

# PLURAL MARRIAGE: WHEN ONE SPOUSE IS NOT ENOUGH

BY JOHN O. HAYWARD\*

*And he [Solomon] had seven hundred wives, princesses, and three hundred concubines;*

- 1 KINGS 11:3<sup>1</sup>

## INTRODUCTION

Now that the U.S. Supreme Court has legalized same-sex marriage nationwide,<sup>2</sup> the only remaining marital frontier—at least for the Judeo-Christian nations of the West—is polygamy, or “plural marriage” as it is known under its sanitized name.<sup>3</sup> This Article presents a brief history of polygamy, reviews how the courts have responded to legal challenges to monogamous marriage, and examines how the rationale in *Obergefell* legalizing same-sex marriage, including its constitutional analysis, can be applied to plural marriage.<sup>4</sup> It also references *Brown v. Buhman*, a federal district court case invalidating the cohabitation prong of Utah’s anti-polygamy statute that was subsequently vacated and remanded,<sup>5</sup> and concludes with the argument that while same-sex marriage merely extended

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1 1 Kings 11:3 (King James).

2 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding 5-4 that under the Fourteenth Amendment of the U.S. Constitution, all states must license a marriage between two people of the same sex and recognize such a marriage if it was lawfully licensed and performed in another state).

3 See generally Peter Nash Swisher, “*I Now Pronounce You Husband and Wives*”: *The Case for Polygamous Marriage after United States v. Windsor and Burwell v. Hobby Lobby Stores*, 29 BYU J. PUB. L. 299 (2015). Of course, Islamic countries allow polygamy because the Koran sanctions it. See *Koran* 4:1 (N.J. Dawood trans., Penguin Books 2006) (“If you fear you cannot treat orphans with fairness, then you may marry other women who seem good to you: two, three, or four of them.”). See generally DAVID P. BARASH, *OUT OF EDEN: THE SURPRISING CONSEQUENCES OF POLYGAMY* (2016) (arguing that humans are biologically and anthropologically inclined toward polygamy).

4 See *Obergefell*, 135 S. Ct. at 2584.

5 947 F. Supp. 2d 1170 (D. Utah 2013). A three-judge panel unanimously ruled the case moot for various reasons, including the relocation of the plaintiffs to Nevada. See *Brown v. Buhman*, 822 F.3d 1151, 1155 (10th Cir. 2016); see also *infra* note 17. For a summary of the appellate court’s decision, see Ruthann Robson, *Tenth Circuit: Utah’s Ban on Polygamous Cohabitation and Marriage Stands*, CONST. L. PROF. BLOG (Apr. 12, 2016), <http://lawprofessors.typepad.com/conlaw/2016/04/tenth-circuit-ban-on-polygamous-cohabitation-and-marriage-stands.html>

the right to marry to homosexuals without disturbing the “status quo” of heterosexual marriage, plural marriage has the potential to disrupt both heterosexual and same-sex marriage by destroying the exclusivity of the marriage bond.

### I. A BRIEF HISTORY OF POLYGAMY

Polygamy (i.e., a man being married to more than one woman at the same time)<sup>6</sup> is taken for granted in the Old Testament, even though the account of creation indicates that monogamy was the original state envisaged by the Creator.<sup>7</sup> Despite frequent biblical instances of polygamy,<sup>8</sup> monogamy appears to have been the rule, polygamy the exception. The Ten Commandments are silent about the number of wives a man may have, and at the time of the writing of Exodus (1450–1400 B.C.E) and Deuteronomy (1410–1395 B.C.E.), polygamy was well accepted and practiced by Judaism and its surrounding cultures.<sup>9</sup> The influential rabbi Gershom ben Judah (c. 960–1040) “put the nail in the polygamy coffin” with his many rules and laws.<sup>10</sup> While monogamy is common in Western societies, and often observed more in the breach than the practice,<sup>11</sup> polygamy is so common in non-Western societies that it can fairly be regarded as the norm.<sup>12</sup>

One commentator on the history of polygamy has written that it

... is as old as man himself and polygamy has existed in most of the world’s known cultures, including ancient China, the Incas of Peru, the American Navajo, and the Macedonians of Persia. During the age of the Old Testament patriarchs, Abraham, Esau, and Jacob headed polygamous households, and the great kings of Israel, David and Solomon, took plural wives, with apparent biblical approval. Likewise, there was no prohibition of polygamy in the New Testament and it was practiced in Judea and Galilee during the ministry of Jesus. Moreover, under Islamic Shari’ah law, in the past and present, a

6 If a woman has more than one husband at the same time, it is polyandry. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 900 (10th ed. 2001).

7 *Genesis* 1:27 and 2:18-24 (King James); THE ENCYCLOPEDIA OF THE JEWISH RELIGION 305 (R.J. Zwi Werblowsky & Geoffrey Wigoder eds., 1965).

8 Lamech had two wives (*Genesis* 4:19), and Solomon had seven hundred (1 *Kings* 11:3).

9 See DARREL RAY, *SEX AND GOD: HOW RELIGION DISTORTS SEXUALITY* 57 (2012).

10 *Id.* at 32.

11 See generally DAVID P. BARASH & JUDITH EVE LIPTON, *THE MYTH OF MONOGAMY: FIDELITY AND INFIDELITY IN ANIMALS AND PEOPLE* (2001) (examining the regularity of polygamy in both animal and human relationships from a scientific perspective); see also NENA O’NEIL & GEORGE O’NEIL, *OPEN MARRIAGE: A NEW LIFE STYLE FOR COUPLES* (1972) (suggesting spouses take a fresh look at sexual fidelity). On the potent combination of sex and religion, see generally GEOFFREY PARRINDER, *SEXUAL MORALITY IN THE WORLD’S RELIGIONS* (1996), which explores these topics within the historical and contemporary context of each of the world’s major living religions, including the influences of medicine, psychology, and women’s rights.

12 Cf. RICHARD A. POSNER, *SEX AND REASON* 69 (1992) (noting that polyandry—women with multiple husbands—is “extremely rare”).

man may have up to four wives so long as he can adequately provide for them and treat them justly.

Martin Luther, while not endorsing polygamy as an ideal practice, nevertheless observed that polygamy does not contradict Scripture and so cannot be prohibited by Christianity. It was not until the Council of Trent in 1563, that the Roman Catholic Church finally prohibited the practice of polygamous marriage. At this time, monogamous marriage, according to one commentator, “became coextensive with religious devotion”:

[A]dultery, fornication, and concubinage were deemed “sinful” and outlawed. . . . In time, the Church came to exercise exclusive temporal power over matrimonial matters, establishing monogamy as the only legitimate marital form in Western Europe. Simultaneously, polygamy came to be identified in Christian ethnocentric thought with the Moslem infidels and the heathens in “uncivilized” lands, an attitude which has survived well into the twentieth [and twenty-first] century.<sup>13</sup>

The writer continues:

While polygamy is illegal in the United States, forms of it are still practiced either overtly, pursuant to religious traditions, or covertly, by the maintenance of two or more family units. Historically, the prosecution of polygamists has been rare in the United States, and a growing tolerance has been shown towards them . . . . It has been estimated that as many as 60,000 individuals practice polygamy in the United States.<sup>14</sup>

Critics of polygamy usually raise arguments against it, to wit: underage marriage, child abuse, incest, subjugation of women, and welfare fraud.<sup>15</sup> However, advocates point to the Qur’an (4:1), which, like the Old Testament, authorizes a man to have more than one wife at the same time. Furthermore, they argue that polygamy is allowed when the wife can’t have children or is ill, thus permitting the husband to have children without abandoning his first wife or not providing for her adequately. Polygamy advocates also believe that it helps prevent immorality, i.e., prostitution, rape, fornication, adultery, and cuts down on the high divorce rate found in many Western monogamous societies. Finally, they maintain that it protects widows and orphans by dealing with the issue of women outnumbering men in time of war or other disasters.<sup>16</sup>

Whatever the merits or demerits of polygamy, since 1878 when the U.S. Supreme Court decided *Reynolds v. United States*,<sup>17</sup> bigamy, the prac-

<sup>13</sup> Swisher, *supra* note 3, at 301 (footnotes omitted).

<sup>14</sup> *Id.* at 308 (quoting Michèle Alexandre, *Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse So As to Include De Facto Polygamous Spouses*, 64 WASH. & LEE L. REV. 1461, 1463 (2007)).

<sup>15</sup> *Id.* (citing Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment*, 38 FAM L.Q. 711, 715-17 (2004)(applying the “liberty interest” of *Lawrence v. Texas*, 539 U.S. 558 (2003) as a rationale for legalizing polygamy).

<sup>16</sup> *Id.* at 309 (citing HODKINSON, MUSLIM FAMILY LAW: A SOURCEBOOK 107-08 (1984)).

<sup>17</sup> 98 U.S. 145 (1878). For a recent judicial critique of *Reynolds*, see *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1188-90 (D. Utah 2013), *vacated*, 135 S. Ct. 1039 (2015) (criticizing the reason-

tice of having more than one spouse at the same time, has been illegal in the U.S. It is to this decision we now turn.

## II. PLURAL MARRIAGE IN THE COURTS<sup>18</sup>

George Reynolds, a member of the Church of Jesus Christ of Latter Day Saints (Mormons), was arrested and charged with polygamy, which violated the territorial law of Utah.<sup>19</sup> Among Reynolds's defenses was the claim that he was acting in accordance with the dictates of his religion and the territorial law infringed upon his free exercise rights.<sup>20</sup>

The Court noted that "religion" is not defined anywhere in the U.S. Constitution, and so it must inquire into "the history of the times in the midst of which the provision [the First Amendment] was adopted."<sup>21</sup> In the opinion, the court reviewed the development of the Amendment and concluded by citing Thomas Jefferson's well-known letter to the Danbury Baptist Association in 1802:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State.<sup>22</sup>

Since this emanated from the "acknowledged leader of the advocates of the measure," the Justices accepted it as authoritative, and concluded that "Congress was deprived of all legislative power over mere opinion, but was

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ing in the case but noting that "the Supreme Court has periodically continued to cite *Reynolds* in Free Exercise cases" and admitting that the case is "binding on the limited question of any potential free exercise right to the actual practice of polygamy"). On the moral and legal aspects of polygamy, see Richard A. Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 239-45, 253 (2001) (arguing that courts have done an "unsatisfactory job" of establishing that the state has a compelling interest in limiting plural marriage and should move away from moralistic arguments toward arguments about protecting women and children).

<sup>18</sup> This section originally appeared in 53 J. OF CATHOLIC LEGAL STUDIES 219-223 (2014).

<sup>19</sup> He was sentenced to two years at hard labor and ordered to pay a fine of \$500. See *Reynolds*, 98 U.S. at 150-51.

<sup>20</sup> He argued before the district court "that it was the duty of male members of said church, circumstances permitting, to practise polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the 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 founder and prophet of said church; that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come." *Id.* at 161.

<sup>21</sup> *Id.* at 162.

<sup>22</sup> *Id.* at 164.

left free to reach actions which were in violation of social duties or subversive of good order.”<sup>23</sup>

The Court declared that “[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”<sup>24</sup> The Court then briefly discussed in the opinion the substantial legal precedent that criminalizes polygamy, declaring that

. . . it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.<sup>25</sup>

The Court stated that given the legislature’s authority to outlaw polygamy, then

. . . the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free.<sup>26</sup>

Remarking that this would introduce a new element into criminal law, the Justices declared that while the law may not interfere with religious beliefs or opinions, it may prohibit actions, using as dramatic examples a religious practice that required human sacrifice<sup>27</sup> or a widow burning herself upon her husband’s funeral pyre.<sup>28</sup> In any event, the Court announced it could not be seriously argued that the free exercise of religion allowed such practices,<sup>29</sup> otherwise:

To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.<sup>30</sup>

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23 *Id.*

24 *Id.*

25 *Id.* at 165.

26 *Id.* at 166.

27 *Id.* Perhaps the Court had in mind worship of the god Baal, whose followers practiced human sacrifice. See Werblosky & Wigoder, *supra* note 7, at 53.

28 The Court was referring to the now-outlawed Hindu practice of suttee that was common in India for many years. See generally EDWARD THOMPSON, SUTTEE: A HISTORICAL AND PHILOSOPHICAL ENQUIRY INTO THE HINDU RITE OF WIDOW-BURNING (1928).

29 See *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

30 *Id.* at 167. Justice Scalia would cite this very phrase 112 years later in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), upholding a state statute criminalizing the use of peyote against a free exercise of religion challenge brought by Native Americans who used it as a sacrament in their religious practices.

The Free Exercise Clause was again unsuccessful as a defense to polygamy in *Davis v. Beason*,<sup>31</sup> where the Supreme Court remarked that:

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind.<sup>32</sup>

Commenting on the purpose of the Free Exercise Clause, the Court declared that “[i]t was never intended or supposed that the [A]mendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.”<sup>33</sup> As in *Reynolds*, the Court paraded out an assortment of heinous practices that would not be tolerated under the Free Exercise Clause: human sacrifice, “promiscuous intercourse of the sexes, as prompted by the passions of its members,” and the abolition of marriage.<sup>34</sup> Finally, laying to rest any notion that religion can take precedence over the criminal law, the Justices emphasized that:

[N]ever before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.<sup>35</sup>

Thus, as the nation entered the twentieth century, the Supreme Court made it apparent that religious practices “inimical to the peace, good order and morals of society”<sup>36</sup> would not be sanctioned by cloaking them with the mantle of religious practice or custom. However, both the twentieth and twenty-first centuries saw petitioners before the Court challenging the “peace, good order and morals of society”<sup>37</sup> by wanting to marry individuals of different races<sup>38</sup> or of the same gender.<sup>39</sup> In both instances, the Court obliged. Now advocates of plural marriage

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31 133 U.S. 333 (1890).

32 *Id.* at 341-42.

33 *Id.* at 342.

34 *Id.* at 343. Perhaps the Court had in mind the “Free Love” movement of the late nineteenth century, which sought to remove the state from matters of marriage, birth control, and adultery. See generally JOHN C. SPURLOCK, *FREE LOVE, MARRIAGE AND MIDDLE-CLASS RADICALISM IN AMERICA* (1988).

35 *Id.*

36 *Davis v. Beason*, 133 U.S. 333, 342 (1890).

37 *Id.*

38 *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating state laws prohibiting interracial marriage on Fourteenth Amendment Equal Protection and Due Process grounds).

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

seek to use the rationale of these decisions to invalidate bigamy laws and allow individuals to have multiple spouses at the same time. Let us now examine these arguments and determine whether they are persuasive.

### III. CAN SAME-SEX MARRIAGE JUSTIFY PLURAL MARRIAGE?

In his dissent in *Obergefell*, Chief Justice Roberts opined that the arguments supporting same sex marriage could be used with equal force to justify plural marriage.<sup>40</sup> During the *Obergefell* oral argument, some Justices raised the same issue. One observer documented the exchange:

While issues related to polygamous marriages or polyamorous relationships appear only in Chief Justice Roberts' dissent in *Obergefell*, it was of concern to Justice Alito throughout the oral arguments in the case. In fact, in reviewing the transcript of the oral arguments, it appears that concern about the possible recognition of polygamous marriage dominated Justice Alito's questioning.

Throughout the oral argument in *Obergefell*, Justice Alito returned to the issue of the implications inherent in the *Obergefell* arguments for the future recognition of polygamous or polyamorous relationships. Justice Alito engaged in several exchanges with Mary Bonauto, arguing on behalf of the same-sex couples seeking recognition of their marriages, asking her at one point: "Suppose we rule in your favor in this case and then, after that, a group consisting of two men and two women apply for a marriage license. Would there be any ground for denying them?" While Bonauto argued that this would not be the result required by the recognition of same-sex marriage, Justice Alito pushed further, asking:

Well, what if there's no—these are 4 people, 2 men and 2 women, it's not—it's not the sort of polygamous relationship, polygamous marriages that existed in other societies and still exist in some societies today. And let's say they're all consenting adults, highly educated. They're all lawyers. (Laughter.) What would be the ground under—under the logic of the decision you would like us to hand down in this case? What would be the logic of denying them the same right?

As John Bursch argued on behalf of the states against the recognition of same-sex marriage, Justice Alito again returned to the issue of polygamy in the following exchange:

Justice Alito: [T]he reason for marriage is to provide a lasting bond between people who love each other and make a commitment to take care of each other, I'm not—do you see a way in which that logic can be limited to two people who want to have sexual relations—

Mr. Bursch: It—it—can't be.

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<sup>40</sup> *Id.* at 2621-22 (Roberts, C.J., dissenting).

Justice Alito: [W]hy that would not extend to larger groups, the one I mentioned earlier, two men and two women, or why it would not extend to unmarried siblings who have the same sort of relationship?<sup>41</sup>

Clearly some Justices were concerned that sanctioning same-sex unions would open the door to plural marriage. It is not surprising that counsel for the same-sex unions would disavow its impact on plural unions, since advocates for a cause usually are concerned only with achieving their objective and could care less about any societal reverberations.

Next, let us examine the *Obergefell* rationale for same-sex unions and see if and how it would apply to plural marriage.

Basing its decision on the Fourteenth Amendment, the *Obergefell* majority reasoned as follows:

The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. Courts must exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer boundaries. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.<sup>42</sup>

The Court then enumerated four principles and traditions that demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples: first, that "[t]he right to personal choice regarding marriage is inherent in the concept of individual autonomy"; second, that "[t]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals"; third, that this right "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."<sup>43</sup> Finally, the majority concluded that marriage being important to the nation's social order, in this regard same-sex marriage is no different than traditional marriage and so it would be demeaning to same-sex couples to prohibit them from marrying.<sup>44</sup>

Applying these principles to plural marriage, it can be argued that:

- (1) Plural marriage, like same-sex marriage, is encompassed in the right to personal choice inherent in the concept of individual autonomy;
- (2) The right to marry is fundamental but nowhere is it required that it be limited to two people, just as it is nowhere written that it be limited to individuals of the opposite sex;

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41 Jack Harrison, *On Marriage And Polygamy*, 42 OHIO N.U. L. REV. 89, 140-41 (2015).

42 *Obergefell*, 135 S. Ct. at 2589 (citations omitted).

43 The court noted that precedent protects the right of married couples not to procreate so the right to marry cannot be conditioned on the ability to procreate. *Id.*

44 *Id.* at 2599.

(3) Just as prohibiting same-sex marriages would harm and humiliate the children of such unions, so would prohibiting plural marriages harm and humiliate the offspring of such unions, who most likely would be more numerous;

(4) Just as it would be demeaning to lock same-sex couples out of a central institution of our nation's society, it would be just as debasing to bar polygamous couples from this institution.

These arguments do not address the issue of whether prohibiting plural marriage is a denial of Equal Protection and Fourteenth Amendment Due Process rights, perhaps the crux of the *Obergefell* case, which many legal commentators argue is the case.<sup>45</sup>

Furthermore, let's review Justice Roberts's assertion that the arguments advanced by the majority in *Obergefell* apply equally to plural marriage.<sup>46</sup> To quote:

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.<sup>47</sup>

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?<sup>48</sup>

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45 See e.g., Ronald C. Otter, *Three May Not Be A Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977, 1998, 2014 (2015)(arguing that the focus on same-sex marriage in the Marriage Equality Movement has come at the expense of other forms of marriage that may be equally worthwhile); Swisher, *supra* note 13 (arguing that recent Supreme Court cases give proponents of polygamous marriage a strong case for validating polygamous marriage); Rower, *supra* note 15 (applying the "liberty interest" of *Lawrence v. Texas*, 539 U.S. 558 (2003) as a rationale for legalizing polygamy).

46 See *supra* note 2.

47 *Obergefell v. Hodges*, 135 U.S. 2584, 2589 (2015) (citation omitted).

48 *Id.* at 2599 (internal citations omitted).

The Chief Justice cited *Brown v. Buhman*<sup>49</sup> where, in a lengthy ninety-one page opinion, a federal district court ruled that the cohabitation prong of Utah anti-polygamy law violated the religious, free speech, and due process rights of the plaintiff,<sup>50</sup> who while holding one marriage license to one woman, said he was “spiritually married” to three other women.<sup>51</sup> Although the media sensationalized the case, in today’s moral climate individuals are seldom prosecuted for cohabitation, even in the Bible belt state of Mississippi.<sup>52</sup> Interestingly enough, while invalidating the cohabitation prong of the statute, the district court did not disturb the requirement that an individual hold one marriage license at a time, thus not challenging *Reynolds*, though expressing doubts about its continuing viability in light of recent U.S. Supreme Court decisions and whether the “social harm” *Reynolds* sought to prevent still existed. To quote:

But what exactly was the “social harm” identified by the *Reynolds* Court in the Mormon practice of polygamy that made the practice “subversive of good order”? Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. [T]his expression of the social harm identified in the Mormon practice of polygamy aptly exemplifies the concept. A decade later, the Supreme Court clarified the social harm further, explaining that Mormons were degrading the morals of the country through their religious practices, such as polygamy, which, the Supreme Court declared, constituted “a return to barbarism” and were “contrary to the spirit of Christianity.”<sup>53</sup>

Apparently the Court does not recognize any “social harms” from polygamy. However, one observer has recounted harms to women, children, and society. To wit:

*WOMEN:* Women in polygamous relationships are at an elevated risk of physical and psychological harm. They face higher rates of domestic violence and abuse, including sexual abuse. They have higher rates of depressive disorders, give birth to more children, and are more likely to die in childbirth and live shorter lives than their monogamous counterparts, in addition to having less autonomy, higher rates of marital dissatisfaction and lower levels of self-esteem.

*CHILDREN:* Children in polygamous families face higher infant mortality, tend to suffer more emotional, behavioural and physical problems, and have lower educational achievement than children in monogamous families. This most

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49 947 F. Supp. 2d 1170 (D. Utah 2013). The decision has been vacated and remanded. See *supra* note 4. The plaintiff was the subject of the TLC reality series *Sister Wives*. See Dustin Siggins, *Federal Judge Declares Utah Polygamy Law Unconstitutional*, LIFESITE NEWS (Aug. 29, 2014), <https://www.lifesitenews.com/news/federal-judge-declares-utah-polygamy-law-unconstitutional>.

50 *Brown*, 947 F. Supp. 2d at 1221-22.

51 *Brown v. Buhman*, 822 F.3d 1151, 1155 (10th Cir. 2016).

52 See M. Devin Whitt, “*Shackin’ Up and the Legal Effects of Cohabitation in Mississippi*” MISSISSIPPI FAMILY LAWYER BLOG (May 29, 2014), <http://www.mississippifamilylawyerblog.com/2014/07/shackin-up-the-legal-effects-o.html>.

53 *Brown*, 947 F. Supp. 2d at 1186-87 (citations omitted) (cited in Harrison, *supra* note 38, at 150).

likely results from increased conflict, emotional stress and tension in polygamous families. Rivalry among co-wives can cause significant emotional problems for their children as well as the inability of fathers to give sufficient affection and disciplinary attention to all of their children, who are at enhanced risk of psychological and physical abuse and neglect. Early marriage for girls is common, with resultant early sexual activity, pregnancies and childbirth having negative health implications for them.

*SOCIETY:* Polygamy has negative impacts on society flowing from the high fertility rates, large family size and poverty associated with the practice. It generates a class of largely poor, unmarried men who are statistically predisposed to violence and other anti-social behaviour. It also institutionalizes gender inequality. Patriarchal hierarchy and authoritarian control are common features of polygamous communities whose individuals tend to have fewer civil liberties than their counterparts in societies that prohibit the practice. Furthermore, polygamy's harm to society are not specific to any particular religious, cultural or regional context.<sup>54</sup>

Thus while the *Obergefell* Court opined that no harm could result from allowing same-sex couples to marry,<sup>55</sup> plural marriage does pose substantial harm to society.

#### CONCLUSION

While public opinion has gradually accepted same-sex marriage,<sup>56</sup> only 16% of the American public believe plural marriage is acceptable.<sup>57</sup> This overwhelming majority will not stand by quietly as the un-elected and un-accountable judiciary reformulates the centuries old institution of marriage to suit their political taste. Although same-sex marriage does not impinge on traditional marriage, plural marriage threatens every existing marriage, including same-sex marriage, by destroying the exclusivity of the marriage bond. Eventually society will be confronted with demands for group marriage (or “polyamorous” marriage as its advocates euphemistically refer to it) and be forced to address the constitutional questions it poses.<sup>58</sup> While our social engineers in the judiciary causally redefine civilization's oldest institution, let's hope there won't be hell to pay.

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<sup>54</sup> Harrison, *supra* note 38, at 115, n.242 (citing Jonathan Turley, *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions*, 64 EMORY L.J. 1905, 1916-17 (2015)).

<sup>55</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606-07 (2015).

<sup>56</sup> Otter, *supra* note 41, at 1987, n.25 (citing Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP (May 21, 2014), <http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx>).

<sup>57</sup> Frank Newport, *Americans Continue to Shift Left on Key Moral Issues* (citing Gallup Poll May 6-10 Values & Belief Survey, available at <http://www.gallup.com/poll/183413/americans-continue-shift-left-key-moral-issues.aspx>).

<sup>58</sup> See generally Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessens from The Marriage Equality Struggle*, 38 HARV. J. L. & GENDER 269 (2015) (analyzing the implications of the same-sex marriage movement on attempts to legalize polygamy).