2016

The Future of Polygamy in Western Culture: The Slippery Slope Debacle

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THE FUTURE OF POLYGAMY IN WESTERN CULTURE: THE SLIPPERY SLOPE DEBACLE

I. Introduction

As it stood prior to August 27, 2014, Utah’s anti-bigamy statute\(^1\) was the state’s most effective tool in combatting the practice of polygamy, which, simply stated, is the knowing act of having more than one spouse. Due to the difficulty the government experienced in prosecuting polygamy in the 19\(^{th}\) Century prior to modern day anti-polygamy laws, Congress incorporated new and now controversial language into its legal understanding of polygamous marriages: “cohabitation.”\(^2\) The changing public opinion on the status of Bill of Rights protections has caused a shift in First Amendment jurisprudence.\(^3\) That shift inspired the Supreme Court’s ruling United States v. Windsor,\(^4\) a case which invalidated the Defense of Marriage Act’s Section 3 and extended federal rights and benefits of marriage to same-sex couples who legally married.\(^5\) From the time Vermont, being first state to do so, recognized same-sex civil unions in 1999, to the Supreme Court’s overturn of DOMA and dismissal of Proposition 8 in California, 47 state and federal courts have gradually reduced anti-same-sex marriage laws to nothing more than a piece of American history.\(^6\) Many individuals, including moralists, conservative politicians, and legal theorists alike, view the increasing judicial support for same-sex marriage as a gateway to far more controversial ground: polygamy.\(^7\) As a result of a recent district court ruling in Brown

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1 Utah Code Ann. § 76-7-101
6 Id. See also http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage.

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v. Buhman\(^8\) invalidating the cohabitation provision of the law, traditional conservatives and moralists have continued their anticipation of this slippery slope, employing the same analysis and moral basis that was promulgated by natural law theorist John Finnis. \(^9\)

II. The History of Polygamy

Contrary to some popular belief, Islam was not responsible for the invention of polygamy. \(^10\) In fact, Islam’s introduction to the world in the Common Era’s seventh century encompassed an adoption of the existing system of marriage in the region. \(^11\) As promulgated by Bible Scripture, Lamech, who was the grandson of Adam, “took unto him two wives: the name of the one was Adah, and the name of the other Zillah.” \(^12\) Jacob had four wives who produced twelve sons, and Abraham had two wives as well. \(^13\) Additionally, The Second Book of Samuel mentions several wives of the prophet David in Hebron and Jerusalem. \(^14\)

As Islam encountered it, marriage was open to interpretation, and polygamous marriages were not against religious law. \(^15\) Generally, Islam describes two of the competing types of marriage regularly discussed in polygamy case law: Monogamy and Limited Polygyny. \(^16\) Monogamy is comprised of one man married to one woman (a composition that is recently expanding in Western law to include same-sex couples)\(^17\) and Polygyny (a form of polygamy) is

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\(^11\) Id.
\(^12\) The Book of Genesis 4:19
\(^13\) See Rizvi.
\(^14\) 2 Samuel 3:2-5, 13-16; 5:13-16.
\(^15\) See Rizvi.
\(^16\) Id.
\(^17\) United States v. Windsor, (Kennedy, J. Holding that DOMA’s definition of marriage was unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment.).
one man married to a maximum of four wives. However, Islam supports a monogamous marriage more so than its counterpart, because it is believed that in order to have more than one wife, a man must be able to deal with both (or several) “on the basis of justice and fairness.” A passage in the Qur’an relating to this notion states that “you do not have the ability to do justice between the wives, even though you may wish.” Thus, it appears that, although polygamous marriage is technically permitted by two of the world’s largest religions, it is not endorsed as the favorable option.

A. The Mormon Church

Plural marriage entered the United States when the revelation that came to the Church of Latter Day Saints (“LDS”) Prophet, Joseph Smith, was written down in 1843. On July 12, 1843, Section 132 of the Doctrine and Covenants was recorded, and this particular revelation introduced the idea that plural marriage was not condemned by the Lord, but commanded into existence. It was not until 1852 that Polygamy was openly endorsed by an apostle of the Mormon Church, Orson Pratt, and the leaders subsequently encouraged all members to engage in polygamous marriages. Under the presidency of Abraham Lincoln, following the assassination of Prophet Joseph Smith and the rapidly approaching Civil War, the Republican Party classified polygamy and slavery as “the twin relics of barbarism.” In response to the public’s vehement opposition to polygamy in the United States during a time when the government desperately needed support in its upcoming endeavors, Congress passed the Morrill Act in 1862. This act,

18 Id.
19 Id.
20 Surah an-Nisaa, 4:129.
21 See Embry.
23 Id.
25 See Embry.
making bigamy a crime punishable by $500 fine and five years in prison, prohibited plural marriage in its entirety, dis-incorporated the Mormon Church, and restricted its ability to own property. 26

George Reynolds, the new Mormon leader's private secretary, agreed to be the first individual tried for polygamy under the Morrill Act in order to test its constitutionality. 27 The basis for the Mormon opposition to the law, aside from the fact that it is mandated by religious scripture, was rooted in the First Amendment's guarantee of free exercise of religion. 28 The Supreme Court in Reynolds v. United States explicitly stated that "a party's religious belief cannot be accepted as a justification for his committing an overt act made criminal by the law of the land." 29 The sheer difficulty in prosecuting bigamy charges for lack of testimonial evidence and cooperation from the suspected wives drove Congress to pass the Edmunds Acts in 1882 to approach the issue from a "cohabitation" standpoint. 30

Even with the laws now only requiring proof of couples living together as opposed to a legal marriage ceremony, conviction rates were not as high in Utah as the Government, or the majority of citizens, would have liked. 31 The 1887 version of Congress's anti-polygamy legislation came in the form of the Edmunds-Tucker Act, which prohibited polygamists from serving on juries, in public office, from voting, forced plural wives to testify against their husbands, abolished the local Mormon-based militia, and provided a fast track for government

26 Id.
27 Id. See also Jason D. Berkowitz, Beneath the Veil of Mormonism: Uncovering the Truth About Polygamy in the United States and Canada, 38 U. Miami Inter-Am. L. Rev. 615, 622 (2007).
31 See Embry.
acquisition of the church property that was dis-incorporated by the Morrill Act. As a result of the federal courts’ display of uniformity in their stand against polygamy in the coming years, Mormon Church President Wilford Woodruff publicly and formally announced in 1890 that Mormons were therein required to abide by all existing marriage laws in the nation. Two years later, as a final push for a collective stance against polygamy, the Federal Government included polygamy in its classification for individuals not permitted to enter the United States as aliens. The official legal standoff between the Government and the Church was now over. The higher authorities of the Church, however, continued to display behavior (cohabitating with plural wives) contrary to the nation’s laws, and their constituents followed accordingly.

Today, as many as three billion people in over 150 countries in the world still uphold the practice of polygamy. In the United States, over 100,000 people are actively practicing polygamy, regardless of the express legal prohibition. The major, and possibly most significant, policy factor weighing heavily against permitting polygamy in any form is the fact that underage girls are being subject to entering marriage with much older men. The media has been especially vivid in describing polygamy’s oppressive nature, including the notion that

\[\text{\textsuperscript{32} Id. See also Utah Commission, Agency History #1249, http://archives.utah.gov/research/agencyhistories/1249.html. (The Edmunds-Tucker Act required the Commission, originally designed to enforce the Edmunds Act, to provide regular reports to the Secretary of the Interior, who in turn forwarded the reports to Congress. The reports were used to reflect on the progress in solving the “Utah problem,” and provided feedback to the Commission on how to proceed more efficiently.)}\]

\[\text{\textsuperscript{33} See Embry.}\]

\[\text{\textsuperscript{34} 8 U.S. Code § 1182. (Under the “Miscellaneous” category, the first item is labeled “Practicing Polygamists,” and the law states that “any immigrant who is coming to the United States to practice polygamy is inadmissible.”)}\]

\[\text{\textsuperscript{35} See Davis. See also Smith, Book of Doctrine and Covenants, Official Declaration 1. (after a general conference with his counselors and the Twelve Apostles of the Church of Jesus Christ Latter-day Saints, President Woodruff declared once and for all that plural marriage was to cease. Many criticized this declaration for lack of actual and specific revelation from the Lord, but rather a product of public and political pressure to end plural marriage in the states.)}\]

\[\text{\textsuperscript{36} Id.}\]

\[\text{\textsuperscript{37} Id.}\]

\[\text{\textsuperscript{38} Id.}\]

“it has fostered and condoned statutory rape.” 40 The additional social issues surrounding
polygamy are also significantly harmful and prevalent, including abnormal levels of child
poverty, tax fraud from income underestimation, and barriers to proper education, continue to
plague plural marriage societies. 41

One of the most widely publicized scandals of the Church occurred during the 2008 raid
of the 1,600 acre Eldorado, Texas LDS ranch where 468 children (under 18) were removed from
the compound for fear of ongoing abuse and rape in response to anonymous calls to authorities
alerting to such behavior. 42 The children were subsequently returned to their respective homes
due to a Supreme Court ruling which invalidated their removal for failure to show eminent
danger. 43 In August 2011, the leader of the compound, Warren Jeffs, was sentenced to life in
prison on two separate charges of sexual assault in regards to his marriage to two underage girls.
44 In April 2014, authorities seized the entirety of the property after a judge determined that the
Government had amassed enough evidence showing that the ranch was used to facilitate the
aforementioned crimes. 45 The raid and seizure of the property evidence a growing trend among
states in which polygamy is present, which is to continue to encourage those involved to step
forward and protect each other from threats to personal autonomy, as well as child abuse. 46

While Warren Jeffs was depicted as a predator in the media, a much more benevolent
figure replaced him in the minds and opinions of mainstream American culture: Kody Brown. 47

40 Id.
/news/mn-43824.
42 Michael Martinez and AnneClaire Stapleton, Polygamist Warren Jeffs’ Texas Ranch Being Seized by State Officials, (April 18,
43 Id.
44 Kolen Parker, Polygamist Sect Leader Warren Jeffs Hospitalized in Texas, (March 17, 20104),
45 See Martinez.
46 See Carter.

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The Brown family, consisting of one husband, four wives, and 17 children (not all from the one husband), were given a chance to show the nation a sitcom-esque depiction of plural marriage and family life. The TLC reality show “Sister Wives” premiered on the network and cultivated a sense of relatability and normalcy in relation to the type of lifestyle the family has chosen to lead. Utah authorities, however, were not as receptive as the general public, or TLC fans in particular, and went so far as to acknowledge the ease with which they will be able to prosecute the Browns as a result of their inadvertent confession to polygamy felonies on national television. The anti-polygamy, anti-cohabitation statute was the primary focus of Utah government officials’ criminal investigation of the Brown family.

III. The Utah Anti-Polygamy Statute

Utah, the epicenter of the Mormon movement, has a powerful history of opposition from both the Government and citizens in favor of permanently blocking the practice of polygamy. In fact, Utah’s entry into the Union in 1896 was conditioned upon its Mormon population renouncing polygamy indefinitely. As a result, the criminal punishment for polygamy, or bigamy as it is referred to interchangeably in the statute, was codified in the Utah Code as a third degree felony. In its constitution, Utah explicitly extends First Amendment protection and religious tolerance to any form of worship, with an exclusive exception carved out for

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48 Id.
49 Id.
51 Id.
53 Id.
54 Utah Code Ann. § 76-7-101 (1953). See also Black’s Law Dictionary, (Online 2nd Edition), http://thelawdictionary.org/bigamy. (The offense of having several wives or husbands at one time is called Polygamy, and the offense of entering into a second marriage while the first is still valid is called Bigamy.)
“polygamous or plural marriages,” which are “forever prohibited.” 55 The Utah Criminal Code bigamy provision states that an individual will be found guilty of bigamy when he/she knowingly has a spouse and “purports to marry or cohabits with another person.”56

In the early 2000’s, the Utah Supreme Court upheld numerous convictions in an unprecedented forward step toward the eradication of polygamy state-wide.57 In 2001, with the Winter Olympics looming over Salt Lake City, government officials began taking a more pointed notice of polygamy prosecution in the state. 58 With testimony highlighting the true dangers and problems surrounding successful prosecution of polygamous marriages beginning in 2001, the state Supreme Court delivered the State v. Green holding which upheld the constitutionality of the anti-bigamy statute. 59 In its opposition, the Defendant polygamist, Thomas Green, argued that the Utah statute was a) unconstitutional for violating the Free Exercise Clause of the First Amendment, and b) void for vagueness. 60 The Defendant, father to 25 children from 9 licensed and unlicensed wives, did not successfully argue the Free Exercise Clause because the government retains the right to restrict certain religious practices. 61

The Green Utah Supreme Court not only upheld the untouched analysis in Reynolds, but followed the legal standard used in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.62 The standard applied by the state and federal government requires such a law to be “neutral and of general applicability” in order to bypass the compelling government interest and narrowly

55 Utah Const. art. III. (emphasis added).
57 See Cart.
58 Id.
59 Id. See also State v. Green, 99 P.3d 820, (September 3, 2004).
60 Id. at 822.
61 Id.
62 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, at 569 (1993). ( “Reynolds...has been consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct “pose[s] some substantial threat to public safety, peace or order.”)
tailed heightened standard. Having found the Utah bigamy statute constitutional, the Court determined that the word “cohabit” has a secular meaning separate from its religious counterpart. Expounding upon the Utah statute even further in State v. Holm, the same court defined the “marry” element to officially include legally and non-state sanctioned marriages.

Once again, the Utah Supreme Court supported its decision by citing the fact that the United States Supreme Court has never overturned the following Reynolds rationale, which supports its continued relevance in modern society:

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.

A. Brown v. Buhman, Overturning the Cohabitation Provision

Kody Brown, star of “Sister Wives” and proponent of polyamorous marriage, filed a civil rights complaint in the District Court of Utah, Central Division on July 13, 2011. The Browns are not part of the LDS Church or Mormon Church, but are fundamentalists whose roots are aligned with Mormonism, with the exception of their decision to openly practice polygamy, which they openly practice. In their complaint, the Brown family asserted that any involvement in the practice polygamy is a direct function of their core religious beliefs, and requested that the Utah bigamy statute be invalidated under the Due Process and Equal Protection clauses of the

63 Id. at 520.
64 State v. Green, 99 P.3d 820 at 827.
65 State v. Holm, 137 P.3d 726. (2006). (“Where no suspect classification or violation of a fundamental right is involved, a difference in treatment need be only rationally related to a valid public purpose to withstand equal protection scrutiny.” The court goes on to say that “framers of our state constitution understood the irrevocable ordinance [anti-bigamy statute] to mandate the prevention of polygamy and not to merely prohibit government recognition of polygamy.”) Id. at 741.
66 Id. at 742.
69 See Shwartz.
Fourteenth Amendment, as well as the First Amendment’s religious freedom protections.\textsuperscript{70} The central argument in support of invalidating the law highlighted the fact that non-religious married couples may live with other adults in adulterous relationships and would still not be prosecuted under the Utah cohabitation provision.\textsuperscript{71} As a result, the law is not operationally neutral, which is required by the level of scrutiny deemed appropriate in \textit{City of Hialeah}.\textsuperscript{72}

In a 91-page decision, U.S. District Court Judge Clark Waddoups’s ruling attacked the section of Utah’s law against cohabitation, declaring the phrase "or cohabits with another person" a violation of both the First and Fourteenth Amendments.\textsuperscript{73} In an unprecedented departure from the reigning Reynolds legacy of case law, Judge Waddoups signaled a change in the way individual rights cases are treated in courts, noting that the balance of society’s interests and personal rights are not set in stone.\textsuperscript{74} The interests of privacy rights in the past century have created “morally defensible...’penumbral’ rights” derived from certain Bill of Rights provisions.\textsuperscript{75}

The Judge attributes the overall shift in First Amendment jurisprudence to the evolution of culture in the nation, namely the eradication of the popular idea of “orientalism,” or more commonly known as “imperialism.”\textsuperscript{76} The court in Reynolds reconciled the fact that it was dealing with mostly European descendants in the Mormon Church by attempting to equate the type of polygamy practiced by Mormons with the “odious” practice of polygamy revered by the

\textsuperscript{70} Compl. ¶ 16.
\textsuperscript{71} \textit{Brown v. Buhman}, 947 F. Supp. 2d 1170 at 1178.
\textsuperscript{72} \textit{Id.} at 1170.
\textsuperscript{73} See Bailey. See also Bill Mears, \textit{Judge Strikes Down Part of Utah Polygamy Law in ‘Sister Wives’ Case}, CNN Justice, (December 16, 2013), http://www.cnn.com/2013/12/14/justice/utah-polygamy-law.
\textsuperscript{74} \textit{Brown v. Buhman}, 947 F. Supp. 2d 1170 at 1181.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} (Orientalism, as described in detail by Columbia University Professor Edward W. Said, was the prevalent mindset of Americans, British, and French elites in the late nineteenth century. The term is derived from the collective grouping of Middle Eastern, African, and Asian societies, upon which the elites then used to subsequently impose inferiority. The assumption that the “Orient” was inferior to Americans in general helped fuel decisions like Reynolds, which relied on overwhelming public opposition to groups or beliefs which departed significantly from its own.)
Orient people. 77 The “anti-polygamy discourse also spoke of Mormon polygamy in ‘us/them’ terms, treating polygamists not as people, but as problems to be solved.” 78 As a result of this historical disparity, Judge Waddoups suggested that the LDS Church may very well have been both a victim and violator in the realm of polygamy in Utah. 79 In the past, the State has used societal norms and common ideals of morality in its legislative purpose in creating the criminal laws against bigamy in the same manner that sodomy was targeted prior to the iconic Lawrence v. Texas ruling. 80 The Supreme Court’s Lawrence declaration that homosexuals had and continue to have Due Process protection when engaging in activities in their private homes, once again defined the areas of life which fall under the Fourteenth Amendment’s protection: “marriage, procreation, contraception, family relationships, child rearing, and education.”81

The court in Reynolds labeled polygamy a “social harm,” though never articulating the exact social harms the act of bigamy itself created,82 and referred to monogamous marriage as a “most important feature of social life.” 83 However, in order for such a law to exist under the Free Exercise standard, the government must show that it is facially neutral and generally applicable if it wishes to circumvent strict scrutiny.84 The Brown decision first concluded that polygamy does not constitute a fundamental right, and applied the standard articulated by the Supreme Court in Washington v. Glucksberg. 85 The Brown court compared the deep-rooted history of prohibition against assisted suicide in Anglo-American society to that same society’s

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77 Id. at 1183-84, 86.
78 Id. at 1183, n. 15.
79 Id. at 1184.
80 Id. at 1185. (Lawrence v. Texas invalidated a Texas statute making it a crime for consenting adults to engage in sodomy in the privacy of their own homes. The law violated the Due Process Clause of the Fourteenth Amendment and provided legal basis for the invalidation of DOMA and same-sex marriage bans nationwide.)
82 Brown v. Buhman at 1186.
83 Reynolds v. United States, 98 U.S. 145 at 165.
85 Washington v. Glucksberg, 521 U.S. 702 (1997). ("Asserted right to assistance in committing suicide is not fundamental liberty interest protected by due process clause; history of law's treatment of assisted suicide has been and continues to be rejection of nearly all efforts to permit it.")

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similarly vehement rejection of polygamy. As a result of the Substantive Due Process
Glucksberg analysis, the plaintiffs in Brown had no reasonable “expectation that their purported
marriage will be legally recognized even though they describe their often religiously motivated
cohabitation as ‘marriage’…” The cohabitation provision of the Utah bigamy statute similarly
falls short of achieving fundamental right status which would require heightened scrutiny under
the Glucksberg substantive Due Process analysis.

Pursuant to the Free Exercise Clause analysis, if a law that purports to deny or prescribe a
certain type of religious practice “is found not to be neutral or of general applicability, then a
court evaluating the constitutionality of the challenged law must apply the strict scrutiny
standard.” The Utah law, in its plain meaning, criminalizes the act of “cohabitating with a
second adult partner after having married a first partner.” Because cohabitation alone would
sufficiently satisfy the statute, the Brown court applied strict scrutiny to that provision, and found
it unconstitutional and void from the remainder of the statute. It is imperative to note that only
the cohabitation provision was stricken from the statute, and the bigamy ban in Utah is still good
law today, though it only makes criminal the act of holding two separate marriage licenses
simultaneously.

The caveat to the Brown court’s final determination lies in the religious motivation of the
cohabitation in question, namely whether or not it was considered to be a factor of actual

87 Id. at 1197.
88 Id. at 1198. (The Browns suggested that the Lawrence rationale applied by the Supreme Court was parallel to their case and
could be classified as heightened scrutiny. Judge Waddoups was reluctant to label it as such, specifically given the lack of
express language in the Lawrence decision proclaiming its use of one standard over the other; the court employed what looked to
be a hybrid rational basis test.)
89 Id. at 1203.
90 Id. at 1193.
91 Id. at 1204.
92 Id.
marriage. The Court determined that “the one and only factor that is officially indicative of marriage is the marriage license which must be present before any kind of solemnization ritual has legal effect creating a marriage...” The Utah government, in attempting to provide reasons as to how the statute is rationally related to its goals, asserted that monogamous marriage should be protected as a social institution. The Court, reverting to Chief Justice Durham’s dissent in Holm, agreed only to the extent that such marriages were seeking legal status. Essentially, the Utah District Court used Lawrence to hold the cohabitation prong unconstitutional for the following reason:

The incongruity between criminalizing religious cohabitation but not adulterous cohabitation, or rather selectively prosecuting the former while not prosecuting the latter at all, demonstrates that the cohabitation prong is not narrowly tailored to advance a compelling state interest.

Despite the significant interference with a century’s worth of jurisprudence fighting against polygamy, the Utah District Court was still unable to provide a basis on which to discredit Reynolds with regard to polygamy or bigamy as an institution in and of itself.

IV. The Morality of The Anti-Polygamy Law

Less than one decade after same-sex couples received a similar, albeit indirect, victory in Lawrence v. Texas in pursuit of equality, the Supreme Court granted full marriage equality in Windsor’s groundbreaking invalidation of DOMA. Could the Brown ruling have similar implications on plural marriage in America within the next few decades? "If love and mutual consent become the definition of what the boundaries of marriage are, can we as a society any

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93 Id. at 1212.
94 Id.
95 Id. at 1217.
96 Id. at 1218.
97 Id.
98 Id. at 1203.
99 United States v. Windsor, 133 S. Ct. 2675.
longer even define marriage coherently?"^{100} It has been widely speculated that polygamy, particularly in Utah, may not be far from approaching the path that same-sex marriage is currently dominating.^{101} Renowned moralist, legal scholar, and philosopher, sometimes referred to as a “new natural lawyer,”^{102} John Finnis, presents a natural law argument in opposition to same-sex marriage and all other non-monogamous non-heterosexual relationships.^{103}

In opposition to Judge Richard Posner’s September 2014 opinion for the Seventh Circuit Court of Appeals in Baskin v. Bogan, Finnis detailed his unwavering natural law position that Indiana should regulate the definition of marriage as limited to couples of different sexes.^{104} The common good of marriage is something he has extensively expounded upon, and his stance is clear: same-sex couples cannot procreate (the goal of marriage) because they do not actually engage in sexual intercourse (male and female sexual organs uniting).^{105} The sexual conduct between those couples is, therefore, “irrelevant to marriage.”^{106} He also suggests that extending marriage to same sex couples could lend itself to polygamous relationships.^{107} Finnis explicitly states that it is “commonsensical to acknowledge the profound interest the mother has in being the equal of the father (not a competitor with other mothers for his attentions and resources) in responsibility for that child.”^{108} In fact, Judge Posner stated that if marriage is only a symbolic imprimatur, then there is no reason for the state to deny it to any limited set of relationships.^{109}

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^{100} See Bailey.
^{102} Id. at 502
^{105} Id.
^{106} Id.
^{107} Id.
^{108} Id.
^{109} Id.
Posner ignored the idea that his words can also be interpreted to refer to polygamous marriage. During a lecture at Notre Dame University AU in 2013, Finnis proclaimed to listeners that “there are compelling reasons, especially in justice, to maintain the legal and moral judgment that marriage is a committed and exclusive union between a man and a woman.”

In analyzing the morality of polygamy as an institution, Finnis’s concept of the basic goods inherent in each individual provides a starting point. From understanding these basic goods as “to-be-pursued” means, a person is able to realize the ends of almost all human interaction and activity, including marriage. To begin, Finnis articulates the following seven basic goods, which in theory are of equal rank and priority to the human condition: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion. The extent to which anti-polygamy statute in Utah violates or distorts any of these goods will determine its morality, and eventually whether it will follow the same process as same-sex marriage.

The first basic good, life, is consistent with the innate drive for self-preservation. “Every aspect of the vitality (vita, life) which puts a human being in good share for self-determination” is encompassed in the term. In a relevant explanation, Finnis states that “transmission of life by procreation of children” is included under this first basic good, but is not

110 Id.
111 Id.
112 FINNIS, NATURAL LAW & NATURAL RIGHTS at 85. (Finnis refers to these basic goods as “basic aspects of [a person’s] well-being.”)
113 Id. at 93. (Though individuals may choose to treat one basic good more favorably, they are all independently fundamental, and do not outrank one another. One good may not be used in pursuit of another good, as this also violates the principle of equality.)
115 Id. at 86.
116 Id. at 87.
117 Id.
118 Id.
119 Id. at 88.
120 Id.
121 Id. at 89.
122 Id. at 86.
123 Id.
exclusive to it. 124 “We can distinguish the desire and decision to have a child, simply for the sake of bearing a child,” from desires related to rearing children and affection for offspring.125 This desire to have a child for the purpose of just having one is promulgated by polygamy in a more advantageous manner than in monogamy126. As a result of being able to have more offspring (from a man’s point of view) in a polygamous relationship, Utah’s anti-polygamy statute (unlike same-sex marriage) promotes the basic good of life. In this respect, polygamy and same-sex marriage are not analogous and cannot be deemed parallel or conducive to similar legal recourse.

Knowledge127, the second basic good, is described as an independent good, and not simply knowledge as a means to pursue “some other objective, such as survival, power, popularity…”128 Out of pure desire to explain “what one is up to,” knowledge (or “truth”) is the means by which a person is able to explain (inwardly or outwardly) the point of a particular activity or commitment being pursued.129 In general, the “well-informed and clear-headed” individual is considered to be “well-off.”130 Knowledge is said to be self-evident and its value becomes clear to those who have “experienced the urge to question” and “grasp the connection between question and answer.”131 One may argue that participation in polygamy promotes knowledge of a broader definition of family and exposes a person to the truths of such a different set of relationships. In every sense of the idea, the anti-polygamy statute directly subordinates

124 Id. at 87.
125 Id.
126 Emily J. Duncan, The Positive Effects of Legalizing Polygamy: “Love Is A Many Splendored Thing”, 15 Duke J. Gender L. & Pol’y 315, 332-33 (2008). (In Utah, the polygynous community grew tenfold over the last fifty years, and polygynists now constitute two percent of the state’s population.167 In Colorado City alone, the town’s number of polygynous residents has doubled every decade since the 1930s.”)
127 FNNIS, NATURAL LAW & NATURAL RIGHTS at 59.
128 Id.
129 Id. at 61.
130 Id.
131 Id. at 65. (It then follows that a newborn baby does not have these inclinations for knowledge itself.)
knowledge to the effect that it prevents a curious individual from discovering the truth about life as a polygamist.

The third basic good takes the form of play,\textsuperscript{132} which Finnis deems “irreducible” to humankind.\textsuperscript{133} Enjoying play for its own sake is the essence of this good, even though it can intermingle with other life experiences.\textsuperscript{134} The term can take on various elements, including “social, intellectual, or physical, strenuous or relaxed, highly structured or relatively informal, conventional or \textit{ad hoc} in its pattern.”\textsuperscript{135} Play may also take on the form of intercourse\textsuperscript{136}, which is an integral part of marriage, and therefore is incorporated into marriages of all types. From this assertion, it can be argued that denying the right to enter into polygamous marriage denies the right to have intercourse with whom it is desired: a spouse. However, as a result of the overture of the cohabitation provisions, polygamists in Utah will now be able to have spiritual marriages, as opposed to legal marriages; and thus play will not be fully subordinated.

The fourth basic good, aesthetic experience,\textsuperscript{137} does not need to stem from one’s own action and can be found for its own sake.\textsuperscript{138} The aesthetic experience may take on two separate forms: the actual beautiful form on the outside and the inner form of appreciation the beauty that is being recognized.\textsuperscript{139} The anti-polygamy statute neither involves nor undermines this good, because the beauty to which Finnis is referring can be seen in experiences such as dancing, singing, or playing a sport.\textsuperscript{140}

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\textsuperscript{132} Id. at 87.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} See Finnis, \textit{Law, Morality, and “Sexual Orientation}}, 8. (Marital intercourse is vital to the “full intelligibility of marital commitment.” Finnis also operates under the assumption that marital intercourse is the only intercourse for purposes of morality.)
\textsuperscript{137} FINNIS, \textit{NATURAL LAW & NATURAL RIGHTS} at 87.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 88.
\textsuperscript{140} Id. at 87.
Conversely, sociability (friendship),\textsuperscript{141} the fifth basic good, is highly impacted by the anti-polygamy statute, as it involves relationships among people in relation to promoting other people’s well-being.\textsuperscript{142} “In its weakest form [sociability] is realized by a minimum of peace and harmony amongst persons, and which ranges through the forms of human community to its strongest form in the flowering of full friendship.”\textsuperscript{143} In fact, Finnis has argued that marriage is a bifurcated fundamental human good comprised of procreation and friendship.\textsuperscript{144} The first facet, procreation, makes very clear that his position against same-sex marriage stems from its inability to naturally produce offspring.\textsuperscript{145} Friendship, however, is described as creating a community between the friends where common interests align and lead to a common pursuit of those interests, where each person effectively gets what they originally wanted.\textsuperscript{146} Friendship is the “common good of mutual self-constitution, self-fulfillment, self-realization.”\textsuperscript{147} The anti-polygamy statute in Utah, as it stands today following the Brown holding, does not prohibit any friendships that may be realized between spouses. The act merely limits the legal status of multiple spouses, but not the spiritual joining of husband and wife. Finnis himself has stated that marriage is an “intelligible and inherent connection with human flourishing (and thus with human nature) [which] makes it far more than a function of legal arrangements and definitions.”\textsuperscript{148} It can be assumed that people interested in forming non-legal marriages which create friendships are free to do so under the newly edited anti-polygamy statute.

\textsuperscript{141} Id. at 88.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} See Finnis, Law, Morality, and “Sexual Orientation, 4.
\textsuperscript{145} Id.
\textsuperscript{146} Id. (These common interests are not limited to simple friendship, but may take on the form of passion as the relationship develops.) See also Finnis, NATURAL LAW & NATURAL RIGHTS at 141.
\textsuperscript{147} Id.
\textsuperscript{148} See Finnis, Law, Morality, and “Sexual Orientation, 4.

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The sixth basic good, practical reasonableness, allows one to choose the course of one's actions in order to shape one's ultimate character. The order a person seeks to bring to his/her life has an internal and external aspect. The internal aspect deals with bringing "one's emotions and dispositions into the harmony of an inner peace of mind," while the external "strives to make one's actions authentic...genuine realizations of one's own freely ordered evaluations." Prohibiting people who wish to become husband and wife, with however many partners they choose, diminishes their ability to use practical reasonableness to freely make that decision for themselves. The anti-polygamy statute, therefore, is a direct subordination of the basic good of practical reasonableness, as it inflicts a widely held public determination of morality upon an individual who did not genuinely make that determination of his own will.

The seventh and final basic good, the crux of the anti-polygamy statute debate, is religion. Finnis inquires whether it is possible that human freedom, in all its control, is "subordinate to something which makes that human freedom, human intelligence, and human mastery possible and which is free, intelligent, and sovereign in a way no human being can be." More relevant to the practice of polygamy as a church-mandated institution, if there is a "transcendent origin of the universal order-of-things and of human freedom and reason," isn't harmonizing one's life with what is known about the transcendent being the best way to establish order in one's life?

Polygamy, as discussed above, was a doctrine of the LDS and Mormon Church for several decades before it was publicly renounced as a result of external pressure. This means that

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149 Finnis, Natural Law & Natural Rights at 88.
150 Id.
151 Id.
152 Id. (Emphasis added.)
153 Id. at 89.
154 Id.
155 Id. at 90.
in order reconcile their lives with God’s will, Mormons were required to be polygamists. The anti-polygamy statute is no longer preventing people from practicing polygamy in Utah. Instead, it is preventing individuals from holding two concurrent marriage licenses. Effectively, the invalidation of the cohabitation provision has little interference with religious practices, and only affects the legal aspects of polygamy. Polygamy itself is present in the Bible, as well as the Qur’an, so religious interference is not a motivating factor in the law prohibiting plural, simultaneous marriage licenses. Therefore, the anti-polygamy statute does not affect the basic good of religion.

At first glance, mainly because the issue pertains to Mormon teachings almost exclusively, it is not uncommon to assume that analyzing the morality of the anti-polygamy statute would automatically affect religion. However, because the law operates in a secular capacity, religion is not implicated. The only basic goods truly subordinated by the anti-polygamy statute are knowledge and practical reasonableness. Upon establishing which goods are at risk, Finnis subsequently inquires (in a morality assessment) whether choosing which basic goods to pursue (and which to deny) complies with the nine basic requirements of practical reasonableness. The ability to choose, the very essence of a person’s freedom and responsibility, why “(and thus the ways in which) there are things that morally ought (not) to be done.” The means by which we make these decisions include the following: a coherent plan of life, no arbitrary preferences amongst values, no arbitrary preferences amongst persons, detachment and commitment, the (limited) relevance of consequences: efficiency, within

156 Id. at 101.
157 Id. at 103.
158 Id.
159 Id. at 105.
160 Id. at 106.
161 Id. at 109.
reason,\textsuperscript{162} respect for every basic value in every act,\textsuperscript{163} the requirements of the common good,\textsuperscript{164} and, following one’s conscience.\textsuperscript{165}

The first basic principle of reasonableness is a coherent plan of life.\textsuperscript{166} Drawing from the work of John Rawls, Finnis described this principal as consisting of a “harmonious set of purposes and orientations, not as the ‘plans’ or ‘blueprints’ of a pipe-dream, but as effective commitments.”\textsuperscript{167} Living moment to moment is seen as a negative approach to life, and commitment to certain goods like marriage, “for the sake of friendship and children,” requires “direction and control of impulses and the undertaking of specific projects.”\textsuperscript{168} Rawls further explains that life should be “seen as a whole, the activities of one rational subject spread out in time.”\textsuperscript{169} The anti-polygamy statute itself provides a state-defined guideline for couples who wish to enter into legal marriages. Therefore, the statute does facilitate the creation of a coherent life plan, one which involves marriage in the legal sense and benefiting from that marriage through state-provided perks.

Couples who wish to enter into several marriage-like relationships could, in theory, create coherent life plans along the guidelines of the anti-polygamy statute. The statute, as it stands currently, does not prohibit those relationships per se, simply the legalization of more than one marriage at one time. Polygamous couples could plan and determine which particular spouses will enter into the single legal marriage permitted, and work out the details of the other relationships going forward. Unlike same-sex marriage statutes, the anti-polygamy statute does

\textsuperscript{162} Id. at 111.
\textsuperscript{163} Id. at 118.
\textsuperscript{164} Id. at 125.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 103.
\textsuperscript{167} Id. at 104.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
not deny benefits or privileges in a two-person marriage. The statute, which has been present for centuries, gives ample opportunity and promotes planning the undertaking of the commitment to marriage in advance, which satisfies the first requirement of practical reasonableness.

The second requirement, that there be “no arbitrary preferences amongst values,” calls for “no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values.”\(^{170}\) It is common that while a person is pursuing a coherent plan of life in relation to committing to one good, other goods may be suppressed, temporarily or permanently.\(^{171}\) The suppression of those goods is only reasonable when “one’s capacities, circumstances, and even one’s tastes” were considered prior to making the ultimate decision.\(^{172}\) By choosing amongst goods arbitrarily and acting “as if these (the other goods) were not real forms of goods,” one “can be properly accused both of irrationality and of stunting or mutilating oneself and those in one’s care.”\(^{173}\)

The Utah State Legislature has chosen to define marriage as being limited to one legal marriage recognized at one time for any person due to the complex history and treatment of polygamous marriage in the United States.\(^ {174}\) The court in Reynolds determined that polygamy was a crime against society as a whole, one which would ultimately lead to despotism.\(^{175}\) The basic good of marriage, via the pursuit of friendship, is undoubtedly protected by the statute. Finnis firmly believes that marriage is meant to be exclusive to one man and one woman for the purposes of morality, and therefore this analysis of the second requirement of practical reasonableness must follow that the anti-polygamy statue purports to promote the basic good of

\(^{170}\) Id. at 105.
\(^{171}\) Id.
\(^{172}\) Id.
\(^{173}\) Id. at 106.
\(^{174}\) See Berkowitz.
\(^{175}\) Reynolds v. United States, 98 U.S. 145 at 165.
marriage (as defined by Finnis). It may also be argued that an alternative reason behind the continued devotion to anti-polygamy laws in the United States exists in order to allow the basic good of life to flourish. The basic good of life is not exclusive to child bearing, and can include anything that is encompassed in the term. Leading a safe life, for the sake of the community, may be deemed more important than allowing those who are curious about polygamy to follow their curiosity to its logical end. The Utah anti-polygamy statute, which only prohibits multiple licenses, does not permanently subordinate knowledge and practical reasonableness, and promotes leading a safe life (for the wives and children) and therefore is not an arbitrary preference among values.

The third principal requires “no arbitrary preference amongst persons.” Finnis argues that this principal allows for a “reasonable scope for self-preference” but is essentially a direct denouncement of “selfishness, special pleading, double standards, hypocrisy, indifference to the good of others whom one could easily help, and all the other manifold forms of egoistic and group bias.” The non-philosophical manifestation of this requirement is the “Golden Rule,” which dictates “do to (or for) others what you would have them do to (or for) you.” This principal requires no improper favoring of one group of individuals over another. Opponents of the Utah anti-polygamy statute would argue that the law explicitly casts aside polygamists in favor of a more conventional form of marriage. The Golden Rule requires one to “not (without special reason) prevent others from getting for themselves what you are trying to get for

177 FINNIS, NATURAL LAW & NATURAL RIGHTS at 87.
178 Id. at 106.
179 Id. at 107. (“The only reason for me to prefer my own well-being is that it is through my self-determined and self-realizing participation in the basic goods that I can do what reasonableness suggests and requires, viz. favour and realize the forms of human good indicated in the first principals of practical reason.”)(emphasis in original).
180 Id.
181 Id. (This rule is “formulated not only in the Christian gospel but also in the sacred books of the Jews...”)
182 Id. at 109.
yourself.”\textsuperscript{183} Opponents of the law may argue that monogamous marriage supporters are not following the rule, which restricts the right to marry whomever one chooses. In this way, polygamy differs from same-sex marriage because it is not the pursuit of freedom to marry, but actually the pursuit of freedom to marry concurrently. Nevertheless, the anti-polygamy statute does provide for an arbitrary preference amongst persons for the purposes of the morality analysis, and thus violates the third principle of practical reasonableness.

The fourth requirement of practical reasonableness, detachment, functions closely with the first (coherent plan of life) and fifth requirements (commitment).\textsuperscript{184} Finnis claims that taking up an “attitude to any of one’s particular objectives, such that if one’s project failed and one’s objective eluded one, one would consider one’s life drained of meaning” only “irrationally devalues and treats as meaningless the basic human good of authentic and reasonable self-determination, a good in which one meaningfully participates simply by trying to do something sensible and worthwhile, whether or not that sensible and worthwhile project comes to nothing.”\textsuperscript{185} The detachment principal does not favor one particular project receiving “overriding and unconditional significance.”\textsuperscript{186} Polygamists who favor overturning such laws are fanatically pursuing religion and knowledge. Because this particular anti-polygamy law does not interfere with religion, knowledge and practical reasonableness will ultimately be the fanatical pursuit of those who practice or promote polygamy. Those against polygamy argue against it by means of a fanatical pursuit of life and marriage (Finnis’s strictly defined version of friendship). Therefore, it is likely that this law will be deemed a fanatic attempt to pursue certain basic goods.

\textsuperscript{182} Id. at 108.  
\textsuperscript{183} Id. at 109.  
\textsuperscript{184} Id. at 110.  
\textsuperscript{185} Id.  
\textsuperscript{186} Id.
The fifth requirement, commitment, "establishes the balance between fanaticism and
dropping out, apathy, unreasonable failure, or refusal to 'get involved with anything.'" One
must not abandon commitments lightly, "for to do so would mean, in the extreme case, that one
would fail ever to really participate in any of the basic values." The goal of this requirement is
to inspire creativity throughout the pursuit of a commitment to a project or general goal, rather
than "projects, methods, and routines with which one is familiar." The Utah anti-polygamy
statute places into law a long-standing and long-established tradition in not only the United
States, but in Western Culture. The government, by limiting marriage to include one license
between two people (a definition which is currently expanding to include same-sex individuals),
has effectively banned polygamous marriages in pursuit of certain goods. Until the overture of
the cohabitation provision in Utah, this measure was not creative in any way. However, the state
is now able to simultaneously pursue friendship through monogamous marriage without severely
limiting polygamists’ pursuit of goods. As a result, the Utah law as it stands today is supported
by the fifth principal of reasonableness.

The sixth principal of reasonableness is "the (limited) relevance of consequences:
efficiency, within reason." This principal instructs that "one must not waste one's
opportunities by using inefficient methods. One's actions should be judged by their

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187 Id.
188 Id.
189 Id. (The routines to which Finnis is referring consist of "conventional rules of conduct, rules of thumb, rules of method, etc.
whose real appeal is not to reason (which would show their inadequacies) but to the sub-rational complacency of habit, mere urge
to conformity, etc.")
190 Cheshire Calhoun, Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of
Polygamy, 42 San Diego L. Rev. 1023, 1024 (2005). ("...in the nineteenth century, every state made bigamy a crime. The
constitutionality of this marriage bar was challenged on First Amendment freedom of religion grounds in 1878, in Reynolds v.
United States. In said case, the Supreme Court upheld the bar on polygamy, and that ruling still stands today.")

191 FINNIS, NATURAL LAW & NATURAL RIGHTS at 111.
effectiveness, by their fitness for their purpose, by their utility, their consequences...”\textsuperscript{192} The preferred choice would produce a “lesser rather than greater damages to one-and-the-same basic good in one-and-the-same instantiation.”\textsuperscript{193} “A remedy that both relieves pain and heals is to be preferred to the one that merely relieves pain.”\textsuperscript{194} Finnis suggests that in certain situations, a cost-benefit analysis is an appropriate way to achieve this principal.\textsuperscript{195}

Finnis also believes that consequentialism is irrational when dealing with moral reasoning, because the framework requires for such an ideal is “senseless” and cannot be reconciled with the human condition.\textsuperscript{196} Consequentialism attempts to synthesize the notion of a “greatest good,” commensurate that good, and compare those goods in degree and kind.\textsuperscript{197} Such an approach is, thus, arbitrary, and cannot be used to measure goods because “what generates the conclusions (drawn by the alleged calculations) is always something other than the calculus: an overpowering desire, a predetermined objective, the traditions or conventions of the group, or the requirements of practical reason...”\textsuperscript{198} The current Utah anti-polygamy statue brings a balance between what is vehemently requested by society and the common good (monogamous marriage) and the ultimate right to lead a life of one’s choosing (polygamists). Because the law does not prevent certain types of relationships from being formed, it is merely reconciling the need to define marriage and the nation’s traditions. The statue, therefore, does not violate the sixth principal of practical reasonableness.

\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 112-113. (Finnis states that the consequentialist method is unworkable and senseless because “only an inhumane fanatic thinks that human beings are made to flourish in only one way for only one purpose.
\textsuperscript{197} Id. at 114.
\textsuperscript{198} Id. at 117.
The seventh principal, respect for every basic value in every act, has several formulations.\(^{199}\) The first, and arguably most relevant for the purposes of this analysis, is "that one should not choose to do any act which of itself does nothing but damage or impede a realization or participation of any one of more of the basic forms of human good."\(^{200}\) Essentially, the direct "damage" to a basic good is not moral, while indirectly damaging a basic good (which is a reasonable consequence of making such choices) is a rational occurrence.\(^{201}\) The anti-polygamy statute can be said to have directly attacked the pursuit of life, friendship, and several other goods if the cohabitation provision was intact. However, without that clause, the law does not directly attack those good which are subordinated (knowledge and practical reasonableness) because the ability to enter into polygamous relationships is not fully revoked. Individuals may enter into such arrangements, but must do so without legal recognition. This is an indirect damage caused by the pursuit of marriage, and is thus a moral occurrence consistent with this principle.

The eighth principal, the requirement of the common good, calls for "favouring and fostering the common good of one's communities."\(^{202}\) These communities may include, but are not limited to, family, friends, political, business, local, state, or country.\(^{203}\) The anti-polygamy statute must be analyzed in light of whether the law promotes the common good by defining restricting the number of marriage licenses permitted at one time by one person. Finnis explicitly states that "marriage is a distinct fundamental human good,"\(^{204}\) which is undoubtedly promoted

\(^{199}\) Id. at 118.
\(^{200}\) Id.
\(^{201}\) Id. at 120. (The word "damage" signifies "impoverishment, inhibition, or interference." The word "promote" signifies "pursuit or protection.")
\(^{202}\) Id. at 125.
\(^{203}\) Id.
\(^{204}\) John Finnis, *Marriage: A Basic and Exigent Good*, (2008). The Monist, Vol. 91, pp. 388-406, 2008; Notre Dame Legal Studies Paper No. 09-13. http://ssrn.com/abstract=1392288. ("Marriage is a distinct fundamental human good because it enables the parties to it, the wife and husband, to flourish as individuals and as a couple, both by the most far reaching form of

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by the Utah statute. The goods subordinated for the common good, knowledge and practical reasonableness, do not outweigh the value of marriage as it pertains to the common good. As a result, the anti-polygamy statute is promoted by the common good principal of reasonableness.

The ninth and final principal requires “following one’s conscience,” which means that “one should not do what one judges or thinks or ‘feels’-all-in-all should not be done.” Thomas Aquinas first developed this principal by stating that “if one chooses to do what…is unreasonable, or if one chooses not to do what one judges to be…required by reason, then one’s choice is unreasonable…” Regardless of however unreasonable the judgment may be, disregarding one’s judgment is said to be contrary to “personal full-being.” The anti-polygamy statute was enacted and upheld by the Supreme Court in Reynolds, and was, therefore, decided by judges following clear consciences. The statute itself has been upheld in Utah by state legislature with the same mindset. The fact that polygamy itself is no longer outlawed (using a cohabitation provision) provides that the law is not prohibiting any individuals from acting on their own consciences in determining which choices to make and whom to marry. The creation of the laws against polygamy, in Utah and across the country, is thus supported by the ninth principal of practical reasonableness.

Following the analysis of the basic goods and principals of practical reasonableness, one can see how each plays a vital role in “rational choice of commitments, projects, and particular actions. Each, moreover, contributes to the sense, significance, and force of terms such as

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205 Finnis, Natural Law & Natural Rights at 124.
206 Id. at 125.
207 Id. at 126.
208 Id.
moral,' ‘[morally] ought,’ and ‘right.’”209 In fact, “each requirement can be thought of as a mode of moral obligation or responsibility.”210 Upon analyzing the nine principles of practical reasonableness in conjunction with the seven basic goods, the Utah anti-polygamy statute satisfied seven of the nine principles: allowing a coherent life plan, detachment, commitment, the limited relevance of consequences, respect for every basic value in every act, the common good of the community, and following one’s conscience. Of the seven basic goods, life and religion were promoted or facilitated upon invalidation of the cohabitation provision of the Utah anti-polygamy statute, while knowledge and practical reasonableness were subordinated. Finnis would, therefore, consider the Utah Statute, as permitting only one marriage license per person,211 to be a moral law.

Assuming that each aspect of this analysis which could have possibly swayed in the opposite direction did, in fact, do so, it is possible that the law against polygamy could be labeled immoral. However, even if that were the case, according to the notion of ‘obligation,’ with respect to the common good and laws in general, it would have to be followed by the citizens of Utah regardless of its morality.212 Due to the complexities and “depth of social interdependencies which the law, unlike promises between individuals, attempts to regulate,” “the law provides the citizen, like the judge, with strongly exclusionary moral reasons for acting or abstaining from actions.”213 In essence, one’s “allegiance to the whole system (“the law”) is put on the line: either you obey the particular law, or you reveal yourself (to yourself, if not to others) as lacking or defective in allegiance to the whole, as well as to the particular.”214 By refusing to obey the

209 Id.
210 Id.
211 Utah Code Ann. § 76-7-101.
212 Finnis, Natural Law & Natural Rights at 319.
213 Id.
214 Id. at 317.
particular anti-polygamy statute (because it is hypothetically immoral), one is disregarding the whole system of laws upon which the country was created, a notion carrying serious implications.

In its assessment of the Utah anti-polygamy statute’s anti-cohabitation provision, the court in Brown v. Buhman agreed that due to longstanding opposition to polygamy (which was compared most to physician assisted suicide rather than same sex marriage), there would not be an inquiry as to whether the actual anti-polygamy law itself was invalid. The court did acknowledge the Utah legislative policies behind the prohibition of polygamy, including preventing harm to society by reducing the likelihood of “incest, rape, unlawful sexual conduct with a minor, and domestic and child abuse.” The state also maintains an interest in preventing marriage fraud and misuse of government benefits, concerns which could easily become reality without the anti-polygamy laws in place. The court’s decision turned on reality that the cohabitation provision was inadvertently and disproportionately affecting one religion and no other groups in the same or similar living situations (adulterers).

While keeping Reynolds in mind throughout the decision, Judge Waddoups refuses to automatically revert to it without a thorough constitutional analysis of the anti-cohabitation provision, which was required due to the significant legal changes since the 19th century case was decided. However, even when given liberty to discuss the alternative, the court ultimately reverts to Reynolds:

216 Id. at 1224.
217 Id.
218 Id.
219 Id. at 1181. (To state the obvious, the intervening years have witnessed a significant strengthening of numerous provisions of the Bill of Rights, and a practical and morally defensible identification of “penumbral” rights “of privacy and repose” emanating from those key provisions of the Bill of Rights.)
In fact, the court believes that *Reynolds* is not, or should no longer be considered, good law, but also acknowledges its ambiguous status given its continued citation by both the Supreme Court and the Tenth Circuit as general historical support for the broad principle that a statute may incidentally burden a particular religious practice so long as it is a generally applicable, neutral law not arising from religious animus or targeted at a specific religious group or practice. The court therefore defers to *Reynolds* as binding on the limited question of any potential free exercise right to the actual practice of polygamy.\(^{220}\)

The *Brown* court ultimately determined that no fundamental right “of individuals to enjoy official State recognition or legitimation of their “purported” polygamous marriages” exists or ever existed, and the statute will continue to be upheld constitutionally against free exercise challenges as it stands without the cohabitation provision.\(^{221}\) The law against polygamy as it stands today in Utah is morally sound, according to Finnis and constitutional. The morality analysis determines that though some basic goods are subordinated, the basic principles of reasonableness, as applied to the goods at stake, determined that an anti-polygamy law would not violate general principles of morality. The law, according to history and cultural perception of polygamy, will likely not follow the path of the dissipating anti-same-sex marriage laws in the near future, as the larger question of democracy is arguably at stake in a polygamous society.

While same-sex marriages challenge the traditional gender structure of marriage, polygamy is more likely to exaggerate the gender hierarchy within marriage and is thus incompatible with a liberal democracy that values women’s equality.\(^{222}\)

\(^{220}\) Id. at 1189-90.
\(^{221}\) Id. at 1180.