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Sister Wives: A New Beginning for United States Polygamist Families on the Eve of Polygamy Prosecution

Katilin R. McGinnis

SISTER WIVES: A NEW BEGINNING FOR UNITED STATES POLYGAMIST FAMILIES ON THE EVE OF POLYGAMY PROSECUTION?

I. INTRODUCTION

"Love should be multiplied, not divided," a statement uttered by one of today's most infamous, and candid, polygamists, Kody Brown, during the opening credits of each episode of The Learning Channel's ("TLC") hit reality television show, *Sister Wives.*[1] Kody Brown, a fundamentalist Mormon who lives in Nevada, openly practices polygamy or "plural marriage" and is married in the religious sense to four women: Meri, Janelle, Christine, and Robyn.[2] The TLC website describes the show's purpose as an attempt by the Brown family to show the rest of the country (or at least those viewers tuning into their show) how they function as a "normal" family despite the fact that their lifestyle is shunned by the rest of society.[3] It is fair to say, however, that the rest of the country not only shuns their lifestyle but also criminalizes it with laws upheld against constitutional challenge by the Supreme Court in *Reynolds v. United States.*[4] Consequently, the Brown family may be in for more than

1. *See generally Sister Wives* (TLC television broadcast) (*Sister Wives* airs weekly on Sunday nights at 9 PM on TLC, and this statement made by Kody Brown appears in the opening credits of each episode).

2. *See Who are the Browns?*, TLC, http://tlc.discovery.com/tv/sister-wives/about-the-show.html (last visited Oct. 21, 2011) (providing background of Brown family and discussing purpose and plot of show). For the first couple of seasons of *Sister Wives,* the Brown family lived in Utah, but the family has since relocated to Nevada. *See, e.g.*, Jennifer Dobner, *'Sister Wives' Family Moves from Utah to Nevada,* BLOOMBERG BUSINESSWEEK (Jan. 19, 2011), http://www.businessweek.com/ap/financialnews/D9KRFF980.htm (indicating family's attorney, Jonathan Turley, told Associated Press that Kody Brown and family moved to Nevada).

3. *See Who are the Browns?, supra* note 2 (stating purpose of program is to show viewers how polygamist family "navigate[s] life as a 'normal' family in a society that shuns their lifestyle").

4. 98 U.S. 145 (1878) (upholding constitutionality of Morrill Act which criminalized polygamy, because while freedom to believe is protected by First Amendment's free exercise clause, freedom to act is not necessarily so protected). "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. State statutes use varying terminology in criminalizing polygamy, but it is important to note that the terms "bigamy" and "polygamy" are used interchangeably today. *See* Marjorie A. Shields, Annotation, *Validity of Bigamy and Polygamy Statutes and Constitutional Provisions,* 22 A.L.R.6TH 1 (2007) (providing bigamy was crime of marrying another spouse while prior marriage was still in *effect* whereas polygamy designated act of entering into another marriage while prior marriage was still in *force,* although distinction between two terms has been blurred today). Therefore, uses of

they anticipated. Due to broadcasting their atypical lifestyle to the rest of the country, Utah officials are now contemplating the possibility of prosecuting Kody Brown and his wives for polygamy despite their recent move to Nevada.[5] This decision, however, is somewhat anomalous since polygamy is not typically prosecuted without an accompanying child endangerment charge.[6]

This Comment begins with an exposition of the background and history of Mormon polygamy in the United States.[7] It then examines the constitutional ramifications of polygamy, including free exercise, right of association, equal protection, and due process/ right to privacy implications.[8] The due process clause was also implicated by historical challenges to laws targeting homosexual activ-

"bigamy" and "polygamy" in this Comment should be read to have the same meaning.

5. *See* Dobner, *supra* note 2 (citing information from Utah County Attorney that state will still consider bringing polygamy charges against Brown family despite its relocation to Nevada). Utah treats bigamy as a third degree felony, and "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." *See* UTAH CODE ANN. § 76-7-101 (West 2010) (detailing crime of bigamy). Utah has a four year statute of limitations for the prosecution of polygamy, meaning Utah officials have four years from the date of the Browns' departure from Utah to initiate charges against them since their moving out of state resulted in them ceasing to violate Utah's statute. *See* UTAH CODE ANN. § 76-1-302 (West 2010) (providing Utah's statute of limitations for felonies, including third degree felonies such as bigamy).

6. *See, e.g.*, Timothy Egan, *The Persistence of Polygamy*, N.Y. TIMES (Feb. 28, 1999), http://www.nytimes.com/1999/02/28/magazine/the-persistence-of-polygamy.html (providing that no one has been prosecuted for polygamy alone in Utah in almost fifty years); Joanna L. Grossman & Lawrence M. Friedman, *"Sister Wives": Will Reality Show Stars Face Prosecution for Polygamy in Utah?*," FINDLAW (Oct. 4, 2010), http://writ.news.findlaw.com/grossman/20101004.html (stating Brown family does not appear to violate other criminal laws often violated by polygamists, such as child marriage, rape, or sex with minors, meaning state will have to determine whether to prosecute Brown family for polygamy "in its purest form"); *'Sister Wives' Bigamy Prosecution Would Be Rare*, FOX NEWS (Oct. 8, 2010), http://www.foxnews.com/entertainment/2010/10/08/sister-wives-bigamy-case-stats-dont-lie/ (stating review of Utah bigamy prosecutions revealed no recent prosecutions for bigamy that were unaccompanied by some form of child endangerment crime because of lack of resources to prosecute all polygamists solely for crime of bigamy); Ben Winslow, *Utah Co. Prosecutors Want to See 'Big Picture' of Prosecuting Reality TV Polygamists*, FOX 13 NEWS (Sept. 28, 2010), http://www.fox13now.com/news/local/kstu-sister-wives-stars-investigated-bigamy,0,6323096.story (citing information from Utah Attorney General's Office indicating that Office does not typically prosecute polygamy alone because of lack of resources and instead opt to prosecute polygamy only when accompanied by other crimes such as underage marriages).

7. For a further discussion of Mormon polygamy in the United States, see *infra* notes 16-26 and accompanying text.

8. *See, e.g.*, Shields, *supra* note 4 (providing citations to polygamy cases that have involved aforementioned constitutional issues). For further discussion of the constitutional implications presented by polygamy, see *infra* notes 78-93 and accompanying text.

ity.[9] Put simply, the Court reversed its *Bowers v. Hardwick*[10] decision in *Lawrence v. Texas*[11] by concluding that laws targeting consensual homosexual activity violate due process.[12] Although only a few years had lapsed between the two decisions, cultural and social changes played a large role in the Court's doctrinal shift.[13] An argument can be made that polygamy is the new homosexual sodomy, meaning television shows such as *Sister Wives* and HBO's *Big Love* that portray polygamy in a relatively positive light may represent a turning point towards acceptance of the practice.[14] Perhaps the Court will again shift its analysis from upholding laws banning the practice of polygamy to overturning them as an unconstitutional violation of due process.[15]

9. *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding state statute criminalizing consensual homosexual conduct because there is no fundamental right to engage in such conduct), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). *But see Lawrence*, 539 U.S. at 567 (2003) (overruling *Bowers* by holding state statute criminalizing consensual homosexual conduct was impermissible violation of individual's due process liberty interest in making sexual choices free from government interference).

10. 478 U.S. 186 (1986).

11. 539 U.S. 558 (2003).

12. *See id.* at 578 (holding that *Bowers* was incorrectly decided and accordingly overruled the decision). In reversing *Bowers*, the Court stated, "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.* at 567. For further discussion of *Bowers* and *Lawrence*, see *infra* notes 108-118 and accompanying text.

13. *See, e.g.*, Diana Hassel, *Lawrence v. Texas: Evolution of Constitutional Doctrine*, 9 ROGER WILLIAMS U. L. REV. 565, 574-75 (2004) (indicating that cause of change in Court's holdings from *Bowers* to *Lawrence* may have been increasing social acceptance of homosexuals since *Bowers* was decided in 1986); Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 CONN. L. REV. 1523, 1523 (2009) (arguing successful advocacy on part of lesbian, gay, bisexual, transgender ("LGBT") movement played role in shifting public opinion towards acceptance of homosexuality and ultimately in Court's *Lawrence* decision to overrule *Bowers*); Christoper Lisotta, *Courting Discrimination*, THE ADVOCATE, Apr. 13, 2004, at 28 (citing opinion that big difference between *Bowers* and *Lawrence* was increased social awareness of rights that homosexuals were being denied). For further discussion of Court's doctrinal shift from *Bowers* to *Lawrence*, see *infra* notes 119-141 and accompanying text.

14. For further discussion of polygamy's recent portrayal in the media, see *infra* notes 50-61 and accompanying text.

15. For a further discussion of *Lawrence* and its application to polygamy, see *infra* notes 142-187 and accompanying text.

II. POLYGAMY BACKGROUND

A. History of Mormon Polygamy in the United States

Polygamy in the United States has been practiced primarily by the Mormon Church, although the practice is much more prevalent in other parts of the world.[16] The mainstream Mormon Church today, however, does not recognize the practice of polygamy, and Mormons who still engage in the practice are members of break-off sects.[17] The Mormon Church, the Church of Jesus Christ of Latter-day Saints, was founded in 1830 by Joseph Smith, who was the Church's "founder, prophet, and first president."[18] The *Book of Mormon*, the scripture followed by the Mormon Church, was revealed to Smith in a series of gold plates, which he then translated.[19] In addition to the *Book of Mormon*, Mormonism embraces revelations given directly from God to Smith as part of the Church's doctrine.[20]

Polygamy was not an original tenet of the Mormon Church insofar as Smith publicly condemned the practice in the early 1840s, although there are indications that Smith secretly practiced polygamy during that time.[21] In 1843, however, Smith had his "Revela-

16. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) ("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 Asiatic and of African people."); Jonathan Turley, *Polygamy Laws Expose Our Own Hypocrisy*, USA TODAY (Oct. 3, 2004), http://www.usatoday.com/news/opinion/columnist/2004-10-03-turley_x.htm (citing study that indicates up to seventy-eight percent of world's cultures practice polygamy).

17. *See* David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 67-68 (1997) (providing overview of dissidents who broke off from mainstream Mormon Church upon Church's disavowal of polygamy).

18. *See* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 19 (Thomas A. Green & Hendrik Hartog eds., 2002) (providing description of early Mormon Church).

19. *See id.* at 20-21 (describing *Book of Mormon* as providing "a concrete example of divine intervention in the lives of Americans and the promise of the Second Coming," which was revealed to Smith in gold plates which he translated into *Book of Mormon*). Smith claimed that the plates predated other biblical manuscripts and "were untainted by moral scribes." *See id.* at 21 (providing further detail of *Book of Mormon*'s origin). The angel Moroni led Smith in a series of revelations to a hill close to his family's farm in which he found the gold plates, and the angel gave him two stones, the Urim and Thummin, which he used to translate the plates. *See* Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854-1887*, 13 YALE J. L. & FEMINISM 29, 33-34 (2001) (providing history of gold plates).

20. *See* GORDON, *supra* note 18, at 21 (providing that Mormonism includes both *Book of Mormon* and direct communication that Joseph Smith received from God in form of revelations).

21. *See* Campbell, *supra* note 19, at 31-32 (stating Smith issued formal statements against practice of polygamy despite fact that he and some other "elites" within Church engaged in polygamy).

tion on Celestial Marriage," in which it was "proclaimed that the marriage of one man to more than one woman was 'justified' by the example of Abraham."[22] Polygamy became official Church doctrine nearly a decade after that revelation.[23]

Much of the Church's history was shaped by the legal challenges it faced in practicing polygamy, and in fact, it was the oppressive legal restrictions imposed upon the Mormon Church throughout the nineteenth century that led the Church to officially abandon the practice of polygamy in 1890.[24] Nevertheless, some Mormons thought the Church was incorrect in disavowing the practice of polygamy and broke off from the mainstream Mormon Church to continue with the practice, primarily settling in Canada and Mexico, as well as in Utah and Arizona in the United States.[25] Statistics reflecting the prevalence of polygamy today in the United States are scarce because of its illegality, but it is estimated that polygamy is still practiced by approximately two percent of the population of Utah.[26]

22. *See* GORDON, *supra* note 18, at 22 (providing connection between Mormonism and practice of polygamy). Mormons believe that Christ's Second Coming is imminent, and in order to prepare for that moment, there must be a "restoration of all things," which includes "reinstituting biblical social relationships." *See* Campbell, *supra* note 19, at 34 (providing rationale behind Mormon practice of polygamy).

23. *See* GORDON, *supra* note 18, at 23 (stating polygamy remained secret for approximately ten years after Smith's revelation with polygamy only being practiced by Smith and several other Church leaders); Campbell, *supra* note 19, at 31-32 (describing Smith's revelation and its subsequent place as "one of the central tenets of early Mormon doctrine" nearly ten years after revelation).

24. For further discussion of the legal restrictions imposed upon Mormons and the Church's ultimate decision to abandon polygamy, see *infra* notes 27-49 and accompanying text.

25. *See* Chambers, *supra* note 17, at 67-68 (providing history of Mormon polygamy, including overview of dissidents who broke off from main Church upon Church's disavowal of polygamy).

26. *See* Julie Cart, *Utah Paying a High Price for Polygamy*, L.A. TIMES (Sept. 9, 2001), http://articles.latimes.com/2001/sep/09/news/mn-43824 (stating polygamy is still embedded in Utah culture, but precise statistics about practice are hard to find with most information coming from investigators or polygamists who have "left the fold"). *See also* Dobner, *supra* note 2 (estimating that there are 38,000 practicing polygamists in "Intermountain West"); Egan, *supra* note 6 (stating there are at least four major polygamous clans in Utah with one such clan having an estimated membership of 5,000 people); Grossman & Friedman, *supra* note 6 (providing that polygamous Mormons tend to live in small communities in western United States, and it is estimated that 40,000 fundamentalist Mormons continue to practice polygamy today).

B. Prohibition of Polygamy: Statutes and Case Law

The first federal statute criminalizing bigamy was the Morrill Act, which was enacted in 1862.[27] The Act was aimed at combating polygamy and provided that:

> Every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States . . . shall . . . be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years.[28]

Additionally, the Act revoked all laws passed by the Utah legislature that shielded the practice of polygamy from criminalization.[29] There was little debate surrounding the enactment of the Act, thereby reflecting the staunch opposition to the practice of polygamy within Congress during the nineteenth century.[30] The Act, however, was deemed to be ineffective in the late 1860s.[31] The ineffectiveness was due largely to the fact that Mormon juries in Utah were unwilling to convict other Mormons under the Act, and the Act required proof that the polygamist had married twice, which was difficult to accomplish considering the lack of formal marriage laws and records at that time.[32]

Congress' next attempt at regulating polygamy came in 1874 with the passage of the Poland Act.[33] The Poland Act constituted an attempt by Congress to rectify the significant shortcoming of the Morrill Act, namely the fact that Mormon juries were unwilling to

27. *See* Morrill Act, ch. 126, 12 Stat. 501 (1862) (codified at Rev. Stat. § 5352) (describing statute as "an act to punish and prevent the practice of polygamy").

28. *Id.*

29. *See id.* (disapproving and annulling all Utah laws "which establish, support, maintain, shield, or countenance polygamy").

30. *See* Robert G. Dyer, *The Evolution of Social and Judicial Attitudes Towards Polygamy*, 5 UTAH BAR J. 35, 35 (1977) (providing insight into legislative history of Act, including Morrill's statement that he presumes "there is no member of the House who desires to discuss this measure" made while introducing bill to House (quoting CONG. GLOBE, 37th Cong., 2d Sess. 1847 (1862))).

31. *See* GORDON, *supra* note 18, at 97 (providing that Congress's condemnation of Mormon polygamy grew in late 1960s and recognized that Morrill Act was ineffective at outlawing practice).

32. *See* Campbell, *supra* note 19, at 38 (providing Act was unenforceable because it depended upon "Mormon juries to convict their own" and because of lack of marriage laws making proof of multiple marriages difficult).

33. *See* Poland Act, ch. 469, 13 Stat. 253 (1874) (establishing purpose of Act as regulating jurisdiction of Utah courts).

convict polygamists, by transferring jurisdiction of polygamy cases to the United States courts.[34] As one author on the polygamy issue has said, "[s]uch amendments to jurisdiction and procedure were not the stuff of sensation, to be sure, but they represented a significant loss for Mormon juridical independence."[35]

Although the Poland Act was much more effective at regulating the practice of polygamy, it was the Morrill Act that was litigated before the Supreme Court in 1878 in *Reynolds v. United States*.[36] *Reynolds* not only was the first polygamy prosecution to reach the Supreme Court, but was also the first case in which the Court construed the free exercise clause of the First Amendment.[37] The Court framed the free exercise issue as whether a religious belief motivating an overt act, in this case the practice of polygamy, can excuse such conduct from amounting to a violation of a statute criminalizing the practice.[38] The Court went on to acknowledge that a law cannot be passed that prohibits the free exercise of religion, but it held that the Morrill Act does not violate that prohibition because of the distinction between freedom to believe and freedom to act or practice.[39] To that effect, the Court stated, "[l]aws are made for the government of actions, and while they cannot inter-

34. *See id.* (delineating those matters over which federal district courts would have jurisdiction and providing that clerk of district court is to have control over jury pool). *See also* GORDON, *supra* note 18, at 112 (providing Act reduced power of Utah's probate judges and allowed jury pools to be selected by federal court system); Campbell, *supra* note 19, at 39 (stating Act "sought to facilitate polygamy convictions by transferring plural marriage cases from the Mormon-controlled probate courts to the non-Mormon federal system").

35. GORDON, *supra* note 18, at 112.

36. *See* Reynolds v. United States, 98 U.S. 145, 146, 161-62 (1878) (stating Reynolds was charged with and found guilty of violating Morrill Act by engaging in practice of bigamy, and one of Reynolds's grounds of appeal was that statute was unconstitutional violation of free exercise clause).

37. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1246 (3d ed. 2006) (providing summary and significance of *Reynolds*).

38. *See Reynolds*, 98 U.S. at 162 ("The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.").

39. *See id.* at 162, 166 (framing issue as whether Morrill Act prohibits free exercise of religion in violation of First Amendment, but concluding that Act is constitutional and there should be no exception to its prohibition against polygamy for those people who utilize practice as part of their religion). In fact, the Court held that making exception for those people who practice polygamy as part of their religion would place religious belief in a position superior to the law, "and in effect to permit every citizen to become a law unto himself." *See id.* at 166-67 (explaining consequences of allowing religious belief to trump law).

fere with mere religious belief and opinions, they may with practices."[40]

Reynolds served both to further the anti-polygamist cause and give Congress the authority to continue regulating polygamy.[41] Consequently, Congress enacted the Edmunds Act in 1882, which amended certain provisions of the Morrill Act.[42] Not only did the Edmunds Act prohibit polygamy, it also affected polygamists' political rights in that no polygamist was allowed to vote.[43] Additionally, the Edmunds Act allowed attorneys to strike a person from a jury in a bigamy prosecution if he practiced polygamy.[44] Finally, the Act attempted to resolve the definitional problem posed by the Morrill Act by criminalizing cohabitation.[45] In other words, because of the aforementioned lack of formal marriage laws and records, traditional polygamy in the sense of having more than one wife was difficult to prosecute, and the Edmunds Act sought to rectify that problem by criminalizing not only formal marriages to multiple spouses but also cohabitating with multiple women.[46]

Finally, the 1887 Edmunds-Tucker Act served as the legislative end to Mormon polygamy.[47] The most important provisions of the Act included (1) allowing for a lawful husband or wife of the alleged polygamist to testify in prosecutions for bigamy; (2) allowing witnesses to be called in a bigamy prosecution without a subpoena; (3) criminalizing adultery; (4) requiring that all marriages be certified; (5) initiating forfeiture proceedings against the Mormon Church; (6) reaffirming the property limitations that the Morrill

40. *Id.* at 166.

41. *See* GORDON, *supra* note 18, at 121-22 ("[T]he opinion in *Reynolds* immediately and irrevocably raised the pitch of antipolygamy activism. . . . The opinion reassured congressmen, lobbyists, newspaper editors, and husbands and wives in the states that the marital structure they inhabited was indeed the very marrow of the Constitution."); Campbell, *supra* note 19, at 42 (stating *Reynolds* allowed Congress to more heavily regulate polygamy under Edmunds Act).

42. *See* Edmunds Act, ch. 47, 22 Stat. 30 (1882) (codified at 48 U.S.C. § 1461) (repealed 1983) (stating purpose of Act was to amend certain sections of Morrill Act).

43. *See id.* (disqualifying any polygamist or person cohabitating with more than one woman to vote at any election or run for public office).

44. *See id.* (stating it is sufficient cause of challenge to any juror if he practices polygamy or unlawful cohabitation with more than one woman).

45. *See id.* ("That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor.").

46. *See* Campbell, *supra* note 19, at 43 (delineating how Edmunds Act sought to rectify definitional problem posed by Morrill Act's criminalization of polygamy).

47. *See id.* at 50 ("Congress dealt Mormon polygamy its fatal blow with the 1887 Edmunds-Tucker Act.").

Act imposed upon religious organizations; (7) reaffirming the disincorporation of the Mormon Church; (8) prohibiting women from voting in Utah elections; and (9) invalidating any formation of a local militia in Utah.[48] Largely as a result of the serious restrictions imposed upon Mormon polygamy by this Act, the President of the Mormon Church at the time, Wilford Woodruff, issued a declaration in 1890 urging Mormons to refrain from entering into marriages that are forbidden by United States law, namely polygamous marriages.[49]

C. Polygamy Today

1. *Portrayal in the Media*

Although the Mormon Church no longer officially espouses polygamy, some members of break-off Mormon sects continue the practice today.[50] This fact becomes apparent by watching TLC's reality show, *Sister Wives*, which details the daily life of a modern-day polygamist family.[51] *Sister Wives* depicts the life of Kody Brown and his four wives, Meri, Janelle, Christine, and Robyn, and their sixteen children.[52] The family recently clarified its marital status: Kody Brown's marriage to his first wife, Meri, is a civil marriage licensed by the state, while the other three marriages are only religious unions that do not have state approval.[53] This makes clear that

48. *See* Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887) (codified at 28 U.S.C. §§ 633, 660) (repealed 1978) (providing certain amendments to Rev. Stat. § 5352 [the Morrill Act]).

49. *See* GORDON, *supra* note 18, at 220 (providing background regarding Wilford Woodruff's "Manifesto" urging Mormons to cease practicing polygamy). "The pain of resistance overwhelmed the Saints, their church, and their commitment to legal difference. After four long decades of conflict, the victory was as eagerly anticipated by most antipolygamists as it was dreaded by many Mormons. Mormon leaders understood that survival and resistance had finally come full circle." *Id. See also,* Campbell, *supra* note 19, at 51 (stating Wilford Woodruff issued his Manifesto and thereby brought practice of polygamy to end among Mormons).

50. For further discussion on why some Mormons continue to practice polygamy and its prevalence today, see *supra* notes 25-26 and accompanying text.

51. *See Who are the Browns?*, *supra* note 2 (providing background of Brown family and describing purpose of show as depicting polygamous family that navigates life "in a society that shuns their lifestyle"). *See also, Inside the Lives of a Polygamist Family*, OPRAH (Oct. 14, 2010), http://www.oprah.com/oprahshow/Inside-the-Lives-of-a-Polygamist-Family/print/1 (providing interview with Brown family in which Kody Brown said "they invited cameras inside their homes to dispel misconceptions about polygamists").

52. *See, e.g., Inside the Lives of a Polygamist Family*, *supra* note 51 (providing biographical information of Brown family).

53. *See id.* (providing interview with Kody Brown in which he stated that his marriage to Meri was licensed by state but that family did not expect state of Utah to recognize his other marriages). "'We weren't looking for the state to do that,'

the family does, in fact, fall within the ambit of the Utah bigamy statute, which criminalizes the act of purporting to marry other women while already having one wife.[54]

As previously mentioned, the Brown family lived in Utah but recently relocated to Nevada, a move that technically should not have any impact on potential bigamy charges brought against the family by the state of Utah because of Utah's four year statute of limitations.[55] Consequently, although the family currently no longer resides in Utah, Utah officials have four years from the date of the family's departure to charge them with bigamy.[56] Furthermore, while there are some reports that the Browns may have moved to Nevada on the pretense that Nevada is a safe harbor state for bigamy, such thinking would be incorrect as Nevada also criminalizes bigamy, although unlike Utah, Nevada does not recognize cohabitation as violating the bigamy statute.[57] The Brown family was well aware of some of the potential consequences of

he says. 'This is strictly a family unit, [and] we didn't feel like we needed that.'" *Id.*

54. *See* UTAH CODE ANN. § 76-7-101 (West 2010) ("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."). Based upon the statute, Kody Brown and his latter three wives could all be subject to bigamy prosecution since the statute criminalizes not only having multiple wives but also cohabiting with someone who is already married. *See id.* (criminalizing both taking multiple spouses and marrying or cohabiting with married individual). Prior to the Browns' marital status being clarified, commentators posited that the Browns may not be guilty of bigamy if only religious marriages were involved, meaning Kody Brown had to be civilly married to at least one of his wives before they could be in violation of Utah's statute. To this extent, Grossman and Friedman provide:

> If even one of the marriages is a legal, civil marriage, then Kody and the wives are probably guilty of bigamy under Utah's definition. . . . But if all three were merely religious 'marriages' – and not marriages recognized by the state of Utah – then Kody and his wives might be safe from prosecution. It is not a crime to engage in multiple, simultaneous cohabitation as long as there is no civil marriage involved.

Grossman & Friedman, *supra* note 6.

55. *See* UTAH CODE ANN. § 76-1-302 (West 2010) (stating Utah has four year statute of limitations for all felonies and bigamy is felony of third degree under the Code).

56. For a further discussion of the Brown family's relocation to Nevada and its attendant implications for a Utah bigamy prosecution, see *supra* notes 2-5 and accompanying text.

57. *See* NEV. REV. STAT. ANN. § 201.160 (West 2009) (providing definition of bigamy). According to the Nevada statute:

> Bigamy consists in the having of two wives or two husbands at one time, knowing that the former husband or wife is still alive. . . . It is not necessary to prove either of the marriages by the register and certificate thereof, or other record evidence, but those marriages may be proved by such evidence as is admissible to prove a marriage in other cases, and when the second marriage has taken place without this State, cohabita-

broadcasting its lifestyle (and its attendant violation of the law) for the entire country to see, but it did not necessarily foresee a bigamy prosecution resulting from its program.[58] Nevertheless, that is the state of affairs as they currently rest with the Brown family – continuing to film *Sister Wives* in Nevada while Utah officials contemplate bringing bigamy charges against the family.

HBO's *Big Love* is another television program that depicts polygamy in a relatively positive light, although from the perspective of a fictional family as opposed to a reality program.[59] The show depicts the protagonist's trials and tribulations in handling the drama with his three wives, his children, and his career as a state senator.[60] One practicing polygamist believes that the show is having a positive impact on Americans' perception of polygamist families and may even result in people's questioning the merits of criminalizing polygamy.[61]

Consequently, although the Browns are potentially facing criminal charges as a result of their publicized violation of Utah's bigamy law, their television program, in conjunction with *Big Love,* may actually be achieving the Browns' goal of dispelling polygamy misconceptions and could potentially represent the beginning of a societal turning point towards acceptance of the practice. At the very least, the television shows are displaying a side of polygamy never before seen, namely the side in which polygamous families function

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tion in this State after the second marriage constitutes the commission of the crime of bigamy.

Id.

58. *See, e.g., Inside the Lives of a Polygamist Family, supra* note 51 (providing interview with Kody Brown in which he described his surprise at possibility of prosecution by stating that he did not expect criminal charges to result from his television program). Nevertheless, the Brown family stands by the mission of their television show, and Kody Brown recently stated, "'[w]e're just hoping that ultimately . . . the fear of being prosecuted is less daunting than the fear of continuing a society in secrecy and darkness.'" *See* Winslow, *supra* note 6 (detailing Kody Brown's opinion on prosecution possibility).

59. *See generally Big Love* (HBO television broadcast). *Big Love* airs on HBO on Sundays at 9 PM and is in its fifth season.

60. *See Big Love: About the Show,* HBO, http://www.hbo.com/big-love/index.html#/big-love/about/index.html (last visited Jan. 29, 2011) (providing background and plot of *Big Love*). "Bold, funny and wholly original, 'Big Love' continues to explore the evolving institution of marriage through this typically atypical family." *Id.*

61. *See* Felicia R. Lee, *'Big Love': Real Polygamists Look at HBO Polygamists and Find Sex,* N.Y. TIMES (Mar. 28, 2006), http://www.nytimes.com/2006/03/28/arts/television/28poly.html?_r=1&ref=polygamy ("This is making all of America say 'Why is there a law against polygamy?' . . . This guy is just trying to support his family, and the family is just trying to make it." (quoting interview conducted with polygamists during screening of *Big Love*)).

"normally" without child endangerment and welfare issues accompanying their everyday lives.

2. *Criminal Charges Brought Against Polygamists*

Child endangerment crimes were at the forefront of the recent highly publicized prosecutions of polygamists Warren Jeffs and Tom Green.[62] In fact, prosecuting the Browns for bigamy would be unique in that their bigamy charges, presumably, would be unaccompanied by child endangerment crimes.[63] Some of the problems typically associated with polygamy, which were brought to light by the Jeffs and Green prosecutions, include incest, child abuse, wife battering, and child poverty.[64] As Marci Hamilton, a law professor, has said, HBO's *Big Love* "is getting a lot of attention – but it plays fast and loose with the facts."[65] In fact, testimony from a former member of Jeffs' community revealed that Jeffs "controlled every aspect of the women's lives, including how they dressed and what they ate. He also controlled whom they married and when. 'Age was not a factor.' "[66]

Warren Jeffs was the leader of a polygamous Mormon sect that was located on the Yearning for Zion Ranch in Eldorado, Texas.[67] After a raid on the ranch in 2008, Jeffs was charged with bigamy,

62. *See, e.g.*, James C. McKinley, Jr., *Polygamist Sect Leader Extradited to Texas for Trial*, N.Y. TIMES (Dec. 1, 2010), http://www.nytimes.com/2010/12/02/us/02jeffs.html (stating Jeffs was convicted in 2007 of two counts of rape for arranging marriage of 14-year-old girl to her cousin); Turley, *supra* note 16 (stating Green was alleged to have married thirteen-year-old girl, thereby allowing him to be prosecuted for child sex crime).

63. For further discussion of the rare nature of prosecuting bigamy alone, see *supra* note 6 and accompanying text.

64. *See* Cart, *supra* note 26 (providing interview with law enforcement officials who describe how plural marriages operate and some problems often associated with polygamous communities).

65. *See* Marci Hamilton, *The Reality of Polygamy: Very Different From What's Depicted on HBO's "Big Love,"* FINDLAW (Mar. 23, 2006), http://writ.news.findlaw.com/hamilton/20060323.html (criticizing polygamy's portrayal on *Big Love*). Hamilton goes on to say that "polygamy rests, inevitably, on child abuse and neglect. The numbers simply cannot lie. And to the extent it suggests otherwise, 'Big Love' is really a Big Lie." *Id.*

66. *See* James C. McKinley, Jr., *Polygamist Sect Leader Convicted of Sexual Assault*, N.Y. TIMES (Nov. 6, 2009), http://www.nytimes.com/2009/11/06/us/06polygamy.html?_r=1&ref=polygamy (providing testimony from former member of Jeffs's community that was presented at trial for another leader of Yearning for Zion Ranch, Raymond Jessop).

67. *See, e.g.*, McKinley, *supra* note 62 (stating Jeffs was alleged to have founded Yearning for Zion Ranch in 2004 as community for his polygamous followers, and as part of polygamous practice, he arranged marriages between underage girls and men of community).

rape, sexual assault of a child, and aggravated assault.[68] Jeffs was convicted of being an accomplice to rape, but the Utah Supreme Court overturned that conviction in July 2010 on the basis of faulty jury instructions and remanded the case.[69] After being extradited to Texas, however, a jury in August 2011 convicted Jeffs of aggravated sexual assault of a twelve year-old girl and sexual assault of a fifteen year-old girl and sentenced him to life in prison for those crimes.[70]

As a practicing polygamist who lived in Utah, Tom Green was sentenced in 2001 to a minimum of five years in prison after being convicted of four counts of bigamy.[71] Green had over twenty-six children from five wives at the time of his court proceedings.[72] The marital situation of Green is particularly shocking: no wife was older than sixteen when she married, one of his wives was thirteen when she became pregnant, his other four wives are two sets of sis-

68. *See, e.g., id.* (describing 2008 raid on Yearning for Zion Ranch); *Polygamist Warren Jeffs' Convictions Overturned*, CBS NEWS (Jul. 27, 2010), http://www.cbsnews.com/stories/2010/07/27/national/main6717635.shtml (describing 2008 raid on ranch and alleged activity that led to Jeffs' criminal charges). During the raid, over 400 children were removed from the Yearning for Zion Ranch, and more than a dozen men, including Jeffs, have been indicted on criminal charges such as bigamy and sexual assault of a child. *See, e.g.*, Hilary Hylton, *Texas Polygamists Prep for Criminal Trials*, TIME (July 26, 2009), http://www.time.com/time/nation/article/0,8599,1912477,00.html (describing raid and charges stemming from it). The children were eventually ordered to be returned to their parents because of a lack of evidence of abuse. *See, e.g.*, McKinley, *supra* note 62 (discussing return of children).

69. *See, e.g.*, Hilary Hylton, *Will Texas Have Better Luck with Warren Jeffs?*, TIME (July 28, 2010), http://www.time.com/time/nation/article/0,8599,2006999,00.html (providing details of Utah Supreme Court's decision to overturn and remand Jeffs' rape accomplice conviction). Jeffs was extradited to Texas, where his Yearning for Zion Ranch is located, in December 2010 to face charges of bigamy, sexual assault of a child, and aggravated assault in that state. *See id.* (discussing Texas extradition); McKinley, *supra* note 62 (stating Jeffs was awaiting decision by Utah prosecutors as to whether to retry his rape accomplice charge when Utah Supreme Court decided it would not stand in way of Jeffs's extradition to Texas).

70. *See, e.g., Court Releases Warren Jeffs Audio Sex Tapes*, CNN JUSTICE (Aug. 12, 2011), http://articles.cnn.com/2011-08-12/justice/texas.polygamist.jeffs_1_warren-jeffs-sexual-assault-fundamentalist-church?_s=PM:CRIME (describing sex tapes that Texas jury heard during Jeffs's trial); Dennis Wagner, *Polygamist Sect Leader Warren Jeffs Gets Life in Prison*, USA TODAY (Aug. 10, 2011), http://www.usatoday.com/news/religion/2011-08-09-polygamist-sect-leader-warren-jeffs-life-sentence_n.htm (providing analysis of Texas jury's verdict in Warren Jeffs case).

71. *See, e.g.*, Grossman & Friedman, *supra* note 6 (detailing Green's convictions).

72. *See, e.g., id.* (providing background regarding circumstances leading to Green's convictions); Terry McCarthy, *He Makes a Village*, TIME (May 6, 2001), http://www.time.com/time/magazine/article/0,9171,1101010514-108793,00.html (stating Green had five wives and twenty-six children with three wives pregnant at time of court proceeding).

ters, and Green was also previously married to the mothers of two of his wives.[73]

The impact that the media had in publicizing Green's crimes is undeniable. Green came to the attention of Utah authorities by appearing on national television talk shows and candidly discussing his lifestyle.[74] In fact, it was Green's decision to give an interview to NBC's *Dateline* supporting his lifestyle that prompted Utah officials to initiate charges against him.[75] The Browns may face a similar destiny in that their decision to make their illegal conduct public may now result in a bigamy prosecution.[76] In other words, their decision to flout the law for the entire country, including law enforcement officials, to see may be the 'but for' cause of their current legal situation.

III. CONSTITUTIONAL IMPLICATIONS OF POLYGAMY

Officials are well aware of the potential ramifications of prosecuting the Brown family for polygamy with one Utah official asking, "[d]o we want to open this can of worms and maybe have some court of appeals say this statute is unconstitutional? . . . Is this a test case that we want to go ahead and take up?"[77] Nevertheless, as this official correctly points out, there are a number of potential constitutional implications raised by prosecuting the Brown family for a violation of Utah's bigamy statute, including free exercise of religion, right of association, equal protection, and due process right to privacy.[78]

The First Amendment to the United States Constitution provides, in relevant part, that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise

73. *See* McCarthy, *supra* note 72 (describing family situation of Green).

74. *See, e.g.*, Dobner, *supra* note 2 (stating Tom Green came to attention of Utah authorities by appearing on national TV shows); Grossman & Friedman, *supra* note 6 ("[Tom Green] provoked local prosecutors out of their habit of nonenforcement by appearing on popular talk shows touting their lifestyle and proclaiming a constitutional right to pursue it.").

75. *See* McCarthy, *supra* note 72 (citing information from Green's prosecuting attorney that Green's interview with NBC in 1999 is what prompted Utah officials to bring charges against him).

76. *See* Grossman & Friedman, *supra* note 6 ("Certainly, [the Browns] have made it hard for local authorities to ignore their apparently illegal behavior, by parading it on television for all the world to see.").

77. *See* Winslow, *supra* note 6 (providing discussion with deputy Utah County Attorney regarding prosecution of Brown family).

78. For further discussion of these constitutional implications, see *infra* notes 79-92 and accompanying text.

thereof."[79] *Reynolds v. United States*, in addition to being the first polygamy prosecution to reach the Supreme Court, was also the first case in which the Court construed the free exercise clause of the First Amendment.[80] In light of *Reynolds*, however, a free exercise argument is unlikely to succeed because the Court drew a distinction between the freedom to believe and the freedom to act, which means that while the government cannot interfere with religious belief, the government can prohibit religious practices stemming from that belief.[81] In fact, the Utah Supreme Court followed the *Reynolds* line of reasoning in *State v. Holm*,[82] which dealt with a polygamist's claim that the state's bigamy law violated his First Amendment free exercise right (among others).[83]

Although there are no Supreme Court precedents on the right of association or equal protection in the polygamy context, the Utah Supreme Court also discussed those issues in *Holm*.[84] The right of association is not explicitly mentioned in the First Amendment, but the Court has held that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech [as protected by the First Amendment]."[85] Holm claimed that the Utah bigamy law violated his right of association in that it restricted his ability to teach his children, by way of example, the polygamous lifestyle.[86] The Utah Supreme Court, however, held that the state's bigamy statute did not run afoul of the right of association because

79. U.S. CONST. amend. I.

80. *See* CHEMERINSKY, *supra* note 37, at 1246 (providing summary of *Reynolds*). For further discussion of *Reynolds*, see *supra* notes 36-41 and accompanying text.

81. *See* Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (making distinction between belief and action). In making this distinction, the Court stated:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . To permit this [to allow practice of polygamy because of religious belief] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Id.

82. 137 P.3d 726 (Utah 2006).

83. *See id.* at 741-42 (upholding *Reynolds* and viewing it as dispositive on Holm's free exercise claim). The Utah Supreme Court's position on these issues is relevant to the Brown family because their bigamy prosecution would likely be brought under Utah law.

84. *See id.* at 745-46 (discussing Holm's right of association and equal protection claims).

85. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

86. *See Holm*, 137 P.3d at 745 (outlining Holm's right of association argument).

the right to engage in polygamous behavior is not a right protected by the Constitution.[87] In other words, the right of association is not violated by the bigamy law because such a right extends only to those associations that further liberty interests protected by the Constitution, and polygamy does not constitute such an interest.[88]

The equal protection clause with respect to state action can be found in the Fourteenth Amendment, which provides in relevant part, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[89] The Utah Supreme Court in *Holm* recognized that the equal protection clause requires similarly situated individuals to be treated the same.[90] The Court held, however, that the Utah bigamy law is facially neutral with respect to religion in that it does not mention polygamists or their religion but instead "is designed to punish behavior regardless of the motivations giving rise to that behavior."[91] Consequently, the Court determined that there was no equal protection violation presented by criminalizing polygamy.[92]

The Supreme Court of Utah also addressed the application of substantive due process to the polygamy context in *Holm*, but in light of the Supreme Court's decision in *Lawrence v. Texas*, the Browns (and other polygamists) can persuasively argue both that *Holm* was incorrectly decided on this issue and that Utah's bigamy law does, in fact, violate their substantive due process rights under the Fourteenth Amendment.[93]

87. *See id.* at 745-46 (holding no violation of Holm's right of association).

88. *See id.* at 746 ("Holm's right to intrinsic association has not been unduly infringed upon because . . . the right to engage in polygamous behavior is not encompassed within the ambit of the individual liberty protections contained in our federal constitution.").

89. U.S. CONST. amend. XIV, § 1.

90. *See Holm*, 137 P.3d at 745 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985)) (detailing requirements of Fourteenth Amendment's equal protection clause).

91. *See id.* (disagreeing with Holm that Utah bigamy law violates equal protection clause).

92. *See id.* (holding no equal protection violation presented by Utah bigamy statute).

93. For further discussion of polygamy and substantive due process rights in light of *Lawrence*, *see infra* notes 142-187 and accompanying text.

IV. POSSIBLE PARALLEL BETWEEN HOMOSEXUALITY AND POLYGAMY

A. Homosexual Sodomy Laws and Development of Substantive Due Process Jurisprudence

In *Bowers v. Hardwick*, the Court addressed the issue of whether the right to privacy first acknowledged by the Court in *Griswold v. Connecticut*[94] extends to homosexual conduct.[95] In *Griswold*, the Court was confronted with a Connecticut law that forbade the use of contraceptives.[96] The Court held that the law was an unconstitutional violation of an individual's right to privacy, which was deemed to be a fundamental right.[97] The Court, however, did not ground the fundamental right to privacy in the Fourteenth Amendment's due process clause.[98] Rather, the Court found such a right to emanate from the penumbra of rights protected by the First, Third, Fourth, Fifth, and Ninth Amendments.[99] Because a fundamental right was at stake, the Court applied strict scrutiny to the statute at issue.[100] Strict scrutiny as applied to a fundamental right means that the government must prove that the statute and its attendant interference upon an individual's right is necessary to

94. 381 U.S. 479 (1965).

95. *See* Bowers v. Hardwick, 478 U.S. 186, 190 (1986), *overruled by*, Lawrence v. Texas, 539 U.S. 558 (2003) (framing issue as whether there is fundamental right to engage in homosexual sodomy that is violated by laws prohibiting such conduct).

96. *See Griswold*, 381 U.S. at 480 (citing Connecticut law that criminalized act of using "any drug, medicinal article or instrument for the purpose of preventing conception").

97. *See id.* at 485 (holding law to be unconstitutional violation of fundamental right to privacy).

98. *See id.* at 481-82 ("[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. State of New York* . . . should be our guide. But we decline that invitation as we did in [other cases.]").

99. *See id.* at 484 ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."). Justice Douglas, in writing for the majority, went on to say that a zone of privacy is created by the penumbras emanating from certain amendments: the First Amendment creates a privacy right in the sense that a citizen cannot be denied his or her right to association; the Third Amendment's prohibition against quartering soldiers also is a "face of privacy;" the Fourth Amendment's guarantee of a citizen's right to be secure against unreasonable searches and seizures is yet another aspect of privacy; the Fifth Amendment creates a form of privacy in that the government cannot compel a citizen to incriminate himself; and finally the Ninth Amendment states that the citizen has other rights despite the fact that certain rights are specifically enumerated in the Constitution. *See id.* (providing discussion of Court's penumbra analysis).

100. *See id.* at 485 (using word "fundamental" to describe privacy right at stake).

achieve a compelling government purpose.[101] The contraception statute at issue failed the strict scrutiny test, meaning it impermissibly interfered with an individual's right to privacy.[102] Justice Harlan, while agreeing that the Connecticut contraception statute violated a person's fundamental right to privacy, grounded his concurring opinion in the Fourteenth Amendment's due process clause as opposed to the penumbra concept utilized by the majority.[103]

Justice Harlan's Fourteenth Amendment due process approach in *Griswold* became the majority's approach in the seminal case of *Roe v. Wade*.[104] In *Roe*, the Court was confronted with a Texas law that prohibited abortions unless the procedure was necessary to save the woman's life.[105] In applying strict scrutiny to the statute, the Court held that it infringed upon a woman's fundamental right to privacy, meaning a woman has a constitutional right to abortion pre-viability, although the Court did conclude that the

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101. *See, e.g.*, CHEMERINSKY, *supra* note 37, at 797 (stating government must show compelling purpose for statute and that statute is necessary to further that purpose, meaning there are no less restrictive alternatives). By contrast, when only a liberty interest is at stake (as opposed to a fundamental right), the Court applies rational basis scrutiny to a statute that allegedly infringes upon that interest, meaning the government only needs to prove that it had a legitimate interest that it seeks to regulate by the statute and the statute is rationally related to achieving that interest. *See id.* (describing rational basis scrutiny).

102. *See Griswold*, 381 U.S. at 485-86. In explaining why the statute failed strict scrutiny, the Court stated:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

Id.

103. *See id.* at 500 (Harlan, J., concurring) (agreeing with Court's ultimate holding, but concluding that fundamental right to privacy lies in due process clause of Fourteenth Amendment). "While the relevant inquiry [into Fourteenth Amendment due process] may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause . . . stands, in my opinion, on its own bottom." *Id.*

104. 410 U.S. 113 (1973).

105. *See id.* at 117-18 (citing Texas law that criminalizes procuring or attempting abortion unless procedure is done for purpose of protecting mother's life).

state has a compelling interest in banning abortion post-viability.[106] In arriving at this conclusion, the Court grounded the fundamental right to privacy in the Fourteenth Amendment's due process clause.[107]

Due process was first confronted in the homosexual conduct context in *Bowers v. Hardwick*.[108] That case involved police catching two men engaging in homosexual conduct when the police entered the apartment on an unrelated matter.[109] Although he was not prosecuted for violating a Georgia statute that criminalized homosexual sodomy, Hardwick brought suit arguing that the statute criminalizing consensual homosexual conduct was an impermissible violation of his right to privacy.[110] The Court, however, disagreed and instead held that homosexuals do not have a fundamental right to engage in consensual sodomy insofar as the due process right to privacy does not include such conduct.[111] In resolving this issue, the Court stated:

> [W]e think it evident that none of the rights announced in those cases [referring to decisions pertaining to privacy in family and reproductive matters] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation

106. *See id.* at 155, 163 (holding fundamental right to privacy includes right to abortion, but right is qualified to allow for state prohibition of abortion after viability because of compelling state interest in protecting prenatal life, although there must be exceptions to prohibition if procedure is necessary for protecting maternal health).

107. *See id.* at 153 (stating right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" regardless of whether right stems from Fourteenth Amendment liberty or Ninth Amendment's reservation of rights to people).

108. *See* Bowers v. Hardwick, 478 U.S. 186, 190 (1986), *overruled by*, Lawrence v. Texas, 539 U.S. 558 (2003) (stating issue presented to Court was whether statute prohibiting consensual homosexual sodomy violated fundamental right).

109. *See id.* at 187 (providing brief factual background of case); CHEMERINSKY, *supra* note 37, at 866 (explaining police officer witnessed Hardwick engaging in homosexual conduct after being led to Hardwick's bedroom by his roommate).

110. *See id.* at 188 (stating district attorney did not present matter to grand jury but Hardwick brought suit alleging statute was unconstitutional). The Court of Appeals for the Eleventh Circuit agreed with Hardwick and deemed the statute at issue to be a violation of Hardwick's fundamental right to privacy that cannot be regulated by the state pursuant to the Ninth Amendment and the Fourteenth Amendment's due process clause. *See id.* at 189 (providing procedural history of case).

111. *See id.* at 190-91 (framing issue as whether there is fundamental right of homosexuals to engage in sodomy and concluding there is no such right).

> on the one hand and homosexual activity on the other has been demonstrated.[112]

In *Lawrence v. Texas*, the Court was faced with a similar fact pattern as that presented in *Bowers*: a man was found engaging in a homosexual act when the police entered his home based on a report of a weapons disturbance.[113] Unlike Hardwick, however, Lawrence was prosecuted for violating a Texas statute that criminalized engaging in homosexual intercourse, and Lawrence alleged that the statute was an unconstitutional violation of his Fourteenth Amendment equal protection and due process rights.[114] When the case reached the Supreme Court, the Court reversed track and instead held that the starting point in *Bowers* was incorrect in terms of defining the right at stake.[115] The *Bowers* Court limited its framing of the issue to the fundamental right of homosexuals to engage in sodomy whereas the correct depiction of the issue is the liberty interest that individuals have in entering into personal sexual relationships without fear of government intrusion.[116] In other words, the proper framing of the issue is the individual's freedom to enter into consensual sexual relationships without government interference. To that effect, the Court stated:

> The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled

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112. *Id.* at 190-91.

113. *See* Lawrence v. Texas, 539 U.S. 558, 562-63 (2003) (providing factual background of case).

114. *See id.* at 563 (stating Lawrence was fined pursuant to Texas sodomy statute, and he filed suit alleging violation of his constitutional rights). The Court of Appeals for the Texas Fourteenth District rejected any violation of equal protection or due process and affirmed Lawrence's conviction. *See id.* (providing procedural history of case).

115. *See id.* at 566-67 (determining *Bowers* Court's analytical starting point of considering whether there is fundamental right of homosexuals to practice sodomy was incorrect).

116. *See id.* at 567 ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual marriage intercourse.").

> to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[117]

It is important to note, however, that although the Court affirmed the existence of a fundamental right to privacy, it did not expressly use strict scrutiny to analyze the Texas statute at issue.[118]

B. Impact of Social Movements on Court's Jurisprudence from *Bowers* to *Lawrence*

In determining what led to the Court's decision to reverse *Bowers* in *Lawrence*, it is important to note that societal changes occurred between the years in which the two cases were decided that resulted in greater public acceptance of the homosexual lifestyle.[119] Although the justices of the Supreme Court are unelected and have lifetime tenure, "their rulings, particularly on matters of broad social concern, respond to Congress, the President and public opinion."[120] William Eskridge, Jr., a constitutional law scholar, believes

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117. *Id.*

118. *See id.* at 564 (concluding that case should be decided on basis of liberty under due process clause and providing detailed analysis of Court's right to privacy precedent beginning with *Griswold*). The Court, however, did not expressly delineate a standard of scrutiny, as evidenced by its statement that "a law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, *under any standard of review*." *Id.* at 585 (emphasis added). *See also*, CHEMERINSKY, *supra* note 37, at 846 (stating *Lawrence* did not articulate standard of review to be used or speak of fundamental right, although Court did rely upon privacy right cases in which strict scrutiny was used to analyze statutes at issue). For further discussion of the distinction between fundamental rights and liberty interests, see *supra* note 101 and accompanying text.

119. *See, e.g.*, Diana Hassel, *Lawrence v. Texas: Evolution of Constitutional Doctrine*, 9 ROGER WILLIAMS U. L. REV. 565, 574-75 (2004) (indicating there was increased societal acceptance of homosexuals after *Bowers* was decided in 1986); Hutchinson, *supra* note 13, at 1525-26 (arguing successful advocacy on part of LGBT movement played role in shifting public opinion towards acceptance of homosexuality); Christopher Lisotta, *Courting Discrimination*, THE ADVOCATE, Apr. 13, 2004, at 28 (arguing greater social awareness of rights being denied to homosexuals between *Bowers* and *Lawrence*). *See also* Turley, *supra* note 16 ("[T]his recent change [referring to Court's *Lawrence* decision] was brought about in part by the greater acceptance of gay men and lesbians into society, including openly gay politicians and popular TV characters."). At the time of writing this article, however, Turley did not anticipate there ever being such societal acceptance of polygamy. *See id.* ("Such a day of social acceptance will never come for polygamists. It is unlikely that any network is going to air *The Polygamist Eye for the Monogamist Guy* or add a polygamist twist to *Everyone Loves Raymond*."). TLC and HBO's shows, however, may be proving this hypothesis wrong.

120. Hutchinson, *supra* note 13, at 1525 (explaining that despite Justices' lifetime tenure, there are many outside influences that may shape Court's jurisprudence, including social movements).

that social movements were critical in shaping twentieth century constitutional law.[121] Specifically, he suggests that social movements were important in three respects: (1) in protecting perceived threats to the liberty of their members; (2) in seeking to gain political recognition of their group members and ending legal discrimination; and (3) in seeking to provide remedies for past discrimination.[122] To this effect, Eskridge stated, "ISBMs [identity-based social movements] and their allies did not single-handedly work these transformations [in the Court's jurisprudence], but they have provided impetus and then support for judges when they have moved in the direction of those stances."[123] Darren Hutchinson, a constitutional law professor, echoes Eskridge's sentiment in saying that "[s]ocial movements are essential for the achievement of legal and political change."[124]

Specifically with respect to *Bowers* and *Lawrence*, successful advocacy on the part of the lesbian, gay, bisexual, transgender ("LGBT") movement led to greater social awareness of the rights being denied to homosexuals under then-existing sodomy laws.[125] This changed mindset eventually worked its way to the Supreme Court in the *Lawrence* opinion.[126] In fact, the majority itself recognized that there has been an "emerging awareness" within society suggesting that the liberty protected by the Constitution includes the right of adults to decide "how to conduct their private lives in matters pertaining to sex."[127] Although the majority indicates that

121. William Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002) (arguing that "identity-based social movements" were critical in shaping Court's constitutional law jurisprudence during twentieth century).

122. *See id.* at 2065 (providing that identity-based social movements were engaged in three different kinds of politics: "politics of protection," "politics of recognition," and "politics of remediation.").

123. *Id.* at 2066.

124. *See* Hutchinson, *supra* note 13, at 1525 (stating while social movements, in general, are essential for achieving legal and political change, LGBT movement was especially important in shaping society's viewpoint between *Bowers* and *Lawrence*).

125. *See, e.g., id.* at 1526, 1530 (detailing advocacy of LGBT movement in time between *Bowers* and *Lawrence*).

126. *See id.* at 1529-30 (explaining that "legal landscape" regarding homosexuality changed by time *Lawrence* was decided). For further discussion of *Lawrence v. Texas*, see *supra* notes 113-118 and accompanying text.

127. *See* Lawrence v. Texas, 539 U.S. 558, 572 (2003) (recognizing that although historically homosexual conduct was not recognized and is still morally abhorred by some, there has been growing trend or "emerging awareness" towards acceptance of this conduct). In fact, the majority thinks that this "emerging awareness" or "recognition" should have been apparent even when *Bowers* was decided. *See id.* (stating awareness that liberty includes right of adults to choose their sexual

this awareness was present even at the time *Bowers* was decided, it references changes that occurred in state sodomy laws between *Bowers* and *Lawrence* as indicia of even more significant societal changes that occurred between the two decisions.[128] Specifically, while twenty-five states criminalized sodomy at the time of *Bowers*, only thirteen states criminalized such conduct at the time *Lawrence* was decided with a pattern of non-enforcement among consenting adults engaging in such activity in private.[129] Furthermore, the Court in *Lawrence* acknowledged that *Planned Parenthood of Southeastern Pa. v. Casey*[130] and *Romer v. Evans*,[131] both decided between *Bowers* and *Lawrence*, gave greater credence to the argument that societal and jurisprudential changes suggest that family and sexual relationships should be given greater protection under substantive due process.[132]

Social change has had an impact on the Court in terms of altering the course of its decisions in other contexts as well.[133] As Professor Eskridge says, "ISBMs and their countermovements brought

relationships should have been apparent at time *Bowers* was decided largely because Model Penal Code, promulgated in 1955, stated "consensual sexual relations conducted in private" should not be criminalized).

128. *See id.* at 573 ("In our own constitutional system, the deficiencies in *Bowers* became even more apparent in the years following its announcement.").

129. *See id.* (providing overview of state sodomy laws and changes in criminalization of sodomy and enforcement of such laws that occurred between *Bowers* and *Lawrence* decisions).

130. 505 U.S. 833 (1992). *Casey* dealt with a Pennsylvania abortion law in which the Court reaffirmed *Roe v. Wade*'s general holding that there is a constitutional right to abortion, but the Court, in a joint opinion, abandoned *Roe*'s trimester framework in favor of an undue burden standard. *See id.* at 873, 876-77 (abandoning trimester framework in favor of undue burden standard). With respect to *Casey* and the Court's concern for protecting intimate relationships, the Court in *Lawrence* stated, "[t]he *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence*, 539 U.S. at 573-74.

131. 517 U.S. 620 (1996) (declaring Colorado statute that repealed prohibitions on discriminating against gays, lesbians, and bisexuals unconstitutional).

132. *See Lawrence*, 539 U.S. at 576 ("The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance.").

133. *See, e.g.*, DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 77-79 (4th ed. 2009) (describing NAACP's growing success post-World War II with challenging de jure segregation in that government officials were now on board with questioning merits of such segregation); Gerald Torres, *Some Observations on the Role of Social Change on the Courts*, 54 DRAKE L. REV. 895, 897-98 (2006) (stating litigation brought by NAACP to de jure segregation laws in twentieth century was only part of solution to ending de jure segregation with other part being mobilizing people behind their cause).

constitutional litigation that required the Court to apply old constitutional texts and precedents to new circumstances, not just in a single case, but in a string of cases that ran like a chain novel whose audience shifted in the course of narration."[134]

The Court's decision in *Brown v. Board of Education*[135] is a prime example of that notion.[136] In fact, it can be said that social change and social science data were really the only bases for the Court's decision to overrule *Plessy v. Ferguson*[137] in *Brown*.[138] The Court stated that the doctrine of separate but equal, first established in *Plessy*, was no longer "supported by modern authority."[139] The modern authority cited in a footnote, however, is nothing more than a litany of social science studies and data indicating the negative psychological impact that segregation had on black students.[140] Consequently, the fact remains that social change is often necessary to precipitate a formal change in the Court's jurisprudence, which may be in the works for polygamy as a result of television shows such as *Sister Wives* and the attendant change in mindset.[141]

C. Expanding *Lawrence* to Polygamy Context

1. *Does Lawrence's Expansive Language Reach Polygamy?*

Not only do homosexual sodomy laws and polygamy share the social change similarity, but an argument can be put forward that

134. Eskridge, *supra* note 121, at 2065.

135. 347 U.S. 483 (1954).

136. *See* FARBER ET AL., *supra* note 133, at 77-79 (describing impact social movements had in preparing Court to overturn *Plessy* in *Brown*); Torres, *supra* note 133, at 896 (arguing social movements are critical in changing legal doctrine).

137. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Education, 347 U.S. 483 (1954).

138. *See* FARBER ET AL., *supra* note 133, at 88-89 (implying Court failed to rely on text of Constitution in overruling *Plessy* but instead relied on feelings of inferiority created by segregation).

139. *See Brown*, 347 U.S. at 494-95 (stating holding of *Plessy* no longer supported by modern authority because of psychological impact segregation has on Negro children).

140. *See id.* at 494-95 n.11 (citing social science studies from 1940s and 1950s lending support to Court's conclusion that segregation has negative psychological impacts on black children, including feelings of inferiority).

141. *See, e.g.*, Torres, *supra* note 133, at 900 ("It is the movement that you need in order to change the culture to ultimately make a rule shift."). *See also* Chambers, *supra* note 17, at 72, 81 (discussing changes in Utah culture that have led to greater social acceptance of polygamy, but yet polygamists are still denied protection under law). "[T]he families who live in plural marriages are caught in the same anomalous position that gay couples find themselves in most of the United States – no longer persecuted by the authorities . . . but not yet accepted as full legal participants." *Id.* at 81.

laws banning both practices constitute a violation of substantive due process after *Lawrence*.[142] As previously mentioned, the Court in *Lawrence* determined that the liberty protected by substantive due process includes the right of homosexuals to choose what sexual relationships they want to enter into without fear of interference by the government.[143] Although the narrow scope of the issue presented in *Lawrence* was homosexual sodomy, the Court used rather sweeping language that can potentially encompass intimate relationships other than homosexual relationships.[144] Specifically, the Court held:

> The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.[145]

Furthermore, the Court recognized that although the homosexual lifestyle may be morally reprehensible to some, the imposition of a singular moral stance vis a vis the criminal law is improper.[146]

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142. *See, e.g.*, Chambers, *supra* note 17; Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 CONN. L. REV. 1523 (2009); Gregory C. Pingree, *Rhetorical Holy War: Polygamy, Homosexuaity, and the Paradox of Community and Autonomy*, AM. U. J. GENDER SOC. POL'Y & L. 313 (2006); Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 LAW & INEQ. 59 (2008); 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 (2004); Jacob Richards, Comment, *Autonomy, Imperfect Consent, and Polygamist Sex Rights Claims*, 98 CAL. L. REV. 197 (2010). All of the aforementioned articles undertake an examination of possible parallels between homosexual sodomy laws post-*Lawrence* and polygamy.

143. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (stating that although homosexual relationships may not be entitled to formal legal recognition, individuals should have liberty to enter into such relationships).

144. *See id.* at 572 (referring to "emerging awareness" that liberty as protected by Constitution includes right of adult persons to decide "how to conduct their private lives in matters pertaining to sex").

145. *Id.* at 567.

146. *See id.* at 571 (detailing history of homosexual sodomy laws but emphasizing that Court's role is to define contours of liberty as opposed to imposing majority's moral viewpoint on society at large).

The potentially far-reaching implications of *Lawrence*'s language were acknowledged by Justice Scalia in his dissent.[147] In fact, Justice Scalia specifically suggested that bigamy laws may be deemed unconstitutional on the basis of the majority's holding.[148] On this issue, Justice Scalia said, "[s]tate laws against bigamy . . . are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. . . . [T]he Court makes no effort to cabin the scope of its decision to exclude . . . [state laws prohibiting such conduct as bigamy] from its holding."[149] Justice Scalia's concerns are echoed by constitutional law scholar Erwin Chemerinsky who suggested that the majority's holding "more than any other case in American history" provides constitutional protection to sexual activity as "a fundamental aspect of personhood."[150] In other words, the majority did not provide an explicit limitation to ensure that only homosexual activity was encompassed by their decision, but rather, the majority's language could be construed to encompass other forms of sexual activity, including polygamy.

The Court, however, was careful to note that Texas failed to put forward a legitimate state interest that could justify upholding the sodomy law and intruding into private sexual relationships.[151] It explained:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.[152]

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147. *See id.* at 590 (Scalia, J., dissenting) (recognizing that language utilized by majority could be used to render state laws prohibiting "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" unconstitutional).

148. *See id.* (citing state prohibitions relating to bigamy as example of laws that may be deemed unconstitutional as consequence of majority's holding).

149. *Id.*

150. *See* CHEMERINSKY, *supra* note 37, at 846 (describing potential expansive scope of *Lawrence* Court's decision).

151. *See Lawrence*, 539 U.S. at 578 (stating Texas statute did not further legitimate state interest and as such, state's intrusion into personal sexual relationships was improper).

152. *Id.*

Had any of those concerns been implicated, it is possible that the Court would have upheld the statute as furthering a legitimate state interest.[153]

As previously mentioned, child endangerment concerns often surround the practice of polygamy, and those concerns are typically advanced as the interests that justify criminalizing the practice.[154] Nevertheless, the fact remains that bigamy is a separate and distinct offense from child endangerment crimes, as bigamy only requires being simultaneously "married" to multiple people.[155] The fact that bigamy is seldom prosecuted absent a child endangerment charge suggests that polygamy in and of itself is not a crime that law enforcement officials typically consider to be sufficiently important to waste resources investigating and prosecuting.[156] The Brown family, furthermore, illustrates that polygamy and child welfare concerns do not always go hand-in-hand given that there is no indication that the family implicates any of the welfare concerns that often surround the practice.[157] Consequently, the state must advance some other legitimate interest in order to justify criminalizing bigamy post-*Lawrence* because, like homosexual conduct, the practice of polygamy is arguably a "personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[158]

2. *The Supreme Court of Utah's Interpretation of Lawrence*

The Supreme Court of Utah had the opportunity to address the potential extension of *Lawrence* to the polygamy context in *State v. Holm*.[159] Rodney Holm was a member of the Fundamentalist

153. *See id.* (suggesting that statute was overturned precisely because none of these potential state interests were implicated).

154. *See, e.g.*, Hamilton, *supra* note 65 (describing some problems typically associated with polygamy, including child welfare concerns).

155. *See, e.g.*, UTAH CODE ANN. § 76-7-101 (West 2010) (criminalizing bigamy as knowingly marrying another person or cohabiting with another person while either individual already has spouse).

156. For a further discussion of rarity of polygamy prosecutions, see *supra* note 6 and accompanying text.

157. *See, e.g.*, Grossman & Friedman, *supra* note 6 (stating Brown family does not appear to violate other criminal laws often violated by polygamists, such as child marriage, rape, or sex with minors, meaning state will have to determine whether to prosecute Brown family for polygamy "in its purest form").

158. *See generally Lawrence*, 539 U.S. at 567 (using expansive language in holding Texas sodomy law to be unconstitutional violation of liberty protected by substantive due process).

159. *See generally* State v. Holm, 137 P.3d 726 (2006) (involving claim that Utah's bigamy law violated Holm's substantive due process rights under Fourteenth Amendment).

Church of Jesus Christ of Latter-day Saints and was charged with three counts of unlawful sexual conduct with a minor and one count of bigamy.[160] Holm married his first wife in 1986; he eventually took a second wife; and married his first wife's sister when she was only sixteen.[161]

Holm argued that the bigamy charges violated his substantive due process rights under the Fourteenth Amendment because, after *Lawrence*, Holm's conduct constituted a liberty interest protected by this Amendment.[162] The court, however, held that Holm "misconstrue[d] the breadth of the *Lawrence* opinion."[163] The court concluded that the *Lawrence* decision was narrow in scope and applied in the homosexual context exclusively.[164] Furthermore, the fact that Holm's behavior involved both minors and women who may have been coerced into relationships to which they did not consent implicated some of the concerns that the *Lawrence* Court recognized as potentially legitimate state interests.[165] The court also suggested that the state had an interest in ensuring legally binding marriages for the purpose of enforcing marital obligations, including spousal support and the prevention of welfare abuse.[166] As further support for its holding, the court suggested that society's conception of morality was furthered by limiting mar-

160. *See id.* at 731 (describing crimes with which Holm was charged).

161. *See id.* at 730 (providing background of Holm's marriages).

162. *See id.* at 742 (stating Holm relied upon seemingly broad language of *Lawrence* to support his substantive due process argument).

163. *See id.* (explaining that Holm misconstrued *Lawrence* insofar as he too broadly interpreted its holding).

164. *See id.* at 742-43 (holding that *Lawrence* is narrow decision that is applicable only in homosexual context). To this extent, the court stated:

> Despite its use of seemingly sweeping language, the holding in *Lawrence* is actually quite narrow. Specifically, the Court takes pains to limit the opinion's reach to decriminalizing private and intimate acts engaged in by consenting adult gays and lesbians. In fact, the Court went out of its way to exclude from protection conduct that causes "injury to a person or abuse of an institution the law protects."

Id. (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003)).

165. *See id.* (suggesting state here had legitimate interest). In arriving at this conclusion, the court, as previously mentioned, referred to language in *Lawrence* that suggested the holding may have been different had state put forward some legitimate interest for promulgating the statute, such as involvement of minor children or potentially non-consenting people in the relationships at issue. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.").

166. *See Holm*, 137 P.3d at 743-44 (providing that legally binding marriage is necessary before state can enforce marital obligations).

riages to monogamous marriages.[167] Ultimately, the court determined that there was a critical distinction between Holm's polygamous marriage and the consensual sexual behavior addressed in *Lawrence* such that Utah's prosecution of Holm under its bigamy laws did not offend any liberty interest.[168]

3. *Did the Holm Majority Get It Right?*

The *Holm* dissent took issue with the legitimate state interests that the majority found.[169] First, the dissent viewed the majority's conclusion that the state has a legitimate interest in ensuring legally binding marriages as untenable.[170] Furthermore, the dissent argued that the conclusion that polygamous marriages are repugnant to society's view of morality stands in direct contradiction to *Lawrence* in that the *Lawrence* Court made clear that decisions cannot rest on the justices' sense of morality.[171] On this point, the *Lawrence* Court said, "These considerations [moral and ethical convictions held by society concerning acceptable behavior] do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."[172] In fact, the only potential legitimate state interest that the dissent was willing to recognize was the fact that Holm's polygamous marriage involved a minor, which it viewed as sufficient to hold that Holm's due process

167. *See id.* at 744 (holding state has some control over relationships). The court stated that the State needs to have some power "over those relationships to ensure the smooth operation of laws and further the proliferation of social unions our society deems beneficial while discouraging those deemed harmful. The people of this State have declared monogamy a beneficial marital form and have also declared polygamous relationships as harmful." *Id.*

168. *See id.* at 744-45 (stating that case is distinguishable from *Lawrence*).

169. *See id.* at 777 (Durham, C.J., concurring in part and dissenting in part) (disagreeing with majority's conclusion that Holm's due process claim is outside scope of *Lawrence*).

170. *See id.* (stating majority's marriage rationale is problematic in that state would be able to criminalize people for entering into same-sex relationships because state cannot recognize their marriage as legally binding, and dissent does not understand welfare abuse rationale since people who are not in legally recognized polygamous marriages are only able to receive welfare benefits available to unmarried people).

171. *See id.* (Durham, C.J., concurring in part and dissenting in part) (arguing that majority ignores *Lawrence* proposition that state cannot criminalize conduct just because it is repugnant to majority of people's sense of morality). The *Lawrence* majority explicitly stated that the Court cannot use the power of the state and criminal laws to enforce moral views upon society. *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003) (discussing idea that Court cannot legislate its own idea of morality). For further discussion of the morality language used in *Lawrence*, see *supra* note 146 and accompanying text.

172. *Lawrence*, 539 U.S. at 571.

rights were not violated.[173] As previously mentioned, however, these child endangerment issues do not have to go hand-in-hand with polygamy, as the Brown family illustrates, meaning such concerns do not amount to legitimate state interests in all polygamy cases.[174]

Furthermore, the dissent considered *Lawrence* to have potentially broad application and, unlike the majority, viewed the holding as applying to intimate relationships other than homosexual relationships.[175] Consequently, the dissent's view is in accordance with Justice Scalia's concern expressed in his *Lawrence* dissent and the statements of other scholars that *Lawrence* does apply broadly beyond the homosexual context.[176] The plain language of the *Lawrence* decision further supports this view.[177]

The Browns' potential bigamy prosecution sets up a slightly different scenario from that presented in *Holm* in that the spouses in the Brown family all married as adults (and ostensibly as consenting adults).[178] As one of the attorneys who represented Holm stated, "I think the prosecution of consenting adults for bigamy sets up the test case."[179] The attorney was referencing the distinction that can be made between charging consenting adults who engage in polygamy from the charges of bigamy accompanied by child endangerment charges that were presented in *Holm* and other cases, including those of Tom Green and Warren Jeffs.[180]

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173. *See Holm*, 137 P.3d at 778 (Durham, C.J., concurring in part and dissenting in part) (agreeing with majority that Holm is unable to succeed on his due process liberty claim because case involved minor, but stating that same result may not apply in case involving relationship between consenting adults).

174. For a further discussion of the distinction between polygamy and some of its attendant crimes, see *supra* notes 62-75 and accompanying text.

175. *See Holm*, 137 P.3d at 778 (Durham, C.J., concurring in part and dissenting in part) (stating that there is liberty interest in intimate relationships and government should not interfere with what occurs inside individual's home "as long as it does not involve injury or coercion or some other form of harm to individuals or to society").

176. For further discussion of Justice Scalia's concern, which was echoed by Erwin Chemerinsky, see *supra* notes 147-150 and accompanying text.

177. *See Lawrence*, 539 U.S. at 567 (utilizing language suggesting that private, intimate relationships other than homosexual relationships may potentially fall within ambit of Court's holding).

178. For further discussion of the Brown family, see *supra* notes 51-58 and accompanying text for further discussion of the Brown family.

179. Winslow, *supra* note 6 (quoting discussion with Holm's defense attorney regarding differences presented in Holm and situation presented by Brown family).

180. *See id.* (discussing differences between Holm prosecution and Brown family). "The Browns could prove more problematic: they were all consenting adults when they entered into a polygamous relationship." *Id.* For further discus-

Finally, it is important to note that the Browns' potential due process defense is supported by additional Supreme Court precedent, including *Moore v. City of East Cleveland.*[181] The *Holm* dissent stated that *Moore* further supports the conclusion that there is a liberty interest in intimate relationships, and "this individual liberty guarantee essentially draws a line around an individual's home and family and prevents governmental interference with what happens inside," absent a legitimate state interest for regulating the relationship.[182] *Moore* involved a zoning ordinance that limited occupancy of dwellings to members of a single family.[183] Appellant Moore was charged with violating the ordinance because she lived in a home with her son and two grandsons, an arrangement which did not meet the ordinance's definition of "family."[184] Moore argued that the ordinance violated her substantive due process rights under the Fourteenth Amendment, and a plurality of the Court agreed.[185] Specifically, the Court stated, "the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns."[186] Consequently, although not as on point as *Lawrence, Moore* is another opinion that suggests that family and other personal relationships should be free from government intrusion absent a state interest sufficient to meet the Court's level of scrutiny.[187]

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sion of the Green and Jeffs prosecutions, see *supra* notes 62-75 and accompanying text.

181. 431 U.S. 494 (1977).

182. *See* State v. Holm, 137 P.3d 726, 778 (2006) (Durham, C.J., concurring in part and dissenting in part) (referring to other Supreme Court doctrine that finds liberty interest in intimate relationships).

183. *See Moore*, 431 U.S. at 495-96 (providing description of zoning ordinance at issue, which permitted only families to live together in single dwelling).

184. *See id.* at 496-97 (stating Moore violated ordinance by failing to remove one of her grandsons from her home since her grandsons were cousins as opposed to brothers, which meant Moore's living situation did not meet definition of family provided in zoning ordinance).

185. *See id.* at 501-02 (holding zoning ordinance to be unconstitutional violation of substantive due process rights under Fourteenth Amendment).

186. *Id.* at 506.

187. *See id.* (holding in plurality opinion that State cannot mandate definition of family unit). The Supreme Court has developed a significant amount of case law recognizing a private realm of family life, which includes not only *Lawrence* and *Moore*, but numerous other cases. *See e.g.*, Santosky v. Kramer, 455 U.S 745 (1982) (recognizing parents' fundamental right to custody of their children); Stanley v. Illinois, 405 U.S. 645 (1972) (holding unmarried father has liberty interest in custody of his children, meaning due process must be observed prior to terminating his parental rights); Wisconsin v. Yoder, 406 U.S. 205 (1972) (allowing Amish parents to be granted exemption from compulsory schooling for their fourteen and fifteen year-old children on basis of free exercise of religion); Loving v. Virginia, 388 U.S. U.S. 1 (1967) (holding right to marry is fundamental right); Skinner v.

V. CONCLUSION

As the foregoing analysis suggests, the Brown family, although currently facing potential criminal charges, may simultaneously be ushering in a new social movement regarding more widespread acceptance of the practice of polygamy.[188] In fact, Kody Brown and his family filed a lawsuit in July 2011 challenging the constitutionality of Utah's polygamy law in light of some of the aforementioned constitutional concerns.[189] The Brown family illustrates that polygamy does not always include the seedier criminal concerns that have been problematic for polygamists in the past, and this message is being broadcasted for viewing by society at large on their reality television show, *Sister Wives*.[190] Similar social movements have occurred in the past with respect to other issues, including homosexual relationships, and those movements and attendant mindset shifts have had a marked impact on the Supreme Court's constitutional law jurisprudence.[191] Nevertheless, although there may be a growing social trend towards acceptance of polygamy as manifested by *Sister Wives* and HBO's *Big Love*, it is ultimately up to the Supreme Court to decide whether *Lawrence*'s rather expansive language should be extended to the polygamy context.

*Kaitlin R. McGinnis**

Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (deeming right to procreate to be fundamental right); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925) (recognizing liberty interest of parents to control upbringing of their children); Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing liberty interest of parents to control upbringing of children and consequently invalidating state law prohibiting teaching in German language).

188. For further discussion of the impact that television shows such as *Sister Wives* may be having on society, see *supra* notes 50-61 and accompanying text.

189. *–See, e.g.*, John Schwartz, *Polygamist, Under Scrutiny in Utah, Plans Suit to Challenge Law*, N.Y. TIMES (July 11, 2011), http://www.nytimes.com/2011/07/12/us/12polygamy.html (stating Brown family filed suit alleging Utah's polygamy law is unconstitutional violation of due process, equal protection, free exercise, establishment, free speech, and freedom of association).

190. For further discussion of *Sister Wives*, see *supra* notes 50-58 and accompanying text.

191. For a further discussion of social trends and their impact on the Court's jurisprudence, see *supra* notes 119-141 and accompanying text.

* J.D. candidate, May 2012, Villanova University School of Law; B.A., The Catholic University of America, 2009.