POLYMMIGRATION: IMMIGRATION IMPLICATIONS AND POSSIBILITIES POST *BROWN V. BUHMAN*

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In recent years polygamy has taken center stage on prime-time television and in the nation's courts. After the Supreme Court's reexamination of marriage in Obergefell v. Hodges*, polygamy was thought to be the next major issue the Court hears regarding the structure and purpose of marriage and family. The Sister Wives case,* Brown v. Buhman*, may have a broader effect on U.S. policies and laws than merely in the realm of marriage and cohabitation. In fact, it may be a gateway to offering other benefits, such as immigration benefits, to polygamist families. The rationale of* Brown *challenges the longstanding bars against polygamous immigrants. While the Tenth Circuit Court of Appeals dismissed* Brown *on mootness grounds, subsequent appeals or challenges to anti-polygamy laws could be the beginning of a reexamination of policy and law that can better address the realities of immigration in the globalized age.*

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INTRODUCTION

Love is in the air! Recently, love has served as the raison d'être of several movements. On June 25, 2015, the U.S. Supreme Court held, in *Obergefell v. Hodges*, that the Fourteenth Amendment requires states to both issue marriage licenses to same-sex couples and recognize same-sex marriages performed in other states.[1]

Polygamy played a significant role in the debates over same-sex marriage; some argued that same-sex marriage would be a slippery slope to polygamy's return, while others argued that the "polygamy problem" was distinct from same-sex marriage.[2] In his dissenting opinion, Chief Justice Roberts argued that the majority opinion created a pathway for polygamy, noting that the decision offered "no reason at all as to why the two-person element of the core definition of marriage may be preserved while the man–woman element may not."[3] Shortly after the ruling, a polygamous family argued that *Obergefell* validated their application for a marriage license in Yellowstone County, Montana.[4]

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1. 135 S. Ct. 2584 (2015).

2. *See generally* WILLIAM ESKRIDGE, FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT: THE CASE FOR SAME-SEX MARRIAGE (1996).

3. *Obergefell*, 135 S. Ct. at 2621–22 (Roberts, C.J., dissenting) ("[F]rom the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world.").

4. Heather Clark, *Montana Judge Denies Polygamist's Request for 'Marriage Equality' in Striking Down Bigamy Law*, CHRISTIAN NEWS (Dec. 15, 2015), http://christiannews.net/2015/12/15/montana-judge-denies-polygamists-request-for-marriage-equality-in-striking-down-bigamy-law/; *Montana Man Seeks License for Second Wife*, CBSNEWS (July 1, 2015, 10:44 PM) [hereinafter *Montana Man Seeks License*], http://www.cbsnews.com/news/polygamous-montana-trio-applies-for-wedding-license/; Matt Volz, *Montana Officials Deny Wedding License for Polygamous Trio*, DESERET NEWS (July 16, 2015, 3:10 PM), http://www.deseretnews.com/article/765677586/Montana-officials-deny-wedding-license-for-polygamous-trio.html (Collier claimed that under *Obergerfell* his marriages should be recognized and legally permissible, however the County disagreed and denied his application for a license because it violated Montana state laws against bigamy and polygamy). Nathan Collier and his wives Christina and Victoria submitted an amended complaint in their lawsuit on March 8, 2016, arguing that Montana's anti-bigamy law was unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Free Exercise, Establishment, Free Speech, and Freedom of Association Clauses of the First Amendment. Plaintiffs' Amended Complaint at 16, Collier

Polygamy has long been condemned by the U.S. Government and society at large. For years, the portrayal of polygamy focused on violence, a need to "save the children," and one-sided portrayals of a nonconforming lifestyle.[5] However, in the years that preceded *Obergefell*, polygamy emerged from the "hidden cultish confines of southern border towns and western desert wastelands" and "entered popular culture" as the subject of various popular TV shows.[6] In 2006, HBO's fictional drama Big Love became the first television series to portray a contemporary polygamous lifestyle.[7] This series "present[ed] the many problems that arise within polygamy . . . while at the same time portraying a relatively normal, loving family that struggled with the daily challenges of work and home life."[8] In 2010, TLC aired its own reality television series, Sister Wives, in which viewers came to know the hectic but surprisingly relatable life of Kody Brown and his wives Meri, Janelle, Christine, and Robyn, as well as their 18 children.[9] Sister Wives became immensely popular and will be entering its seventh season in 2016.[10]

The debut of Sister Wives prompted increased legal scrutiny of Utah's anti-bigamy law along with a criminal investigation into the Brown family's polygamous

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v. Fox, No. 1:15-CV-00083-SPW (D. Mont. Mar. 8, 2016), http://deadeye.media/CollierFox.pdf.

5. JANET BENNION, POLYGAMY IN PRIME TIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM 164 (2012) ("The American public is especially vulnerable to the 'save the children mentality' and the media often uses this idea to create mass hysteria . . . . We are quick to label polygamist behavior as illness or deviance, especially if we don't quite understand it or if we allow a particularly nasty case . . . to represent all plural families.").

6. *Id.* at 3.

7. *Id*. at 167.

8. *Id.* The show's narrative attempted to show that "modern polygamy is less about sexual deviance and more about how to manage a rather colorful suburban family in a struggling economy." *Id.*

9. *Id*. at 163. Author Janet Bennion compares these shows to older series that exposed Americans to taboo relationships and lifestyles, like the Brady Bunch (divorcees) and Queer Eye for the Straight Guy (homosexuality). *Id.* Kody Brown married Meri Brown in 1990. *Id.* at 185. Kody divorced Meri in 2015 and legally married Robyn in order to provide financial security and health insurance for Robyn's existing children. *See* Meagan Shaefer, *'Sister Wives' Divorce: The Truth Behind Meri's Decision to Allow Kody to Marry Robin*, INT'L BUS. TIMES (Feb. 16, 2015, 10:16 AM), http://www.ibtimes.com/sister-wives-divorce-truth-behind-meris-decision-allow-kody-marry-robyn-1817530; *see also* Sierra Marquina, *Sister Wives' Robyn Brown Welcomes Second Child, a Baby Girl, with Kody Brown!*, US WKLY. (Jan. 12, 2016, 6:24 PM), http://www.usmagazine.com/celebrity-moms/news/sister-wives-robyn-brown-welcomes-baby-girl-w161533.

10. The season five premiere of Sister Wives had 1.614 million viewers, and season four had an average of 2.025 million viewers per episode. *See* Melissa Stavarksi, *Reality TV Viewer Numbers: Sister Wives, Kardashians, Real Housewives, Love & Hip Hop Atlanta, Kandi's Wedding, and More*, REALITY TEA (June 13, 2014), http://www.realitytea.com/2014/06/13/reality-tv-viewer-numbers-sister-wives-kardashians-real-housewives-love-hip-hop-atlanta-kandis-wedding-and-more/.

practices.[11] As a result, the Browns fled Utah for Las Vegas, Nevada.[12] After receiving notice of Utah's criminal investigation for bigamy—a third-degree felony—the Browns challenged part of Utah's anti-bigamy statute in a Utah federal court.[13] Although Utah eventually dropped its criminal investigation, a federal judge refused to dismiss the Brown's suit, reasoning that Utah's "strategic attempt to use the mootness doctrine to evade review in this case draws into question the sincerity of [the Utah County Attorney's] contention that prosecution of plaintiffs for violating this statute is unlikely to recur."[14]

In 2013, the federal court issued an opinion challenging Utah's constitutional ban on bigamy.[15] The court upheld Utah's ban on multiple formal marriages (i.e., marriages preformed pursuant to official state-issued marriage licenses), but it struck down the application of the statute to cohabitation and, more frequently targeted, unrecognized religious marriages.[16] In 2014, Utah appealed the decision to the Tenth Circuit Court of Appeals.

The *Brown* case raised many important issues of constitutional law. Numerous groups submitted amicus briefs, including the Cato Institute, which noted the case's free speech implications.[17] The Browns' attorney, Jonathan Turley,

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11. Mike Fleeman, *Police Investigating Sister Wives Stars for Felony Bigamy*, PEOPLE (Sept. 28, 2010), http://www.people.com/people/article/0,,20429667,00.html.

12. Christopher Lawrence, *Las Vegas 'The Land of Plenty' for 'Sister Wives' Family*, LAS VEGAS REV. J. (Mar. 13, 2011, 3:01 AM), http://www.reviewjournal.com/entertainment/tv/las-vegas-land-plenty-sister-wives-family.

13. Brown v. Herbert, No. 2:11-CV-0652-CW, 2012 WL 3580669, at *1 (D. Utah Aug. 17, 2012). Utah's bigamy statute states that 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 (West 2013) (emphasis added). The State of Utah claimed that it never planned to prosecute the Brown family and, therefore, the Browns lack standing to challenge the statute because there was no "harm" done to them. Ben Winslow, *Utah Says It Wouldn't Prosecute 'Sister Wives' For Polygamy*, FOX 13 SALT LAKE CITY (Jan. 6, 2016), http://fox13now.com/2016/01/06/utah-says-it-wouldn't-prosecute-sister-wives-for-polygamy/. However, in their brief to the Tenth Circuit Court of Appeals, the Browns argued that there was no "guarantee that the Browns would not be prosecuted in the future" and the criminal investigation had a chilling effect on their rights to free speech, privacy, and religion. Brief of Appellees at 5, Brown v. Buhman, No. 2:11-CV-00652-CW, 2015 WL 5095840, at *4 (10th Cir. Aug. 25, 2015).

14. *Brown*, 2012 WL 3580669, at *2.

15. Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013), *subsequent determination in* Brown v. Herbert, 43 F. Supp. 3d 1229 (D. Utah 2014); *see also* Bill Mears, *Judge Strikes Down Part of Utah's Polygamy Law in "Sister Wives" Case*, CNN (Dec. 16, 2013, 11:03 AM), http://www.cnn.com/2013/12/14/justice/utah-polygamy-law/; Steven Nelson, *'Sister Wives' Defeat Polygamy Law in Federal Court: Judge Denounces 'Absurdity' of Utah State Government's Position*, U.S. NEWS & WORLD REP. (Dec. 16, 2013, 1:07 PM), http://www.usnews.com/news/articles/2013/12/16/sister-wives-defeat-polygamy-law-in-federal-court.

16. *Brown*, 947 F. Supp. 2d at 1204; *see also* UTAH CODE ANN. § 76-7-101 (West 2013).

17. Brief of the Cato Institute as Amicus Curiae in Support of Plaintiffs-Appellees, Brown v. Buhman, No. 2:11-CV-00652-CW, 2015 WL 5095840, at *4 (10th Cir. Aug. 25,

stressed the significance of the case for both religious freedom and individual rights.[18] Although dismissed by the Tenth Circuit Court of Appeals on mootness grounds,[19] *Brown* is not yet settled as both Turley and the Browns have expressed their intent to appeal.[20] As this Note was being published, it was unclear whether the appeal will focus on a review by the entire Tenth Circuit Court of Appeals or a filing directly to the U.S. Supreme Court.[21] Because of this uncertainty, the case may still have a great impact beyond merely allowing for polygamous cohabitation and removing fear of state prosecution. As was seen after *United States v. Windsor*, allowing individuals to legally enter previously prohibited relationships can have far reaching legal implications. [22] *Brown*'s acknowledgement of "religious

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2015); *see also* Eugene Volokh, *The 'Sister Wives' Case, Criminal Punishment of Polygamy and the Free Speech Clause*, WASH. POST: VOLOKH CONSPIRACY (Aug. 28, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/28/the-sister-wives-case-criminal-punishment-of-polygamy-and-the-free-speech-clause/ ("The law, we argue, essentially criminalizes not the physical acts involved in having a polygamous relationship, but the speech and symbolic expression involved in a wedding ceremony (and in holding oneself out as husband and wife). That makes it a speech restriction, and one that doesn't fit within any of the exceptions to the free speech principle.").

18. Jonathan Turley, *Utah Appeals Sister Wives Ruling*, RES IPSA LOQUITUR ("THE THING SPEAKS FOR ITSELF") (Sept. 25, 2014), http://jonathanturley.org/2014/09/25/utah-appeals-sister-wives-ruling/ (highlighting that the case is "one of the strongest defenses of religious liberty handed down in decades. . . . Neither the Attorney General nor the state of Utah should fight a ruling that reaffirmed freedom of religion and equal protection. Utah is a state that was founded by citizens seeking those very rights against government abuse. . . . [T]he state [now] seek[s] to reverse that outcome and walk back to the long-troubled history surrounding this law."); *see also* Brady McCombs, *Utah Appeals Ruling on Anti-Polygamy Laws in "Sister Wives" Case*, SALT LAKE TRIB. (Oct. 16, 2014, 1:45 PM), http://www.sltrib.com/news/polygamy/1689789-155/utah-ruling-law-families-family-multiple.

19. Brown v. Buhman, No. 14-4117, 2016 WL 1399358, at *20 (10th Cir. Apr. 11, 2016) ("Assuming the Browns had standing to file suit in July 2011, this case became moot when [the County Attorney for Utah County] announced the [Utah County Attorney's Office's Policy] in May 2012. That policy eliminated any credible threat that the Browns will be prosecuted. We therefore remand to the district court with instructions to vacate its judgment and dismiss this suit without prejudice."). For more on the Utah County Attorney's Office's Policy, see *infra* note 186 and accompanying text.

20. Turley has stated that he and the Browns plan to appeal the decision. Jonathan Turley, *Tenth Circuit Reverses Sister Wives Decision*, RES IPSA LOQUITUR ("THE THING ITSELF SPEAKS") (Apr. 11, 2016), http://jonathanturley.org/2016/04/11/tenth-circuit-reverses-sister-wives-decision/.

21. Ben Winslow, *Federal Appeals Court Tosses 'Sister Wives' Lawsuit over Utah's Polygamy Ban*, FOX 13 SALT LAKE CITY (Apr. 11, 2016, 11:24 AM), http://fox13now.com/2016/04/11/federal-appeals-court-tosses-sister-wives-lawsuit-over-utahs-polygamy-ban/ (quoting Jonathan Turley) ("We have the option of seeking the review of the entire Tenth Circuit or filing directly with the Supreme Court. We will be exploring those options in the coming days. However, it is our intention to appeal the decision of the panel.").

22. Richard Roane & Richard A. Wilson, *Marriage Equality Update*, 27 J. AM. ACAD. MATRIM. LAW. 123 (2014) (noting that after *Windsor*, same-sex couples were eligible for several government benefits, including those related to taxes and immigration). After *Windsor*, "[f]ederal agencies immediately began interpreting the decision and its voiding of

cohabitation" could be the basis for broad policy reconsiderations, including immigration benefits for polygamous families.[23]

In 2007, half a million immigrants were granted legal permanent resident status ("LPR") from countries where polygamy is formally practiced.[24] In 2010, the United States accepted 101,355 immigrants from Africa, where an estimated 20–50% of marriages are polygamous.[25] Additionally, many immigrants are arriving to the United States from the Middle East, South Asia, and other areas where polygamous marriages are legal, traditionally practiced, and commonplace.[26] Academics suggest that 50,000–100,000 Muslim immigrants from various countries secretly practice polygamy in the United States.[27] Some speculate that polygamists entering the United States remain under the radar by bringing second and third wives to the United States as sisters or daughters.[28] As civil wars and other conflicts rage on around the world, more polygamous families may immigrate to, or seek refuge in, the United States.[29]

This Note explores whether polygamous marriages can be protected under the U.S. Constitution. It also examines how *Brown* could provide a basis for allowing polygamous immigrants to be admitted to, and remain together in the United States as cohabitants. Part I examines the different forms of polygamy and the cultural contexts in which these marriages arise. Part II reviews the historical ban on polygamy in the United States and how Kody Brown and the Sister Wives might significantly impact the future of polygamy. Part III explores the historical development of anti-polygamy immigration laws and how the *Brown* district court case, as well as other legal considerations, call the validity and future of anti-polygamy immigration laws into question. Finally, Part IV proposes a tenable path

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Section 3 of DOMA [the Defense of Marriage Act], and through the rulemaking process immediately began revising and implementing federal rules, policies, and procedures to comply with the demise of Section 3 of DOMA." *Id.* at 130 n.12.

23. *Brown*, 947 F. Supp. 2d at 1181, 1190.

24. Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in the U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382, 385 (2009).

25. W. Cole Durham & Robert Smith, *Effect of Anti-Polygamy Laws on Immigrants*, 3 RELIGIOUS ORGS. & L. § 14:32 (2013).

26. Smearman, *supra* note 24, at 447 ("With the growing number of immigrants arriving in the United States from countries in which polygamy is practiced legally, as well as the rising incidence of polygamous marriage within immigrant communities in the United States, immigration officials will be applying with increasing frequency the provisions of the [Immigration and Nationality Act] in which polygamy plays a role.").

27. *Id.*; *see also* Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR (May 27, 2008, 12:49 AM), http://www.npr.org/templates/story/story.php?storyId=90857818.

28. *U.S. Officials Visit Hmong Refugees*, BBC (Mar. 2, 2004), http://news.bbc.co.uk/2/hi/asia-pacific/3525967.stm ("On paper, [immigrants engaging in polygamy] can have one wife only. But in reality, they can all move together to the United States and stay together as a family group.").

29. Mehveş Evin, *Syrian Refugees Sold as "Co-Wives" in Turkey*, CONTRIBUTORIA (May 2014), http://www.contributoria.com/issue/2014-05/531b15dbd63a707e78000177/ (noting that polygamy in Syria occurs among Sunnis in the country side; some polygamists displaced by civil war).

for polygamous immigration along with a method to monitor polygamous families after their arrival in the United States.

I. POLYFACTS

To effectively discuss the immigration of polygamous immigrants, it is important to understand where these immigrants come from, why they enter these marriages, and what kind of polygamous culture already exists within the United States.

A. Forms of Polygamy Around the World

Polygamy is generally defined as "the practice whereby a person is married to more than one spouse at the same time."[30] As Chief Justice Roberts has pointed out, "plural unions . . . have deep roots in . . . cultures around the world."[31] Members of Mormon fundamentalist sects, such as the Browns,[32] practice the most common form of polygamy: polygyny, where a man takes more than one wife.[33]

Polygyny has been practiced in 81% of societies around the world.[34] Today, polygyny is most prevalent in Africa, where it persists largely in traditional forms.[35] In some tribal settings, polygyny is used to create large families; cement alliances; solidify kinship and gender roles; and show class distinction.[36] In large, modernized cities, wealthy men take additional wives as they become more stable, often keeping a family in the city and a family in their rural ancestral land.[37] World leaders, such as President Jacob Zuma of South Africa[38] and former King Abdullah

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30. MIRIAM KOKTVEDGAARD ZEITZEN, POLYGAMY: A CROSS CULTURAL ANALYSIS 3 (2008).

31. Obergefell v. Hodges, 135 S. Ct. 2584, 2621–22 (2015) (Roberts, C.J., dissenting).

32. The Browns are members of the Apostolic United Brethren, founded by Lorin C. Wooley in 1929. *See* BENNION, *supra* note 5, at 34–39.

33. In this form, the relationships between wives are classified as "sororal polygyny," and co-wives are often called "sisters." *Id*. at 9.

34. PATRICIA DIXON-SPEAR, WE WANT FOR OUR SISTERS WHAT WE WANT FOR OURSELVES: AFRICAN AMERICAN WOMEN WHO PRACTICE POLYGAMY BY CONSENT 19 (2009); *see also* GEORGE P. MURDOCK, ETHNOGRAPHIC ATLAS (1967).

35. ZEITZEN, *supra* note 30, at 4. Traditional explanations for polygyny in Africa include: balancing the sex ratio due to higher male mortality, economic security, a desire for progeny, and even spiritual concerns for immortality. *See* DIXON-SPEAR, *supra* note 34, at 20–21; *see also* Durham & Smith, *supra* note 25 (estimating 20 to 50% of marriages are polygamous in Africa). In South America, some Amazonian tribes limit polygyny to tribal leaders to distinguish their importance and power. ZEITZEN, *supra* note 30, at 9.

36. *See, e.g.*, ZEITZEN, *supra* note 30, at 9.

37. *Id.* at 153.

38. Jacob Zuma, the president of South Africa, became the second polygamous head of state from a country in the Southern African Development Community (after King Mswati III of Swaziland) when he was elected in 2009. *See Women's Rights and Polygamy*, GENDER LINKS FOR EQUALITY & JUSTICE (Apr. 8, 2013), http://genderlinks.org.za/programme-web-menu/a-press-releases/womens-rights-and-polygamy-2013-04-08/.

ibn Abdulaziz al-Saud of Saudi Arabia,[39] have also practiced polygyny. In some African nations, polygyny is regaining legal ground.[40]

In the Middle East and North Africa ("MENA"), polygyny has long been a traditional form of family life, going back centuries before the advent of Islam.[41] Religion has promoted polygyny in the MENA, but it should not be considered the only driving factor, as economics, nomadic lifestyles, and other variables have also contributed to polygyny's existence in the region.[42] In fact, there is debate over whether the Quran even supports polygyny at all.[43] Polygyny remains legal in many MENA nations;[44] in some, polygyny is experiencing a revival.[45] However, some

39. King Abdullah Ibn Abdulaziz Al-Saud had more than 20 wives (though not all at the same time) and over 30 sons and daughters. *See King Abdullah ibn Abdulaziz al-Saud Obituary*, TELEGRAPH (Jan. 22, 2015, 11:37 PM), http://www.telegraph.co.uk/news/obituaries/11322271/King-Abdullah-Ibn-Abdulaziz-al-Saud-obituary.html.

40. *E.g.*, Malkhadir Muhummed, *Polygamy Bill Allows Kenyan Men Many Wives*, AL-JAZEERA (Apr. 4, 2014, 12:57 PM), http://www.aljazeera.com/indepth/features/2014/04/polygamy-bill-allows-kenyan-men-many-wives-201443132059130919.html.

41. WILLIAM L. CLEVELAND & MARTIN BUNTON, A HISTORY OF THE MODERN MIDDLE EAST 53 (4th ed. 2008) (noting that polygamy before Islam was "unlimited" in pre-Islamic Arabia).

42. *See, e.g.*, Alean al-Krenawi et al., *Social Work Practice with Polygamous Families*, 14 CHILD & ADOLESCENT SOC. WORK J. 6 (1997) (discussing reasons for polygamy among the Bedouin).

43. Under some interpretations of Quran and Sharia law, men can take up to four wives. *See* MOHAMMAD MARMADUKE PICKTHALL, MEANING OF THE GLORIOUS KORAN: AN EXPLANATORY TRANSLATION 4:3 (1953) ("And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands posses. Thus it is more likely that ye will not do injustice."). However, in some schools of thought, sura 4:129, negates the legitimacy of polygyny because a husband can never be entirely fair and just to more than one wife and so he should take only one as directed in sura 4:3. *Id.* at 4:129 ("Ye will not be able to deal equally between (your) wives, however much ye wish (to do so). But turn not altogether away (from one), leaving her as in suspense. If ye do good and keep from evil, lo! Allah is ever Forgiving, Merciful.").

44. *See infra* notes 45–50; *see also* Huda Ahmed, *Iraq*, *in* THE MIDDLE EAST AND NORTH AFRICA 157, 168 (Sanja Kelly & Julia Breslin eds., 2010); RANA HUSSEINI, *Jordan*, *in* THE MIDDLE EAST AND NORTH AFRICA 193, 201 (Sanja Kelly & Juila Breslin eds., 2010); Sanja Kelly, *Hard-Won Progress and A Long Road Ahead: Women's Rights in the Middle East and North Africa*, *in* THE MIDDLE EAST AND NORTH AFRICA 1, 13 (Sanja Kelly & Juila Breslin eds., 2010) (polygamy remains legal in Algeria); Fatima Sadiqui, *Morocco*, *in* THE MIDDLE EAST AND NORTH AFRICA 311, 320 (Sanja Kelly & Juila Breslin eds., 2010).

45. ALEAN AL-KRENAWI, PSYCHOLOGICAL IMPACT OF POLYGAMY IN THE MIDDLE EAST 1 (2014).

governments across MENA—such as Tunisia,[46] Turkey,[47] Morocco,[48] Egypt,[49] and Jordan[50]—have taken steps to limit or ban polygyny entirely.

In Asia, polygyny has traditionally taken the form of concubinage.[51] In classical Chinese society, polygyny distinguished social classes and indicated individual success and prestige.[52] Although polygyny is outlawed in modern China, it persists in other forms.[53] In Bhutan, polygyny survives in a system that affords great rights to women.[54] In many Bhutanese polygynous marriages, a man marries

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46. MARTHA BAILEY & AMY KAUFMAN, POLYGAMY IN THE MONOGAMOUS WORLD: MULTICULTURAL CHALLENGES FOR WESTERN LAW AND POLICY 7 (2010). Tunisia prohibits polygamy based on the Quranic argument that equality among spouses is impossible. *Id.*; *see also supra* note 43. Tunisia criminalized polygamy in 1956 as a part of westernization and modernization and continued to treat it as a crime under staunch secularist regimes like that of Zine al-Abidine bin Ali; however, Tunisia's criminalization came with many calling for polygamy's revival for various social and religious reasons. *See* BAILEY & KAUFMAN, *supra*, at 7 n.8 (citing Jamel Arfaoui, *Possible Polygamy Revival Raises Debate in Tunisia*, MAGHAREBIA (Aug. 14, 2009), http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2009/08/14/feature-01).

47. BAILEY & KAUFMAN, *supra* note 46, at 38–39 (discussing influence of Ottoman Law of Family Rights on areas previously belonging to the Ottoman Empire); *see also* Pinar Tremblay, *Big Love in Turkey*, AL MONITOR (Mar. 24, 2015), http://www.al-monitor.com/pulse/originals/2015/03/turkey-polygamy-acceptable-conspicuously.html. Polygamy has been illegal in Turkey since 1926. Tremblay, *supra*. However, some men marry up to four wives under Islamic law, but only the first wife will be recognized by the State.

48. BAILEY & KAUFMAN, *supra* note 46, at 26–30. The Moroccan family law, *Mudawwana*, limited polygamy in 1957–58. *Id*. The law imposed more stringent requirements on men, such as having to demonstrate financial ability to support multiple spouses and requiring a showing of an "exceptional and objective" motive for polygamy. *Id*.

49. *Id*. at 23. Polygamy was traditionally associated with higher classes of Egyptian society because they could afford to have multiple wives. *Id*. In Egypt, polygamy is now practiced in less than 3% of the population and has been openly opposed by several social movements, including that of Huda Sha'arawi in the 1920s. *Id*. Modern Egyptian law combines both French civil law and Islamic law. *Id*. Marriage contracts with a first wife may be terminated if a husband marries another wife. *See id*.

50. *Id*. at 48–50. Polygamy is legal, but relatively low in Jordan, especially in urban areas. *Id*. Jordan's legal system was greatly influenced by Ottoman era governance and recent attempts to amend laws for greater gender equality within polygamous marriages have fallen short of enacting change. *Id*.

51. ZEITZEN, *supra* note 30, at 165.

52. BAILEY & KAUFMAN, *supra* note 46, at 165; *see also* KEITH MCMAHON, POLYGAMY AND SUBLIME PASSION: SEXUALITY IN CHINA ON THE VERGE OF MODERNITY (2010).

53. ZEITZEN, *supra* note 30, at 5. In some cases, a man may marry one wife and then "marry" the second wife by performing a ceremony according to customary laws. *Id.* However, acceptance of this marriage may be denied, in which case a woman attains merely concubine status. *Id.* This, in effect, continues the ancient practice of concubinage, which stems from rapid industrialization and economic growth in China. *Id*. at 165.

54. Jamie M. Gher, *Polygamy and Same-Sex Marriage - Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 593–94 (2008).

biological sisters.[55] Unlike polygyny in other areas, these unions are often formed to maximize an efficient division of labor as opposed to "imposing a patriarchal order on women."[56]

Polyandry, another form of polygamy is the practice of one woman having multiple husbands. It is practiced primarily in the Himalayan region of India[57] and Nepal.[58] Many practice polyandry for economic reasons.[59] Specifically, because arable land is scarce, brothers marry the same woman to avoid partitioning family-held property.[60] Further, given the harsh geography and climate in the Himalayas, polyandry enables a man to leave the family home without fear that his wife is inadequately protected.[61] Tibetans believe that this form of marriage creates greater intergenerational stability because families remain together as opposed to separating onto their own lands.[62] Polyandry is not limited to Tibetan Buddhists; in fact, some polyandrous families in India are Hindus and Sikhs.[63]

Although European and North American societies have been predominately monogamous for centuries, there has been a "long but largely underground tradition of Christian polygamy . . . which extends from the first half of the sixteenth century to about 1800, and indeed in isolated areas . . . to the present day."[64] The most well-known occurrence of polygamy in North America occurred in the Church of Jesus Christ of Latter-day Saints ("Mormon" or "LDS Church") and break-off fundamentalist sects. Around 1849, the LDS Church began practicing polygyny as part of the "restoration of all things," which was initiated by the prophetic mission of the faith's founder, Joseph Smith.[65] LDS polygyny was

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55. *Id.* at 594.

56. *Id.*

57. MANIS KUMAR RAHA & PALASH CHANDRA COOMAR, POLYANDRY IN INDIA: DEMOGRAPHIC, ECONOMIC, SOCIAL, RELIGIOUS, AND PSYCHOLOGICAL CONCOMITANTS OF PLURAL MARRIAGES IN WOMEN vii (1987) (noting that polyandry has been practiced in India since the Vedic ages and possibly earlier).

58. *See generally* Y.S. PAMAR, POLYANDRY IN THE HIMALAYAS (1975). Pamar gives excellent explanations of economic and cultural factors that create an incentive for individuals to practice polyandry, including the principle of *reet*, whereby women transfer between families of men based on economic opportunity. *Id*. at 151–53; *see also* Gher, *supra* note 54, at 594.

59. ZEITZEN, *supra* note 30, at 11; RAHA & COOMAR, *supra* note 57, at 200.

60. RAHA & COOMAR, *supra* note 57, at 27.

61. PAMAR, *supra* note 58, at 151–53.

62. *Id*.

63. ZEITZEN, *supra* note 30, at 109; RAHA & COOMAR, *supra* note 57, at 205.

64. JOHN CARINCROSS, AFTER POLYGAMY WAS MADE A SIN i (1974). In Reformation Germany, some groups practiced polygamy and one group of Anabaptists even took control of the city of Münster. *Id*. at 3. The Münsterites viewed plural marriage as a vehicle to accomplish their God-bestowed duty of increasing and multiplying mankind in a blatant reaction against medieval celibacy. *Id.* at 7. Prominent European thinkers and leaders, including Voltaire, Rosseau, and Napoleon Bonaparte, contemplated the virtues of polygamy. *Id.* at 114–17, 122.

65. THE DOCTRINE & COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS § 132 (1979) (laying the foundation for the LDS practice of polygyny (called "plural marriage" within the LDS and offshoot communities), which was believed to be an ancient practice (performed by prophets like Abraham) made anew in latter-days).

practiced in much of the western territories of the United States and in Mormon colonies in Mexico.[66] LDS polygyny officially ended in 1890 when Wilford Woodruff announced that God had instructed him to end the practice.[67] Utah's desire to receive statehood and to avoid repercussions from the federal government might have also influenced the decision to end polygyny.[68] Still, some Mormons continued practicing polygyny in secret. In 1904, then-LDS Church president Joseph F. Smith reaffirmed prior Church declarations and called for an end to polygyny "once and for all."[69] Those who continued to openly practice polygyny were excommunicated from the LDS Church, including Lorin C. Woolley.[70] After Woolley was excommunicated in 1924, he continued leading a group, founded by his father John Woolley, and other prominent leaders, which was known as the Council of Friends, the predecessor of the Fundamentalist Church of Jesus Christ of Latter-day Saints ("FLDS") and other polygamy-practicing groups.[71]

Another form of polygamy is de facto polygamy, in which men and women do not wed but have multiple partners or different families.[72] It is often ignored in discussions on polygamy, but it occurs around the world more frequently than formal polygamous marriages.[73] Upon closer inspection, many western countries, including France, Germany, and the United States, are less monogamous than they purport to be.[74] De facto polygamy in these countries varies from mistresses and paramours to informal second families.[75] Polygamy takes many forms, but in every situation, individuals share their lives together and create families.

B. Modern Polygamy in the United States

Like the Brown family, other polygamist families are revealing themselves and are "coming out" to the public.[76] Between 38,000 and 60,000 individuals

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66. BENNION, *supra* note 5, at 25–28.

67. *See Official Declaration—1*, *in* THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (1979).

68. BENNION, *supra* note 5, at 24.

69. *Id.* at 25.

70. *Id*. Various Mormon fundamentalist groups believe that Woolley received authority from the third president of the LDS Church, John Taylor, to continue plural marriage. *Id*. Bennion describes it as the "defining narrative for Mormon Fundamentalists." *Id.*

71. *Id.* at 28 (providing a thorough description and chart of the splintering of various groups of Mormon fundamentalists).

72. *See generally* DOMINIQUE LEGROS, MAINSTREAM POLYGAMY: THE NON-MARITAL CHILD PARADOX IN THE WEST (2014) (suggesting that polygamy happens all the time in the West, just in varied forms).

73. *Id.*

74. *Id.*

75. *Id.*

76. Zoe Mintz, *Utah Polygamy Ban 'Bad News' for LDS Church*: *Mormon Scholar*, INT'L BUS. TIMES (Aug. 29, 2014, 4:17 PM), http://www.ibtimes.com/utah-polygamy-ban-reversal-bad-news-lds-church-mormon-scholar-1673848. There are approximately 40,000 polygamists in Utah. *Id*. This high concentration of polygamists may be explained by the higher birth rate among fundamentalist families. *Id*.; *see also* Cecila Vega & Mary Marsh, *Modern Polygamy: Arizona Mormon Fundamentalists Seek to Shed*

practice polygamy in North America.[77] In addition to members of the FLDS and other fundamentalist Mormon sects, some immigrant communities practice polygamy in the United States.[78] Reasons for continuing the practice after arriving in the United States include religion, custom, and prior arrangements made before entering the United States.[79]

There is also a growing trend of African Americans pursuing polygamy for economic and social benefits.[80] Some argue that due to the War on Drugs and other campaigns that have had gendered effects on the African-American population, some African-American women have difficulty finding African-American husbands because many African-American men are incarcerated.[81] In one report, African-American Muslims in Philadelphia shared how polygamy was an alternate solution to being alone—a solution that, although challenging at first, benefitted their families.[82] Although people practice polygamy for different reasons, no type of polygamy is permitted within the United States and no polygamous marriage can be recognized as valid.

II. POLYCRIMINALIZATION: THE BAN OF POLYGAMY IN THE UNITED STATES

Bigamy and polygamy are banned in all 50 states, the District of Columbia, and U.S. territories.[83] Over the years, U.S. courts have denounced the practice for numerous reasons.[84] Early on, courts' rhetoric focused on popular Christian values and widespread fears that the practice would spread.[85] The Supreme Court also cited harm to children and women as bases for criminalizing polygamous relationships.[86]

Stereotypes, ABC NEWS (June 4, 2013), http://abcnews.go.com/US/modern-polygamy-arizona-mormon-fundamentalists-seek-shed-stereotypes/story?id=19322087.

77. Maura I. Strassberg, *The Crime of Polygamy*, 12. TEMP. POL. & CIV. RTS. L. REV. 353, 354 (2003) ("Today, there are ten times as many Mormon fundamentalists living in polygamous marriages as there were in the original Mormon community in 1862.").

78. Nina Bernstein, *Polygamy, Practiced in Secrecy, Follows Africans to N.Y.*, N.Y. TIMES, Mar. 23, 2007, at A1.

79. *Id.*

80. *See* DIXON-SPEAR, *supra* note 34, at 277–94.

81. *Id.*

82. Barbara Bradley Hagerty, *Philly's Black Muslims Increasingly Turn to Polygamy*, NPR (May 28, 2008, 5:11 PM), http://www.npr.org/templates/story/story.php?storyId=90886407; *see also* Pauline Bartolone, *For These Muslims, Polygamy is an Option*, S.F. GATE (Aug. 5, 2007, 4:00 AM), http://www.sfgate.com/opinion/article/For-these-Muslims-polygamy-is-an-option-2549200.php.

83. *See* Marjorie A. Shields, Annotation, *Validity of Bigamy and Polygamy Statutes and Constitutional Provisions*, 22 A.L.R. 6th 1 (2007). For examples of state statutory and constitutional provisions banning bigamy and, more broadly, polygamy, see ARIZ. CONST. art. 20, § 2; MASS. GEN. LAWS ch. 272, § 15 (2014); MICH. COMP. LAWS §§ 750.439, 750.441 (2014); MISS. CODE ANN. § 97-29-43 (2014); UTAH CODE ANN. § 76-7-101 (LexisNexis 2013); VA. CODE ANN. § 18.2-362 (2014).

84. *See infra* Section III.A.

85. Reynolds v. United States, 98 U.S. 145, 150 (1878) (fearing polygamy will spread).

86. *Id.* (fearing harm to children).

Many of the laws enacted to prevent the practice were aimed directly at nineteenth century Mormons engaged in polygamy.[87] Recently, however, courts have begun to question century-old justifications for the absolute ban against this lifestyle.[88] By examining the history of the ban on polygamy with a critical eye, and in light of the achievements of same-sex marriage advocacy, the rationale behind these laws may not be as sound as previously thought.

A. A History of the Ban on Polygamy

The development of anti-polygamy laws parallels a struggle between the LDS Church in the Utah territory and the federal government, spanning decades and including legislation that was aimed directly at Mormons.[89] Anti-polygamy legislation began in 1862 when the Morrill Anti-Bigamy Act officially criminalized polygamy.[90] The prosecution of polygamy accelerated in the post-bellum period and in 1874 Congress passed the Poland Act, which removed obstacles to the prosecution of polygamists by "reduc[ing] the powers of the [Utah] territory's probate judges and provid[ing] for jury pools to be selected by the U.S. Marshall."[91] After the Poland Act, enforcement of anti-polygamy laws began, which led to *Reynolds v. United States*.[92] In *Reynolds*, the U.S. Supreme Court upheld Congress's power to enact anti-polygamy laws in U.S. territories.[93] It also held, that the defendant, George Reynolds, could not claim his belief in the LDS Church as a valid defense.[94] Furthermore, anti-polygamy laws did not violate the Free Exercise Clause

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87. State v. Holm, 137 P.3d 726, 777 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part) (discussing laws that target specific groups).

88. *See generally id.*; Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013).

89. *See generally* EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830–1900, at 139 (1988).

90. Act of July 1, 1862 ("Morrill Anti-Bigamy Act"), 12 Stat. 501, *repealed by* Act of Nov. 2, 1978 § 2, Pub. L. No. 95-584, 92 Stat. 2483, 2483. Due to pressures facing the federal government, President Lincoln and LDS Church leaders agreed that the United States would not actively pursue Mormon polygamists, despite the Morrill Anti-Bigamy Act, so long as the LDS Church stayed out of the Civil War and did not hinder U.S. communications en route to California. FIRMAGE & MANGRUM, *supra* note 89, 139; CHRISTINE TALBOT, FOREIGN KINGDOM: MORMONS AND POLYGAMY IN AMERICAN POLITICAL CULTURE 1852–1890, at 60 (2013); Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287 (2010).

91. 43 Cong. Ch. 469, June 23, 1874, 18 Stat. 253; *see also* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 111–12 (2002) ("[The Act] also eroded the general immunity that Mormon leaders, especially Brigham Young, had enjoyed the exodus to Utah.").

92. Reynolds v. United States, 98 U.S. 145 (1878); *see also* FIRMAGE & MANGRUM, *supra* note 89, at 161.

93. *Reynolds*, 98 U.S. at 168.

94. In *Reynolds*, the defendant, a practicing polygamist, argued that it was his God-bestowed duty—one shared with all males—to practice polygamy, and that he believed it necessary to avoid damnation. *Id.* at 161. However, the Court held that his argument had "no foundation for its admission" in justice, reason, or law. *Id.* at 167.

of the First Amendment;[95] the ban merely interfered with Reynolds' practice and not his belief.[96]

After *Reynolds*, the Edmunds-Tucker Act of 1887 closed evidentiary loopholes in the prosecution of polygamists and made cohabitation (without a formal marriage license) with more than one woman a punishable offense.[97] The Edmunds-Tucker Act also disincorporated the LDS Church and was "a clear message to Mormons . . . [that] fornication, adultery, and the revocation of women's suffrage brought women as well as men into the criminal and political focus of [U.S.] law."[98] The LDS Church challenged the Edmunds-Tucker Act, resulting in the Supreme Court's decision in *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*.[99] The decision upheld the Edmunds-Tucker Act and gave permission to the U.S. Government to distribute the seized assets of the LDS Church.[100] After *Late Corp.*, the federal government had greater power to prohibit bigamous and polygamous relationships and punish offenders.[101] Scholars have noted that the underlying tone of the majority opinion in *Late Corp.*, authored by Justice Joseph P. Bradley, demonstrated a disdain for the Mormons' "'barbarous' customs."[102]

Federal action against polygamy continued into the twentieth century. In 1910, Congress passed the Mann Act, which was aimed at preventing white slave trafficking and was also intended to curb the possibility of Mormons trafficking women for brides.[103] Later in 1946, the Supreme Court, in *Cleveland v. United States*, again upheld federal power to regulate marriage and polygamy. Further, the Court reaffirmed that Congress could regulate marriage without encountering a federalism problem.[104] Likewise, in 1985, the Tenth Circuit Court of Appeals reaffirmed earlier decisions like *Reynolds* and *Cleveland* in holding that Utah's ban on polygamy did not violate the First Amendment's Free Exercise Clause.[105]

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95. *See id.* at 166–67.

96. *See infra* Section III.B (discussing *Reynolds* in more detail).

97. 49 Cong. Ch. 397, February 19, 1887, 24 Stat. 635.

98. GORDON, *supra* note 91, at 180.

99. 136 U.S. 1 (1890) (upholding the Edmunds-Tucker Act of 1887).

100. GORDON, *supra* note 91, at 186, 209–12.

101. *See Late Corp.*, 136 U.S. at 1.

102. GORDON, *supra* note 91, at 213–14 ("The opinion knit together many internal court-centered concerns of precedent and interpretation with the external political and humanitarian antipolygamy rhetoric [and denied some of the very real sufferings of Mormons].").

103. 61 Cong. Ch. 394, June 25, 1910, 36 Stat. 825 (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)) (making it a felony to engage in interstate or foreign commerce transport of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose"); GORDON, *supra* note 91, at 236–37 (discussing Justice Murphy's dissenting opinion in Cleveland v. United States, 329 U.S. 14, 16 (1946) that polygamy was not the equivalent of bondage or slavery).

104. *Cleveland*, 329 U.S. at 16.

105. Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985) (upholding the firing of police officer because of his polygamous lifestyle).

On the state level, Utah also upheld its anti-polygamy laws in 2004 and 2006.[106] In *State v. Green* and *State v. Holm*, the Utah Supreme Court pointed to higher rates of sexual misconduct with minors, child abuse, neglect, and the disproportionate negative effects of polygamy on women to justify prohibiting polygamy.[107] However, in *State v. Holm*, Chief Justice Durham drafted a powerful dissenting opinion, opining that strictly spiritual marriages that do not seek state approval might be beyond the reach of the state's legal authority.[108] In 2005, one polygamous family tried to challenge Utah's constitutional ban; however, the federal court found the family to be without standing because the state never charged the husband, wife, and second fiancée with violating the anti-bigamy statute.[109]

B. Kody Brown and the Sister Wives Challenge the Historical Ban

Brown v. Buhman is the latest chapter in the evolution of polygamy prohibition and has shifted the tide of the century-long debate over polygamy, cohabitation, and marriage.[110] Kody Brown and the Sister Wives brought suit against the County Attorney for Utah County challenging the validity of Section 76-7-101 of the Utah Code after his family was investigated for polygamy following the first airing of their show Sister Wives in 2010.[111] The Browns framed their situation as individuals who had "consciously chose[n] to enter into personal relationships that [they] knew would not be legally recognized as marriage . . . even though they used religious terminology to describe [their] relationship[s]."[112] Instead of being legally married, the Browns argued that they had relationships that were similar to ordinary cohabitation or extramarital sexual relationships. The federal district court held that neither polygamy nor religious cohabitation merited heightened scrutiny as protected liberty interests under the *Glucksberg* framework or the Free Exercise Clause, and therefore, the court did not apply heightened scrutiny to the Browns' due process claim of sexual privacy.[113] Thus, *Reynolds*

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106. State v. Green, 99 P.3d 820 (Utah 2004); State v. Holm, 137 P.3d 726 (Utah 2006).

107. *Green*, 99 P.3d at 830; *Holm*, 137 P.3d at 744.

108. *Holm*, 137 P.3d at 762–63 (Durham, C.J., concurring in part and dissenting in part).

109. Bronson v. Swenson, 500 F.3d 1099 (10th Cir. 2007), *vacating* 394 F.3d 1329 (D. Utah 2005). Standing issues have also played key roles in *Brown* and in the Collier family's lawsuit against Montana. *See supra* note 19.

110. 947 F. Supp. 2d 1170 (D. Utah 2013), *subsequent determination in* Brown v. Herbert, 43 F. Supp. 3d 1229 (D. Utah 2014).

111. UTAH CODE ANN. § 76-7-101 (LexisNexis 2010); *see also supra* Part I.

112. *Brown*, 947 F. Supp. 2d at 1190 (quoting *Holm*, 137 P.3d at 774).

113. *Id*. at 1201–03. The court did note, however, that there was great persuasive value in the U.S. Supreme Court's concern about oppression by majority power against unpopular groups. *See id.* at 1181–82 ("[T]he Supreme Court has over decades assumed a general posture that is less inclined to allow majoritarian coercion of unpopular or disliked minority groups, especially when blatant racism (as expressed through Orientalism/imperialism), religious prejudice, or some other constitutionally suspect motivation, can be discovered behind such legislation."); *see also* Washington v. Glucksberg, 521 U.S. 702, 720–26 (1997) (providing a framework for determining whether liberty interests are "deeply rooted in the nation's history" and, thus, qualifying as a protected liberty interest).

controlled in this matter of polygamy and the ban remained valid.[114] However, the court held that the provision banning cohabitation could not survive a rational-basis analysis under the Due Process Clause or heightened scrutiny under the Free Exercise Clause of the First Amendment. Thus, the Browns could "religiously cohabitate" without fear of government intrusion, but could still not formally marry within the state.

The court noted that common law marriages, which required only a religious ceremony or cohabitation, could have constituted legal marriages in earlier centuries, but that Utah, as well as many other states, had stopped recognizing common law marriages; thus, polygamous cohabitants cannot gain marital status by means of their cohabitation alone.[115] Similarly, it observed that states do not consider growing numbers of unwed cohabitants legally married.[116] Although the Utah statute regarding cohabitation was facially neutral, it was not operationally neutral because it only targeted cohabitants who were living together for religious reasons, such as spiritual "plural marriages."[117] The court concluded that the only major distinction being made in the application of the law prohibiting polygamy was that some form of religious ceremony or recognition of a marriage had been performed among cohabitants.[118] As such, the statute could not be operationally neutral or generally applicable under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[119]

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114. *Brown*, 947 F. Supp. 2d at 1203.

115. *Id*. at 1205–07 (citing Schurler v. Indus. Comm'n, 43 P.2d 696, 697 (Utah 1935)) ("In this state a common-law marriage cannot be consummated."). Utah, like many other states, still recognizes common law marriages validly entered into in another state. *See* R.H.S., Annotation, *Validity of Common-law Marriage in American Jurisdictions*, 133 A.L.R. 758 (1941).

116. *Brown*, 947 F. Supp. 2d at 1206–08.

117. *Id*. at 1210. The statute was not operationally neutral because religious cohabitants (those claiming religious marriages) were the only cohabitants targeted. *Id.* at 1209–10. Cohabitants in other circumstances—including those living in adulterous relationships—were not subject to prosecution. *Id.* at 1210–11. For that reason, the cohabitation prong of the statute failed rational basis review under the Due Process Clause and *Lawrence v. Texas*, 539 U.S. 558 (2005). *Id.* at 1223–25. The state found no reason to distinguish cohabitation from adultery, which is not prosecuted to protect marriage. *See id.* at 1210 (quoting State v. Holm, 137 P.3d 771, 771–72 (Utah 2004) (Durham, C.J., concurring in part and dissenting in part)). Brown succeeded in showing that the only persons prosecuted under the statute were religiously motivated to enter into polygamous unions. *See id.* at 1213; *see, also, e.g.*, Bronson v. Swenson, 500 F.3d 1099, 1103 (10th Cir. 2007); White v. Utah, 41 F. App'x 425, 236 (10th Cir. 2002); Potter v. Murray City, 760 F.2d 1065, 1066 (10th Cir. 1985); Barlow v. Evans, 993 F. Supp. 1390, 1392 (D. Utah 1997); *In re* Steed, 131 P.3d 231, 231–32 (Utah 2006) (adopting the Utah Judicial Conduct Commission's recommendation to remove a judge from office for violating Utah's constitutional prohibition on bigamy despite the judge defending his multiple marriages on the basis of a "mutual religious faith"); State v. Green, 99 P.3d 820 (Utah 2004); *Holm*, 137 P.3d at 31.

118. *Brown*, 947 F. Supp. 2d at 1211.

119. *Id.* at 1215–17; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that a city ordinance that prohibited animal sacrifices performed by practitioners of the Santeria religion: (i) was not neutral; (ii) was not generally

Further, the court found that Utah's "selective prosecution" was fatal to any argument the government might make regarding general applicability.[120] Because the statute was not operationally neutral or generally applicable, it should have been narrowly tailored to meet the state's compelling interest of "protecting vulnerable individuals from exploitation and abuse."[121] However, the court noted that there were more narrowly tailored laws operating in Utah to regulate those crimes.[122] The court also said that previous reasoning against polygamy and in favor of monogamy amounted to stating that domestic relations law favored monogamous marriage over polygamous marriage.[123]

The *Brown* district court echoed Chief Justice Durham's dissent in *Holm* by rejecting Utah's argument that criminal prohibitions were needed to protect the institution of marriage.[124] It also found that "neither the *Holm* majority nor the [State of Utah] adequately explain[ed] 'how the institution of marriage is abused or state support for monogamy threatened simply by an individual's choice to participate in a religious ritual with more than one person outside the confines of legal marriage.'"[125] Further, the bigamy statute did not protect marriage because if Kody Brown had maintained relations with multiple women, had children with them, and never expressed a belief in a spiritual bond with them, he would have avoided criminal exposure.[126] The ban also failed to prevent fraudulent behavior by cohabitants because cohabitants were still eligible for the benefits and assistance given to unmarried persons.[127] For all these reasons, the district court held that Utah's cohabitation provision was a facial violation of the First Amendment's Free Exercise Clause.[128]

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applicable; and (iii) was not supported by a governmental interest that justified the targeting of the religious animal sacrifices).

120. *Brown*, 947 F. Supp. 2d at 1216.

121. *Id.* (citing *Green*, 99 P.3d at 830).

122. *Id.* at 1217 (citing *Holm*, 137 P.3d at 775).

123. *Id*. at 1217–18.

124. In her dissent, Chief Justice Durham criticized Utah's argument of protecting the institution of marriage, noting "the state has an important interest in regulating marriage, but only insofar as marriage is understood as a legal status." *Holm*, 137 P.3d at 771 (Durham, C.J., concurring in part and dissenting in part). The *Brown* district court further reasoned that:

> Chief Justice Durham's observation [was] to be well-taken, that the Statute protects marriage, as a legal union, by criminalizing the act of purporting to enter a *second legal union*. Such an act defrauds the state and perhaps an innocent spouse or purported partner. It also completely disregards the network of laws that regulate entry into, and the dissolution of, the *legal status of marriage*, and that limit to one the number of partners with which an individual may enjoy this status.

Brown, 947 F. Supp. 2d at 1218 (emphasis in original).

125. *Brown*, 947 F. Supp. 2d at 1218.

126. *Id.*

127. *Id.* at 1219.

128. Alternatively, cohabitation could qualify for high scrutiny under *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694 (10th Cir. 1998) (recognizing a hybrid-rights constitutional theory). *See Brown*, 947 F. Supp. 2d at 1225 (citing *Swanson*, 135 F.3d at 694).

Chief Justice Durham's dissent in *Holm* asserted that the "purports to marry section" of Utah's cohabitation statute needed to be narrowed.[129] Narrowly interpreted, the statute would only criminalize those polygamous "marriages" that sought legal recognition via marriage licenses.[130] More significantly, the *Brown* district court's analysis considered polygamy in the context of twentieth-century constitutional protections. The court stated that it would not rely on *Reynolds* because it was not a "legally or morally responsible approach in this case given the current contours of constitutional protections at issue."[131] As the court noted, society had changed dramatically, and many important individual rights cases had appeared before the Supreme Court—identifying practical and morally defensible identification of "'penumbral rights' of privacy and repose"—in the decades since *Reynolds*.[132] Overall, the *Brown* district court called into question the soundness of the underlying rationales against polygamy and whether elements of the historical ban can still stand.

Regardless of whether polygamy gains greater constitutional protection, constitutional concerns are only one part of the polymmigration puzzle. Despite the Tenth Circuit Court of Appeals dismissing the Browns' case on mootness grounds,[133] questions regarding the constitutionality of the ban on polygamy and the rights of individuals to practice polygamy will continue to loom on the legal horizon, whether in the Browns' case or otherwise. In addition to federal and state laws against polygamy within the United States and its territories, U.S. immigration laws prevent polygamist from immigrating to the United States.

III. POLYMMIGRATION: ANTI-POLYGAMOUS LAWS DIRECTED AT IMMIGRANTS

Immigration laws in the United States have had a similarly long history of anti-polygamy policies that developed alongside the anti-polygamy laws to be discussed in Section III.A. In fact, immigration concerns played a significant role in some of the U.S. Supreme Court's decisions on polygamy.[134] Distaste for nonwestern cultures, such as the Chinese, and polygamous practices were evident in

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129. *Holm*, 137 P.3d at 759–64.

130. The statute was also found to be void for vagueness; it was not easily understood by citizens that do not know the history of the federal government's prohibition on polygamy, and for that reason, it could be arbitrarily and discriminatorily enforced. *See Brown*, 947 F. Supp. 2d at 1225 (citing Gonzales v. Carhart, 550 U.S. 124, 148–49 (2007)).

131. *Id*. at 1181. The Court also stated that *Reynolds* had "no place in a discourse about religious freedom, due process, equal protection, or any other constitutional guarantee or right in the genuinely and intentionally racially and religiously pluralistic society that has been strengthened by the Supreme Court's twentieth century rights jurisprudence." *Id.* at 1188.

132. *Id*. at 1181–82.

133. Brown v. Buhman, No. 14-4117, 2016 WL 1399358, at *20 (10th Cir. Apr. 11, 2016).

134. GORDON, *supra* note 91, at 214 (noting that Justice Bradley's majority opinion in *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States* was also sensitive to the international embarrassment occasioned by the existence of a polygamous sect in Utah and by the role of immigration in the maintenance of the church's power).

this development. After the district court decision in *Brown*, these laws may also become subject to greater scrutiny and reconsideration.

A. Development of Anti-Polygamy Laws in Immigration

The development of immigration law also reflects longstanding distrust and fear of polygamy.[135] In the late nineteenth and early twentieth centuries, Chinese immigrants came to the United States to work on the railroads.[136] Many Americans feared the unorthodox practice of Chinese polygyny (concubinage) and thought that its taint would challenge "Christian monogamous marriage" and corrupt white civilized society.[137] Thus, it became imperative to keep such undesirable people out of the country.[138] In 1875, Congress passed what became known as the Page Law, which aimed to ban Chinese women from immigrating altogether, decreasing their influence and limiting their ability to reproduce on U.S. soil.[139] In a string of cases involving Chinese immigrants, the federal government increased its control over immigration by removing state-controlled immigration laws and limiting equal protection in immigration.[140]

As federal power over immigration continued to grow, Congress began to pass laws aimed at other groups as well. In 1891, Congress passed a law prohibiting idiots, insane persons, paupers, and polygamists from immigrating into the United States.[141] The Immigration Act of 1907 broadened immigration bars to include "persons who admit their belief in the practice of polygamy."[142] This Act created great tension with the Ottoman Empire, which accused the United States of discriminating against its citizens.[143] As a result, the commissioner–general of immigration and the Department of State clarified that there is a "well defined

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135. Polygamy was long associated with Asiatic and African peoples and, coupled with slavery, was believed to constitute the "twin relics of barbarism." *See id.* at 55.

136. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 649–50 (2005).

137. *Id.* at 661 ("Polygamy, like prostitution, was considered a racial trait of the 'yellow' and 'Mongol' race.").

138. *Id*. at 643.

139. *Id*. at 643–44. Chinese reproduction represented a challenge to California and the United States' future as a white, Christian state. *Id.* at 663. The Page Law represented the beginning of increased Federal Involvement in immigration law. *See id*. at 665. Although the U.S. Supreme Court had ruled that the federal government had power over immigration in *Smith v. Turner (The Passenger Cases)*, 48 U.S. (7 How.) 283 (1849), it was not until Congress passed the Page Law some 25 years later that the federal government took greater control over immigration. *Id.*

140. *Id*. at 686–87. This is often discussed as the plenary power of the federal government in immigration. *See generally* Chy Lung v. Freeman, 92 U.S. 275 (1875); *In re* Ah Fong, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102). Eventually, the Supreme Court afforded greater equal protection against noncitizens. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that a facially neutral law with a discriminatory effect on Chinese laundry owners was unconstitutional).

141. 51 Cong. Ch. 550, March 3, 1891, 26 Stat. 1084

142. 59 Cong. Ch. 1134, February 20, 1907, 34 Stat. 898, 898–99.

143. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 139 (2000).

distinction between belief in a religion which tolerates a practice and belief in the practice itself."[144]

In 1917, Congress again revised inadmissibility statutes to include "polygamists, or persons who practice polygamy or believe in or advocate the practice of polygamy."[145] This remained constant through the next several decades and when Congress enacted the Immigration and Nationality Act (the "INA") of 1952, these older laws essentially remained in place and barred polygamist immigrants.[146] In 1990, the INA provisions were changed to their current form, which state that immigrants who "[come] to the United States to practice polygamy" are inadmissible.[147] With the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996, the class "polygamist" was removed from a list of aliens that were considered "absolutely without good-moral character" for consideration in cancellation of removal and adjustment of status.[148]

Today, polygamy is grounds for inadmissibility, but not deportation.[149] Polygamy and bigamy are not synonymous and carry different immigration consequences.[150] Decisions regarding the inadmissibility of polygamous aliens have been consistent.[151] In most cases, courts maintain that polygamous marriages, in all

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144. *Id.*; *see also* Ali v. Reno, 829 F. Supp. 1415, 1420 n.5 (S.D.N.Y. 1993); ROGER DANIELS & OTIS L. GRAHAM, DEBATING AMERICAN IMMIGRATION 1882–PRESENT 14 (2001).

145. Sarah L. Eichenberger, *When For Better is For Worse: Immigration Law's Gendered Impact on Foreign Polygamous Marriage*, 61 DUKE L.J. 1067, 1083 (2012) (citing Act of March 3, 1891, ch. 551, 26 Stat. 1084).

146. *Id*. at 1083–84.

147. 8 U.S.C. § 1182(a)(10)(A), INA § 212(a)(10)(A) (2012); *see also* 22 C.F.R. § 40.101.

148. *See* Avendano-Ramirez v. Ashcroft, 365 F.3d 813, 817 (9th Cir. 2004). The Ninth Circuit Court of Appeals questioned the reasoning for removing polygamists from the list, but concluded:

> [P]erhaps Congress decided it had been too harsh toward those from countries where polygamy is accepted. We do not know. What we do know is that Congress has been very concerned about the ease and frequency of return by aliens who have been removed. While some of them might feel that they have a moral right to come back despite our laws, Congress could disagree with that moral judgment.

Id. at 818.

149. Cabasug v. INS, 847 F.2d 1321 (9th Cir. 1988) (practicing polygamy after immigration is not a separate grounds for deportation), *abrogation recognized by* Wai Shek Kwong v. Holder, 346 Fed.App'x 195 (9th Cir. 2009). *But see* 8 U.S.C. § 1227(a)(1)(A), INA § 237(a)(1)(A) (2012) (grounds for deportation are broader than, but include, the grounds for inadmissibility).

150. *In re* G—, 6 I. & N. Dec. 9 (B.I.A. 1953), *superseded by In re* F-M-, 7 I. & N. Dec. 420 (B.I.A. 1957).

151. *See, e.g.*, Sugianto v. Gonzales, 138 F. App'x 451, 454 (3d Cir. 2005) (inadmissible because respondent was polygamist; request for voluntary departure denied because polygamists are included in people "who lack good moral character"); Al Sharabi v. Heinauer, No. C-10-2695 SC, 2011 WL 3955027 (N.D. Cal. Sept. 7, 2011) (Egyptian cleric's appeal dismissed because he was inadmissible as a polygamist); *In re* Adomako, 2006 WL 3712508 (B.I.A. 2006) (valid polygamous marriage under customary law of Ghana not

their various forms, render an alien inadmissible for entry into the United States.[152] Many cases state that polygamous marriages are invalid because they are contrary to sound public policy and are repugnant to the laws of nature and Christian nations.[153] Even if valid where celebrated, polygamous marriages will not be recognized and aliens who participate in such marriages are inadmissible.[154] However, this longstanding ban is susceptible to significant criticism in light of recent cases, including the decision issued by the *Brown* district court.

B. Loosening Restrictions on Polymmigration

The *Brown* district court's reconsideration of polygamy and longstanding case law calls into question the motivations and effect of anti-polygamy laws. Just as it offers solutions for polygamist citizens in the United States, *Brown* may also provide solutions for polygamous immigrant families. The outdated reasoning of the ban, the success of same-sex marriage advocacy, the selective enforcement or non-enforcement of bigamy laws, the harm to families, the history of recognizing polygamous relationships in other contexts, and the potential solutions from abroad, all suggest that there are alternatives to the United States' historical stance that all polygamists are inadmissible.

1. Outdated Reasoning and Criticism of Longstanding Bans

The historical bar of all polygamous immigrants is based upon outdated rationales and cultural superiority. Immigration law has been susceptible to forms of racism and other cultural prejudices,[155] and this is no different in the case of polygamous immigrants. The development of immigration law arose from the same reasoning and fears as the U.S. Supreme Court's anti-bigamy jurisprudence during the nineteenth century.

Policies like those in *Reynolds* reflect a fear of foreign lifestyles.[156] In *Reynolds*, the Court's analysis determined that "religion" was defined by the drafters of the Constitution—white, Protestant Christians—and that, in the Drafters' eyes,

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recognized for immigration purposes); *In re* Abulrub, 2006 WL 3485576 (B.I.A. 2006) (second polygamous marriage in Yemen not valid for immigration purposes); *In re* Arenas, 15 I. & N. Dec. 174 (B.I.A. 1975); *In re* Darwish, 14 I. & N. Dec. 307 (B.I.A. 1973); *In re* H, 9 I. & N. Dec. 640 (B.I.A. 1962).

152. *See, e.g.*, Ng Suey Hi v. Weedin, 21 F.2d 801, 801–02 (9th Cir. 1927) (stating the general rule that marriages are valid everywhere if valid in *lex loci contractus*, but that if a marriage is repugnant to the new domicile, such a marriage will be invalid).

153. *See In re* H—, 9 I. & N. Dec. at 641 (B.I.A. 1962).

154. *In re* Mujahid, 15 I. & N. Dec. 546, 546–47 (B.I.A. 1976) (invalidating a Jordanian marriage because the parties entered into it while one was still married, even though the first marriage was dissolved subsequent to the second marriage).

155. Abrams, *supra* note 136, at 646 n.9; Ertman, *supra* note 90, at 315–17.

156. Mormons were looked down upon and feared by many in the United States because of their similarities to "Mohammedan, Asiatic, and African peoples." *See* Deirdre M. Moloney, *Muslims, Mormons, and U.S. Deportation and Exclusion Policies: The 1910 Polygamy Controversy and the Shaping of Contemporary Attitudes*, *in* THE SOCIAL POLITICAL AND HISTORICAL CONTOURS OF DEPORTATION 9–24 (Bridget Anderson et al. eds., 2013); *see generally* EDWARD SAID, ORIENTALISM (1978).

polygamy was not a natural right in accordance with social duties, nor was it a mark of civilized people.[157] The *Reynolds* Court also claimed that polygamy inevitably leads to despotism and compared it to dangerous practices like human sacrifice and wives burning themselves on their husbands' funeral piles.[158] To modern eyes, the *Reynolds* decision demonstrates an overbearing use of power by the federal government and represents cultural imperialism.[159] As the district court noted in *Brown*, the "*Reynolds* court was erasing eighteenth century ideas of universal reason and natural law and replacing [them] with the 'rhetoric of imperialism' to bring civilization through law to [benign races]."[160] The *Reynolds* Court's treatment of one group's religious and cultural practices is demeaning and out of sync with modern respect for religious diversity and, as the *Brown* district court noted, unsuited for further use in U.S. constitutional law analysis.[161]

Many immigration cases cite similar reasoning and *Reynolds* itself for justifications on the inadmissibility of polygamous immigrants.[162] The rationale of racial and religious superiority should not be perpetuated any further towards U.S. citizens or those who seek to make the United States their home. The United States is a nation famed for its religious, cultural, and ethnic diversity, and it makes little sense to continue with immigration practices that seek to preserve its nature as a white and Christian state.

2. Individual Rights and Same-Sex Marriage

The bar against polygamous immigrants stands in stark contrast to advancements in individual liberties and sexual autonomy. Recent decades have produced a rich string of cases examining personal freedoms, privacy, and individual

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157. Reynolds v. United States, 98 U.S. 145, 164 (1878). The *Reynolds* Court further stated: "[P]olygamy has always been odious among the northern and western nations of Europe, and until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people." *Id.*

158. *Id*. at 166.

159. The *Brown* district court examined Edward Said's theory of Orientalism and how *Reynolds* exemplified nineteenth century views of imperialism and racial superiority. Brown v. Buhman, 947 F. Supp. 2d. 1170, 1182–83 (D. Utah 2013); *see generally* SAID, *supra* note 156. When examined though the lens of Orientalism, the *Reynolds* decision demonstrates how lawmakers and judges were influenced by social animosity towards Mormons, who were often portrayed as Oriental, exotic, and in need of correction and civilization. *Id.* at 1183 n.15; *see also* TERRYL GIVEN, THE VIPER ON THE HEARTH: MORMONS, MYTHS, AND THE CONSTRUCTION OF HERESY 130–37 (1997) (mentioning numerous cartoons portraying the Mormon polygamists as undesirable Asians and Blacks). The exact moral targeting of a group, as contemplated in *Lawrence*, while not totally eliminated today, was exactly what occurred in the 1870s around the time of *Reynolds*. *Brown*, 947 F. Supp. 2d at 1185.

160. *Brown*, 947 F. Supp. 2d at 1182 n.11 (citing Nathan B. Oman, *Natural Law and the Rehetoric of Empire: Reynolds v. United States, Polygamy, and Imperialism*, 88 WASH. U. L. REV. 661 (2011)).

161. *Reynolds*, 98 U.S. at 151–52.

162. *See, e.g.*, *In re* G—, 6 I. & N. Dec. 9 (B.I.A. 1953), *superseded by In re* F-M-, 7 I. & N. Dec. 420 (B.I.A. 1957).

autonomy, such as *Griswold v. Connecticut*.[163] Courts have struck down laws establishing marriage prohibitions based on miscegenation and poverty.[164] In *Loving v. Virginia*, the U.S. Supreme Court even began to articulate a "right to marry" that recently expanded to include same-sex unions.[165]

In *Romer v. Evans*, the Court protected sexual behavior, intimate partner arrangements, and lifestyle choices from prohibitive laws.[166] Justice Kennedy held that Colorado's constitutional amendment preventing cities, towns, and counties from granting protected status for homosexuals and bisexuals did not even meet a rational-basis test, noting that there was no governmental interest other than a "desire to harm a politically unpopular group."[167] This case marks a completely different approach from that of *Reynolds* a century earlier and from other cases in which groups like the Mormons were specifically targeted by legislation.[168]

Lawrence v. Texas announced "the end of all morals legislation."[169] *Lawrence* recognized that the Due Process Clause of the Fourteenth Amendment provides substantive protection for personal decisions relating to marriage, procreation, contraception, family, child rearing, and education.[170] The Court limited its holding to avoid affecting the institution of marriage.[171] The *Lawrence* Court noted that criminal laws based solely on animus towards a class of people are unconstitutional.[172] Most recently, in *Obergefell*, the Supreme Court held that the Fourteenth Amendment's Equal Protection and Due Process Clauses protect same-sex marriage, and states could not deny same-sex couples marriage licenses.[173]

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163. 381 U.S. 479 (1965). Justice Douglas's opinion explained how privacy is a freedom that, while not explicitly a right, "emanated from the guarantees in the Bill of Rights, [whose] penumbras, formed by emanations from those guarantees that help give them life and substance." *Id*. at 484.

164. Zablocki v. Redhail, 434 U.S. 374, 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

165. *Loving*, 388 U.S. at 12. The recent cases on same sex marriage, discussed in *supra* note 2, recognize a right to marry and apply that right to same-sex couples. *See e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Kitchen v. Herbert, 961 F. Supp. 2d 1811, 1194 (D. Utah 2013).

166. 517 U.S. 620, 635–36 (1996).

167. *Id*. at 634.

168. For more of this argument, see State v. Holm, 137 P.3d 726, 758–79 (Utah 2006) (Durham, C. J., concurring in part and dissenting in part).

169. 539 U.S. 558, 599 (2005) (Scalia, J., dissenting).

170. *Id.* at 573–74 (citing Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

171. *Lawrence*, 539 U.S. at 578.

> The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.

Id.

172. *Id.* at 585; *Romer*, 517 U.S. at 635.

173. Obergefell v. Hodges, 135 S. Ct 2584, 2600–08 (2015).

Further, the Court held that states must recognize same-sex marriages celebrated in other states.[174]

This broader recognition of rights for same-sex couples indicates a favorable view toward protecting once-forbidden relationships among minority groups.[175] There are notable—although not exact—similarities between the LGBTQ and polygamy movements, including the desire to protect extramarital relationships and the expanding view of the family.[176] And, as noted previously, polygamists are pointing to the success of gay-rights cases like *Obergefell* to justify their campaign for similar rights.[177]

For polymmigrants, several of these gay-rights cases have important immigration implications. For example, *United States v. Windsor* opened the doors to extending government benefits to same-sex couples,[178] and gay and lesbian spouses began receiving immigration benefits thereafter.[179] The Ninth Circuit Court of Appeals has noted Congress's intent that private sexual conduct among consenting adults should no longer be considered a legitimate basis for making immigration decisions.[180] Then-secretary of the Department of Homeland Security, Janet Napolitano, instructed the United States Citizenship and Immigration Services (the "USCIS") to allow married same-sex couples to petition for visas and review such visas the same way as married heterosexual couples.[181] In *In re Zeleniak*, the Board of Immigrant Appeals (the "BIA") held that same-sex marriages should be given equal standing in immigration proceedings.[182]

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174. *Id.* at 2607–08.

175. *See* Gher, *supra* note 54, at 598–99.

176. *Id*. at 599.

177. Ben Winslow, *'Sister Wives' Point to Same-Sex Marriage in Fighting Utah's Polygamy Appeal*, FOX 13 SALT LAKE CITY (Aug. 26, 2015, 6:59 PM), http://fox13now.com/2015/08/26/sister-wives-point-to-same-sex-marriage-in-fighting-utahs-polygamy-appeal/; *see also* Clark, *supra* note 4; *Montana Man Seeks License*, *supra* note 4; Volz, *supra* note 4.

178. 133 S. Ct. 2675 (2013).

179. *Statement from Secretary of Homeland Security Janet Napolitano on July 1, 2013*, U.S CITIZEN & IMMIGRATION SERVS. [hereinafter *Statement from Janet Napolitano*], http://www.uscis.gov/family/same-sex-marriages.

180. Yepes-Prado v. INS, 10 F.3d 1363, 1373 n.12 (9th Cir. 1993) ("We think it most unlikely that Congress would have chosen to emphasize considerations of privacy and dignity in determining that homosexual conduct is irrelevant to immigration decisions and at the same time continue to permit governmental inquiries into an individual's heterosexual 'affairs' so that heterosexuals may be excluded or deported on the ground of a lapse in marital fidelity."); *see also* Smearman, *supra* note 24, at 397–98.

181. *Statement from Janet Napolitano*, *supra* note 179.

182. *In re* Zeleniak, 26 I. & N. 158, 158 (B.I.A. 2013) (holding that a same-sex couple that was married in Vermont, where same-sex marriage was recognized, was eligible for immigration benefits for visa purposes). The court also noted that the ruling in *Windsor* would apply in numerous sections of the INA, such as § 101(a)(15)(K) (fiancé and fiancée visas); §§ 203 and 204 (immigrant visa petitions); §§ 207 and 208 (refugee and asylee derivative status); § 212 (inadmissibility and waivers of inadmissibility); § 237 (removability and waivers of removability); § 240A (cancellation of removal); and § 245 (adjustment of status). 8 U.S.C. §§ 1101(a)(15)(K), 1153–55, 1157–58, 1182, 1227, 1229b (2012).

Zeleniak and the post-*Windsor* changes to USCIS policy, while not entirely analogous to polygamous immigration, demonstrate that as domestic policy and recognition of alternative structures of families expand, immigration policy can expand as well and include marriages once deemed unrecognizable. The great successes of same-sex marriage advocacy provide strong precedent for polygamists in making constitutional arguments for equal treatment, sexual autonomy, and spousal benefits enjoyed by monogamous heterosexuals and monogamous homosexuals.

3. Non-Enforcement

The non-enforcement of anti-bigamy laws, in addition to a number of other laws more narrowly targeting the harms of polygamy, also demonstrate why the absolute bar is not necessary. While the laws against polygamy are longstanding, they have often gone unenforced against known polygamists.[183] Non-enforcement is the product of several factors.[184] Perhaps chief among these is the limited ability of law enforcement to punish polygamist offenders who commit crimes against spouses or children due to a lack of resources.[185] In Utah, for example, the state does not prosecute all polygamists due to volume and cost. There are so many polygamists that the state cannot afford to prosecute them for practicing plural marriage without evidence of other, more serious crimes. [186] If the state did prosecute all polygamists, many cities and compounds would cease to exist, families would be broken up, and more children would need replacement into new homes.[187]

Instead of witch hunts for polygamists, law enforcement agencies rely on other laws, which target coercing children into sexual relationships; domestic violence; criminal nonsupport; tax and benefit fraud; and adultery (although this is disappearing as a prosecutable offense).[188] Utah can and does prosecute criminal offenders for other crimes that occur in polygamous *and* monogamous families.[189]

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183. Brief of Appellees at 4, Brown v. Buhman, No. 2:11-CV-00652-CW, 2015 WL 5095840, at *4 (10th Cir. Aug. 25, 2015) ("Utah government officials are aware of thousands of polygamist families in the state and regularly interact with such families as part of the 'Safety Net' program and other governmental programs.").

184. Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101 (2006).

185. *Id.* at 141.

186. Brown v. Buhman, 947 F. Supp. 2d 1170, 1180–81 (D. Utah 2013). In *Brown*, the Utah County Attorney swore, "[A]s Utah County Attorney, I have now adopted a formal office policy not to prosecute the practice of bigamy unless the bigamy occurs in the conjunction with another crime or a person under the age of 18 was a party to the bigamous marriage or relationship." *Id*. at 1179–80.

187. *See* Sigman, *supra* note 184, at 166–84 (discussing the over enforcement of bigamy and traditional expected harms of the practice at the sacrifice of protecting actual harms experienced by adolescent girls and boys).

188. State v. Holm, 137 P.3d 726, 775–76 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part); BAILEY & KAUFMAN, *supra* note 46, at 167–69.

189. Turley, *supra* note 18. Johnathan Turley also argued that, after *Brown*:

> [A]buse of spouses and children will continue to be prosecuted regardless of whether they occur in monogamous or polygamous

Thus, the existence of the complete ban on polygamy, even nonstate recognized marriages, does nothing to promote the prosecution of violent crimes and abuse.

Polygamist immigrants, like other polygamists and monogamists in the United States, will have to live by regularly enforced rules prohibiting crimes that are commonly associated with polygamy.[190] Again, this weakens the argument that an absolute ban is necessary because there are already mechanisms in place to prevent these crimes and punish offenders. As such, the actual function of anti-polygamy laws targets a particular group instead of performing a preventative or protective function.

4. Harm to Polygamous Families

Current U.S. immigration policy inflicts harm upon polygamous families—providing yet another reason against the absolute bar as it presently stands. Labeling all polygamists inadmissible harms women and children substantially, and refusing to extend recognition to marriages into which spouses legally entered in their countries of origin can have adverse effects.[191] Current USCIS policy allows for a polygamist to petition on behalf of *one* spouse.[192] The husband and the first wife will be eligible as spouses because their marriage is valid and recognized in the United States.[193] However, the potential for splitting families is a severe reality for second or subsequent spouses. In a way, these anti-polygamy policies do more harm than good and subject women to greater uncertainty because their husbands have to choose which wife to take with them.[194] Further, in cases where families seek

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> families. These protective services will only be strengthened now that many families can openly integrate into society and not fear prosecution merely because of their family structure. What remains of the statute was narrowly construed by the Court to limit future prosecutions to traditional bigamy, i.e. individuals with multiple marriage licenses.

Id.

190. The Browns argue in their brief however that the State of Utah relied more on stories of abuse rather than pointing to facts supporting their argument regarding the harms associated with polygamy. Brief of Appellees at 3, Brown v. Buhman, No. 2:11-CV-00652-CW, 2015 WL 5095840, at *4 (10th Cir. Aug. 25, 2015) (citing *Brown*, 947 F. Supp. 2d at 1177); *see also id.* at 7, n.4 (citing Ronald C. Den Otter, *Three May Not Be A Crowd: The Case For A Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977 (2015) ("The claims of harm associated with cohabitation or polygamy as the basis for criminalization has been contested as unsupported."); Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory To Polygamy and Same-Sex Marriage*, 64 EMORY L.J. 2047 (2015); Jonathan Turley, *The Loadstone Rock: The Role of Harm In The Criminalization of Plural Unions*, 64 EMORY L.J. 1905 (2015).

191. Eichenberger, *supra* note 145, at 1085.

192. Sarah B. Ignatius & Elisabeth S. Stickney, *Marriages Deemed to Violate Public Policy-Polygamy*, *in* IMMIGRATION LAW AND THE FAMILY (4)(III)(§ 4:19) (2015) (citing a telephone interview with Yolanda Sanchez, Senior Immigration Examiner, INS Central Office, Adjudications (Nov. 23, 1993)).

193. *Id.*

194. Eichenberger, *supra* note 145, at 1088. A similar problem happened with French reforms in the 1990s. *See* BAILEY & KAUFMAN, *supra* note 46, at 147–48.

asylum in the United States, second and third wives are ineligible for derivative benefits.[195]

Polygamy in the context of forced refugees is another delicate issue. Many polygamous refugees come from Africa,[196] and a small number are fleeing the ongoing civil war in Syria.[197] These refugees must petition for visas individually instead of as families in order to relocate and are thus forced to make a decision that may result in splitting up their families.[198] This policy also potentially subjects spouses and children to the dangers of remaining in hostile areas or going to entirely different countries than the other members of their immediate family. Wives may ultimately lose custody of their children in the course of splitting up.[199] In other cases, nonbiological relationships between spouses and children can suffer as family members are split up in different countries.[200] The absolute bar of polygamous immigrants runs afoul the general goal of immigration law, which is to help unite families and admit refugees in need.[201]

Armed conflicts have created many circumstances in which the plight of polygamous immigrants was severe. For example, in the Laotian Revolution many Hmong who had fought with the United States against the Pathet Lao and North Vietnamese regimes sought relocation in the United States.[202] Many Hmong polygamist spouses were faced with either leaving each other behind or splitting up their families in different countries through multiple relocation services—all while keeping the nature of their family secret.[203] Likewise, polygamous families in Iraq faced a similar choice after the first Gulf War.[204] However, the United States unofficially allowed the plural wives and children of men who had assisted the U.S.

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195. Eichenberger, *supra* note 145, at 1088.

196. Smearman, *supra* note 24, at 385 nn.20–21.

197. *See* Evin, *supra* note 29.

198. Eichenberger, *supra* note 145, at 1093.

199. *Id.* (citing to a Canadian example in *Awwad v. Canada* (1999), 2 F.C. 7392 (Can.)). The situation could occur where, children of the second wife are claimed as children of the father and first wife, leaving the second wife alone in the country of origin or last residence.

200. *In re* Man, 16 I. & N. 543 (B.I.A. 1978) (holding that a second wife could not have a recognized relationship to U.S. husband, but children could); *In re* Kwong, 15 I. & N. 312 (B.I.A. 1975) (holding that the mother of a beneficiary did not acquire the status of a tsip (or, a secondary wife), therefore, the beneficiary was not a legitimate child of the petitioner's father and was not entitled to benefits under the immigration). *But see In re* Fong, 17 I. & N. 212 (B.I.A. 1980) (holding that it was permissible for son of concubine to petition for the first wife of the father).

201. Otis L. Graham, *Rethinking Purposes of Immigration Policy*, CTR. FOR IMMIGR. STUD. (1991), http://cis.org/articles/1992/Rethinking.html#II ("[T]he apparent, revealed goals of U.S. immigration policy [are] to reunify families, admit refugees, meet labor force needs in a minor way, and satisfy domestic ethnic demands . . . .").

202. PAUL HILLMER, A PEOPLE'S HISTORY OF THE HMONG 216 (2009).

203. *Id*. ("Polygamy had been a part of Hmong culture for centuries."). U.S. policy toward the Hmong was that "the head of the family would chose . . . his wife that he'd apply for U.S. program with . . . and then if he had one or two or three others . . . they and their children have to come up with a resettlement solution on their own. *Id*.

204. Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273, 279 (2003).

war effort in Iraq to leave from hostile areas where it was unconscionable to leave them behind.[205]

For families that are able to successfully immigrate to the United States, their unrecognized relationships continue to generate problems. These families are unable to adjust their immigration status and gain a greater measure of stability.[206] Further, plural spouses may have to live "invisibly" within the United States because their relationships receive limited recognition and they face social stigmatization.[207] Loosening the ban on polygamous spouses and families would help alleviate pressures faced by those who are secretly practicing polygamy. Not being automatically subject to removal would help polygamous immigrants assimilate into society and feel at ease to reach out for needed services like healthcare and education.

5. History of Limited Recognition for Polygamous Marriages

The absolute bar of polygamists is also weakened by the fact that for decades U.S. courts have offered some, although quite limited, recognition for polygamous marriages. In some instances, courts have even afforded rights through those relationships.[208] As a California court noted in *In re Dalip Singh Bir's Estate*, both Canada and the United States have recognized many instances of polygamous marriages, such as marriages within Native American tribes.[209] These marriages were recognized as part of allowing native communities to govern their own affairs and interactions between the sexes.[210]

Outside of the context of probate and inheritance law mentioned in *In re Dalip Singh Bir's Estate*, polygamists have gained some favorable treatment in the areas of child custody and individual liberties. In *In re W.A.T.*, polygamists successfully refuted presumptions against their ability to act as adoptive parents.[211] In fact, the court went so far as to say that, in some situations, polygamist families

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205. *Id.*

206. Smearman, *supra* note 24, at 399–402. The burden of this policy falls harder on second and third spouses, who do not receive any benefits from this arrangement. *Id*. at 447.

207. Eichenberger, *supra* note 145, at 1093–95.

208. *In re* Dalip Singh Bir's Estate, 188 P.2d 499 (Cal. Dist. Ct. App. 1948) (two wives in India could inherit decedent husband's assets in California).

209. *Id.* at 257–58.

210. *Id*. at 260; *see also* Hallowell v. Commons, 210 F. 793, 799–800 (8th Cir. 1914); *In re* H—, 9 I. & N. 640, 642 (B.I.A. 1962); Rogers v. Cordingley, 4 N.W.2d 627, 629 (Minn. 1942); Ortley v. Ross, 110 N.W. 982, 983 (Neb. 1907).

211. *In re* W.A.T., 808 P.2d 1083, 1086 (Utah 1991) (polygamous parents were not excluded from consideration as adoptive parents solely because they were polygamous; the best interests of the child remains the central concern and standard—not the behavior or beliefs of the parents, unless such a belief shows a detrimental affect on the children); *see* Sanderson v. Tryon, 739 P.2d 623 (Utah 1987) (holding that the practice of polygamy was not enough to disqualify a parent from custody considerations; best interest of child standard governs); *see also* Lauren C. Miele, *Big Love or Big Problem: Should Polygamous Relationships Be a Factor in Determining Child Custody?*, 43 NEW ENG. L. REV. 105 (2008); R. Michael Otto, *"Wait 'Til Your Mothers Get Home": Assessing the Rights of Polygamists as Custodial and Adoptive Parents*, 1991 UTAH L. REV. 881.

might be uniquely able to meet the special needs and demands of children because more parents were in the home to contribute to parenting.[212] Further, as recognition for establishing paternity for people *in loco parentis* becomes more prevalent,[213] polygamist spouses who actively care for children have another valid argument. Given the United States' previous, limited recognition of polygamous marriages the idea of giving some degree of recognition to these relations is not entirely unsupported and the absolute ban is not entirely necessary.

6. Polygamy in Other English Common Law Based Countries and Legal Pluralism

The success of other English common law countries in regulating polygamous marriages demonstrates that the absolute bar of polygamists is unnecessary. In England and Wales, polygamous spouses are entitled to spousal support, successor rights, and state benefits.[214] Although residents of the United Kingdom cannot enter into polygamous marriages, those entered into by people domiciled in countries that recognize polygamous marriages are considered valid and are not severed upon immigration to a new home.[215] In Canada, polygamy is illegal and Canadian citizens cannot enter into polygamous marriages; however, for immigration and child legitimacy purposes, polygamous marriages entered into in other countries are considered valid and spouses enjoy limited economic rights.[216]

Polygamous marriages are legal in South Africa and recognized under the customary laws of various tribes.[217] However, prospective husbands must provide a written contract, which must be approved by a court that regulates the matrimonial

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212. *In re* W.A.T., 808 P.2d at 1086 (polygamous parents may be better able to help children with special needs and disabilities because there are more parents to support the child full time).

213. *Persons* in Loco Parentis, 59 Am. Jur. 2d Parent and Child § 9 (2016).

214. W. Cole Durham & Robert Smith, *Effect of Anti-Polygamy Laws on Immigrants*, *in* LAW AND RELIGIOUS ORGANIZATIONS § 14:32 (2013).

215. KATHERINE FAIRBAIRN, HOUSE OF COMMONS: HOME AFFAIRS SECTION, POLYGAMY, H.C. NOTE (May 8, 2014); *see also id.* at 4–5 ("For a polygamous marriage to be considered valid in the UK, the parties must be domiciled in a country where polygamous marriage is permitted, and must have entered into the marriage in that country. Provided the parties follow the necessary requirements under the law of the country in question, the marriage would be recognised [sic] in England and Wales. The law is drafted thus because the Government have [sic] no desire forcibly to sever relationships that have been lawfully contracted in other jurisdictions. This should not, however, be construed as government approval of polygamous marriage. The Government do [sic] not support polygamous marriage and support the law that prohibits parties from contracting polygamous marriages in this jurisdiction.").

216. Tse v. Canada, [1983] 2 F.C. 308, 311, ¶ 27 (Can. Fed. Ct.), Urie, J.A. (concurring in result (answering whether or not polygamous marriages from other countries are valid [. . .] answer is it seems to be "yes.")). The court recognized the legitimacy of a girl who was born to a concubine in Hong Kong. *Id*. The father resided in Ontario, so Ontario was counted as the child's residence even though the father was in Hong Kong at her birth. *Id*.; *see also* Martha Bailey et. al, *Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada*, 25 NAT'L J. CONST. L. 83 (2009).

217. Recognition of Customary Marriages Act No. 120 (1998) Government Gazette (Acts) § 2 (S. Afr.), http://www.gov.za/sites/www.gov.za/files/a120-98_0.pdf .

property system of his marriages.[218] In doing so, South African courts allow for the customary laws of various tribes to remain in force, but these laws must remain within constitutional limits.[219] In a recent case, the Constitutional Court of South Africa held that, although customary laws should be respected in their jurisdiction, ensuring protections for first wives required first wives' consent to their husbands' later marriages.[220]

In other countries, such as India and Bangladesh, English common law and longstanding cultural tradition regarding polygamous marriage conflict. In these countries, complex structures of personal-status law govern different segments of society.[221] For example, Hindu personal law may be applied to some portions of the population while Sharia law is applied to others.[222] Customary laws and practices are allowed to continue under the authority of local oversight.[223] The United States rivals all of these countries in diversity and could borrow this idea of multiple, self-imposed jurisdictions from these complex and dual systems to allow for effective regulation of different marriage traditions.

Legal systems, like those in India and Bangladesh, showcase what is commonly called "legal pluralism." Legal pluralism is a policy of intentional blindness to differences in gender, race, ethnicity, and religion.[224] Instead of fitting citizens of diversity-rich states into one mold, legal pluralism strives to find ways for smaller communities within a state to self-regulate, thus allowing for greater flexibility in lifestyle differences and cultural traditions. [225] To an extent, U.S. courts have taken similar approaches in cases involving marriages, dissolutions, and even polygamous relationships in tribal courts.[226] In tribal court cases, the court views Native Americans as in a unique position to determine their own domestic relations laws.[227] While U.S. law may be unable to fully accept a pluralistic view of law and acknowledge customary marriages, a modification would suit immigration needs. The success of other nations demonstrates that the United States' absolute ban on

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218. *Id*.

219. S. AFR. CONST. 41.6.

220. Mayelane v. Ngwenyama 2013 (4) SA 415 (CC) (S. Afr.), http://www.saflii.org/za/cases/ZACC/2013/14.html.

221. PRAKASH SHAH, PLURALISM IN CONFLICT: COPING WITH CULTURAL DIVERSITY IN LAW 94 (2005).

222. *Id.*

223. *Id.*

224. *Id*. at ix.

225. *Id*.

226. Hallowell v. Commons, 210 F. 793 (8th Cir. 1914) ("The Indians were subject, while their tribal relations existed, to the laws only of Congress, and in the absence of such laws were left to be governed by their own laws and customs as to domestic and social practices including marriage, and whether they should practice monogamy or polygamy was left wholly to them.").

227. *See, e.g.*, Kobogum v. Jackson Iron Co., 43 N.W. 602 (Mich. 1889). *Kobogum* is an early example of a court finding that traditional law of a tribe was like that of any other nation, and monogamous laws of Michigan did not necessarily govern spouses in a polygamous marriage conducted under tribal laws. *Id.* at 507–08.

polygamy is not the only, and by no means the best, workable solution to the complex issues presented by the practice of polygamy in a globalized world.

The centuries-old justifications for the ban, the success of same-sex marriage advocacy, the limited enforcement of bigamy laws, the potential harm to polygamous families, the (limited) historical recognition of polygamous marriages in the United States, and viable international systems designed to accommodate polygamous families, demonstrate that the absolute bar on polygamous immigrants may be unnecessary and even unethical. The effect of *Brown* could be the next major event to unravel justification for this policy altogether.

IV. POLYGA-WAY FOR PROGRESS

So far, this Note has examined the laws banning polygamy within the United States, polygamy around the world, and immigration laws aimed at preventing polygamous immigrants from entering the United States. It has also explored the reasoning behind these laws—both compelling and outdated—and shown how other countries handle the arrival of polygamous immigrants into their populations. This Note now proposes a viable pathway for polymmigration, and a manner in which to effectively monitor polygamous families after their arrival in the United States.

Current laws and policies are not flexible toward polygamist immigrants.[228] Although marriages conducted in other countries are typically presumed valid, marriages that violate public policy, like polygamy, are not.[229] But some conflicts of law theories allow for flexibility. A state may allow for children born into a polygamous marriage that was performed abroad to be recognized as legitimate.[230] In other cases, states allow polygamous spouses some rights in probate or other interest-based contexts.[231]

Previously, it has been suggested that a possible solution to helping polygamous immigrant families stay together was to expand humanitarian visas or institute a putative spouse doctrine.[232] *Brown* adds a new dimension to this consideration. The district court analysis in *Brown* could lay a legal foundation for

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228. *See* Annotation, *Recognition of Foreign Marriage as Affected by the Conditions or Manner of Dissolving it Under Foreign Law, or the Toleration of Polygamous Marriages*, 74 A.L.R. 1533 (1931).

229. Lord Penzance in Hyde v. Hyde and Woodmansee (1866) L.R. 1 P. & D. 130 (The idea that a "marriage as understood in Christendom is the union for life (or until its dissolution by proper divorce proceedings) of one man and one woman, to the exclusion of all others…," has given rise to the notion that any union inconsistent with the elements of exclusiveness and indissolubility, though called a marriage and valid where formed, is no marriage at all, and should not be recognized in countries the courts of which adhere to the above-stated conception of a marriage relation.).

230. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 11 (AM. LAW INST. 1971).

231. *Id*. § 284.

232. Eichenberger, *supra* note 145, at 1101; *see also* Michèle Alexandre, *Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse so as to Include De Facto Polygamous Spouses*, 64 WASH. & LEE L. REV. 1461 (2007).

granting limited protection for polygamous families and their right to cohabitate.[233] In that sense, *Brown* expands the view of the family, as did cases like *Moore v. City of East Cleveland*.[234] *Brown* recognizes that people may live together for different reasons, beyond those of sexual relationships.[235] Further, *Brown* also recognizes the growing trend of cohabitation as opposed to marriage.[236] Cohabitation is at the highest level that it has ever been in the United States, and statutes opposed to cohabitation and adultery are not being enforced.[237] It makes little sense to allow for polygamous families to live together as cohabitants in the United States, but to ban those who try to immigrate as refugees or asylees from being able to continue the same kind of family relationships.

However, even without formally recognizing polygamous marriages, polygamous families could live together as cohabitants. As such, these families could maintain their relationships and live openly instead of in secret. In doing so, these families would be more able to access legal and social services without fear of separation or negative repercussions.[238] Unlike *Brown*, a solution for polygamous immigrants must go beyond "religious cohabitation" because religion is only one—and often not the principal—reason for people to enter polygamous unions.[239] But whether as religious cohabitants or cultural cohabitants, the effect would be the same. Qualifying cohabitants could be determined by such establishing criteria like having a valid marriage performed in another country or having lived together for a set amount of years. This would help to avoid fraudulent applications or abuse of this mechanism.

The extension of marriage equality to same-sex couples provides other insights into possible solutions. Prior to states allowing same-sex marriage, many states allowed for same-sex couples to enter domestic partnerships and civil

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233. Other important areas of law would need to be addressed before a system could be implemented to handle polygamous immigration. Like other nations, the United States would have to find ways to outline marital rights between plural spouses, allocate property in cases of death, divorce, etc., the extension of legal privileges (evidentiary and otherwise), and many more. However, as discussed earlier, many nations have functional systems that address these areas and concerns.

234. Moore v. E. Cleveland, 431 U.S. 494 (1977) (holding that relationships other than those established through sanguinity could constitute families for the sake of community or housing purposes).

235. Brown v. Buhman, 947 F. Supp. 2d 1170, 1213 (D. Utah 2013) (discussing how anti-bigamy statute was not neutral because it went after religious cohabitants and not cohabitants for other reasons).

236. *Id.* at 1210 ("[O]f the 42% of Utah residents between the ages of 18 and 64 who were unmarried, 30% to 46% were currently cohabiting outside of marriage.").

237. *Id.* (noting that last adultery prosecution in Utah appears to have been in 1928).

238. Some advocates argue that legalizing polygamy will have generally positive effects. Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love is a Many Splendored Thing,"* 15 DUKE J. GENDER L. & POL'Y 315 (2008). For example, legalizing polygamy would help bring polygamist communities out of the shadows, increase involvement in society, provide services, and prevent the danger of young children being taken advantage of. *Id*. at 316; Mark Strasser, *Marriage Free Exercise and the Constitution*, 26 LAW & INEQ. 59 (2008).

239. *See supra* Section I.A.

unions.[240] In these forms, partner–cohabitant relationships were recognized and afforded property rights and privileges.[241] These relationships were something "less than marriage" but were a solution when same-sex marriage was unavailable.[242] These unions allowed for some measure of recognition that partners were a family unit and had commitments to one another. A similar approach can help alleviate some of the plights, which families secretly living in polygamous relationships often face. These polygamous relationships could be recorded like civil unions or domestic partnerships, thus granting some degree of recognition and security. It would also help polygamous families live openly in, and integrate into, society because there is no fear of living in a forbidden relationship.

There are legitimate fears that many legal complications will arise out of polygamous relationships. Currently, it is not settled how property rights and domestic relations can be regulated among more than one spouse. Further, courts fear that polygamists will commit fraud against the government, private creditors, and insurance companies through their unrecognized marital relationships. However, this fraud could be prevented by the government asking for proof of marriage, whether religious or customary, in the immigrant's home country.

The potential for confusion arising from domestic relations litigation within polygamous families could cause difficulties for judges to resolve issues in divorce. For example, if one wife divorces, to what extent may she seek marital assets that belong to the husband or the other wives? For community property states, this problem is even more complicated because it would negate the presumption of 50% ownership of assets.

However, looking to other nations may provide an answer. As discussed above, nations like South Africa require express contracts between spouses before a person can take a secondary spouse.[243] Just as many U.S. citizen couples enter into prenuptial agreements, polygamous immigrants could do the same as a part of their immigration process, or soon thereafter. In situations involving marriage contracts (even religiously based) that have been entered into prior to immigration, courts should enforce them to the extent that they are reasonable, focus on property rights, and not impose religious duties.[244] Further, as cohabitants, polygamist immigrants could find redress as other cohabitants have done.[245] Parents could also be asked to establish paternity through testing to verify family relations of spouses and children.

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240. *See* Jes Kraus, *Monkey See, Monkey Do: On Baker, Goodridge, and the Need for Consistency in Same-Sex Alternatives to Marriage*, 26 VT. L. REV. 959, 961 (2002).

241. *Id.* at 985–86.

242. Baker v. State, 744 A.2d 864 (Vt. 1999) (led to legislative response making civil unions); *see also* CONN. PUB. ACT 05-10 (2005) (Connecticut's version). Exact forms like domestic partnerships and civil unions differ generally and from location to location; however, the general idea is to provide something less than full recognition of marriage. *See* Kraus, *supra* note 240, at 984–86.

243. Recognition of Customary Marriages Act of 1998 (S. Afr.) (Dec. 2, 1998), http://www.gov.za/sites/www.gov.za/files/a120-98_0.pdf.

244. *See, e.g.*, Ghada G. Qaisi, Note, *Religious Marriage Contracts: Judicial Enforcement of Mahr Agreements in American Courts*, 15 J.L. & RELIGION 67, 79–80 (2002).

245. For example, palimony has become a relief option for couples who have cohabitated together without any formal marriage or other union. William H. Danne, Jr.,

All of these factors raise the question of whether an absolute ban on polygamy is necessary and, in light of the district court decision in *Brown*, even constitutionally valid. Practical systems allowing polygamy are working in other nations and greater rights are being recognized in the United States. Numerous laws exist to punish the feared dangers of polygamous marriages. While the Tenth Circuit Court of Appeals declined to reach the merits in *Brown*, successful challenges to anti-polygamy statutes could be in the future for polygamous immigrants.

CONCLUSION

It is unresolved whether the love that is in the air will extend to polygamous relationships. However, with growing numbers of immigrants coming to the United States from countries where polygamy is legal, a solution is needed to keep families together. Imperialist and racial supremacist views regarding polygamy are diminishing, as are many other stereotypes against once frowned upon lifestyles. People practice polygamy in many forms and for many reasons, including the ability to reap religious, social, and economic benefits and to uphold tradition. While Sister Wives may have started as a quirky show on TLC showing the world a new perspective on polygamy, the district court decision in *Brown* could ultimately influence other polygamists to challenge anti-polygamy statutes and provide a vehicle to enact policy changes that affect the lives of polygamist immigrants making their new home in the United States.

"Palimony" Actions for Support Following Termination of Nonmarital Relationships, 21 A.L.R. 6th 351 (2007).