

Legal Relationships, Illegal Marriage: Examining Plural Marriage and a Legal Inconsistency

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I. INTRODUCTION

The Supreme Court has held that sexual behavior between consenting adults cannot be criminalized.¹ Two men can engage in sex, as can two women, one man and one woman, three men, or three women, and so on and so forth. However, if more than two of those people would like to be married, in any combination (for example: a man with two wives, a woman with two husbands, or a triad), it is criminal. The illegality of plural marriages contradicts the logic many scholars and judges have previously used in legalizing further freedom and civil rights in marriage. The unthinking domination of monogamy creates a stigma against plural

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1. *Lawrence v. Texas*, 539 U.S. 558 (2003).

marriage. I will first discuss the history of plural marriage in the United States, starting in the Nineteenth Century with the Church of Jesus Christ of Latter-Day Saints (LDS Church). I will then delve into the modern resurgence of plural relationships of various kinds. Next, I will cover plural marriage as a foil for same-sex marriage and why this logic is inconsistent. Then I will discuss the meat of the argument, which is the constitutional case for plural marriages and why its legalization is the logical extension of existing law. Finally, I will conclude with the next legal steps.

A. Terminology

Throughout this Comment I will use several different terms, but I generally use the term “plural marriage” to refer to marriages that involve more than two people. People currently have the right to engage in a plural relationship without legal recognition. Outside of quoting (or paraphrasing) others or speaking about the LDS Church, I will not be using the terms “polygamy” or “bigamy.” Those terms are loaded with negative connotations, none of which are helpful. Furthermore, they limit the type of relationships imagined to one man and several wives; sometimes with the knowledge of the women, sometimes not. The relationships I will be writing about are consensual, compassionate, and enthusiastically chosen by their participants. There are many other, more specific terms for types of relationships.² This Comment focuses exclusively on the right for any of these various types of relationships to be legal and on equal footing with monogamous marriages.

II. HISTORY OF PLURAL MARRIAGE IN THE UNITED STATES

A. Church of Jesus Christ of Latter-Day Saints

Plural marriage came to the fore nationally with the rise of the LDS Church in the American West, specifically in what would become Utah.³ According to the LDS Church, because Jesus was a man who became a god, any man could become a god, and Polygamous marriage was how a man could become a god.⁴ Marriage is critical to becoming a god, and the

2. For an excellent primer, see Ada Powers, *The Coffee Break Primer on Polyamory*, MEDIUM (Feb. 27, 2016), <https://medium.com/@mspowahs/the-coffee-break-polyamory-primer-6c64b4dc53de>.

3. See Danel Bachman & Ronald K. Esplin, *Plural Marriage*, in ENCYCLOPEDIA OF MORMONISM 1091-95 (1992); Elizabeth Larcano, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065 (2006).

4. Bachman & Esplin, *supra* note 3, at 1091-95.

more marriages, the better.⁵ It became a tenet of the Church from 1852-1890.⁶ Four years after the initial endorsement of polygamy by the LDS Church, the Republican Party called polygamy and slavery the “twin relics of barbarism” and called for their abolition in the territories.⁷ However, there was still no federal anti-polygamy law until ten years after it became a tenet of the LDS Church. President Lincoln signed the Morrill-Anti Bigamy Law in 1862 as a direct pushback to Mormon plural marriages.⁸

Enforcement of the Morrill Act was delayed by the Civil War (April 1861-May 1865) and then by Reconstruction (1865-1877).⁹ In the 1870s George Reynolds, Brigham Young’s personal secretary, was convicted under the Morrill Act.¹⁰ Reynolds fought his case up to the Supreme Court.¹¹ In 1878, the Supreme Court ruled that in no case would plural marriage be acceptable, and there would be no religious exception for practitioners of the LDS Church or any other sect that advocates for any type of plural marriage.¹² The Court ruled that it did not matter that Reynolds was acting in accordance with what he believed to be his religious and moral duty.¹³ If Reynolds had forgone a polygamous existence, practitioners of LDS Church believed that he would have given up his chance at godhood.¹⁴ *Reynolds* first outlined the belief/practice dichotomy that is critical to free expression jurisprudence (it is best exemplified in *Employment Division, Department of Human Resources v. Smith*—discussed below).¹⁵

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to

5. For a discussion of the rise of polygamy in the Church of Latter-Day Saints, see Larcano, *supra* note 3.

6. *Id.* at 1069.

7. Elijah L. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion*, 28 W. NEW ENG. L. REV. 257, 265 (2006) (discussing the beginning of legislature resistance to LDS polygamy).

8. *Id.* at 265-66.

9. *Id.* at 267.

10. *Reynolds v. United States*, 98 U.S. 145 (1878); Milne, *supra* note 7, at 266.

11. Milne, *supra* note 7, at 266.

12. *Reynolds*, 98 U.S. at 166-67.

13. *Id.* at 166.

14. Larcano, *supra* note 3, at 1069.

15. Milne, *supra* note 7, at 267.

prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this 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. Government could exist only in name under such circumstances.¹⁶

While the Court ruled against Reynolds, the ruling in the short-term had the opposite effect and convinced many Mormons that they needed to protect their religious rules.¹⁷ It did not help matters that Chief Justice Waite included such language in the dicta as follows: “Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”¹⁸ Chief Justice Waite made no secret of his disdain for the practice and the practitioners themselves.

While some Mormons continued to engage in polygamy as before, signing legal documents for each new marriage, others changed course slightly.¹⁹ Many Mormon men would legally marry their first wife and then take part in a spiritual or religious ceremony for subsequent wives (although most men had two wives at most, unless they were very wealthy).²⁰ In 1882 Congress passed the Edmunds Act, which criminalized “unlawful cohabitation” as well as religious polygamy, a direct attack on LDS Church-style polygamy.²¹ Five years later the Edmunds-Tucker Act passed Congress.²² The Act disenfranchised polygamists as well as made it a felony to not publicly record your marriage.²³ The Edmunds Act and the Edmunds-Tucker Act were both written to undermine polygamy in the LDS Church, but they were also written to dismantle the power of the LDS Church in the Utah Territory.²⁴ The Edmunds-Tucker Act, in addition to targeting polygamy, could

16. *Reynolds*, 98 U.S. at 166-67.

17. Milne, *supra* note 7, at 267.

18. *Reynolds*, 98 U.S. at 164.

19. For a discussion of how laws have impacted Mormon polygamist practices, see Joanna Brooks, *Explaining Polygamy and Its History in the Mormon Church*, CONVERSATION (Aug. 2017), <http://theconversation.com/explaining-polygamy-and-its-history-in-the-mormon-church-81384>.

20. Milne, *supra* note 7, at 266.

21. *Id.* at 267-68.

22. Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887) (repealed 1978); see Milne, *supra* note 7, at 267.

23. Milne, *supra* note 7, at 268.

24. *Id.*

“dissolve the legal entity of the church corporation and [] confiscate all church property in excess of \$50,000.”²⁵ Subsequent Supreme Court cases upheld these Acts and called the LDS Church a “‘cultus’ whose belief in polygamy as a ‘tenet of religion . . . offend[ed] the common sense of mankind.’”²⁶ The Federal Government kept putting pressure on LDS polygamists, but the death knell came in 1890 with the proposed Cullom-Struble Bill.²⁷ This bill would have essentially deprived Mormons of their rights as American citizens.²⁸ In September of that same year, the President of the LDS Church (Wilford Woodruff) ended polygamy as a tenet of the Church.²⁹

B. Strict Scrutiny of Nineteenth Century Anti-Polygamy Laws

These laws and associated court cases were decided before the clearest statement of free expression versus other laws was decided. In 1990, the Supreme Court decided *Employment Division, Department of Human Resources v. Smith*.³⁰ In that case, two Native American men were practicing members of their tribe and also worked at a private drug rehabilitation center.³¹ They were fired for taking peyote, which is a part of religious ceremonies.³² In Oregon, intentional possession of peyote was a crime, and there was not an affirmative defense for religious use.³³ Both men filed for unemployment benefits but were denied because their termination was related to “misconduct.”³⁴ It was appealed up to the Oregon Supreme Court and then to the United States Supreme Court.³⁵ Justice Scalia wrote the majority opinion, which affirmed that the state cannot discriminate against religious behavior unless that behavior is already proscribed by law.³⁶ The law must be neutral and is subject to strict scrutiny—a compelling government interest that is strictly tailored to the ends.³⁷ In *Smith*, Scalia wrote that the regulation of substances is a

25. *Id.*

26. *Id.* at 269 (quoting *Davis v. Beason*, 133 U.S. 333 (1890)).

27. *Id.*

28. *Id.* at 270.

29. Larcano, *supra* note 3, at 1069.

30. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

31. *Id.* at 874.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 874-75.

36. *Id.* at 878-79.

37. *Id.* at 882-83; see *United States v. Carolene Prods. Co.*, 304 U.S. (1 Pet.) 144 (1938); *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Roe v.*

compelling governmental interest and the law itself was not directed at Native Americans but instead was a blanket ban on drug possession.³⁸ Scalia told the men to petition the legislature to create a carve out for religious possession (three other states had done it at the time).³⁹ Religious commands do not entail the willful and wanton breaking of neutral laws.⁴⁰

While Justice Scalia would say that the banning of polygamy or other plural relationships is a compelling governmental interest, skepticism is needed for the laws in question. The legislative history as well as the text of the Edmunds Act, Edmunds-Tucker Act, and the almost-law Cullom-Struble Bill all pejoratively mention Mormons or the LDS Church or directly sanction the Church itself. These laws were not neutral, nor were they narrowly tailored. It was a direct circle, an ouroboros. It is unclear if any iteration of the Supreme Court would follow the *Smith* logic exactly and overturn these laws since they have already been repealed and replaced with religiously neutral alternatives banning plural marriages. This brings us to the question, are the modern laws constitutional, and more importantly, are they right?

III. PLURAL MARRIAGE AS A FOIL FOR SAME-SEX MARRIAGE

During the decade or so leading up to the legalization of same-sex marriage in 2015, hyperbole was a common tactic used by opponents. Most common was the slippery slope argument. If same-sex marriage is legalized then what stops proponents of bestiality, pedophilia, and polygamy from legalizing those verboten types of marriages?⁴¹ While this type of argument is offensive and absurd for many reasons (notably it conflates same-sex marriage with bestiality and other harmful behaviors), it has been made at all levels of discussion, from the most outrageous TV pundits to the Supreme Court. In his dissent for *Lawrence v. Texas* (2003), the case that struck down the criminalization of sodomy, Justice Scalia listed nine things that now had the potential to become legal, based on the same logic used in the majority opinion.⁴² Justice Scalia's list was bigamy/polygamy, same-sex marriage, prostitution, adult incest,

Wade, 410 U.S. 113 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

38. *Smith*, 494 U.S. at 878.

39. *Id.* at 890.

40. *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

41. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2622 (2015); see *Lawrence v. Texas*, 539 U.S. 558, 590 (2003).

42. *Lawrence*, 539 U.S. at 590.

masturbation, adultery/fornication, bestiality, and obscenity.⁴³ Justice Kennedy, in the majority opinion, wrote that privacy in the home is paramount and that to define one's orientation by their actions is demeaning.⁴⁴ In laymen's terms, people often say that the government should stay out of your bedroom as long as you are not hurting anyone.

Nearly fifteen years after *Lawrence* some of these items are legal or were legal at the time. Justice Scalia used a tradition-based argument in his dissent in *Lawrence* and later in his dissent in *Obergefell v. Hodges*.⁴⁵ There was no tradition in the United States of rights for LGBTQ+ people, specifically the right to same-sex marriage or same-sex intercourse. According to Justice Scalia, tradition could not evolve or change to include that right one day.⁴⁶ While this static sense of legal tradition is still popular among constitutional conservatives, liberals criticize it for denying rights to particular groups of people.⁴⁷ However same-sex marriage was legalized in 2015, and the world has not collapsed; Justice Scalia even witnessed part of it, before his passing in early 2016. Separating out the items that are now legal (same-sex marriage, masturbation, adultery/fornication, and obscenity—except in particular cases), it is easy to see that all of these items have two characteristics in common—(former) societal moral disapproval and being harmless to others.

Does plural marriage truly fit amongst the items that are harmful to others?⁴⁸ As discussed earlier abusive marriages are not part of the discussion here, for a variety of reasons—notably, because abuse would remain illegal. So outside of other illegal activities, who does a plural marriage harm? The consenting adults who enter into such a relationship are not harmed. There is no direct victim; it is a victimless crime. So, then it must be determined if this action is so detrimental to society as a whole that the government must ban consenting adults from engaging in behavior in the privacy of their homes. There are few areas where the government explicitly bans adults from behaving how they so please; the

43. *Id.*

44. *Id.* at 578.

45. *Obergefell*, 135 S. Ct. at 2629; see *Lawrence*, 539 U.S. at 590.

46. *Obergefell*, 135 S. Ct. at 2629.

47. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 644-45 (1990).

48. There is much debate about whether legalized prostitution is actually harmful. Some argue that legalizing it would protect women from violent pimps and johns as well as the other hazards of engaging in an illegal profession that requires intimacy. These people often cite the Netherlands and the red district in Amsterdam as an example.

most notable is regarding illegal substances.⁴⁹ The government argues that even though this is victimless crime, it is a public health concern and, therefore, under its purview.⁵⁰ A plural marriage cannot be a public health concern, and therefore it justly falls under the category of items with moral societal disapproval and harmless to others. Furthermore, the laws surrounding marriage and raising children have evolved towards more freedom and less restriction.⁵¹

IV. PLURAL RELATIONSHIPS IN THE MODERN MEDIA AND CULTURE

A. *Television Shows*

Plural marriages are overwhelmingly depicted negatively in modern media. Or if not explicitly negatively, they are portrayed as a voyeuristic spectacle. In terms of fictional shows, plural marriages often turn up in criminal procedurals. For example, in the show *Lie to Me*, there is an episode where a woman ends up escaping her plural marriage and the cult her husband runs.⁵² While the focus is on this particular woman and her children, the episode highlights the patriarchal church her husband founded and its forced plural marriage. Her children are a measure of control to ensure that she cannot leave the marriage. The concept of plural marriage is clearly and easily the villain alongside the husband.⁵³ Plural marriages are associated with cults and abuse of women and children. They are portrayed as the desire of the man, and the coerced woman goes along.

Plural marriage is usually viewed as stemming from a religious command, likely a remnant of the nearly forty years when it was a tenant of the LDS Church. There have been religious groups since then, some classified as cults, which have advocated plural marriage.⁵⁴ However

49. Many on the left argue that the government often does infringe on a woman's right to privacy in limiting abortion access and limiting access to contraceptives like the morning-after pill (commonly known as Plan B).

50. There is currently a national debate about the medicinal and recreational legalization of marijuana. There are some in government (on both sides of the aisle, but more so those who belong to the Republican Party or consider themselves conservative) who believe marijuana must remain in this category of substances, because it is gateway drug. The most extreme example of this view is former Attorney General Jeff Sessions.

51. DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 1-3 (4th ed. 2015).

52. *Lie to Me: Truth or Consequences* (Fox Network television broadcast Oct. 5, 2009).

53. *Id.*

54. According to Merriam-Webster, "Cult" is defined as

1: a religion regarded as unorthodox or spurious . . .

also: its body of adherents . . .

there are many who now engage in plural marriages or plural relationships without a religious command. There are some media examples, like the new TLC show *Seeking Sister Wives*, which came about due to the popularity of the show, *Sister Wives*. *Sister Wives* follows one family, the Browns, throughout their daily lives.⁵⁵ *Seeking Sister Wives* follows three different families seeking to add another wife to their families. Both shows do a fairly good job of showing the minutia of life in a plural marriage, such as arguing over chores and the bonds of the wives. However, it perpetuates the myth that all plural relationships are between one man and many women.⁵⁶ It also has a voyeuristic quality that makes the viewer feel like a peeping tom peering into a scandalous world that is so different from and yet so similar to their own lives. The families have been criticized for going on a show that opens them up to criminal prosecution.⁵⁷

B. *The Online Community*

As acceptance for nontraditional families grows, so does acceptance of plural relationships, often called polyamory (poly: many, amory: loves).⁵⁸ There are no rules on what constitutes a poly relationship other than enthusiastic consent and honesty from all involved. It could be a triad (where all three people are dating one another) or you and your partner could have multiple partners who may or may not know one another (but they know *about* each other). The rise of the Internet and a more open

-
- 2a: great devotion to a person, idea, object, movement, or work (such as a film or book)
 - ...
 - b: the object of such devotion
 - c: a usually small group of people characterized by such devotion . . .
 - 3: system of religious beliefs and ritual,
also: its body of adherents . . .
 - 4: formal religious veneration: WORSHIP
 - 5: a system for the cure of disease based on dogma set forth by its promulgator . . .

Cult, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cult?src=search-dict-hed> (last visited Nov. 28, 2018).

55. See *Sister Wives*, TLC, <https://www.tlc.com/tv-shows/sister-wives/> (last visited Nov. 28, 2018).

56. Paulina Jayne Isaac, *New TV Show 'Seeking Sister Wife' Will Follow Three Polygamist Couples—Meet the Families!*, INTOUCH WEEKLY, <http://www.intouchweekly.com/posts/seeking-sister-wife-cast-149213> (last updated Jan. 12, 2018).

57. Mark A. Perigard, *It's All Four One, One Four All in TLC's 'Sister Wives,'* BOS. HERALD (Sept. 26, 2010), http://www.bostonherald.com/entertainment/television/television_reviews/2010/09/it%E2%80%99s_all_four_one_one_four_all_tlc%E2%80%99s_%E2%80%98sister.

58. Powers, *supra* note 2.

sexual culture has led more couples to experiment with polyamorous relationships.

Plural relationships can exist in any capacity; however, members of plural relationships cannot be legally married. Some in the community have argued that marriage should be designated a social and religious institution, and a legal union would be a civil union, for everyone—gay, straight, two, three, etc.⁵⁹ This is a logical and promising idea, however, during the fight for same-sex marriage, the idea was often thrown out and disregarded. The problem was that straight couples would continue to get married and gay couples would have civil unions. Marriage would continue to be a mixed legal and social institution, closed to some citizens.

As more people begin to know others who participate in plural relationships, it becomes less of an unknown quantity and just a type of a relationship that works for some and not for others, like many other types of relationships. Justice Scalia is not the only Supreme Court Justice who feared legalization of plural marriage. Chief Justice Roberts commented that “[i]t is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.”⁶⁰ The implication is that this result is to be viewed with horror and that anyone who advocates same-sex marriage should trip all over themselves to create artificial separations. As Fredrik deBoer writes:

Polyamory is a fact. People are living in group relationships today. The question is not whether they will continue on in those relationships. The question is whether we will grant to them the same basic recognition we grant to other adults: that love makes marriage, and that the right to marry is exactly that, a right.⁶¹

Many Millennials and Gen Xers are publicly coming to the realization that a different conception of marriage does not mean it should be illegal, including plural marriages.

59. Janet W. Hardy, Opinion, *Why Plural Marriage Makes Sense*, CNN, <http://www.cnn.com/2014/01/15/opinion/hardy-plural-marriage/index.html> (last update Jan. 14, 2015).

60. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621 (2015).

61. Fredrik deBoer, *It’s Time to Legalize Polygamy*, POLITICO (June 26, 2015), <http://www.politico.com/magazine/story/2015/06/gay-marriage-decision-polygamy-119469>.

V. THE CONSTITUTIONAL CASE

Just as Justices Roberts and Scalia feared, there is a constitutional case for the legalization of plural marriage, as this Part will lay out.

A. *Marriage Is a “Zone of Privacy”*

The defendants in *Griswold v. Connecticut* (a doctor/professor at Yale School of Medicine and the Executive Director of the Planned Parenthood League of Connecticut) were convicted of violating the Connecticut birth control law. This law made it illegal to give information about, instructions on, or medical advice about contraceptives to married couples. Justice Douglas, who wrote the majority opinion, was disturbed by the idea of the government controlling any aspect of the inner workings of a marriage, including when and if to have children. He wrote:

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. . . . 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. We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.⁶²

While the law in question was struck down, and was the basis for the lawsuit, the right that the Supreme Court stated was much broader than a right to contraceptives. The Court ruled that marriage was private and sacred, and the government’s attempts to regulate almost any aspect of it would be unconstitutional. Justice Goldberg, in a concurring opinion, cited the “penumbras” theory of the Bill of Rights, which states that even though certain rights may not be explicitly enumerated, they are supported by the spirit of the Constitution and previous Court decisions.⁶³ In essence, it is the idea that the Bill of Rights is a list of important examples, not a definitive static list. This argument is frequently used by the Court’s liberals to explain the logic of rights they believe to be obvious but are not explicit in the Constitution, called Substantive Due Process.⁶⁴

62. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (emphasis added).

63. *Id.* at 487-88.

64. *See, e.g., Griswold*, 381 U.S. 479.

So, the Court has ruled that the government may not violate the zone of privacy of marriage. The Court has additionally ruled on several occasions that right to privacy includes the actual right to marry. For example, in *Loving v. Virginia*, the Court ruled that a state could not ban interracial marriages.⁶⁵ In *Turner v. Safley*, the Court held that prisoners could not be banned from marrying.⁶⁶ Most recently, in *Obergefell v. Hodges*, the Court ruled that gay couples have the right to marry.⁶⁷ In *Obergefell*, Justice Kennedy, writing for the majority, listed four key “principles and traditions [that] demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”⁶⁸ While Justice Kennedy writes only about couples, rather than groups, he himself uses cases that presumed heterosexual relationships but still believed them to be illustrative and somewhat helpful.⁶⁹ Justice Kennedy’s four principles are (1) “the right to personal choice regarding marriage is inherent in the concept of individual autonomy”; (2) “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals”; (3) “it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education”; and (4) “this Court’s cases and the Nation’s traditions make it clear that marriage is a keystone of the Nation’s social order.”⁷⁰

Point number two is the only one of the four that mentions marriage being limited to two people. The rest of the points can easily, without changing a single word, apply to plural marriage. There is no reason why point two cannot be changed to a “group union,” and the rest still applies. A marriage among a group would be just as important to the committed individuals Justice Kennedy mentions as would be a marriage of two people. Marriage is important to those who enter into it, regardless of orientation, race, or number of people.

65. *Loving v. Virginia*, 388 U.S. 1 (1967).

66. *Turner v. Safley*, 482 U.S. 78 (1987).

67. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

68. *Id.* at 2589-90.

69. *Id.* (“To be sure, these cases presumed a relationship involving opposite-sex partners.”).

70. *Id.*

B. The Zone of Privacy Includes Families

Adults have the right to marry and enter into loving consensual legal unions. The Court has further held that within those unions, these adults are allowed to raise their children as they so choose and structure their families as it most makes sense for them (as long as it is not abusive, obviously). In *Moore v. City of East Cleveland*, a grandmother was fined and placed in jail for five days since she had her son (Dale), his son (Dale Jr.), and another grandson (John) living with her.⁷¹ The issue was with John, whose mother died, and his grandmother was raising him.⁷² There was no immediate family member of John's living in the house.⁷³ The statute in question limited occupancy of a unit to members of a single family and did not recognize this family as one of the acceptable relationships.⁷⁴ The Court stated they "have consistently acknowledged a 'private realm of family life which the state cannot enter.'"⁷⁵ In *Moore*, the Court ruled that the freedom of choice related to pregnancy and childbirth, parental custody, and parental authority in matters of child-raising and education previously accorded to families, undoubtedly extended to this case.⁷⁶ The Court reasoned that "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case."⁷⁷ Furthermore, the Court held that it would not matter if Moore had just chosen to raise her grandson for reasons outside of the death of his mother; it is not the government's business to decide that their family ties are not acceptable.⁷⁸ The Court also acknowledged that living with extended families is common amongst black and particularly minority families.⁷⁹ Therefore, to take away the right for extended families to live together would disproportionately impact these families who often rely on their extended relatives for emotional and financial support.

Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not

71. *Moore v. City of E. Cleveland*, 431 U.S. 494, 497 (1977).

72. *Id.* at 497-98.

73. *Id.*

74. *Id.*

75. *Id.* at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

76. *Id.* at 500.

77. *Id.* at 500-01.

78. *Id.* at 504-06.

79. *Id.* at 508.

lightly be denied by the State By the same token the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.⁸⁰

The state cannot define what a family means. The state also cannot define how parents choose to raise and educate their children. This precept is supported by *Wisconsin v. Yoder* where Amish families were convicted of violating compulsory education laws.⁸¹ Their children graduated from eighth grade, and then their parents and the community gave them a vocational education (to prepare them for life in the rural Amish community).⁸² These parents believed that attending high school in a non-Amish setting was contrary to the Amish religion and lifestyle.⁸³ Several experts testified about uncontested aspects of the Amish religion, sincerity of the belief, and the needs of their community.⁸⁴ For the Amish, elementary and middle school are deemed necessary to teach their children reading, writing, and arithmetic.⁸⁵ A basic education is important and does not overly expose the children to problematic “worldly” values.⁸⁶ The Court stated:

On the basis of such considerations, Dr. Hostetler testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today.⁸⁷

In this case, the Court explicitly ruled that even though these Amish families were breaking the law for compulsory education, to force them to comply in the traditional way would violate their other constitutional rights.⁸⁸ Parents have the right to raise their children as they so choose.

80. *Id.* at 505-06.

81. *Wisconsin v. Yoder*, 406 U.S. 205, 205 (1972).

82. *Id.* at 212.

83. *Id.* at 208.

84. *Id.* at 208-09.

85. *Id.* at 211.

86. *Id.* at 210.

87. *Id.* at 212.

88. *Id.*

C. Positive Developments

There has been one case in the last year that dealt with an unusual family structure.⁸⁹ Three people, Dawn, Michael (legally married), and Audria formed a family unit and had a child (J.M.), biologically Michael and Audria's child.⁹⁰ When J.M. was around ten years old, Dawn and Michael divorced, and Dawn and Audria moved out of their shared apartment with Michael, into another one.⁹¹ Dawn and Audria continued to live together with J.M. throughout the divorce, and Audria and Michael legally settled a joint custody agreement.⁹² Dawn's continued involvement in J.M.'s life was legally precarious and seemed to be dependent on Michael and/or Audria's continued consent.⁹³ Once divorce proceedings began, Michael withdrew consent and claimed Dawn was not J.M.'s mother.⁹⁴ Dawn sued to clarify her status in J.M.'s life. The Supreme Court of New York, Suffolk County, ruled that tri-custody was correct in this scenario.⁹⁵

In sum, plaintiff, defendant and Audria created this unconventional family dynamic by agreeing to have a child together and by raising J.M. with two mothers. The Court therefore finds that J.M.'s best interests cry out for an assurance that he will be allowed a continued relationship with plaintiff [Dawn]. No one told these three people to create this unique relationship. Nor did anyone tell defendant to conceive a child with his wife's best friend or to raise that child knowing two women as his mother. Defendant's assertion that plaintiff should not have legal visitation with J.M. is unconscionable given J.M.'s bond with plaintiff and defendant's role in creating this bond. A person simply is responsible for the natural and foreseeable consequences of his or her actions especially when the best interest of a child is involved. Reason and justice dictate that defendant should be estopped from arguing that this woman, whom he has fostered and orchestrated to be his child's mother, be denied legal visitation and custody. As a result of the choices made by all three parents, this ten-year-old child to this day considers both plaintiff and Audria his mothers. To order anything other than joint custody could potentially facilitate plaintiff's removal from J.M.'s life and that would have a devastating consequence to this child.⁹⁶

89. Dawn M. v. Michael M., 47 N.Y.S.3d 898, 903 (N.Y. Sup. Ct. 2017).

90. *Id.* at 900.

91. *Id.*

92. *Id.* at 900-01.

93. *Id.*

94. *Id.*

95. *Id.* at 903.

96. *Id.*

While in its final decision the Supreme Court of New York did not emphasize the polyamorous nature of the previous relationship, it is mentioned earlier. The court stated, “Sometime in 2004, the relationship between plaintiff, defendant and Audria changed and the three began to engage in intimate relations. As time went on, Audria, plaintiff [Dawn] and defendant [Michael] began to consider themselves a ‘family’ and decided to have a child together.”⁹⁷ Veiled sub textual quotation marks aside, the Court here acknowledges the bond these three consenting adults shared and that for the child, a continued relationship with all three of his parents was best.

VI. WHAT ARE THE NEXT STEPS?

The most common form of legal plural marriage is polygyny, one husband and many wives, which makes it an imperfect model for the United States. While there is nothing inherently wrong with choosing this lifestyle, historically it has not often been a choice for the women involved. In 2000 the United Nations Human Rights Committee (UNHRC) report stated that polygamy violated the International Covenant on Civil and Political Rights, because it is inconsistent with the “equality of treatment with regard to the right to marry.”⁹⁸ This violation occurred because most instances of polygamy were really just polygyny, and it violates the dignity of women.⁹⁹ The Department of Justice of Canada has limited its arguments about violation of International Human Rights Law solely to polygyny, so there is somewhat of a debate among the international community (mostly in Western nations) about whether plural marriages are the problem or specifically only allowing polygyny. The Department of Justice of Canada’s research report entitled *Polygyny and Canada’s Obligations Under International Human Rights Law* only condemns the practice of exclusive polygyny, rather than plural relationships writ large. Implicit in this exclusion of other plural relationships is that the choice to enter or not enter a variety of types of plural relationships is the key to following international human rights law, rather than banning a type of relationship entirely.

Since the Department of Justice of Canada’s report in 2006 there have been many legal developments in the United States regarding

97. *Id.* at 900.

98. Rebecca J. Cook & Lisa M. Kelly, *Polygyny and Canada’s Obligations Under International Human Rights Law*, DEP’T JUST. CAN. (Sept. 2006), <http://www.justice.gc.ca/eng/rp-pr/other-autre/poly/poly.pdf>.

99. *Id.*

marriage and private relationships. Notably same-sex marriage has been legalized across the entire country. However, there are still ongoing struggles, notably that while it is legal to get married, many same-sex couples can still be fired under state law for their marriage. *Obergefell*, and Justice Kennedy's sweeping opinion, have opened the door for more alternative families to be legally recognized, or at the very least not legally discriminated against. *Dawn M. v. Michael M.* shows the beginnings of that legal change. Their intent to form a family and the best interests of the child were the factors that swayed the court. So, what comes next?

While personally, I would advocate for legalization of all relationships with consenting, capable adults, as well as the benefits that configures, that seems an unlikely leap at this stage.¹⁰⁰ Especially considering the dissents in *Obergefell*, which frequently mentioned plural relationships as an unintended and horrifying consequence to avoid. Pragmatically then it seems best to follow in the example of the Supreme Court of Suffolk, New York, which relied on the intent to form a family when deciding issues around divorce. When plural families break apart, which some do, just like monogamous ones, there must be a recognition of the relationship if the family turns to the court system. In the cast of *Dawn M.*, she and her husband were first legally married and then had an unmarried partner. Throughout the divorce and custody proceedings, an acknowledgement of the formation of a family (legally binding or not) is required to ensure an equitable outcome, as the court did for Dawn, Michael, and Audria.

VII. CONCLUSION

In order to ensure equity and fairness throughout family law, there should be an acknowledgement that even though plural marriage is not legal, many families (religious or otherwise) choose to enter into a variety of plural relationships. There has been a continued, rising awareness, especially amongst GenXers and Millennials, that many people choose to enter into plural relationships that are happy, healthy, and loving. This awareness is visible in newer television shows, a plethora of online resources, and in their communities. There is a constitutional case that these relationships can and should be legalized, but at the least there is a strong case that they should not be criminalized. Consensual, loving, adult

100. Sometimes an argument against plural marriage legalization is the complication of the legal benefits system; however, that argument does not hold much weight when considering the past. For example, previously, women had no rights to hold any property and were legally treated as children basically, and the legal system coped just fine when that shifted.

relationships should not cause the participants to suffer criminal or civil penalties, especially since many state laws contain bizarre quirks around this type of cohabitation. If no one is legally married, there is usually no issue, but when one couple is married and there are additional members of the relationship who are not, this often falls within bigamy statutes and the family is vulnerable to prosecution.¹⁰¹ Take the same relationships, the same family, but where there are only spiritual commitments and no legal ones, no prosecution; one legal commitment and the rest spiritual, vulnerable to prosecution. This style of law makes no sense and is actively harmful. The privacy of a family's home should be sacred and not subject to the moral judgements of mainstream society when there is no harm.

101. *See, e.g.*, UTAH CODE ANN. § 76-7-101 (West 2018) (“(1) A person is guilty of bigamy when, knowing the person has a husband or wife or knowing the other person has a husband or wife, the person purports to marry and cohabitates with the other person.”).