

Ménage à What? The Fundamental Right to Plural Marriage

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MÉNAGE À WHAT? THE FUNDAMENTAL RIGHT TO PLURAL MARRIAGE

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INTRODUCTION

Same-sex relationships have been highly controversial for decades, with opponents using religion, tradition, and custom to justify their positions. The rhetoric about same-sex marriage opens the door to discussion of plural marriage, as the reasons to allow same-sex couples to marry apply similarly to plural unions. In America, Fundamentalists remain the most prominent group to seek out plural marriages, arguing that the First Amendment's Free Exercise Clause protects one's right to a plural marriage. In the nineteenth century case of *Reynolds v. United States*, the Supreme Court found that there was no constitutional violation of one's free exercise of religion in banning plural marriage. Anti-plural marriage laws in the religious context have been contested since then on a small scale but have not gained the same traction as same-sex unions. This difference occurs because of the varying levels of discrimination faced by each group. Immutability plays a crucial role in these differences.

An immutable quality is out of one's control and is (more or less) unchanged over time. Being gay is an immutable quality, which is why laws discriminating against those who are gay are more sinister—because the state is persecuting people for something over which they have no control. The result is that arguably more people are affected by anti-same-sex marriage laws than anti-polygamy laws.

In 2015, *Obergefell v. Hodges* finally legitimized same-sex marriages. The Supreme Court ruled that marriage is a fundamental right that extends to all unions between two people, regardless of their sex or gender. Justice Roberts dissented in this landmark decision, suggesting that the majority had opened the door for plural marriages. This is precisely what this Note will argue as well: since *Obergefell* finds that the fundamental constitutional right to marriage extends to gay couples, this right also necessarily extends to include plural unions. This Note argues that although the majority opinion mentions that a legitimate union comprises of two individuals, this number was decided arbitrarily and without support, simply to narrow the scope of legitimate marriages. This Note will show that the constitutional arguments for legalizing same-sex marriage apply fully to polygamous relationships. Part I will address foundational issues about polygamy and its history in America, comparing it to perceptions of polygamy today. Part II will look at the monumental case of *Obergefell v. Hodges* and derive from it a constitutional right to plural marriages. Part III will focus on the impact and objections that legitimizing plural marriages could lead to and the likelihood of plural unions being recognized in this country.

I. POLYGAMY IN AMERICA

A. *History of Polygamy in America*

Polygamy refers to a marriage in which individuals have multiple spouses at the same time.¹ This practice was not prevalent in the United States until 1843, when Joseph Smith, Jr., founder of Mormonism, had a revelation concerning plural marriages.² For the next three decades, tensions arose between members of the Church of the Latter Day Saints (LDS) and the Fundamentalist Church of the Latter Day Saints (FLDS), the former which renounced polygamy,

1. *Polygamy*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/polygamy> [<http://perma.cc/6TUG-2N75>].

2. *Fundamental Mormon and FLDS Time Line*, in MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL, AND LEGAL ISSUES xi (Cardell K. Jacobson & Lara Burton eds., 2011).

and the latter being a proponent of it.³ In this time, the government passed laws outlawing the practice of bigamy, which is the legal term for being legally married to more than one person at the same time.⁴ Members of FLDS believed that their religion allowed and endorsed the practice of polygamy, and that therefore it was a practice that was protected by the Constitution's First Amendment, recognizing the free exercise of religion.⁵

In 1878, the Supreme Court ruled that there was no First Amendment violation in outlawing bigamy.⁶ The Court reasoned that polygamy has a tradition of being "odious" to the West until the establishment of the Mormon Church and has traditionally been considered an "ofence [sic] against society."⁷ The Court honed in on the intent of the Framers of the Bill of Rights, stating that religious freedom was never intended to prevent the state from enacting laws in the sphere of marriage, which is an important feature of social life.⁸ The Court emphasized that marriage is a civil contract in which the government is a party,⁹ and while the First Amendment does protect an individual's right to form any religious opinions and beliefs, this does not necessarily extend to practices.¹⁰ The Court used examples of state prohibition on human sacrifices in the name of religion and how the state can regulate religion when it concerns social order and organization.¹¹ The Court essentially argues that laws exist to keep society in order and functioning cohesively.¹² Allowing religious exemptions on conduct could lead to disastrous and potentially violent results.¹³

Reynolds defined legitimate marriages as one between one man and one woman, with sodomy (along with other acts, such as bestiality) being considered a "crime against nature."¹⁴ Sodomy specifically

3. *Id.*

4. *Id.*

5. *Reynolds v. United States*, 98 U.S. 145, 161–62 (1878).

6. *Id.* at 166–68.

7. *Id.* at 164.

8. *Id.* at 165.

9. *Id.*

10. *Id.* at 166.

11. *Reynolds*, 98 U.S. at 166 ("Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?").

12. *Id.*

13. *Id.*

14. See *id.* at 161–62; *Crime Against Nature*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

was a criminal offense¹⁵ across the country until 1961, when Illinois repealed its anti-sodomy law.¹⁶ Other states followed, but the majority of states retained their anti-sodomy laws.¹⁷ This resulted in constitutional challenges on the basis that these laws violated due process because the definition of “crime against nature” was too vague.¹⁸ Over the years leading up to *Obergefell*, many courts, including the Supreme Court, heard cases challenging anti-sodomy laws on the basis of privacy and the right to choose one’s intimate associations.¹⁹ Finally, in *Obergefell v. Hodges*, the Court ruled that marriage, which has historically been found to be a fundamental right,²⁰ also included gay couples.²¹ It further found that it was a Fourteenth Amendment violation to deny marriages to same-sex couples.²² The Court’s reasoning shows its awareness that same-sex couples have gradually become more accepted over the course of the century. The Court says that there has been a “shift[] in public attitudes” that has allowed same-sex couples to lead more public lives than was possible for them in the twentieth century.²³ This is an acknowledgment that the laws of the nation are linked to public opinion. The majority notes how the Framers of the Bill of Rights could not perceive the issues that future individuals would face, leaving us with the task of deciding the scope of freedoms we give our citizens because “[t]he nature of injustice is that we may not always see it in our own times.”²⁴

The Court’s emphasis on societal and cultural changes is worth noting. The *Obergefell* ruling means that for all the decades that

15. *Charges to the Grand Jury*, 2 Del. Cas. 168 (Del. C.P. 1802).

16. *Getting Rid Of Sodomy Laws: History And Strategy That Led To The Lawrence Decision*, ACLU, <https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision> [<http://perma.cc/YL5J-DMZC>].

17. *Id.*

18. *Id.*

19. See *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (holding that the Defense of Marriage Act is an unconstitutional deprivation of liberty under the Fifth Amendment’s Equal Protection Clause by “impos[ing] a disability” on same-sex couples by insinuating that those unions are “less worthy”); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (noting that the criminal statute in question imposes a stigma on the private domestic lives of same-sex couples rising to an Equal Protection violation); *Bowers v. Hardwick*, 478 U.S. 186, 220 (1986) (finding that same-sex sodomy was not a fundamental right rooted in history and that the fact that the majority has decided it is an immoral act is enough of a rational basis to support the law).

20. See *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978) (finding that the right to marry was a fundamental liberty protected by the Fourteenth Amendment’s Due Process Clause); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that depriving an interracial couple the right to marry would be a violation of their liberty under Fourteenth Amendment’s Equal Protection Clause).

21. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

22. *Id.* at 2588.

23. *Id.*

24. *Id.* at 2598.

same-sex couples were denied marriage, the state was infringing on constitutional rights. This leads to a troubling conclusion: in order for a fundamental right to be acknowledged, society must be comfortable with the right in question. This means that when we consider plural unions, we must be sure that it is not because of personal discomfort and prejudices that we deny people the fundamental right to marriage. I will delve further into this analysis in Part II.

B. Polygamy in the Twenty-First Century

Though plural marriages are not recognized in this country, participants in plural marriage avoid legal obstacles by having one legal marriage and having “spiritual marriages” with the other individuals.²⁵ These latter unions are not, and need not be, sanctioned by the state.²⁶ This has led to religious cohabitations, where individuals live together in marriage-like situations without seeking legal legitimacy.²⁷ The TV show *Sister Wives* explores a plural family in Utah, comprised of Kody Brown and his four wives.²⁸ The state of Utah sued the Brown family for violating its anti-bigamy law.²⁹ Utah had defined bigamy to include purporting to marry or living with someone other than the individual to whom one is married.³⁰ At the core of the case was religious cohabitation, which was also illegal under that bigamy statute.³¹ The Court ruled that there was no fundamental right to enter into a second marriage because the practice of plural marriage does not have a deeply rooted history or tradition in the Nation (in fact, there is a strong tradition against it).³² However, the Court used *Lawrence* to say that the Browns also have the right to choose the nature of their personal and intimate relationships, especially in the home, and that the statute did not satisfy the rational basis test under *Lawrence*.³³ The Court stated that the fact that adulterous cohabitation is not prosecuted, whereas religious cohabitation would be, cuts against the state’s argument that economic and social implications in religious cohabitation

25. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1198 (D. Utah 2013).

26. *Id.* at 1181.

27. *Id.* at 1197.

28. *Kody*, TLC, <http://www.tlc.com/tv-shows/sister-wives/bios/kody> [http://perma.cc/XS4Y-7M8F].

29. *Brown*, 947 F. Supp. at 1170.

30. UTAH CODE ANN. § 76-7-101(1) (LexisNexis 1997).

31. *Brown*, 947 F. Supp. at 1178.

32. *Id.* at 1203 (citing *State v. Holm*, 137 P.3d 726, 771 & n.20 (Utah 2006) (Durham, C.J., dissenting)).

33. *Id.* at 1224–25.

create a rational basis for them to prohibit it.³⁴ Further, the statute was facially neutral, but the state only prosecuted religious cohabitation.³⁵ Additionally, the Court held that to “purport to marry” under the statute, individuals must have sought state recognition of their marital status. Merely having a spiritual ceremony without eliciting the state does not rise to that level.³⁶ All of this culminated in a finding that the cohabitation prong of Utah’s anti-bigamy statute was unconstitutional under the substantive due process clause from *Lawrence*.³⁷

On a policy level, this also indicates a growing comfort with the idea of polygamous relationships, and a greater deference of the idea that an individual’s private life is a space in which the state should not intrude. Just as the Court in *Brown* used *Lawrence* as the basis to find a violation of a fundamental right, Part II will show that *Obergefell* is the basis on which to find a fundamental right to plural marriages.

C. Comparing Same-Sex Relationships and Polygamy

The next section goes into detail regarding *Obergefell* and the implications for polygamy. Before this, we must compare same-sex relationships to polygamous ones, and in doing, so we can reveal how similar (or not) both practices are. In many respects, both sodomy and bigamy share a common history, eventually diverging in modern times.

1. Pre-Twentieth Century

In the eighteenth century, sodomy was illegal.³⁸ At that time, sodomy included bestiality and anal sex, and while the punishment for these acts was death, that was rarely enforced.³⁹ Unlike current discourse surrounding sodomy, it was not characterized as anti-homosexual, as this concept did not emerge until the late nineteenth century (that is not to say that homosexuality itself did not exist).⁴⁰

34. *Id.* at 1218.

35. *Id.* at 1210.

36. *Id.* at 1231.

37. *Brown*, 947 F. Supp. at 1225.

38. *Charges to the Grand Jury*, 2 Del. Cas. 168 (Del. C.P. 1802).

39. WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003 2–3 (2008).

40. *Id.* See also Margot Canaday, *The Strange History of Sodomy Laws*, ALTERNET: SEX & RELATIONSHIPS (Sept. 16, 2008, 2:00 PM), http://www.alternet.org/story/99092/the_strange_history_of_sodomy_laws [<http://perma.cc/9X8S-NGYG>].

Some suggest that these laws aimed at promoting sex for procreation purposes,⁴¹ and that the change in how these laws have been perceived in modern times, as anti-homosexuality, is more of a byproduct of our urbanization and a change in how we talk about and perceive sexuality.⁴² During the nineteenth century, the aforementioned *Reynolds* case found that there was no constitutional violation of the First Amendment in the prohibition of polygamous unions for Mormon groups.⁴³

2. *Post-Twentieth Century*

In the twentieth century, discourse about same-sex relationships took a much larger space in the public than polygamy. This may be attributed to the fact that those who sought plural unions have traditionally been Mormon sects who can settle for religious unions rather than legal ones and still live as a family. Conversely, same-sex couples could not do that. Same-sex relationships did not receive the same marital legitimacy as heterosexual couples had. Same-sex intercourse was targeted in *Bowers*⁴⁴ and *Lawrence*.⁴⁵ In the former, the Supreme Court found that the due process clause of the Fourteenth Amendment does not confer a fundamental right to consensual homosexual sodomy.⁴⁶ The Court reasoned that (1) private acts between adults are not constitutionally insulated from state intrusion; (2) homosexual sodomy is not a practice deeply rooted in tradition; and (3) it is only in very narrow circumstances that the Court should expand the reach of the Due Process Clause.⁴⁷

II. LEGAL ANALYSIS OF POLYGAMY AND A COMPARISON TO *OBERGEFELL*

A. *Obergefell: The Catalyst for Polygamy*

The landmark case, *Obergefell v. Hodges*, confirmed a fundamental right to marriage in this country that extends to same-sex couples under the Fourteenth Amendment.⁴⁸ The Court found that marriage is a fundamental right because: (1) individual autonomy

41. See ESKRIDGE, *supra* note 39, at 4.

42. See Canaday, *supra* note 40.

43. *Reynolds v. United States*, 98 U.S. 145, 166–68 (1878).

44. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

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

46. *Bowers*, 478 U.S. at 186.

47. *Id.*

48. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

and the right to make personal choices are fundamental concepts,⁴⁹ as seen in *Loving*⁵⁰ and *Lawrence*,⁵¹ that apply to choosing a spouse to spend one's life with; (2) it supports a two-person union that has unparalleled importance to the individuals in the partnership,⁵² as was central in *Griswold*;⁵³ (3) it protects children and families in important ways that affects child-rearing, procreation, and education, additionally providing stability to children;⁵⁴ and (4) the United States has a deeply rooted tradition of marriage and it is an essential component to our social order.⁵⁵

Though the case was not ruled by using the Equal Protection Clause, Justice Kennedy does mention this avenue for finding the fundamental right to same-sex marriages.⁵⁶ Being gay or lesbian is an immutable trait because an individual has no choice over his or her sexual preferences.⁵⁷ We can compare this to anti-miscegenation laws that criminalized interracial marriages.⁵⁸ In *Loving*, the Court held that restricting marriage on the basis of race violated the Equal Protection Clause because measures that restrict rights of citizens on the basis of race violate the Clause's central meaning.⁵⁹ The Court noted that "[m]arriage is one of the basic civil rights of man," and that it is "fundamental to our very existence and survival."⁶⁰

The *Loving* decision echoes *Obergefell*. Chief Justice Roberts' dissent in *Obergefell* argues that the majority uses the number "two," with respect to the number of people in the union, in a manner that is random.⁶¹ He states that while the majority explains why marriage is a fundamental right, it provides no reasoning for why this aspect is preserved, and the man-woman aspect is not.⁶² He asks, if, as the majority states, it is a matter of dignity to allow two men or women to exercise their autonomy to make the profound choice to be married, "why would there be any less dignity in the bond between three

49. *Id.* at 2599.

50. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

51. *Lawrence v. Texas*, 539 U.S. 558, 565 (2003).

52. *Obergefell*, 135 S. Ct. at 2599.

53. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that the Constitution protects the right of married couples use contraception).

54. *Obergefell*, 135 S. Ct. at 2600–01.

55. *Id.* at 2599–2601.

56. *Id.* at 2590.

57. *Id.* at 2594. The Court could have found in favor of same-sex unions by referring to the Equal Protection Clause. If one's orientation is immutable, the same-sex marriage ban would fail for the same reason that the anti-miscegenation laws did.

58. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

59. *Id.* at 12.

60. *Id.*

61. *Obergefell*, 135 S. Ct. at 2621.

62. *Id.*

people who . . . seek to make the profound choice to marry?”⁶³ He continues to propose that if it is disrespectful to gay and lesbian couples to deny them marriage, it is also disrespectful to individuals in plural unions to prevent them from legalizing their marriages.⁶⁴

B. Standards of Review

In order to make the legal argument for the fundamental right to plural marriages, it is necessary to ascertain what standard of review must be applied.⁶⁵ This standard decides what level of “suspicion” will be balanced against deference to the state that created the law.⁶⁶ For example, in the context of racially discriminatory laws created by a state, the level of scrutiny is strict (because race is an immutable quality and has been a historical source of discrimination), and therefore, the state is given less deference, and the law is likely struck down.⁶⁷ The different standards of review, from most likely to strike down a law to least, are: strict scrutiny (e.g., race⁶⁸), critical examination (e.g., marriage⁶⁹), intermediate scrutiny (e.g., gender⁷⁰), “rationality review with teeth”⁷¹ (same-sex relationships⁷²), and rationality review (e.g., hippies⁷³).

Considering same-sex marriage, the majority opinion in *Obergefell* does not make clear what the standard of review for evaluating the right to marry should be. In fact, the bulk of the dicta focuses on the emotional reasons for same-sex marriage and how important marriage is to people on a human level.⁷⁴ Kennedy, who wrote the majority opinion, included that there was a liberty interest under the Equal Protection Clause (EPC) implicated in the denial of same-sex marriage,⁷⁵ on top of the violation of the Due Process Clause

63. *Id.* at 2621–22.

64. *Id.* at 2622.

65. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that different levels of review should be used when different rights are implicated by legislation).

66. *Id.*

67. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967).

68. *See Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

69. *See Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

70. *See Craig v. Boren*, 429 U.S. 190, 210 (1976).

71. The author uses “rationality review with teeth” to refer to a review standard more stringent than rational basis but less than intermediate scrutiny. Jeremy Byellin, *Tackling the Most Important Topics of Law School, Part 6B: Rational Basis, “With Teeth,” and Intermediate Scrutiny*, LEGAL SOLUTIONS BLOG (Sept. 5, 2013), <http://blog.legalsolutions.thomsonreuters.com/law-school-1/tackling-important-topics-law-school-part-6b-rational-basis-teeth-intermediate-scrutiny> [<https://perma.cc/JHC7-KWVR>].

72. *See Romer v. Evans*, 517 U.S. 620, 635 (1996).

73. *See United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973).

74. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

75. *Id.* at 2604.

(DPC) of the Fourteenth Amendment.⁷⁶ These two different violations point to different levels of scrutiny (addressed in the next subsection). The decision not to clearly outline the standard of review may have been strategic so as not to draw firm lines: Kennedy may have been strategically avoiding expanding the scope of marriage by limiting the analysis provided in the decision. In prior cases, when the Court has decided what standard of review applies in a case, later courts have used that as precedent for their own cases. For example, once the Court established that laws that discriminate on the basis of race get strict scrutiny, most subsequent cases dealing with race in a similar manner get the same treatment as the precedent. Therefore, it is possible that to avoid expanding the scope of the right to marry and creating bright line rules that could lead to future litigation, the Court avoided a clear legal standard.

When a fundamental right is at stake, the Court will apply a stricter standard of suspicion on the law. If an Equal Protection issue is at stake, then we focus the analysis on the individual rather than the “right” at stake, and more deference is given to the state.

1. Strict Scrutiny Standard

The *fundamental* right to marry is implicated in *Obergefell* and in the context of plural marriages.⁷⁷ When a fundamental right is burdened, the Court will apply a “strict scrutiny” evaluation.⁷⁸ A higher standard of review applies because the Court is suspicious of the state impinging on one’s fundamental right, something core to one’s individual liberty.⁷⁹ When this analysis applies, the Court looks at whether the law is narrowly tailored to achieve a compelling government purpose.⁸⁰ There is an inherent presumption against the state in a strict scrutiny analysis (because a fundamental right is at stake), so the burden is on the state to prove its case.

Since *Obergefell* dealt with what it claimed was a fundamental right, a strict scrutiny analysis applies. Under such analysis, and in order to be consistent with the Court, the outcome should be that a state’s ban on same-sex unions will be struck. In this case, the government proposed certain interests, which can be analyzed under

76. *Id.*

77. *Id.* at 2594.

78. Emanuel Francone, *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [<http://perma.cc/RU65-DQSZ>].

79. *Id.*

80. *See* *Roe v. Wade*, 410 U.S. 113, 155 (1973) (stating that when fundamental rights are involved, the state can only justify the infringement by showing a compelling state interest); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (stating that the means by which the government implements legislation that affects constitutional rights may not be unnecessarily broad).

the strict scrutiny standard and will ultimately be found not compelling enough:

(1) In question is a fundamental right and it would be hasty to make a decision without more public discussion.⁸¹

The Court rejects this for two reasons. First, extensive deliberation and discussion of same-sex unions has already taken place, with countless debates, litigation, and scholarly work, showing the presence of a great deal of information and public rhetoric on the issue.⁸² Second, individuals should not have to wait for the legislature to assert their fundamental rights.⁸³ The Court also noted that individuals are able to invoke their fundamental rights even if the public at large disagrees with their right and the legislature refuses to act.⁸⁴ To some extent this is ironic, as the Court has essentially waited until the public has more or less accepted same-sex unions to recognize a fundamental right in this space.⁸⁵

We can apply this to the plural marriage context as well. This topic has been extensively written about as well and litigated since early in this country's history.⁸⁶ Also applicable in this context is that individuals asserting their *fundamental right*, here to marry more than one individual, should not have to wait for the public or legislature to recognize that they have been deprived of a right.

(2) Allowing same-sex couples to marry will harm the institution of marriage, as it is counter to convention and tradition.⁸⁷

The Court responds that though the concept of marriage is old, its history is one of "continuity and change."⁸⁸ It explains how our understanding of basic concepts has evolved over time, encompassing societal norms and new understanding.⁸⁹

Within this line of reasoning exists the notion that there are likely legal rights that we do not recognize today that we may in the future. Same-sex marriage is a fundamental right that we only began to recognize across the nation in 2015, but it existed as an unacknowledged fundamental right before that point. Additionally, at the time the Court ruled, thirteen states still did not view same-sex unions as legitimate,⁹⁰ and it was controversial even in the states

81. *Obergefell*, 135 S. Ct. at 2605.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 2615.

86. *Reynolds v. United States*, 98 U.S. 145, 161–68 (1878).

87. *Obergefell*, 135 S. Ct. at 2594.

88. *Id.* at 2595.

89. *Id.*

90. Julia Zorthian, *These are the States Where SCOTUS Just Legalized Same-Sex Marriage*, TIME MAG. (June 26, 2015), <http://time.com/3937662/gay-marriage-supreme-court-states-legal> [<http://perma.cc/S22D-BE6T>].

that did. Had we waited for the legislatures in those thirteen states to be comfortable with the notion of same-sex marriage, a supposed *fundamental* right would have been suppressed even further. These assertions apply to the plural marriage context as well. The fact that marriage has looked a certain way in history does not mean that it cannot be expanded further to encompass “new” relationships. Tradition cannot bar the recognition of unconventional unions.

(3) In *Obergefell*, petitioners are not seeking to exercise their right to marriage but are trying to create a new right.⁹¹

To this, the Court counters by stating that the right exercised is not the right for same-sex couples to marry but simply the *right to marry*.⁹² They analogize this to other cases where individuals sought to exercise their right to marry in general.⁹³ The Court points out that rights should not be defined by who has exercised them in the past because this would automatically keep things as status quo and prevent new groups from invoking those rights as well.⁹⁴

With respect to plural unions, this means that we need not focus on the individual asserting the right. No “new right” is being created here; instead, just as with *Obergefell*, *Loving*, and *Turner*, it is just an invocation of an already existing right.

(4) Allowing same-sex marriage will lead to a decline in the number of opposite-sex couples marrying because it “severs the connection between natural procreation and marriage.”⁹⁵

The Court rejects this vehemently. It says that the decision to marry and raise children is based on many personal and intimate considerations, and that these are not affected by same-sex couples getting married.⁹⁶ The Court also notes that the rights here are between two consenting adults who want to enter into a marriage that poses no risk of harm to either party or to others.⁹⁷

The state’s contention also fails because it suggests that marriages where procreation is not possible are less legitimate. This would mean that even heterosexual couples that marry when either party is impotent or barren, or couples that do not want children, *cause* other couples to avoid marriage and/or procreation altogether. This is an illegitimate concern because states do not police married couples to ensure they are procreating, nor does the state mandate

91. *Obergefell*, 135 S. Ct. at 2602.

92. *Id.*

93. *Id.* (noting that cases like *Loving* did not ask about the right for interracial couples to marry, and *Turner* did not ask about the right of inmates to marry—both looked at the broader right to marry).

94. *Id.*

95. *Id.* at 2606–07.

96. *Id.*

97. *Obergefell*, 135 S. Ct. at 2607.

that procreation is a condition of their marriage license. So, this concern does not apply to the plural marriage context either because whether or not the individuals in the marriage can procreate is not dispositive to the issue of plural marriage—whether or not one chooses to marry or have children remains a private and personal decision. The Court emphasized that marriage is between the people inside the marriage and does not affect other marriages.⁹⁸ This is true for plural unions as well. The adults that consent to the union are the only ones affected by it, and the fact that others may marry does not impact the very serious and personal decision other couples make when contemplating marriage and children.

(5) Some religions do not condone same-sex marriage, and people adhering to their faith-based beliefs have a First Amendment right to teach the principles central to their core beliefs, such as what the structure of a family should be.⁹⁹

The Court agrees that religious beliefs are protected under the Constitution, but that this also means that proponents of same-sex marriage *because* of their religious or secular beliefs are also protected.¹⁰⁰ The State cannot use religious faith to, on one side, protect couples of the opposite sex, and then, on the other side, shun same-sex couples—the law must apply equally on both ends.

This idea of religious freedom is basic to our American liberties and should extend to plural marriage as well. In one respect, faith-based polygamy should be protected under the free exercise of religion. This has already been litigated with the Court, holding that while an individual has the right to the free exercise of religion, this cannot trump the law of the land.¹⁰¹ The Court drew a line between state interference with religious beliefs (prohibited) and its interference with practices (permissible).¹⁰² This line of reasoning is, to some extent, sound. We would not want to allow faith-based murders or sacrifices, even if we respect one's right to have a personal belief of any kind. A line must be drawn somewhere.

However, the line need not be drawn in front of polygamy. As discussed in the previous section, homosexuality was also considered immoral at the same time the *Reynolds* case was litigated, yet we now allow same-sex marriage. If marriage licenses are not considered an unsafe practice, does it matter to whom we are extending it? The case for plural marriage is not about recognizing a new religious belief; it is simply about extending an already existing mechanism

98. *Id.*

99. *Id.*

100. *Id.*

101. *Reynolds v. United States*, 98 U.S. 145, 162 (1878).

102. *Id.* at 166.

to more individuals. Giving individuals in plural unions the ability to marry would still not validate a religious belief in murder or sacrifice that are abhorrent to our society.¹⁰³ A new right is not being created; an existing and already qualified one (marriage comes with certain rights and privileges, but these do not obviate laws already in place) is being extended further without inherently being changed.

Moreover, just because one has a religious belief that polygamy is wrong does not mean that they can impose their belief on someone else. Religious beliefs can be used as shields, to protect one from having to perform acts that are harmful to their religious sensibilities. These beliefs cannot be used as swords, to regulate other people's conducts. The simplest way to explain this is that one has the right to condemn same-sex marriage because they may believe it is antithetical to their religious beliefs. They have a constitutional right to believe that it is immoral, and the Constitution then protects them from having to enter into same-sex unions. But, they cannot project their religious beliefs on others. Similarly, religious condemnation of polygamy is irrelevant if it is part of the fundamental right to marry. If one is against it, their remedy is to not enter into a plural union.

It is clear from the above analysis that the state was unable to show a compelling enough reason under the doctrine of strict scrutiny to prohibit same-sex marriage, and since they did not meet their burden, the law was struck. The reasons offered against expanding the scope of marriage may also apply to the plural marriage context, and as the analysis above shows, these would not hold up under the high bar. When a fundamental right is at stake, the state is not given deference unless it can show compelling reasons and a narrowly tailored law. Since the state is unable to provide compelling reasons against plural marriage, the ban fails the strict scrutiny standard and is struck.

It is necessary to compare the case for plural marriage to other cases that also deal with the fundamental right to marry, as this can help articulate the standard of review more clearly.

In *Loving*, the Court dealt with Virginia's anti-miscegenation laws.¹⁰⁴ It noted that marriage is one of the basic civil liberties, and is "fundamental to our . . . existence and survival."¹⁰⁵ The Court also found that the State had failed to meet its burden showing that there was a compelling reason for this fundamental right to be

103. See *infra* Part III.

104. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

105. *Id.* at 12.

limited.¹⁰⁶ Most importantly, the Court held that racial classifications were invidious and subversive to notions of equality and that they cannot stand as reasons to restrict marriage.¹⁰⁷

But *Loving* dealt with race in the context of marriage, making it a more clear case of strict scrutiny than plural marriage. However, the case still stands for the proposition that marriage is fundamental to our existence,¹⁰⁸ and therefore, laws that curtail this fundamental right must be given the highest standard of scrutiny. Anti-polygamy laws, in the above analysis, do not meet the high bar and therefore these laws should be struck.

So, because laws about marriage concern a fundamental right, strict scrutiny applies. I have shown through the above analysis that the compelling reasons against same-sex marriage also apply to bigamy and that they have been found not compelling. Therefore, plural unions should be protected as a fundamental right and offered the highest scrutiny.

Despite this, it is not as intuitive that plural unions should be protected because the “victims” are different. In *Loving*, a black and white couple was targeted because of their race,¹⁰⁹ and in *Obergefell*, couples were targeted because of their sexualities.¹¹⁰ Both of these cases concern immutable qualities, whereas bigamy does not implicate an immutable quality. Additionally, the discrimination faced by polygamous couples does not rise to the same level as the discrimination faced by racial minorities and members of LGBTQUIA communities. More individuals suffer because of their racial and sexual identities, largely because there are more individuals in both implicated groups than there are polygamous groups. The population of minorities in America, those who may be discriminated against on the basis of race, is approximately seventy-four million,¹¹¹ and the population of LGBT individuals in America is approximately five million.¹¹² By contrast, there are an estimated 50,000 to 100,000 polygamous individuals.¹¹³ The vast difference between the number of individuals affected in each group, coupled with the fact that polygamy

106. *Id.* at 11.

107. *Id.*

108. *Id.* at 12.

109. *Loving*, 388 U.S. at 2.

110. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015).

111. U.S. CENSUS BUREAU, QUICKFACTS (2016), <https://www.census.gov/quickfacts/fact/table/US/PST045216> [<http://perma.cc/S2EV-YH8W>].

112. Brian W. Ward et al., *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013*, 77 NAT'L HEALTH SURV. REP. 1, 7 tbl. 1 (2014), <https://www.cdc.gov/nchs/data/nhsr/nhsr077.pdf> [<https://perma.cc/JFD3-YRX4>].

113. Samantha Allen, *Polygamy Is More Popular Than Ever*, DAILY BEAST (June 2, 2015, 5:15 AM), <http://www.thedailybeast.com/polygamy-is-more-popular-than-ever> [<http://perma.cc/J29Z-CCVW>].

is not immutable or visible explain why we may be less sympathetic to polygamous couples.¹¹⁴

2. *Critical Examination Standard*

Since anti-bigamy laws do not impinge on any immutable quality, a strict scrutiny standard is not appropriate for this issue. A lesser standard is critical examination, where the state must show sufficiently important interests and a law that is closely tailored to effectuate only those interests.¹¹⁵

In *Zablocki*, the Court considered a statute that prohibited someone who is in arrears in child support from being able to marry.¹¹⁶ The Court cited *Loving* to contend that the right to marry is of fundamental importance, and that since the legislation in question interferes with the exercising of that right, the Court must apply a "critical examination" of the state's interests.¹¹⁷ The Court said that though the state does have an interest in ensuring children are supported, the statute would not further or encourage that end, and so it is not narrowly tailored enough.¹¹⁸ Though the state was preventing a petitioner to marry when in arrears, it did not also funnel money from him to the children which would have been the way to deal with its interest in protecting children.¹¹⁹ The Court also stated that although *Loving* was about racial discrimination, it was confirming that the right to marry is a fundamental one.¹²⁰ *Zablocki* is a good example of a case that implicates the fundamental right to marry without also involving other historically discriminatory practices (like those involving race or homosexuality), so it is better suited to make the point about whether bigamy should be protected.

The analysis of reasons against polygamy above would apply here as well, showing that the state has no sufficiently important interest to justify its ban. An important interest for the state could be that the state wants to control what marriage looks like, as they have historically have done. But this would go against the ruling in *Obergefell* which does not afford states the opportunity to define marriages in a way they believe is suitable. Since the critical examination standard

114. Immutability necessarily plays a part in this differential. More people have been affected by racially restrictive or anti-LGBT legislation. For example, a white man could not have a legal plural union, but could walk on any side of the street or sit anywhere on the bus. By contrast, a black man could not do either of the aforementioned things, and LGBT individuals have been denied services and bathroom access by enacted laws.

115. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

116. *Id.* at 390.

117. *Id.* at 383.

118. *Id.* at 388.

119. *Id.* at 389.

120. *Zablocki*, 434 U.S. at 384.

is lower than that of strict scrutiny, anything that passes the highest level must also pass this lower one. Additionally, as we have seen with race and homosexuality, what is considered important or compelling may change over time, just as the social norms do. Previously, keeping the practice of monogamy itself, in the form of a union between a man and a woman, would have been an important state interest. The argument is that our laws, such as family and property laws, are based on a premise of a monogamous union.¹²¹ But this is a flawed argument. If a fundamental right is at play, mere inconvenience to legislatures in changing the law or dealing with new administrative work, does not outweigh the gravity of depriving a basic right to one's existence. Certainly there were plenty of laws created when slavery was still the norm in our country, but no one today would argue that the complicated web of laws created on the premise of slavery is a reason to deny people their basic liberties.¹²² A counter to that is that the *ability* to marry is not denied, as consenting adults may marry other consenting adults equally. However, the burden is on the state to show why this qualification must exist. Why is it not that any number of consenting adults can choose to marry? Another commonly offered reason is the protection of children.¹²³ Studies have shown that the more unrelated people within a relationship, the greater the risk of abuse, violence, and homicide.¹²⁴ In a polygamous relationship there will be unrelated individuals, like in the Brown family, where the union is composed of four wives and children who are not related to every parent in the relationship. However, this same concern would exist in step-parent-child situations too, and remarriage happens with much more frequency than plural unions.¹²⁵ Laws against child abuse and neglect already exist to protect children in those situations, regardless of whether it is a remarriage situation or a plural union one. Protection of children cannot be the reason to ban plural unions. Without an important interest, the ban on bigamy fails the critical examination test as outlined in *Zablocki*.¹²⁶

121. Jonathan A. Porter, *L'Amour for Four: Polygyny, Polyamory, And the State's Compelling Economic Interest in Normative Monogamy*, 64 EMORY L.J. 2093, 2115 (2015).

122. *Id.*

123. *Id.* at 2117.

124. Joseph Henrich, Robert Boyd & Peter J. Richerson, *The puzzle of monogamous marriage*, 367 PHIL. TRANSACTIONS ROYAL SOC'Y B 657, 664–65 (2012).

125. Compare GRETCHEN LIVINGSTON, FOUR-IN-TEN COUPLES ARE SAYING “I DO,” AGAIN, PEW RESEARCH CTR. (2014), <http://www.pewsocialtrends.org/2014/11/14/four-in-ten-couples-are-saying-i-do-again> [<http://perma.cc/QL3D-N2GT>], with Nate Carlisle, *Think Mormon offshoots have the most polygamists in U.S.? Think again*, SALT LAKE TRIBUNE (Apr. 15, 2016, 7:18 AM), <http://www.sltrib.com/blogs/3779255-155/think-mormon-offshoots-have-the-most> [<http://perma.cc/G23Y-X4JM>].

126. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

In cases like *Zablocki*, courts also cite a right to privacy in the context of marriage¹²⁷ arising out of *Griswold*.¹²⁸ In *Griswold*, the state was attempting to restrict a couple's ability to obtain counsel on the use of contraceptives, and the Court considered whether the Constitution offered the couple a right to marital privacy from the state.¹²⁹ The Court found absurdity in the idea of policing marital bedrooms to see whether contraceptives are being used.¹³⁰ The Court also described marriage as "a coming together for better or for worse, hopefully enduring It is an association that promotes a way of life, not causes; a harmony in living, not political faiths. . . ." ¹³¹ Though the Court was not considering plural relationships, the ethos behind the sentiment about marital privacy should still apply to polygamous marriages.

In some ways, this association is permitted whether or not the state recognizes it. People may live with multiple partners, though only one of those relationships may have a marriage license. But if that is the case, then this applies equally to same-sex marriages which we now recognize. Same-sex couples could previously live as a married couple, just without the state recognition, but we reject this compromise to marriage equality. Legitimizing their unions came with a host of other benefits. One such benefit is a spouse being able to list their same-sex spouse on their property titles, so that when one spouse dies, the surviving spouse automatically gets 100 percent of the property and avoids the probate or intestate succession processes which can be costly and time consuming.¹³² Why should this not also apply to plural marriages? Saying that the relationship can still exist and that it simply won't be recognized by the state is no longer a justification against same-sex marriage. Perhaps this should apply in the context of plural marriages as well.

Assuming the argument that polygamous families can exist without legal recognition, it is worth noting that some states have anti-cohabitation laws that could interfere with this.¹³³ This was the type of law in question in the *Brown* case, where the Supreme Court of Utah struck down the state's anti-cohabitation law that specifically targeted plural families and not more "conventional" cohabitation.¹³⁴

127. *Id.* at 394.

128. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

129. *Id.* at 480.

130. *Id.* at 485.

131. *Id.* at 486.

132. Brittany Blackburn Koch, *The Effect of Obergefell v. Hodges for Same-Sex Couples*, NAT'L LAW REV. (July 17, 2015), <https://www.natlawreview.com/article/effect-obergefell-v-hodges-same-sex-couples> [http://perma.cc/V9Q7-YNSE].

133. *Housing*, UNMARRIED EQUAL., <http://www.unmarried.org/housing> [http://perma.cc/9E3P-CBB6].

134. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1234 (D. Utah 2013).

That case involved a husband and his three wives with whom he lives as a family unit.¹³⁵ He has only one legal marriage, and the rest are spiritual.¹³⁶ The Court ruled that the state cannot prohibit religious cohabitation and allow every other type of cohabitation to go unpunished.¹³⁷

3. *Intermediate Scrutiny*

The next level of scrutiny is intermediate scrutiny. This typically applies in the context of gender classifications and stereotypes¹³⁸ so does not apply to the case of plural unions.

4. *Rationality Review with Teeth*

This standard of review is a variant of Rationality Review (below) and is applied by courts to protect vulnerable groups under a more lax standard. This has been used in cases involving the mentally handicapped¹³⁹ and also for same-sex couples.¹⁴⁰ Polygamous families have faced stigma and may be classified as a vulnerable group. Under this standard of review, the court looks at the purpose behind the law. If the purpose rests on an irrational fear or prejudice, then it is illegitimate and will be struck under rationality review with teeth. In the *Cleburne* case, the Court found that prejudice against the mentally ill was not legitimate.¹⁴¹ *Romer* dealt with a state's anti-discriminatory laws, where the Court struck the laws because it deemed them to have the illegitimate purpose of prejudicing gay individuals.¹⁴² Polygamous couples could argue that the state's purpose behind enacting certain laws is prejudicial and based on an invidious motive. However, in the example offered above, being mentally handicapped is not a choice, just as being gay is not either. Polygamous families do not have to change something fundamental to their existence as those groups would have to. It is difficult, legally and even morally, to say that the experience of being gay is akin to that of

135. *Id.* at 1178.

136. *Id.*

137. *Id.* at 1210.

138. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 259 (1979) (looking at whether a Massachusetts law that gives preference to male veterans over female ones was an unconstitutional and discriminatory practice); *Craig v. Boren*, 429 U.S. 190, 208–10 (1976) (noting that a law that had different legal alcohol consumption ages for men and women is an impermissible gender classification based on stereotypes); *Geduldig v. Aiello*, 417 U.S. 484, 486 (1974), *superseded by statute*, 42 U.S.C. § 2000e(k) (investigating whether disability insurance harms pregnant women and perpetuates stereotypes about women).

139. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

140. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

141. *City of Cleburne*, 473 U.S. at 450.

142. *Romer*, 517 U.S. at 635.

being polygamous. Polygamy is more about conduct than status, whereas one's race, gender, orientation, or mental health is about an inherent quality of one's self.¹⁴³ This points to polygamous families as nonvulnerable and likely inappropriately evaluated under this standard of review. Also, the courts have been otherwise reluctant to expand what could be defined as a suspect class (like those of a certain race, gender, mental capacity, orientation etc.) In the *Lee Optical* case, the Court refused to find that ophthalmologists were a sufficient suspect class.¹⁴⁴ All these reasons point to finding that rationality review with teeth would not apply. However, this does not affect our earlier findings of a right to plural unions because the cases that adopted rationality review with teeth did not concern *fundamental rights* like we have with polygamy.¹⁴⁵

5. Rationality Review

This is the lowest standard of review, where the analysis looks at whether the state has a discriminatory purpose, and if so, whether the law in question is rationally related to achieving a legitimate government purpose. The analysis is more or less the same as rationality review with teeth, except that the "victims" may not be typically vulnerable groups. A legitimate government purpose may not have any bare animus or intent to target an unpopular group. An example of the application of this standard is in the *Moreno* case.¹⁴⁶ There, the Court found that a law that was created to target hippies was bare congressional harm to a politically unpopular group.¹⁴⁷ Another case that applies this standard is the *Clover Leaf* case, where milk sellers challenged a Minnesota law that banned the retail sale of milk unless it was packaged in specific materials (paper rather than plastic).¹⁴⁸ In its decision, the Court deferred to the legislative and factual findings and held that there was a theoretical fit between the purpose and the execution, and so the law may stand under the test.¹⁴⁹

143. The Court has previously held that the government cannot criminalize behavior that is a product of their status (over which they have no control) rather than their action (over which they may exercise control). *See, e.g., Jones v. City of Los Angeles*, 444 F.3d 1118, 1137 (9th Cir. 2006).

144. *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 491 (1955).

145. Though, I would argue that if *Romer* was litigated in today's post-*Obergefell* society, it would come out differently due to the social attitudes toward gay individuals that exist today as opposed to ten years ago when *Romer* was decided.

146. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

147. *Id.* at 537–38. The law prevented one from getting food stamps if they lived with a nonfamily member, and it was clearly meant to be applied to hippies specifically.

148. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 458–59 (1981).

149. *Id.* at 470.

It is not conclusive whether the government has a discriminatory purpose behind the bigamy laws, to target a specific group. It seems that certain groups may be affected *because* our laws against bigamy are the way they are, rather than that the laws around bigamy *were created* to target plural unions. But, assuming that the government has a discriminatory purpose, we can evaluate the laws under the rationality review test. The government, arguably, has a legitimate purpose, since marriage has traditionally been the purview of state law to regulate and is the basis for many other laws (family law, property law, etc.), and, whereas under the “critical examination” standard the state’s interests were not important enough, here the bar is much lower. Still, because a fundamental right is at stake, unlike the right to get food stamps or sell milk in plastic containers, the purpose would not be legitimate enough to trump such a basic right.

In summary, plural unions can be evaluated under the different standards of review, but two of them are most appropriate to this conversation. Strict scrutiny applies because marriage is at stake and is a fundamental right. For the same reasons that *Obergefell* was decided, bans on plural unions should be struck under the standard. Stepping down to the lower critical examination standard, bans on plural unions would be struck. And, as polygamy does not implicate an immutable quality, this is probably the best standard to apply here.

III. POLICY ARGUMENTS FOR AND AGAINST POLYGAMY

This section of the Note will move away from the legal arguments and focus on the policy issues surrounding polygamy. Though, as stated, not technically “legal,” we have seen time and time again how policy considerations make and break laws. For example, new social awareness of identities such as race and sexuality resulted in *Brown* and *Obergefell*. Policy drives laws and lawmakers, and that is why understanding the policy concerns for polygamy illuminates whether its legalization is something we may ever see. The Note will address the dangers of polygamy, its benefits, and a feminist perspective.

A. Dangers of Polygamy

The typical gut reaction to polygamy paints it as abhorrent and dangerous. Our preconceived notions are based on our socialization in the Western world, where the dominating religion is Christianity¹⁵⁰

150. PEW RESEARCH CTR., GLOBAL CHRISTIANITY: A REPORT ON THE SIZE AND DISTRIBUTION OF THE WORLD’S CHRISTIAN POPULATION 9 (2011), <http://www.pewforum.org/2011/12/19/global-christianity-regions> [<http://perma.cc/T2VB-G52L>].

and where monogamy rules. Somehow, polygamy is less romantic and in many cases dangerous, feelings likely conceived from and exacerbated by sensationalized groups such as the Fundamentalist Latter Day Saints (FLDS), discussed below. That is not to say that these fears are baseless, and this section explores the typical arguments from danger, countering them with the benefits that can be realized from plural unions.

In *State v. Green*, the court stated that the practice of polygamy “often coincides with crimes targeting women and children.”¹⁵¹ This deductive leap could have been based in part on the particular defendant, who had, on top of his polygamous marriage, been convicted of rape of a thirteen-year-old and criminal non-support as well.¹⁵² Similarly, the FLDS case with Warren Jeffs portrayed polygamy as a sinister world, ripe with sex with underage girls.¹⁵³ Another narrative in the same vein is the case where leaders of the Apostolic United Brethren were convicted on child molestation charges.¹⁵⁴ These examples are undoubtedly abhorrent, but key to note is that these are examples of (1) religion used as a tool to coerce and (2) breaking laws that protect vulnerable groups. With respect to the first point, in those cases, religion was used as a tool to commit the crimes, as opposed to criminal activity based on religious doctrine.¹⁵⁵ The fact that religion was intimately involved in these heinous acts does not mean that its religious doctrines encourage such behavior or that the usual practice of the religion involves these crimes. This is a point that is often ignored. To explicate this, consider the example of a Muslim terrorist. A Pew Research Center study estimated that in 2015 there were 1.8 billion Muslims in the world,¹⁵⁶ and that most Muslims are vehemently against suicide bombings and violence against civilians.¹⁵⁷ Other studies indicate that there is an estimated range of

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

152. *Id.* at n.14.

153. *Jeffs v. State*, No. 03-11-00568-CR, 2012 WL 1068797, at *1 (Tex. Ct. App. Mar. 29, 2012).

154. Maura Irene Strassberg, *Symposium: Can We Still Criminalize Polygamy: Strict Scrutiny of Polygamy Laws Under State Religious Freedom Restoration Acts After Hobby Lobby*, 16 U. ILL. L. REV. 1605, 1620 n.106.

155. See, e.g., Clayton Sandell & Erin McLaughlin, *Warren Jeffs Prosecution Rests After Playing Audio Sex Tape*, ABC NEWS (Aug. 3, 2011), <http://abcnews.go.com/US/warren-jeffs-rape-trial-hears-audio-girls-alleged/story?id=14221603> [<http://perma.cc/6CR7-EBHW>]. The videos show that Jeffs used religious rhetoric as he sexually assaulted his “spiritual wives”, telling the girls they were “property of [their] husband’s kingdom and the Kingdom of God on Earth”. *Id.*

156. PEW RESEARCH CTR., *THE CHANGING GLOBAL RELIGIOUS LANDSCAPE* 8 (2017).

157. Michael Lipka, *Muslims and Islam: Key findings in the U.S. and around the world*, PEW RESEARCH CTR. (Aug. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world> [<http://perma.cc/5XET-P45H>].

85,000 to 106,000 Muslim extremists,¹⁵⁸ and a basic calculation leads to the conclusion that, at most, 0.0000059 percent of Muslims *in the world* are extremists who may do harm. However, in this country the fear of Islamic extremists is very high.¹⁵⁹ What this suggests is that those who commit criminal acts are doing so despite their religion, since the vast majority (almost all) retain their faith and do no harm.¹⁶⁰ It is illuminating to compare this figure to the number of Christian-American “terrorists” that have committed acts of violence on U.S. soil, which is arguably much higher,¹⁶¹ but the fear of Christian terrorists is not at all on par. This discrepancy is suspect and shows that there are other areas where we are prone to exaggerating dangers without acknowledging the facts and where we give the benefit of the doubt to groups in power (e.g., Christian-Americans). We see this with the Catholic Church, which has consistently come under fire over the years for inappropriate relationships with children.¹⁶² The Vatican revealed that since 2004, it had defrocked 848 priests and sanctioned 2,572 priests for various levels of abuse, molestation, and rape of children.¹⁶³ But, Catholicism is still a respected and widely followed religion.¹⁶⁴ The point is that when it comes to the faith of the majority, we are able to parse out the difference between faith-based criminal acts and criminal acts where religion is misused. For the minority religions like Islam and Mormonism, the same logic should be applied.¹⁶⁵ We must hold all religions accountable the same way.

Returning to the prior discussion about concerns of heinous conduct against vulnerable groups, such as in *Green*, the FLDS, and

158. Peter Bergen & Emily Schneider, *Jihadist threat not as big as you think*, CNN (Sept. 29, 2014, 8:33 AM), <http://www.cnn.com/2014/09/26/opinion/bergen-schneider-how-many-jihadists> [<http://perma.cc/Z3WZ-ZAT2>].

159. *Islamophobia: Understanding Anti-Muslim Sentiment in the West*, GALLUP, <http://www.gallup.com/poll/157082/islamophobia-understanding-anti-muslim-sentiment-west.aspx> [<http://perma.cc/25RE-PE9G>].

160. See Lipka, *supra* note 157.

161. See Aurelie Corinthios, *How Many Terrorist Attacks in the U.S. Have Been Carried Out by Immigrants from the 7 Banned Muslim Countries?*, PEOPLE: POLITICS (Jan. 29, 2017, 10:00 AM), <http://people.com/politics/donald-trump-refugee-muslim-ban-terrorist-attack-us-statistics> [<http://perma.cc/64CV-B8V8>].

162. *Vatican facing U.N. showdown on sex abuse record*, CBS NEWS (Jan. 15, 2014, 10:03 AM), <http://www.cbsnews.com/news/vatican-facing-un-showdown-on-sex-abuse-record> [<http://perma.cc/ENG2-6777>].

163. *Vatican reveals how many priests defrocked for sex abuse since 2004*, CBS NEWS (May 7, 2014, 10:14 AM), <http://www.cbsnews.com/news/vatican-reveals-how-many-priests-defrocked-for-sex-abuse-since-2004> [<http://perma.cc/PN5D-3BY7>].

164. *The Global Catholic Population*, PEW RESEARCH CTR. (Feb. 13, 2013), <http://www.pewforum.org/2013/02/13/the-global-catholic-population> [<http://perma.cc/PFQ7-Z2LS>].

165. My Note does not make an argument for religious polygamy, but the criticisms of polygamy generally arise out of the religious examples, specifically Mormonism, which is why I address these concerns.

the Apostolic United Brethren, these groups broke *pre-existing laws* that were created to protect vulnerable members of society. Laws against child abuse, molestation, and rape already exist. No exception exists in any group or religious sect that allows for children to be abused in any capacity.

Even assuming that the incidence of child abuse and neglect are increased in polygamous homes, society applies this concern for safety of vulnerable individuals very selectively. Approximately forty to fifty percent of American marriages end in divorce,¹⁶⁶ and approximately twenty-three percent of adults currently married have been married before.¹⁶⁷ Further, tens of millions of children are involved in these relationships.¹⁶⁸ The National Center for Health Research found that in families where the father is not biologically related to the children in the home, Child Protective Services is more likely to be contacted about abuse.¹⁶⁹ Given the aforementioned rates of marriage, divorce, and remarriage,¹⁷⁰ the dangers of abuse exist. While this is the case, marriages are not scrutinized to reduce the potential for abuse. We do not vet individuals who remarry with the presumption that a child in the family is going to be abused. But the concern is a real one as 700,000 children are abused annually.¹⁷¹ Where are the protests against remarriage then? Why are people not advocating against divorcees with children that want to date? All of these situations lead to a statistically proven increase in the risk of child abuse, but plural families bear the brunt of the criticism.¹⁷²

This section serves to show that many major religions have bad actors, yet, we do not write off all of these religions as bad. Additionally, concerns of abuse in the home are only used to prevent plural marriages and not other (traditional) marriages that are statistically also likely to result in incidents of abuse.

166. *Marriage & Divorce*, AM. PSYCHOLOGICAL ASS'N, <http://www.apa.org/topics/divorce> [<http://perma.cc/WWH3-VJPB>].

167. LIVINGSTON, *supra* note 125, at 4.

168. STEP FAMILY STATISTICS, STEP FAMILY FOUND., <http://www.stepfamily.org/step-family-statistics.html> [<http://perma.cc/CAE6-KA3W>]. The Foundation notes that approximately 30 million children under the age of 13 are living with one biological parent and their partner.

169. Diana Zucherman, PhD, & Sarah Pedersen, *Child Abuse & Father Figures: Which Kind of Families Are Safest to Grow Up In?*, NAT'L CTR. FOR HEALTH RESEARCH, <http://www.center4research.org/child-abuse-father-figures-kind-families-safest-grow> [<http://perma.cc/RN65-MGTQ>].

170. Henrich, Boyd & Richerson, *supra* note 124; LIVINGSTON, *supra* note 125.

171. *National Statistics on Child Abuse*, NAT'L CHILDREN'S ALL., <http://nationalchildalliance.org/media-room/media-kit/national-statistics-child-abuse> [<http://perma.cc/C5D3-H8TH>].

172. Also, the plural families or sects in question were clear extremists and not the norm.

B. *Benefits of Polygamy*

One of the benefits of polygamy is the creation of a much larger support system.¹⁷³ Extended families can be beneficial to a child's development, specifically members like grandparents.¹⁷⁴ This important relationship is cultivated better when grandparents are in a quasi-parent or substitute parent role.¹⁷⁵ From this, we can interpret that a child benefits from multiple parental figures in his or her life—and that is exactly what polygamy offers. Children in plural families have a greater support system, made up of multiple “parents” and likely more siblings as well.

This support system benefits the adults in the relationship as well. When one parent is struggling, whether emotionally, professionally, or otherwise, there are others to pick up the slack for them. A woman who is in a plural family highlighted this very benefit.¹⁷⁶ When she was experiencing postpartum depression, her husband and “sister wives” helped her get her life back on track.¹⁷⁷ During these times, they also gave her children all the love and attention she was unable to give them.¹⁷⁸ If the focus is supposed to be on the child and its physical and emotional well-being, it would seem that the state would encourage family structures, like polygamous ones, that would ensure that a child does not miss out on love and care because one parent is struggling.

Studies indicate that in any given year, 16 million American adults, mostly women, suffer from Major Depressive Disorder.¹⁷⁹ This Disorder can make it difficult for people to continue their daily routines and function normally.¹⁸⁰ The prevalence of this Disorder, and the fact that many other mental health related disabilities, illnesses, and disorders exist, suggest that children have a heightened likelihood of being around parents that may be unable to take care of them or themselves. With this in mind, it becomes more important to have other members in the family to support the parent and child. Plural unions have this support built into their inherent structure.

173. I am referring to the theoretical, non-religious practice of polygamy.

174. Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1323 (1994).

175. *Id.* at 1324.

176. Vicki Darger, *A Real Sister Wife Speaks Out: Why I Chose Polygamy*, HUFFINGTON POST: THE BLOG (Dec. 3, 2011), http://www.huffingtonpost.com/vicki-darger/real-sister-wife-chose-polygamy_b_991552.html [<http://perma.cc/L3A8-RKAG>].

177. *Id.*

178. *Id.*

179. *Facts & Statistics*, ANXIETY & DEPRESSION ASS'N OF AM. (Aug. 2016), <https://www.adaa.org/about-adaa/press-room/facts-statistics> [<http://perma.cc/VTP7-WMDQ>].

180. *Depression*, ANXIETY & DEPRESSION ASS'N OF AM., <https://www.adaa.org/understanding-anxiety/depression> [<http://perma.cc/ZT97-U429>].

Rather than going to a grandmother, the child can stay in his or her usual environment with his other mother or father. The lack of disruption is an important consideration, if, like states typically claim, the welfare of children is at the helm of their concerns.

The fear of children in danger (1) is a pre-existing problem in two-person unions, and states do not presumptively prevent individuals from forming romantic relationships with people not biologically related to their children; (2) polygamy does not create new dangers the law does not already address; and (3) polygamy is able to offer unique benefits to children and families.

C. Feminist Perspective

A major critique of polygamy is that its manifestation tends to be polygynous (one husband to multiple wives). This asymmetry understandably leads people to the conclusion that it is unfair to the women in the relationship. This Note addresses the “hierarchical structure” that polygamy creates, the potential dehumanizing conservatism that could be attached to this family structure, and the emotional toils that could occur.

As mentioned previously, one of the concerns with polygamy is the sexist power dynamic that is purportedly created in a polygamous family structure, but sexism is generally rampant and is not exclusive to polygamy. If our reason for making polygamy impermissible is that it is a sexist family structure, we are committing to then police all people that get into relationships. A sexist structure can be prevalent in *any* conservative household, if encouraged by religious doctrines or personal beliefs. Additionally, even with the absence of religion, there is nothing to prevent a family dynamic where a man takes charge and dictates what happens in the home. While this sexism critique is valid, it is more of a social commentary applicable broadly than a criticism of polygamy specifically. We do not require that all relationships meet a standard of gender equality (even if that is what we aspire for). This applies equally to the dehumanizing conservatism to which alluded to earlier. We do not stop Orthodox Catholics, who may believe that a man’s place is at the head of the household, from marrying whosoever they wish.¹⁸¹

The emotional toil of sharing a partner might be compelling, if this was a unique problem that does not already exist today. While polygamy may in some ways legitimize (legally speaking) a romantic

181. Bishop Nicholas, *The Role of Women in the Orthodox Church*, ANTIOCHIAN ORTHODOX CHRISTIAN ARCHDIOCESE OF N. AM., <http://www.antiochian.org/role-women-orthodox-church> [<http://perma.cc/BP8B-SVGK>] (discussing the differing roles for men and women in the Church).

relationship with a third individual; truthfully this happens anyway: extramarital affairs and cheating generally. Outlawing polygamy, as has been the status quo, has certainly not prevented cheating in any way.

CONCLUSION

Many of us have the same gut reaction to polygamy—unease. It is important to realize two things: (1) that this was the reaction people had to black folk, women (in the workplace), gay individuals, and more recently, trans individuals and (2) we should think hard before writing off polygamous marriage, especially in light of *Obergefell*. The Supreme Court has held, in *Obergefell* and going as far back as *Loving*, that marriage is a fundamental right and an issue of personal autonomy in an intimate space in our lives. While we may not want certain things for ourselves, our discomfort shouldn't dictate the lives and liberties of others.

When we think back to cases such as *Dred Scott* and *Plessy*, where we reduced humans to property because of skin color and declared that separate can somehow be equal, our reaction should be shame and confusion that it took us so long to realize something basic.¹⁸² While there are clear differences to polygamy, namely the quality of immutability, once we have found a fundamental right we have the duty to protect it. In not doing so, we diminish hard fought cases such as *Loving* and *Obergefell*,¹⁸³ simply because we just do not feel like it right now.

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182. See *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Scott v. Sanford*, 60 U.S. 393 (1856).

183. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

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