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I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America

Cassiah M. Ward

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I NOW PRONOUNCE YOU HUSBAND AND WIVES:
LAWRENCE V. TEXAS AND THE PRACTICE OF
POLYGAMY IN MODERN AMERICA

On June 26, 2003, the Supreme Court of the United States decided *Lawrence v. Texas*,¹ declaring that a Texas statute prohibiting homosexual sodomy in the privacy of an individual's home² was unconstitutional.³ This decision overturned the Court's 1986 decision in *Bowers v. Hardwick*,⁴ which upheld the constitutionality of a Georgia statute criminalizing homosexual sodomy⁵ and expressly denied the existence of a fundamental right to privacy, specifically the right to consensual sexual privacy or to define one's own sexuality.⁶ In *Lawrence*, however, the Court established the right of homosexuals to participate freely in "intimate sexual conduct" within the privacy of their own homes.⁷ The Court in *Lawrence* emphasized that the case concerned more than the simple right to "engage in certain sexual conduct";⁸ it outlined a deeper and more expansive fundamental right to define one's own relationships and happiness by focusing on the role that intimate conduct plays in the establishment of the personal bonds that are integral to that right.⁹

Which rights are protected under this new decision and whether a person has an unconditional right to define his or her own sexuality and act upon that self-definition remain uncertain. Close examination of the *Lawrence* opinion allows for an exploration of its scope and potential applicability to other sexual practices that society has traditionally considered deviant. Underlying the decision in *Lawrence*, which significantly expands personal liberties, is a concern that the right it granted was too broad and that it will be extended to include other groups with nontraditional sexual

1. 539 U.S. 558 (2003).

2. TEXAS PENAL CODE ANN. § 21.06(a) (2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.").

3. See *Lawrence*, 539 U.S. at 578.

4. 478 U.S. 186 (1986).

5. GA. CODE ANN. § 16-6-2(a) (2003) ("A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.").

6. See *Bowers*, 478 U.S. at 191 (determining that the right to privacy discussed in *Griswold v. Connecticut*, 381 U.S. 479 (1965), did not extend so far as to grant a right to engage in homosexual sodomy, even if the act was consensual).

7. 539 U.S. at 562.

8. *Id.*

9. See *id.* at 567.

practices such as polygamy, incest, or adultery. The effects of these practices extend far beyond the privacy of one's own home or one's own bedroom.

The notoriety of the Elizabeth Smart¹⁰ story and the publication of Jon Krakauer's novel *UNDER THE BANNER OF HEAVEN*¹¹ cast the existence of polygamy¹² into the foreground of American culture.¹³ Experts estimate that more than thirty thousand — and as many at one hundred thousand — Fundamentalist Mormons currently practice polygamy in Utah, Arizona, Canada, and Mexico.¹⁴ In light of this, it is even more appropriate to consider the possible conjunction of the practice of polygamy and the right to privacy in one's own home delineated in *Lawrence*.

To determine the potential success of construing the Court's language in *Lawrence* as a justification for polygamy, this note will address the following three key areas: the historical and modern practice of polygamy in the United States, the Court's rationale in *Lawrence*, and elements of a due process claim that could be levied on behalf of polygamists. A thorough analysis of these factors reveals that a state's interest in prohibiting the practice of polygamy far outweighs any right that a polygamist might have to continue his practices. Consequently, the Court's protection will not extend to those seeking a legal right to practice polygamy.

INTRODUCTION TO POLYGAMY

Polygamy is most often thought of as a problem belonging to another time and place.¹⁵ Polygamy is often associated with countries and cultures other than the United States, and frequently

10. See JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* 41 (2003) (noting the abduction of Utah teenager Elizabeth Smart, which was carried out by a self-proclaimed fundamentalist prophet who proclaimed God revealed to him that Elizabeth was to be taken as his second wife, gave national attention to modern polygamy).

11. *Id.*

12. For the purposes of this note, unless otherwise noted, the term "polygamist" is used in reference to Fundamentalists Mormons practicing polygamy in the United States, primarily in the Southwest. For the purposes of this note, the terms 'plural marriage,' 'celestial marriage,' and 'spiritual wifery' will all be considered synonymous to polygamy.

13. KRAKAUER, *supra* note 10, at 41 ("Details of the audacious kidnapping were reported breathlessly and without pause by the news media, leaving much of the country aghast and riveted.").

14. *Id.* at 5 (citing RICHARD N. OSTLING & JOAN K. OSTLING, *MORMON AMERICA: THE POWER AND THE PROMISE* (1999) and MICHAEL D. QUINN, *THE MORMON HIERARCHY: EXTENSIONS OF POWER* (1997)).

15. See *id.* at 100.

with the practice of Islam.¹⁶ In the United States, polygamy is most commonly associated with Mormon Church practices in the late 1800's and the teachings of Joseph Smith, the Church's prophet and founder.¹⁷ The following paragraphs provide a brief history of the Mormon Church, polygamy, and the controversy and litigation surrounding the practice.

A Brief History of Polygamy

In 1830, Joseph Smith founded the Church of Jesus Christ of Latter-day Saints.¹⁸ The Church's teachings and tenets are based upon revelations Smith reportedly received throughout his lifetime.¹⁹ One such revelation, recorded as *The Doctrines and Covenants*, Section 132, decreed that 'worthy' male members of the Church were to take multiple wives.²⁰ According to Smith, God had commanded this as a means of spreading His true word.²¹

The practice of polygamy in early Mormonism did not begin until 1843, when Joseph Smith announced his revelation to the public and to the Church leaders.²² Smith apparently received the revelation as early as 1831 and began taking plural wives as early as 1835.²³ It is estimated that he took at least thirty-three wives in

16. See *id.* ("Joseph [Smith] was not the only person to draw parallels between the founding prophets of Mormonism and Islam. Most such comparisons were made by Gentile critics intending to denigrate the Saints and their faith, but certain undeniable similarities were also noted by those sympathetic to Joseph's church.").

17. See *id.* at 5.

18. KRAKAUER, *supra* note 10, at 5. The Church was formally founded in 1830, although its inception dates back to 1827 when Joseph Smith found and translated the scriptures that comprise the Book of Mormon. *Id.*

19. *Id.* at 70.

20. *The Doctrines and Covenants*, Section 132, reprinted in KRAKAUER, *supra* note 10, at 125.

If any man espouse a virgin, and desire to espouse another . . . then he is justified; he cannot commit adultery for they are given unto him And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him; therefore he is justified But if one or either of the ten virgins, after she is espoused, shall be with another man, she has committed adultery, and shall be destroyed; for they are given unto him to multiply and replenish the earth, according to my commandment.

Id.

21. See generally KRAKAUER, *supra* note 10, at 124-27. It is interesting to note that at the time of this revelation, Joseph Smith was being pressured by the Church because of his womanizing and extramarital encounters. *Id.*

22. See EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1839-1900* 40 (1988).

23. *Id.*

his lifetime.²⁴ By 1852, the Church openly endorsed polygamy.²⁵ Mormon men felt themselves duty-bound to the word of God as given to them by Joseph Smith,²⁶ who asserted that God's will was for Mormons to procreate and spread their religion and the true teachings of God.²⁷ For this reason, men saw polygamy as a holy obligation and resisted attempts to regulate and eradicate its practice in the Utah territory.²⁸

Firmage and Mangrum point out that "[t]he preeminent religious obligation to build Zion necessarily challenged the constitutional boundary between church and state."²⁹ Questions, fundamental in the nation from its founding, about whether secular laws or religious rules regarding economic or social relations should prevail, flourished in the context of Mormon polygamy.³⁰ Because "the highest ecclesiastical authorities directed certain believers to enter polygamous marriages," it became unclear what effect legal sanctions should have on individuals faced with the "choice between obedience to God or the state."³¹

However, polygamy was not as widespread as is commonly believed.³² The number of men practicing polygamy was limited because only 'worthy' members of the Church were allowed to take multiple wives.³³ These men were both morally and financially stable.³⁴ Polygamists were typically Church leaders.³⁵ Consequently, legislation enacted to criminalize polygamous marriage "paralyzed Mormon society by removing its leadership" and was instrumental in the downfall of the Utah government.³⁶

24. KRAKAUER, *supra* note 10, at 5. He may have married as many as forty-eight women. *Id.*

25. *See id.* at 119-20.

26. *See id.* at 5-6.

27. *See id.*

28. *See id.*

29. FIRMAGE & MANGRUM, *supra* note 22, at 3.

30. *Id.*

31. *Id.*

32. *See id.* at 168.

33. *Id.*

34. *See id.*

35. *Id.* It is interesting to compare these original Mormon polygamists to the modern Fundamentalist Mormon polygamists. The majority of men practicing polygamy today are not affluent or well-respected leaders of the Church. They tend to be outcasts of the Church who often subsist on welfare from the State to support their many children. *See generally* KRAKAUER, *supra* note 10.

36. FIRMAGE & MANGRUM, *supra* note 22, at 168 (discussing the impact of "[t]he conviction and imprisonment of polygamists").

The History of Legislation Regarding Polygamy

Stigma still lingers from the Church's support of polygamous practices,³⁷ but the Church's public renunciation of polygamy and polygamists, in conjunction with the statutes that Congress enacted and enforced against multiple marriages, have dispelled most rumors of persisting polygamy within the Mormon Church.³⁸

To quell polygamy and release the Mormon stronghold on the Utah government, Congress enacted several laws during the nineteenth century addressing governmental control of the Territory and the regulation of polygamy in Utah.³⁹ The first efforts to gain federal control of Utah began in 1854, when Congress attempted to bar polygamists, and Mormons in general, from gaining title to the lands on which they were living.⁴⁰ The federal government surveyed land in Utah but refused to open a land office, making it impossible for Mormons to rightfully gain ownership of their land.⁴¹ In response, the Church established its own system for surveying land, granting title, and settling land disputes.⁴²

Less than a decade after the Civil War shifted Congressional focus away from polygamy, Congress took increasingly crippling steps toward gaining federal control over Utah.⁴³ In 1862, Congress passed the Morrill Act,⁴⁴ making multiple marriages punishable by a \$500 fine or five years' imprisonment.⁴⁵ The Act also revoked the Mormon Church's incorporation and declared that no religious or charitable organization could own more than \$50,000 worth of land.⁴⁶ The United States could rightfully claim any amount beyond this threshold.⁴⁷ The Morrill Act was not retroactive and, thus, had the desired result: it damaged the Mormon Church more strongly than other, more established and accepted religious or charitable

37. See KRAKAUER, *supra* note 10, at 5.

38. See FIRMAGE & MANGRUM, *supra* note 22, at 205.

39. See generally *id.* at chs. 6 and 7.

40. See *id.* at 131.

41. See *id.*

42. See *id.*

43. See *id.*

44. Morrill Act, 37 Cong., ch. 126, 12 Stat. 501 (1862). The Act was named for Representative Justin Morrill of Vermont. See FIRMAGE & MANGRUM, *supra* note 22, at 131. In 1856 he introduced a bill that provided that "no person having a husband or wife living should marry any other person, whether married or single, in a Territory of the United States." Morrill Act § 1.

45. Morrill Act § 1.

46. Morrill Act § 3.

47. See FIRMAGE & MANGRUM, *supra* note 22, at 131.

organizations in the nation.⁴⁸ Only lands acquired after the Act's passage were restricted;⁴⁹ therefore, the then-developing Mormon Church suffered significantly more than established organizations that had already accumulated large amounts of land.

The Morrill Act was only the first in a series of legislative acts aimed not only at polygamy but also at the core of the Church's structure.⁵⁰ For example, the Poland Act took judicial power from the existing state government, which was controlled by the Church, vesting that power in the federal government and facilitating further damage to the Church.⁵¹ The disaccord between the United States federal government and the territory of Utah continued to grow and began pervasively affecting the Mormon-dominated government in Utah.⁵² Congress enacted the Poland Act⁵³ in 1874 in response to distress over the Mormon-controlled Utah judiciary and its process of jury selection.⁵⁴ The Act prohibited the territory from selecting juries, resulting in Mormons being disallowed from participation in their own judicial system.⁵⁵ The federal government took control of jury selection and set the stage for systematic prosecution of polygamy offenses.⁵⁶

After *Reynolds v. United States*,⁵⁷ Congress recognized that further measures were necessary to facilitate the enforcement of anti-polygamy laws.⁵⁸ In response to this and presidential concern, Congress enacted the Edmunds Act in 1882.⁵⁹ The Act "imposed civil disabilities on polygamists and dramatically simplified the

48. *See id.*

49. *Id.* ("[P]roperty acquired prior to the act's passage was not subject to those limits.").

50. *See id.* at 132 ("[W]hile the most flamboyant rhetoric was aimed at polygamy, Congress's target was as much the social power of the Mormon church as the Mormon practices.").

51. *See id.* at 148 ("The Poland Act . . . resolved the rivalry between territorial and judicial officers by placing the judiciary firmly in federal hands.").

52. *See id.* at 140-41.

53. Poland Act, 43 Cong. Ch. 469, 18 Stat. 253 (1874).

54. FIRMAGE & MANGRUM, *supra* note 22, at 140-44.

55. *Id.* at 144; *see generally* Poland Act.

56. *See* FIRMAGE & MANGRUM, *supra* note 22, at 148-49. Although the Poland Act increased the likelihood of prosecution for polygamy because it facilitated the process and made success more probable, prosecutions of polygamy did not automatically increase dramatically because it was difficult for the government to meet its burden of proof. Demonstrating that a man had married more than one woman was extremely difficult because Utah did not keep marriage records at that time. It was not until four years later that the *Reynolds* prosecution was possible. *See* discussion of *Reynolds*, *infra* pp. 136-37.

57. 98 U.S. 145 (1878). For a discussion of *Reynolds* *see infra* pp. 136-37.

58. *See* FIRMAGE & MANGRUM, *supra* note 22, at 160.

59. Edmunds Act, 47 Cong. Ch. 47, 22 Stat. 30 (1882). For a discussion of the Act, *see* FIRMAGE & MANGRUM, *supra* note 22, at 161-67. The Act is named after George F. Edmunds, the Vermont senator who proposed the bill. *Id.*

prosecution of polygamy.⁶⁰ Most importantly and most effectively, the Act changed the evidentiary requirement for proving polygamy.⁶¹ Instead of requiring *marriage* to two or more women at once, simply *cohabiting* with two or more women was sufficient to imply guilt of a polygamy offense.⁶² The Act also affected the Mormons' potential influence over the prosecution of polygamy.⁶³ It provided that any man who was or had been a polygamist could be excluded from a jury.⁶⁴ In addition to limiting polygamists judicially, the Edmunds Act also implemented civil restraints.⁶⁵ Men practicing polygamy were prohibited from voting or holding office.⁶⁶

These divisive attacks on polygamy had the desired effects on Mormons in Utah.⁶⁷ The pressure that the federal government placed on the Church and on the territory and the secession of power prompted Church President Wilford Woodruff to issue the Manifesto, a statement of the Church's intention to submit to federal laws.⁶⁸ This action facilitated Utah's admission into statehood in 1896.⁶⁹

Despite the general effectiveness of these regulations and precautionary measures, a population of Fundamentalist Mormons,⁷⁰ who adamantly support Joseph Smith's original teachings and endorse and practice polygamy, still exists.⁷¹

60. FIRMAGE & MANGRUM, *supra* note 22, at 161.

61. *Id.*

62. *Id.*

63. *See id.* ("Section 5 of the Edmunds Act restricted the Mormons' ability to influence prosecutions by providing that potential jurors who were or had been polygamists could be questioned on that subject and excluded for cause.")

64. *Id.*

65. *See id.* at 162.

66. *See id.* at 161.

67. *See id.* at 168. Between the enactment of the Edmunds Act and the renunciation of polygamy by Mormons, there were 1004 convictions for unlawful cohabitation and 31 for polygamy. *Id.*

68. *Id.* at 205.

69. *Id.* (noting that after Utah was admitted into statehood, the Church's property was returned and the focus on anti-polygamy law abated).

70. It is important to note that, although these fundamentalist groups are Mormon by name, they are not affiliated with the Church of Jesus Christ of Latter-day Saints. The Mormon Church makes a point of excommunicating any of its members who practice polygamy. There is a general disassociation by the Church. "Mormon authorities treat fundamentalists as they would a crazy uncle – they try to keep the 'polygs' hidden in the attic, safely out of sight" because of the negative light they shed on Mormonism in general. KRAKAUER, *supra* note 10, at 5.

71. *See generally* KRAKAUER, *supra* note 10. In his novel, Krakauer addresses the issue of modern-day polygamy in America. He explores the issue through the story of the Lafferty brothers, members of a divergent Fundamentalist Mormon sect, who murdered their sister-in-law and her daughter because of the woman's opposition to their polygamist practices. *Id.* at 4-5.

This is most visible in Colorado City, a colony of Fundamentalist Mormons, home to at least three Fundamentalist sects, including the world's largest, the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS).⁷² These polygamists assert that they are bound by the word of God, and that polygamy is a practice that brings them closer to God.⁷³ For these fundamentalists, polygamy is not just about sex or engaging in certain sexual practices.⁷⁴ Polygamists view their practices, both sexual and social, similarly to the way that the Supreme Court addressed homosexual sodomy in *Lawrence*. They seek not simply the ability to engage in desired sexual practices but also the ability to define their own sexuality and their own way of life through that sexuality.⁷⁵ Polygamy is not just about what happens in the bedroom, it is about what happens in the home and in the communities that these polygamous homes comprise.

Polygamy as a Fundamental Right

The United States Constitution places limits on the amount of control the government may exert over its citizens.⁷⁶ The First Amendment of the Constitution allows Americans to observe the religion of their choice, free from governmental interference.⁷⁷

In 1878, George Reynolds, the private secretary to Brigham Young, the president of the Mormon Church, was charged, by the territory of Utah, with practicing bigamy.⁷⁸ Reynolds defended his actions by claiming that "members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the

72. See *id.* at 10-16 (focusing, *inter alia*, on the Colorado City colony).

73. *Id.* at 5 ("Mormon fundamentalists passionately believe that Saints have a divine obligation to take multiple wives. Followers of the FLDS faith engage in polygamy, they explain, as a matter of religious duty.").

74. *Id.*

75. See generally *Lawrence*, 539 U.S. 558.

76. See generally U.S. CONST. amend. I-XXVI.

77. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" *Id.* The first amendment of the United States Constitution provides that Congress shall neither prohibit nor endorse any particular religion or set of religious ideals. This clause, known as the Free Exercise Clause, grants citizens the right to hold religious beliefs and to engage in certain religiously motivated conduct.

78. See generally *Reynolds*, 98 U.S. 145.

founder and prophet of said church.”⁷⁹ Reynolds asserted that, because polygamy was practiced in the name of God, it was protected by the Free Exercise Clause of the First Amendment of the Constitution,⁸⁰ despite the fact that it was intentionally committed in violation of existing state law.⁸¹ The Supreme Court rejected this argument, stating that the First Amendment does not provide absolute immunity for all religiously motivated conduct and that it was necessary to determine which religious freedoms the Constitution guaranteed.⁸² The Court determined that religious principles leading to “overt acts against peace and good order”⁸³ are not protected by the Free Exercise Clause.⁸⁴ Consequently, religious motivation did not negate the criminal intent necessary to convict Reynolds for bigamy under Utah statute § 5352.⁸⁵ The Free Exercise Clause protects only religious beliefs and not religious practices, and consequently polygamy is a not constitutionally protected right under the First Amendment.⁸⁶

Statutory Prohibitions and Recent Litigation Over Polygamy

Polygamy was not a major subject of litigation after *Reynolds* precluded using the Free Exercise Clause as a defense for polygamy.⁸⁷ However, federal and state statutes that prohibit polygamy and cohabitation still exist.⁸⁸ In Utah (the state that has historically been the focal point for scrutiny of polygamy), Annotated Code section 30-1-2 defines marriage and specifically prohibits any person from marrying more than one person or a person under eighteen years of age.⁸⁹

79. *Id.* at 162.

80. *Id.*

81. UTAH REV. STAT. § 5352 (1878) reprinted in *Reynolds*, 98 U.S. at 146 (“Every person having a husband or wife living, who marries another . . . is guilty of bigamy.”).

82. See *Reynolds*, 98 U.S. at 162 (“The word ‘religion’ is not defined in the Constitution The precise point of the inquiry is, what is the religious freedom which has been guaranteed [by the Constitution].”).

83. *Id.* at 166.

84. See *id.*

85. *Id.* at 167.

86. *Id.* at 166.

87. See *FIRMA & MANGRUM*, *supra* note 22, at 157 (“Even though *Reynolds* continues to be cited as binding precedent, the attitudes of courts toward religious expression are markedly different today.”).

88. *KRAKAUER*, *supra* note 10, at 24 (“polygamy is a crime in all fifty states, as well as Canada.”).

89. UTAH CODE ANN. § 30-1-2 (2003) (“the following marriages are prohibited and declared void: when there is a husband or wife living, from whom the person marrying has not been divorced.”).

Few people were subsequently prosecuted for polygamy until 1991, when Tom Green was convicted on four counts of bigamy.⁹⁰ Green's prosecution and conviction brought polygamy out from the privacy of the bedroom and into the spotlight,⁹¹ and led to the discovery of the relatively widespread practice of polygamy in the Southwestern United States.

The June 5, 2002, kidnapping of Elizabeth Smart brought polygamy to national attention, focusing, this time, on polygamy as victimization.⁹² Elizabeth was a Mormon, familiar with the teachings of Joseph Smith.⁹³ It is plausible that her Mormon beliefs allowed her captor to gain control over her,⁹⁴ as it seems that a girl raised under Joseph Smith's teachings and presented with a 'revelation' that polygamy is the true way to salvation would be more susceptible to this indoctrination than would a girl who was not raised in the Mormon Church.

The cumulative weight of these two unexpected events prompted people to question whether the 'eradication' of polygamy in the nineteenth century had been successful. These events, and the curiosity they stimulated, led to an examination of the existing polygamist culture in the United States and encouraged this consideration of the possible implications of the Supreme Court's *Lawrence* decision for issues of sexual self-identification beyond consensual homosexual sodomy.

In January 2004, the first challenge to the Utah statute gave credence to the concerns voiced in Justice Scalia's *Lawrence* dissent.⁹⁵ Two Mormon, Utah residents filed a claim against the state, seeking to get married despite the man's existing marriage

90. UTAH CODE ANN. § 76-7-101(1) (2003). ("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."). In addition to the bigamy counts, Green was also charged with welfare fraud. Between the years of 1989 and 1999, Green had received \$647,000 in both federal and state government assistance. See KRAKAUER, *supra* note 10, at 20.

91. See KRAKAUER, *supra* note 10, at 19-20 (discussing Green's "insatiable thirst for publicity" and subsequent arrest and prosecution).

92. See *id.* at 47-48 (discussing Elizabeth's concern for her captors and how she "cried all the way to the [police] department" after being found).

93. See *id.* at 44-45 (discussing how Smart's abductor manipulated her with "the religious indoctrination [she] had received since she was old enough to talk").

94. *Id.*

95. See Leonard Post, *Lawyers Square Off Over Polygamy Case; Scalia's Dissent in the Texas Sodomy Case is Echoed in a Utah Action*, 26 NATIONAL LAW JOURNAL 4 (2004) (discussing Justice Scalia's concern that after the invalidation of state laws prohibiting consensual sodomy laws, laws banning other types of sexual behaviors would also be invalidated).

and asking for relief to live "as their forebears did."⁹⁶ They claim that the Utah statute violates their right to engage in intimate expression within the privacy of their own home.⁹⁷ The couple will face serious and difficult hurdles in their challenge, as polygamy has been outlawed statutorily by both the federal government and in the State of Utah.⁹⁸

Furthermore, the *Reynolds* decision precludes any free exercise claim.⁹⁹ The plaintiff's attorney, Brian Barnard, predicts that the Supreme Court will use a different analysis and grant the couple's prayer for relief.¹⁰⁰ Barnard cites *Church of the Lukumi Bablu Aye v. City of Hialeah*,¹⁰¹ which focused on whether the law in question was singling out a particular religious group,¹⁰² asserting that statutory prohibitions against polygamy are similarly aimed directly at one religious group: Mormons.¹⁰³ This interpretation, however, is inconsistent with the holding in *Lukumi*. The Court in *Lukumi* looked to the *inclusivity* of the ordinance.¹⁰⁴ The problem was not that there were certain exceptions to the ordinance, but that there were too many exceptions to the ordinance.¹⁰⁵ Killing animals was only prohibited for 'ritual' and 'sacrificial' purposes.¹⁰⁶ It was permissible to kill animals for any other reason, such as food consumption and sport.¹⁰⁷ The same inconsistencies are not at play in the case of polygamy. The regulation prohibiting multiple marriages applies to everyone equally. There are no exceptions. The claim that the law is neither neutral nor generally applicable is unsupportable. The plaintiffs are unlikely to succeed under either alleged theory.

96. *Id.* at 4.

97. *See id.*

98. *See* discussion of nineteenth century Congressional legislation, *supra* pp. 133-35; discussion of Utah legislation prohibiting bigamy, *supra* pp. 137.

99. *See generally Reynolds*, 98 U.S. 145; *see also* discussion of *Reynolds*' constitutional challenges to anti-polygamy legislation, *supra* pp. 136-37.

100. *See Post, supra* note 95, at 4.

101. 508 U.S. 520 (1993).

102. *See id.* at 536. In *Lukumi* the ordinance in question prohibited animal sacrifice. Although the law was facially neutral, the Court determined that it was actually aimed specifically at the Santerian religion. *Id.*

103. *See Post, supra* note 95, at 4.

104. *See Lukumi*, 503 U.S. at 536.

105. *Id.*

106. *Id.*

107. *Id.*

ALTERNATIVE CONSTITUTIONAL JUSTIFICATIONS FOR THE PRACTICE OF POLYGAMY

Although polygamy has not been a focal point of judicial scrutiny in recent years, the broader subject of privacy in the bedroom and the idea of personal liberty in choosing one's relationships has been the subject of much debate. There is concern whether polygamy might be justified under a claim that consenting adults have a fundamental privacy right to practice polygamy.¹⁰⁸ This idea did not even merit consideration before *Lawrence* because the Court had consistently refused to acknowledge any fundamental right to privacy as a personal liberty guaranteed by the Constitution.¹⁰⁹ This question necessitates a re-examination of the issue because of the possible implications of the *Lawrence* decision.

The Polygamist Argument

Polygamists can obtain sanctuary under the *Lawrence* decision only if the parties involved are consenting adults.¹¹⁰ Polygamist men maintain that they are acting out of duty to God and that their multiple wives see polygamy as a holy obligation as well, an obligation that they are happy to fulfill.¹¹¹

Polygamists might also argue that their marriages are not state sanctioned: they are 'spiritual' or 'celestial' marriages that take place in a church and do not involve breaking any laws, as they are purely religious. *Fundamentalist* Mormons assert that the strictly religious nature of their marriages places them beyond governmental control.¹¹² Polygamists might contend that a due process right to engage in polygamy resulted from the creation of the right to sexual

108. *Lawrence*, 539 U.S. at 577-78. The Court never explicitly stated that the right of privacy being granted was fundamental, as Justice Scalia highlighted in his dissent. Scalia stated, "The impossibility of distinguishing homosexuality from other traditional 'morals' offenses is precisely why *Bowers* rejected the rational-basis challenge." *Id.* at 590 (Scalia, J., dissenting). The Court, however, used a substantive due process analysis to decide *Lawrence*, the type of analysis traditionally used when a *fundamental right* is infringed, even though it labeled its standard of review the 'rational basis test.' Therefore, when analyzing *Lawrence* in a broader context and exploring its possible application to polygamy, it is appropriate to use the stricter *Lawrence* 'rational basis' as the standard of review rather than the strict scrutiny standard that would be employed were the right to privacy expressly classified as fundamental. Through the *Lawrence* 'rational basis' review, the compelling interest that states must have for prohibiting polygamy must outweigh any interest that the polygamist might have in continuing his practice.

109. See *Bowers*, 478 U.S. at 191.

110. See generally *Lawrence*, 539 U.S. 558.

111. KRAKAUER, *supra* note 10, at 5-6.

112. See *id.* at 24.

privacy in *Lawrence*, a right that might help polygamy pass the necessary rational basis review. However, an examination of the different factors at play in polygamous marriages and families will show that no justification exists for the continued practice of polygamy.

HISTORICAL INFLUENCES IN *LAWRENCE*

To understand how far the decision in *Lawrence* might feasibly extend, it is necessary to understand the rationale behind *Lawrence* and the historical influences that guided the Court. Every judicial decision involves a consideration of previous Court decisions and the cultural and historical influences that shaped those cases, especially one in which the Court grants a right that has previously been denied or disregards *stare decisis*.¹¹³ The Court must also realize that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry,"¹¹⁴ meaning that cases decided on similar facts may be influenced by a changing cultural climate. The Court must modify prior decisions in accordance with these changing ideals.

The *Lawrence* decision discussed cultural and historical influences in depth.¹¹⁵ It specifically addressed the shift in American cultural ideals since the *Bowers* decision¹¹⁶ and concluded that *Bowers* employed faulty logic and inaccurate historical interpretations.¹¹⁷ The *Lawrence* Court determined that the *Bowers* Court did not even address the right question.¹¹⁸ In *Bowers*, the Court treated the issue simply as whether two consenting adults had the right to engage in homosexual sodomy¹¹⁹ and determined that they did not.¹²⁰ The *Lawrence* decision redefined the issue as whether the individual has a right to engage in certain sexual behaviors in the privacy of his bedroom without fear of government proscription or prosecution.¹²¹ *Lawrence* is grounded largely in the lack of any historical legal treatment of homosexuality, whereas the *Bowers* Court rested its reasoning largely on the purported

113. *Lawrence*, 539 U.S. at 572. *Stare decisis* is "the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

114. *Lawrence*, 539 U.S. at 572 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998)).

115. *Id.* at 568-73.

116. *Id.*

117. *Id.* at 578.

118. *Id.* at 567.

119. *Bowers*, 478 U.S. at 190.

120. *Id.* at 191.

121. See *Lawrence*, 539 U.S. at 566-67.

historical view of homosexuality as deviant behavior, contrary to the laws of God and man.¹²² The original laws in colonial America concerning 'sexually deviant' behavior were anti-*sodomy*, regardless of sexual orientation, not anti-*homosexual*.¹²³ The concept of homosexuality did not emerge until the late nineteenth century,¹²⁴ so it is highly unlikely that the English criminal laws, upon which the United States' systems are based, would have directly addressed or proscribed homosexuality.¹²⁵

Laws criminalizing homosexuality emerged in the United States in the 1970s.¹²⁶ Until then, existing decisions dealt only with sexual conduct in public places.¹²⁷ The purpose of these laws was to prohibit non-procreative sexual conduct generally.¹²⁸ The *Lawrence* Court criticized the fact that these statutes regulated conduct that was not harmful to others and that such prohibitions undermined respect for the law by penalizing conduct in which many people engaged.¹²⁹ These laws were arbitrarily enforced and thus invited the danger of blackmail.¹³⁰ To avoid this problem, evidentiary standards for convicting a man of sodomy were very strict:¹³¹ a man could not be convicted based solely on the testimony of a consenting partner.¹³² This evidentiary standard, viewed in conjunction with the infrequency of prosecution for sodomy, "makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults."¹³³

The Court in *Lawrence* also relied on an analysis of the Model Penal Code.¹³⁴ The Code did not provide for criminal penalties for sexual relations conducted in private,¹³⁵ nor did it provide for the criminalization of actions that did not harm anyone.¹³⁶ From the

122. *Bowers*, 478 U.S. at 194 (stating that "proscriptions against that conduct have ancient roots . . . Sodomy was a criminal offence . . . forbidden by the laws of the original 13 states").

123. *Lawrence*, 539 U.S. at 568.

124. *Id.*

125. *See id.*

126. *Id.* at 570.

127. *Id.*

128. *See id.* It is uncertain what effect this historical interpretation would have on an analysis of polygamy as a protected practice. Even though polygamy seems to focus on procreation, this would not be a justification by modern standards and modern acceptance of non-procreative sexual activity.

129. *Id.* at 572.

130. *Id.*

131. *Id.* at 569.

132. *Id.*

133. *Id.* at 569-70.

134. *Id.* at 572.

135. MODEL PENAL CODE § 213.2 (1980); *see also Lawrence*, 539 U.S. at 572.

136. MODEL PENAL CODE § 213.2; *see also Lawrence*, 539 U.S. at 572.

history of anti-sodomy laws and the current status of sodomy in the criminal law, the Court concluded that the main purpose of these early laws was to prevent predatory acts.¹³⁷ Presumably, this concern continues to be viable and would be a key reason to differentiate between homosexual sodomy and polygamy when looking to the intent of the Court's decision and how far the right granted in *Lawrence* extends.

THE IMPLICATIONS OF *LAWRENCE* AND THE 'RIGHT TO PRIVACY' ON THE PRACTICE OF POLYGAMY IN MODERN AMERICA

If polygamists were able to raise adequate support for the proposition that all polygamous relationships were between consenting adults, the State would have to demonstrate a compelling interest for the continued disallowance of such practices.¹³⁸

Polygamous Wives and the Issue of Consent

In examining a due process claim of a right to engage in polygamy, it is necessary to examine the interests of the State and the interests of polygamists themselves. Although the relationships referenced by polygamy supporters are between 'consenting adults,'¹³⁹ it does not follow that the women participating in such relationships are truly acting out of free will.¹⁴⁰

The effect that polygamy may have on the women who are essentially forced participants creates a duty on the part of the State

137. See *Lawrence*, 539 U.S. at 569.

138. See discussion of the *Lawrence* Court's alternative interpretation of 'rational basis' review, *supra* note 108 and accompanying text.

139. Although it is not uncommon for polygamists to marry girls who do not meet the age of consent, such relationships will not be discussed, as they would be illegal and unconstitutional for reasons other than the outcome of the due process analysis discussed. Such instances would be immediately dispelled through rape statutes, lack of consent, etc. The only polygamous situation that could ever pass constitutional muster would be one in which only consenting adults were involved.

140. See generally STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 115-67 (1998). Although Schulhofer does not directly address the issue of polygamy, his book is nonetheless a valuable tool for examining the potential coercive element of polygamous relationships. Young women are somehow placed in polygamous situations, often arranged by their parents or seduced by men who wine and dine them. A large part of the reason women stay in relationships even after realizing they are abusive or destructive is that they have been taken advantage of sexually and emotionally at a young age. Sometimes they have children and are, therefore, bound to the marriage with no means of escape. *Id.* The element of religious indoctrination and the use of religious beliefs coerce women into staying. Women who are raised being told that the word of Joseph Smith is law and that they will suffer if they do not obey are very unwilling to disobey religious tenets.

to proscribe such situations. There is even a state interest in protecting the many women who marry into polygamous relationships when they are of age because of the possible element of coercion that is involved in polygamous marriages. Although there may not be any actual physical coercion, the potential for psychological and religious coercion that comes to fruition through the indoctrination of the original teachings of Joseph Smith and the seclusion of these women from the rest of society still exists.¹⁴¹

The coercion to marry into a polygamous family goes beyond simply the inducement to marry.¹⁴² It also involves the inducement of polygamous wives to engage in sexual relations and procreate.¹⁴³

In the existing law of rape, it remains perfectly legal for a man to use coercive pressure to compel a woman's consent to sex. Flagrant threats are treated as part of the permissible repertoire of sexual bargaining, provided they steer clear of arousing fear of physical harm. The law seeks, at least in theory, to protect women from serious violence, but until now the law has not been concerned, even in theory, with protecting a woman's right to make a genuinely free choice whether to participate in a sexual encounter.¹⁴⁴

Polygamists justify this proscribed behavior by relying on doctrines of Mormonism and teachings of Joseph Smith that are no longer followed by the Mormon Church.¹⁴⁵ They use these doctrines to convince women that God wills them to marry into polygamous families and bear as many children as possible.¹⁴⁶ This is a form of religious coercion.¹⁴⁷ They use religion to force young women into relationships in which they would otherwise not be involved.¹⁴⁸

It is difficult to define the boundary between religious coercion and sexual coercion. Schulhofer notes, "The distinctive features of sexual interaction make effective requirements of consent both

141. See generally KRAKAUER, *supra* note 10, at chs. 2-4 (telling the stories of many women and girls who have been coerced or worse, forced, into polygamous marriages, often at very young ages, leading lives of deceit, seclusion, and secrecy).

142. For documented examples of men inducing their wives, daughters, or subordinates to have sex, see SCHULHOFER, *supra* note 140, at 114.

143. *Id.*

144. *Id.*

145. KRAKAUER, *supra* note 10, at 5.

146. *Id.* at 31.

147. SCHULHOFER, *supra* note 140, at 115 ("All coercive behavior, whether violent or nonviolent, seeks to induce sexual intimacy that the coerced individual would not otherwise choose.").

148. See KRAKAUER, *supra* note 10 and accompanying text. This phenomenon is illustrated by the Elizabeth Smart story. Her religion was used to bond her with her captors and convince her that she was acting in accordance with God's will. *Id.*

especially important and especially hard to design.”¹⁴⁹ Polygamy and the use of religious indoctrination serve to effectively rob young women of their free will. Most polygamous wives were raised in polygamous households and know no other way of life.¹⁵⁰ They have not been exposed to extrinsic cultural influences, and so they know no means of escape.¹⁵¹ It is clear that the deprivation of freedom and free will suffered by polygamous wives may rob them of the sexual autonomy that makes consent possible in the first place. Schulhofer also notes, “Sexual autonomy includes . . . not just at its fringes but as a centrally important feature, the freedom to decide whether and when to terminate any personal relationship.”¹⁵² The combined effects of religious, psychological, and sexual coercion imply the fact that no consent exists in these situations and that women are not free to terminate a polygamous marriage.

Women are further degraded by the fact that only men can take on multiple partners.¹⁵³ Despite this, however, polygamous wives put forth arguments in support of polygamy.¹⁵⁴ Women state that the benefits of automatic childcare give women a “more effective choice to have a career without devaluing the role of the homemaker.”¹⁵⁵ Elizabeth Joseph, a polygamous wife, has even gone so far as to say that “if polygamy didn’t exist, the modern American career woman would have invented it.”¹⁵⁶ What remains, however, is a situation of female subordination, because most of these women do not have a

149. SCHULHOFER, *supra* note 140, at 118.

150. See *Polygamy is a Culture of Abuse, Crime*, THE YORK DISPATCH, Dec. 23, 2003 [hereinafter *Polygamy is a Culture of Abuse*].

151. See generally KRAKAUER, *supra* note 10, at chs. 2-4.

152. SCHULHOFER, *supra* note 140, at 123.

153. See *Doctrines and Covenants*, section 132, *supra* note 20; see also *supra* note 20 and accompanying text.

154. *Practical Aspects of Polygamy*, available at www.btinternet.com/~familyman/ppractic.htm (last visited Sept. 1, 2004).

155. *Id.*

156. Elizabeth Joseph, *Polygamy: The Ultimate Feminist Lifestyle*, available at www.polygamy.com/Practical/Ultimate.htm (last visited Sept. 1, 2004). Mrs. Joseph, a journalist and attorney residing in Utah, explains her “free-market approach” to marriage. She claims polygamy is beneficial for women as it enables them to “marry the best man available, regardless of his marital status.” She further argues that polygamists make better husbands due to their vast marital experience. *Id.* With respect to Mrs. Joseph’s opinions, the fact remains that the majority of women who are in polygamous marriages are not in them for the benefit of their careers or because they think their husbands are the best man they ever met. On the contrary, most of these women are wives of polygamists because they grew up in polygamous families and know no alternative. Most of these women have no career outside of the household. In fact, for most of them life is limited to the family.

choice regarding whether they will be part of a polygamous family.¹⁵⁷ Many are traded between multiple polygamists, including uncles and step-fathers.¹⁵⁸ The subversion of women that results from these conditions and their lack of exercisable free will outweighs any privacy interest of the polygamist.

The Strain on Government and Society

The strain on the government and citizens due to the collection of state support by polygamous families is substantial.¹⁵⁹ The welfare fraud that occurs within these communities of enormous families has already cost the government, and American society as a whole, millions of dollars.¹⁶⁰ Fundamentalist Mormon polygamists teach that God has created the welfare system for their benefit, to help them spread His true word and live the life He desires them to lead.¹⁶¹ Since multiple marriages are not legal marriages and are not, as such, a matter of state record,¹⁶² subsequent wives file welfare claims as single mothers in need of child support.¹⁶³ The polygamist men then collect this money to support themselves and their polygamous lifestyles.¹⁶⁴ Their children and wives do not seem to benefit from this income.

The strain that this has already placed on the economy would be felt manifold were the practice of polygamy to be condoned by law. One possible method to circumvent the abuse would be a tax on marriages. This would not, however, be an effective countermeasure against the economic strain of polygamy, as polygamous marriages are difficult to regulate since they are not a matter of public record and the communities in which they occur are not forthcoming with information about multiple marriages.¹⁶⁵ The draining effect that

157. See, e.g., KRAKAUER, *supra* note 10, at 25 (relating the story of Ruth Stubbs, who stated, "They told me who to marry . . . I think women should have the right to say 'yes' or 'no' - to have the right to say what's going on in their lives").

158. *Id.* at 32.

159. See KRAKAUER, *supra* note 10, at 13. Colorado City alone has received nearly \$5 million in federal funds. Thirty-three percent of people living in the town receive food stamps. The fundamentalists call this fraud "bleeding the beast." *Id.*

160. *Id.*

161. See *id.* at 12-13.

162. *Id.* at 12.

163. *Id.*; see also Tom Zoellner, *Polygamy on the Dole: Welfare Aids the Illegal Lifestyle of Many Families in Utah-Arizona Border Community*, SALT LAKE TRIB., June 28, 1998, available at <http://www.polygamyinfo.com/media%20plyg%205trib.htm> (last visited Sept. 16, 2004).

164. See *id.*

165. See KRAKAUER, *supra* note 10, at 12.

polygamy has on the American economy is a further reason why polygamy should not be permitted under the *Lawrence* rationale.

The Effects of Polygamy on Children

The children of polygamous marriages suffer many adverse effects.¹⁶⁶ They are often without healthcare, proper education, or social security.¹⁶⁷ These children's existences are kept as secret as the marriages that produce them.¹⁶⁸ Polygamous men procreate, take money from the government, and do little to support their children.¹⁶⁹

Furthermore, the proliferation of polygamy is dependent upon the existence of those children. Often, female children of polygamists are forced to marry other polygamists at ages as young as thirteen or fourteen.¹⁷⁰ In polygamous colonies, it is not uncommon for a girl to be married to her step-father or her uncle.¹⁷¹ Because secrecy is a vital element of polygamy, the communities are often private and secluded from the rest of society. All aspects of life, from stores to law enforcement and judicial matters, are controlled by the Church.¹⁷² Education is also controlled by the Church.¹⁷³ It is possible to control the thoughts and beliefs of the children of polygamy, indoctrinating only polygamist beliefs and blinding children to the existence of life outside polygamy. This creates an environment of control that perpetuates the polygamist lifestyle. In addition, there is little chance that a child will receive the individual attention and nurturing that is necessary to thrive, because children

166. See Carmen Thompson, *Dynamics of Polygamy*, available at <http://www.polygamyinfo.com/dynamics.htm> (last visited Sept. 16, 2004).

167. See *id.*

168. See *id.*

169. See KRAKAUER, *supra* note 10, at 12-13.

170. See *id.* at 12. See also *Polygamy is a Culture of Abuse*, *supra* note 150 (noting that young girls living in polygamous families may be sexually abused at ages as young as four).

171. See Carolyn Bright, *The House of Thomas: Part Two: Father. Husband. Lord.*, INDEP. REC., Nov. 29, 2003, available at <http://www.polygamyinfo.com/plygmedia%2003%20206mt.htm> (last visited Sept. 16, 2004).

172. See *e.g.*, KRAKAUER, *supra* note 10, at 11-12. It is important to note that, in this context, 'the Church' does not refer to the main body of the Mormon Church. Rather, it refers to the conglomerate of break-off fundamentalist churches that comprise these polygamist communities.

173. See *id.* at 12-13. The fact that children in polygamous colonies receive minimal or no exposure to external influences such as the internet, newspaper, and television further contributes to their lack of formal, non-religious education. *Id.*

of polygamy are so numerous.¹⁷⁴ These conditions result in the victimization of polygamous children and create yet another justification for the governmental prohibition of polygamy.

CONCLUSION

The holding in *Lawrence* did much for the establishment of a right to privacy and should be commended, but the majority's opinion should have been more aware of the possibility of the extension of the decision to other areas. The Court not only declared the Texas statute criminalizing homosexual sodomy unconstitutional, it went further to state that the real issue was the ability of the individuals to define their own relationships without the threat of being branded 'criminals.' This right stems from the liberty of "an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct."¹⁷⁵ However, the *Lawrence* decision does not expressly delineate exactly which "certain intimate conduct" is protected.

An awareness of the pervading existence of polygamy and the possibility of the manipulation of the words of *Lawrence* to support such a lifestyle are issues that need to be more closely addressed. Even if such issues are not addressed either judicially or legislatively, the polygamists' prayer for protection under the decision will not withstand judicial scrutiny. The burden that the practice of polygamy produces on polygamous wives, the children of polygamy, and the government far outweighs any claim that polygamists might have to the right outlined in *Lawrence*. Even in polygamous situations where all parties involved claim to be consenting adults, there are pressures put on multiple wives by their husbands, their communities, and their churches through the proliferation of Joseph Smith's original teachings that may override their free will. These pressures are tantamount to coercion and result in the subordination of women in polygamous marriages, negating any true possibility of consent. The state has the additional concerns of how profoundly multiple marriages affect the children born into such families and how burdensome it would be to financially support such large families.

The combined weight of such concerns results in a compelling state interest to prevent polygamous marriages, one that substantially trumps any claim to a privacy right that a polygamist

174. See generally *Polygamy is a Culture of Abuse*, *supra* note 150.

175. *Lawrence*, 539 U.S. at 562.

might assert. In *Lawrence*, the Court stated that “the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty.”¹⁷⁶ Applying this standard to polygamy, it is clear that such a liberty does not transfer to polygamy.

CASSIAH M. WARD*

176. *Id.* at 564.

* J.D. candidate, 2005, Marshall-Wythe School of Law, College of William and Mary; B.A., Psychology and French, 2001, Bucknell University.