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Casey E. Faucon

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DECRIMINALIZING POLYGAMY

Casey E. Faucon*

Abstract

Polygamous families are our national outlaws. Despite the expansion of sexual rights and marriage equality in the U.S., polygamy remains a crime. Challenging that stigma is the Brown family, who star in the reality TV show "Sister Wives" and who practice polygamous marriage as a tenet of their religion. The Browns filed suit against multiple Utah state actors in federal district court, challenging Utah's polygamy statute as unconstitutional in violation of their Free Exercise of Religion, substantive Due Process, and Equal Protection rights. The district court agreed and decriminalized informal polygamy in Utah. On appeal, the Tenth Circuit reversed the district court on mootness grounds, displaying an inherent reluctance to address the merits of the arguments, re-affirming outdated misconceptions, and leaving prosecutors and polygamists in an uncertain legal position.

This Article provides much needed clarity on the decriminalization of polygamy to inform future litigation. This Article approaches the decriminalization debate by re-framing the issue into its three key considerations—the harm, the law, and the policy—that must guide the polygamy debate moving forward. The aim is to provide a gloss over the Brown *litigation in order to draw out the harms of polygamy, the constitutional arguments and statutory interpretation issues at stake, and the transformative legal and theoretical social policies that could ideally result from the polygamy debate at this moment in history.*

Using this framework, this Article's novel argument is that polygamy bans are unconstitutional under a combination of substantive Due Process and Free Speech grounds as they apply to the private aspects of polygamy and the public aspects of polygamy, respectively. The Article culminates with an idealized, mock opinion from a fictional Tenth Circuit panel in the Brown *litigation that approaches the decriminalization of polygamy using a combination of substantive Due Process and Free Speech tenets, and not arguments based in Free Exercise of Religion.*

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* © 2016 Casey E. Faucon. Faucon is the 2015–2018 Whiting Clinical Fellow at the University of Denver Sturm College of Law. LL.M., University of Wisconsin Law School; J.D./D.C.L., LSU School of Law; B.A., Rice University. I would like to thank Professors Patience Crowder, Tamara Kuennen, Christopher Lasch, Lindsey Webb, Robin Walker Sterling, and Courtney Cross for their advice and critiques of earlier drafts of this Article; my fellow Fellows at the University of Denver Sturm College of Law Rachel Moran, Jennifer Wadhwa, Timothy Estep, and Nicole Godfrey for reviewing earlier versions of this Article; and Professor Adrienne Davis, for her support and continued inspiration.

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I. INTRODUCTION

Polygamous families are our national outlaws.[1] Despite the expansion of sexual rights and marriage equality in recent decades, multi-party relationships have yet to

[1] *See* Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL'Y 1, 1–2 (2014) [hereinafter Faucon, *Marriage Outlaws*]. The term

shed their cultural and moralistic taboos.[2] Contributing to that stigma is the continued criminalization of polygamous and polyamorous relationships throughout the United States.[3] In 2011, the polygamous Brown family sought to challenge our millennia-old restrictions against multi-party marriages and brought suit against numerous Utah state actors in federal district court, alleging that Utah's criminal polygamy statute was unconstitutional.[4] The district court agreed and decriminalized informal polygamy in Utah.[5] This groundbreaking decision sparked a renaissance of interest in polygamous and polyamorous relationships and the law, and the case provides a fresh lens through which to reassess the future decriminalization of polygamy.

To simplify a task that has mystified for decades, this Article aims to provide clarity on the decriminalization issue and to inspire future arguments in support of poly relationships. This Article separates the analysis into three categories that should control the decriminalization issue—the harm, the law, and the policy. The harm analysis contributes to the current debate on polygamy's harms by investigating what individual or societal harms—if any—might result if polygamy were decriminalized. The second step focuses on the law, the substantive constitutional arguments that might inform or dispose of whatever those alleged harms are, as well as the statutory language required to particularly delineate prohibited conduct from permissible conduct. The third step in the analysis discusses the overriding social and political policies that should guide the future direction of the decriminalization process.

"poly" includes numerous multi-party adult relationship forms, such as polygamy (the practice of having multiple spouses), polygyny (a husband with multiple wives), polyandry (a wife with multiple husbands), and polyamory (multi-party relationship with numerous potential structures). *See* Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. WOMEN'S L.J. 269, 274, 297–99 (2015); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1966, 1966 n.27 (2010).

[2] *See* Faucon, *Marriage Outlaws*, *supra* note 1, at 20–21; Casey E. Faucon, *Polygamy After* Windsor*: What's Religion Got to Do With It?*, 9 HARV. L. & POL'Y REV. 471, 478–81 (2015) [hereinafter Faucon, *Polygamy After* Windsor].

[3] *See* JANET BENNION, POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM 6 (2012) [hereinafter BENNION, POLYGAMY IN PRIMETIME]; Barbara Bradley Hagerty, *Some Muslims in the U.S. Quietly Engage in Polygamy*, NAT'L PUB. RADIO (May 27, 2008), http://www.npr.org/templates/story/story.php?storyId=90857818 [https://perma.cc/FA59-52L3].

[4] Brown v. Buhman, 947 F. Supp. 2d 1170, 1176–77 (D. Utah 2013), *vacated as moot*, 822 F.3d 1151, 1159 (10th Cir. 2016); *see* John Witte, Jr., *Why Two in One Flesh? The Western Case for Monogamy Over Polygamy*, 64 EMORY L.J. 1675, 1678 (2015) [hereinafter Witte, *Western Case*] ("For nearly two millennia, the West has thus declared polygamy to be a crime and has had little patience with various arguments raised in its defense.").

[5] *Brown*, 947 F. Supp. 2d at 1234.

This Article uses this three-step guide as a gloss over the *Brown v. Buhman*[6] district court decision and appeal. It discusses both private and public aspects of polygamy's alleged harms under *Brown*; analyzes arguments on appeal, including amici curiae and the Tenth Circuit's decision; and finally, addresses alternative approaches the Tenth Circuit could have taken in response to the district court's decision. Applying this framework to the *Brown* litigation, this Article is then the first to argue that polygamy bans are unconstitutional based on a combination of substantive Due Process (as it relates to the private aspects of polygamy) and Free Speech (as it relates to the public aspects of polygamy).[7] The Article then culminates with an idealized, mock Tenth Circuit opinion in a fictionalized *Brown* case, grounded in ideals of substantive Due Process and Free Speech.[8] As the actual *Brown v. Buhman* litigation will suffer in terms of its long-standing impact and legitimacy because of the Tenth Circuit's mootness determination, the aim is that this mock opinion will influence the future shape of arguments in favor of the decriminalization of informal polygamy.

The family members at the heart of the *Brown* case, Kody Brown and his four wives, Meri, Janelle, Christine, and Robyn,[9] are members of a religious group who practice polygamy as a tenet of their faith.[10] The Browns star in the reality TV show on The Learning Channel, "Sister Wives," now in its sixth season.[11] The purpose of the show is to "explore[] the daily issues and realities of a plural family" and to defend "plural families and discuss[] . . . the Browns' religious beliefs in polygamy."[12] In its season five finale, "Sister Wives" grabbed over 3.4 million viewers, shattering its previous records.[13] America is tuning in.

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[6] 947 F. Supp. 2d 1170 (D. Utah 2013).

[7] *See infra* Section III.C.6. Although poly proponents have invoked Free Speech as a grounds to decriminalize polygamy, no argument attempts to bifurcate the application of Free Speech tenets to only the public aspects of polygamy and substantive Due Process to only the private aspects of polygamy. *See* Brief of the Cato Inst. as *Amicus Curiae* in Support of Plaintiffs-Appellees at 4–14, Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016) (No. 14-4117); Jonathan Turley, *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions*, 64 EMORY L.J. 1905, 1923, 1935, 1937–38 (2015).

[8] *See infra* Section IV.A.

[9] Brown v. Herbert, 850 F. Supp. 2d 1240, 1244 (D. Utah 2012).

[10] *Brown*, 947 F. Supp. 2d at 1178.

[11] *See Sister Wives*, THE LEARNING CHANNEL, http://www.tlc.com/tv-shows/sister-wives/ [https://perma.cc/52N8-XQBC].

[12] *Brown*, 947 F. Supp. 2d at 1178. The family members routinely participate in outreach efforts to educate the public. Before the show aired, Christine Brown gave an interview to HBO in 2007, appeared in the TV show *48 Hours* in 2008, and spoke at the University of Utah about polygamy and her practices in 2009. *Brown*, 850 F. Supp. 2d at 1244.

[13] Steve Baron, *TLC's 'Sister Wives' Season 5 Finale Delivers 3.4 Million Viewers in Live + 3 Ratings*, TV BY THE NUMBERS, (Mar. 6, 2015, 3:28 PM), http://tvbythenumbers.zap2it.com/2015/03/06/tlcs-sister-wives-season-5-finale-delivers-3-4-million-viewers-in-live-3-ratings/ [https://perma.cc/VCC7-5H7F].

The Browns are not alone in their public personae as "poly." Since the airing of their show, numerous other shows exploring the lifestyles of plural relationships have emerged, including shows such as "Polyamory: Married & Dating" on Showtime and "Polygamy USA" on National Geographic, which chronicle both religious and secular poly relationships.[14] The popularity of these TV shows both contributes to and evidences an overall collective shift in acceptable relationship norms that make up modern families today.[15] Included under the broad umbrella of "poly" are numerous multi-party adult relationship forms, such as polygamy (the practice of having multiple spouses), polygyny (a husband with multiple wives), polyandry (a wife with multiple husbands), and polyamory.[16] Polyamory encompasses the widest range of relationship structures; a polyamorous relationship can be composed of anything from two males and three females in a range of hierarchies of relationships, to two lesbians and the biological father of their children, who may have no sexual relationship with the two adult women.[17] In conjunction with the rise of "intimacy pluralism,"[18] characterizing poly relationships as representative of modern tenets of liberalism based in choice and self-identity can politically galvanize a practice previously characterized as insular, foreign, and backward.[19]

The Harm. Scholars point out that identifying the harm, if any, caused by polygamy is paramount in justifying its continued criminalization.[20] The first step is to identify the exact harm that would result if informal polygamy were allowed to

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[14] *Polyamory: Married and Dating*, SHOWTIME, http://www.sho.com/sho/polyamory-married-and-dating/home [https://perma.cc/VJN3-BST2]; *Polygamy USA*, NATIONAL GEOGRAPHIC CHANNEL, http://channel.nationalgeographic.com/polygamy-usa/ [https://perma.cc/8WR5-DHCY].

[15] *But cf.* Aviram & Leachman, *supra* note 1, at 325 (warning that the "recent visibility of multiparty marriage in the mainstream media provides one example of how public exposure to multiparty relationships might reinforce stereotypes, even if the ostensible intention is to normalize those relationships").

[16] *Id.* at 273–74, 297–99.

[17] *Id.* at 298–99 ("Many polyamorous relationships consist of a 'primary' dyad, a couple sharing a household, in which each partner also has 'secondary' and 'tertiary' relationships with outsiders to the household . . . . Other common structures are the 'polyamorous vee,' in which two people have romantic relationships with the same person, but not with each other (though they may share a nonromantic sense of affection and commitment); a triad or a quad, in which all three or four members are romantically involved with each other; or an intimate network of friends, in which relationships are more fluid and involve several people in different and ever-changing relationship structures.").

[18] For a discussion of "intimacy pluralism," see Faucon, *Polygamy After* Windsor, *supra* note 2, at 521, 525–28.

[19] *See generally* Aviram & Leachman, *supra* note 1, at 306–08 (discussing background principles of the gay liberationist and polyamorous communities).

[20] *See* Maura I. Strassberg, *Scrutinizing Polygamy*: *Utah's* Brown v. Buhman *and British Columbia's* Reference Re: Section 293, 64 EMORY L.J. 1815, 1819–20 (2015) [hereinafter Strassberg, *Scrutinizing Polygamy*]; Turley, *supra* note 7, at 1910–11.

flutter out into the world, decriminalized. Regardless of the constitutional test used to measure the fit of any criminal bans of polygamy—whether it be strict, heightened, or rational basis scrutiny under the Due Process, Equal Protection, or Free Exercise clauses—the government in each instance would still have to prove the apparent harms of polygamy to justify its restrictions.[21]

The debate around polygamy's harms, what Professor Jonathan Turley calls "The Loadstone Rock" of the polygamy question,[22] has always been a fierce one. But Judge Waddoups' decision for the Utah Federal District Court brought a flurry of scholarly responses in part because, procedurally and substantively, the decision was so heavily shaped by the defense's apparent "non-response" to the Brown family's seven detailed constitutional claims.[23] The defense introduced a mere narrative with anecdotal stories in an attempt to prove the harms of polygamy.[24] Had the defense offered into evidence either personal testimony or empirical evidence of polygamy's harms, this would have presented to the district court some disputed facts that could have prevented the granting of a summary judgment. Hindsight is, of course, twenty-twenty, and while the litigation process in this instance failed to produce a rigorous debate about the harms of polygamy, polygamy scholars since the case frame both sides of the harm issue which can guide future litigation or legislative action.[25]

One important theme to emerge from this litigation is the distinction exacted between the harms of informal polygamy as they relate to both the private and public aspects of the practice. The type of polygamy at stake in the *Brown* case touches the private sphere in that it, by definition, involves persons cohabiting and otherwise engaging in a marital-type relationship in a private, domestic setting. At this point in the scholarly debate, most of the alleged harms attendant to the private aspects of informal polygamy, such as statutory rape, spousal abuse, and sexual abuse, have been largely discredited as mere ancillary effects of the secretive and insular nature of polygamous communities led by despotic men, and not as direct results of polygamy itself.[26] The more poignant and relevant debate regarding the harms of

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[21] *See* Turley, *supra* note 7, at 1910–11.

[22] *Id.* at 1910 ("[Harm] functions much like what Dickens called 'The Loadstone Rock' in *A Tale of Two Cities*—the rock upon which inevitably all cases must break.").

[23] Brown v. Buhman, 947 F. Supp. 2d 1170, 1177 (D. Utah 2013) (stating that the Browns were in the odd position of having to respond to defendants' "non-response"); Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1819; *see also* Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 2 (noting that "the case against polygamy is all about harm").

[24] *Brown*, 947 F. Supp. 2d at 1191.

[25] *See* Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1821–43; Turley, *supra* note 7, at 1942–72.

[26] *See, e.g.*, JANET BENNION, WOMEN OF PRINCIPLE: FEMALE NETWORKING IN CONTEMPORARY MORMON POLYGYNY 154 (1998) (noting that abuse in polygamous societies is a result of individual personality types that would be abusive in monogamous culture as well); Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love Is a*

polygamy focus on the public aspects and the alleged social harms. Informal polygamy touches upon the public sphere in that it often involves a public "marriage" ceremony, after which the parties to the ceremony hold each other out as husband and wife, despite not being legally married.[27] In the case of the Browns, the public conduct also involves their national TV show as well as their numerous speaking engagements.[28] As pointed out by the trial court, the State sees no harm in clandestine or adulterous cohabitation when one of the cohabitants is already married, yet somehow mandates criminal sanctions if the parties were to suddenly make their conduct public and hold each other out as husband and wife.[29]

So what is the real harm here? Is simply calling someone a spouse in public when legally he or she is not so harmful as to justify continuing to criminalize polygamy? A felony conviction seems like a steep price to pay for engaging in this type of rebellious, public behavior.[30] Ironing out the harms of polygamy should be the primary objective before any court could address whether the laws restricting such conduct are either narrowly tailored or rationally related to achieving those ends. Without more compelling arguments on the societal harms allegedly caused by polygamy, I argue that informal polygamy, where the parties do not seek legal recognition from the State for their polygamous relationship, should no longer be outlawed.

The Law. After identifying the legitimate harms, if any, of informal polygamy, the next inquiry focuses on the legal response to the supposed harm-inducing conduct. Keeping in mind that the law can (and should) change over time to adapt to the prevailing perceptions of acceptable and, more importantly unacceptable, constraints on liberty,[31] this next step explores the applicable constitutional law in relation to its response to the alleged harms and its implications on individual constitutional guarantees and protections.

Many Splendored Thing," 15 DUKE J. GENDER L. & POL'Y 315, 332 (2008) (noting that most polygynists do not engage in many of the crimes or practices that have been associated with polygynists). Another study concluded that these abuses are the result of "particularly dysfunctional" polygynist families rather than problems inherent to polygamy. Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 398 (2003).

[27] *See* Brief of the Cato Inst., *supra* note 7, at 9–14.

[28] *See* Robert E. Rains, *The Future of Justice Scalia's Predictions of Family Law Doom*, 29 BYU J. PUB. L. 353, 364 (2015).

[29] *Brown*, 947 F. Supp. at 1212–15.

[30] UTAH CODE ANN. § 76-7-101 (West 2010), *invalidated by* Brown v. Herbert, 43 F. Supp. 3d 1229 (D. Utah 2014).

[31] *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2013) ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

The law inquiry has two subparts: (1) the legal arguments at stake that control the polygamy question, and (2) the legal verbiage needed to particularly define the line—if any—between acceptable behavior and outlawed behavior in the context of polygamy. One inquiry focuses on the actual law; the other focuses on the language of the law. The primary step in the law inquiry is to establish which constitutional protections and arguments can and should frame the legal debate. The next inquiry is then how to word the language of the prohibited conduct so as to ensure the public knows what conduct is condemned and which is allowed.

Most arguments attacking the constitutionality of anti-bigamy criminal statutes use some form of a combination of Free Exercise jurisprudence under the 1st Amendment and substantive Due Process jurisprudence under the 14th Amendment.[32] Some occasionally add an Equal Protection claim, while others may add a "hybrid" rights claim under the *Wisconsin v. Yoder*[33] analysis in the Free Exercise arena.[34] In the *Brown* litigation alone, the district court used Free Exercise, substantive Due Process and Equal Protection, as well as the hybrid analysis in order to support the opinion.[35] The points of contention in both the Free Exercise and the substantive Due Process arguments focus on the level of scrutiny to apply to the criminal laws under both schools. With so many constitutional protections potentially implicated, the need to focus on which constitutional protections and why is necessary to quiet the dissonant din.

The law inquiry also focuses on *how* to write the language of the law, which stems from the sporadic, divergent, and legal gerrymandering adopted by law enforcement and courts over the years to interpret and apply the anti-polygamy

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[32] *See, e.g.*, James Askew, *The Slippery Slope: The Vitality of* Reynolds v. US *After* Romer *and* Lawrence, 12 CARDOZO J.L. & GENDER 627, 627–28 (2006) (discussing "the legal definition of marriage" in the context of "American marriage jurisprudence"); Todd M. Gillett, *The Absolution of* Reynolds*: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 497–501 (2000) (analyzing the history of polygamy in the United States and arguing that polygamy should be legal); Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977, 1977 (2015) (considering constitutional arguments that support the legality of plural marriage); Cassiah M. Ward, *I Now Pronounce You Husband and Wives:* Lawrence v. Texas *and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131, 132 (2004) (analyzing *Lawrence v. Texas* and arguing that plural marriage should not be legal under due process principles); Michael G. Myers, Comment, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 HOUSTON L. REV. 1451, 1456–57 (2006) (analyzing *Lawrence v. Texas* and arguing that plural marriage should be legal if same-sex marriage is legal).

[33] 406 U.S. 205 (1972).

[34] In *Yoder*, the Supreme Court articulated a theory later termed "hybrid rights" in which a free exercise of religion claim coupled with another constitutionally protected claim pushed the potentially infringing statute into the category of strict scrutiny review. *Id.* at 234–36.

[35] *Brown*, 947 F. Supp. 2d at 1217–18, 1221–25.

criminal statutes.[36] One of the main substantive issues in the *Brown* case comes from the district court's rightful inability to square the conduct that the State says it wants to outlaw against the vague "cohabitation" language actually used in the statute. The statute in question reads: "A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or *cohabits with another person*."[37] The district court found the cohabitation prong to be impermissibly vague, as a married person who merely cohabits with another person is guilty of bigamy, and struck it from the statute.[38] The district court then turned to the "purports to marry" prong and determined that it refers to attempts at legal, not informal, polygamous marriages.[39] After the decision, essentially only marriage license fraud is illegal under the statute—unlikely the intent of the legislature.[40]

The Policy. With so many potential constitutional protections implicated, it becomes increasingly more imperative that some guiding principle or overarching aim should inform which route to take. The policy question looks to both the current clime and into the future to determine which guiding principle it should be. Considering the procedural point of the *Brown* case in particular, where the district court already struck down the cohabitation prong of the polygamy statute using Free Exercise jurisprudence, the arguments based upon religion are inescapable.

Framing the polygamy issue as primarily a religious one, however, is problematic in the long-term. Among many reasons, a victory secured on its grounds would be a short-lived celebration followed by calls for religious exceptionalism and equal protection violations for secular polys or those who adhere to no religious agenda in their poly lifestyles.[41] The hope is that future litigants and courts will heed earlier pleas to turn away from arguments based in religion and instead focus on defining the fundamental rights attendant to the practice of polygamy under

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[36] *See generally* Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1850 (critiquing the Utah District Court's finding that the anti-polygamy statute is "'a 'religious gerrymander'" requiring strict scrutiny (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993)).

[37] UTAH CODE ANN. § 76-7-101 (West 2010) (emphasis added), *invalidated by* Brown v. Herbert, 43 F. Supp. 3d 1229 (D. Utah 2014).

[38] *Brown*, 947 F. Supp. 2d at 1225–26.

[39] *Id.* at 1226–28.

[40] *Id.*; Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1845–46.

[41] Faucon, *Polygamy After* Windsor, *supra* note 2, at 522–26. While continuing to frame the issue as a religious one would implicate the Religious Freedom Restoration Act (RFRA), which requires a strict scrutiny standard of review, the RFRA is still bound by the limits of the Constitution, specifically, the First Amendment's Establishment Clause. Because accommodation laws cannot improperly privilege religion over non-religion, securing exemptions or privileges based on religion would "relieve believers of constraints from which many nonbelievers might also prefer to be free." Gregory P. Magarian, *How to Apply the RFRA to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1977 (2001).

substantive Due Process.[42] This approach would protect plural marriages and relationships based on modern liberalist ideals of personal identity and intimacy pluralism, as traditional polygamy is just one iteration of a multi-party consensual relationship based on autonomy and choice.[43]

Focusing on this overriding policy, this Article argues that criminal laws against informal polygamy are unconstitutional based on tenets of substantive Due Process and Free Speech.[44] While scholars have considered both bodies of law in formulating arguments in favor of polygamy, none have yet to combine the two doctrines in a way that applies substantive Due Process guarantees to the private aspects of polygamy (living together as a married couple, sharing an intimate relationship, and raising children) and applies Free Speech guarantees to the public aspects of polygamy (engaging in a public "marriage" ceremony and holding each other out as spouses in public). To solidify the contours of this policy and legal approach, this Article offers an idealized, mock opinion in the *Brown* litigation that decides the constitutionality question based on substantive Due Process and Free Speech.

Part II of this Article reviews the Utah district court's decision in *Brown v. Buhman* and the flurry of reactionary scholarship critiquing the reasoning and ultimate conclusions. Looking through the lens of potential evils, this section analyzes the arguments based on harm to the individual and then provides a more in-depth analysis of the potential harms to society.

Part III of the Article transitions into the current status of the case and focuses on the substantive arguments at stake on appeal and the different approaches that both the litigants and *amici curiae* took toward arguing their positions. Next, the Article discusses the Tenth Circuit's decision to dispose of the case on procedural grounds and offers different avenues the court could have taken to draw the confines of the law around the prohibited behavior.

Part IV of the Article provides an idealized, mock Tenth Circuit opinion—reflective of how I hope an appeals court would address the decriminalization question in a model case. Part IV also briefly provides ideas for model criminal legislation. This section then concludes with an argument that the next decriminalization challenge should approach the case using substantive Due Process and Free Speech, exploring the potential legal tenets that could ultimately emerge from this case and what it could mean in shaping our modern iterations on acceptable forms of consenting adult relationships.

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[42] Faucon, *Polygamy After* Windsor, *supra* note 2, at 522–26.

[43] *See* Aviram & Leachman, *supra* note 1, at 297. "Traditional polygamy" is used in this context to refer to "polygyny" (a husband with multiple wives).

[44] *See infra* Part IV.

II. THE HARM

Conceptions of inherent harm are not always intuitive.[45] In the context of polygamy, capturing and defining the exact harms caused by polygamous behavior, while proving somewhat elusive, remains paramount in justifying its continued criminalization.[46] When measured against constitutional protections, regardless of the scrutiny level or "fit" test used, the government must still identify and support a public concern.[47] The *Brown* litigation highlights the continued importance of identifying polygamy's harms in two ways. The failure of the litigation to produce a robust evidentiary and legal debate on polygamy's harms caused a lopsided constitutional analysis which almost compelled the district court's ruling.[48] Another influential concept that results from overlaying the harm glossed over in the *Brown* litigation is the emergence of the distinction between the public and private aspects of polygamy. Zeroing in on the public and private aspects can more explicitly outline specific harms as they relate to either private or public behavior.

First, this section discusses the circumstances leading up to the initial filing of the suit by the Brown family in *Brown v. Buhman* and briefly discusses some preliminary procedural motions about standing and mootness, as well as evidentiary weaknesses on the part of litigators. Second, this section then discusses the district court's holding and its effect on the law, specifically its failure to address the all-important question of harm. Third, this section analyzes the different arguments used regarding the potential harm, or evil, allegedly at the heart of polygamy that justifies its criminalization. Finally, the section ends with an attempt to box in the specific social evil allegedly caused by informal polygamy and determine whether or not such a social harm can justify polygamy's continued prohibition.

A. The District Court Decision

The overall tenor of the events leading up to the district court's decision reflects the need for more clarity, as the constant threat and sporadic enforcement of polygamy laws leave both law enforcement and poly families in a tenuous position.[49] Before the "Sister Wives" reality show aired, Utah government officials knew that

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[45] *See* Cheryl Hanna, *Rethinking Consent in a* Big Love *Way*, 17 MICH. J. GENDER & L. 111, 129–35 (2010).

[46] *See* Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1820; Turley, *supra* note 7, at 1910 ("In case after case, courts return to the question of harm: harm in interracial marriage, harm in same sex marriage, harm in plural marriage.").

[47] Debate exists over whether polygamy bans are subject to strict or heightened scrutiny as opposed to rational basis scrutiny under the Free Exercise, substantive Due Process, and Equal Protection doctrines. *See* Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1843. *But see* Turley, *supra* note 7, at 1910–11.

[48] *See* Turley, *supra* note 7, at 1910–11.

[49] *See* Ashley E. Morin, *Use It or Lose It: The Enforcement of Polygamy Laws in America*, 66 RUTGERS L. REV. 497, 518 (2014).

the Brown family was poly.[50] State officials acknowledged that the show prompted them to open an investigation, stating that the Browns were "committing crimes every night on television," which made their prosecution easier.[51] The State failed to uncover evidence of any other crime. The investigation was eventually dropped, but Utah County Attorney Jeffrey R. Buhman stated that the Browns could still be prosecuted for polygamy in the future and that the Browns' move to Nevada would not that.[52]

The Browns filed suit in Utah Federal District Court on July 13, 2011 against Defendants Buhman, Gary Herbert in his capacity as governor of Utah, and Mark Shurtleff in his capacity as Utah attorney general.[53] Of the many pretrial motions filed, the defendants brought a motion to dismiss based on lack of standing.[54] The court denied the motion, but it did dismiss two of the defendants, leaving only Buhman, as he made the public comments about the Brown family.[55] The Browns then filed a motion for summary judgment, setting forth seven detailed constitutional claims, including "due process, equal protection, free speech, free association, free exercise, the Establishment Clause, and 42 U.S.C. § 1983."[56] In response, Buhman filed a motion to dismiss based on mootness, as well as a cross motion for summary judgment.[57] When Buhman lost the mootness challenge, he then filed his response to the Browns' original motion for summary judgment.[58]

At this point, it is unclear why, when the merits of the case were finally before the court, that the government should fail to mount a vigorous defense. As noted by both the trial court and numerous scholarly responses to the decision, the "sheer lack of response" by the defense to the plaintiff's "seven detailed constitutional claims" was shocking.[59] The district court noted his astonishment during trial and explicitly asked the defense before closing of evidence whether it wanted to introduce more evidence or argument on the issue of harm.[60] The defense declined. As evidence of polygamy's harms, the defense introduced mere anecdotal references and stories of alleged harm, without any expert or testimonial evidence.[61] This failure on the part of the defense is evident, but the deeper question is why.[62] Regardless of the cause,

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[50] Brown v. Buhman, 947 F. Supp. 2d 1170, 1178–79 (D. Utah 2013), *vacated as moot by* 822 F.3d 1151 (10th Cir. 2016).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 1176.

[54] Brown v. Herbert, 850 F. Supp. 2d 1240, 1243 (D. Utah 2012).

[55] *Id.* at 1244.

[56] *Brown*, 947 F. Supp. 2d at 1176.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 1176–77.

[60] *Id.* at 1177, 1191, 1216.

[61] *Id.* at 1177.

[62] It could have just been mere exhaustion after having lost, what I think, were meretricious and debatable jurisdictional objections. It could have been a failure on the part

the effect of this omission essentially compelled the ultimate decision from the district court, which accepted the Browns' factual allegations largely uncontested.

After the hearing on plaintiffs' motion for summary judgment, the district court issued a ninety-one page opinion granting plaintiffs' motion, which struck down the cohabitation prong of the Utah anti-polygamy statute as being unconstitutional.[63] In the opinion, the court engaged in what I see as three exercises—statutory interpretation, scrutiny level constitutional analysis, and statutory reinterpretation to save the statute.

1. Statutory Interpretation

The Utah statute at issue reads: "A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person."[64] In interpreting this statute, the court read the "purports to marry prong" and the "cohabitation" prong as separate and tried to identify the prohibited conduct in each. In interpreting the "purports to marry" prong, the court was not persuaded by the definition used by the majority in *State v. Holm*,[65] a 2006 Utah Supreme Court polygamy case, which found that "purports to marry" is not limited to attempts at multiple legal marriages.[66] According to the *Holm* majority, "purports to marry" also includes instances in which a couple does not seek legal recognition but may conduct a religious ceremony and otherwise hold themselves out as married.[67] The district court in *Brown* instead followed the dissenting opinion in *Holm*, which limited the "purports to marry" prong to only those seeking multiple *legal* marriage licenses.[68] The district court then found that the "purports to marry" prong did not apply to the Browns because Kody Brown only had one legal license at the time to Meri.[69]

The court then read the statute again with the "purports to marry" prong removed: "A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person . . . cohabits with another

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of the defense, among the sea of pretrial and cross motions and memoranda, to see the importance of this particular summary judgment. The omission could also arise out of a sort of self-assuredness, resting on historical and societal negative attitudes toward polygamy and a failure to foresee a scenario in which the plaintiffs could possibly prevail.

[63] *Brown*, 947 F. Supp. 2d at 1176.

[64] UTAH CODE ANN. § 76-7-101 (West 2010), *invalidated by* Brown v. Herbert, 43 F. Supp. 3d 1229 (D. Utah 2014).

[65] 137 P.3d 726 (Utah 2006).

[66] *Brown*, 947 F. Supp. 2d at 1191–92 (citing State v. Holm, 137 P.3d 726, 737 (Utah 2006)).

[67] *Holm*, 137 P.3d at 731.

[68] *Brown*, 947 F. Supp. 2d at 1205–06, 1217–18 (citing *Holm*, 137 P.3d at 765, 771 (Durham, C.J., dissenting)).

[69] *Id.* at 1178, 1210.

person."[70] The court found that this second, cohabitation prong applied to the Browns by way of their "religious cohabitation," in which a person, usually the husband, participates in a religious "marriage" ceremony with a "spiritual" wife and after which the couple cohabits or lives together as a family.[71] The court then considered whether plaintiffs' challenges to the cohabitation prong had merit.

2. Scrutiny Level Constitutional Analysis

This lead the district court into its main constitutional analysis. I have previously detailed the court's constitutional bases for striking the cohabitation prong from the statute in previous works, so I will not repeat the entirety of that explanation here.[72] Ultimately, the district court held that under either strict scrutiny or rational basis scrutiny under the Free Exercise clause, the cohabitation prong would not pass constitutional muster.[73] Looking to the standard established in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[74] the court found that strict scrutiny applied to the Browns' Free Exercise claim because of the historical persecution of religious polygamists in particular.[75] The court also found that the Free Exercise claim was subject to strict scrutiny under the hybrid rights analysis in *Wisconsin v. Yoder*,[76] in which the Supreme Court held that laws restricting practices rooted in Free Exercise of Religion in conjunction with another fundamental right receive strict scrutiny.[77]

The prohibition in the Utah statute, the court held, could not pass strict scrutiny because it was not narrowly tailored to promote a compelling government interest.[78] It is at this point that the court returned to its previous exercise of statutory interpretation. When deciding whether the statute was narrowly tailored, the court read the terms of the "cohabitation" prong literally: "*or* cohabits with another person." In other words, a person is guilty of bigamy if they are married and simply cohabit with another person.[79] The court detailed how the language of the statute applies equally to both polygamous cohabitants or to adulterous cohabitants and

[70] *Id.* at 1226–28.
[71] *Id.* at 1181.
[72] *See* Faucon, *Polygamy After* Windsor, *supra* note 2, at 503–10.
[73] *Brown*, 947 F. Supp. 2d at 1178.
[74] 508 U.S. 520 (1993).
[75] In *Hialeah*, the Supreme Court held that a statute that is neutral and generally applicable on its face is subject to rational basis scrutiny unless the statute is discriminatory as applied. *Id.* at 531–32. In the instance of "religious polygamy," the Utah district court found that the anti-bigamy statute was historically used to target religious polygamists, so strict scrutiny should apply. *Brown*, 947 F. Supp. 2d at 1197–1202.
[76] 406 U.S. 205 (1972).
[77] *Id.* at 234–36.
[78] *Brown*, 947 F. Supp. 2d at 1221–22.
[79] *Id.* at 1215.

those with mistresses, which are not considered crimes.[80] By pointing out the vagueness in the statute, the court effectively held that the statute failed strict scrutiny and also held that, even if rational basis review applies to the Free Exercise claim, the statute was not rationally related to promoting whatever the alleged government concern was.[81]

As to the Browns' Due Process and Equal Protection claims, the court declined to apply heightened scrutiny based on the fundamental right to intimate relationships within a private home, as established in *Lawrence v. Texas*.[82] The infamous *Lawrence* case struck down Texas's criminal law against sodomy as unconstitutional, decriminalizing homosexual sexual conduct within the home.[83] Applying that protection to the conduct of the Browns, in which they have never claimed to be legally married but live their lives as married couples do within the privacy of their homes, the district court found that it was bound by previous interpretations of *Lawrence*.[84] Covering its bases, the district court held that even if private polygamous conduct is not a fundamental right, the statute would still fail under rational basis review, again returning to the vagueness argument in the context of polygamous cohabitation versus adulterous cohabitation.[85]

3. Statutory Reinterpretation to Save the Statute's Constitutionality

Because of the failure of the cohabitation prong's fit, the court attempted to then "save" the statute by excising the "bad" parts.[86] The court struck the cohabitation prong from the statute altogether. What remained was, "A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person."[87] Left intact was the State's ability to prosecute those who, knowing they are married, "purport to marry" another person. Under Judge Waddoups' interpretation, "purport to marry" only means anyone who tries to commit marriage license fraud or tries to get multiple marriage licenses.[88] By this new interpretation of the criminal statute, the only harm that Judge Waddoups saw worthy of outlaw was a public attempt at obtaining more than one legal marriage at a time. By restricting the crime to marriage license fraud, the district court decriminalized informal polygamy in Utah.

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[80] *Id.* at 1213–15.
[81] *Id.* at 1222–23.
[82] 539 U.S. 558, 584–85 (2003).
[83] *Id.* at 567.
[84] *Brown*, 947 F. Supp. 2d at 1202.
[85] *Id.* at 1222–25.
[86] *Id.* at 1227, 30–31.
[87] *See id.*
[88] *Id.* at 1233–34.

B. The Public and Private Spheres at Play in Polygamy's Harms

When the Utah district court announced its decision on December 13, 2013, the media and public reactions were swift and varied, ranging from praise and elation to derision and dismay.[89] Academics tracking the case produced a flood of analytical scholarship in response to or inspired by events at stake in the case.[90] The main issues with the *Brown* case in the critical scholarship address all three aspects of the court's process—the statutory interpretation, the constitutional analysis, and the statutory reinterpretation to save the statute. The case also became a catalyst for larger theoretical discussions about the current clime of family law in an age of expanding rights,[91] the alleged harms of polygamy on individuals and on society as a whole,[92] and the need to elevate monogamy in Western society over the liberty interest inherent in choosing family composition and intimate relationships.[93] Some even used the *Brown* case, in conjunction with other Supreme Court marriage equality cases, to springboard arguments supporting a constitutional right to the recognition of multiple legal marriages.[94]

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[89] *See, e.g.*, Sarah Pulliam Bailey, *Utah Polygamy Court Ruling on 'Sister Wives' Case Confirms Fears of Social Conservatives*, HUFFINGTON POST (Dec. 17, 2013, 8:28 AM), http://www.huffingtonpost.com/2013/12/17/utah-polygamy-court-ruling_n_4455706.html [https://perma.cc/3FK3-4ERP]; Bill Mears, *Judge Strikes Down Part of Utah Polygamy Law in 'Sister Wives' Case*, CNN (Dec. 16, 2013, 11:03 AM), http://www.cnn.com/2013/12/14/justice/utah-polygamy-law/index.html [https://perma.cc/UY2X-2GDP]; John Schwartz, *A Utah Law Prohibiting Polygamy Is Weakened*, N.Y. TIMES (Dec. 14, 2013), http://www.nytimes.com/2013/12/15/us/a-utah-law-prohibiting-polygamy-is-weakened.html?_r=0 [https://perma.cc/7TLW-XV6S].

[90] *See, e.g.*, Julia Chamberlin & Amos N. Guiora, *Polygamy: Not "Big Love" but Significant Harm*, 35 WOMEN'S RTS. L. REP. 144, 148 (2014); Hope Marie Deutsch, *Marrying Polygamy into Title VII*, 16 RUTGERS J.L. & RELIGION 145, 175 (2014); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661, 666 (2015); Rains, *supra* note 28, at 353; Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1819–20; Turley, *supra* note 7, at 1907–08; Kelly O. White, *The Sister Wives: Has Incest and Sexual Assault Become the New Reality? The United States District Court for the District of Utah Grants Polygamists the Holy Grail*, 48 CREIGHTON L. REV. 681, 683 (2015).

[91] *See, e.g.*, Murray, *supra* note 90, at 685, 692.

[92] *See, e.g.*, Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1821–42.

[93] *See, e.g.*, John Witte, Jr., *The Nature of Family, the Family of Nature: The Surprising Liberal Defense of the Traditional Family in the Enlightenment*, 63 EMORY L.J. 591, 671 (2015) [hereinafter Witte, *Enlightenment*] ("The heart of the argument is that exclusive and enduring monogamous marriages are the best way to ensure paternal certainty and essential joint parental investment in fragile and dependent children.").

[94] *See, e.g.*, Aviram & Leachman, *supra* note 1, at 308 n.253, 327; Faucon, *Polygamy After* Windsor*, supra* note 2, at 515–22; Elizabeth Oklevitch & Lynne Marie Kohm, *Federalism or Extreme Makeover of State Domestic Regulations Power? The Rules and the Rhetoric of* Windsor *(and* Perry*)*, 6 ELON L. REV. 337, 367 (2014); Otter, *supra* note 32, at 2012–14.

The district court's decision provided a thorough analysis to support its choice of scrutiny level for each of the Browns' constitutional claims, as well as the vagueness problems with the statute as written. What is hidden within the opinion is a discussion of the potential harms of polygamy that could justify restricting and criminalizing the practice, which is what the district court should have focused on, regardless of the scrutiny level used. The defense provided academic discussion of the "social harms" of polygamy, but introduced no admissible evidence of that factual assertion. Indeed, since the *Brown* decision, scholars stress that the showing or dispelling of alleged harm is the key to the decriminalization question.[95] If the poly movement is going to track the political and judicial trajectory of the gay rights movement, mirroring the progress of the *Lawrence—Windsor—Obergefell* line,[96] then the first step for poly supporters is to decriminalize polygamy. The fiercely debated scholarly discussions on harm post-*Brown* can provide guidance on this issue in order to help shape the direction of future decriminalization litigation.

Professor Maura Strassberg's approach to framing the harms of polygamy practically gives future poly opponents a line up of judicial arguments and supporting evidence that they could use to litigate the issue of harm.[97] She compared the showings of harm in the *Brown* case with another recent decision by the British Columbia Supreme Court upholding polygamy criminalization, *Reference Re: Section 293*, in which opponents of polygamy provided extensive evidence of the alleged harms of polygamy through expert and personal testimony.[98] She then chronicled the harms identified in different state and federal polygamy cases and discussed each of the harms identified in *Reference Re: Section 293*.[99] We can generally group these alleged harms into harms to individuals, such as the sensationalized abuses to women and children, and harms to society.

Some scholars focus more theoretically on polygamy's potential harms to society in that polygamy disrupts social, legal, normative, and traditional institutions

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[95] *See* Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1823.

[96] The progression of the *Lawrence-Windsor-Obergefell* line in the context of homosexual rights begins first with *Lawrence*, which decriminalized homosexual sexual conduct within the home. Lawrence v. Texas, 539 U.S. 558, 563 (2003). The *Windsor* case next found, on a federal level, that the failure to recognize same-sex couples as married for purposes of federal legislation is unconstitutional. United States v. Windsor, 133 S. Ct. 2675, 2696 (2013). Finally, the *Obergefell* opinion applied that rational to state prohibitions on same-sex marriage. Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

[97] Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1821–42.

[98] Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1818–19. The trial in *Reference re: Section 293 of the Criminal Code of Canada* under Canadian law involved forty-two days of hearings, ninety affidavits and expert reports, and "Brandeis Brief materials . . . . compris[ing] several hundred legal and social science articles, books, and DVDs." *Id*. at 1818 (alteration in original) (citing Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 15–16).

[99] Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1821, 1824.

based on monogamous marriage.[100] John Witte, Jr.'s recent work, *The Western Case for Monogamy Over Polygamy*, argues against the acceptance of polygamy in the West. He claims that monogamy is based on historical policies meant to create a domestic sphere in which two equal partners are complementary and equivalent to the other, thus creating stability in the home and mutual support as two people age and change over time.[101] These monogamous ideals, as well as the historical derision against polygamy's harms, such as its being a "threat to good citizenship, social order, and political stability, even an impediment to the advancement of civilizations toward liberty, equality, and democratic government,"[102] continue to influence discussions about the overall harm to society caused by polygamy.

Professor Turley's stance on the issue of harm takes a step back from the detailed enumeration of harms and instead approaches the question by asking what type of harm needs deterrence based on two theoretical conceptions of harm.[103] The first, which he discredits in the polygamy arena, is "compulsive liberalism," which "seeks limitations on speech and consensual conduct to combat sexism and other social ills."[104] The "compulsive liberalism" model, as applied to polygamy, would impermissibly restrain individual choice and liberty for the supported protection and advancement of women and ordered society.[105] The second model of harm, based

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[100] *See, e.g.*, Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101, 128–32 (2006); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1509–11 (1997) [hereinafter Strassberg, *Distinctions*]; Witte, *Enlightenment*, *supra* note 93, at 591, 599, 620, 631, 641, & 651.

[101] JOHN WITTE, JR., THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY 36 (2015).

[102] Witte, *Western Case*, *supra* note 4, at 1678; *see also* Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 306–31 (2010) (discussing the Mormon practice of polygamy as a form of race treason). In the late 1800s, political cartoons depict Mormon polygamists as "barbaric" and "primitive," often pictured with "others"—Chinese immigrants, Native-Americans, African-Americans, and Irish immigrants—as "troublesome." *Id.* at 308. Congressional Republicans compared Mormon polygamy to Chinese, Muslim, and South Asian despotic cultural practices, like concubinage, coolieism, and prostitution. *Id.* at 312–13. According to these characterizations, "civilization rose 'like the sun in the farthest reaches of the East and advanced progressively westward,' leaving behind China, India, and the Arab world as cultures 'past their glory.'" *Id.* at 313 (quoting JOHN KUO WEI TCHEN, NEW YORK BEFORE CHINATOWN: ORIENTALISM AND THE SHAPING OF AMERICAN CULTURE 1776–1882, at xvi (1999)).

[103] Turley, *supra* note 7, at 1929–30.

[104] *Id.* at 1905.

[105] *Id.* at 1933 ("[F]eminist scholars have embraced arguments based on majoritarian morality or values to seek to criminalize some forms of consensual conduct. These 'bad choices' are consensual but still harmful in the view of these scholars. This trend in some scholarship, and legislative measures, can be called 'compulsive liberalism'—an effort to

on John Stuart Mill's theory of societal harm and regulation, requires a more concrete form of injury to an individual to justify government restrictions on individual choice.[106] Turley pushes the second model of harm, and, in the context of polygamy, uses both tried and true as well as new arguments to discount the alleged harms caused to individuals by the practice of polygamy.[107]

In approaching my framework for discussing the harms of polygamy, my first goal is to view harms in both a theoretical and concrete fashion. In reviewing the converse side of that equation, I think that harms to both individuals and harms to society belong within the purview of justifications for the use of criminal laws. The crux of this section is not to recount arguments for and against the veracity of each of the individual harms, as I think sound scholarship already discredits many of the alleged individual harms.[108] This section approaches the individual harms by grouping them by their counterarguments instead in order to distill which harms, if any, remain relevant for discussion. The section then discusses in more detail the alleged harms to society, which will provide a more enumerated-style of counterargument. In particular, I address the "cruel arithmetic of polygamy"[109] and the need to maintain "ordered liberty" and our system of laws based on monogamy.

1. Harms Caused by Criminalization, Isolation, and Misogynist Beliefs

This subsection addresses a mixture of both harms to individuals and harms to society that are allegedly caused by polygamy. I posit, instead, that these outcomes are not caused by polygamy itself but can be ancillary effects of polygamy when practiced within an isolated society, removed from governmental oversight or mainstream societal influence. These harms include crimes such as child marriage,[110] statutory rape,[111] incest,[112] spousal and child abuse,[113] and lack of

compel the correct choices or conduct in society."). Turley further indicates that Professor Harcourt referred to this trend as "conservative liberalism" to capture the same ironic shift in legal theory. *Id.* at 1933–34 n.122 (citing Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 116 (1999)).

[106] *Id.* at 1932–33 (quoting JOHN STUART MILL, ON LIBERTY 23 (Boston, Ticknor & Fields 1863) (1859)) (stating that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others").

[107] *Id.* at 1942–72.

[108] *See infra* Section II.B.1.

[109] *See* CRAIG JONES, A CRUEL ARITHMETIC: INSIDE THE CASE AGAINST POLYGAMY 1–5 (2012).

[110] *See* DAPHNE BRAMHAM, THE SECRET LIVES OF SAINTS: CHILD BRIDES AND LOST BOYS IN CANADA'S POLYGAMOUS MORMON SECT 2, 5–6 (2008).

[111] *See* Chamberlin & Guiora, *supra* note 90, at 178.

[112] *See* White, *supra* note 90, at 681.

[113] *See* BRAMHAM, *supra* note 110, at 5–6; Chamberlin & Guiora, *supra* note 90, at 182–85 (discussing polygamy's "lost boys" as child endangerment and abandonment in the name of religious extremism).

education and healthcare,[114] as well as society's alleged overall need to maintain and control despotic groups from flourishing and perpetuating abuse.[115] As to the individuals harms listed, such as child marriage and spousal abuse—they are already outlawed. Criminal laws are specifically tailored to, and already do, address these particular crimes.[116] In fact, in the context of polygamy, law enforcement seldom prosecutes practicing polygamists unless one of these other heinous abuses is present.[117] But polygamy itself remains a crime. The lack of enforcement for polygamy alone, absent these other abuses, seems itself evidence that polygamy does not inherently cause these harms.[118]

As many have pointed out, these alleged individual harms are not *caused* by polygamy, much like they are not *caused* by monogamy. Monogamous marriages are not free from crimes such as spousal abuse, incest, and child sexual abuse, but monogamous marriages remain legal despite the long and historical presence of misogynist laws and unthinkable abuses committed against women and children in monogamous relationships.[119] While polygamy became defined by these ancillary abuses, monogamy somehow escaped these broad characterizations. This broad characterization that polygamy is abusive continues to haunt otherwise law-abiding polygamists today.[120] Even in the *Brown* litigation, the parties felt the need to

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[114] *See* Chamberlin & Guiora, *supra* note 90, at 166 (noting that Warren Jeffs, the now-incarcerated leader of the FLDS Church, told his members to remove their children from public schools and provided instead recorded lectures by Jeffs regarding religion and his view of the world, rather than topics such as math, English, and science).

[115] *See* United States v. Reynolds, 98 U.S. 145, 166 (1878) (noting that polygamy causes despotic groups).

[116] *See* Turley, *supra* note 7, at 1919–20.

[117] Brown v. Buhman, 947 F. Supp. 2d 1170, 1178–79 (D. Utah 2013).

[118] On oral argument, Judge Moritz asked counsel for defendant Buhman how the state can argue that the law is rational considering its lack of enforcement. Oral Argument at 20:56, Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016) (No. 14-4117) (on file with author); *see also* Emp't Div. v. Smith, 494 U.S. 872, 911 (1990) (Blackmun, J., dissenting) ("The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest, if it does not, in fact, attempt to enforce that prohibition."); Treasury Emp't. v. Von Raab, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting) (stating that a government interested in symbolism, "even symbolism for so worthy a cause as the abolition of unlawful drugs," cannot suffice to abrogate the constitutional rights of individuals.).

[119] *See* Turley, *supra* note 7, at 1950–51.

[120] One FBI agent who dealt with polygamous communities said, "At least 99% of all polygamists are peaceful, law-abiding people, no threat to anybody. It's unfortunate that they're stigmatized by a band of renegades." Bella Stumbo, *No Tidy Stereotype: Polygamists: Tale of Two Families*, L.A. TIMES (May 13, 1988), http://articles.latimes.com/1988-05-13/news/mn-3403_1_lebaron-family/3 [https://perma.cc/36K9-KLER]. Professor Debra Majeed, who interviewed over 400 African-American Muslims and over a dozen in a polygamous marriage, found no evidence of physical or sexual abuse of children within polygamous marriages in that community. "If it does occur," she states, "it is exceedingly

stipulate that the Browns have never been accused of any other ancillary crime like child or spousal abuse—would a monogamous defendant accused of criminal adultery feel compelled to make such assertions?[121] The distinction between harms as they apply to monogamous marriage and as they apply to polygamous marriage is a crucial one, as it can directly affect any rationality tests that might apply to constitutional challenges to the distinction.[122]

I have also argued that the criminalization of the practice itself turns otherwise law-abiding citizens into outlaws and misfits, pushing them into hidden, insular groups.[123] The isolation resulting from both the criminal and social stigmas against polygamy is the very reason that these groups have the potential to perpetuate and commit abuse—outside of the protective eye of the law, otherwise abusive men can thrive in secretive and self-supporting environments.[124] I would again argue that the relationship between polygamous societies and potentially threatening groups is not a direct one, but one in which polygamous groups are a mere example of a potentially politically threatening group. Many forms of insular and politically threatening groups exist that in no way advocate for polygamy in their political platforms.[125]

One thought to take from this perspective is that polygamy should not be defined by its extreme cases, as it is religious belief coupled with the isolationism that can allow salacious and dangerous behaviors to grow unfettered. In a larger work by Julia Chamberlin and Amos N. Guiora, they seek to show a link between religious extremism in general and harm, using polygamy as an example.[126] An additional aspect of Chamberlin and Guiora's theory is that seclusion from the outside world can even compound the dangers to the harmed children. I take issue

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rare." *Inside African-American Muslim Polygamy* at 3:32 NAT'L PUB. RADIO (July 23, 2008), http://www.npr.org/templates/story/story.php?storyId=92822369 [https://perma.cc/TZ29-KGEX].

[121] Brown v. Buhman, 947 F. Supp. 2d 1170, 1179 (D. Utah 2013).

[122] Abuse occurs in all types of relationships, monogamous ones included. *See* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 135–38 (1989); Faucon, *Marriage Outlaws*, *supra* note 1, at 4 (stating that "abuse is not absent from monogamous marriage, nor does society define monogamous marriage by its instances of abuse"); Strassberg, *Distinctions*, *supra* note 103, at 1578 (stating that "monogamous marriage in America has been described as highly patriarchal, and nineteenth-century Mormon views on the proper gender roles for women were not particularly unusual, or out-of-step with their non-Mormon contemporaries").

[123] Faucon, *Marriage Outlaws*, *supra* note 1, at 11–14. Tim Dickson, a lawyer who argued against anti-polygamy laws, "suggested that the high instance of teen pregnancy in Bountiful, B.C., may be linked to religion and isolation rather than to polygamy per se." BENNION, POLYGAMY IN PRIMETIME, *supra* note 3.

[124] *See id.* at 15–16.

[125] *See, e.g.*, Kirk Johnson, *25 Plead Not Guilty in Standoff at the Oregon Wildlife Refuge*, N.Y. TIMES (Feb. 24, 2016), http://www.nytimes.com/2016/02/25/us/25-plead-not-guilty-in-standoff-at-the-oregon-wildlife-refuge.html?_r=0 [https://perma.cc/5DL9-VD9F].

[126] Chamberlin & Guiora, *supra* note 90, at 144–45.

with the reasoning used by the authors to reach their conclusion in the context of religious polygamy—Chamberlin and Guiora use an extreme example of an abusive religious polygamous sect, the FLDS Church which is under the leadership of now-imprisoned Warren Jeffs, as a case study to prove their general tenet that polygamy causes harm.[127] While I find the link between extremist religious beliefs and subjugation of women a compelling generality, I decline to take a harder stance on the merits of this argument as it relates to the practice of polygamy itself absent from other environmental catalysts for abuse. I decry the use of religious exceptionalism arguments in general in the context of decriminalization and potential recognition of polygamy only to point out the pragmatic and theoretical shortcomings of using religious freedom arguments, as I support, instead, arguments based on intimacy pluralism and liberty ideals based on choice, identity, and speech.[128]

2. Harms to Society

If we can discredit most of the harms to individuals as direct results of polygamy, then the alleged public and societal harms must hold the key. Otherwise, informal polygamy cannot remain outlawed, and Judge Waddoups did not err in setting it free. An examination of the societal harms generates a more theoretical approach. In addressing the "harms to society," Strassberg is keen to point out that judicial opinions in the Tenth Circuit and the Utah Supreme Court fail to present a cogent link between their findings that polygamy is bad for society and that monogamy is generally important and the evidence of the effects of each societal state.[129] As Strassberg points out, *Potter* states without further explanation that "[m]onogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built."[130] But these opinions fail to explain how polygamy is actually "harmful to 'public life.'"[131]

She discredits arguments used in previous cases based on the desire to prevent marriage fraud by stating that "fraud" does not exist in the context of religious polygamists like the Browns, who have made no claim to multiple marriage licenses (no fraud against the State) and who have made no claim of ignorance of the other marriages (no fraud by Kody against any of the wives).[132] She also highlights the court's inability in *Holm* to square the justification that polygamy laws prevent the "misuse of government benefits," as subsequent "wives" are not "and could not be

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[127] *See id.* at 163–68.

[128] Faucon, *Polygamy After* Windsor, *supra* note 2, at 478–79.

[129] Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1823–24 (discussing Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985), State v. Holm, 137 P.3d 726 (Utah 2006), and State v. Green, 99 P.3d 820 (Utah 2004)).

[130] *Id.* at 1823 (alteration in original) (internal quotation marks omitted) (quoting Potter v. Murray City, 760 F.2d 1065, 1070 (10th Cir. 1985)).

[131] *Id.* at 1824.

[132] *Id.* at 1830.

legally married to the father of their children," and thus "no fraud is involved in claiming benefits as unmarried."[133]

After chronicling the failure of federal and state polygamy cases to particularly justify both the alleged harms to individuals and harms to society, Strassberg turns to the evidentiary showings of harm and the findings of the British Columbia Supreme Court in *Reference Re: Section 293*, which came to the opposite result of the Utah Federal District Court in *Brown*.[134] In her recounting of the societal harms identified in the *Reference* litigation, Strassberg begins by stating that "[a]ny understanding of the harms arising from polygamy must begin with an appreciation of the 'cruel arithmetic of polygamy.'"[135] In responding to the listed harms to society, this section first addresses and attempts to discredit the soundness of the argument based on the "cruel arithmetic of polygamy" and show its logical flaws.

(a) Prevent the "Cruel Arithmetic of Polygamy"

The "cruel arithmetic of polygamy" is an analytical tool used to argue that the practice of polygamy, or specifically polygyny, is inherently harmful to society.[136] The title stems from a book by Craig Jones, entitled *A Cruel Arithmetic*.[137] The general theory is that if some men are able to have more than one wife, other men, likely low-status and undesirable ones, will be unable to find wives and will be unable to produce a family.[138] Strassberg supports Dr. Joseph Heinrich's model of the theory, as reproduced below:

> Imagine a society of 40 adults, 20 males and 20 females . . . Suppose those 20 males vary from the unemployed high-school drop outs to CEOs, or billionaires . . . Let's assume that the twelve men with the highest status marry 12 of the 20 women in monogamous marriages. Then, the top five men (25% of the population) all take a second wife, and the top two (10%) take a third wife. Finally, the top guy takes a fourth wife. This means that of all marriages, 58% are monogamous. Only men in the to[p] 10% of status or wealth married more than two women. The most wives anyone has is four. The degree of polygynous marriage is not extreme in cross-cultural perspective . . . but it creates a pool of unmarried men equal to 40% of the male population.[139]

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[133] *Id.* at 1831.
[134] *Id.* at 1834.
[135] *Id.* at 1836 (citation omitted) (internal quotation marks omitted).
[136] *Id.* For a definition of "polygyny," *see supra* note 1 and accompanying text.
[137] *See* JONES, *supra* note 109.
[138] Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1836.
[139] *Id.* at 1836–37 (alteration in original) (quoting Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 505).

Strassberg summarizes the full effect of this equation, as "polygyny causes the proportion of young unmarried men [to unmarried women] to be high, up to a ratio of 150 men to 100 women."[140] This "cruel arithmetic" then implicates the remaining societal harm that I will address, which is the general idea that the state wants to uphold social good by maintaining laws based on monogamy. The argument is that the harms resulting from as-practiced polygyny justify criminalizing all forms of poly marital-like relationships.[141]

The parameters of the theory is itself flawed—it uses a closed society of only 40 people in which only the males are poly and allowed to have more than one spouse.[142] While this example reflects some religious polygynous communities, it certainly cannot apply to all of the other forms of polygamy or poly relationships which actually exist in the real world, especially those outside of a closed society.[143] It certainly cannot justify the continued criminalization of all forms of adult poly relationships. It also assumes that all members of the society are heterosexual; it assumes that no other forms of polyamorous relationships could form to encompass every adult member of the society; and it also assumes that every man wants to *or is able to* participate in the marital lifestyle or the poly lifestyle. The arithmetic argument assumes that the resulting tableau of relationships would only be that of polygyny. In reality, monogamous couples would still exist; some couples might be homosexual or have bisexual triads; some group relationships of four or five adults might form. The realities of decriminalizing polygamy would be that many forms of adult relationships could result. The two "leftover" men, if they wanted to be in relationships at all, could form relationships with any of these groups, or, as in reality, be so undesirable as to remain single.[144]

The arithmetic argument is also flawed because it assumes that the same relationship structures that we end up with—in which the billionaire has four wives—would not occur if polygamy remained criminalized. In reality, a billionaire would be more likely to have more than one "girlfriend" or mistress, and the two remaining, low-brow unmarried men would still be considered as such in the

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[140] *Id.* at 1837 (alteration in original) (quoting Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 586).

[141] *Id.* at 1835–36.

[142] *See id.* at 1836–37.

[143] *See* Turley, *supra* note 7, at 1918. The British Columbia Supreme Court dismissed polyamorist interests with the following sweeping generalization: "Assuming that any particular polyamorous relationship is captured by [section] 293 as I have interpreted it, I do not agree that the provision infringes their . . . rights. What evidence I have that suggests that polyamorists are a discrete group sharing truly common principles is scant. Polyamory is, I conclude, a largely secular phenomenon, as varied in practice as the imagination of its practitioners." *Id.* at 1918–19 n.58 (quoting Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 1094).

[144] The idea of an "old maid" man as a harm, as opposed to a romanticized "old bachelor" is almost amusing to me, because "old maid" was coined to represent unmarried women in society, which have existed for years.

monogamous marriage market.[145] Even in a monogamous society, the two "leftover" men might still struggle to find partners, which can stem not just from the apparent lack of available women within their closed society, but because of numerous factors that are contributing to the overall decline in traditional marriage and the rise of other forms of interpersonal and nonlegal relationships.[146] Even within our current monogamous system, criminalizing polygamy does not eradicate mistresses and the natural imbalance that a capitalist society produces in choosing a partner. The billionaire in the real world, instead of calling each woman his "wife" would simply have her as his mistress, could still provide for each one with suitable living arrangements, and could otherwise provide for their needs and any children produced. The only difference is that the law criminalizes that behavior if he were to call any of them his "wives" in public.

This harkens back to the public versus private argument that informs whether *Lawrence* applies to polygamous cohabitation. Is the harm mere public affirmations that someone is a "spouse" when they are not? If so, does no harm exist in private, lifelong affairs that, while not publicly displayed, everyone otherwise knows about and accepts? And what would be the resulting harm to society if we allowed the billionaire to call his wife and his three mistresses his "spouses"? I posit that the alleged harm stems from the State's desire to control the question of marriage and that public affirmations that someone is your spouse when they are not challenges

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[145] A recent study done by a psychology professor who testified as an expert in the *Reference 293* case concluded:

> I give [the women] a choice: You're in love with two men. One is a billionaire, he already has one wife and he wants you to be his second wife. You'll be a billionairess; you will have your own island. . . . And then compare him—just a regular guy, identical in every way, but you will just be his first wife. And then the question to the women is, ["W]hat is the probability . . . that you would be willing to go with the billionaire[?"], and I was surprised that 70 percent of my female . . . undergraduates said they either would go with the billionaire, with a 75 percent or a hundred percent chance they'd marry the billionaire.

Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 555.

[146] *See, e.g.*, GUY GARCIA, THE DECLINE OF MEN: HOW THE AMERICAN MALE IS TUNING OUT, GIVING UP, AND FLIPPING OFF HIS FUTURE, at xv (2008); HANNA ROSIN, THE END OF MEN AND THE RISE OF WOMEN 93 (2012); D'vera Cohn et al., *Barely Half of U.S. Adults Are Married—A Record Low,* PEW RES. CTR.: SOC. & DEMOGRAPHIC TRENDS, Dec. 14, 2011, http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/ [https://perma.cc/FMV2-A56W]; Aja Gabel, *The Marriage Crisis: How Marriage Has Changed in the Last 50 Years and Why It Continues to Decline*, UNIV. VA. MAGAZINE, Summer 2012, http://uvamagazine.org/features/article/the_marriage_crisis#.UZZfYZVgPHg [https://perma.cc/AN82-KVDS].

that control.[147] That a public threat to the State's control over marriage as a harm can justify strict or heightened scrutiny, or even rational basis scrutiny, seems absurd.

(b) Uphold Ordered Liberty and Maintain the System of Law Based on Monogamy

This challenge to the State's control of marriage is reflected under this broad idea that the decriminalization of polygamy would threaten social good as well. Strassberg points out that the *Reference*'s social harms encompassed both previously discussed individual harms, as abuse and subordination of women and children harms the overall development of citizens in establishing their autonomy and self-identity.[148] Social harms also include some of the alleged administrative burdens that might result from decriminalizing polygamy, as well as some more theoretical threats to monogamy as the foundation of society.

Here, I address the argument that decriminalizing polygamy would somehow threaten our vast network of laws based on monogamy and whether that "harm" is sufficient to continue to outlaw the practice as a crime. Scholars have pointed out that the desire to maintain laws based on monogamy are insufficient to justify continued criminalization—just because it would require some rewriting of the laws that we have long adhered to falls short.[149] Many laws are grounded in the structure that marriage is between two people. But at the same time, the laws have changed over time to accommodate the legal rights of those who may have more than one spouse over the course of a lifetime—or serial polygamy—which is allowed.[150] For example, in the social security context, if a claimant is married to a recipient for ten years or more, regardless of whether he or she is that recipient's current spouse, then he or she is entitled to a portion of the social security benefits.[151] Although decriminalizing polygamy would require some rewriting of our federal and state marriage laws, this potential administrative headache is not enough to justify a criminal ban on polygamy—in other words, it likely would not pass strict or heightened scrutiny.[152]

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[148] Strassberg, *supra* note 20, at 1834.

[149] *See, e.g.*, Strassberg, *supra* note 20, at 1828–30.

[150] *See* Faucon, *Marriage Outlaws*, *supra* note 1, at 42 n.233 (citing Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 673 (1976)) ("Successive polygamy is so much in vogue in Western industrialized societies that, far from forbidding it, the law of divorce, with its economic and child-related consequences, is fast changing to adapt to it.").

[151] *See* 42 U.S.C. § 416 (2012); Smith v. Barnhart, 57 F. App'x 406, 408–09 (10th Cir. 2003); Albertson v. Apfel, 247 F.3d 448, 448 (2d Cir. 2001); Robinson v. Shalala, 1995 WL 681044, *1 (S.D.N.Y. 1995); Contreras v. Sullivan, 1990 WL 357098, *2 (D. Ariz. 1990).

[152] *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 102 n.9 (1972) (noting that for fundamental rights, mere "administrative convenience" is not a compelling interest).

I bring up this issue because I want to add that I am not sure why this has ever been posited as a potential harm of decriminalizing polygamy. The need to maintain laws based on two-person marital rights is not implicated by the *decriminalization* of informal polygamy. The Browns here were not asking the court to find a constitutional right to multiple legal marriages—they were simply asking the court to decriminalize informal polygamy, and no "wife" asked the court to give her any legal rights currently reserved for legal spouses.[153] Decriminalization does not create a positive right which would then require the legislatures to re-write marriage laws to include legal polygamy.

Considering the current state of the polygamy debate today, however, the need to identify the harms resulting from decriminalization are paramount—what is the direct harm of polygamy that mandates its continued criminalization? Is it the mere telling the public that a person is a polygamous spouse, which threatens our societal traditions based on monogamy, which then threatens the State's control over the marital question? I do not think that the threat to the State's control over acceptable forms of adult relationships is sufficient to continue to criminalize the behavior. I also do not think that arguments based in historical tradition are compelling anymore,[154] especially in the face of the expansion of marital rights in the social and legal arenas,[155] nor do I think that Enlightenment ideals, while partly responsible for Western society's development of self-identity,[156] can justify modern marriage laws. I am at a loss trying to pinpoint the exact societal harm,[157] other than a public threat to the State's control over intimate adult relationships, which would result from decriminalizing informal polygamy. It is no wonder that, absent any evidence of harm presented by the defense in the *Brown* case, Judge Waddoups was compelled to release informal polygamy from its criminal stigma.

III. THE LAW

Keeping in the mind the exact alleged harm isolated in the initial analysis, the next step in the process is to determine the legal reaction in relation to that alleged harm. By proceeding from the particularized harm, this allows us to zero in on whether the law allows this type of restriction and, if so, under what confines. This second step has two sub-inquiries—focusing first on determining the substantive constitutional laws that should impact the regulation, and second on determining the actual statutory language needed to define prohibited conduct from permissible

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[153] Brown v. Buhman, 947 F. Supp. 2d 1170, 1178–79 (D. Utah 2013).

[154] Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . .").

[155] *See, e.g.*, Aviram & Leachman, *supra* note 1, at 290–96.

[156] *See* Witte, *Western Case*, *supra* note 4, at 1677.

[157] *See also* Turley, *supra* note 7, at 1970–71 (arguing that state action requires "more tangible and direct statements of harm").

conduct. Both inquiries continue to mystify courts, legislators, and scholars.[158] The arguments made in the appeal to the Tenth Circuit,[159] as well as the legislative responses by the Utah House,[160] demonstrate the dire need to pick the strongest pony moving forward next time there is occasion to challenge the constitutionality of the anti-bigamy laws.

This section presents the current status of the *Brown v. Buhman* litigation, analyzes the main arguments made on appeal, and discusses additional arguments advanced by *amici curiae*. It then chronicles the oral arguments in the *Brown* case, which occurred before the Tenth Circuit on January 21, 2016, focusing on the questions that the panel asked regarding mootness and *stare decisis*. Furthermore, this section discusses the Tenth Circuit's decision to reverse the district court on jurisdictional mootness grounds. The section concludes with a discussion of the different approaches that the Tenth Circuit could have taken and the different legal implications of each of those potential approaches.

A. The Appeal to the Tenth Circuit

On May 25, 2015, Buhman filed an appeal to the United States Tenth Circuit Court of Appeals.[161] Buhman, now represented by Utah Federal Solicitor, Parker Douglass, challenged the district court's decision on rational basis review on the plaintiffs' Fourteenth Amendment claim, the application of strict scrutiny to the Browns' Free Exercise claim, as well as the district court's interpretation of the statute.[162] A Tenth Circuit panel composed of Judges Matheson, Baldock, and Moritz heard oral arguments on January 21, 2016 in Denver, Colorado.[163]

1. Arguments on Appeal

The briefs on appeal focus mainly on the district court's ignoring *Reynolds* and *Potter*, as they relate to the polygamy question in general as well as the use of strict scrutiny for the Browns' Free Exercise claim, the use of heightened scrutiny for the Browns' substantive Due Process claim, and the proper interpretation of the Utah bigamy statute. This subsection presents the arguments made by parties on appeal in

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[158] *See, e.g.*, Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013); Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588.

[159] *See* Brief of Appellant at 13–63, Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016) (No. 14-4117).

[160] H.B. 281, 61st Leg., Gen. Sess. (Utah 2016), http://le.utah.gov/~2016/bills/static/HB0281.html [https://perma.cc/4ZDY-B7AT]; H.B. 58, 60th Leg., Gen. Sess. (Utah 2014), http://le.utah.gov/~2014/bills/static/HB0058.html [https://perma.cc/83TW-WC9S].

[161] Brief of Appellant, *supra* note 159, at 2.

[162] *Id.* at 11–12.

[163] Oral Argument, Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016) (No. 14-4117) (on file with author).

the *Brown* litigation, with commentary in support of certain arguments taken from the scholarly critiques following the publication of the decision.

(a) Buhman's Appeal

Buhman's appellate brief was hit or miss. Its stronger challenges to the district court's interpretations of Free Exercise and substantive Due Process were undermined by its confused reply to the court's statutory interpretation of the bigamy statute[164] and its failure to address the hybrid rights grounds used by the district court.[165]

The substantive arguments in Buhman's brief start with a compelling analysis of applicable Supreme Court and Tenth Circuit cases, *U.S. v. Reynolds* and *Potter v. Murray City*, respectively. The Tenth Circuit in *Potter* reaffirmed that *Reynolds* is still controlling law and binding on the question of Free Exercise rights of polygamists, which has never been overruled.[166] Although I think that *Reynolds* is outdated, archaic, and in need of re-examination, the weight of prior cases and the district court's decision to ignore them may have played a role in the Tenth Circuit's decision, at least in the substratum. A reliance on precedent and an apparent inability to overturn prior rulings of the Tenth Circuit unless by *en banc* decision or Supreme Court reversal also gave the panel a foundational principle of law to reverse the district court decision without having to address the deeper constitutional issues.[167]

The arguments then invoke persuasive Utah Supreme Court cases that interpret the bigamy statute differently than Judge Waddoups did. Strassberg's thorough

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[164] Brief of Appellant, *supra* note 159, at 33–38.

[165] Brief of Appellees at 2, Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016) (No. 14-4117).

[166] Brief of Appellant, *supra* note 159, at 18–19 (citing Potter v. Murray City, 760 F.2d 1065, 1067–70 (10th Cir. 1985)); *see also* Faucon, *Polygamy After* Windsor, *supra* note 2, at 505 (citation omitted) (stating that "*Reynolds* still controls the analysis of 'straightforward polygamy or bigamy'"); Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U.L. REV. 691, 710–16 (2001) (discussing *Reynolds* and the "anti-Mormon hysteria" caused by the practice of polygamy); Kenneth W. Starr, *Liberty and Equality Under the Religion Clauses of the First Amendment*, 1993 BYU L. REV. 1, 2 (noting Justice Scalia invoked *Reynolds* in another case); 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, 325 (2015) (stating that *Reynolds* "continues to be recognized as binding legal authority in America"). In an oft-quoted passage from *Reynolds*, the Court considered polygamy a distinctly non-Western cultural trait—"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." Reynolds v. United States, 98 U.S. 145, 164 (1878).

[167] *See generally* Barnes v. United States, 776 F.3d 1134, 1136–37 (10th Cir. 2015) (affirming the district court's order).

critique of the district court's decision tracks the historical development and legislative intent of the different iterations of Utah's polygamy statute up to the current version at issue.[168] The modern wording stems from a series of legislative reactions to the behaviors of polygamists in their attempts to skirt the technical language of the prohibition in the statute.[169] In reaction to this behavior, the statutes were later amended to include "purport to marry" and "cohabitation," which would allow for a more objective use of evidence.[170] The effect of this language is that the current Utah statute is meant to capture both attempts at multiple marriage licenses and attempts at informal cohabitation, with or without evidence of a marriage ceremony. The interpretations of "purports to marry" and the "cohabitation" prong in two Utah Supreme Court polygamy cases, *State v. Green* and *State v. Holm*, certainly do not limit "purport to marry" to attempts at multiple marriage licenses.[171] The critique is that the judge in the *Brown* case misinterpreted the statute when measured against the interpretations by the Utah Supreme Court.[172]

I also agree with that critique. The "purports to marry" and "cohabitation" prongs should be interpreted together, as their intent is to capture nonlegal marriage ceremonies and other public indicia of a married husband and wife. That would mean that the Brown family relationships would actually fit into the "purporting to marry" category *and* the "cohabitation" category. I do agree with Judge Waddoups, however, in his analysis that the cohabitation prong is vague when interpreted on its

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[168] Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1844–49.

[169] *See id.* In *Reynolds v. United States*, the first U.S. Supreme Court case to address the issue of polygamy in 1878, Reynolds was convicted of violating the federal anti-bigamy law by his factually attempting to obtain multiple marriages licenses. 98 U.S. 145, 150–51, 168 (1878). In reaction, practicing polygamists stopped applying for marriage licenses and instead "married" their subsequent wives in private, religious ceremonies only.

[170] Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1844–45. For example, the federal Morrill Anti-Bigamy Act of 1862 read: "[E]very person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall . . . be adjudged guilty of bigamy . . . ." Morrill Act of July 1, 1862, ch. 126, 12 Stat. 501 (repealed 1910). After amendment, the Edmunds Anti-Polygamy Act of 1882 included in its list of offenses: "unlawful cohabitation." Edmunds Anti-Polygamy Act of 1882, ch. 47, § 5, 22 Stat. 30, 31 (repealed 1910).

[171] Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1846–49. In *State v. Green*, the Utah Supreme Court held that the cohabitation prong of the anti-bigamy statute was not unconstitutionally vague. 99 P.3d 820, 834 (Utah 2004). In *State v. Holm*, the Utah Supreme Court held that "purports to marry" is not limited to attempts at multiple legal marriages, but includes religious "marriage" ceremonies. 137 P.3d 726, 732 (Utah 2006).

[172] Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1844–49; *see also* Rains, *supra* note 28, at 362–64 (criticizing Judge Waddoups' analysis in Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013)); White, *supra* note 90, at 696 (stating that "the district court incorrectly interpreted the United States Supreme Court precedent in its application of the Free Exercise Clause to the Statute").

plain language—the statute clearly has an "or" between the two provisions.[173] Further, even if the court had measured the Browns' conduct under the Utah Supreme Court's interpretation of "purports to marry," that prong is still open to the same constitutional attacks based in substantive Due Process, Free Exercise of Religion, Equal Protection, and Free Speech.

These early challenges to the district court's decision are likely the strongest substantive arguments as to why the decision was inappropriate on the merits. The brief starts to go off the rails when it begins to critique the district court's reading of the statute. Buhman argues that instead of reading the "purports to marry" prong and the "cohabitation" prong as disjunctive, the court should have inserted an "and" to thus read the statute conjunctively.[174] In other words, the appellant argues that after finding the statute vague, the district court should have rewritten the statute to read as follows: "A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person *[and]* cohabits with another person."[175] This particular argument that the trial court should have substituted the "or" with an "and" was ill founded, especially when, as Strassberg previously indicated, sensible alternative interpretations of the statute exist already that do not require an absurd retreat to rewriting disjunctive terms with conjunctive ones.[176]

The next substantive locus of Buhman's argument challenged the district court's use of heightened scrutiny based on *Lawrence* to the Browns' substantive Due Process claim. The argument is that the private acts at issue in *Lawrence* are protected but that the public acts at issue in polygamous marriage "presents the exact conduct identified by the Supreme Court in *Lawrence* as outside the scope of its holding."[177] Related to that argument, Professor Robert E. Rains asserts that *Lawrence* protects persons in their intimate relationships from government intrusions into their dwelling or other private place.[178] Rains argues that the Brown family's conduct is distinguishable from that at the heart of *Lawrence*: "It is difficult to perceive what privacy is involved with relationships which the *Brown* plaintiffs have seen fit to broadcast on a nationally syndicated television show or how they could possibly have standing to assert any privacy argument."[179]

Honing in on the private versus public conduct distinction splinters the liberty interest asserted by polygamists in two. While that differentiation may take part of

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[173] UTAH CODE ANN. § 76-7-101 (West 2010), *invalidated by* Brown v. Herbert, 43 F. Supp. 3d 1229 (D. Utah 2014).

[174] Brief of Appellant, *supra* note 159, at 35–40.

[175] *Id.* at 37 (alterations in original).

[176] Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1845–49.

[177] State v. Holm, 137 P.3d 726, 743 (Utah 2006).

[178] Rains, *supra* note 28, at 354–55. The *Lawrence* court stated that the "private acts in question did not involve people who might be coerced or injured; people who may not readily refuse to consent; or people involved in public conduct." Brief of Appellant, *supra* note 171, at 45 (citing Lawrence v. Texas, 539 U.S. 558, 560 (2003)).

[179] Rains, *supra* note 28, at 364.

the liberty interest of polygamists outside of the protection of *Lawrence*, this does not preclude *Lawrence*'s application to the private aspects of polygamy. It appears the public versus private conduct distinction is paramount in whether *Lawrence* or some other constitutionally limiting principle can protect the conduct of "public" polygamous families within its penumbra.

(b) The Browns' Response

The Browns, represented by Professor Turley, were quick to grab two, low-hanging counterarguments. First, the Browns pointed out the absurdity of Buhman's new statutory interpretation argument that the district court should have imposed an "and" for an "or" in the statute in order to save it from unconstitutional vagueness.[180] I will not repeat the entirety of that argument, but will only point out that the panel did not place much stock in this argument on appeal.[181] Second, the Browns highlighted Buhman's failure in his brief to challenge the district court's striking of the cohabitation prong using the hybrid rights grounds.[182] This effectively waived this ground to challenge the decision on appeal.

Scholars also critique the court's use of strict scrutiny under the hybrid rights analysis set out in *Wisconsin v. Yoder*[183] to the Browns' Free Exercise claim.[184] The hybrid rights analysis requires a finding that a practice restricts the Free Exercise of Religion in conjunction with its restricting another fundamental and constitutionally protected right.[185] The *Yoder* case involved the rights of Amish parents to defy a public law requiring all children to attend public school until at least the eighth grade in compliance with their Amish beliefs. In *Yoder*, the Court held that religious belief coupled with a parent's fundamental right to determine the education and upbringing of his or her children, subjected the public school requirement to strict scrutiny.[186] The *Yoder* decision can be criticized as an aberration in the court's otherwise ordered Free Exercise analyses.[187] Second, scholars argue that, in the context of polygamy, no hybrid right exists as the Supreme Court has never defined or included the right

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[180] Brief of Appellees, *supra* note 165, at 8–12.

[181] *See* Oral Argument, *supra* note 163, at 12:45.

[182] Brief of Appellees, *supra* note 165, at 59–62.

[183] 406 U.S. 205 (1972).

[184] *See id.* at 247 (Douglas, J., dissenting).

[185] *See* Emp't Div. v. Smith, 494 U.S. 872, 881 (1990) (describing the hybrid application needing to be "in conjunction with other constitutional protections").

[186] *Yoder*, 406 U.S. at 215–17.

[187] While I was previously neutral on *Yoder*'s propriety, I now argue against its merits. I think the opinion in *Yoder* was results-oriented, focusing more on glamorizing the beautiful and simple lifestyle of the Amish and therefore finding an acceptable scrutiny test that would allow the Amish to "opt-out" of the public education requirement. I do not necessarily agree with the Court that the desire to educate children up until the eighth grade is not a compelling one that could pass strict scrutiny.

to polygamous marriage, informal or otherwise, as a fundamental one.[188] While I agree that the hybrid rights grounds should be re-examined in general, I disagree with the reactionary scholarship that argues that polygamy is not a protected fundamental right that can support a hybrid rights analysis, as I will explain more thoroughly below.

The more intricate substantive arguments focus on upholding the district court's decisions to use strict scrutiny for the Free Exercise challenge and heightened scrutiny under the substantive Due Process challenge. The Browns argued that the district court was correct to look past *Reynolds* and *Potter* in light of subsequent Supreme Court cases, as *Reynolds* is no longer "good law."[189] The Browns further argued that state tests used to interpret federal constitutional rights are not controlling on a federal court.[190] The brief also supports the district court's decision by arguing that, even if strict or heightened scrutiny do not apply to either claim, the statute would still fail under rational basis review and that the statute is unconstitutionally vague.[191] Peppered throughout the Browns' brief are references to Buhman's failure to introduce any evidence of harm to the district court.[192] Without any evidence of harms, they argue, the statute cannot pass even a rational basis review—the court cannot do the fit test at all in fact. Considering the additional confusion added by the potential numerous ways to read the "cohabitation" portion of the statute, the Browns maintain that the district court was correct in striking it from the statute.[193]

(c) Buhman's Reply

Buhman's reply brief focused on two main points: that *Reynolds* and *Potter* are still binding precedent that compel reversal of the district court and that Browns'

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[188] Strassberg, *Scrutinizing Polygamy*, *supra* note 20, at 1867–69.

[189] Brief of Appellees, *supra* note 165, at 13–14 (citing Faucon, *Polygamy After* Windsor, *supra* note 1, at 496); Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 710 (2001) ("*Reynolds v. United States* demonstrates the degree to which even the Supreme Court was in the grip of anti-Mormon hysteria and was willing to ignore constitutional concepts of fundamental fairness in trials against Mormons."); Kenneth W. Starr, *Liberty and Equality Under the Religion Clauses of the First Amendment*, 1993 BYU L. REV. 1, 2 (criticizing *Reynolds*); 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, 311 (2015) ("[T]he archaic and moralistic Victorian rationale of *Reynolds v. United States* is no longer supportable . . . .").

[190] Brief of Appellees, *supra* note 165, at 18–23.

[191] *Id.* at 23–37.

[192] *See, e.g.*, *id.* at 6, 18, 30.

[193] *Id.* at 37–43.

asserted fundamental rights are nonexistent as the harms attendant to polygamous practices are legitimate subjects of Utah's police powers.[194]

2. Arguments by Amici Curiae *Eagle Forum and CATO Institute*

The court received three briefs from *amici curiae*, two submitted on behalf of Buhman, and one submitted on behalf of the Browns. I briefly discuss two, the Eagle Forum Education and Legal Defense Fund and the CATO Institute.[195] The main thrust of the Eagle Forum's argument was that the district court lacked subject matter jurisdiction to hear the case, an issue that has loomed over this litigation since its inception.[196] Given the lack of any criminal enforcement proceedings against the Browns, the argument is "[s]uits to declare marriage rights—including rights to the unlicensed 'quasi-marriages' here—fall under the domestic-relations exception to federal jurisdiction."[197] Coupled with the *Reynolds* decision's control of the issue, the federal controversy is too insubstantial to confer jurisdiction and, in any event, "[f]ederal courts do not sit as a super state legislature, [and] may not impose [their] own narrowing construction . . . if the state courts have not already done so."[198] The jurisdictional argument is a pertinent one that ultimately disposed of the case at the Tenth Circuit, but not in the approach urged by Eagle Forum.[199]

The Cato Institute *amici curiae* brief enhanced and raised an argument hinted at in the Browns' response brief—that Utah's bigamy statute criminalizes speech, and that the restriction on speech in the statute is unconstitutional because it does not fall within any exceptions.[200] Further, the brief argues that the law is not narrowly tailored to support any compelling governmental interest and that speech cannot be restricted on the grounds that it may incite people to engage in potentially socially harmful conduct.[201]

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[194] Reply Brief of Appellant at 6, Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016) (No. 14-4117).

[195] The brief for the Sound Choices Coalition, Inc. on behalf of Buhman, supplies the court with an analysis on polygamy's harms, arguing that polygamy harms women and children and that the laws are narrowly tailored to advance these compelling interests. Brief for *Amicus Curiae* Sound Choices Coal., Inc. Supporting Appellant-Defendant & Reversal at 1–8, Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016) (No. 14-4117).

[196] Brief for *Amicus Curiae* Eagle Forum Educ. & Legal Def. Fund in Support of Appellant & Reversal at 4–17, Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016) (No. 14-4117).

[197] *Id.* at 3.

[198] *Id.* at 20 (quoting United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc., 857 F.2d 422, 431 (8th Cir. 1988)).

[199] The Eagle Forum position is that the domestic relations exception to subject matter jurisdiction is not limited to cases such as marriage, divorce, and child custody, but also includes the Browns' claims to informal polygamy. *Id.* at 5.

[200] Brief of the Cato Inst., *supra* note 7, at 14.

[201] *Id.* at 14–23.

The argument looks to the prohibited conduct at issue in the statute—"purporting to marry" another person or cohabiting with another person. In practice, this means engaging in a religious (or non-religious) ceremony or engaging in marital-like conduct and calling someone a "spouse" or saying "that's my wife," even if the marriage is not legally recognized. The Cato Institute concludes from this: "Indeed, the statute criminalizes speech that creates and maintains intimate associations between consenting adults, and communicates freely chosen religious and moral values. The bigamy statute thus restricts protected and valuable speech because of its content, and is therefore presumptively unconstitutional." [202] Completing the analysis, the brief argues that the statute is not narrowly tailored to any compelling state interest and that it is over-inclusive as to "any interest in preventing fraud, domestic abuse, or child sexual abuse."[203]

The Cato Institute position helped to crystallize the exact conduct or alleged public harm sought to be at the heart of the polygamy bans—calling someone a spouse in public when they are not or otherwise acting like married persons when one is already married. While I have hinted that this harm relates to threatening the State's control over marriage, the Cato Institute's brief frames the constitutional analysis based on the substance of improper state control over speech and association.[204] For me, the novelty of this approach in the religious polygamy context provides yet another potential ground to challenge polygamy bans in any future litigation—a Free Speech ground. This could potentially lead to the use of a "tri-brid" rights grounds in the context of religious-based polygamy—substantive Due Process, Free Exercise of Religion, and Free Speech.

[202] *Id.* at 3.
[203] *Id.*
[204] *Id.*

3. Oral Arguments

On January 21, 2016, a Tenth Circuit panel composed of Judges Matheson, Baldock, and Moritz heard oral arguments in *Brown v. Buhman* in Denver, Colorado.[205] As I was currently a fellow at the University of Denver, Sturm College of Law, I attended oral arguments, in addition to many interested law students, law professors, and media. Most of the seats were filled by the time oral argument began at 8:30 a.m. The panel's questions focused on three main issues: standing and mootness (an issue raised *sua sponte* by the panel), the evidence of religious targeting to support strict scrutiny of the Free Exercise claim, and the interpretation of the Utah statute in a manner that differs from the Utah Supreme Court.

(a) Buhman's Oral Argument

The attorney for Buhman, Parker Douglas, first approached the lectern, and before he could complete his opening, Judge Matheson asked counsel about the court's *sua sponte* mootness issue and whether the district court was correct in proceeding on the merits.[206] Douglas did point out, to the surprise of the court, that a bill was introduced in the House in Utah that week which changed the "or" in the statute to an "and" in response to the district court decision.[207] Douglas then returned to the mootness question. The court pointed out that standing is determined at the time the complaint is filed, but it wanted to know if there is a difference between a mere investigation and a threat of prosecution and whether investigation alone is enough for an injury.[208] The panel focused on whether there was a credible threat of prosecution given the fact that the Browns now live in Nevada.[209] Judge Baldock stressed this point, asking counsel in numerous ways how the Browns could be prosecuted by Utah County for acts committed in Utah now that they live in Nevada. [210] Quite incredulously, Douglas responded that they could not be prosecuted now, a position he had to take given his underlying position of arguing that no case or controversy exists.[211]

Judge Baldock briefly addressed defendant's argument in his brief that the district court should have substituted an "and" for the "or" in the statute—to which Judge Baldock quickly imposed that he would not be inclined to do. Deflecting and minimizing that argument (although not a bad one considering the recent action by

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[205] Nate Carlisle, *'Sister-Wives' Polygamy Case to Go Before Appeals Court in January*, SALT LAKE TRIB. (Nov. 12, 2015), http://www.sltrib.com/news/3170921-155/sister-wives-polygamy-case-to-go [https://perma.cc/26BN-E9JQ].

[206] Oral Argument, *supra* note 163, at 2:25.

[207] *Id.* at 2:30.

[208] *Id.* at 6:20.

[209] *Id.* at 9:48.

[210] *Id.*

[211] *Id.*

the Utah House in accordance with that statutory suggestion),[212] Douglas instead focused on the private conduct versus public conduct distinction that he thinks is covered in the statute.[213] Baldock asked whether *Windsor* and *Obergefell* have any impact on the cohabitation conduct in this case, to which Douglas responded that those cases involve recognition of marriage rights and not decriminalization of conduct, which is what is at issue here.[214]

At this point, Judge Matheson asked pointed questions as to why counsel did not specifically challenge the district court's hybrid rights analysis in its brief, and whether that means the argument is waived on appeal. Somewhat of an implied berate of his lack of briefing on the issue, counsel's response was well-reasoned—he cited a case which found that two questionable constitutional claims do not make up a hybrid rights claim, and then he pointed out that his brief addressed how both constitutional challenges are insufficient.[215] Matheson then asked why there was no introduction of evidence of harm at the district court level. At this point, Douglas reminded the panel that the defendant was previously represented by different attorneys (who no longer hold their positions), and that he was simply bound at this point by the record in this case.[216] What Douglas does instead is try to cite cases which find harm and then say that citations to these cases are sufficient as evidence of harm.[217] He used the Tenth Circuit case, *Kitchen v. Herbert*,[218] (which Douglas also argued before the Tenth Circuit), which allowed citations to social science papers as evidence.[219] While not further pressed on this issue, the *Kitchen* case is distinguishable as social science papers in terms of evidence are not the same as case law. The former is used to establish a fact, and not the law as an opinion can do.

The defendant's oral argument ended with Judge Moritz asking counsel how the State can even justify a rational basis for the statute in light it of its rare enforcement or use only to find evidence of other crimes.[220] In response, Douglas argued that the statute is used to prosecute bigamists along with fraud and sexual abuse, that the statute allows them to find evidence of these other crimes, and that, essentially, it is a common practice that has been recognized by the Tenth Circuit recently. Finally, Judge Baldock asked what the defendant's single best argument moving forward was; he responded by pointing out that the court is bound by *Potter* and *Reynolds*, which remains good law.[221]

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[212] *Id. See* H.B. 281, 61st Leg., Gen. Sess. (Utah 2016), http://le.utah.gov/~2016/bills/static/HB0281.html [https://perma.cc/4ZDY-B7AT].

[213] Oral Argument, *supra* note 163, at 9:48.

[214] *Id.* at 14:27.

[215] *Id.* at 15:45.

[216] *Id.* at 17:10.

[217] *Id.*

[218] 755 F.3d 1193 (10th Cir. 2014).

[219] *Id.* at 1198–99 (holding that the Utah prohibitions on same-sex marriage were unconstitutional).

[220] Oral Argument, *supra* note 163, at 21:18.

[221] *Id.* at 24:45.

(b) The Browns' Oral Argument in Response

Like with the appellant, most of the panel's questions to counsel for the Brown family focused on mootness and standing. While there was some opening argument about whether the defendant waived the mootness issue on appeal, Judge Matheson quickly pointed out that a litigant cannot waive the court's jurisdiction, especially considering in this instance the panel raised the question *sua sponte*.

Judge Moritz returned to the "credible threat of injury" inquiry and how plaintiffs' allegations are actionable. Turley responded that Kody Brown executed an affidavit stating that he would like to move back to Utah where the center of their church is located. Turley also raised an additional injury grounded in the free speech angle—that the law has a "chilling effect," which is specifically injurious in Free Speech cases under *Virginia v. American Booksellers Ass'n Inc*.[222] Further, Turley argued that singling this family out and calling them "felons" has an injurious effect to them individually because they stopped giving public speeches in Utah as a result.[223] Even though they did not discontinue the airing of their show, calling "public figures" such as the Browns felons is injurious. At another point in the oral argument, Turley returned to this argument to remind the panel not to ignore the "chilling effect" on speech.[224]

Judge Matheson introduced the next focus of inquiry by asking what evidence exists in the record that shows the law is only enforced against religious polygamists and not secular ones.[225] Turley pointed to the admissions and comments made by defense counsel to Judge Waddoups during the motion for summary judgment.[226] In that argument, the defendant admitted that the State only enforces the law against religious polygamists. Those admissions, Turley argued, are binding, and the defendant did not argue the *Geer* case, in which a secular polygamist was prosecuted, to the trial judge.[227] Although pressed numerous times for any other evidence in the record of religious targeting, counsel again returned to the trial court's findings and the admissions made in court.[228]

The last main section of inquiry involved the district court's ability, as a federal court, to interpret a state bigamy statute in a manner that differs from the interpretation by the Utah Supreme Court.[229] In somewhat of a humorous exchange

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[222] 484 U.S. 383, 384–85 (1988) (holding that pre-enforcement nature of the litigation did not prevent the plaintiffs from having standing to challenge a statute that restricted commercial display of sexual material based on an actual and well-founded fear that the law would be enforced against them and the alleged danger was in large part one of self-censorship).

[223] Oral Argument, *supra* note 163, at 37:30.

[224] *Id.*

[225] *Id.*

[226] *See* Brown v. Buhman, 947 F. Supp. 2d 1170, 1178 (D. Utah 2013).

[227] Oral Argument, *supra* note 163, at 44:30.

[228] *Id.* at 46:30.

[229] *Id.* at 52:49.

between Professor Turley and Judge Baldock, Turley stated that he might ask that question on an exam, to which Baldock responded, "I can tell you that if you say that they can do that, we've just learned some new constitutional law."[230] At the same time, Turley never gave a clear answer, while he did point out that federal courts are not bound by state interpretations of federal constitutional questions, Judge Matheson pointed out that they are referring to the "purports to marry" and statutory interpretations of the Utah Supreme Court.[231] Turley closed his argument by pointing out that *Reynolds* can still be cited for bans against multiple marriage licenses.

On reserved time, Douglas pointed out that colloquy with the district court is not a record of religious targeting and that the court was not bound by defendant's answers to the court's questions.[232] The court inquired into the legislative intent of the Utah ban, even looking to the original irrevocable ordinances from 1890,[233] but allowed counsel to end by arguing that the current bans do not target religious polygamists.[234] At the end of reserved time, in somewhat of a break from procedural etiquette, but allowed by the court, Turley made a few closing statements answering the court's question about scrutiny levels, at first speaking from his bench but then walking up to the lectern mid-sentence. He quickly stated that the district court did announce different standards for religious cohabitors and non-religious ones in the opinion.[235] The oral arguments then closed after running over allotted time by almost double.

B. The Tenth Circuit Opinion

Considering the court's *sua sponte* standing and mootness inquiries and the large portion of the oral arguments dedicated to those issues, it is no surprise that the Tenth Circuit reversed the district court on jurisdictional mootness grounds. This allowed the Tenth Circuit to reverse the district court without having to answer the constitutional merits. At the same time, the appeals court had substantive grounds to reverse the decision based on prior precedent. With that result, the current status of the law returns to its interpretations under *Potter* and, thus, under the Utah Supreme Court interpretations.[236] The additional wrinkle of the new Utah legislation that Buhman's counsel brought to the attention of the panel, although an attempt to amend the statute, still falls prey to the constitutional challenges in a conjunctive

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[230] *Id.* at 54:23.

[231] *Id.* at 52:50 (referencing State v. Holm, 137 P.3d 726 (Utah 2006) and State v. Green, 99 P.3d 820 (Utah 2004)).

[232] *Id.* at 52:50.

[233] The "irrevocable ordinance" refers to a provision in the Utah constitution that forever bans polygamy in the State. *See* UTAH CONST. art. III.

[234] Oral Argument, *supra* note 163, at 55:00.

[235] *Id.*

[236] *See* Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985); State v. Holm, 137 P.3d 726 (Utah 2006); State v. Green, 99 P.3d 820 (Utah 2004).

form. With the court's jurisdictional punt, we are left guessing at how the Tenth Circuit would analyze the deeper, and much thornier, underlying constitutional protections at stake.

1. Reversal on Mootness Grounds

After oral arguments, it seemed likely that the Tenth Circuit would decide the appeal on either jurisdictional grounds, prior precedent, or a combination of both. When the Tenth Circuit published its decision on April 11, 2016, the panel avoided the case law altogether and instead reversed on jurisdictional mootness grounds.[237] The Tenth Circuit held that the case was moot because the Utah County Attorney's Office adopted a policy that it would not bring a bigamy prosecution against an offender unless he or she (1) induces a partner to marry through misrepresentation or (2) is suspected of committing a collateral crime, such as fraud or abuse.[238] The Tenth Circuit stated that, because of this adopted policy, the district court erred in proceeding to the merits as the case "ceased to qualify as an Article III case or controversy."[239]

Under its mootness analysis, the Tenth Circuit found that the Browns were "under no credible threat of prosecution."[240] To reach this result, the court engaged in a three-part inquiry. First, the court found that the Browns complaint only sought prospective relief, and not relief for past injuries. This finding allowed the court to then limit the district court's proper inquiry to whether any injury continued now or into the future. Second, within that prospective frame work, the court found that Buhman's adoption of the "office policy" not to prosecute the Browns and the Browns' move to Nevada "eliminated any reasonable expectation that the Browns will be prosecuted . . . ."[241] Finally, the court responded to the four arguments the Browns made against a finding of mootness. In particular, that (1) *Winsness v. Yocum*,[242] in which the Tenth Circuit found mootness, is distinguishable and requires a finding of ripeness here; that (2) the office policy adopted by Buhman could change after he leaves; that (3) Buhman continues to uphold the statute's constitutionality; and that (4) Buhman adopted the office policy in order to moot the case.[243]

The aim of this subsection is not to address each step in the Tenth Circuit's analysis,[244] as I generally agree with its initial finding that the Browns' complaint

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[237] Brown v. Buhman, 822 F.3d 1151, 1155 (10th Cir. 2016).
[238] *Id.*
[239] *Id.*
[240] *Id.* at 1169.
[241] *Id.*
[242] 433 F.3d 727 (10th Cir. 2006).
[243] *Brown*, 822 F.3d at 1171–72.
[244] *See id.*

cannot support a claim for damages and requests proscriptive relief only.[245] But within that restricted scope of inquiry, I do take some issue with the court's finding that there was "no reasonable expectation that Mr. Buhman will violate" the office policy.[246] Particularly, I question the court's treatment of that standard under its interpretation of *Winsness* and *Mink v. Suthers*.[247] The district court, relying on *Mink*'s interpretation of *Winsness*, used the three "*Winsness* factors" to determine whether or not a credible threat of prosecution existed.[248] The Tenth Circuit's opinion takes great pains to explain that the three "*Winsness* factors" used in *Winsness* and *Mink* did not "purport to state a definitive test that would govern in every case."[249] The "*Winsness* factors," according to the Tenth Circuit, merely "described some evidence supporting the prosecutors' credibility, not a doctrinal test."[250]

In *Winsness*, the plaintiff was cited by the police for burning a symbol onto an American flag and hanging it from his garage.[251] The district attorney dismissed the charge of flag abuse before trial. Afterward, Winsness filed a § 1983 action, arguing that the Utah flag-abuse statute violated the First and Fourteenth Amendments.[252] In an affidavit filed with the court, the Salt Lake County district attorney declared that he had no intention of prosecuting anyone under the flag-abuse statute as its enforceability was doubtful in light of the Supreme Court's decision in *Texas v. Johnson*.[253] He further declared that "until the constitutional doubts about the Utah statute are eliminated through a constitutional amendment or a new decision of the United States Supreme Court, [he had] no intention of prosecuting . . . anyone . . . under the statute."[254] On appeal, the Tenth Circuit held that *Winsness* lacked standing and that the affidavits mooted the case.[255] Weighing these facts together, the court stated that the "veracity of these affidavits is bolstered both by the prosecutors' actions, quickly repudiating the citation against Mr. Winsness, and by

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[245] The court explained its holding in two footnotes, 10 and 19. The former explained that, even though Buhman was a municipal and not state-level actor, § 1983 claims brought against officials in their official capacities (as the *Brown* case was), may only sue for injunctive relief. Defendants sued in their individual capacity can be sued only for money damages. *Id.* at 1162 n.10 (citations omitted). In footnote 19, the court further argued that the Browns' request for "such other relief as [the district court] may deem just and proper" did not properly plead money damages and was distinguishable from the Tenth Circuit's careful treatment of the language in the prior case *Frazier v. Simmons*. *Id.* at 1170 n.19 (citing Frazier v. Simmons, 254 F.3d 1247, 1251 (10th Cir. 2001)).

[246] *Id.* at 1170.

[247] *See id.* at 1165; Mink v. Suthers, 482 F.3d 1244, 1251 (10th Cir. 2007).

[248] *Brown*, 822 F.3d at 1174–75.

[249] *Id.* at 1174.

[250] *Id.* at 1175.

[251] Winsness v. Yocum, 433 F.2d 727, 729 (10th Cir. 2006).

[252] *Id.* at 730.

[253] 491 U.S. 397 (1989).

[254] *Winsness*, 433 F.3d at 730–31.

[255] *Id.* at 734, 736.

Texas v. Johnson, which gives the prosecutors good reason to avoid initiating potentially futile prosecutions."[256]

The next year, in *Mink*, the Tenth Circuit considered the mootness of a constitutional challenge to Colorado's criminal libel statute pre-enforcement or prosecution.[257] In *Mink*, the court discussed *Winsness* and found that in *Mink*, the prosecutor's "assurances established mootness since the government (1) had quickly repudiated the action initially taken against Winsness, (2) its statements were made in sworn affidavits, and (3) it based its decision on controlling Supreme Court precedent, making future prosecution unlikely."[258] The court then stated that the "factors" as present in *Mink* weighed against a finding of ripeness.[259] In *Brown*, the Tenth Circuit held that the district court erred in relying on the "*Winsness* factors," emphasizing that "*Winsness* represents a fact-specific application of [a] general rule,"[260] and that the district court erred in limiting its analysis to weighing the "*Winsness* factors" and "ignored the broader lesson of *Winsness* and *Mink*: that evidence supporting the veracity of the decision and the policy not to prosecute is important to the mootness analysis. That evidence need not be limited to the '*Winsness* factors.'"[261]

Accepting that the Tenth Circuit's explanation in *Brown* of the controlling and probative value of *Winsness* is just that, a clarification of the use of "*Winsness* factors," the issue then becomes one of rhetoric and context. If the Tenth Circuit did not intend the three factual circumstances in *Winsness* to be used or considered as legally probative "factors," then the court's use and interpretation of the "*Winsness* factors" in *Mink* certainly did not do this current panel any favors to that end. *Mink*'s use of the phrase "*Winsness* factors" and then its explicit numbering of the three factors in a (1), (2), and (3) manner,[262] signals to a legally trained mind, if not even a lay person, that the following three items listed are indeed "factors" that have some doctrinal weight. The fact that *Mink* further measured the facts present in that case against the three "*Winsness* factors" in the same manner that lawyers are traditionally taught to analyze facts against factors further belies the court's current interpretation here.

Accepting then that *Winsness* and *Mink* instead stand for a much broader balancing test to weigh the facts to indicate that an official is unlikely to repeat the unlawful conduct, that means we have to look at each case, including this one, holistically. In this case, the whole of the facts should at least rise to the same level of reasonable assurances found in *Winsness* and *Mink*. This is another sub-issue, upon closer inspection, where the Tenth Circuit decision in *Brown* may not pass muster. The court lists four facts in *Brown* that weighed in favor of finding "no reasonable expectation" that Buhman would violate the office policy:

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[256] *Id.* at 736.
[257] Mink v. Suthers, 482 F.3d 1244 (10th Cir. 2007).
[258] *Id.* at 1256.
[259] *Id.* at 1256–57.
[260] *Brown*, 822 F.3d at 1175.
[261] *Id.*
[262] *See Mink*, 482 F.3d at 1256.

> First, he announced an office policy that would prevent prosecution of the Browns and others similarly situated in the future. Second, the UCAO Policy is essentially the same as the AG Policy, which the district court considered sufficient to deny the Browns standing to sue the Governor and the Attorney General. Third, the UCAO Policy and the decision not to prosecute the Browns are contained in a declaration that was signed under penalty of perjury and submitted to the federal district court. Fourth, violation of the declaration would expose Mr. Buhman to prosecution for perjury or contempt.[263]

The court continues throughout the analysis to remind the parties that a violation of the office policy could subject Buhman to perjury charges, as if to point out the weight of this particular fact.[264] But I think the court makes too much of it, at least with respect to how this particular factual situation was treated in *Winsness*. In *Winsness*, the Salt Lake County district attorney also filed a sworn affidavit with the court, which also subjected its speaker to potential prosecution for perjury, but which did not need to be so explicitly drawn out into allegedly separate supporting facts.[265] In that regard, facts three and four listed above would be just one consideration.

What remains for comparison is (1) in *Brown*, similar office policies adopted by the Utah attorney general's office were found sufficient to dismiss the governor and attorney general from the suit, but (2) in *Winsness* and *Mink*, the office policy was supported by a Supreme Court case stating that the laws in question were unconstitutional.[266] The fact remains that, even in *Mink*, where the office policy not to prosecute was never formalized in an affidavit and submitted to the court, the court found the office policy weighed in favor of finding mootness.[267] With the *Brown* case in particular, the import of this factor becomes even more compelling because the district court released the governor and attorney general offices based on similar formal policies in the attorney general's office.

The most glaring difference with the *Brown* case, however, is the absence of any Supreme Court or even district court decision, as in *Mink*, finding that the Utah anti-bigamy law is unconstitutional. With respect to polygamy, the opposite exists—we have numerous Supreme Court and Tenth Circuit opinions saying criminal anti-bigamy statutes *are* constitutional. While the panel seemed to dismiss this distinction at oral argument as a trivial one, it was a huge consideration behind the court's analyses in *Winsness* and *Mink*.[268] At least comparing the facts in *Brown* holistically

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[263] *Brown*, 822 F.3d at 1171.
[264] *See id.* at 34, 43, 44, 46.
[265] *Winsness*, 433 F.2d at 731–32.
[266] *See id.* at 735; *Mink*, 482 F.3d at 1257.
[267] *See Mink*, 482 F.3d at 1257.
[268] *See Winsness*, 433 F.2d at 735; *Mink*, 482 F.3d at 1257.

against the facts present in *Winsness* and *Mink*, the *Brown* case certainly did not rise to the same level of reasonable certainty as in those cases.

Assuming the test really is a holistic one, and not one tied to three doctrinal factors, then the facts present in *Brown* did not rise to the same levels as *Winsness* and *Mink*. However, this does not mean that the facts present in *Brown* should not have been sufficient to support a finding of mootness, especially considering the previous rulings on mootness as to the governor and attorney general based on similar formal office policies.[269] But it does aim to point out that the facts were at least not as strong as those present in *Winsness* and *Mink*.

The fact that Buhman's successor could change the office policy at any time was also unavailable to the defendants in *Winsness* and *Mink* because another case held that conduct unconstitutional.[270] This becomes more important than the court gives it credit. The ability to change the office policy at any time may not have defeated the Browns' mootness claim in this particular instance or against this particular defendant, but it becomes problematic on a larger scale because of what it ultimately perpetuates and implicitly encourages.

It implicitly encourages leaving a potentially unconstitutional law on its face on the books, as it reflects the majority's general moral disapproval of the conduct, while only staving off prosecution for potentially another day. This raises a whole host of issues relating to the symbolic functions of laws in desuetude that remain the law, to which I do not address here.[271] While I am critiquing the Tenth Circuit's decision on the narrow issue of *Winsness*, as it is part of my job to do, I certainly understand why the Tenth Circuit chose to intervene and reverse the case in the manner that they did.

While the *Brown* litigation is ripe with "lessons learned" for the next attempt at decriminalizing polygamy, the *Brown* decision will also stand for what it could have been in the pantheon of influential equality cases. This case could have been the equivalent of a *Lawrence* for the decriminalization of informal polygamy,[272] and it indeed had all of the initial trappings to be that—a "model" plaintiff polygamous family, a well-versed constitutional law professor acting as lead counsel,[273] and following on the heels of the expansion of marriage equality rights with *Windsor* and *Obergefell*.[274] Instead, this case will likely be remembered for what it could have been. This decision could also discourage polygamy proponents as yet another judicial blow to their attempts at decriminalization, a result that could turn even more

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[269] *Brown*, 822 F.3d at 1165–68.

[270] *See Winsness*, 433 F.2d at 735; *Mink*, 482 F.3d at 1257.

[271] *See, e.g.*, Morin, *supra* note 49.

[272] *See* Lawrence v. Texas, 539 U.S. 558 (2003); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1917 (2004).

[273] Lead counsel for the Brown family was Professor Jonathan Turley, a constitutional law scholar and professor at George Washington Law School.

[274] *See generally* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (holding that DOMA's definition of marriage was unconstitutional); Obergefell v. Hodges, 135 S. Ct. 2584, 2598–99 (2015) (holding that the right to marry is a fundamental right).

poly proponents away from the judicial forum as a method to challenge polygamy bans. On the other hand, the decision could galvanize polygamy proponents to present a stronger case that will, at least procedurally, break through any potential jurisdictional barriers so as to get an analysis on the merits.

2. Current Status of the Law

The Utah legislative responses to the Utah district court decision further evidences the need for more clarity on how to write the statute in order to capture the type of behavior that is permissibly outlawed. Immediately following the decision, Rep. Jerry B. Anderson filed HB 58 in January 2014, which proposed to remove "cohabitation" as an element of the offense of bigamy.[275] Anderson stated, "[t]o relieve our attorney general and all of our law enforcement, I think this is a step in the right direction . . . . Besides being in line with the First Amendment religious liberty. . . . I think it's a good bill to get in line with the reality of what's going on."[276] The proposed changes would read: "A person is guilty of bigamy when, knowing he or she has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person."[277] Notably, the cohabitation prong is removed in its entirety. On March 13, 2014, however, the Bill failed to make it out of the House.[278]

Immediately following oral arguments, media asked counsel for Defendant about the "surprise" bill that Defendant raised during oral arguments. "I think it clarifies who might be covered by the law. The reason for it is to give the public precise knowledge of what is criminal and what is not."[279] Who exactly was running the bill was unknown at the time, but Douglas stated that he was obligated to report the news to the panel of judges.[280] The "surprise" bill that Defendant raised actually referred to Utah HB 281, sponsored by Rep. Michael E. Noel, and later introduced on February 3, 2016, merely a week and a half after oral arguments in the case.[281] The proposed amendment would read: "A person is guilty of bigamy when, knowing [*the person*] has a husband or wife or knowing the other person has a husband or wife, the person purports to marry [*and*] cohabitates with [*the other*] person."[282] This

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[275] H.B. 58, 60th Leg., Gen. Sess. (Utah 2014), http://le.utah.gov/~2014/bills/static/HB0058.html [https://perma.cc/83TW-WC9S].

[276] Ben Winslow, *Bill Would Basically Decriminalize Polygamy in Utah*, FOX13 SALT LAKE CITY (Jan. 29, 2014), http://fox13now.com/2014/01/29/bill-would-basically-decriminalize-polygamy-in-utah/ [https://perma.cc/T767-X2AC].

[277] H.B. 58, 60th Leg., Gen. Sess. (Utah 2014), http://le.utah.gov/~2014/bills/static/HB0058.html [https://perma.cc/83TW-WC9S].

[278] *Id.*

[279] Winslow, s*upra* note 276.

[280] *Id.*

[281] H.B. 281, 61st Leg., Gen. Sess. (Utah 2016), http://le.utah.gov/~2016/bills/static/HB0281.html [https://perma.cc/4ZDY-B7AT].

[282] *Id.*

proposed legislation makes the statute gender neutral and does, indeed, attempt to insert an "and" in place of the "or," thus requiring reading both sections together.

The issue with changing the "or" to an "and" is that reading the prohibited conduct to contain both private and public aspects of polygamy *requires* a showing of both. Further, this amendment does not change the underlying conduct prohibited under the original interpretation of the statute with "or" inserted. Although the language would make conduct prohibited a little less vague, in that it would now exclude adulterers from its scope who do not otherwise "purport to marry" one another, it still subjects the prohibited conduct to the same substantive constitutional attacks that do not hinge on vagueness arguments. As the bill is currently on the house floor, it is unclear at this point whether it will pass or whether it will fall prey to same fate as HB 58.[283]

The Tenth Circuit's disposal of the case on jurisdictional grounds, as well as Utah H.B. 281, leaves the contours of the law around polygamy in flux. Absent the proposed bill, the Tenth Circuit's opinion re-affirms the law in the Circuit as established over thirty years ago in *Potter v. Murray City*.[284] This means that the current legal test used to measure polygamy bans under constitutional tests is rational basis,[285] and that the Utah Supreme Court interpretations control the definition of "purports to marry" and "cohabitation."

As Strassberg previously outlined, the outlawed behavior would include four forms of polygamy.[286] The "purports to marry" language would cover the following: 1. "Fraudulent bigamy" in which a person unknowingly "marries" someone who already has a legal spouse; 2. "Legal polygamy" in which a person attempts to obtain multiple legal marriages; and 3. "Polygamous marriage" in which multiple religious marriage-like ceremonies occur while only one marriage is legally valid. The "cohabitation" prong is meant to cover the last form of polygamy identified by Strassberg as boxed in by the statute: 4. "Polygamous cohabitation" in which multiple marital relationships exist.[287] Interpreting each clause against its jurisprudential historical definitions aids in applying what would otherwise be a vague statute on its face.

C. Alternative Approaches

With the easy out on jurisdictional and prior precedent grounds, poly proponents are left to postulate as to what else the court could have done to define the law as it relates to the criminal polygamy laws. This subsection addresses some alternative approaches that the Tenth Circuit could have taken to dispose of this case and then provides a brief discussion of the implications of each particular route. The aim of providing alternative formulations of the law in the context of

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[283] *Id.*
[284] 760 F.2d 1065 (10th Cir. 1985).
[285] *Id.*
[286] Strassberg, *supra* note 25, at 1846.
[287] *Id.*

decriminalization is to provide future litigants and legislators with potential arguments in which to ground their approach, while at the same time using the flaws and their effects on the different routes as "lessons-learned."

1. Free Exercise of Religion Grounds

As far as providing substantive support for the law, the panel could have addressed the question on Free Exercise of Religion grounds. Some scholars have argued that the Free Exercise jurisprudence provides religious polygamists with the strongest constitutional case to decriminalize polygamy because of deference given religious adherents.[288] The litigants are correct in this instance in relying on the district court's interpretation and application of *Hialeah* as the bigamy statute is neutral and generally applicable on its face.[289] In this case, the justification for either strict scrutiny or rational basis review will then depend on how the court would square the evidence of religious targeting in enforcement. If the appeals court had found that it was bound to the trial court's finding and Defendant's admissions that law enforcement only targets religious polygamists, as opposed to secular ones, then the court would have to apply strict scrutiny.[290] But if the panel found that Defendant's admissions and trial court's findings on the issue of religious targeting was not a factual one and somehow relied on the example of *State v. Geer*,[291] then the court would have to apply rational basis review. In this case in particular, the level of scrutiny used is almost irrelevant because of the defendant's lack of evidence of harms to support either a compelling or rational state interest.

The difficulty in using the Free Exercises approach, however, is that *Reynolds* and *Potter* seem to control the Free Exercise analysis already. Litigants in both of those cases asserted the unconstitutionality of the bigamy statute based on Free Exercise of Religion.[292] While *Reynolds* was decided in 1878 before the Court had developed its jurisprudence on testing the fit of restrictive statutes—indeed *Reynolds* was the first time the Supreme Court ever interpreted the Religion Clauses in the First Amendment[293]—the *Potter* case explicitly stated that there is no strict scrutiny for religious polygamists and that, even if there were, that the State has a compelling interest to justify its continued criminalization.[294] In order to make this analysis, the Tenth Circuit would have to overrule itself in *Potter*, which is something I do not think the Tenth Circuit would have done under the facts in the *Brown* case.

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[288] *See, e.g.*, Faucon, *Polygamy After* Windsor, *supra* note 2, at 523.

[289] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

[290] *Id.*

[291] 765 P.2d 1 (Utah Ct. App. 1988).

[292] *See* Reynolds v. United States, 98 U.S. 145, 162 (1878); Potter v. Murray City, 760 F.2d 1065, 1065 (10th Cir. 1985).

[293] *See Reynolds*, 98 U.S. at 162–64.

[294] *Potter*, 760 F.2d at 1068–69.

2. Substantive Due Process Grounds

The Tenth Circuit could also ground its analysis in substantive Due Process. Although the panel inquired into whether *Windsor* and *Obergefell* impacted the cohabitation issue in the current polygamy case, the litigants were correct to focus instead on *Lawrence*. The *Lawrence* case is more applicable here because, like the statute in *Lawrence*, the statute attempts to criminalize private intimate associations, one aspect, I argue, of the fundamental right at issue for polygamists in the current decriminalization debate.[295] One argument used by those against *Lawrence*'s application to polygamists is that the public aspects of informal polygamy—having a "marriage ceremony" and holding each other out as "husband and wife"—take polygamy outside of the scope of Lawrence, which only protects private consensual adult relationships within the home.

A recurring theme throughout this litigation is the distinction made between polygamy's public conduct and its private conduct. While I agree with making the distinction between the public and private aspects of polygamy, I do not agree that this distinction means *Lawrence* no longer applies to informal polygamists. What *Lawrence* does not apply to is the public behavior,[296] but it does apply to protect the intimate, private, marital relationships of adult, consenting polygamists.[297] In other words, *Lawrence* can and should apply to the private aspect of polygamy—the cohabitation and "living together as husband and wife" part, that is still encapsulated in the language of the "cohabitation" prong of the current statute.[298] Using this approach, the court would have to apply heightened scrutiny under *Lawrence* to the cohabitation prong of the statute. Again, without a showing of harm in this litigation, the cohabitation prong would likely fail in the context of the Browns.

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[295] Lawrence v. Texas, 539 U.S. 558, 558 (2003).

[296] *Id.* at 560 ("This case does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct . . . .").

[297] *See id.* at 562 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); *see also* Ward, *supra* note 32, at 132 (noting that *Lawrence* "concerned more than the simple right to 'engage in certain sexual conduct': it outlined a deeper and more expansive fundamental right to define one's own relationships and happiness . . . ."); Myers, *supra* note 32, at 1471–72 (discussing *Lawrence* and its holding on private conduct).

[298] UTAH CODE ANN. § 76-7-101 (West 2010), *invalidated by* Brown v. Herbert, 43 F. Supp. 3d 1229 (D. Utah 2014); State v. Green, 99 P.3d 820, 827–32 (Utah 2004) (applying the "cohabitation" prong to the conduct of defendant Green).

3. Equal Protection Grounds

Another potential route that was not extensively explored in the *Brown* litigation, but that has been addressed in the scholarship, is a possible Equal Protection claim. Professors Hadar Aviram and Gwendolyn M. Leachman recently argued that polyamorists could bring an equal protection claim in the context of recognition of poly rights (not just the decriminalization), but these same equal protection arguments can support a claim for decriminalization.[299] As the authors point out, polys can argue that polyamory is itself a "sexual orientation."[300] Recent published studies tend to show that polyamorous behavior is a part of a person's identity and can be immutable. This research implies that polyamorists could have a basis for recognition as a suspect class for purposes of equal protection of the laws.[301] Aviram and Leachman, however, admit the difficulty of this approach, as the Supreme Court has not announced a new protected class since gender and illegitimacy in the 1970s and has yet to define such a class for sexual orientation in the context of homosexual rights, despite having numerous opportunities since the 1970s to do so.[302]

An argument on Equal Protection grounds would not likely work within the confines of this case because it would fall prey to many of its recurring problems: it was not litigated at the trial level and no evidence was introduced to support any claim to a suspect class. Numerous things would have to occur before an Equal Protection claim like this would be viable for decriminalizing polygamy. First, there would have to be some sort of revival of defining suspect classes in the Supreme Court,[303] and that would likely require the Court to first address and protect sexual orientation as it applies to homosexual behavior and rights first. Second, the studies on our societal and scientific understandings of polygamy and polyamory would

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[299] Aviram & Leachman, *supra* note 1, at 310–14.

[300] *Id.* at 313 (citing CHRISTOPHER RYAN & CACILDA JETHA, SEX AT DAWN: HOW WE MATE, WHY WE STRAY, AND WHAT IT MEANS FOR MODERN RELATIONSHIPS 101–04 (2011) ("*Sex at Dawn,* uses evolutionary psychology findings to show that humans most resemble communities of bonobos, for whom sex is a means of social engagement and closeness, and for whom sexual exchanges and promiscuity are an inexorable part of social life. Based on this and other sources, Ann Tweedy argues that polyamory could be considered a sexual orientation."); Ann E. Tweedy, *Polyamory as a Sexual Orientation,* 79 U. CIN. L. REV. 1461, 1473–1509 (2011).

[301] Aviram & Leachman, *supra* note 1, at 310–14.

[302] *Id.* at 313; William D. Araiza, *After the Tiers:* Windsor*, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 385 (2014); Eric Berger, Lawrence*'s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 778 (2013); Adam Lamparello, *Why Justice Kennedy's Opinion in* Windsor *Shortchanged Same-Sex Couples*, 46 CONN. L. REV. ONLINE 27, 30 (2014).

[303] *See* Araiza, *supra* note 302.

need to develop to a point of legitimacy. Using the model from same sex marriage litigation, the science and social studies evidence would likely have to tend to show that polyamory is a form of sexual orientation and at the core of a person's identity.[304] Considering the amount of resistance experienced by homosexuals to establish sexual orientation's immutability instead of being a "choice,"[305] imagine the resistance to any initial social or scientific study on the immutable nature of polygamy in humans. Much would have to progress on both the legal, social, and scientific tracts before an Equal Protection claim such as this could work for polygamists.

4. Free Speech Grounds

The Cato Institute more extensively briefed the statute's apparent restrictions on Free Speech. This approach centers on the statute's prohibition on "purporting to marry" as it relates to the public aspects of informal polygamy—the "marriage" ceremony and the holding each other out as "spouses."[306] As previously discussed, the potential harm at the heart of informal polygamy is this public challenge or threat to monogamous marriage.[307] The statute's restriction on this type of conduct is treated as a restriction on speech—conducting a ceremony and then telling people or acting like a person is one's "spouse." Because of the restriction on the content of the speech—in other words, a person is allowed to call someone a "mistress" without violating the statute but not a "wife"—the statute must be narrowly tailored to promote a compelling governmental interest. A content-based speech restriction will fail strict scrutiny if the State cannot show a "direct causal link" between the forbidden speech and the compelling government interest.[308]

While the Cato Institute framed the compelling interest in terms of preventing marriage fraud and protecting women and children from sexual and physical abuse, there still exists the "governmental interest" of promoting monogamous marriage and the government's control over public manifestations of marital relationships.[309] But as previously addressed in Part II, neither interest is legitimate, much less compelling. If the court were to use the Free Speech route to address the conduct, this would allow the court the opportunity to again more squarely address what I

[304] "[I]t is likely that advocates for the polyamorous community would have to focus considerable energy to marshal evidence that polyamory is 'so fundamental to one's identity that a person should not be required to abandon' it to avoid discrimination." Aviram & Leachman, *supra* note 1, at 313 (citing Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000)).

[305] Aviram & Leachman, *supra* note 1, at 312.

[306] UTAH CODE ANN. § 76-7-101 (West 2010), *invalidated by* Brown v. Herbert, 43 F. Supp. 3d 1229 (D. Utah 2014).

[307] *See supra* Section II.B.

[308] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011).

[309] Brief of the Cato Inst., *supra* note 7, at 3.

perceive is the troublesome part of the statute—the "purports to marry" prong and how that relates to the Browns in this case.

5. Hybrid Rights

One effect of a dismissal on jurisdictional grounds is that it avoids having to address Buhman's un-briefed hybrid rights grounds.[310] The panel could have disregarded this omission because of counsel's quick defense that two ill-formed constitutional rights do not make up a hybrid rights claim.[311] If the court were to address the hybrid rights analysis, there are a few ways to structure it: 1) free exercise + free speech; 2) free exercise + substantive due process; or even potentially 3) free exercise + free speech + substantive due process. Although the district court opinion only addressed the possibility of a Free Exercise and substantive Due Process hybrid claim,[312] the speech aspect of this formulation of a hybrid rights theory brings in yet another ground for strict scrutiny that is stronger than *Lawrence*'s heightened scrutiny privacy interest. The benefit of using the hybrid rights theory is that it essentially bundles together, under the purview of Free Exercise of Religion, a number of rights that, when taken together, become much more difficult to "break apart" because of the automatic application of strict scrutiny to hybrid rights claims.[313]

My hesitations with using such a hybrid rights claim stem from my previous denigrations of using Free Exercise arguments in the context of multi-party marriage rights, which should not be based on religious exceptionalism but on expansion of liberty rights and society built on pluralism, self-identity, and choice. I also hesitate to push for the use of hybrid rights because I, like previous scholars before me, question the soundness of its genesis in *Yoder v. Wisconsin*.[314] Although I find using a combination of Free Exercise, Free Speech, and substantive Due Process a fascinating expansion of the hybrid rights jurisprudence, I decline, for previous and overall policy reasons, to endorse the hybrid rights theory in the context of polygamy.

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[310] Oral Argument, *supra* note 163, at 15:34.

[311] *Id.* at 17:20.

[312] Brown v. Buhman, 947 F. Supp. 2d 1170, 1221–22 (D. Utah 2013).

[313] *See* Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2219–20 (2005).

[314] 406 U.S. 205 (1972); *see also* MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY 64 (rev. 2d ed. 2014) (criticizing *Yoder* for making Amish children "martyr[s] to their parents' faith"); JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD 200 (2014) ("[I]s not schooling beyond the eighth grade a prerequisite for the information and self-confidence required for independent judgment?").

6. A Combination of Substantive Due Process and Free Speech

In the context of informal polygamy, I am not sure that the Free Exercise argument provides the plaintiffs much more than a combined substantive Due Process and Free Speech argument. One thing the Tenth Circuit should have done, had it been presented, is used *Lawrence* to analyze informal polygamy. As the conduct in question involves both private behavior and public behavior, the court should analyze the applicable parts of the statute under the applicable controlling cases. The "cohabitation" prong would be invalid under *Lawrence* as an impermissible infringement on the privacy interests that exist for consenting adults within the home. The "purports to marry" prong addresses a couple's outward conduct and speech, such as a ceremony and holding each other out as spouses.[315] It would be invalid under Free Speech's strict scrutiny test because the language of the statute is not narrowly tailored to promote any compelling governmental interest related to that speech.

IV. THE POLICY

With so many options from which to choose, it is imperative to pick the guiding principles and policies to ground the debate moving forward. Since polygamy's national outlaw in the late 1800s, scholars have offered a smattering of overarching principles they argue should control our treatment of polygamy: from historical philosophical principles to morality and Western culture,[316] to anti-discrimination and the expansion of privacy after *Lawrence*,[317] and of course, religious freedom.[318] As previously mentioned throughout this Article, considering the dual private and public aspects of polygamous conduct, my policy would be to favor the use of substantive Due Process and Free Speech as part of the norm-shaping and proscriptive function of the law in this arena.

I argue this position because, while Free Exercise of Religion does afford polygamists with the highest level of scrutiny in terms of constitutional review, that strict scrutiny comes at an impermissible cost.[319] Further, with the addition of Free Speech tenets, strict scrutiny can still be invoked, at least with respect to the public aspects of polygamy.[320] For utility purposes, the religion angle is less vital to success than it once was. With respect to the private aspects of polygamy, those are governed by *Lawrence*. While the Tenth Circuit may disagree, as the district court did, that

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[315] *See* State v. Holm, 137 P.3d 726, 733 (Utah 2006) (discussing application of "purports to marry").

[316] *See* Witte, *Western Case*, *supra* note 4, at 1677.

[317] *See* Myers, *supra* note 32, at 1457; Askew, *supra* note 32, at 627–28.

[318] *See* D. Marisa Black, *Beyond Child Bride Polygamy: Polyamory, Unique Familial Constructions, and the Law*, 8 J.L. & FAM. STUD. 497, 500 (2006) ("[Polygamy's] defenders frequently cite religious convictions for such a practice."); Davis, *supra* note 1, at 1969.

[319] *See* Faucon, *Polygamy After* Windsor, *supra* note 2, at 522–26.

[320] *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011).

heightened scrutiny applies to the substantive Due Process rights of polygamists,[321] arguments exist that the statute would not even pass rational basis as to these private aspects as well.

This section presents a "mock" opinion of what the Tenth Circuit should have done in an idealized procedural and factual trial court litigation. The section also includes a suggestion as to permissible legislation in reaction to the "mock" Tenth Circuit opinion that outlaws, essentially, only marriage license fraud or multiple marriage licenses (although I have previously argued that the latter should be legalized as well). The section ends with an explanation of the opinion and justification for the policy choice to choose Due Process and Free Speech over religion as the defining approach to decriminalizing polygamy.

A. Mock Opinion

The inspiration for the mock opinion to follow was inspired by Professor Adam Lamparello's response to the U.S. Supreme Court's recent *Obergefell v. Hodges* decision.[322] Lamparello wrote a mock opinion as to how the Supreme Court should have addressed the issues at stake in *Obergefell*, a Supreme Court case which applied the rationale of *Windsor* to the states in holding bans against same sex marriage unconstitutional.[323] This pedagogical method was effective because, like with the *Brown* case, the *Windsor* and *Obergefell* decisions caused confusion in the courts and reactionary scholarship as to what fit test, if any, the Court used to strike down same sex marriage bans.[324] The *Windsor* and *Obergefell* opinions were also critiqued for the vague way in which Justice Kennedy defined and measured the liberty interest at stake, continuing to ignore the Court's previously well-versed tiers method.[325] Similarly, the hope is that the mock opinion in this Article will guide future approaches to the decriminalization issue and shed some legal clarity on the applicable analysis.

Because this is a mock opinion, a few assumptions constrain and inform it. First, the opinion omits a statement of background facts and procedural background. Second, the opinion presumes that the factual question of polygamy's harms, both private and public, were properly argued and supported at the trial court level and factually weighed in a manner consistent with the findings of Part II of this Article. Second, the opinion borrows statements of facts and laws from prior related

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[321] *Brown*, 947 F. Supp. 2d at 1202.

[322] Adam Lamparello, Obergefell v. Hodges*: How the Supreme Court Should Have Decided the Case*, 7 CONLAWNOW 27, 27 (2015).

[323] Obergefell v. Hodges, 135 S. Ct. 2584, 2585 (2015).

[324] Lamparello, *supra* note 322 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2630 n.22, 2616 (2015) (Scalia, J., dissenting) (Roberts, C.J., dissenting)) ("In *Obergefell, et al. v. Hodges,* Justice Kennedy's majority opinion legalizing same-sex marriage was based on 'the mystical aphorisms of a fortune cookie,' and 'indefensible as a matter of constitutional law.'").

[325] *Id.*

published opinions in the case, namely *Brown v. Hebert*,[326] as well as from briefs for both appellant and appellees,[327] and from amici curiae,[328] where appropriate, to support the substantive analysis. I adopt similar persuasive language from appeals briefs as a nod to my agreement with and endorsement of them. I further acknowledge instances in which I have taken arguments and language from litigant and amicus briefing in footnotes which would otherwise not appear in a judicial opinion. Other areas in which the mock opinion diverges from those proffered already in the *Brown* litigation are entirely my own.

Plaintiffs/Appellees in this case brought suit in Utah federal district court challenging the constitutionality of Utah's Anti-Bigamy criminal statute, Utah Code Ann. § 76-7-101. On summary judgment, the Utah district court found that the "cohabitation" prong of the Utah Anti-Bigamy statute violated both the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See Brown v. Buhman*, 947 F. Supp. 2d 1170, 1204–21, 1222–26 (D. Utah 2013). Defendant Buhman appealed.

Upon review, we affirm in part, and reverse in part.

I. STANDARD OF REVIEW

We review a grant of summary judgment *de novo*. *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1266 (10th Cir. 2015). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

II. DISCUSSION

We affirm the district court's decision to grant Plaintiffs' motion for summary judgment on the grounds that the statute as applied to the Browns is unconstitutional in violation of their Free Speech rights under the First Amendment and their Due Process rights under the Fourteenth Amendment. We reverse the portion of the district court's decision that interprets the Utah Anti-Bigamy statute in a manner that differs from the Utah Supreme Court interpretations of the "purports to marry" portion and the "cohabitation" portion of the statute.

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[326] 850 F. Supp. 2d 1240, 1244 (D. Utah 2012).
[327] Brief of Appellees, *supra* note 165, at 26–27.
[328] Brief of the Cato Inst., *supra* note 7.

A. Interpretation of Utah's Anti-Bigamy Statute

Appellant argues that the district court erred when it ignored Utah state cases interpreting the language of Utah's Anti-Bigamy Statute. The relevant part of the statute in question reads:

> (1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.

Utah Code Ann. § 76-7-101. In interpreting this statute, the district court held that "purports to marry" is limited to attempts at legal marriage and does not include informal "marriage" ceremonies that have no legal significance. Appellant argues that the district court erred when it interpreted "purports to marry" and "cohabitation" in a manner that differs from interpretations by the Utah Supreme Court. We agree.

In *State v. Holm*, 137 P.3d 726 (Utah 2006), the Utah Supreme Court held that the term "marry" in the "purports to marry" part of the statute is not limited to lawfully recognized marriages: "[T]he term 'marry' is not confined to legally recognized marriages . . . [and] one need not purport that a second marriage is entitled to legal recognition to run afoul of the 'purports to marry' prong of the bigamy statute." *Id.* at 736. In *Holm*, Plaintiff Rodney Holm was lawfully married to Suzi Stubbs, after which he married Wendy Holm and Ruth Stubbs in two separate religious ceremonies. *Id.* at 730. At trial, Ruth Stubbs testified that she believed that she was married to Mr. Holm even though she was aware that the marriage was not lawful. She testified that she wore white dress, which she considered a wedding dress; that she and Mr. Holm exchanged vows; and that a religious leader of their church conducted the ceremony. *See id.* The State also introduced evidence that Mr. Holm and Ruth Stubbs considered themselves husband and wife and frequently had sexual intercourse.

Mr. Holm petitioned the court for dismissal on the ground that the "purports to marry" prong only applied to legally recognized marriages. The Utah Supreme Court disagreed, and held that the term "marry" includes both legal marriages and others not authorized by the State. *Id.* at 733. Looking to the legislative history and purpose of the statute, the court determined that the Utah legislature anticipated the possibility of an unlawful marriage or unlawful marital relationship when it drafted the statute. The *Green* court explained that the lower court correctly "allowed an unsolemnized marriage to serve as a predicate marriage for purposes of a bigamy prosecution." *Id.* at 736 (citing *State v. Green*, 99 P.3d 820, 823 (Utah 2004)). The court stressed that the statute "does not require a party to enter into a second marriage (however defined) to run afoul of the statute; cohabitation alone would constitute bigamy pursuant to the statute's terms." *Holm*, 137 P.3d at 735. The court ultimately held that Mr. Holm violated both the "purports to marry" and the "cohabitation"

portions when he engaged in a marriage ceremony and lived together as husband and wife with Ruth Stubbs.

In *State v. Green*, the Utah Supreme Court held that the "cohabitation" prong of the Utah Anti-Bigamy statute does not target religious polygamists and that it is facially neutral and neutral in operation. 99 P.3d at 828. In *Green*, Mr. Thomas Green was an avowed polygamist with nine wives and twenty-five children who appeared on multiple TV shows with his wives. *Id.* at 822–23. In 2000, Utah charged Mr. Green with four counts of bigamy, alleging he violated the statute when he cohabitated with five other women while he was legally married to Linda Kunz. *Id.* at 823. Mr. Green and his wives resided in a collection of mobile homes, which they called "Green Haven." Mr. Green lived in his own mobile home, and his wives took turns spending nights with him on a rotating schedule. *Id.* at 822–23.

To convict Mr. Green, the State had to bring a motion under the Unsolemnized Marriage Statute, which allows a court to find a legal marriage in the absence of solemnization. *Green*, 99 P.3d at 823 (citing *Whyte v. Blair*, 885 P.2d 791, 793 (Utah 1994)). An unsolemnized marriage becomes valid and legal in Utah if it is established that a marriage has "emerged between a woman and a man who are capable of giving consent, are of legal age, and are legally able to enter into a solemnized marriage under Utah law, have cohabited, have mutually undertaken marriage duties, obligations, and rights, and created a reputation with the public as husband and wife." UTAH CODE ANN. § 30-1-4.5. Based on these facts, the court found Mr. Green guilty of four counts of bigamy.

Mr. Green also argued on appeal that the statute's use of the word "cohabit" targeted religiously motivated bigamous practices because the previous laws made in reaction to polygamy had used "cohabitation" as a factor in prosecuting polygamy. Thus, the "cohabitation" provision is actually aimed at religiously motivated polygamy. The *Green* court disagreed and held that the statute was facially neutral and that the word "cohabit" did not have a genesis in religious meaning or association. Counsel for the Browns argue that the district court did not err in ignoring the Utah Supreme Court's interpretation of "purports to marry" and using a narrower interpretation of "marry," which is limited to attempts at legal marriage. We disagree. While this Court is not bound by a state court's interpretation of federal constitutional guarantees, *United States v. Madden*, 682 F.3d 920, 927 (10th Cir. 2012), we are bound by the Utah Supreme Court's interpretations of the "purports to marry" prong and the "cohabitation" prong in the statute. "[I]t is not within our power to construe and narrow state laws." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). "Federal courts do not sit as a super state legislature, [and] may not impose [their] own narrowing construction . . . if the state courts have not already done so." *United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 431 (8th Cir. 1988) (alterations in original).

We must now determine whether the Plaintiffs' conduct is prohibited under either or both the "purport to marry" prong and the "cohabitation" prong of the statute. The Brown family does not have multiple marriage licenses. There is only one recorded marriage license in the Brown family—that of Kody and Meri Brown. It is also undisputed that the Brown family publicly acknowledges their lifestyles as

a polygamous family in both their TV show and their public speaking engagements. Kody refers to each of his wives as his "spiritual wives." Testimony exists that Kody engaged in a religious ceremony with each of his spiritual wives. Season One of their TV show ended with Kody's engaging in a ceremony with Robyn, in which Robyn wore a white dress, the couple exchanged vows, and Meri, Janelle, and Christine welcomed Robyn into the family by presenting her with a ring. Under *Holm*'s interpretation of "purports to marry," which is not limited to only multiple legal marriages, but also includes non-legal religious marriage ceremonies and otherwise acting as spouses, we find that the "purports to marry" portion of the statute applies to the public aspects of the Brown's polygamous marriage as stated above.

The Browns also violate the "cohabitation" prong of the statute because Kody Brown engages in private, marital-like relationships and lives as a spouse with all of his wives in a domestic setting. When the family still lived in Lehi and before Robyn married into the family, the Browns lived in a ranch-style home with three interconnected apartments, sharing a common curtilage. In Season Two, the family looked for real estate in Las Vegas in which the entire family could live in a single home or in which they could occupy four houses in a cul-de-sac. Under the plain language of the "cohabitation" prong of the statute as well as *Green*'s interpretation that "cohabitation" is not restricted to religious polygamists on its face, we find that the "cohabitation" portion of the statute applies to the private aspects of the Browns' polygamous marriage as stated above.

We hold that the district court erred when it narrowed the "purports to marry" section of the statute to include only attempts at multiple legal marriages and erred when it found that the "purports to marry" section did not apply to the Browns.

B. ***Constitutional Challenges to Utah's Anti-Bigamy Statute***

Appellee Browns allege that both the "purports to marry" provision and the "cohabitation" provision are unconstitutional as applied to the Browns. Specifically, the Browns allege that the "purports to marry" provision violates their Free Speech under the First Amendment and that the "cohabitation" provision violates their Due Process rights under the Fourteenth Amendment. We agree.

1. ***Free Speech***

Although we are bound by state interpretations of the Anti-Bigamy statute, we are not bound by state interpretations of federal constitutional questions. *Madden*, 682 F.3d at 927. The Browns allege that the "purports to marry" provision violates their Free Speech rights under the First Amendment. Utah defines criminal bigamy to include saying "I do" in a wedding ceremony, or saying "that's my wife" about a person one lives with, even when everyone knows that the marriage is not legally recognized. The Utah Supreme Court stated in *Holm* that the restriction on "purports to marry" more than one person applies even when one is not "claiming any legal recognition of the marital relationships." *State v. Holm*, 137 P.3d 726, 736 (Utah

2006). The *Holm* court found that "religious solemnization," which requires nothing but speech and expressive conduct, violates the statute. *Id.* at 732.

As applied to the Brown family, the restrictions against "purport[ing] to marry" more than one spouse at a time violates their First Amendment rights to Free Speech by criminalizing not only their public marriage ceremonies in which the couple expresses their commitment to each other as spouses, but also their public TV show and their public appearances in which they discuss their polygamist lifestyle and beliefs. "Such statements, which are aimed at legal and social change, are at the core of First Amendment protections." *National Gay Task Force v. Bd. of Educ. of Oklahoma City*, 729 F.2d 1270, 1274 (10th Cir. 1984) (holding a statute unconstitutional that restricted school teachers from hypothetically appearing on TV or advocating before the Oklahoma legislature with respect to a ban against school teachers advocating, encouraging, or promoting homosexual activity).

With respect to their public marriage ceremonies, the message-conveying nature of the ceremony is present even if the expression is nonpolitical. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004) ("First Amendment protection does not hinge on the ideological nature of the speech involved."). Here, the statute restricts speech because of the contents of the speech. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 657 (10th Cir. 2006) ("Content-based restrictions on speech [are] those which suppress, disadvantage, or impose differential burdens upon speech because of its content . . . ."). Just as wearing black armbands to protest the Vietnam War, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969), burning an American flag, *Texas v. Johnson*, 491 U.S. 397, 404–05 (1989), and holding a St. Patrick's Day parade, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568–70 (1995), are all considered speech under the First Amendment because of the message they convey, so too is a marriage ceremony. Such a ceremony is "inherently expressive," *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 66 (2006), because the parties have an "intent to convey a particularized message" by the ceremony—the message that they want to treat each other as spouses—and "the likelihood [is] great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404.[329]

We find that the "purports to marry" portion of the Utah Anti-Bigamy statute restricts speech—namely, the public aspects of polygamy. In the case of the Browns, this includes airing their reality TV show, making public appearances and speaking about their poly lifestyles, engaging in non-legal marriage ceremonies, and otherwise holding its family members out as spouses.

We also find that the restriction does not fall into any exception. Although fraudulent speech is constitutionally unprotected, the bigamy statute is not limited to fraud and bars a broad range of speech just because some instances of speech may be fraudulent. *See Riley v. Nat'l Fed. of Blind of N.C., Inc.*, 487 U.S. 781, 798–99 (1988). In fact, the district court's limiting the statute to criminalize only marriage fraud would fit into this exception. Nor can this court seriously construe the statute

[329] *Id.* at 5–6.

as an attempt to prevent conspiracies to engage in criminal conduct. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 298 (2008); *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

As a restriction on speech, the "purports to marry" portion of the Utah Anti-Bigamy statute is unconstitutional unless the government can show that the statute is narrowly tailored to serve a compelling government interest. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). A content-based speech restriction fails strict scrutiny if the government cannot show a "direct causal link" between the forbidden speech and the compelling government interest. *Id.* at 2738.

Appellant alleges that the compelling government interest relating to the "purports to marry" restriction on speech is to uphold ordered liberty based on monogamy. Appellant argues that the government submitted both expert testimony and social science reports documenting these public harms at the trial court level. In response, Plaintiffs submitted arguments discrediting the soundness of these arguments, to which we now thinkweigh against a finding of material fact that would preclude summary judgment. We further find that the government interest submitted is not compelling. The Court has made clear that the government has no power to demand "that a symbol be used to express only one view of that symbol or its referents." *Johnson*, 491 U.S. at 417. The statute aims to prevent one of the very things most protected at the core of the First Amendment—speech and conduct that challenges or critiques political and social injustices or norms, in this case, the symbolism involved for the word "marriage" and that involved in wedding ceremonies and public proclamations of marriage. We find that the Anti-Bigamy statute's "purports to marry" provision is unconstitutional as applied to the Browns in violation of their Free Speech guarantees in the First Amendment.

*2. **Substantive Due Process***

The district court held that the "cohabitation" provision of the statute, as applied to the Browns, violated their Due Process rights under the Fourteenth Amendment. Appellant argues that the district court erred when it found that even if heightened scrutiny did not apply the "cohabitation" provision would still fail rational basis scrutiny. The Brown family also argues that the district court erred when it found that heightened scrutiny under *Lawrence v. Texas* does not apply to the "cohabitation" prong of the statute. For reasons stated below, we agree with Appellee Browns that the district court should have used *Lawrence*'s heightened scrutiny, and affirm the district court's finding that the "cohabitation" prong would still fail rational basis scrutiny. The Browns argue that the "cohabitation" prong violates their substantive Due Process rights under heightened scrutiny set out in *Lawrence*. To state a claim for substantive Due Process, the plaintiff must show (1) an asserted "fundamental right" or "fundamental liberty" that is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed" and (2) a "careful description of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Seegmiller v. Laverkin City*, 528 F.3d 762, 769 (10th Cir.

2008). The district court found that, while the Browns' asserted a careful description of the liberty interest at stake, that the Tenth Circuit's decision in *Seegmiller* required a finding that heightened scrutiny was inapplicable to the Browns' "cohabitation" claim. *Buhman*, 947 F. Supp. 2d at 1201.

We find that the district court erred in its reliance on *Seegmiller* because *Seegmiller* is distinguishable from the instant case. *Seegmiller* involved a female police officer who was reprimanded by her department for having extra-marital sexual relations with an officer from another department while on a department trip. 528 F.3d at 765. We held that the police officer did not have a fundamental liberty interest in engaging in private act of consensual sex to support a heightened scrutiny claim under *Lawrence*. *Id.* at 772. We further held that the department properly reprimanded the officer based on its office code of ethics, which precluded a finding that the statute violated rational basis review. *Id.* The *Seegmiller* case is distinguishable because the fundamental liberty interest at stake in that case involved adulterous sexual relations, whereas the fundamental liberty interest at stake for the Browns (and proscribed by the statute) is polygamous cohabitation, which involves much more than just sexual intimacy but also a choice to live domestically and in private as a poly family.

Appellees argue on appeal that the district court should have applied heightened scrutiny to the "cohabitation" statute under *Lawrence*. In *Lawrence*, the Court found a fundamental liberty interest in the "right [of] homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 566–67. The Court found that liberty required protecting private sexual conduct:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

Id. at 562. In *Lawrence*, the Court rejected a general claim of harm to justify the criminalization of "the most private human conduct, sexual behavior, and in the most private of places, the home." *Id.* at 567. The Court further amplified this fundamental right in *Windsor* and again in the opening line of *Obergefell*: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Obergefell*, 135 S. Ct. at 2593. It is the same right first described in *Lawrence* that "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons." *Lawrence*, 539 U.S. at 567. We find that the Browns have identified a fundamental right subject to heightened scrutiny under *Lawrence*.

As applied to the Browns, the law criminalizes their individual choices to organize their families and romantic relationships as a poly family. It further

criminalizes the mere act of cohabitation of these close, intimate adults, even in the absence of a religious ceremony or other public acknowledgements of marriage, by directly and impermissibly interfering with their domestic living arrangements. Thus, either facially or as applied, the cohabitation provision violates the Browns' fundamental Due Process interests.[330] Pursuant to *Lawrence*'s heightened scrutiny standard, we find that the "cohabitation" provision fails this heightened standard of review.

Appellant alleges that the district court erred in finding that no evidence of material fact exists with respect to harms caused by polygamous cohabitation. We disagree. On summary judgment, Defendant Buhman introduced expert and personal testimony that polygamous cohabitation is often affiliated with abuses to women and children. The Browns in response submitted both expert and personal testimony to support a finding that these ancillary abuses are not caused by polygamous cohabitation itself, but by isolationism, criminalization, and extreme misogynist beliefs. Based upon this evidence, we find that the "cohabitation" provision is not narrowly tailored to support these government interests. Such harm cannot be assumed any more than it can be for monogamous relationships or monogamous cohabitation in society. Any harm like child abuse or fraud can occur as readily in non-polygamous relationships and are, more importantly, already regulated by narrowly tailored criminal laws. We further affirm the district court's finding that even if heightened scrutiny does not apply, the "cohabitation" provision as applied to the Browns cannot pass rational basis scrutiny.

The Supreme Court has recently admonished that rational basis review is "not a toothless" inquiry. *See Mathews v. Lucas*, 427 U.S. 495, 510 (1976). In a similar case to the present, in *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), the federal government claimed a rational basis of combatting fraud, as is the case here, with a provision that made households ineligible for food stamps if they contained a member who was not related to other members of the household. The Court struck down the law under a rational basis analysis and specifically rejected the argument that certain types of households were more likely to commit fraud, as is the case here. Much like criminalizing all cohabitation by citing a few extreme cases of polygamists, the Court noted that the government could not satisfy a rational basis test with such loose association or extrapolation.

Appellant argues that the State has a legitimate interest in outlawing polygamous cohabitation because it often uses, as is consistent with Tenth Circuit precedent to do, the polygamy statute in order to open an investigation into other more heinous crimes that might be present, such as child abuse or underage marriage. Appellant argues that this is a rational basis because evidence of these ancillary crimes are often difficult to obtain in such close-knit communities who often fear law enforcement. However, we find that using the "cohabitation" provision of the statute as a tool to "fish" for evidence of other crimes cannot support a rational basis. To allow such a use of the statute would be the equivalent of criminalizing homosexual conduct in order to potentially find evidence of child

[330] Brief of Appellees, *supra* note 165, at 26–27.

abuse or pedophilia—a basis hardly rational or even thinkable when put in those terms.

The Supreme Court has also found that rational basis does not exist if the restrictions are based on animus or moral disapproval. The Supreme Court struck down the law in *Lawrence* in part because such claims are often thinly veiled examples of moralistic disapproval of non-traditional and alternative relationships and lifestyles. In *United States v. Windsor*, the Supreme Court held that the federal Defense of Marriage Act was invalid because its legislative intent and effect was "to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." 133 S. Ct. 2675, 2696 (2013). *Lawrence* stands for the protection of the right to choose one's lifestyle and intimate relations. It stressed that such liberty interests necessarily mean that outdated notions of societal harms are invalid in a multi-cultural and plural society.[331]

We find no rational basis exists to criminalize polygamous cohabitation as opposed to monogamous cohabitation or other forms of cohabitation where one person is not legally married to someone else. As we previously discussed, the harms ancillary to polygamous cohabitation are already subject to more exacting criminal laws that govern child abuse, spousal abuse, and fraud in all families, polygamous or monogamous. We affirm the district court's decision that found the "cohabitation" provision of the statute cannot pass rational basis scrutiny.

We affirm the district court's decision to grant Plaintiffs' motion for summary judgment on the grounds that the statute as applied to the Browns is unconstitutional in violation of their Free Speech rights under the First Amendment and their Due Process rights under the Fourteenth Amendment. We reverse the portion of the district court's decision that interprets the Utah Anti-Bigamy statute in a manner that differs from the Utah Supreme Court interpretations of the "purports to marry" portion and the "cohabitation" portion of the statute.

AFFIRMED IN PART, REVERSED IN PART.

B. Model Legislation

Although it is unclear at this point whether the poly equality movement will track the progression of the same-sex marriage equality movement, the locus of legal movement could occur in the legislatures. Indeed, after the Utah district court's decision, at least two bills were introduced in the house in an attempt to re-write the anti-bigamy statute to support that particular sponsor's view following the *Brown* decision.[332] In aid of that endeavor, I have included sample legislation which would

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[331] *Id.* at 35.

[332] H.B. 281, 61st Leg., Gen. Sess. (Utah 2016), http://le.utah.gov/~2016/bills/static/HB0281.html [https://perma.cc/4ZDY-B7AT]; H.B. 58, 60th Leg., Gen. Sess. (Utah 2014), http://le.utah.gov/~2014/bills/static/HB0058.html [https://perma.cc/83TW-WC9S].

follow a case in which informal polygamy is no longer outlawed. The model statute would, however, still ban formal polygamy or marriage fraud.

The work done by the more recent Utah House Bill 281, which places an "and" between the "purports to marry" and the "cohabitation" prongs,[333] at least attempts to more clearly delineate adulterous cohabitation from polygamous cohabitation in requiring both "purporting to marry" and "cohabitation" to trigger the statute. While it fixes the vagueness problem, it still does not address the substantive problems in criminalizing both the public and private aspects of polygamy. In an attempt to mirror the holding in the mock opinion, the following is just one example of a way to re-write the polygamy bans to delineate prohibited conduct from acceptable conduct:

(1) A person is guilty of bigamy when, knowing he or she has a husband or wife, or knowing the other person has a husband or wife, the person attempts to legally marry the other person.
(2) Bigamy is a felony of the third degree.
(3) It shall be a defense to bigamy that the accused reasonably believed he or she and the other person were legally eligible to remarry.

When measured against the acceptable legal foundation, the only acceptable constraint is to protect against marriage license fraud or legal polygamy, the exact conduct Judge Waddoups' decision left intact in the statute after his judicial re-fashioning of the statute.[334] Although balked at by scholars following his decision, his end result does not seem so off course now.

C. The Hope for the Future

This Article is meant to be forward-looking, but not so placed in the future to be of no moment now. Poly reform is happening, much faster than imagined, following on the heels of the same-sex marriage equality movement. And I do believe that courts and legislatures will have to soon wrestle with whether criminalizing polygamy can pass constitutional muster.[335] But in our haste to ride the equality wave, we have to make sure we are approaching this grounded in a policy best suited for the future, and not just what will get us there the fastest. This subsection outlines why the hope is that polygamy laws will be found unconstitutional under substantive Due Process and Free Speech grounds and not Free Exercise of Religion grounds with respect to the strength and long-term effects of the legal arguments and the norm-shaping function of the law.

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[333] H.B. 281, 61st Leg., Gen. Sess. (Utah 2016), http://le.utah.gov/~2016/bills/static/HB0281.html [https://perma.cc/4ZDY-B7AT].

[334] Brown v. Buhman, 947 F. Supp. 2d 1170, 1233–34 (D. Utah 2013).

[335] *See generally* Doug Fabrizio, *The Legal Future of Polygamy*, RADIOWEST (Apr. 19, 2016), http://radiowest.kuer.org/post/legal-future-polygamy [https://perma.cc/RL3X-9HW7] (discussing the potential unconstitutionality of bans on polygamy).

1. Grounding Arguments in Free Speech and Due Process

The policy choice made in the "mock" opinion applies tenets of Free Speech to the public aspects of polygamy and tenets sounding in substantive Due Process to the private aspects of polygamy. While neither body of law is foreign to the polygamy debate, the Free Speech ground is relatively novel, and no one has yet to bifurcate the analysis and application of Free Speech and substantive Due Process in this way.

In its amicus brief to the Tenth Circuit, submitted by Ilya Shapiro and Eugene Volokh on behalf of the CATO Institute and which influenced a large portion of the "mock" opinion, amicus argued explicitly that the Utah Anti-Bigamy statute impermissibly criminalizes speech.[336] The CATO Institute approach differs from the approach used in the "mock" opinion in that it applied Free Speech jurisprudence to both the public, symbolic aspects of polygamy as well as to the private, cohabitation aspects.[337] This legal application of Free Speech laws is grounded in the finding that cohabitation normally results only after a public, ceremonial marriage, and that such "conduct-plus-speech" restrictions are treated as restrictions on speech.[338] In this situation, this reading would be even more convincing if the underlying statute in question read both "purports to marry" and the "cohabitation" provisions together, but as it stands, one can violate the statute by one's engaging in either the public aspects or the private aspects of polygamous behavior.[339]

Instead, the "mock" opinion first argues that Free Speech laws apply to the public conduct at issue. In the case of the Browns, this includes their nationally televised reality show as well as their public appearances. This also includes, as for many practicing polygamists, a ceremonial element and other objective conduct tending to show that Kody regards Meri, Janelle, Christine, and Robyn as his wives. Even with polys who are not "public figures" in the manner that the Brown family is or who do not speak out publicly to foster understanding and acceptance of poly families, but who only engage in the marriage ceremony or publicly hold themselves out as married spouses, the "mock" opinion and the bifurcation of the applicable substantive law applies equally to them.

The "mock" opinion applies the *Lawrence* rationale to the "cohabitation" provision of the statute in order to find that it violates the Fourteenth Amendment's Due Process guarantees. Although some would argue that *Lawrence* cannot and should not be interpreted to extend to and apply to polygamists,[340] I argue that

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[336] Brief of the Cato Inst., *supra* note 7, at 5–6.

[337] *Id.* at 9–14.

[338] *Id.*

[339] *See* UTAH CODE ANN. § 76-7-101 (West 2010), *invalidated by* Brown v. Herbert, 43 F. Supp. 3d 1229 (D. Utah 2014).

[340] *See* Joanna Grossman, *The Consequences of* Lawrence v. Texas*: Justice Scalia Is Right that Same Sex Marriage Bans Are at Risk, but Wrong that a Host of Other Laws Are Vulnerable*, FINDLAW (July 8, 2003), http://writ.news.findlaw.com/grossman/20030708.html [https://perma.cc/9UMB-5W8M].

Lawrence's articulation of the fundamental right, coupled with the further gloss provided to the *Lawrence* decision in recent cases such as *Windsor* and *Obergefell*, captures the fundamentally protected liberty interest at the heart of polygamous cohabitation. In that regard, the "mock" opinion consciously chooses to support the substantive Due Process claim using the more strict, heightened scrutiny standard used in *Lawrence* without having to necessarily rely on the "backup" of doing a rational basis analysis. However, I do think the "cohabitation" provision, even when read in the conjunctive in order to limit the criminalized conduct to polygamous cohabitation, would still fail rational basis scrutiny.

Leaving somewhat of a gap in the decision actually puts the *Lawrence* analysis more in line with the Supreme Court's overall shift toward focusing less on stringent fit tests in the realm of substantive Due Process, fundamental rights cases and more toward reasonableness and animus in general.[341] If that prediction is correct, but with more strict confines than is often proffered by Justice Kennedy in the recent same-sex marriage cases,[342] then restrictions on poly behavior will be found unreasonable and based on animus in the same manner that sodomy laws were enforced against gays.[343] Further, decriminalizing polygamy is not a marriage case, and I am not implying to rely on *Windsor* or *Obergefell* in this instance. But what I am saying is that looking at how *Lawrence* is likely to be interpreted after the addition of *Windsor* and *Obergefell*, *Lawrence*'s "stealth constitutionalism" captures the fundamental right at issue for poly families today.[344] In somewhat of an ironic turn on the late Justice Antonin Scalia's dissent in *Lawrence*, in which he argues that decriminalizing sodomy will lead down a slippery slope toward polygamy, it appears that *Lawrence* does just as he predicted.[345] In the context of polygamous cohabitation, *Lawrence* provides some heightened level of scrutiny around private sexual acts within the privacy of one's home and between consenting adults that, while difficult to determine its contours in subsequent cases, the heightened nature of the inquiry becomes less important than does its applicability to certain conduct.

2. Promoting "Intimacy Pluralism" Over Religion

Noticeably absent from the mock opinion is any inquiry into whether the statute targets religious polygamists in practice and does not address any arguments or distinctions based on the Browns' religious beliefs in polygamy. As stated

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[341] *See* Araiza, *supra* note 302, at 385; Berger, *supra* note 302, at 778; Lamparello, *supra* note 302, at 30.

[342] *See generally* Lamparello, *supra* note 302, at 29–30 (discussing Justice Kennedy's departure from "traditional equal protection jurisprudence" in *Windsor*); Adam Lamparello, *Justice Kennedy's Decision in* Obergefell*: A Sad Day for the United States Supreme Court*, 6 HOUSTON L. REV.: OFF REC. 45, 45–46 (2015) (arguing against the reasoning employed by Justice Kennedy in *Obergefell*).

[343] *See* Lawrence v. Texas, 539 U.S. 558, 560–71 (2003).

[344] Berger, *supra* note 302, at 778.

[345] Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

throughout this Article, this omission is conscious and deliberate after years of careful study of polygamy in the United States. While there are some social and political benefits to including religion as a feature of the poly debate, its inclusion comes at too high a cost in the theoretical long-run. Instead, we should promote laws that decriminalize polygamy based on tenets of diversity, liberty, and choice in intimate family relationships.

Objectively, arguments grounded in religion may represent the strongest legal route to decriminalizing polygamy, as religious freedom is afforded great reverence in the Supreme Court jurisprudence.[346] As my previous research has shown, for many polygamists, their religious beliefs are the most important feature of their lives, and ignoring the religious nature in the legal analysis could also devalue the liberty interests of those polygamists who practice for not just social or cultural reasons.[347] Deciding to include Free Exercise of Religion as a grounds to challenge polygamy bans also provides a strict level of constitutional scrutiny.

But with the advantage of strict scrutiny comes unintended and impermissible consequences. The first obvious problem is that this choice would make a distinction between those who practice polygamy for religious reasons versus those who engage in poly behavior for non-religious reasons. Treating those who practice polygamy for secular reasons disparately than those who practice it for religious ones could lead to even more claims of substantive Due Process and Equal Protection violations. As a result of the disparate treatment, this could lead to practicing polys feigning religious adherence to achieve equal status as religious polys.

On a deeper level, including religious exception as a basis to decriminalize polygamy only re-introduces and intertwines religious influence and control into the marriage arena. This religious intertwining, while practiced and accepted by many mainstream Americans, can potentially become more pernicious toward women when practiced at its extremes. Some recent scholars have argued that extremist religious beliefs, such as those practiced by fundamentalist Mormons and Muslims, are inherently misogynist and harmful to women.[348] While I decline to take a hard stance on those arguments, especially in the context of religious polygamy, I find the arguments compelling and think it raises some interesting questions. If that is the case, then validating religious beliefs that may support both polygamy and, in some extreme cases, the elevation of men over the status of women to the point of abuse, would be an unwise policy move.

Considering the United States' long history with Mormon polygamists and our more recent dealings with Muslim polygamists,[349] which pits minority religious

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[346] *But cf.* Faucon, *Polygamy After* Windsor, *supra* note 2, at 495 ("Despite Free Exercise rights experiencing great expansions and retractions according to the composition of the Court over the last century, the religious practice of polygamy always remained as an outlier, seemingly beyond question as a religious practice that states could restrict.").

[347] *See* Faucon, *Marriage Outlaws*, *supra* note 1, at 3–4.

[348] *See* Chamberlin & Guiora, *supra* note 90, at 144–45.

[349] *See* Faucon, *Marriage Outlaws*, *supra* note 1, at 13–20 (discussing the demographics of polygamists in the United States).

beliefs against mainstream religious beliefs that control the majority and translate into laws,[350] the religion argument may cause more damage to the poly movement's acceptance than good. While the United States is a religious country compared to other First World, Western countries, it is still very particular about which religions and which religious beliefs are valued as acceptable to influence the mainstream.[351] I find that this adherence has led to the use of religion to create dissention and to suppress where any conduct is at issue that might implicate our moral compass in the context of expanding civil rights. Because of this historical tension which is inescapable at this point in clouding our dealings with polygamy, it is best to remove the polygamy debate from within that framework and instead promote its acceptance through tenets of Free Speech and Due Process ideals of equality, identity, and choice.

Focusing instead on substantive Due Process or "intimacy pluralism" as this paper has previously described it, allows us to decriminalize polygamy by recognizing and upholding the plurality of intimate associations as equal to one another when based on the conscious choice and identity of consenting adults.[352] The Supreme Court recently affirmed in *Windsor* and again in *Obergefell* the policy to value consenting adult same-sex relationships on similar "equal dignity" grounds.[353] To refuse that same equal dignity to the lifestyles and intimate associations of polys is an offense to ideals of equality, liberty, and justice. These ideals frame a larger push toward decriminalization and acceptance of alternative marital structures and the privatization and contractualization of marital and family obligations. In that regard, we do not "need" Free Exercise of Religion to get us to the ultimate goal of "intimacy pluralism" as religious polygamy would likely be subsumed within that framework as well.

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[350] This ideal affects immigration from countries that recognize polygamy. Immigration and Nationality Act ("INA") § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A) (2012); INA § 204A(b)(1)(B), 8 U.S.C. § 1229(b)(1)(B) (2012) (cancellation or removal for inadmissible permanent residents requires a finding of good moral character, for which practicing polygamists are per se ineligible).

[351] *See* Cyra Akila Choudhury, *Between Tradition and Progress: A Comparative Perspective on Polygamy in the United States and India*, 83 U. COLO. L. REV. 963, 969–70 (2012).

[352] *See* Faucon, *Polygamy After* Windsor, *supra* note 2, at 463, 467; *see also* Robert A. Destro, "*You Have the Right to Remain Silent": Does the U.S. Constitution Require Public Affirmation of Same-Sex Marriage?*, 27 BYU J. PUB. L. 397, 399 (2013) (arguing that the legal recognition of polygamy and alternative marital structures is a "strategic objective in a more ambitious and longer-term philosophical and political effort to separate from 'heteronormativity' and 'heteropatriarchy' of cultures of Judeo-Christian and Muslim religions.").

[353] United States v. Windsor, 133 S. Ct. 2675, 2693 (2013); Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

Plus, adding a Free Speech element brings strict scrutiny back into the fold.[354] In that sense, we do not lose much in terms of the legal arsenal by dropping Free Exercise of Religion and adding Free Speech. While novel, the Free Speech angle is less controversial and more likely to garner agreement instead of debate. Even the most conservative of judges on the Court, who would find polygamous behavior abhorrent to morality and an absurd expansion of the Fourteenth Amendment, uphold Free Speech rights as sacrosanct in a country where freedom of the press and information is at the cornerstone of maintaining checks on the government and suppressive laws.[355]

V. CONCLUSION

Although the Tenth Circuit's reversal on mootness grounds reaffirmed the outlawed status of informal polygamy, the *Brown* case did spark a resurgence in the poly decriminalization debate.[356] Once unthinkable, following on the heels of the marriage equality movement and expansion of "intimacy pluralism," we are on the brink of decriminalizing polygamy. While I welcome the end of the criminal sanctions and resulting stigma against poly relationships and the expression of fundamental rights, we must ensure that in our haste we do not sacrifice our principles of liberty and identity in exchange for the fast-track.

To aid in this pursuit and to inform future arguments in the decriminalization debate, this Article sets out a three-step gloss that focuses on the three main inquiries involved in decriminalizing polygamy—the alleged harms of polygamy; the substantive law at the center of the constitutional questions, as well as the precise statutory language required to delineate permissible conduct from impermissible conduct; and the overarching political and social ideologies that should guide our approach to the issue.

The Harm. Applying this gloss over the *Brown* litigation allows us to finally crystallize the harmful conduct that relates to the private aspects of polygamy as well as the public aspects of polygamy. This exercise allows us to see that the harms attendant to the public aspects focus on threatening the State's control over marriage and usurping the marriage ceremony as a literal status symbol conferred only by the alleged benevolent power of the State. This analysis also deduces that the individual or private harms allegedly attendant to polygamous cohabitation are unsupportable as a justification to outlaw informal polygamy.

The Law. Both findings of harm, however, are impermissibly regulated by the Utah Anti-Bigamy statute. With all of the competing constitutional clamor following the Utah district court's decision striking down the cohabitation prong on no less

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[354] *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2731–32 (2011).

[355] *But cf.* Adam Serwer, *At the Supreme Court, Free Speech Is a Partisan Affair*, MSNBC (May 5, 2014), http://www.msnbc.com/msnbc/free-speech-supreme-court-bias [https://perma.cc/H2NF-HGLH] (arguing that freedom of speech cases are partisan affairs).

[356] *See supra* Part II.

than four arguably merited constitutional grounds,[357] this gloss allows an inquiry into the soundness and applicability of each potential constitutional protection against the harms identified in step one as being at the heart of private and public aspects of polygamy. Inherent in this inquiry is an initial investigation into policy grounds.

The *Brown* litigation and its impetus in the Utah House further demonstrates the need for the law to proscribe precisely the prohibited conduct from permissible conduct. The confusion resulting from different interpretations of the statute over the years, as well as its reactionary legislative gerrymandering, have yet to clarify the standard.[358] Although the recent House Bill 281 does improve in that regard in distinguishing between polygamous cohabitation and clandestine and adulterous cohabitation, by requiring both "purports to marry" and "cohabitation" to violate the statute,[359] that revision and proscription against polygamous cohabitation are still subject to the same constitutional attacks as set forth in this Article. In fact, reading the provisions together even bolsters the Free Speech argument, as asserted by the Cato Institute in its amicus brief to the Tenth Circuit.[360]

The Policy. To guide the direction of the constitutional avenues toward decriminalizing polygamy, especially with so many competing voices, this framework requires an inquiry into which overarching policy should prevail. In the case of decriminalizing polygamy, the *Brown* litigation's overall policies were based on Free Exercise of Religion and substantive Due Process.[361] But considering the harms alleged, this Article sets forth as an alternative which is based on tenets of substantive Due Process and Free Speech. In that regard, this Article is the first to argue that the restrictions on the public aspects of poly behavior are unconstitutional under Free Speech laws and that the private, cohabitation aspects of poly behavior are unconstitutional in violation of *Lawrence*'s Due Process findings.[362]

This approach consciously ignores arguments grounded in Free Exercise of Religion. Going into battle under the banner of Free Exercise may win poly proponents a swift victory, but this allegiance would cause nothing but dissension in the ranks and potential regression in the march toward equality.[363] Grounding the argument instead on "intimacy pluralism" as set forth in *Lawrence*'s substantive Due Process allows us to include the widest range of poly conduct and uphold diversity in marital relationships by striving for individual choice, identity, and diversity in intimacy within the private sphere.[364] Free Speech laws allow us to protect the public

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[357] Brown v. Buhman, 947 F. Supp. 2d 1170, 1234 (D. Utah 2013).

[358] *See supra* Part III.

[359] H.B. 281, 61st Leg., Gen. Sess. (Utah 2016), http://le.utah.gov/~2016/bills/static/HB0281.html [https://perma.cc/4ZDY-B7AT].

[360] Brief of the Cato Inst., *supra* note 7, at 9–14.

[361] *Brown*, 947 F. Supp. 2d at 1176.

[362] *See supra* Section IV.A.

[363] *See supra* Section IV.C.

[364] *See* Faucon, *Polygamy After* Windsor, *supra* note 2, at 463, 467.

manifestations of these intimate relationships and the symbolic representations that public manifestations convey.[365]

The hope is that this Article and the mock opinion within it will guide the future decriminalization of polygamy. Although not without its limitations, this approach attempts to learn from the collective past two millennia of judicial and legislative dealings with polygamy in order to predict the proper regulation of poly behavior in the no longer distant future. Once thought completely absurd and as a last stop on the slippery slope toward pedophilia and bestiality,[366] the *Brown* case has also revealed that under more favorable facts and circumstances, a poly family may soon successfully challenge criminal sanctions against polygamy in a manner that resonates within society and creates permanent change in the legal understanding and regulation of multi-party relationships. We need to make sure that in our quest toward progress, we set ourselves out on the right path toward decriminalizing polygamy.

[365] *See supra* Part IV.

[366] *See, e.g.*, Askew, *supra* note 32, at 627; James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage Is Not a Commitment to Polygamous Marriage*, 29 N. Ky. L. REV. 521, 523 (2002).