

**USE IT OR LOSE IT: THE ENFORCEMENT OF POLYGAMY LAWS
IN AMERICA**

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I. INTRODUCTION

Throughout the past decade, polygamy¹ has been thrust into the

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1. This Note construes the term polygamy as the practice in which a man or woman is married to multiple spouses. See BLACK'S LAW DICTIONARY 1197 (9th ed. 2009). This practice is sometimes referred to as bigamy, especially in state statutes. See, e.g., UTAH CODE ANN. § 76-7-101(1) (West 2013) ("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."); § 76-7-101(2) ("Bigamy is a felony of the third degree."). At times this Note will use the words bigamy and polygamy interchangeably, depending on the wording of the statute at issue. However, the analysis in this Note does not include polyamory. For a legal discussion of polyamory, see Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 444 (2003) (defining polyamory as "all forms of multi-partner relating") (internal quotation marks omitted).

spotlight in America,² being portrayed in the news, in reality television shows, and in popular books.³ From the raids in Texas, raising accusations of child abuse and statutory rape,⁴ to the popular

2. See, e.g., Libby Copeland, *Is Polygamy Really So Awful?: A New Study Shows that Despite What You See on Reality TV, Plural Marriage Isn't Very Good for Society*, SLATE, (Jan. 30, 2012, 5:18 PM), http://www.slate.com/articles/double_x/doublex/2012/01/the_problem_with_polygamy.html (“These are boom times for memoirs about growing up in, marrying into or escaping from polygamous families. Sister wives appear as minor celebrities in the pages of *People*, piggybacking on their popular reality TV show. . . . Americans are fixated these days on polygamy, and it’s fair to say we don’t know how to feel about it.”).

3. See *Polygamists Share Their Faith and Family Lives*, NAT’L PUB. RADIO (Aug. 19, 2011, 12:00 PM), <http://www.npr.org/2011/08/19/139784963/polygamists-share-their-faith-and-family-lives> (“Polygamy has become a hot topic in popular American culture thanks, in part, to television programs like ‘Big Love’ and ‘Sister Wives’ and with recent news coverage of the sexual assault conviction of polygamist leader, Warren Jeffs.”). Many popular novels have been published on the topic of fundamentalist Mormonism and polygamy, telling the stories of mothers and children trapped in oppressive communities. See, e.g., CAROLYN JESSOP WITH LAURA PALMER, *ESCAPE* (2008) (telling the story of a woman’s abusive and arranged, polygamous marriage and her eventual escape from an oppressive polygamous sect); ELISSA WALL WITH LISA PULTZER, *STOLEN INNOCENCE: MY STORY OF GROWING UP IN A POLYGAMIST SECT, BECOMING A TEENAGE BRIDE, AND BREAKING FREE OF WARREN JEFFS* (2008) (detailing the story of a young teenager’s forced marriage and the abuse and rape she endured for years); BRENT W. JEFFS WITH MAIA SZALAVITZ, *LOST BOY: THE TRUE STORY OF ONE MAN’S EXILE FROM A POLYGAMIST CULT AND HIS BRAVE JOURNEY TO RECLAIM HIS LIFE* (2009) (describing the difficulties boys face growing up in Mormon fundamentalist sects). There have also been a multitude of books detailing the corruption and rampant abuses practiced by fundamentalist leaders. See, e.g., JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF A VIOLENT FAITH* (2003) (tracing the development of Mormonism from New York to Utah and arguing that the faith has developed a dangerous and deadly fundamentalist sect); DEBRA WEYERMANN, *ANSWER THEM NOTHING: BRINGING DOWN THE POLYGAMOUS EMPIRE OF WARREN JEFFS* (2011) (detailing the abuses practiced by Warren Jeffs); STEPHEN SINGULAR, *WHEN MEN BECOME GODS: MORMON POLYGAMIST WARREN JEFFS, HIS CULT OF FEAR, AND THE WOMEN WHO FOUGHT BACK* (2009) (detailing the corrupt leadership of Warren Jeffs and his attempts to elude prosecution for his crimes).

4. After receiving an anonymous phone call about child abuse at a polygamous compound led by Warren Jeffs, Texas law enforcement raided the ranch and removed 416 children. Ralph Blumenthal, *52 Girls Are Taken from Mormon Sect’s Ranch in Texas*, N.Y. TIMES, Apr. 5, 2008, at A11; Gretel C. Kovach & Kirk Johnson, *Officials Tell How Sect in West Texas Was Raided*, N.Y. TIMES, Apr. 11, 2008, at A16. The children were removed because law enforcement “had reason to believe they had been abused or were at immediate risk of future abuse.” Blumenthal, *supra*. One hundred thirty-nine women left the compound voluntarily to help care for the removed children. Kovach & Johnson, *supra*. While the children were removed for their own safety, there were conflicting reports about their placement within the child welfare system and questions as to whether removal was necessary in the first place. See Kirk Johnson & Gretel C. Kovach, *Dispute on Treatment of Children After Raid*, N.Y. TIMES, Apr. 17, 2008, at A20 (“A spokesman for the State Department of Family and Protective Services said Wednesday that the children, most of whom are now at the San Angelo Coliseum, a midsize multipurpose arena, were doing well, eating good food and happily playing ball. . . . Some mothers, however, painted a different picture. Separated from

television show *Big Love*, depicting a modern polygamist family trying to live in mainstream society,⁵ many Americans have become intrigued with the practice of polygamy. This growing presence has led some to question the legal status of polygamy and its morality.⁶ These questions are fueled by the growing acceptance of sexual freedom and privacy as evidenced by the Supreme Court's decisions in *Lawrence v. Texas*,⁷ *United States v. Windsor*,⁸ and *Hollingsworth*

their offspring on Monday so that the older children could be questioned about abuse that may have occurred at the compound, the mothers said their children . . . had wanted only to go home. Colds and a wave of chickenpox had swept through . . . [their] quarters . . ."); Kirk Johnson, *Separated From Children, Sect Mothers Share Tears*, N.Y. TIMES, Apr. 16, 2008, at A15 ("Mothers separated from their children after the police raid on a polygamist compound in West Texas have spoken out for the first time, denouncing the authorities in tear-filled accounts."). Thus, the raids drew criticism, causing some to question which mechanism was better for dealing with the problems of polygamy: the criminal justice system or the child welfare system. See Martin Guggenheim, *Texas Polygamy and Child Welfare*, 46 HOUS. L. REV. 759 (2009) for further discussion of this topic.

5. *Big Love: About the Show*, HBO, <http://www.hbo.com/big-love/about/index.html>; see also Timothy Egan, *Notice Anything Funny About the Folks Next Door?*, N.Y. TIMES, Feb. 19, 2006, at A1.

6. See, e.g., Jonathan Turley, Op-Ed., *One Big, Happy Polygamous Family*, N.Y. TIMES, July 21, 2011, at A27, available at www.nytimes.com/2011/07/21/opinion/21turley.html.

7. 539 U.S. 558 (2003). Some argue that the precedent of sexual privacy established in *Lawrence* may be extended to other prohibited acts, such as incest and polygamy. See, e.g., *id.* at 590 (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding."); Sean Loughlin, *Santorum Under Fire for Comments on Homosexuality*, CNN, (Apr. 22, 2003, 9:10 PM), <http://www.cnn.com/2003/ALLPOLITICS/04/22/santorum.gays/> (quoting Sen. Rick Santorum) ("If the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything."). However, many reject the linkage between same-sex marriage and polygamy, cautioning people about these slippery slope arguments. As Hema Chatlani explains:

The primary argument set forth by opponents of gay marriage is that opening the door to same-sex marriage will result in a parade of horrors, such as bestiality, incest, and polygamy. The concern is as follows: If the state can no longer rely on morality to justify prohibiting same-sex marriage, how will it be able to defend the illegality of polygamy? The answer is simple. The two institutions are distinguishable because there are a number of social ills historically prevalent in polygamy that are not present in same-sex marriages. "Incest, statutory rape, physical, sexual[,] and emotional abuse, deprivation of education, and forced marriages of young girls are endemic to all of the polygamist communities," but not to homosexual unions.

Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101,

v. Perry,⁹ as well as changing social norms on the definition of family.¹⁰

Despite what seems to be a growing acceptance of the practice, polygamy remains illegal in all fifty states.¹¹ However, with the exception of a few infamous fundamentalist leaders, polygamists are generally ignored by law enforcement today,¹² which raises questions about the practice's criminal status and its prosecution. While there are scholars on both sides of the issue arguing about the rationales for legalizing polygamy,¹³ there is very little debate about the current enforcement regime and its effects, which are the focus of this Note. By disregarding and selectively enforcing polygamy laws, state governments are failing to advance the purported protective goals of polygamy legislation and negating the purpose of the laws, while also

128 (2006) (alteration in original) (citation omitted).

While the constitutionality of anti-polygamy laws is debated by many given the reasoning set forth in *Lawrence*, as well as religious issues raised by the Constitution's Free Exercise Clause, such analysis is outside the scope of this Note, which will primarily focus on the current inequality created by the selective enforcement of polygamy statutes. See Kristen A. Berberick, *Marrying into Heaven: The Constitutionality of Polygamy Bans Under the Free Exercise Clause*, 44 WILLAMETTE L. REV. 105 (2007) for a discussion of the free exercise argument.

8. 133 S. Ct. 2675 (2013).

9. 133 S. Ct. 2652 (2013).

10. See, e.g., Lisa Miller, *Polygamy May Be Hot, but in Marriage, Three's Still a Crowd*, ONFAITH (Oct. 5, 2012), <http://www.faithstreet.com/onfaith/2012/10/05/polygamy-may-be-hot-but-in-marriage-threes-still-a-crowd> ("Beneath the sensationalism, there lies a real question. If Americans increasingly value their rights to privacy and liberty above historical social norms, then why should the state not legally approve other unconventional domestic set-ups?").

11. See, e.g., MICH. COMP. LAWS § 750.439 (2009) ("Any person who has a former husband or wife living, who shall marry another person, or shall continue to cohabit with such second husband or wife, in this state, he or she shall . . . be guilty of the crime of polygamy, a felony."); ARIZ. REV. STAT. ANN. § 13-3606 (2010) (West) ("A person having a spouse living who knowingly marries any other person is guilty of a class 5 felony."); UTAH CODE ANN. § 76-7-101 (West 2013) ("(1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person. (2) Bigamy is a felony of the third degree."); N.Y. PENAL LAW § 255.15 (McKinney 2013) ("A person is guilty of bigamy when he contracts or purports to contract a marriage with another person at a time when he has a living spouse, or the other person has a living spouse.");

12. See *infra* Part IV.

13. Compare Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS L. REV. 353, 430 (2003) (explaining the various harms polygamy causes and concluding that "decriminalization is not an option") with JANET BENNION, POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM 163, 242-43 (2012) (maintaining that the arguments in support of polygamy criminalization are invalid and concluding that the practice should be deregulated).

restraining law-abiding citizens from entering into the practice.¹⁴ Thus, the current state of polygamy legislation operates in an illogical middle ground and undermines the legitimacy of the criminal justice system.¹⁵ Therefore, federal and state governments need to reform their stance on polygamy and either decriminalize polygamous relationships or enforce the statutes disallowing them.¹⁶

First, this Note will provide a brief history of polygamy legislation and its implementation.¹⁷ Second, it will look at the current practice of polygamy in America and the enforcement of the laws proscribing it.¹⁸ Third, it will demonstrate how the current prosecution of polygamy is ineffective and fails to advance any compelling purpose.¹⁹ Fourth, it will explain why the selective enforcement of polygamy statutes is a problem, as well as offer reasons why law enforcement uses this illogical method.²⁰ Last, it will discuss alternative models for dealing with polygamy—complete enforced prohibition and total legalization—demonstrating how these are both superior to the current selective enforcement.²¹

II. HISTORY OF POLYGAMY STATUTES AND CASE LAW

To understand the current state of polygamy and its criminalization in America, one must consider its history.²² Polygamy prosecution has waxed and waned throughout the country's history. Periods of intense raids on the practice are interspersed with stretches of general prosecutorial disregard. Historically, the main practitioners of polygamy in America were Mormon populations, and thus, were, and arguably still are, the target of polygamy laws.²³

14. *See infra* Part IV.

15. *See infra* Part V.

16. *See infra* Part VII.

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part V, VI.

21. *See infra* Part VII.

22. In analyzing the history of polygamy in the United States, this Note does not discuss the practice of polygamy by Native Americans because their tribal marriage practices supersede state law. *See* Todd M. Gillet, Note, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 508 (“Native Americans are allowed to marry according to their customs as long as they ‘are members of a tribe recognized and treated with as such by the United States government.’ If a tribe has a recognized custom of polygamy a Native American of that tribe may enter into such a polygamous marriage, even if it conflicts with state law.”) (quoting *Hallowell v. Commons*, 210 F. 793, 800 (8th Cir. 1914)).

23. *See* Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131, 132 & n.14 (2004) (“Experts estimate that more than thirty thousand—and as many at [sic] one hundred thousand—Fundamentalist Mormons currently practice polygamy in Utah, Arizona, Canada, and Mexico.”).

The creation and development of the Mormon religion is closely tied to early polygamy legislation. The Church of Latter Day Saints began in upstate New York as a byproduct of the Second Great Awakening in the early nineteenth century.²⁴ Mormon followers did not initially practice polygamy, and plural marriage did not become popular within the faith until the late 1850s.²⁵ However, Mormon followers “encountered conflicts with non-Mormon locals” from the very beginning of the religion, as many non-believers feared that Mormons “sought to dominate political office at the local, state, and even federal level.”²⁶ Furthermore, Mormons were often viewed as outsiders, as they “rejected much of nineteenth-century American culture” and perceived themselves as “step[ping] out of the profane world and into a new spiritual space.”²⁷ As a result of their conflicts with nonbelievers, the Mormon community migrated across America, eventually settling in Utah with the hope of being able to freely practice their religion.²⁸ However, many Americans continued to see Mormonism and polygamy as a threat to American values, and efforts were made to “ban the practice of polygamy by prosecuting polygamists, disenfranchising Church members, and financially crippling the LDS Church itself.”²⁹

The first piece of legislation formally banning polygamy was the Morrill Anti-Bigamy Act.³⁰ The Act expressly outlawed bigamy, which was defined as when a person with a living husband or wife marries another person.³¹ The Act was unsuccessful in curtailing polygamy because Mormon juries refused to convict their peers.³² Despite the largely ineffective nature of the Act, “the existence of the law, the continued attention the federal government was paying to

24. SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 19 (Thomas A. Green & Hendrick Hartog eds., 2002).

25. Ward, *supra* note 23, at 134; *see also* Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL’Y 101, 109 (2006).

26. Sigman, *supra* note 25, at 111.

27. Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 739 (2003).

28. *See id.* at 743.

29. Sigman, *supra* note 25, at 118; *see also* NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 73 (2000) (“Utah presented more than a religious and social aberration. It was a political threat to the integrity of the United States. Popular novels published in the 1850s, with titles such as *Mormonism Unveiled* and *Female Life among the Mormons*, equated polygamy with political tyranny, moral infamy, lawlessness, and men’s abuse of women; monogamy in contrast represented national morality and lawful authority.”).

30. Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862) (repealed 1882); *see also* MARTHA BAILEY & AMY J. KAUFMAN, *POLYGAMY IN THE MONOGAMOUS WORLD: MULTICULTURAL CHALLENGES FOR WESTERN LAW AND POLICY* 86 (2010).

31. Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (repealed 1882).

32. GORDON, *supra* note 24, at 83.

anti-polygamy efforts, and the general anti-polygamy sentiment in the rest of the country prompted the Mormon leaders to” challenge the law’s constitutionality in *Reynolds v. United States*.³³ Mormons contended that the Act constrained their free practice of religion, violating the First Amendment; however, this argument was unsuccessful.³⁴ The Court held that polygamy was not protected under the Free Exercise Clause of the Constitution, explaining that “[l]aws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.”³⁵ This decision “galvanized the anti-polygamy movement further,”³⁶ transforming “Mormon Utah from an alternate society (however dangerous) into [an] unconstitutional deviance.”³⁷

33. BAILEY & KAUFMAN, *supra* note 30, at 87; *see also* *Reynolds v. United States*, 98 U.S. 145 (1878).

34. *See Reynolds*, 98 U.S. at 166-67 (stating that the Act was “constitutional and valid”).

35. *Id.* at 166. The Court further explained that “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.” *Id.* at 164. “The Court thus drew a distinction between beliefs and actions; the free exercise [clause] limited government regulation of the former, but not the latter.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1295 (4th ed. 2011). Following the Court’s reasoning, Mormons are free to believe in the importance of polygamy, but can be forbidden from practicing it. *See Reynolds*, 98 U.S. at 166 (“[W]hile [laws] cannot interfere with mere religious belief and opinions, they may with practices.”); *see also* *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (“The freedom to hold religious beliefs and opinions is absolute However, the freedom to act, even when the action is in accord with one’s religious convictions, is not totally free from legislative restrictions.”); *Shepp v. Shepp*, 906 A.2d 1165, 1174 (Pa. 2006) (finding that a child’s stepfather’s belief in and advocacy for fundamentalist Mormonism and polygamy did not constitute a threat of great harm to a child so as to justify limiting the stepfather’s constitutional rights). However, courts have heard several additional cases on the constitutionality of polygamy regulations. *See, e.g.*, *Bronson v. Swenson*, 500 F.3d 1099, 1107-09 (10th Cir. 2007) (quoting *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004) (finding that a husband with his wife and his fiancée, who were denied a second marriage license, did not have standing to challenge the constitutionality of Utah’s criminal prohibition of polygamy because they could not demonstrate “a ‘credible’ threat of prosecution . . . that arises from an ‘objectively justified fear of real consequences’” because there was no evidence that they realistically feared prosecution for polygamy); *State v. Fischer*, 199 P.3d 663, 666-69 (Ariz. Ct. App. 2008) (holding that defendant’s prosecution for sexual conduct with a minor, who he claimed was “one of his plural wives,” did not violate his free exercise rights); *State v. Holm*, 137 P.3d 726, 742-45 (Utah 2006) (finding that Utah’s bigamy statute did not violate defendant’s freedom of association or his due process rights); *State v. Green*, 99 P.3d 820, 825-26 (Utah 2004) (finding that statute banning bigamy did not violate defendant’s free exercise of religion). For a further discussion of the history of polygamy and the Free Exercise Clause, *see* Richard A. Vasquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 225 (2001).

36. BAILEY & KAUFMAN, *supra* note 30, at 89.

37. GORDON, *supra* note 24, at 149.

Thus, “reformers of all kinds—women’s rights advocates, educators, church leaders, politicians, presidential platforms, state legislatures, the Supreme Court, and the American Congress—all harshly condemned polygamy.”³⁸

With this increased support, in 1882 Congress responded to the Morrill Act’s failure and the success of *Reynolds* by passing the Edmunds Act, which added several provisions to help enforce polygamy prohibition.³⁹ In addition to bigamy, the Act criminalized cohabitation.⁴⁰ It also suggested that anyone who “believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman” may be unfit to serve as a juror.⁴¹ In addition, people who engaged in polygamy “were disenfranchised and could not hold [public] office.”⁴² These new additions to the fight against polygamy resulted in a much larger number of indictments.⁴³ After *Reynolds*, Mormons continued to fight federal laws aimed at curtailing polygamy, but they were largely unsuccessful.⁴⁴

Eventually crippled by Congress’s efforts to stamp out polygamy, Mormon Church leadership issued a manifesto abandoning polygamy.⁴⁵ While polygamy was officially rejected by the Church, many Mormons continued to practice it until the Church threatened to excommunicate polygamous believers in the 1930s.⁴⁶ As a result, “[t]he vast majority” of Mormons abandoned the practice.⁴⁷ However, some Mormons continued to embrace polygamy and developed fundamentalist communities.⁴⁸ These fundamentalists “d[o] not believe the Church of Latter-day Saints had the authority to issue a manifesto in 1890 banning plural unions” and “that if an ‘eternal principle’ was valid at one time it was valid for all times.”⁴⁹ Thus, they believe the Church was wrong to ban the practice and continue to believe that polygamy is a fundamental tenet of the Mormon faith.⁵⁰

38. PHILLIP L. KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 70 (1994).

39. BAILEY & KAUFMAN, *supra* note 30, at 90.

40. Edmunds Act, ch. 47, 22 Stat. 30, 30-32 (1882) (repealed 1983).

41. *Id.* at 31.

42. BAILEY & KAUFMAN, *supra* note 30, at 90.

43. *Id.* at 90-91.

44. Jeffrey Michael Hayes, Comment, *Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists*, 3 STAN. J. C.R. & C.L. 99, 103 (2007).

45. *Id.* at 103-04.

46. BAILEY & KAUFMAN, *supra* note 30, at 94.

47. *Id.*

48. *Id.* at 94-97.

49. *Id.* at 96-97 (internal quotation omitted).

50. *See id.*

For decades the government largely ignored the pockets of polygamous communities; however, prosecution was resurrected in the mid-twentieth century, culminating with police raids on a polygamous community in Short Creek, Arizona.⁵¹ The driving force behind the raids was Arizona governor Howard Pyle, who felt the children in the polygamous community needed to be saved, as they were “white slaves who are without hope of escaping this degrading slavery from the moment of their birth.”⁵² During the raid “almost the entire population of Short Creek [was] taken into police custody,” with charges ranging from “statutory rape, adultery, bigamy, open and notorious cohabitation, contributing to the delinquency of minors, marrying the spouse of another, and an all-embracing conspiracy to commit all of these crimes.”⁵³ In addition, there were also charges involving “income tax evasion, failure to comply with Arizona’s corporation laws, misappropriation of school funds . . . [and] falsification of public records.”⁵⁴ It took “years for all the cases to be heard,” and most were either dismissed or plea-bargained to suspended sentences.⁵⁵ The children in state custody were also eventually “returned to their parents.”⁵⁶

Accordingly, the raid was deemed a failure and has been historically characterized as “an unprecedented effort[] by American law enforcement to destroy a peaceful community, eradicate family relationships, and scatter a people to the winds.”⁵⁷ It is often viewed as the “climax of government prosecution[] of polygam[y],” which “backfired in a storm of public criticism for its perpetrators and in enormous financial costs to the government.”⁵⁸

The failure of the raid ushered in another era in which polygamy was largely ignored.⁵⁹ This general disregard continues today, with a few important exceptions, and will be explained in Part IV.

III. CURRENT PRACTICE OF POLYGAMY IN AMERICA

In order to analyze how polygamy laws are being enforced, one must understand where and how polygamy is currently being practiced in the United States.⁶⁰ The group most associated with

51. *Id.* at 96-97, 101-02.

52. *Id.* at 96, 102 (internal quotation marks and footnote omitted).

53. *Id.* at 102 (internal quotation marks and footnote omitted).

54. *Id.* (internal quotation marks and footnote omitted).

55. *Id.* at 103.

56. *Id.*

57. D. Michael Quinn, *Plural Marriage and Mormon Fundamentalism*, in 2 *FUNDAMENTALS AND SOCIETY: RECLAIMING THE SCIENCES, THE FAMILY, AND EDUCATION* 245 (Martin E. Marty & R. Scott Appleby eds., 1993).

58. *Id.* at 272.

59. *See id.* at 272-73.

60. While the focus of this Note is polygamy in the United States, American

polygamy today is Mormon fundamentalists.⁶¹ There are “[a]t least 21,000 Mormon fundamentalists” living in the western United States.⁶² As many as seventy-five percent of these followers were born into their fundamentalists groups.⁶³ Further, “[m]any fundamentalists today are members of families that have an unbroken pattern of polygamy extending well before [] 1890.”⁶⁴

Although American society tends to group all Mormon fundamentalists together, they actually consist of several different, independent religious sects with their own unique characteristics.⁶⁵ Each sect has their own leadership and their communities are all run differently.⁶⁶ These groups also differ greatly in their interactions with the outside world, in their relationships within the sect, and in the prevalence of abuse within their communities.⁶⁷ For example, the Fundamentalist Church of Jesus Christ of Latter Day Saints (“FLDS”), previously headed by Warren Jeffs, has had several abuse allegations and convictions,⁶⁸ whereas a division of the Apostolic United Brethren (“AUB”), located in Pinedale, Montana, has had no abuse-related scandals.⁶⁹ These groups also differ greatly in the degree to which they interact with the outside world.⁷⁰ While FLDS is very isolationist,⁷¹ the AUB group in Pinedale coexists amicably

polygamous groups have spread to Canada. Polygamy is also illegal in Canada and law enforcement there faces similar problems as it does here. *See Polygamy in Canada: Hunting Bountiful*, ECONOMIST, July 8, 2004.

61. *See* Strassberg, *supra* note 13, at 354 (noting that there are ten times as many Mormon fundamentalists partaking in polygamous marriages today than in the original Mormon community).

62. *Id.*

63. Quinn, *supra* note 57, at 251.

64. *Id.*

65. For a discussion of the various fundamentalist Mormon sects and how they formed, see Janet Bennion, *History, Culture, and Variability of Mormon Schism, in MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL, AND LEGAL ISSUES*, 101 (Cardell K. Jacobson & Lara Burton eds., 2011).

66. *Id.* at 102-106.

67. *Id.* at 110-11.

68. *Id.* at 105 (“In the FLDS group, for example, Rodney Holm was convicted in 2003 of unlawful sexual conduct with a 16-year-old girl. In 2007 Warren Jeffs was convicted of contracting a sexual alliance with between a 14-year-old, an 18-year-old, and of raping a male minor. Also, in 2005, ten FLDS men were indicted for sexual contact with minors. The FLDS also has the world’s highest incidence of fumarase deficiency, a genetic disorder resulting from cousin marriage . . . The deficiency causes encephalopathy and mental retardation . . . Jeremy Kingston was sentenced in 2004 for taking his 15-year-old cousin as a fourth wife. John Kingston was also accused of beating his daughter because she would not remain in a marriage to his brother . . . David [Kingston] was charged with ‘incest and unlawful sexual conduct’ with his 16-year-old niece, who was also his fifteenth wife.”). *Id.* at 101, 105.

69. BENNION, *supra* note 13, at 163-64.

70. *See id.*

71. Warren Jeffs has told his followers “to separate themselves from the ‘apostates’

with their neighbors, interacting with them on a daily basis.⁷²

There are also various polygamist Mormon families living in mainstream America.⁷³ For example, the reality television show *Sister Wives* documents the life of Cody Brown and his four wives and seventeen children.⁷⁴ These polygamists flaunt their beliefs with little fear of prosecution, given law enforcement's general disregard. One open polygamist living in Utah told a reporter, "I'm not a bit afraid of the law It's not even worth worrying about."⁷⁵

In addition to Mormon groups, there are Muslim polygamists in the United States.⁷⁶ For example, a large polygamous African American community resides in Philadelphia, which is actually the largest concentration of polygamists in the country.⁷⁷ Adrienne Davis attributes this surge of polygamy to the "combination of conversions to Islam, currents of racial nationalism, and the demographic effects of male incarceration and underemployment."⁷⁸ This polygamist community remains relatively unknown to most Americans;⁷⁹ and while Mormon fundamentalists are depicted in countless news stories,⁸⁰ there is only one readily available National Public Radio story on Muslim polygamists.⁸¹

There are also some reports about polygamy being practiced by recent immigrants throughout the country, but especially in New York.⁸² Some men live with multiple wives in the United States,

around them" and has mandated that the children of the polygamous community not attend public schools. Andrew Murr, *Strange Days in Utah*, NEWSWEEK, Nov. 13, 2000, at 74.

72. BENNION, *supra* note 13, at 164 ("The Pinedale community has a positive relationship with neighboring townships and works with the police on common goals. Pinedale community members send their children to the same high school that the children of nonfundamentalists attend, and they shop at the same stores and work in the same industries as nonfundamentalists do.").

73. *See infra* note 82.

74. *Sister Wives*, IMDB.COM, <http://www.imdb.com/title/tt1721666/> (last visited Feb. 7, 2014).

75. Timothy Egan, *The Persistence of Polygamy*, N.Y. TIMES, Feb. 28, 1999, at 651 (internal quotation marks omitted).

76. *See infra* note 77.

77. Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1979 (2010); Barbara Bradley Hagerty, *Philly's Black Muslims Increasingly Turn to Polygamy*, NAT'L PUB. RADIO, May 28, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=90886407>.

78. Davis, *supra* note 77, at 1974.

79. *See id.* at 1970.

80. *See id.* at 1966.

81. Hagerty, *supra* note 77, at 1-5.

82. Nina Bernstein, *Polygamy, Practiced in Secrecy, Follows Africans to New York*, N.Y. TIMES, Mar. 23, 2007, at A1, available at http://www.nytimes.com/2007/03/23/nyregion/23polygamy.html?pagewanted=all&_r=0.

while others have one wife here and others abroad.⁸³ However, there is very little information about the practice because “polygamy is grounds for exclusion from the United States” under immigration law.⁸⁴

IV. SELECTIVE ENFORCEMENT, PROSECUTORIAL DISREGARD, AND GENERAL INEFFECTIVENESS

Despite the existence of polygamist communities and open polygamists in mainstream American culture,⁸⁵ polygamy is generally ignored by law enforcement and statutes are only selectively enforced.⁸⁶ Law enforcement in both Utah and Arizona are aware of the number of polygamists who reside within their borders;⁸⁷ however, little is done to enforce polygamy statutes.⁸⁸ In 2001, Tom Green was the first person to be prosecuted for polygamy in Utah since the 1960s, further illustrating the point that polygamy frequently goes unprosecuted.⁸⁹

Even when polygamists openly display their lifestyle, law enforcement officers still generally ignore them. For example, the Brown family on *Sister Wives* openly flaunts their lifestyle for a

For a further discussion about polygamy and its relationship to immigration law, see Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382 (2009).

83. Bernstein, *supra* note 82.

84. *Id.* (“No one knows how prevalent polygamy is in New York. Those who practice it have cause to keep it secret No agency is known to collect data on polygamous unions Don't-ask-don't-know policies prevail in many agencies that deal with immigrant families in New York, perhaps because there is no framework for addressing polygamy in a city that prides itself on tolerance of religious, cultural, and sexual difference—and on support for human rights and equality.”).

85. See, e.g., Judy Mann, *The Brutal Truth About Polygamy*, WASH. POST, Apr. 12, 1998 (“One of Utah's best-known dirty little secrets is that polygamy flourishes there, more than a hundred years after it was banned by the state and the Mormon Church.”).

86. See, e.g., UTAH ATTORNEY GENERAL'S OFFICE & ARIZONA ATTORNEY GENERAL'S OFFICE, THE PRIMER: A GUIDEBOOK FOR LAW ENFORCEMENT AND HUMAN SERVICES AGENCIES WHO OFFER ASSISTANCE TO FUNDAMENTALIST MORMON FAMILIES 4 (2011) [hereinafter PRIMER], available at http://media.wix.com/ugd/4ceccd_3cf54999dcbc9a4bf48463ce41ede11b.pdf (“Bigamy is illegal in Utah, and plural marriages are prohibited in the Utah and Arizona constitutions. However, both states appear to have decided to focus law enforcement efforts on crimes within the polygamous communities that involve child abuse, domestic violence and fraud.”).

87. *Id.* at 7. (“A recent, informal survey indicated [that] there are approximately 38,000 people (residing primarily in the Rocky Mountain Region) who consider themselves to be Fundamentalist Mormons.”).

88. *Id.* at 8. (“Bigamy laws have not frequently been enforced against consenting adult polygamists.”).

89. Ryan D. Tenney, *Tom Green, Common-Law Marriage, and the Illegality of Putative Polygamy*, 17 BYU J. PUB. L. 141, 142 (2002).

reality show on national television, yet no one in the family has been formally prosecuted.⁹⁰ There are also newspaper articles and National Public Radio stories about polygamists, but law enforcement rarely investigates these sources.⁹¹

The rare prosecutions generally involve polygamists who live within secluded fundamentalist communities. For example, Tom Green was convicted of polygamy,⁹² and Warren Jeffs was charged with it.⁹³ Green marked the first prosecution in decades and garnered national attention.⁹⁴ Further, Green's case is especially interesting given the legal position he took. Unlike the Mormon Church's arguments in *Reynolds*, Green did not pursue his claim from a constitutional angle.⁹⁵ Instead, he argued that he was only legally married to one wife at a time and that his other marriages were "spiritual."⁹⁶ Green explained, "In the eyes of the government, I consider myself single. . . . In the eyes of God, I consider myself married."⁹⁷ Thus, he maintained that he was not a bigamist in the legal sense. Indeed, Green would systematically marry one woman, then divorce her and marry another woman.⁹⁸ However, his relationship with the women would not change after the divorce, as Green would still treat each woman as his wife.⁹⁹ The State, on the

90. When the show started "Utah County prosecutors announced [that] they were investigating" the family. Lindsay Whitehurst, *Utah County Won't Prosecute Sister Wives for Bigamy*, SALT LAKE TRIB., (June 1, 2012, 11:56 AM), <http://www.sltrib.com/sltrib/news/54219956-78/utah-county-policy-bigamy.html.csp>. However, the county prosecutor ultimately decided not to bring charges. *Id.*

91. See *infra* note 111 and accompanying text.

92. Hannah Wolfson, *A Utah Man with 5 Wives Is Convicted of Bigamy*, N.Y. TIMES, May 20, 2001, at 23. Green was convicted by a jury "on four counts of bigamy and one count of failing to pay child support." *Id.*

93. ASSOCIATED PRESS, *Bigamy Charges Against Polygamist Leader Warren Jeffs Dropped*, CBSNEWS.COM, Oct. 18, 2012, 2:10 AM, http://www.cbsnews.com/8301-201_162-57534778/bigamy-charges-against-polygamist-leader-warren-jeffs-dropped/ [hereinafter *Jeffs*].

94. Julie Cart, *Polygamy Verdict Set Precedent*, L.A. TIMES, May 19, 2001 at A18, available at <http://articles.latimes.com/2001/may/20/news/mn-392> ("[A] Utah jury found outspoken polygamist Tom Green guilty of four counts of bigamy—bringing to an end the state's first polygamy prosecution in nearly 50 years.").

95. Tenney, *supra* note 89, at 144 ("In contrast to the unquestionably polygamist defendants of such seminal polygamy prosecutions as the *Reynolds* prosecution, Tom Green raised as defense the contention that he was *not* in fact a polygamist. Despite having appeared on national and international television touting the virtues of having more than one wife, it quickly became apparent that Tom Green himself *did not* in fact have more than one legal wife.").

96. Kevin Cantera & Michael Vigh, *Green Guilty on All Counts*, SALT LAKE TRIB., May 19, 2001, at A1.

97. *Polygamist Denies Charges*, ORLANDO SENTINEL, May 19, 2001, at A21 (internal quotations omitted).

98. *State v. Green*, 99 P.3d 820, 822 & n.4 (Utah 2004).

99. *Id.*

other hand, argued that Green entered into an unsolemnized, common-law marriage with his first spiritual wife,¹⁰⁰ and thus that his subsequent marriages were in violation of Utah's bigamy statute.¹⁰¹ The State's argument prevailed as Green was convicted of four counts of bigamy, and his conviction was ultimately upheld by the Utah Supreme Court.¹⁰²

A few years after the Green prosecution, Warren Jeffs became the target of law enforcement. However, Jeffs' polygamy charges were just a small part of his illegal activities and were eventually dropped.¹⁰³ "Prosecutors cited the need for judicial economy, noting that Jeffs is already serving a life prison sentence."¹⁰⁴

The prosecution of Green and the charges levied against Jeffs are evidence of the selective enforcement of polygamy laws.¹⁰⁵ Fundamentalist communities are targeted while other open polygamists in mainstream society are ignored.¹⁰⁶ This selective enforcement raises several issues.

The first question that one must ask is, given the selective enforcement of polygamy laws, what is the purpose they serve. The laws have several potential purposes, from the prevention of child abuse to the protection of the traditional family unit.¹⁰⁷ However, as

100. Utah defines a valid, unsolemnized marriage as [a] marriage which is not solemnized . . . that . . . arises out of a contract between a man and woman who: (a) are of legal age and capable of giving consent; (b) are legally capable of entering a solemnized marriage . . . ; (c) have cohabitated; (d) mutually assume marital rights, duties, and obligations; and (e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

UTAH CODE ANN. § 30-1-4.5 (West 2013).

101. *Green*, 99 P.3d at 823. Utah's bigamy statute states: "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 (LexisNexis 2003).

102. *Green*, 99 P.3d at 822, 834. While the Utah Supreme Court accepted the prosecution's use of the common-law marriage statute, *id.* at 833-34, some legal scholars argue that the use has troubling implications. *See, e.g.*, Tenney, *supra* note 89 at 158-62 ("The ultimate effect of the state's prosecution of Tom Green has thus been to take marriage out of the hands of the state and its agents and instead place it squarely in the hands of the people. People are now married based on nothing more concrete than the fact that they say they are. A man is now in jail because he simply used the wrong word to describe his relationships.").

103. *Jeffs*, *supra* note 93.

104. *Id.*

105. *Cf.* PRIMER, *supra* note 86 (stating that "[b]igamy is illegal in Utah . . . [but the state] decided to focus law enforcement efforts on crimes within the polygamous communities that involve child abuse, domestic violence and fraud").

106. *See Jeffs*, *supra* note 93; Whitehurst, *supra* note 90 ("[Utah County] has adopted a formal policy stating it won't file bigamy charges against any consenting adult polygamists unless violence, abuse or fraud is included.").

107. *See infra* Parts IV.A, IV.B.

will be explained below, none of these purposes are served by the current system of selective enforcement.

A. *Child Abuse*

A common reason to support polygamy laws is to prevent child abuse.¹⁰⁸ It can be argued that polygamy promotes the marriage of young girls to older men as “child brides,” encourages statutory rape, and generally abuses children both physically and psychologically.¹⁰⁹ The Los Angeles Times has reported on the abuses of polygamy, stating:

Court records, undisclosed investigative reports and interviews by the Times over the last year show that [polygamous] church authorities . . . systematically deny rights and freedoms, especially to women and children. . . . Among sect members, girls as young as 13 are forced into marriage, sexual abuse is rampant, rape is covered up and child molesters are shielded . . . Boys are thrown out of town, abandoned like unwanted pets by the side of the road and forcibly ostracized from their families to reduce competition among the men for multiple wives.¹¹⁰

Utah Attorney General Mark Shurtleff argues that there is a link between child abuse and polygamy in certain contexts, maintaining that “taken as a whole, the FLDS belief system and lifestyle—including polygamy and the overall treatment of women—enable what amounts to institutionalized child rape and other forms of abuse.”¹¹¹ There are also several former members of these fundamentalist communities who raise allegations of child abuse within polygamist sects. Former female polygamists have called the practice “a Dark Ages hybrid” and have accused polygamist

108. Some studies have found that polygamous families experience more incidents of child abuse and neglect. See, e.g., Joseph Henrich, et al., *The Puzzle of Monogamous Marriage*, 367 PHIL. TRANSACTIONS ROYAL SOC'Y 657, 665 (2013), available at <http://rstb.royalsocietypublishing.org/content/367/1589/657.full.pdf> (finding that monogamy “decreases child abuse, neglect and homicide” in families because each family member is typically directly related to one another).

109. For a first-hand account of the abuse, isolation, rape, and coercion that can occur in some polygamous communities, see ELIZA WALL WITH LISA PULITZER, *STOLEN INNOCENCE: MY STORY OF GROWING UP IN A POLYGAMOUS SECT, BECOMING A TEENAGE BRIDE, AND BREAKING FREE OF WARREN JEFFS* (2008).

110. David Kelly & Gary Cohn, *Blind Eye to Culture of Abuse: Children of a Polygamist Sect Have Been Exploited, Molested for Years*, L.A. TIMES, May 12, 2006, at A1, available at <http://www.latimes.com/news/nationworld/nation/la-polygamyenclave-12may1206,0,5615729.story?page=1>.

111. Jaime M. Gher, *Polygamy and Same-Sex Marriage – Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 580 (2008) (quoting John Gibeaut, *Violation or Salvation?: Prosecutors Say It's a Sex Crime, Polygamist Leader Warren Jeffs Says It's Counseling His Flock*, A.B.A. J., (Feb. 21, 2007, 3:32 AM), www.abajournal.com/magazine/article/violation_or_salvation/).

communities “of sexual abuse, pedophilia and incest.”¹¹² Other critics of polygamy maintain “that the culture invariably leads to problems. . . . [and] has a long tradition of physical abuse, rape, incest and underage marriage.”¹¹³

Many books have been written describing the horrific abuses that occur in some polygamist communities, from beatings to rape to psychological trauma.¹¹⁴ One former fundamentalist Mormon estimates that around “[twenty] percent of the people who live[d]” in her isolated community were “pedophiles and abusers.”¹¹⁵ Further, teenage boys are sometimes forcibly expelled from the communities.¹¹⁶ Often referred to as “[l]ost [b]oys,” the teenagers are abandoned by their families and left homeless and penniless.¹¹⁷

Despite these known abuses, law enforcement currently has a difficult time establishing a case for child abuse within polygamist communities due to the intense isolation and distrust of outsiders.¹¹⁸ The illegality of polygamy itself discourages those who witness child abuse from reporting it and from cooperating with investigating officers because they fear they too might be prosecuted.¹¹⁹ It also pushes child abuse underground, making it easier for abusers to evade law enforcement and perpetuating the problem because there is no one with the ability and knowledge to stop the abuse.¹²⁰ Moreover, there is an argument that the prevalence of abuse in some polygamist communities is not due to polygamy at all. Instead, it is a byproduct of the communities’ intense isolation, as the seclusion of

112. Egan, *supra* note 75, at 651.

113. Kirsten Scharnberg & Manya A. Brachear, *Where the Polygamists Have White-Picket Fences*, L.A. TIMES, Oct. 15, 2006, at A12.

114. See, e.g., FLORA JESSOP & PAUL T. BROWN, CHURCH OF LIES (2009); SAM BROWER, PROPHET’S PREY (2011).

115. JESSOP & BROWN, *supra* note 114, at 41.

116. BROWER, *supra* note 114, at 55-59; see generally Brieanne M. Billie, Note, *The “Lost Boys” of Polygamy: Is Emancipation the Answer?*, 12 J. GENDER RACE & JUST. 127 (2008) (discussing the barriers “adolescent males exiled from polygamist communities” face and evaluating legal remedies).

117. BROWER, *supra* note 114, at 55-59.

118. See BENNION, *supra* note 13, at 211-12.

119. *Id.* at 246-47. Advocates of decriminalization argue “that if the fear of prosecution is removed, polygamous groups could stop living in seclusion and secrecy, the very conditions that enable many of the alleged abuses. They would also feel less fearful about going to authorities to turn in abusers within their ranks.” Scharnberg & Brachear, *supra* note 113, at A12.

120. Law enforcement in both Texas and Utah feared that the raids in Texas would encourage distrust of law enforcement in the polygamist communities within their state. See Kirk Johnson, *Polygamy Raid in West Texas May Pose a Risk for the Authorities Elsewhere*, N.Y. TIMES, Apr. 12, 2008, at A12 (“They were reaching out, opening up,” Mark L. Shurtleff, the attorney general in Utah, said of the polygamist communities. ‘Now they’ve kind of pulled back.’”).

these communities creates a perfect safe haven for child abusers.¹²¹

Furthermore, law enforcement currently ignores most polygamous relationships when there are no physical signs of child abuse. This overlooks the argument that being a member of a polygamous family psychologically damages children.¹²²

B. Coercion of Consent and Protection of Women

Another potential purpose of polygamy laws is the protection of women.¹²³ Some argue that women cannot fully consent to be in polygamous relationships and are manipulated into staying in these relationships.¹²⁴ Others argue that polygamy is patriarchal and

121. See BENNION, *supra* note 13, at 15-16 (“In my view, correlation between abuse and isolation is twofold: abusers deliberately choose remote places in order to maintain control over the victims without being observed; and women in such isolated locations are unable to leave the community easily. I believe that this correlation offers strong evidence against finding a necessary causal connection between polygamy and abuse. Instead, it is my belief that forcing polygamous families to the fringes of society facilitates instances of abuse taking place outside the watchful eye of law enforcement.”).

122. See PRIMER, *supra* note 86, at 4; see also Whitehurst, *supra* note 90.

123. See e.g., Marci Hamilton, *Prosecuting Polygamy in El Dorado*, HUFFINGTON POST, (Apr. 8, 2008, 3:54 PM), http://www.huffingtonpost.com/marci-hamilton/prosecuting-polygamy-in-e_b_95674.html (“If authorities (in TX, AZ, NV, and UT) had vigorously enforced the laws against polygamy, we would not have dangerous cults like the FLDS that are premised on extreme obedience of women and girls to domineering men and the disposal of teenage boys.”); see also ANDREA MOORE-EMMETT, *GOD’S BROTHEL: THE EXTORTION OF SEX FOR SALVATION IN CONTEMPORARY MORMON AND CHRISTIAN FUNDAMENTALIST POLYGAMY AND THE STORIES OF 18 WOMEN WHO ESCAPED* 36-38 (2004).

124. See, e.g., Strassberg, *supra* note 13, at 394 (arguing that “the real issue . . . for adult women is not whether they choose plural marriage, but rather whether life in a polygamous relationship inevitably subjects them to a victimization to which they did not consent”). There is evidence that some women enjoy the camaraderie of polygamy and are actually drawn to polygamous communities because of the difficulties they face as single mothers in monogamous society. Janet Bennion, *The Many Faces of Polygamy: An Analysis of the Variability in Modern Mormon Fundamentalism in the Intermountain West*, in MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL, AND LEGAL ISSUES, 163, 167 (Cardell K. Jacobson & Lara Burton eds., 2011) (“Women report that they are fleeing a difficult life in the mainstream where their status as divorcees, single mothers, widows, and ‘unmarriageables’ limits their access to good men and also access to the economic and spiritual affirmation that comes from a community of worship.”). These women have lived in the outside world and make the choice to leave the life they know and retreat to polygamous communities. See *id.*

In addition, some women living in mainstream society see polygamy as a way to pursue their careers and still have a strong family unit. See, e.g., Elizabeth Joseph, Op-Ed., *My Husband’s Nine Wives*, N.Y. TIMES, May 23, 1991, at A31 (arguing that polygamy “enables women, who live in a society full of obstacles, to fully meet their career, mothering, and marriage obligations”). They can rely on the help of their sister wives in raising their children and can divide household chores more easily. See *id.* Rebecca Cook and Lisa M. Kelly, vocal proponents of polygamy, argue that polygamy

breeds both physical and mental abuse.¹²⁵

Carolyn Jessop escaped from a polygamist community and now tries to help women who are still trapped in the practice.¹²⁶ In an interview she explained the treatment of women: “Women in the polygamist culture are looked at as property, as a piece of meat We’re not looked upon as human beings with rights. The women are basically baby-producers.”¹²⁷ Another former polygamist Vicky Prunty has explained, “I’ve lived [the polygamist] life Anyone who tells you women are not being hurt there—forced into allowing their husbands to take on other wives in the name of religion, getting married too young to men much older, being hit or worse—are not being truthful.”¹²⁸

The United Nations has even taken a strong stance on polygamy, encouraging member nations to abandon the practice:

States parties’ reports . . . disclose that polygamy is practi[c]ed in a number of countries. Polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.¹²⁹

While preventing the abuse of women might justify polygamy bans, the current enforcement system does little to help women trapped in abusive relationships.¹³⁰ Law enforcement typically does not investigate abuse unless there are complaints made.¹³¹ Abused polygamist women are hesitant to reach out to the police for help as they know their family structure is illegal and they fear prosecution

“offers an independent woman a real chance to have it all” and is thus “the ultimate feminist lifestyle.” John Tierney, Op-Ed., *Who’s Afraid of Polygamy?*, N.Y. TIMES, Mar. 11, 2006, at A15. However, there is a strong argument to be made that these women are the exception and not the rule.

125. BENNION, *supra* note 13, at 236-38.

126. Nick Madigan, *After Fleeing Polygamist Community, an Opportunity for Influence*, N.Y. TIMES, June 29, 2005, at A16.

127. *Id.* (internal quotation marks omitted).

128. Scharnberg & Brachear, *supra* note 113, at A12.

129. *Recent Changes Aside, Authorities Generally Keep Their Distance*, U.N. General Recommendation No. 21, 13th Sess. (1994), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

130. While there are hotlines and other resources that polygamist women can call for help outside of law enforcement, many are likely still scared, or their living situations would not allow them access to such resources. See, e.g., *Resources, HOLDING OUT HELP*, <http://holdingouthelp.org/resources/> (last visited Nov. 21, 2013).

131. See, e.g., James Brooke, *Utah Struggles with a Revival of Polygamy*, N.Y. TIMES, Aug. 23, 1998, at 12.

themselves.¹³² They also fear that the State will take away their children.¹³³ Thus, they suffer in silence, refusing to use the legal protection available to them.

C. *Weight on the Welfare System*

A third purpose is to prevent the overuse of government assistance.¹³⁴ Polygamous families are generally very large¹³⁵ and often have financial difficulties.¹³⁶ Some argue that plural marriage places a heavy strain on the welfare system, encouraging both welfare fraud and tax evasion.¹³⁷ However, this purpose is not currently served by the current enforcement mechanism. Instead, the way polygamy laws are currently enforced actually perpetuates welfare fraud, placing an even greater burden on the government.¹³⁸ This is because the current illegality of polygamous marriage allows many polygamous wives to apply for welfare, as the state views them as single mothers.¹³⁹ Thus, there likely would not be any increase in

132. See Strassberg, *supra* note 13, at 403.

133. *Id.* at 400-03.

134. See BENNION, *supra* note 13, at 219-21; Vasquez, *supra* note 35, at 244 (“According to anti-polygamy activists, welfare and tax fraud are commonplace in Utah’s polygamous communities.”).

135. Jason D. Berkowitz, Comment, *Beneath the Veil of Mormonism: Uncovering the Truth About Polygamy in the United States and Canada*, 38 U. MIAMI INTER-AM. L. REV. 615, 632 (2007) (“A recent study of plural families indicated that nearly 80% of polygamous wives had four or more children and almost 20% of the families had eleven or more children.”).

136. While polygamous families do experience financial difficulties, as Adrienne Davis pointed out, “[i]ndividuals have a constitutional right to divorce and remarry as many times as they desire, regardless of whether they are supporting prior families. Nor can the state limit men’s right to reproduce outside of marriage, based on [the] burdens to the welfare system.” See Davis, *supra* note 77, at 2029 (internal citation omitted).

137. See BENNION, *supra* note 13, at 219 (“Tom Green, who was also found guilty of using the government to support his [own] lifestyle, owes Utah nearly \$80,000 in welfare payments fraudulently collected to support his five wives and twenty-six children. The Kingston family also relies on food stamps and subsidies, in spite of a net worth of more than \$150 million.”).

138. Berkowitz, *supra* note 135, at 637 (explaining that “poverty runs rampant in polygamous colonies, and oftentimes requires significant subsidies from state and federal agencies”); see also BENNION, *supra* note 13, at 219 (“The FLDS Hildale/Colorado City order ranks in the top ten cities in the Intermountain West for the amount of federal aid they receive, primarily for poor women and children. They pay very little tax (\$651 for each adult who files a tax return), have the highest average household count in the Intermountain West (8.5 people), and yet they get the most benefits (\$8 per each tax dollar). According to the Utah Department of Workforce Services, in 2002, 66 percent of Hildale FDLs residents received federal assistance, and according to the Arizona Department of Economic Security, 78 percent of Colorado City residents received food stamps.”).

139. Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: “Love is a Many Splendored Thing,”* 15 DUKE J. GENDER L. & POL’Y 315, 329 (2008) (noting that, in

welfare usage if polygamy were not criminal, as the families are already using the welfare system for support.¹⁴⁰

In addition, there are also claims that the fundamentalist leaders are engaged in corrupt business practices and corporate fraud.¹⁴¹ Rowenna Erickson, a former fundamentalist, estimated that while her “clan’s ranches and companies totaled more than \$150 million . . . [the] women and children in the group often lived in poverty, earning minimum wages from business and receiving food stamps.”¹⁴² Many fundamentalists turn over the majority of their income, including welfare benefits, to their community leaders and remain ignorant as to how this money is used. This fraud and corruption exists in spite of polygamy bans and is likely perpetuated by them.¹⁴³

D. Upholding the Integrity and Morality of the Traditional Family

A fourth purpose is that polygamy laws are necessary to uphold the sanctity of the traditional family.¹⁴⁴ Beginning with *Reynolds*, the Supreme Court has set a strong precedent that marriage is between one man and one woman.¹⁴⁵ In establishing the moral repugnance of polygamy, the Court pointed to world history as well as common law:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and [] African people. At common law, the second marriage

2002, sixty-six percent of the Hillsdale polygamous community and seventy-eight percent of the Colorado City polygamous community received government assistance) (citing PRIMER, *supra* note 86).

140. BENNION, *supra* note 13, at 221 (“Welfare, or creative financing, is essential for vulnerable plural wives who do not have any other means of support, either from the group or from their husbands. In posing as single mothers to obtain resources, these polygamist women are doing the same thing that many single mothers in mainstream America do[—]using the system as a way to cope in the absence of husbands/partners and fathers.”).

141. Laura Chapman, a former fundamentalist commented, “[This is] organized crime, operating under the cover of religion.” Egan, *supra* note 5, at 2.

142. Brooke, *supra* note 131, at 12.

143. See Randi Kaye, *How Polygamy Effects Your Wallet*, ANDERSON COOPER 360 BLOG CNN (May 11, 2006), <http://www.cnn.com/CNN/Programs/anderson.cooper.360/blog/2006/05/how-polygamy-affects-your-wallet.html>.

144. See *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (“Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built.”). While many see the nuclear family as the traditional American family structure, this type of family arrangement did not even become “standard for a majority of America[]” until after World War II. STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 262 (2000).

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

was always void, and from the earliest history of England polygamy has been treated as an offence [sic] against society.¹⁴⁶

Even so, the traditional sense of a family containing two opposite-gendered parents is changing as same-sex unions gain more support.¹⁴⁷ However, when courts uphold same sex unions, they often go out of their way to explain that their ruling is limited to marriages between two people and thus is not applicable to polygamy.¹⁴⁸ For example, in a footnote the California Supreme Court explained:

We emphasize that our conclusion that the constitutional right to marry properly must be interpreted to apply to gay individuals and gay couples does not mean that this constitutional right similarly must be understood to extend to polygamous or incestuous relationships. Past judicial decisions explain why our nation's culture has considered the latter types of relationships inimical to the mutually supportive and healthy family relationships promoted by the constitutional right to marry. Although the historic disparagement of and discrimination against gay individuals and gay couples clearly is no longer constitutionally permissible, the state continues to have a strong and adequate justification for refusing to officially sanction polygamous or incestuous relationships because of their potentially detrimental effect on a sound family environment.¹⁴⁹

This distinction suggests both that polygamy is on the judiciary's mind and also that, on the whole, polygamy is still considered to be an unacceptable behavior.

However, the current polygamy enforcement regime fails to advance this purpose because polygamist families still exist and many actually advocate for their lifestyle. These families "have begun a virtual public relations campaign to achieve tolerance, respect, a greater following, and ultimately legal protection" and have been somewhat successful.¹⁵⁰

Further, courts also at times ignore the illegality of polygamy when deciding issues like child placement and custody. For example, the Utah Supreme Court found that polygamists seeking to adopt children are not barred from adoption just because they practice polygamy; instead, the family's structure is one factor that can be

146. *Id.* at 164-65.

147. See generally STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE (2005).

148. See, e.g., *Goodridge v. Department of Public Health*, 798 N.E. 2d 941, 969 (Mass. 2003) ("We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships.").

149. *In re Marriage Cases*, 183 P.3d 384, n.52 (2008).

150. Dirk Johnson, *Polygamists Emerge From Secrecy, Seeking Not Just Peace but Respect*, N.Y. TIMES, Apr. 9, 1991, at A22.

weighed in determining what is in the best interests of the child.¹⁵¹ Thus, not only are polygamists not being prosecuted, courts are actually accepting this practice as an adequate family structure.¹⁵² Such cases send mixed signals about the acceptability of the practice of polygamy and its effect on the traditional family.

V. WHY IS SELECTIVE ENFORCEMENT A PROBLEM?

As the examination of all the possible purposes shows, the current selective enforcement of polygamy laws fails to advance any effective purpose, and yet Mormon fundamentalist communities continue to be affected by the arbitrary enforcement of polygamy statutes.¹⁵³ This predicament is troubling for several reasons. First, it raises issues of fairness. Law enforcement currently has the power to pick and choose whom to prosecute for polygamy and whom to ignore.¹⁵⁴ This selective prosecution is unfair and gives law enforcement too much discretion in determining to whom the laws will be applied. This disconnect also raises questions about the legitimacy of laws and the legal system in general. As an editorial in the Salt Lake Tribune explained:

Utah officials presumably have tolerated polygamy to keep the peace and to avoid making the dependents of polygamists wards of the state. However, when the state makes special allowances for polygamy, it tacitly approves the practice and scorns its own constitution. Such double-dealing cannot continue indefinitely without generating greater contempt for Utah laws and standards.¹⁵⁵

While the editorial argues for full criminalization, it illustrates the problem created by failing to apply laws properly.¹⁵⁶ The perception that laws are only applied to some people also raises troubling consequences for both democracy and equality. Why are some people subject to the laws while others are above censure? This perception ultimately undermines law enforcement and the criminal justice system in general.

Some try to justify selective enforcement by claiming that while polygamy itself may not be intrinsically bad, it can, at times, produce other abuses, and thus polygamy laws should be enforced when these abuses occur.¹⁵⁷ For example, in Utah and Arizona “[a] coalition was formed between polygamous leaders in Arizona and Utah and the

151. *In re Adoption of W.A.T.*, 808 P.2d 1083 (Utah 1991).

152. *See, e.g., id.* at 1086.

153. *See, e.g.,* Blumenthal, *supra* note 4, at A11.

154. *See supra* notes 89-90 and accompanying text.

155. Quinn, *supra* note 57, at 273 (citing Editorial, SALT LAKE TRIB., Dec. 9, 1988, at A22.)

156. *Id.*

157. *See, e.g.,* PRIMER, *supra* note 86, at 4.

attorney general's office in both states that produced an agreement: law enforcement promised not to raid or arrest polygamists unless laws beyond polygamy were violated, particularly laws about child abuse."¹⁵⁸ However, this reasoning is flawed because it fails to explain why the abuses and secondary effects themselves cannot be prosecuted.¹⁵⁹ For example, it is argued that child abuse is often a byproduct of polygamy and that polygamy should thus be prohibited.¹⁶⁰ Yet, child abusers can be prosecuted under child abuse statutes.¹⁶¹ Moreover, child abuse also occurs in monogamous marriages.¹⁶² As one polygamist has aptly explained, "[R]ather than labeling an abuser abusive, they label the entire culture. You never see that with monogamy . . . our entire culture is being condemned."¹⁶³ Accordingly, if the secondary effects of polygamy are the primary issue, those criminal effects should be prosecuted, instead of the practice of polygamy itself.

In addition to the fairness issue, the fact that those who are prosecuted are members of secluded religious groups raises troubling questions about religious freedom and persecution. Given the isolation of fundamentalist communities, they are easy targets for prosecutorial abuse.¹⁶⁴ They have no lobbyists arguing for their rights and virtually no voice in political discourse, as conservatives and liberals alike disapprove of their practices.¹⁶⁵ From their homemade prairie clothing to their seemingly strange religious practices, these Mormon fundamentalists disavow themselves from modern American life, making them easy victims.¹⁶⁶

Furthermore, polygamists face opposition and harsh criticism from the Mormon Church itself, which has gone to great lengths to

158. BENNION, *supra* note 13, at 203.

159. The prosecution of Warren Jeffs further undermines the secondary effects argument since prosecutors dismissed Jeffs's polygamy charge as he was already serving a life sentence for his sexual abuse. CNN Wire Staff, *Arizona Charges Dismissed Against Polygamist Sect Leader*, CNN JUSTICE (June 10, 2010), <http://www.cnn.com/2010/CRIME/06/09/arizona.polygamist.jeffs/>. Thus, in his case polygamy statutes served no purpose.

160. *See supra* Part IV.A.

161. *See e.g.*, UTAH CODE ANN. § 76-5-109(2) (West 2012) ("Any person who inflicts upon a child serious physical injury or, having the care or custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows: (a) if done intentionally or knowingly, the offense is a felony of the second degree; (b) if done recklessly, the offense is a felony of the third degree; or (c) if done with criminal negligence, the offense is a class A misdemeanor.").

162. Hayes, *supra* note 44, at 106.

163. *Id.* (quoting Mary Batchelor).

164. *See* BENNION, *supra* note 13, at 247.

165. A Gallup Poll taken in 2003 showed that 92 percent of Americans disapproved of polygamy. *See* Sigman, *supra* note 25, at 104.

166. *Cf.* Quinn, *supra* note 57, at 255 (describing public discomfort that prompts young fundamentalist Mormons to abandon traditional attire).

distance itself from the practice.¹⁶⁷ With successful political leaders like former presidential nominee Mitt Romney, the Church is working hard to blend the Mormon faith into the American religious and political fold.¹⁶⁸ However, polygamist groups remain left behind. As Jon Krakauer explained,

Mormon authorities treat the fundamentalists as they would a crazy uncle – they try to keep the “polygs” hidden in the attic, safely out of sight, but the fundamentalists always seem to be sneaking out to appear in public at inopportune moments to create unsavory scenes, embarrassing the entire LDS Clan.¹⁶⁹

Fundamentalist groups are also targets of the media. Sociologist Sarah Whedon argues that “the media purposefully makes a spectacle of polygamy-style sexuality and the potential within it for abuse.”¹⁷⁰ She further points out that “[t]he American public is especially vulnerable to the ‘save the children’ mentality, and the media often uses this idea to create mass hysteria about plural marriage.”¹⁷¹ This is particularly dangerous because Mormon fundamentalists make up such a small percentage of the population.¹⁷² Most Americans will likely never meet one, and generally do not understand the faith or the importance of plural marriage to it.¹⁷³ Thus, they will be tempted to rely solely on the media for information and draw sharp criticisms.¹⁷⁴ As Janet Bennion explains, “[w]e 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 of abuse within a polygamous family

167. JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* 5 (2003) (“The LDS leadership has worked very hard to persuade both the modern church membership and the American public that polygamy was a quaint, long-abandoned idiosyncrasy practiced by a mere handful of nineteenth-century Mormons.”).

168. Despite efforts by the Mormon Church to become a more mainstream religion, many Americans still view the religion as “odd” and are “suspicious” of its members. See *id.*; Cathy Lynn Grossman, *Many Americans Uninformed, But Still Wary of Mormon Beliefs*, USA TODAY (Jan. 25, 2012, 3:40 PM), <http://usatoday30.usatoday.com/news/religion/story/2012-01-17/mormon-beliefs-Americans-uninformed/52776870/1>.

169. See KRAKAUER, *supra* note 167, at 5.

170. BENNION, *supra* note 13, at 164.

171. *Id.*

172. Cf. Strassberg, *supra* note 13, at 354.

173. Cf. KRAKAUER, *supra* note 167, at 5 (The 30,000 to 100,000 FLDS polygamists account for “less than 1 percent of the membership in the LDS Church worldwide.”); Quinn, *supra* note 57, at 42. (“Contrary to common assumptions, *many of these committed fundamentalists are living in monogamous relationships . . .*” (emphasis added)).

174. Cf. BENNION, *supra* note 13, at 163 (describing the “enormous entertainment value” of media descriptions of polygamists).

to represent all plural families in our minds.”¹⁷⁵

VI. POSSIBLE EXPLANATIONS FOR SELECTIVE ENFORCEMENT

There are several possible explanations for the limited prosecution of polygamists. First, polygamy is generally hard to prosecute because it is difficult to prove.¹⁷⁶ Witnesses typically are reluctant to cooperate as the communities are isolated and there is a general distrust of outsiders.¹⁷⁷ Also, it can be hard to distinguish between a polygamous relationship and adultery or cohabitation.¹⁷⁸ Therefore, it is hard for law enforcement to collect enough evidence to prosecute polygamists.¹⁷⁹ Further, even those who flee these communities and acclimate to mainstream American life often fear bringing any kind of lawsuit because they typically still have family living within the communities.¹⁸⁰

In addition, investigating and prosecuting polygamists places a large financial strain on the State.¹⁸¹ As Paul Van Dam, Utah’s attorney general, has explained, “there is not enough prison space to hold all the polygamists so there is ‘an uneasy truce’ between law enforcement and polygamists.”¹⁸² There is a question as to whether prosecuting polygamists is worth the financial commitment it would

175. BENNION, *supra* note, 13 at 164.

176. *Id.* 253-54.

177. *Id.* The raids in Texas have further added to this apprehension, as people fear that their communities will be torn apart and their children taken by child welfare agents. See Johnson, *supra* note 120. One attorney general commented, “If we can’t promise protection, they’re not going to talk.” *Id.* Even people who have escaped these communities are hesitant to talk as they fear the polygamist leaders will exact revenge on any family members they left behind in the communities. See, e.g., WALL, *supra* note 3, at 342.

178. See, e.g., Editorial, *Prosecuting Polygamists a Dilemma*, DAILY HERALD (Provo, UT), Jan. 25, 2001, at A6, available at http://www.heraldextra.com/news/opinion/prosecuting-polygamists-a-dilemma/article_82b189c2-5d91-52ab-846d-3cf80644d609.html (prosecution for polygamy complicated by vague cohabitation statute). While adultery used to be an illegal practice, most states have removed adultery statutes from their criminal codes. See Ethan Bronner, *Adultery, an Ancient Crime that Remains on Many Books*, N.Y. TIMES, Nov. 14, 2012, at A12, available at http://www.nytimes.com/2012/11/15/us/adultery-an-ancient-crime-still-on-many-books.html?_r=0 (noting that slightly over half of U.S. states and territories have decriminalized adultery).

179. See e.g., James C. McKinley Jr., *Trial of Sect Leader Exposes Difficulties for Prosecutors*, N.Y. TIMES, Nov. 4, 2009, at A14, available at www.nytimes.com/2009/11/04/us/04polygamy.html (explaining that witnesses of sexual abuse often do not cooperate and prosecutors have a hard time obtaining enough evidence to make a conviction).

180. See, e.g., WEYERMAN, *supra* note 3, at 126 (“The lost boys were adamant that no actions be taken that would harm anyone still inside FLDS.”).

181. Cf. Quinn, *supra* note 57, at 272.

182. *Id.*

take.

Furthermore, with the growing trend of sexual freedom and marriage equality, support for the prosecution of polygamy is wavering.¹⁸³ People are more willing to ignore the sexual practices of others, as long as no one is being harmed.¹⁸⁴ Thus, some law enforcement officials, like those in Utah and Arizona, have agreed to only prosecute polygamy when there are other abuses present like child or spousal abuse.¹⁸⁵ Additionally, there are still those who, despite the Supreme Court's ruling, believe that polygamy is still protected as a religious freedom.¹⁸⁶

While these reasons may explain the current state of polygamy enforcement, they fail to fully justify it. Costs and the difficulty of prosecution should not outweigh justice and fairness. Either polygamy is a repugnant act that needs to be criminalized or it is not. Either all polygamists should be investigated and charged or none should be. Law enforcement should not be permitted to pick and choose to whom the laws apply, as such a system breeds prejudice and exploitation. Further, prison space and funding have not deterred prosecution for other social ills.¹⁸⁷ For example, mandatory minimum sentencing for drug convictions, a key part of the War on Drugs, has resulted in a multitude of prisons being built, as "state spending on corrections . . . has more than tripled in the past three decades."¹⁸⁸ Thus, such funding and prison overpopulation issues have not deterred police from enforcing other laws.

VII. ALTERNATIVES TO SELECTIVE CRIMINALIZATION

Since the current system of polygamy enforcement is inherently unfair and gives law enforcement too much discretion,¹⁸⁹ it needs to be changed. The two remaining options are criminalization with complete enforcement or total decriminalization. Each of these polar options solves the selective enforcement problem and, combined with other legislative actions, can be shown to effectively advance some of the potential purposes of polygamy laws.

183. *See id.*

184. *See id.*

185. *See, e.g.,* PRIMER, *supra* note 86, at 4. This compromise explains why the Brown family has avoided prosecution. Whitehurst, *supra* note 90.

186. *See* Berkowitz, *supra* note 135, at 618. Michael O. Leavitt, former governor of Utah, once "speculated that polygamy might enjoy protection as a religious freedom." *Id.* at 618 n.16.

187. *See* John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES, Dec. 11, 2012, at A1, available at www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html.

188. *Id.*

189. *See supra* Part IV.

A. Criminalization with Complete Enforcement

Criminalization with complete enforcement would require police to investigate and prosecute all potential claims of polygamy. It would solve the fairness issue because law enforcement would no longer have discretion in applying polygamy laws. Thus, it would protect fundamentalist communities from arbitrary enforcement.

Criminalization with complete enforcement is an especially viable option if legislators decide that polygamy is inherently abusive or offensive to morality.¹⁹⁰ This view may have significant support, as according to “a Gallop Poll taken in May 2003, just one month prior to the Supreme Court’s decision in *Lawrence v. Texas* . . . ninety-two percent of adults surveyed nationwide considered ‘polygamy . . . to be morally wrong.’”¹⁹¹

Full criminalization would also help with the abuse that occurs within polygamous communities because law enforcement would be better able to monitor the communities and would be ready to arrest violators. Women would be freed from potentially abusive relationships and children would be saved from a similar fate.

While criminalization would solve the problems that plague current enforcement, it is not without its downsides. The reporting and cooperation problems would still remain hurdles for investigators to overcome, making the ban hard to enforce.¹⁹² These problems are also likely to get worse, as intense government prosecution would likely drive polygamists even deeper underground.¹⁹³ This increased isolation runs the risk of perpetuating the problems of abuse even more.¹⁹⁴ Also, it would continue to be difficult for law enforcement to distinguish polygamy from cohabitation, which is a legal practice.¹⁹⁵

In addition, as mentioned previously, investigating polygamists would place a large strain on state resources, as prosecuting and jailing polygamists would be an expensive endeavor.¹⁹⁶ Furthermore, the State would likely have to support the children of jailed polygamists, which would be very costly, as polygamist families tend

190. See Strassberg, *supra* note 13, at 364-65.

191. Sigman, *supra* note 25, at 104 (citation omitted). However, the poll was taken over ten years ago and does not inquire whether polygamy should be illegal. *Id.*

192. See *supra* notes 176-80 and accompanying text.

193. See *supra* note 119 and accompanying text.

194. See BENNION, *supra* note 13, at 246-47.

195. Cf. Editorial, *Prosecuting Polygamists a Dilemma*, *supra* note 178.

196. See, e.g., Scharnberg & Brachear, *supra* note 113. Utah Attorney General Mark Shurtleff has told reporters, “We don’t have the resources, nor do I think that we should use our resources, to convict every polygamist in Utah, put them in jail and put 20,000 kids into foster care.” *Id.*

to be large.¹⁹⁷

Despite these problems, if polygamy is deemed by legislators to be socially damaging and morally repugnant, then with the proper funding and resources, dedicated law enforcement should be able to enforce the prohibition and at the very least limit the growth of polygamous communities. Furthermore, this system would apply the laws to all people equally, creating a fair model of enforcement that is superior to the current model of selective enforcement.

B. Decriminalization

A second option is to decriminalize polygamous relationships so that the government can properly monitor them. There are two potential ways to decriminalize polygamy. First, the Supreme Court could declare polygamy statutes unconstitutional. Since the statutes are currently constraining an individual's sexual and religious freedom, and they fail to advance a legitimate purpose, given their selective enforcement, the Court could strike them down.¹⁹⁸ However, given that the courts have reaffirmed the polygamy ban over the years, making it settled law, it is unlikely that the Supreme Court would grant certiorari.¹⁹⁹ A second and more likely option is for state legislatures to recognize that polygamy statutes are no longer serving a valid purpose and remove them from their criminal codes.

The decriminalization of polygamy would solve the flaws within the current enforcement system. First, it would promote fairness, as selective enforcement would no longer be an issue.²⁰⁰ This would also remove the dangers that the current system has with respect to religious persecution and class bias.²⁰¹ It would provide consenting adults with the religious and sexual autonomy to enter into whatever family structure they find most favorable, without hindrance or judgment from the government, which is somewhat supported by *Lawrence*.²⁰²

Second, it would remove a potentially expensive strain on state resources, as the enforcement of polygamy laws can be an expensive endeavor.²⁰³ Moreover, arresting the head of a polygamist family creates a large societal burden, as the children of these typically

197. Berkowitz, *supra* note 135, at 631 (“Paul Boyden, executive director of the State Association of Prosecutors, summarized the situation by stating that ‘[f]irst, we couldn’t get a jury to convict and second, we don’t have the resources. . . . There’s been no public outcry to do it.’”) (alteration in original).

198. *See supra* note 7 and accompanying text; discussion *supra* Part IV.

199. *See Hayes, supra* note 44, at 103; Gillet, *supra* note 22, at 509-19, 528-30.

200. *See* discussion *supra* Part IV.

201. *Id.*

202. *See* 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”).

203. *See* Scharnberg & Brachear, *supra* note 113.

large families will have to be supported by the State.²⁰⁴ The State will also be able to more efficiently distribute government assistance, as it will have a better idea of who is receiving the money, preventing the welfare fraud that currently happens within polygamous communities.²⁰⁵ In addition, this transparency would also combat the monetary corruption practiced by polygamist leaders.²⁰⁶

Third, it may open up some of the isolated polygamists' compounds, as they would no longer need to hide their communities to protect their family structure.²⁰⁷ This would allow communities to cultivate better relations with law enforcement and society in general.²⁰⁸ Law enforcement would be better able to monitor these communities and police the abuse that sometimes occurs within them.²⁰⁹ Moreover, members of the community would be more willing to trust and cooperate with law enforcement, which may also help to stop the abuse.²¹⁰ In addition, opening polygamous communities would create greater economic, educational, and social opportunities for community members.²¹¹

While legalizing polygamy may have many positive effects, this option also has its potential downsides, as it assumes that polygamy itself is not socially damaging, and that instead it is the secondary effects, like child abuse, present in some polygamous communities that need to be criminalized. While there is some evidence that this may be true, as not all polygamous communities have problems with abuse, horrific abuses do occur in polygamous communities.²¹² Police will have to be vigilant in monitoring polygamous communities for abuse and work with community members to ensure that abuse is reported.

In addition, there is also the problem of minor girls becoming child brides.²¹³ This issue has the potential to become even more troublesome with the legalization of polygamy; however, this problem can be solved with additional legislation.²¹⁴ Instead of regulating

204. Cf. BENNION, *supra* note 13, at 221.

205. *See id.* at 219-21.

206. *Id.* at 222-23.

207. *See id.* at 221-22.

208. *See id.* at 254 ("Recognizing polygamy would also allow law enforcement to pursue the criminal actions of individuals . . . not the culture itself.").

209. *Id.*

210. *Id.* at 255; *see also* PRIMER, *supra* note 86, at 6-8, 35, 49 (explaining the problems police officers face in gaining the trust of people residing in polygamist communities and offering suggestions on how law enforcement can overcome these issues).

211. *See id.* at 256-57.

212. *See, e.g.*, Scharnberg & Brachear, *supra* note 113.

213. *See, e.g.*, Strassberg, *supra* note 13, at 366.

214. *See* Duncan, *supra* note 139, at 334 ("[G]reater regulation, as a result of legalizing polygamy, could also help alleviate the problems of underage marriage

polygamy as whole, which ultimately perpetuates the problem by driving it underground, legislatures can specially target the problem of child brides by severely punishing adults who enter into these relationships with children. States can also raise the age of consent, requiring court approval of all marriages involving parties under the age eighteen, even if they have parental consent.²¹⁵ Not only will this hinder child marriage, it will send a strong message that these types of marriages are unacceptable. These statutes could also provide punishment for adults who perform religious marriage ceremonies involving minor children without the prior consent of the court.

Furthermore, decriminalization would raise issues of morality, and challenge the concept of family. Some argue, however, that the family structure in America has already changed²¹⁶: “[T]he majority of Americans now live in households that do not mirror the nuclear model of wage-earner husband, homemaker wife, and their biological children, all sharing one domicile.”²¹⁷ As divorce rates climb, integrated families with stepparents and stepchildren are becoming common, as are single-parent households.²¹⁸ In addition, growing numbers of gay men and women are also creating their own family structures, which differ from the traditional nuclear family.²¹⁹

There is also some evidence to suggest that some people, especially those living in areas where there is a shortage of men, actually turn to polygamy to protect the family unit.²²⁰ For example, “[m]ore and more Black Muslim women are adopting polygamy as a tool to preserve the integrity of the male-headed household, an anomaly in many inner-city black enclaves. . . that suffer from

Requiring couples to appeal before an independent civil authority . . . allows someone from outside the family circle to express concerns about, and even refuse to approve, a marriage.”).

215. State statutes generally allow the marriage of minors between the ages of sixteen and eighteen with a parent’s consent. *See, e.g.*, UTAH CODE ANN. § 30-1-9 (2)(a) (West 1953) (“If at the time of applying for a [marriage] license the applicant is a minor, and not before married, a license may not be issued without the signed consent of the minor’s father, mother, or guardian given in person to the clerk.”); *see also* N.J. REV. STAT. § 37:1-6 (2013) (“A marriage or civil union license shall not be issued to a minor . . . unless the parents or guardian of the minor, if any, first certify . . . consent thereto, which shall be delivered to the licensing officer issuing the license.”).

216. *See, e.g.*, Barbara Bennett Woodhouse, “*It All Depends on What You Mean By Home*”: *Toward a Communitarian Theory of the “Nontraditional” Family*, 1996 UTAH L. REV. 569, 570 (1996).

217. *Id.*

218. *See* BENNION, *supra* note 13, at 249. Anthropologist Phillip Kilbride has suggested “that frequent divorce and remarriage, separation of children from parents, multiplication of step-relations, and total breakdown of parental investment all suggest that serial monogamy is in trouble and may not be any better than polygamy.” *Id.*

219. *See* COONTZ, *supra* note 144, at 182-83.

220. BENNION, *supra* note 13, at 252.

imbalanced gender ratios, a lack of economic options, and the absence of fathers.”²²¹ Some see “polygamy as a way of preserving the black family, viewed by many as the bedrock of the black community.”²²² One anonymous polygamist argued in a National Public Radio story that “polygamy is good for society – especially in the inner city, where intact families are rare and many kids grow up without fathers. . . . [Y]ou’re helping legitimize and build a family that’s rooted in values and commitment.”²²³ Thus, there are polygamy proponents who argue that polygamy does not threaten the family unit, and instead may actually allow for its continued existence in struggling communities.

Last, while it can be argued that more families would engage in polygamy if it were legal, placing a greater strain on the welfare system, this argument makes several assumptions and overlooks many additional factors. First, the suggestion that polygamy would greatly increase if legalized is irrational. Most polygamists enter into these relationships because of their religious beliefs.²²⁴ It is highly unlikely that the vast majority of Americans would find the practice appealing.²²⁵ Also, the welfare argument overlooks the idea that criminalizing polygamy creates these cloistered communities, which have little access to economic and educational opportunities.²²⁶ Thus, the illegality of polygamy might actually be one of the factors that creates the poverty that these communities experience,²²⁷ which results in their reliance on government assistance. Last, this argument does not consider the possibility that some working mothers may prefer polygamous relationships as a solution to their work-life balance problems.²²⁸ These hybrid families with multiple working partners would likely be able to support themselves and would not need the assistance of welfare benefits. Ultimately, there is no proof that criminalizing polygamy prevents the overuse of government assistance; instead, criminalization likely perpetuates the use of the welfare system by polygamists.²²⁹

221. *Id.*

222. Davis, *supra* note 77, at 1970.

223. Hagerty, *supra* note 77 (internal quotation marks omitted).

224. Mormon fundamentalists assert that polygamy is a key tenet of their faith, which is why they choose to engage in the practice. BAILEY & KAUFMAN, *supra* note 30, at 96-97.

225. A Gallup Poll taken in in 2003 shows that most Americans disapprove of polygamy. See Sigman, *supra* note 25, at 104 (stating that over ninety percent of adults across the nation viewed polygamy as “morally wrong”). Thus, it is unlikely that the practice would become appealing to them if it was made legal.

226. See BENNION, *supra* note 13, at 262.

227. See *id.* (stating that illegality contributes to economic deprivation by limiting certain employment opportunities for women).

228. See Joseph, *supra* note 124, at A31.

229. See Duncan, *supra* note 139, at 331-32 (drawing a comparison between the

Thus, decriminalization will create some issues and does not address the inherent harm of polygamy or its effect on the family, but with additional legislation it could create an effective way for law enforcement to monitor the physical harms that can occur within polygamous communities and families. Furthermore, it would ensure that polygamists were not be prosecuted in a discriminatory manner.

VI. CONCLUSION

Polygamy has had a long and troublesome history in America, from the early bans to the more recent police raids.²³⁰ While the practice has been illegal for over a century, the current method of enforcement is inherently unfair and gives law enforcement too much discretion in choosing whom to prosecute.²³¹ Isolated, vulnerable religious communities are targeted for censure, while other mainstream members of society are ignored.²³² Further, courts are sending mixed messages about the acceptability of the practice by dropping the polygamy charges of blatant polygamists²³³ and allowing open polygamist families to adopt children, even though their family structure is illegal.²³⁴ In addition, these laws fail to adequately advance any legitimate purpose, such as the protection of women or the prevention of child abuse.²³⁵ Therefore, polygamy laws need be reevaluated and replaced with a more effective model. Legislators should think about what they hope to accomplish with polygamy laws and determine if legalization or full criminalization better accomplishes those goals. If the general practice of polygamy is found to be an immoral social harm, then a full criminalization model should be applied. On the other hand, if legislators find that the basis of polygamy laws lies in the secondary effects of abuse, then legalization is the superior option, as it would help bring these abuses to the surface and allow law enforcement to better deal with them. This Note does not advance one option over the other, as the reasons behind polygamy bans must first be determined before one system can be favored.

While polygamy may not currently be the most pressing issue on legislators' minds, the practice and its problems are not going away anytime soon. Polygamy was referenced in the oral arguments for both marriage equality cases, *Hollingsworth v. Perry* and *United*

harmful effects caused by historical prohibitions on alcohol and prostitution and the harmful effects caused by criminalization of polygamy).

230. See discussion *supra* Part II.

231. See discussion *supra* Part III.

232. See discussion *supra* Part IV.

233. See *supra* notes 82, 84-90, 92-98 and accompanying text.

234. See *In re Adoption of W.A.T.*, 808 P.2d 1083, 1086 (Utah 1991).

235. See discussion *supra* Part IV.

States v. Windsor,²³⁶ showing that it continues to weigh on legal minds one hundred years after *Reynolds*.²³⁷

During the *Hollingsworth* oral arguments, Justice Sotomayor questioned the attorney defending same-sex marriage about the implications of labeling marriage as a fundamental right stating: “If you say that marriage is a fundamental right, what State restrictions could ever exist? Meaning, what State restrictions with respect to the number of people [sic].”²³⁸ In response, the attorney distinguished polygamy from same-sex marriage, arguing:

[T]he polygamy issue, multiple marriages raises questions about exploitation, abuse, patriarchy, issues with respect to taxes, inheritance, child custody, it is an entirely different thing. And if you—if a State prohibits polygamy, it’s prohibiting conduct.

If it prohibits gay and lesbian citizens from getting married, it is prohibiting their exercise of a right based upon their status. It’s selecting them as a class . . . you’re picking out a group of individuals to deny them the freedom that you’ve said is fundamental, important and vital in this society There’s a . . . differen[ce].²³⁹

The fact that this distinction had to be made shows that polygamy is still an issue on the Court’s mind.

In addition, by striking down the Defense of Marriage Act in *Windsor*,²⁴⁰ the Court gave many polygamists hope that *Reynolds* will be overturned in the near future.²⁴¹ One polygamist called the cases “a step in the right direction.”²⁴² Some experts agree that the rulings could have an effect on the legal status of polygamy. For example, Emory University law professor Mark Goldfeder believes the rulings will have “a significant impact in the United States,” stating: “It’s one hundred percent likely that these polygamist cases will come, but they will no longer turn on whether a relationship is immoral . . . The

236. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (involving the constitutionality of California’s Proposition 8, a voter-based initiative banning same-sex marriage); *United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting).

237. *Reynolds v. United States*, 98 U.S. 145, 166 (1879).

238. Transcript of Oral Argument at 46, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf.

239. *Id.* at 46-47.

240. *Windsor*, 133 S. Ct. at 2691, 2696.

241. *Gay Marriage: And Now onto Polygamy*, *ECONOMIST* (Apr. 8, 2013, 2:30 PM), <http://www.economist.com/blogs/democracyinamerica/2013/04/gay-marriage>; *Slippery Slopes: Polygamy Now!*, *ECONOMIST* (June 28, 2013, 2:25 PM), <http://www.economist.com/blogs/democracyinamerica/2013/06/slippery-slopes>.

242. Molly Vorwerck, *Polygamists Find Promise in Supreme Court Decisions*, *USA TODAY* (June 28, 2013, 4:49 PM), <http://www.usatoday.com/story/news/nation/2013/06/28/polygamy-supreme-court/2473157/>.

court will look at whether these relationships cause third party harm.”²⁴³ Given this increased attention and advocacy, legislators need to act and choose a model of enforcement that best serves the needs of society and that can be enforced in an impartial manner.

243. *Id.*