutiny in marriage cases to only cases where a "statutory classification . . . interfere[s] directly and substantially with the right to marry."[232] "By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to strict scrutiny."[233] Instead, Justice Marshall declared that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."[234] Marshall's language in *Zablocki* appears to be calling for a balancing test between the interests of the state and the marriage interests of the individual.[235]

The Rehnquist Court then weighed in on the nature of the right to marry in *Turner v. Safley*, a case holding that prisoners did not need a superintendent's permission to marry.[236] It appears that Justice O'Connor, writing for the majority, applied the balancing test called for by Justice Marshall in *Zablocki* by considering marriage's fundamental nature in society and noted the policy reasons for promoting marriage by scrutinizing restrictions on marriage.[237] *Turner*, however, declined to determine whether this restriction on marriage should be held to strict scrutiny because the relevant restriction could not survive even rational basis scrutiny.[238] The prisons' security interests,

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229 434 U.S. 374 (1978).

230 *Id.* at 384 (citing, in turn, Maynard v. Hill, 125 U.S. 190, 205 (1888) and Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

231 *Id.* at 383.

232 *Id.* at 387.

233 *Id.* at 386.

234 *Id.*

235 *See supra* Part II.B for discussion of balancing tests. Of course, balancing tests do not come naturally when the court applies either strict scrutiny or rational basis, but Justice Marshall did not believe in such rigid application of scrutiny. *See* discussion *infra* Part IV.B.4.

236 482 U.S. 78, 99–100 (1987).

237 *Id.* at 95–96.

238 *Id.* at 97.

according to Justice O'Connor, were not rational reasons to forbid prison marriage, given the facts surrounding the policy.[239]

Thus, from this line of cases, we have the notion that marriage's fundamental importance in society is hefty enough to require good reasons for its regulation, but the doctrine behind that fundamentalism is varied and under-theorized, and the guidelines for a balancing test are unspecified.[240] It should not come as a surprise, then, that courts have had foundational differences in the reaches of the state's ability to regulate marriage.

Many courts have turned back to traditional fundamental-rights analysis in the face of *Loving*'s, *Zablocki*'s, and *Turner*'s lack of clarity.[241] The traditional test, as set forth in *Washington v. Glucksberg*, is whether the right being asserted is "deeply rooted in this Nation's history in tradition" or whether the right is "implicit in the concept of ordered liberty."[242] Courts applying this test to same-sex marriage have rejected the applicability of the former test, since same-sex marriage has no history or tradition in the United States, but the second test has seen a different analysis.[243] A polyamory test would likely see the same analysis, given the lack of historical support. A polyamory test would therefore likely force the courts to determine whether the regulation of the number of participants in a marriage undermines our concepts of liberty.

Given this also-vague direction from the Supreme Court, it is no wonder that courts have struggled even under this more-established test. In the context of same-sex marriage challenges, the courts finding a fundamental right have applied the test generally and determined that gender restrictions on marriage come under the larger definition of marriage, a great liberty interest.[244] Those declining to find a fundamental right have taken a restricted view of the fundamental right to marriage, instead focusing on access issues like the challenges in *Zablocki* and *Turner*.[245]

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239 *Id.*

240 Tebbe & Widiss, *supra* note 223, at 1390–91 (noting that *Loving*, *Zablocki*, and *Turner* "do not share a consistent doctrinal basis").

241 *See, e.g.*, DeBoer v. Snyder, 772 F.3d 388, 411–12 (6th Cir. 2014) (finding no analytical support from *Loving*, *Zablocki*, or *Turner*).

242 521 U.S. 702, 721 (1997) (quoting, in turn, Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977), and Palko v. Connecticut, 302 U.S. 319, 325 (1937)) (internal quotation marks omitted).

243 *See, e.g.*, *DeBoer*, 772 F.3d at 411.

244 *See, e.g.*, Baskin v. Bogan, 766 F.3d 648, 656 (7th Cir. 2014).

245 *See, e.g.*, *DeBoer*, 772 F.3d at 411–13.

A polyamory challenge would suffer from the same lack of guidance. While clearly polygamy has no historical rights in the United States, the liberty interests in expressing love and commitment provide a plausible argument for expanding the concept of marriage. Yet the state interests described in Part III provide the counterbalance called for in *Zablocki* and should withstand even strict scrutiny. Much of this analysis depends on the future clarity of the fundamental right to marry in the context of same-sex marriage. It should be understood, however, that a potentially fundamental right to same-sex marriage does not necessarily mandate a fundamental right to marry multiple partners. The upcoming Supreme Court decision on same-sex marriage will be most useful in clarifying the appropriate analysis for future cases concerning polyamory, but it is doubtful that the Court will signal any type of broad right to determine one's own marriage form. Instead, the Court will most likely grant same-sex rights as an equal right within our society's normative monogamy paradigm. The necessary analysis pertaining to polyamory requires entirely different consideration. In that analysis, the economic interests of the state in maintaining monogamy should ultimately retain the court's deference, even if the court finds polygamy laws to concern a fundamental right.[246]

2. Suspect Classifications

Under the Equal Protection Clause, attempts by legislators to single out groups for unequal treatment receive heightened scrutiny by the courts. Whether this two-tiered approach began with *Loving v. Virginia*[247] or earlier,[248] the traditional classifications that have enjoyed the court's heightened scrutiny are certain to include race, gender, alienage, and illegitimacy.[249] Recently, however, some courts have expanded the groups receiving heightened

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[246] One might ask of the limits to the state's economic interests. Could the state pass a law prohibiting video games under an economic-interest theory? The simple answer is yes. There is no fundamental right to play video games. Thus, if the state has a rational basis for believing that banning video games will increase productivity, then the video game ban should be upheld. The recourse for opponents of the video game ban should be through political channels. Just because a video game ban would be a misguided policy does not make it unconstitutional.

[247] 388 U.S. 1, 11 (1967).

[248] *See* Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943). The disagreement on when equal protection's two-tiered analysis began can be important given the analysis that modern application requires. *Compare* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 226–40 (1991) (claiming *Loving* to be the analysis's origin), *with* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2250–69 (2002) (tracing the two-tiered analysis back to *Hirabayashi* and *Korematsu*).

[249] Klarman, *supra* note 248, at 283.

protection to include classifications based on sexual orientation.[250] Typical suspect-classification analysis applies any number of factors to determine whether a group should be considered a protected class warranting heightened review under equal protection analysis: whether the group has been historically victimized by government discrimination; whether the group has a defining trait, along with the relevancy of that trait; and whether the group is politically powerless.[251]

While the polyamorous have virtually no history of positive discrimination by government units,[252] the polyamorous do fit the rest of the factors for consideration as a suspect classification. The polyamorous have a clear and defining trait, and that trait is the basis of their constitutional challenge to laws restricting their marriage. The polyamorous might also be politically powerless, though no known studies can corroborate the political prowess of the nonmonogamous.

Previous identification as a suspect class has not stopped the courts from applying heightened scrutiny if the legislature is clear in its motives. In *U.S. Department of Agriculture v. Moreno*, for example, there was evidence that Congress wanted to keep "hippies" off of food stamps and tailored the law specifically at hippies.[253] Justice Brennan, writing for the U.S. Supreme Court, declared that hippies could be a suspect classification and struck down the law.[254] This demonstrates courts' willingness to strike down classifications when improper purposes warp the legislative process.[255]

For the polyamorous, however, there are not likely to be any documented instances of purposeful legislative discrimination targeted at those wishing to marry multiple persons, which casts doubt on the likelihood of success as a suspect classification. On the other hand, if clear discrimination against Mormons can be shown to have warped the legislative process in creating polygamy laws, then perhaps the polygamous in general could receive heightened scrutiny. Nevertheless, as shown in Part III, the state's compelling

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250 *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474 (9th Cir. 2014) (holding that classifications based on sexual orientation should receive heightened scrutiny). *But see* Davis v. Prison Health Servs., 679 F.3d 433, 438 (6th Cir. 2012) (applying rational basis review to sexual-orientation classifications).

251 Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 (2011).

252 The argument could be made, however, that ignoring the polyamorous is a form of discrimination.

253 413 U.S. 528, 534 (1973).

254 *Id.* at 538.

255 Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 546 (2004) (discussing *Moreno*'s application of equal-protection rights to hippies).

economic interests in maintaining monogamy would likely trump even heightened review.

3. Animus

Similar to suspect-classification analysis is the analysis of animus, which seeks to invalidate laws that are "born of animosity toward" a certain group.[256] Animus is the catchall of suspected governmental discrimination against a group, featuring legislation that cannot be conceived of by any other means besides "an irrational prejudice."[257] While this is traditionally a rarely successful argument in constitutional law, two of the 2014 challenges to same-sex marriage laws overturned the law on the basis of animus towards homosexuals.[258]

Animus is not likely to be successful as a vehicle for overturning polygamy laws. While many states passed recent legislation aimed at maintaining marriage's status quo as between heterosexual partners, laws making marriage a two-person endeavor have existed for centuries.[259] It cannot seriously be contended that these century-old laws were created with the specific purpose of discriminating against the polygamous, though cohabitation laws may be a different story and will be discussed in section C of this Part. Marriage-based laws, however, seem to be safe from the threat of animus toward the polygamous.

4. Rational Basis Review

With heightened review eliminated from consideration, the court's analysis of polygamy laws thus falls to rational basis review. All laws, at the very least, must be "rationally related to furthering a legitimate state interest."[260] Under rational basis review, courts are instructed to uphold laws so long as the law plausibly advances a governmental objective, even if other less-restrictive

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256 Romer v. Evans, 517 U.S. 620, 634–35 (1996).

257 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985).

258 *See* Latta v. Otter, 771 F.3d 456, 495 (9th Cir. 2014); Baskin v. Bogan, 766 F.3d 648, 666 (7th Cir. 2014).

259 The existence of normative monogamy has existed for centuries in the West. This is to be contrasted with laws specifically banning polygamy, which did grow out of animus of Mormons to a large extent, as shown in Part II. However, the animus contemplated with laws encouraging monogamy did not grow out of such animus, as the West's adoption of monogamy is the development relevant to animus analysis.

260 Vance v. Bradley, 440 U.S. 93, 97 (1979) (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976)) (internal quotation marks omitted).

means to achieving the state interest are available.[261] While this method of review has been criticized for causing irrational legal and governance results,[262] the Court's continued faith in rational basis review relies on its trust that "even improvident decisions will eventually be rectified by the democratic process."[263] Thus, even if a court finds that a challenger's right to plural marriage is not fundamental and that the polyamorous are not a suspect class, states still need to show a rational relationship between their polygamy laws and their interest in limiting marriage to two people.

As we saw in Part III, states have a compelling interest in limiting the participants in marriage to two. This means that, in order to satisfy rational basis review, the state polygamy law needs only to be rationally related to the interests described in Part III. Moreover, the Supreme Court has held that the interest need not be "actually articulate[d] at any time."[264] Therefore, the state's economic interests in monogamy do not need to have been realized by the legislature at the time of enactment of the polygamy laws, so long as they are argued during the challenge.

While the traditional view of rational basis review—such as the view held by Justice Thurgood Marshall—is that its invocation "leaves little doubt about the outcome [because] the challenged legislation is always upheld,"[265] at least one recent decision suggests an alternative. When the Seventh Circuit undertook its same-sex marriage challenge in *Baskin v. Bogan*, Judge Richard Posner's majority opinion applied rational basis review but found no rational relationship between Indiana's statute banning same-sex marriage and any legitimate state interest.[266] Judge Posner reviewed the potential reasons for states to limit marriage to opposite-sex couples and concluded that the

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261 Heller v. Doe, 509 U.S. 312, 330 (1993).

262 *See Murgia*, 427 U.S. at 321 (Marshall, J., dissenting) (describing rational basis review "rudderless" and "unpredictable" and arguing that "[a]ll interests not 'fundamental' and all cases not 'suspect' are not the same; and it is time for the Court to drop the pretense that, for purposes of the Equal Protection Clause, they are"). *See generally* Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801 (2006) (outlining the ways in which rational basis review is "fundamentally flawed").

263 Lawrence v. Texas, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)) (internal quotation mark omitted); FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993) (quoting *Vance*, 440 U.S. at 97); *see also* DeBoer v. Snyder, 772 F.3d 388, 408 (6th Cir. 2014) (holding that heterosexual-marriage laws meet rational basis review and that same-sex marriage rights should be determined by the democratic process "from elected legislators, not life-tenured judges").

264 Nordlinger v. Hahn, 505 U.S. 1, 15 (1992).

265 *Murgia*, 427 U.S. at 319 (Marshall, J., dissenting).

266 766 F.3d 648, 656 (7th Cir. 2014).

proffered reasons are "so full of holes that [they] cannot be taken seriously."[267] Considering the issue in the context of child-welfare interests, Judge Posner pointed out that many of the states' proffered interests applied also to heterosexual couples who were not able to reproduce, ultimately finding that the laws banning same-sex marriage were "not 'tailored' to the problem."[268] "The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny."[269]

Is Judge Posner reintroducing a Justice Marshall style of rational basis review? After all, "Judge Posner is a judicial, academic, and media star"[270] and was once determined to be the most-cited legal scholar in American history.[271] Indeed, Judge Posner has the potential to upend entire areas of the law with his creative and persuasive contributions to modern jurisprudence.[272] This is an important question to ask since, as we determined in the previous sections, rational basis review will likely be the level of scrutiny applied to a nonreligious polyamory challenge to polygamy laws. This means that the constitutionality of restricting marriage to two persons may come down to

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267 *Id.* At *Baskin* oral arguments, Judge Posner was exasperated by the states' attorneys' inability to show any interest the states may have in retaining a heterosexual-marriage-only law, at one point quipping, "You don't have any sort of empirical or even conjectural basis for your law. Funny." Dale Carpenter, *The Posner Treatment*, VOLOKH CONSPIRACY (Aug. 28, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/28/gay-marriage-bans-get-the-posner-treatment/.

268 *Baskin*, 766 F.3d at 672.

269 *Id.* at 656. Judge Posner went on to say that "[a] degree of arbitrariness is inherent in government regulation, but when there is no justification for government's treating a traditionally discriminated-against group significantly worse than the dominant group in the society, doing so denies equal protection of the laws." *Id.* at 664.

270 Stephen J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 N.Y.U. ANN. SURV. AM. L. 19, 20 (2005) (presenting quantitative research on Judge Posner's reputation and influence).

271 Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 tbl.6 (2000). *But see* Fred R. Shapiro & Michelle Pearse, Essay, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483 (2012) (presenting new methods of calculating contributions to legal scholarship, which drop Judge Posner's authority by excluding contributions made by book and to economics).

272 Choi & Gulati, *supra* note 270, at 20–21 (noting Judge Posner's contributions to the fields of antitrust, contracts, torts, discrimination, sexual harassment, evidence, intellectual property, and judicial behavior, along with his "foundational scholarship in areas yet untapped by most legal academics"); *see also* Craig Green, *What Does Richard Posner Know About How Judges Think?*, 98 CALIF. L. REV. 625, 625 (2010) (book review) ("Richard Posner may be America's most celebrated living judge, and although he does not sit on our highest court, his career marks an unmatched fusion of judicial leadership and prolific scholarship."); Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378, 1378 (1985) (book review) ("Posner may now rival [Roscoe] Pound and [Karl] Llewellyn as the academic of the twentieth century who has most influenced the shape of legal thought.").

which version of rational basis review is applied, Posner's or the traditional method.

Under the traditional way of analyzing rational basis review, a challenge to polygamy laws would surely fail. In *Bostic v. Schaefer*, the Fourth Circuit's 2014 same-sex marriage challenge, the plaintiffs admitted that the state had a legitimate interest in promoting family stability[273] and in preventing unforeseen social effects.[274] This means that had that court applied rational basis review to the constitutionality of laws banning same-sex marriage, the plaintiffs' admission of an interest almost certainly would have foreclosed further challenge and upheld the law.[275] Extending the rationale for same-sex marriage laws being upheld under rational basis review, it seems that polygamy laws would also be upheld as furthering a legitimate state interest. Nearly identical interests could be espoused for states' preference for both monogamy and heterosexual marriage, though the interest in maintaining monogamy is arguably even greater, as was discussed in Part III. No economic justification for disallowing same-sex marriage can be reasonably espoused, while a plethora of social science points to significant economic harms should monogamy be abandoned.

Under Judge Posner's version of rational basis review in *Baskin*, however, a different result is entirely possible. Not surprisingly, Posner's approach appears to value empirical data over the generalized untargeted interests that typically suffice in rational basis scrutiny. Posner is, after all, "one of the fathers of the 'law and economics' movement."[276] This suggests that the key to passing Posner's version of rational basis review is to have an economically

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273 Bostic v. Schaefer, 760 F.3d 352, 394 (4th Cir. 2014) (Niemeyer, J., dissenting).

274 *Id.* at 395.

275 The court, however, found the plaintiffs' challenge to involve a fundamental right and applied strict scrutiny. *Id.* at 375–77 (majority opinion). The Ninth Circuit also indicated that their same-sex marriage challenge would have resulted differently if rational basis review had been the standard. *See* Latta v. Otter, 771 F.3d 456, 464 (9th Cir. 2014) (stating that the District Court of Nevada's application of rational basis review in *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), allowed the upholding of Nevada's law banning same-sex marriage but that the Ninth Circuit's subsequent decision to apply strict scrutiny changed the result).

276 Choi & Gulati, *supra* note 270, at 20. Indeed, Posner literally wrote the book on the study of law and economics. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014); *see also* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981) (explaining economic forces in antitrust); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999) (explaining economic forces in evidence law); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (applying economic principles to criminal theory); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998) (defending the use of rational-choice economics in law).

rational reason for keeping the current form of the law. States, therefore, might be required to present empirical evidence of the harms and benefits of polyamory in order to meet this previously easy burden.[277]

On the other hand, Judge Posner's application of rational basis review in *Baskin* may just be another example of what makes Posner unique. Judge Posner has been criticized for his ideas on how other judges should carry out their task, with some concluding that Posner is simply an outlier in the sphere of jurisprudence.[278] It could very well be that Posner's previously held thoughts on the issue of same-sex marriage and gender equality made the issue perfectly clear to him, but other judges, who have not written a book about the regulation of marriage,[279] may not find the issue to be decided as simply.

This possibility is supported by the Sixth Circuit's same-sex marriage opinion in *DeBoer v. Snyder*.[280] *DeBoer* was decided after Posner's *Baskin* opinion, and *DeBoer* frequently cited to *Baskin*. Yet Judge Sutton, writing the majority opinion in *DeBoer*, did not mention Judge Posner's thoughts on the applicability of rational basis review in same-sex marriage challenges. Judge Sutton instead applied the traditional version of rational basis review and found that the states had a plausible reason for maintaining heterosexual-only marriage laws, thus meeting the required constitutional showing.[281] Those disapproving of a state law, according to Judge Sutton, must be a member of a protected class, must be asserting a fundamental right, or must pursue legislative avenues to changing the law.[282] This is the hallmark of the traditional rational basis approach. It therefore is highly likely that a court following this approach to rational basis review in a polyamory challenge to polygamy laws would find the state interests to be proper and uphold the laws. The correct approach, according to *DeBoer*, would be through the democratic policymaking process.[283]

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277 The work by Professor Joseph Henrich discussed in Part III, however, should suffice as sufficient economic rationale for maintaining monogamy restrictions on marriage. *See* Henrich et al., *supra* note 134.

278 Michael J. Gerhardt, *How a Judge Thinks*, 93 MINN. L. REV. 2185, 2204 (2009) (reviewing RICHARD A. POSNER, HOW JUDGES THINK (2008)) (concluding that Posner's perspective on judging "does not provide much help or guidance on how judges other than Posner think" because of the vastly different approaches to the law).

279 *See* RICHARD A. POSNER, SEX AND REASON (1992).

280 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015).

281 *Id.* at 407.

282 *Id.* at 402, 407–08.

283 *See id.* at 408.

C. Cohabitation Laws: Brown v. Buhman

Typically, one would envision laws prohibiting polygamous marriage to serve the same function as laws prohibiting polygamous cohabitation. After all, cohabitation as a polyamorous group is functionally the same familial unit as one seeking to be recognized by state authority. Indeed, the cohabitating polyamorous group brings about the same undesirable effects on society as a legally recognized polyamorous group. Thus, the compelling reasons discussed in Part III of this Comment for preventing an actual, but not legally recognized, polyamorous cohabitation arrangement are still valid. One would therefore expect cohabitation laws to receive the same analysis as polygamy laws.

Yet a recent federal decision in Utah separated analysis of cohabitation laws from polygamy laws and invalidated restrictions on cohabitation in *Brown v. Buhman*.[284] That decision relied heavily on *Lawrence v. Texas*'s invalidation of sodomy laws[285] and found that intra-house restriction on intimate conduct infringed upon a fundamental liberty interest and therefore required heightened scrutiny.[286] However, the Utah federal court boldly stated that Utah's cohabitation requirement could not withstand even rational basis review because of a lack of a state interest in prohibiting cohabitation.[287] Judge Clark Waddoups, finding the cohabitation statute to do little more than regulate sexual conduct, considered and dismissed potential state interests relating to policing closed religious communities and marriage fraud and ultimately held that no state interest was present.

Judge Waddoups, however, did not consider potential state interest regarding increased societal crime resulting from large pools of unmarried men, the potential for harm or a lack of nurturing of children reared in polygamous homes, or the economic benefits derived from normative monogamy because the state did not raise any of these points.[288] Instead, the state focused its defense on crimes that are characteristic in polygynous communities, choosing to tell stories of Warren Jeffs and the Kingston brothers instead of social science research into the harms of polygamy.[289] Judge Waddoups had no choice but to decide the case on the arguments before his court.

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284 947 F. Supp. 2d 1170 (D. Utah 2013).
285 539 U.S. 558, 564–79 (2003).
286 *Buhman*, 947 F. Supp. 2d at 1202.
287 *Id.* at 1202, 1222–23.
288 *See, e.g.*, Defendant's Reply Memorandum, *supra* note 202.
289 *Id.*

Future courts considering cohabitation laws, however, should not be bound by the rationale of *Buhman*. Its lack of consideration of the state's compelling interests described in Part III forecloses its analytical value. Instead, future courts (and those arguing before the court) should rely on the social science presented in Part III and uphold restrictions on cohabitation because of the same societal-level concerns regarding the behavioral incentives of males not practicing monogamy. The economic detriments are the same to society regardless of legal recognition of the relationship.

CONCLUSION

It is curious that courts and scholars considering the legality of laws favoring monogamy have yet to acknowledge the abundance of social science research on the effects of polygamy. Instead, they continue to recite the tired old stories of polygyny-based coercion and crime as their broad-based justification for maintaining monogamy. In doing so, they ignore several extremely compelling justifications for the continuance of normative monogamy and thus shortchange the paradigm that has enabled much of Western society's progress.

Normative monogamy represents more than just some instinctive, un-theorized notion that monogamy is the standard that we like. Instead, monogamy artfully distributes marriage equally along gender lines, reducing the gender gap and alleviating the incentive for men to commit risky and criminal activities as a means to attract a mate. Monogamy increases the likelihood that homes will be peaceful, protecting children from the dangers inherent in living with unrelated adults. And, most importantly, monogamy encourages men to channel their efforts from mate-seeking to more productive means, like education and long-term business investments. The aggregate economic benefit from normative monogamy produces previously uncontemplated results that spur societal prosperity and progress.

These compelling interests should suffice against any level of judicial review. Even so, this Comment has shown that the right to control the number of persons in a marriage should not receive heightened scrutiny because the fundamental right to marry cannot be extended to a fundamental right to marry multiple persons. Therefore, courts should apply rational basis review to polygamy laws, and the states have more than adequate state interests to meet this level of scrutiny.

Too often, courts and legal scholars blur the lines between constitutional rationales and policy concerns to achieve their desired results. But not every desired social change has its basis in legal rights. History is littered with great examples of the courts protecting the constitutional rights of some against the will of the many, but that does not mean that the same analysis is appropriate in all cases. Indeed, some instances of desired social change do not impact any protected constitutional right, and those changes instead must come through the political process instead of the courts.

The push to expand marriage to include the polyamorous is one of those desired changes that is best suited for consideration by states' political processes. Challenges to polygamy laws do not ask for equality but rather for the overhaul of the Western household. That overhaul may one day become prudent as a political choice should future research on the social science discussed in this Comment show the societal benefits of polyamory outweigh the costs of abandoning monogamy. For now, however, courts and legal scholars should appreciate the role of normative monogamy in the story of Western development and continue adhering to monogamy as the marital paradigm that has enabled our society's progress.

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