



Marriage, Polygamy, and Religious Liberty

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For over a decade, conservatives have made “slippery slope” arguments that redefining marriage to include homosexual couples would inevitably open the door for further redefinitions of marriage—including the legalization of polygamy.¹

Most who advocate legal recognition of same-sex unions have adamantly denied such a link. However, some on the left have been more honest—such as the academics and other luminaries who signed a 2006 manifesto, “Beyond Same-Sex Marriage.” The manifesto endorsed legal recognition of, among other things, “Committed, loving households in which there is more than one conjugal partner.”²

Popular culture has also been at work softening the ground for the acceptance of polygamy, as cable TV networks have offered both fictional (*Big Love* on HBO³) and “reality” (*Sister Wives* on TLC⁴) series about polygamous families. On the legal front, Jonathan Turley, a nationally-known professor of constitutional law at George Washington University, has long advocated for the legalization of polygamy.⁵

Turley won a key victory in late 2013, when Utah federal district court Judge Clark Waddoups struck down a provision of Utah’s law criminalizing polygamy as unconstitutional in *Brown v. Buhman*—a case in which Turley represented Kody Brown and his *Sister Wives* of reality TV fame.⁶ At this time, no state grants legal *recognition* to polygamous relationships, and the *Brown* opinion did not mandate such recognition. However, Utah law goes further and makes it a criminal offense to publicly represent one’s self as being “married” to more than one “spouse,” even in the absence of multiple marriage licenses. The court in *Brown* struck down this latter provision.

Although this may seem a far cry from requiring legal *recognition* of polygamy, many shared the same suspicions about *Lawrence v. Texas*⁷—specifically, that the 2003 Supreme Court decision striking down criminal sanctions against homosexual conduct would pave the way for later decisions upholding a “right” to same-sex “marriage.” These suspicions have since been validated, beginning with a decision of the Massachusetts Supreme Judicial Court only six months later.⁸

Ironically, this further radical redefinition of marriage is now being promoted, in part, using an argument that is actually near and dear to the heart of religious conservatives—namely, an appeal to “religious liberty.” (Judge Waddoups, for example, insisted on referring to the practice he was legalizing as “religious cohabitation”—even though the statute makes no reference to religion.)

The purpose of this paper is to show: why laws prohibiting polygamy are consistent with established principles of religious liberty and why permitting or recognizing polygamy would be harmful to society.

(1) Polygamy may be prohibited under current Supreme Court precedent.

In *United States v. Reynolds*, 98 U.S. 145 (1878), the U.S. Supreme Court considered and rejected a free exercise challenge to a statute outlawing bigamy. The Court noted, “[i]t is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life,” and “it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.”⁹ Upon marriage “society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.”¹⁰ Congress may prohibit “actions which were in violation of social duties or subversive of good order.”¹¹ The Court noted that one would not be permitted to engage in human sacrifice or burn oneself on the funeral pile of a dead spouse just because it was claimed to be a necessary part of worship – these things could be properly prohibited as necessary for an orderly society.¹² Likewise, polygamy could be so prohibited, for it “leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.”¹³

Consistent with the Court’s view regarding the justifications for regulating polygamy in the face of a religious liberty challenge, the *New York Times*, at the time *Reynolds* was decided, called plural marriage “degrading,” and noted it went against the conscience.¹⁴

(2) The recent lower court decision that a Utah law imposing criminal sanctions for polygamous “cohabitation” should be invalidated does not prevent the prohibition of polygamy.

The Utah statute prohibiting polygamy that was recently called into question in *Brown v. Buhman* reads: “A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.”¹⁵ The Court struck down the “cohabits with another person” provision of the statute “because of its targeted effect on specifically religious cohabitation” as opposed to cohabitation for other reasons, but upheld the “purports to marry” provision by narrowly defining it to only include acts purporting to create a legal marriage – such as attempting to obtain another marriage license from the state while already married.¹⁶ The court concluded that this part of the statute “survives in prohibiting bigamy” because there is no “fundamental right” to polygamy.¹⁷

Utah is appealing the *Brown* decision, which contradicts recent Utah state court rulings on this issue.¹⁸ Even if *Brown* stands, laws prohibiting legal recognition of polygamy remain intact and perfectly consistent with Free Exercise jurisprudence under *Reynolds*.¹⁹ As the court pointed out, the Browns had “not questioned the right of the state to limit its recognition of marriage and to prosecute those citizens who secure multiple marriage licenses from the state.”²⁰

(3) Polygamy bans should survive RFRA-level scrutiny because of the many compelling government interests in prohibiting polygamy.

The interest of government in prohibiting polygamy is consistent with strong religious liberty laws and policies. The Religious Freedom Restoration Act (RFRA) contains robust protections for religious liberty: “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” and “may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”²¹ Generally applicable and neutral laws outlawing polygamy may substantially burden religious exercise, but would be permitted under RFRA as long as they further a compelling government interest, and are the least restrictive means of furthering that interest. A number of compelling government interests are outlined below and a uniform polygamy ban is the least restrictive way to achieve them. Even under the legal standard most protective of free exercise embodied in RFRA, therefore, polygamy may be outlawed and prohibited.

If one wanting to engage in polygamy brought a RFRA claim to challenge a polygamy prohibition, such a general prohibition should stand even if it substantially burdens religious exercise. A general prohibition of polygamy furthers compelling government interests for a variety of reasons including (but not limited to) the following:

A. Prohibiting polygamy prevents harm to women.

- i. Anthropologists have identified problems in modern polygamous households, such as the fact that “young girls are often tricked or coerced into marrying older wealthy men and that women and children of modern polygamy are often poorly educated, impoverished, and chronically dependent on welfare.”²²
- ii. As polygamy increases, the lives of women and children worsen.²³
- iii. Women are married younger, maternal mortality increases, and life expectancy decreases.²⁴
- iv. Women give birth more between the ages of 15-19, and sex trafficking, female genital mutilation, and domestic violence all increase.²⁵
- v. The rate at which children complete formal education decreases.²⁶
- vi. Family law will end up having inequitable consequences for women in polygamous marriages, as opposed to monogamous marriages.²⁷
- vii. Women in polygamous relationships have higher rates of HIV infection than men.²⁸

- viii. Women in polygamous relationships have a shorter life expectancy than women in monogamous relationships.²⁹
 - ix. Prohibiting polygamy advances health and welfare by “preventing the spread of sexually transmitted disease among multiple wives.”³⁰
 - x. Prohibiting polygamy prevents fraud and failure to pay child support that results in children and “single” mothers being cared for by the state.³¹ Therefore a polygamy ban advances health and welfare by protecting the financial resources of the social welfare system.³²
- B. Prohibiting polygamy prevents disease, bodily harm, violence, incest, sexual assault, and abuse – which occur within polygamous communities.³³**
- C. Polygamist cultures are more likely to produce violent males.**
- i. Polygamist cultures “need to create and sustain an underclass of unmarried and undereducated men, since in order to sustain a system where a few men possess all the women, roughly half of boys must leave the community before adulthood.”³⁴
 - ii. “Such societies also spend more money on weapons and display fewer social and political freedoms than do monogamous ones.”³⁵
 - iii. Moreover, “[w]hen small numbers of men control large numbers of women, the remaining men are likely to be willing to take greater risks and engage in more violence, possibly including terrorism, in order to increase their own wealth and status in hopes of gaining access to women.”³⁶
- D. Monogamy encourages “stable family structures.”³⁷**
- i. Monogamy ensures optimal child rearing – while a polygamous father may know who his children are, his children have to work hard to get his attention, affection, and resources which are dissipated over multiple wives and children.³⁸
 - ii. Monogamous marriages ensure that both fathers and mothers are certain that a baby born to them is theirs.³⁹
 - iii. Monogamous marriages ensure that husband and wife will together care for, nurture, and educate their children until they mature.⁴⁰
 - iv. Monogamous marriages deter both spouses from destructive sexual behavior outside the home.⁴¹
 - a. “A polygamous man, not schooled by monogamous habits, will always be tempted to add another attractive woman to his harem.”⁴²
 - b. “A co-wife, once pushed aside by another, will be sorely tempted to test her neighbor’s or servant’s bed, unless threatened with grave retribution.”⁴³
 - c. “[S]ingle men, with fewer chances to marry, will resort more readily to prostitution, seduction, and other destructive sexual behavior.”⁴⁴

The above concerns would justify a ban on polygamy, and these ample and compelling government interests are advanced by the least restrictive means of a generally applicable ban on all polygamy.

Moreover, courts have already held there is a compelling state interest in outlawing bigamy.⁴⁵ As the U.S. Court of Appeals for the 10th Circuit stated, “beyond the declaration of policy and public interest implicit in the prohibition of polygamy under criminal sanction,” Utah “has established a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage.”⁴⁶ Moreover, “[m]onogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built.”⁴⁷ Looking to *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), the court considered marriage to be the “foundation of family and society,” or “a bilateral loyalty.”⁴⁸ Therefore, “[i]n light of these fundamental values, the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.”⁴⁹

To conclude, religious freedom is protected by the First Amendment to the Constitution, RFRA, and other laws. However, religious freedom rights should not protect the practice of polygamy, which, as outlined above, has such widespread and destructive consequences that it threatens the very foundation of the governmental order which allows our constitutional freedoms to exist. For this reason, and the many compelling government interests outlined above, the government should be able to prohibit polygamy – even in the face of religious liberty laws like RFRA which apply strict scrutiny to any government regulation substantially burdening religious exercise.

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Notes:

¹ Sen. Rick Santorum (R-PA) created a firestorm of controversy when he made such an association in a 2003 interview. See, *The Associated Press*, “Excerpt from Santorum interview,” *USA Today*, April 23, 2003, accessed on April 16, 2014, http://usatoday30.usatoday.com/news/washington/2003-04-23-santorum-excerpt_x.htm.

² “Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships,” *beyondmarriage.org*, July 26, 2006, accessed on April 16, 2014, http://www.beyondmarriage.org/full_statement.html.

³ *Big Love*, IMDb, accessed on April 3, 2014, <http://www.imdb.com/title/tt0421030/>.

⁴ *Sister Wives*, TLC, accessed on April 3, 2014, <http://www.tlc.com/tv-shows/sister-wives>.

⁵ Jonathan Turley, “Polygamy laws expose our own hypocrisy,” *USA Today*, October 3, 2004, accessed on April 16, 2014, http://usatoday30.usatoday.com/news/opinion/columnist/2004-10-03-turley_x.htm.

⁶ *Brown v. Buhman*, No. 2:11-cv-0652 (D. Utah Dec. 13, 2013).

⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁸ See *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941 (Mass. 2003).

⁹ *United States v. Reynolds*, 98 U.S. 145, 165-66 (1878).

¹⁰ *Ibid.*

¹¹ *Ibid.*, 164.

¹² *Ibid.*, 166.

¹³ *Ibid.*

¹⁴ “A Blow at Polygamy,” *New York Times*, January 8, 1879, accessed on April 16, 2014, <http://query.nytimes.com/mem/archive-free/pdf?res=F10910FF395A137B93CAA9178AD85F4D8784F9>.

¹⁵ Utah Code Ann. § 76-7-101 (1999).

¹⁶ *Brown v. Buhman*, No. 2:11-cv-0652, at 23 (D. Utah Dec. 13, 2013),

¹⁷ *Ibid.*, 23, 31.

¹⁸ See, e.g., *State v. Holm*, 137 P.3d 726 (Utah 2006); *State v. Green*, 99 P.3d 820 (Utah 2004).

¹⁹ See *Reynolds*, 98 U.S. at 165-66. Utah state courts that have considered Free Exercise challenges to Utah’s bigamy laws determined that the laws pass constitutional muster. See *State v. Holm*, 137 P.3d 726 (Utah 2006); *State v. Green*, 99 P.3d 820 (Utah 2004). However, the courts in these cases were not working under RFRA or any such version of RFRA in Utah law. They were relying on federal free exercise jurisprudence under *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), which permitted neutral and generally applicable laws that did not facially discriminate religion or target religious practices specifically to escape strict scrutiny. Under RFRA such laws still have to pass strict scrutiny, so it is more likely that Utah’s laws could fail to pass muster under higher RFRA-level protections.

²⁰ *Brown*, No. 2:11-cv-0652, at 68.

²¹ Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1.

²² John Witte Jr., “Why Monogamy is Natural,” *On Faith*, October 2, 2012, accessed on April 16, 2014, <http://www.faithstreet.com/onfaith/2012/10/02/why-monogamy-is-natural/12105>.

²³ “Expert Witness Dr. Rose McDermott,” *B.C. Polygamy Report*, December 16, 2010, accessed on April 16, 2014, <http://polygamyreport.blogspot.com/2010/12/expert-witnes-dr-rose-m-dermott.html>.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Rose McDermott, “Polygamy: More Common Than you Think,” *The Wall Street Journal*, April 1, 2011, accessed on April 16, 2014, <http://online.wsj.com/news/articles/SB10001424052748703806304576234551596322690?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052748703806304576234551596322690.html>.

²⁹ *Ibid.*

³⁰ Keith Jaasma, Note, *The Religious Freedom Restoration Act: Responding to Smith, Reconsidering Reynolds*, 16 *Whittier L. Rev.* 211, 292 (1995).

³¹ Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace*, 5 *N.Y.U. J. Legis. & Pub. Pol’y* 225, 241-45 (2001).

³² *Ibid.*

³³ *Ibid.*

³⁴ McDermott, “Polygamy: More Common Than you Think.”

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Keith Jaasma, Note, *The Religious Freedom Restoration Act: Responding to Smith, Reconsidering Reynolds*, 16 *Whittier L. Rev.* 211, 292 (1995).

³⁸ Witte, “Why Monogamy is Natural.”

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985). However, like the Utah state courts mentioned above, *Potter* was not working under RFRA, and looked to the controlling nature of the Supreme Court’s decision in *Reynolds*. The 10th Circuit evaded the tougher standard of review under *Yoder* by distinguishing *Reynolds* as dealing with “health, safety, and general welfare” matters which may be more freely regulated by the government even when touching upon matters of free exercise. Though this reasoning could be used today when facing a free exercise challenge to a polygamy prohibition, it may be more difficult for a court to avoid applying a statute (like a RFRA) as opposed to distinguishing a case. Advocates of polygamy may argue that when combined with the numerous rulings deciding in favor of a right to same sex marriage (which minimized the state’s interest in regulating marriage), such a free exercise challenge today could be taken more seriously. However, if “health, safety, and morals” could be linked to other harms related to polygamy specifically, as opposed to subjects such as optimal child rearing which have

already been raised in the recent marriage rulings, laws prohibiting polygamy may stand a better chance of being sustained.

⁴⁶ *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985). Ruling under a rational basis standard, other courts have recognized the government has an interest in outlawing polygamy as a recognized form of “marriage” because it is a building block of society. *State v. Green*, 99 P.3d 820, 829 (Utah 2004) (citing *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring)). The government also has an interest in prohibiting bigamy in order to prevent “the perpetration of marriage fraud” and the “misuse of government benefits associated with marital status.” *Id.* at 830. Finally, “Utah's bigamy statute serves the State's interest in protecting vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support.” *Id.* The closed nature of many polygamous communities raises the likelihood that these harms will go undetected. *Id.* The court even considered the possibility that all these interests could be compelling state interests. *Id.*

⁴⁷ *Potter*, 760 F.2d at 1070.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*