THE PRACTICE OF POLYGAMY: LEGITIMATE FREE EXERCISE OF RELIGION OR LEGITIMATE PUBLIC MENACE? REVISITING *REYNOLDS* IN LIGHT OF MODERN CONSTITUTIONAL JURISPRUDENCE

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INTRODUCTION

Once referred to as one of the "twin relics of barbarism,"[1] the practice of polygamy has long been a taboo subject of discussion in the State of Utah. On May 19, 2001, a Provo, Utah, jury handed down a guilty verdict that thrust the practice onto the national public stage. Utah native Tom Green was convicted on four counts of bigamy and one count of criminal nonsupport.[2] He was the first person in Utah prosecuted for bigamy in nearly five decades.[3]

Plural marriage was once regarded as a principal tenet of the Church of Jesus Christ of Latter-Day Saints (LDS Church or Mormon Church). In fact, many members of the eight-person jury that convicted Green have polygamy in their own family histories, serving as an ironic reminder of polygamy's historical ties to Utah.[4] However, many Mormon Church members now look down upon plural marriage, and church officials punish its practice with excommunication.[5]

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1. RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 86 (2d ed. 1989).
2. Geoff Fattah, *Green is Guilty on All Counts*, DESERET NEWS, May 19, 2001, at A1.
3. Joe Bauman, *Reaction to Green Varies*, DESERET NEWS, May 15, 2001, at B2.
4. Fattah, *supra* note 2.
5. Bauman, *supra* note 3.

Polygamy is prohibited by the Utah Constitution[6] and is a third-degree felony under the state's criminal bigamy statute,[7] which served as the basis for Green's convictions.[8] While the statute's constitutionality has not been facially challenged in a Utah court since 1984,[9] recent developments in Free Exercise jurisprudence call for a reexamination of the statute under modern constitutional principles. Because courts have never adequately addressed the potential social harms of polygamy in the policy discussions within their opinions, many of these harms remain unknown and leave criminal bigamy statutes open to criticism. A fresh reexamination of criminal bigamy statutes may help expose the social harms resulting from polygamy and thus help justify judicial reluctance to grant polygamy Free Exercise protection.

This Note will apply modern levels of constitutional scrutiny to the Utah criminal bigamy statute. Part I will begin the discussion with a historical overview of polygamy in Utah. Part II will examine how the courts have historically treated polygamy, mainly focusing on cases that arise in a criminal context. Part III will discuss and analyze the cases that delineate the modern tests that may be applied to Free Exercise challenges of criminal statutes. Part IV will discuss documented testimonial and historical evidence supporting the proposition that criminal polygamy statutes serve a compelling governmental interest and are narrowly tailored to address that interest. Part V will examine polygamy cases that arise in a non-criminal setting to determine how they may affect the application of modern levels of constitutional scrutiny. Finally, Part VI concludes the Note by asserting that, based on the evidence and cases discussed, Utah's criminal bigamy statute would still survive even the strictest level of constitutional scrutiny today.

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6. UTAH CONST. art. III.

7. The statute reads:

> (1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.
>
> (2) Bigamy is a felony of the third degree.
>
> (3) It shall be a defense to bigamy that the accused reasonably believed he and the other person were legally eligible to remarry.

UTAH CODE ANN. § 76-7-101 (1999).

8. Fattah, *supra* note 2.

9. *See* Potter v. Murray City, 585 F.Supp. 1126 (D. Utah 1984), *aff'd as modified*, 760 F.2d 1065 (10th Cir. 1985); discussion *infra* Part III.B.

I
The History of Polygamy in Utah

The birth of polygamy in Utah can be traced to the visions of a twenty-four-year-old New York farmer named Joseph Smith. On April 6, 1830, Smith founded the Church of Christ, later renamed the Church of Jesus Christ of Latter-Day Saints, and based the religion on his translation of a set of gold plates given to him by an angel.[10]

Smith derived the principles of the LDS Church largely from his interpretation of the Bible's Old Testament.[11] Since Smith's understanding of God was similar to Israelite theocracy, it follows that his views on marriage and family were also a product of ancient Israelite traditions.[12] Like the Old Testament biblical patriarchs, "[LDS] males empowered with priesthood were entitled to receive divine guidance in family matters" while "[w]omen were denied both priesthood and hierarchic position."[13] This Old Testament focus led Smith to the conclusion that the practice of polygamy was essential to what he called the "restitution of all things," and would become a principal tenet of the LDS faith.[14]

Mormon leaders made an announcement in 1852 that brought the practice of polygamy into the public eye: Mormons believed in and practiced polygamy as a central tenet of their faith.[15] Public opposition to the practice formed quickly. Clergymen, women's leaders, and newspaper editors urged those in positions of power to put an end to the practice.[16] Congress and the courts soon heeded their voices.

II
Criminal Polygamy Statutes in the Courts

A. Reynolds *and the Birth of "Public Morality"*

What legal justifications have been given for the judicial condemnation of polygamy? An analysis of case law reveals a hybrid of

10. Van Wagoner, *supra* note 1, at 1.
11. *Id*. at 3.
12. *Id*.
13. *Id*.
14. *Id*. While "polygamy is strongly denounced in several Book of Mormon passages . . . the Old Testament provide[d] ample evidence that it was acceptable in ancient Israel. Abraham was not the only husband of multiple wives. David had a large harem and Solomon managed seven hundred wives and more than three hundred concubines." *Id*. (citations omitted).
15. *See* Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 Stan. L. Rev. 1295, 1322 (1998).
16. *Id*.

public policy and historical principles of Judeo-Christian morality as the driving force behind historical persecution of the practice by the courts. This hybrid, referred to as "public morality" hereinafter, was born in the landmark United States Supreme Court case, *Reynolds v. United States*,[17] which upheld a congressional criminal bigamy statute in the face of a Free Exercise challenge.[18] The *Reynolds* Court, in a manner common to other courts and legislatures[19] facing the issue of polygamy, failed to discuss public policy in great enough detail to adequately describe the compelling governmental interest served by criminal polygamy legislation.

In *Reynolds*, the Supreme Court created a "public morality" justification for its polygamy decisions in two steps. First, the Court attempted to cast polygamy as a historical abomination, frowned upon by "civilized" cultures and persecuted with stalwart consistency throughout England's history: "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. . . . [F]rom the earliest history of England polygamy has been treated as an offence against society."[20] The Court, building upon its historical analysis of polygamy, then drew the conclusion that since a society practicing monogamous marriage was a civilized society, the practice of polygamy would undermine the "sacred obligation" of marriage as an institution and lead to societies grounded in despotism.[21]

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17. 98 U.S. 145 (1878).

18. *See id.* at 161–62. Defendant George Reynolds asked the trial judge to instruct the jury that if it found from the evidence that he was married in pursuance of and in conformity with his religious duties, then the verdict must be "not guilty." The judge refused to give this instruction, substituting one that mandated a finding of criminal intent if Reynolds simply knew he was marrying a second wife while his first wife was still living. Reynolds asserted error on the instructions, which raised the issue of whether a religious belief can be accepted as a justification for an act that clearly violated a criminal statute. *Id*.

19. Anti-polygamy congressional statutes are discussed below, and challenges to these and other forms of anti-polygamy legislation are referenced later in this Note. *See infra* text accompanying notes 27–30. For the purposes of this Note's analysis of the public morality paradigm, *Reynolds* and other selected cases will provide the main frame of reference, notwithstanding the paradigm's suitable application to various anti-polygamy cases. *See, e.g.*, Davis v. Beason, 133 U.S. 333, 342 (1890) (finding that First Amendment "was never intended . . . [to be] invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society").

20. *Reynolds*, 98 U.S. at 164. Given the majority racial and ethnic views of nineteenth-century America, it is likely that the association of polygamy with African and Asiatic people was meant to carry a connotation appealing to ethnic bias.

21. *Id*. at 165–66.

After establishing the necessity of monogamous marriage for civilized society, the Court then juxtaposed the sanctity of marriage with its legal characteristics as a civil contract properly regulated by law.[22] Despite the separation of church and state, the Court reasoned that to except a practitioner of polygamy from the established regulation of marriage would create an unstable society of individuals that valued religious practice above "the law of the land."[23] In support of its authorization to rule on the matter, as well as its contempt for the practice of polygamy, the Court stated that "there has never been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts."[24]

The Court thus supported its contempt for the practice of polygamy by appealing to religious views, biases, and opinions on morality commonly held at the time. This section of the opinion lacked substantive legal reasoning and references to viable public policy justifications. Instead, it cast polygamy in such a prejudicial light as to imbue subsequent, suspect opinions with the appearance of reasoned support. For example, in rejecting the Free Exercise challenge, the Court asked rhetorically:

> 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 prevent her carrying her belief into practice?[25]

The shock value created by this disingenuous comparison of consensual polygamy to ritual sacrifice and suicide undermined any substantive argument the Court may have put forth. Although the decision of the Court to curtail criminal activity in the face of a Free Exercise challenge was confirmed as correct in the late twentieth century,[26] the Court's reasoning in *Reynolds* still seems inadequate. By electing not to justify the opinion's hostility toward polygamy with plausible policy justifications (such as heightened potential for sexual

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22. *Id*. at 165.
23. *Id*. at 167.
24. *Id*. at 165.
25. *Id*. at 166.
26. *See generally* Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990) (holding that facially neutral, generally applicable state criminal statute is constitutional, regardless of burden it places on free exercise of religious practices).

abuse of children), the *Reynolds* opinion rings hollow—an unsubstantiated attack on a religious practice.

The tone of the *Reynolds* opinion reflected contemporaneous prejudicial sentiment felt throughout the United States towards polygamy. A little over a decade earlier, Congress began its war on plural marriage with the passage of the Anti-Polygamy Acts,[27] which criminalized polygamy in the United States territories and served as the basis for George Reynolds's conviction.[28] Four years after *Reynolds*, Congress enacted legislation preventing polygamists from seeking political office or serving on a jury.[29] Five years later, Congress passed a statute requiring a man to take an oath affirming that he was not a polygamist before he was allowed to vote.[30] These bills, which were ultimately codified by Congress, seemed drafted to specifically target the Utah Mormon Church, and evinced a national intolerance towards Mormons and their practice of polygamy. These sentiments were even echoed in numerous Supreme Court decisions and served as the Court's basis for rejecting various legal challenges by Mormons.[31]

Eventually, the Mormon Church relented to pressure from the courts and the public. In 1890, Mormon President Wilford Woodruff "issued a Manifesto declaring that because the laws forbidding polygamy . . . had been upheld as constitutional, the Church would submit to the laws of the land, and he would use his influence to discourage Mormons from plural marriage."[32] Soon after, legislative persecution

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27. Ch. 126, 12 Stat. 501 (1862) (repealed 1910). The substantive text of the Act reads:

> [E]very person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall . . . be adjudged guilty of bigamy, and . . . shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years . . . .

Id.

28. 98 U.S. 145.

29. *See* Edmunds Act, ch. 47, §§ 5, 8–9, 22 Stat. 30, 31–32 (1882) (repealed 1983).

30. Edmunds-Tucker Act, ch. 397, § 24, 24 Stat. 635, 639–40 (1887) (repealed 1978).

31. *See, e.g.,* Davis v. Beason, 133 U.S. 333 (1890) (holding that statutes that conditioned voting rights on refusal to practice polygamy were lawful), *overruled by* Romer v. Evans, 517 U.S. 620 (1996); Murphy v. Ramsey, 114 U.S. 15 (1885) (finding that any person is polygamist within meaning of Edmunds-Tucker Act if he has plurality of wives at time he presents himself for voter registration, even though he may not have cohabited with more than one of them since the passage of Act).

32. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 65 (1997) (citing GUSTIVE O. LARSON, THE "AMERICANIZATION" OF UTAH FOR STATEHOOD 274 (1971)).

of the Mormon Church reached its apex,[33] and, in 1896, Utah was finally admitted to the Union[34] on the condition that polygamy would forever be prohibited in the state.[35]

B. Cleveland *Continues the Attack*

While the legislative attack on the Mormon religion may have tapered off, the judicial attack on polygamy was still alive and well. Judges did little to clarify anti-polygamy policy rationales, yet adhered to their vituperative rhetoric condemning the practice well into the twentieth century. In *Cleveland v. United States*,[36] the Supreme Court reviewed the convictions of six men, all members of a fundamentalist Mormon sect, for transporting their plural wives across state lines.[37] The men were prosecuted under the Mann Act, a federal statute that criminalized the use of interstate commerce for the transport of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[38] Originally adopted to cover interstate acts of prostitution and sex commercialism, the Mann Act's application to *Cleveland* hinged on whether the defendants' conduct fell within the Act's definition of "immoral purpose."

The charged opinion, written by Justice Douglas, one of the Court's most ardent defenders of civil liberties, concluded that it did. Quoting *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*,[39] the Court described the practice of polygamy as, "in a measure, a return to barbarism. It is contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the Western world."[40] The Court also flatly labeled the establishment or maintenance of a polygamous household as "a notorious example of promiscuity."[41] The decision did not, at any point, cite a specific policy justification for the application of the Mann Act to polygamous

33. *Id*.
34. *Id*. (citing GUSTIVE O. LARSON, THE "AMERICANIZATION" OF UTAH FOR STATEHOOD 301 (1971)).
35. Utah, Admission as a State, ch. 138, 28 Stat. 107 (1894). The Act stated that "the inhabitants of all that part of the area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah . . . [*p*]*rovided*, [t]hat plural or polygamous marriages are forever prohibited." *Id*. §§ 1, 3, 28 Stat. at 107–08.
36. 329 U.S. 14 (1946).
37. *See id*. at 16.
38. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (1994)).
39. 136 U.S. 1 (1890).
40. *Cleveland*, 329 U.S. at 19.
41. *Id*.

couples, other than the claim that polygamy is immoral. As a result, we see the public morality paradigm being applied in an extreme manner: the Court claimed that morality is the only legitimate public policy needed to justify affirming the Mann Act convictions.

C. In re Black*: Public Morality on the State Level*

In re Black,[42] a state case that followed the morality-as-public-policy paradigm applied in *Cleveland*, focused even more vehemently on moral considerations in its criticism of polygamy. The case involved the children of the Black family, a polygamous family living in Short Creek near the border of Arizona and Utah. During a raid on the Short Creek community organized by the Governor of Arizona, public authorities in Utah filed a neglect petition against the Blacks.[43] The trial judge ordered the removal of the children from their parents on the grounds that the parents consistently violated anti-polygamy law and presented a favorable view of polygamy to their children.[44]

The Utah Supreme Court affirmed the trial court's actions. The court's majority did not address the real harms that children may suffer by living in a family headed by parents engaged in plural marriage. Instead, the court relied on the unexamined assumption that plural marriages by nature have serious negative policy ramifications.[45] Rather than making an argument based on legitimate public policy justifications, the decision merely dismissed its own acknowledgement that many well-adjusted citizens of Utah then living were the children and grandchildren of polygamous relationships, as if that concession had no relevance to the probable future well-being of the Blacks' children.[46]

D. Hope for a Reasoned Discussion of the Harms from Polygamy

Moral platitudes notwithstanding, further reading of the *Reynolds* opinion reveals a reference to a potentially convincing policy rationale for upholding the Morrill Anti-Bigamy Act. In discussing the ramifications of polygamous communities, the majority makes mention of the "pure-minded women" and "innocent children" as potential victims of the practice.[47] Both the *Reynolds* and *Cleveland* courts could have lent much-needed credibility to their arguments had they ex-

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42. 283 P.2d 887 (Utah 1955).
43. *Id*. at 888–89.
44. *See id*. at 891–92.
45. *See generally id*. at 894–914.
46. *See id*. at 909, *discussed in* Chambers, *supra* note 32, at 70.
47. *See Reynolds*, 98 U.S. at 167–68.

amined the protection of women and children as a compelling governmental interest for anti-polygamy statutes. By examining these interests, anti-polygamy statutes can be reconciled with more modern constitutional jurisprudence dealing with Free Exercise challenges.

In contrast to the undocumented harms suffered by wives and children of early polygamists living in Utah, modern testimonials and government investigations suggest that physical and sexual abuse frequently occur in polygamist communities as a result of the structure of such communities.[48] Courts today could therefore reconcile anti-polygamy statutes with more modern jurisprudence, particularly that pertaining to Free Exercise challenges, by examining the harms suffered by women and children in polygamist families.

III
Free Exercise Under Modern Constitutional Case Law and Legislation

A. Sherbert *and* Hobbie

The landmark post-*Reynolds* Supreme Court case of *Sherbert v. Verner*[49] mandated that government action which burdens religious practice should be subject to the rigid standard of strict scrutiny, and invalidated absent a compelling governmental interest.[50] The *Sherbert* rationale was later followed in *Hobbie v. Unemployment Appeals Commission of Florida.*[51] While *Sherbert* and *Hobbie* have not technically been overturned, their scope has been substantially narrowed by subsequent Supreme Court decisions.[52] In fact, the Supreme Court has rejected all claims for Free Exercise exemptions outside the con-

48. For a more detailed discussion of these types of harms, see *infra* Part IV.

49. 374 U.S. 398 (1963).

50. *See id*. at 403.

51. 480 U.S. 136 (1987).

52. Justice Brennan's opinion in *Sherbert*, although containing language which appears to mandate strict scrutiny of all government interference with religious practice, has been subsequently interpreted to apply almost exclusively to two types of interference: The denial of unemployment benefits due to workplace conflicts with the applicant's religious beliefs (the main issue in *Sherbert*), and compulsory education against a child's religious upbringing. *See, e.g.*, Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829 (1989) (holding that denial of unemployment compensation benefits due to appellant's refusal to work on Sundays violated Free Exercise Clause); Wisconsin v. Yoder, 406 U.S. 205 (1972) (finding that state interests in education must be balanced against other fundamental rights such as those protected by Free Exercise Clause).

text of unemployment benefits addressed in *Sherbert* and *Hobbie* since 1972.[53]

Nonetheless, strict scrutiny provides one suitable standard of modern constitutional analysis under which to reexamine *Reynolds*. Since strict scrutiny is the most stringent level of Free Exercise review, any government action that burdens the practice of religion must serve a compelling governmental interest. This was precisely the analysis used in one of the more modern federal polygamy cases, *Potter v. Murray City.*[54]

B. Potter v. Murray City

The *Potter* case examined the 1982 firing of Murray, Utah, police officer Royston Potter. While employed by city law enforcement, Potter was an avid follower of fundamentalist Mormon religious doctrine.[55] In 1980, he married a second wife, claiming that plural marriage was necessary in order to attain the "highest level of existence in the next life."[56] After his polygamous lifestyle was exposed, he was interviewed by a Murray internal affairs officer and fired shortly thereafter.[57] According to Mayor LaRell Muir, the City of Murray terminated Potter for "failure to comply with his oath of office and rules and regulations of the police department."[58]

Potter filed suit in Utah Federal District Court, seeking reinstatement and retroactive pay.[59] The court granted summary judgment on behalf of Murray City.[60] Writing for the majority, Judge Christensen noted "a vast and convoluted network of other laws clearly establishing [Utah's] compelling state interest in . . . a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage."[61] In order to emphasize this point, the opinion reaffirmed one of the driving principles of *Reynolds*: Although the government cannot regulate belief, it can regulate action to the extent necessary to protect society pursuant to a compelling state interest.[62] On appeal, the Court of Appeals for the Tenth Circuit af-

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53. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990).
54. 585 F.Supp. 1126 (D. Utah 1984), *aff'd*, 760 F.2d 1065 (10th Cir. 1985).
55. *See* VAN WAGONER, *supra* note 1, at 210.
56. *Id*.
57. *Id*.
58. *Id*.
59. *See Potter*, 585 F.Supp. at 1128.
60. *See id*. at 1142.
61. *Id*. at 1138.
62. *Id*. at 1137.

firmed the lower court's decision.[63] In an opinion by Chief Judge Holloway, the court found that the promotion of monogamy met the compelling state interest test, declaring it to be "inextricably woven into the fabric of our society" and the "bedrock upon which our culture is built."[64] No further policy justifications were given.

Even in applying strict scrutiny under *Sherbert* and *Hobbie*, both the district court and appellate court in *Potter* appear to fall into the trap of "public morality" rhetoric established by *Reynolds*. For example, the district court opinion never addressed the circularity of its reasoning that, if a compelling state interest can be created merely by enacting a "vast network" of laws to regulate a specific type of conduct, then an active state legislature could easily circumvent the strict scrutiny test.[65] Furthermore, both courts again failed to cast the state's compelling interest in terms of palpable social threats. This type of particularization seems required for a proper application of strict scrutiny under *Sherbert* and *Hobbie*. Instead, these courts opted for a blanket condemnation of polygamy as opposed to a detailed analysis of the possible government interest in its criminalization. In addition, the Tenth Circuit offered no justification "as to why particularized free exercise exemptions [for polygamy] would have endangered the state interest in monogamy or why there was not a less burdensome way to achieve this interest."[66]

The strict scrutiny of *Sherbert* and *Hobbie* should have been applied using the following analysis: (1) Determine whether the state is denying a benefit based on conduct mandated by (or made impossible by) religious belief; (2) determine whether the government action creates substantial pressure to modify behavior and violate these beliefs; and if so, then (3) the government must show that its conduct was motivated by a compelling state interest and that its action was narrowly tailored to meet this interest through the least restrictive means.[67] Under a correct application of strict scrutiny, the district and appellate courts would have needed to specifically enumerate the state's policy interests in order to satisfy the tailoring requirement of strict scrutiny. Enumerating these interests would have provided a solid and reasoned foundation for sustaining anti-polygamy statutes against future Free Exercise challenges. In ignoring these interests,

63. Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985)
64. *Id*. at 1070.
65. *See* Harmer-Dionne, *supra* note 15, at 1298 n.21.
66. *Id*. at 1299.
67. *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717–18 (1981); Sherbert v. Verner, 374 U.S. 398, 403–04, 406–07 (1963).

courts such as *Potter* revert to a "public morality" rationale in upholding the statutes.[68] Whether this rationale is founded on anti-polygamy "urban legend" (as seen in the public morality opinions) or on viable threats to the social welfare could only be revealed by means of a more detailed analysis.

Due to the Supreme Court's substantial narrowing of the *Sherbert* and *Hobbie* approach, it is important to examine other modern standards under which polygamy statutes could be viewed.

C. Smith *and the Likely Modern Standard*

The standard under which modern polygamy statutes would most likely be evaluated is explained in *Employment Division v. Smith*,[69] a case which seemed to flatly reject the *Sherbert* and *Hobbie* advocacy of strict scrutiny.[70] *Smith* held that a generally applicable, facially neutral criminal statute is enforceable regardless of the burden it places on one's religious practices.[71] Under the *Smith* analysis, one would ask two questions when analyzing a criminal statute that burdens religious practice: (1) Is the statute facially neutral and generally applicable with regard to religion; and (2) does the statute indicate from its language that it has a primary purpose of burdening religious practice.[72] If a statute is neutral on its face and does not have the primary purpose of burdening religion, the statute would likely stand.[73]

As presently drafted, Utah's criminal bigamy statute would likely survive a Free Exercise challenge under *Smith*. The statute's substan-

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68. Cf. Barlow v. Blackburn, 798 P.2d 1360, 1367 (Ariz. Ct. App. 1990) (holding that law enforcement review board had to make particularized finding that dismissed police officer's practice of polygamy jeopardized public trust and fidelity with respect to law enforcement profession).

69. 494 U.S. 872 (1990) (holding that Oregon's generally applicable law criminalizing use of peyote is enforceable regardless of its burden on religious beliefs because this burden is incidental effect of valid and neutral law that does not violate Free Exercise Clause of First Amendment).

70. In response to *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993, which intended to restore the strict scrutiny afforded by *Sherbert* to governmental actions that burdened religious practice. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993). The Supreme Court subsequently ruled that RFRA was unconstitutional, stating that Congress had unlawfully expanded constitutional protections in violation of § 5 of the Fourteenth Amendment. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

71. *See Smith*, 494 U.S. at 878–79.

72. *See id*. at 878–80.

73. *Cf*. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that series of city ordinances specifically enacted to prohibit animal sacrifice by church based in City of Hialeah violated Free Exercise Clause).

tive text reads: "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."[74] Since the statute makes no facial reference to religion, and only criminalizes the acts of cohabitation and ceremonial bigamous marriage, the statute appears to be facially neutral and generally applicable to a type of conduct. The drafters of the Utah Constitution used language that made it known that the state's prohibition of plural marriage was not intended to be an attack on religion: "Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited."[75]

This language notwithstanding, one cannot ignore the Act's historical origins and underlying policies in determining whether it is indeed neutral toward religious practice. Statutes like the Morrill Anti-Bigamy Act would likely fail under *Smith's* less stringent level of scrutiny, since some facially targeted the Mormon Church.[76] Other statutes, when viewed in proper context with their legislative histories and the prevailing anti-Mormon sentiment in existence at the time of enactment, use a superficial neutrality to mask the true underlying purpose of burdening religious practice.[77] If merely pretextual neutrality is shown, then the statute cannot be classified as facially neutral, and will not survive constitutional scrutiny.

The second prong of the Smith analysis—whether the statute has the primary purpose of burdening religion—has been further defined in a manner that makes it more difficult for anti-polygamy statutes to survive a Free Exercise challenge. An examination of this change is required to determine whether Utah's criminal polygamy statute could withstand constitutional scrutiny.

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74. UTAH CODE ANN. § 76-7-101 (1999).

75. UTAH CONST. art. III.

76. *See, e.g.*, Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890) (upholding congressional statute authorizing dissolution of Mormon Church corporate entity and escheat of its property to United States government).

77. *See, e.g.*, Davis v. Beason, 133 U.S. 333 (1890), *overruled by* Romer v. Evans, 517 U.S. 620 (1996). Although the statute in *Davis* never mentioned the Mormon Church on its face, the defendant in the case was a member of the Mormon Church, as were all other defendants prosecuted under the statute.

D. Lukumi *and the Animus Caveat*

In further defining the second prong of the *Smith* test, the Supreme Court, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[78] held that if a statute is passed that burdens religious conduct, the statute must not be motivated by animus toward a particular religion. In this case, the Hialeah City Council had passed an ordinance prohibiting animal sacrifice in any ritual ceremony. Legislative history of the ordinance showed that its passage was motivated by a local animus toward members of the Santeria religion who performed ritual animal sacrifice in their ceremonies.[79] Therefore, the statute did not meet the neutrality standard of *Smith*. Furthermore, the statute did not meet the general applicability standard of *Smith* since the statute was underinclusive.[80] While the City Council claimed the statute was passed for health reasons, it did not address health concerns raised by similar unsanitary conditions such as hunting carcasses or leftover food from restaurants.[81] The statute's primary purpose was to restrict the practice of a particular religion, and the Court, in a unanimous decision, said that statutes motivated by prejudice toward a religion would not survive constitutional review.

As discussed above, Utah's criminal polygamy statute appears, at least facially, to survive scrutiny under *Smith*. Yet one cannot ignore the historical context in which the Utah criminal polygamy legislation was drafted. As discussed earlier, the Morrill Anti-Bigamy Act was one of a series of severe laws aimed at "curtailing polygamy and illegal cohabitation, with the ultimate aim of crippling the Mormon Church."[82] The text of the Morrill Act itself stated that its intent was to "punish and prevent the Practice of Polygamy in the Territories of the United States."[83] Public reaction towards plural marriage was reflected in a House Report on a proposed polygamy bill: "[T]he whole civilized world regards the marriage of one man to one woman as being alone authorized by the law of God, and that while the relation of husband and wife exists, neither can be lawfully married to another person."[84] When referring to Utah in particular, the report expressed outrage at the "open and defiant license which, under the name of

78. 508 U.S. 520 (1993).
79. *See id*. at 526–27.
80. *Id*. at 543.
81. *See id*. at 538–39.
82. Chambers, *supra* note 32, at 63.
83. Anti-Polygamy Acts, ch. 126, 12 Stat. 501 (1862) (repealed 1910), *discussed in* VAN WAGONER, *supra* note 1, at 107.
84. VAN WAGONER, *supra* note 1, at 105.

religion and latitudinous interpretation of our Constitution, has been given to this crime in one of our Territories."[85] If we evaluate these examples of anti-Mormon sentiment alongside Utah's forced abandonment of the practice of polygamy as a condition of statehood, an argument can be made that both Utah's constitutional provision and anti-bigamy statute were motivated by animus toward the Mormon religion. Since both the statute and the constitutional provision have a historical basis in laws targeted at invidiously crippling the Mormon religion, it may be argued that facial neutrality towards religion becomes pretextual and therefore impermissible under *Lukumi*.

Notwithstanding a *Lukumi* challenge of animus, state polygamy statutes still need to be based on some form of rational policy interest to survive even the low level of scrutiny under *Smith*. No opinion in the cases discussed above made any substantive effort to enumerate the potential policy interests in criminalizing polygamous marriages. In fact, one could argue that it took an extraordinary case to bring these policy justifications to light. In 1997, a child of a polygamous marriage was abused and sexually assaulted in Salt Lake City by trusted relatives. This incident brought national attention to some of the underlying evils that may take place in polygamous families.[86]

The child's story provides some examples of public policy that collectively could provide a compelling governmental interest for narrowly tailored regulation of bigamy. Such an interest would provide a basis for sustaining criminal polygamy statutes even under the strict scrutiny standards advanced in *Sherbert* and *Hobbie*. This child's story, as well as other case studies of polygamous families, will provide the basis for reexamination of anti-polygamy laws using the standards of *Smith*, *Sherbert*, and *Lukumi*.

IV
A COMPELLING GOVERNMENTAL INTEREST AND NARROW TAILORING: SURVIVING STRICT SCRUTINY

A. Examples of Public Policy Interests in General Anti-Polygamy Laws

Rather than resorting to "public morality" rhetoric in examining criminal bigamy laws, courts should be looking for the real public policy harms in polygamous communities. Two such harms—sexual assault and fraud—provide a legitimate justification for upholding laws similar to Utah's criminal bigamy statute. The courts have an

85. *Id*.
86. *See infra* Part IV.A.1.a.

interest in protecting women and children from the strikingly real crimes committed in polygamous communities.

1. *Sexual Assault and Incest*

An examination of the following three examples illustrates the sexual assault and incest harms prevalent in polygamous families, as well as the courts' hesitancy to develop a strong public policy argument for upholding anti-polygamy laws. In the first example, a Utah man and his brother were charged and convicted of child abuse, incest, and unlawful sexual conduct arising out of their family's strict adherence to polygamous practices. Neither of these men were prosecuted under Utah's criminal bigamy statute, depriving the court of the opportunity to use sexual and physical abuse to uphold such a statute. In the second example, *People v. Ezeonu*,[87] a New York supreme court failed to base its ruling on the significant state interests in regulating polygamy, such as preventing sexual and physical abuse of women. Instead, the court's policy argument rested upon generalized notions of anti-polygamy sentiment. In the third example, the sexual assault of Rena Mackert was covered up in a manner that shows the need for laws that are broad enough to target crimes committed in insular polygamous communities.

a. *The Kingston Example*

On May 24, 1998, a 911 call made from a rural Utah gas station told a story that would bring polygamy, long considered Utah's "dirty little secret,"[88] into the public consciousness. The call was made by a sixteen-year-old girl (referred to hereinafter as "Jane"), who claimed that her father had beaten her to the point of unconsciousness in a barn approximately seven miles away.[89]

Her story bordered on inconceivable. When Jane turned fifteen, her father, John Daniel Kingston, told her she would be married to her thirty-two-year-old uncle, David Ortell Kingston, as his fifteenth plural wife.[90] John Daniel and David Ortell were both members of a 1,500 member polygamous sect known as the Latter Day Church of Christ that has an estimated $150 million business empire in Salt Lake County and in other parts of Utah and Nevada.[91] The sect was

87. 588 N.Y.S.2d 116 (N.Y. Sup. Ct. 1992).

88. Dan Harrie, *House Nixes Bill to Fight Crimes by Polygamists*, SALT LAKE TRIB., Jan. 28, 2000, at A1.

89. *Investigative Reports: Inside Polygamy* (A&E television broadcast, Nov. 8, 1999) [hereinafter *Investigative Reports*].

90. *Id*.

91. *Id*.

founded in 1935 by John Ortell Kingston, who built his church's foundation on the premise that God loved the Kingston family more than any other on earth. He ordered his members only to marry and conceive within the family[92] in order to protect the "purity" of the Kingston bloodline.[93] John Ortell fathered sixty-five children before his death in 1987,[94] two of whom were John Daniel and David Ortell.[95]

Despite her vehement objections, Jane was married to David Ortell a few months later in a secret ceremony.[96] She attempted to escape from her uncle twice.[97] The first time she ran away, her father returned her to her uncle.[98] The second time, she sought refuge with her mother, Susan Nelson, who then telephoned John Daniel on the evening of May 22.[99] John Daniel ordered Jane into his truck and drove north, first dropping off two other relatives in Salt Lake City.[100] They proceeded to a barn near the border of Utah and Idaho, a place ex-Kingston clan members claimed Latter Day Church of Christ husbands used to discipline their wayward wives.[101] There, John Daniel savagely beat Jane with his belt, telling her he would give her "10 licks for every wrongdoing."[102] Jane lost consciousness from the attack, and awoke in the home of Margaret Larsen, one of John Daniel's twenty-plus wives.[103] The following day, Jane walked nearly seven miles to a gas station and dialed 911.[104]

John Daniel was charged with third-degree felony child abuse.[105] David Ortell was charged with three counts of incest and one count of unlawful sexual conduct.[106] Neither man was charged under the Utah criminal bigamy statute.[107] Jane testified through tears in both cases, telling graphic stories of incest, sexual assault, and abuse, all supposedly done in accord with the Kingston religious doctrine.[108] When the

92. *Id*.
93. *Id*.
94. *Id*.
95. *Id*.
96. *Id*.
97. *Id*.
98. *Id*.
99. Ray Rivera, *Girl Testifies of Beating by Polygamist Father*, SALT LAKE TRIB., July 23, 1998, at B1.
100. *Investigative Reports*, *supra* note 89.
101. *Id*.
102. Rivera, *supra* note 99, at B1.
103. *Investigative Reports*, *supra* note 89.
104. *Id*.
105. *Id*.
106. *Id*.
107. UTAH CODE ANN. § 76-7-101 (1999).
108. *See* Rivera, *supra* note 99.

ordeal was finally over, John Daniel pled no contest to third-degree felony child abuse, and a jury found David Ortell guilty of unlawful sexual conduct and one count of incest.[109]

b. Ezeonu: New York's Kingston?

In *People v. Ezeonu*,[110] the defendant, a Nigerian native, was charged with first- and second-degree rape of a thirteen-year-old girl. As a defense to the second-degree rape charge, the defendant raised the claim that although he was legally married to another woman under New York law, he and the victim had entered into a state-sanctioned polygamous marriage in Nigeria.[111] Although Ezeonu was prosecuted under the second-degree rape statute as it pertained to statutory rape, he could have raised an affirmative defense by proving that the victim was actually his wife, regardless of her age.[112]

The court found that although the plural marriage was valid under Nigerian law, New York public policy mandated that the marriage could not constitute a legal state of union domestically, and even carried serious criminal consequences.[113] The opinion characterized polygamy as "repugnant" to public policy, and placed it on a level with incest in recognizing it as a crime in New York regardless of the laws of the defendant's country.[114] Yet the court never specifically listed any public policy reasoning for its decision. The court simply cited a vague section of the New York Domestic Relations Law and dismissed the condemnation of plural marriage as "settled public policy."[115]

The *Ezeonu* opinion, in effect, cited "public morality" as the basis for its decision. Its dismissive tone suggested that the taboo nature of polygamy is so apparent that further discussion was unnecessary. In this case, where a thirteen-year-old girl arguably suffered statutory rape, perhaps that rationale holds true. The nation's highest courts have always recognized a compelling policy interest in protecting children.[116]

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109. *Investigative Reports, supra* note 89.
110. 588 N.Y.S.2d 116 (N.Y. Sup. Ct. 1992).
111. *Id*. at 117.
112. *Id*. The statute in force at the time provided that: "A person is guilty of Rape in the Second Degree when, being eighteen years old or more, he or she engages in sexual intercourse with another person to whom the actor is not married less than fourteen years old." N.Y. PENAL LAW § 130.30 (Gould 2001).
113. *Ezeonu*, 588 N.Y.S.2d at 117.
114. *Id*. at 117–18.
115. *Id*. at 118 n.1.
116. *See e.g*., New York v. Ferber, 458 U.S. 747, 758–62 (1982) (upholding New York's ban on knowing promotion of sexual performances by children under age of

c. The Mackert Example

Kingston and Ezeonu demonstrated the potential for incest, sexual assault, and abuse to thrive in polygamous communities. The following example shows the difficulty in prosecuting such cases. Rena Mackert, who grew up in a Utah polygamous family, claimed that her father ritualistically sexually assaulted her and her sisters on their sixteenth birthdays.[117] Laura Chapman, one of Ms. Mackert's seventeen sisters, claimed that both her father and brothers molested her at a young age.[118] When she complained to her father's wives, they dismissed it as "just something that boys do."[119] Since such actions expressly violate Mormon doctrine, it seems that predators like David Ortell and the fathers of Mackert and Chapman are living examples of Bigelow's concerns: polygamists who use religion as a protective veil to conceal illegal activities. Crimes of physical and sexual abuse are easy to commit and especially difficult to prosecute in light of the tactics used by abusers to keep intact the wall of secrecy surrounding the practice.[120] Many abusive parents in polygamous marriages tell their children that, because polygamy is illegal, the parents will be arrested if children report crimes to the authorities.[121] Furthermore, parents in polygamous relationships often teach their children to shun outsiders and protect the family secrets at all costs.[122] Given the highly private nature of sexual abuse and the self-imposed isolation of polygamous communities, prosecution may well prove impossible. This wall of silence may present a compelling justification for criminalizing the act of polygamy, prosecuting offenders, and effectively breaking down the wall that provides a favorable environment in which crimes of physical and sexual abuse can thrive.

Exploration of the factual circumstances surrounding the types of abuses illustrated by Kingston, Ezeonu, and Mackert, as well as in-

sixteen, even though such material is not technically obscene); FCC v. Pacifica Foundation, 438 U.S. 726, 750 (1978) (holding that radio station can be fined for broadcasting adult language at time when children are likely to be listening); Ginsberg v. New York, 390 U.S. 629 (1968) (upholding criminal conviction for sale of sexually explicit magazine to minor).

117. *Investigative Reports*, *supra* note 89. Mackert related graphic details of the assaults. She said that her father would explain to his daughters that the assaults were "lessons" in how to please one's husband sexually in a plural marriage. *Id*. Her father would also tell her brothers that he would sometimes "tickle" the other girls so as to arouse himself, and thus facilitate his sexual performance with his wives. *Id*.

118. *Id*.

119. *Id*.

120. *See id*.

121. *See id*.

122. *See* Stephen Hunt, *The Law vs. Polygamy: What Next?*, SALT LAKE TRIB., June 6, 1999, at C1.

creased disclosure of similar harms in polygamous families,[123] may force courts to examine in greater detail the pillars upon which they rest their policy arguments. The Kingston, Ezeonu, and Mackert examples, however, indicate that, beyond rote moral condemnation, criminal polygamy legislation can be justified as necessary to protect children from abusive situations which may be more prevalent in plural marriage settings. Child abuse prevention is one of several factors that, if evaluated collectively, could constitute a compelling governmental interest under *Sherbert* and *Hobbie*.

2. *Fraud and Failure to Pay Child Support*

According to anti-polygamy activists, welfare and tax fraud are commonplace in Utah's polygamous communities.[124] In the early 1980s, a Utah judge ordered John Ortell Kingston to undergo paternity tests to determine if he had fathered twenty-six children from three women who had received $200,000 in state child-support and medical payments.[125] Kingston claimed that the fathers of the children had abandoned the mothers, and he refused to pay child support.[126] Prosecutors maintained that Kingston was financially able to support the children but never took him to trial.[127] In a settlement agreement, Kingston promised to reimburse the state for the benefits, and, in return, he would not have to acknowledge paternity.[128]

Similar practices abound today. The polygamist colony of Colorado City in southern Utah is one of the poorest cities in America, dependent almost entirely on welfare since none of the men in the community earn enough to support their plural wives.[129] The crime is one of the hardest to prosecute, since no records exist to authenticate these marriages. Without any way for state officials to track plural marriages, plural wives remain single mothers in the eyes of the state,

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123. *See* Julie Cart, *Tales of Abuse, Incest Frame 'Utah's Dirty Little Secret'*, L.A. Times, Aug. 15, 1998, at A1; Timothy Egan, *The Persistence of Polygamy*, N.Y. Times, Feb. 28, 1999, § 6 (Magazine), at 51; James Langton, *Mormon Wife Proclaims 'Joy' of Polygamy*, Daily Telegraph (London), Aug. 9, 1998, at A1.

124. *Investigative Reports, supra* note 89. Throughout the documentary, some of the interviewed anti-polygamy activists likened Utah's polygamous communities to criminal enterprises when discussing the crimes which occur within the communities. *Id*.

125. Dawn House, *Prosecution of Plural Marriage a Thorny Issue for Courts*, Salt Lake Trib., June 28, 1998, at J6.

126. *Investigative Reports, supra* note 89.

127. House, *supra* note 125.

128. *Id*.

129. *Investigative Reports, supra* note 89.

leaving them free to take liberties with welfare applications and understated income on tax forms.[130]

Prevention of welfare fraud gives substance to the governmental policy interests underlying criminal polygamy legislation. Enforcement of anti-bigamy statutes would provide an additional deterrent for such conduct and may result in the recapture of significant lost tax revenue for states by encouraging settlements similar to the one reached with John Ortell Kingston.

B. Surviving the Narrow Tailoring Requirement of Strict Scrutiny

Due to the closed nature of polygamous communities, empirical evidence indicating an increased rate of crimes against women and children within them is difficult to obtain. This insularity protects criminals within polygamous communities from prosecution under a guise of religious freedom. The difficulty of prosecution may provide a compelling governmental interest in the criminalization of polygamy as a whole. If polygamy is not criminalized, the real harms being committed on women and children in polygamous communities will continue to go unnoticed.

Carmen Thompson is the Director of Public Relations for Tapestry of Polygamy, a Salt Lake City-based organization that provides financial and occupational assistance as well as counseling to women who are or have been involved in plural marriage.[131] Thompson knows first-hand the difficulty of eliminating the harms from polygamy:

> State officials have said, in many cases, that it's probably easier to prosecute the mafia than it is polygamy. . . . [Polygamy] is organized crime on many levels. . . . The reality of it is if a man was marrying his niece, and he lived in mainstream society, you can bet . . . he would serve jail time. But because they hide behind this cloak of religion, the state is afraid to do anything about it.[132]

Thompson's cynicism may be justified. Until Green's conviction, no one had been prosecuted for violations of Utah's criminal bigamy statute since 1953—the year in which Governor J. Howard Pyle of Arizona launched a raid on the polygamous communities of Hildale and Short Creek (now known as Colorado City) located near the border of Utah and Arizona.[133] The raid was a public-relations disaster, viewed

130. *Id*.
131. *Id.*
132. *Id*.
133. VAN WAGONER, *supra* note 1, at 192–98. In 1999, a Millard County court handed down a bigamy indictment, the first in Utah since 1953. Stephen Hunt, *Oppo-*

by many as an unjustified and excessive attack on a peaceful community.[134] Since then, state leaders have blamed the state's failure to prosecute under the criminal bigamy statute on the difficulty in gathering evidence and on a lack of law enforcement resources.[135]

The difficulty in prosecuting crimes in polygamous communities seems to call for a general anti-polygamy law. However, such a general law finds itself open to criticism by opponents who argue that it is possible to selectively target specific crimes in polygamous communities in an attempt to avoid burdensome restrictions on religion. Opponents of general anti-polygamy legislation could argue that selective prosecution is a less restrictive means of infringing on the exercise of the Mormon religion. However, as the following example shows, selective prosecution of specific crimes in polygamous communities is not an effective alternative in the eyes of polygamy defenders. Defenders point to selective prosecution of these specific crimes as a pretextual infringement on the free exercise of religion under *Lukumi*.

1. Utah House Bill 62

In its year 2000 legislative session, the Utah House of Representatives defeated a bill proposed by Republican Ron Bigelow, a certified public accountant employed by the Mormon Church.[136] He had proposed House Bill 62, legislation intended to facilitate the investigation and prosecution of specific crimes committed in polygamous communities.[137] The Bill would have appropriated $200,000 for the creation of a special prosecutor and investigator in the Office of the Utah Attorney General.[138] The caseload of the special prosecutor and investigator would be limited to those crimes committed in polygamous communities involving incest, sexual assault, tax fraud, failure to pay

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nents of Polygamy Applaud Prosecution of Millard County Case, SALT LAKE TRIB., Apr. 20, 1999, at C1.

134. VAN WAGONER, *supra* note 1, at 195–96.

135. *See* Hunt, *supra* note 122. Former Utah Senate Minority Leader Scott Howell, when questioned about the lack of bigamy prosecutions in the state, said the following:

> Do you want to take out a murderer or the number one mafia person and replace them with this polygamist? . . . We don't have enough money—I would dare to say in the country or the state—to lock up every one of them. . . . The practice of polygamy has got to end. If we can't get them on polygamy then we've got to go after the abuses and the frauds that happen in those communities.

Investigative Reports, supra note 89.

136. Harrie, *supra* note 88.

137. H.B. 62, 53rd Leg., Gen. Sess. (Utah 2000), *available at* http://www.le.state.ut.us/~2000/bills/hbillint/HB0062.pdf.

138. *Id*.

child support, and welfare fraud.[139] Among opponents of polygamy, these offenses are considered to lie at the crux of the compelling governmental interest justifying criminal polygamy statutes.[140]

Speaking on the House floor in support of the Bill, Bigelow stated that the Bill was not intended to target polygamy as a practice, but rather those who used religious belief as a veil for the perpetration of the offenses mentioned above.[141] Detractors decried the Bill as encouraging a "witch hunt" against god-fearing polygamists and equated it with overt racial and religious discrimination.[142] The Bill was convincingly defeated in the Utah House of Representatives by a vote of forty-three to twenty-eight.[143] The Bill's landslide defeat indicated public doubt about the ability to target crimes committed under the cloak of religion without, in fact, targeting that religion.

Attempts to target specific crimes committed in polygamous communities are ineffective and undesirable for two reasons: (1) The insularity of polygamous communities makes it difficult to prosecute specific crimes within the communities, and (2) proponents of polygamy claim that the specific targeting of crimes is a pretextual attempt under *Lukumi* to target religious belief. Thus, there is no alternative to Utah's criminal bigamy statute that is less restrictive on the free exercise of religion while still managing to combat the crimes committed in polygamous communities.

V
POLYGAMY AND THE NON-CRIMINAL SETTING: DOES FAIRNESS MANDATE ITS RECOGNITION?

But what if questions of public policy against polygamy did not arise in a criminal case? What about the case of a plural wife seeking

139. *Id*. In urging support for the Bill on the House floor, Representative Bigelow urged that the Bill was not intended to target legitimate polygamists, but rather those who used religious belief as a device for manipulation in the commission of other crimes. Harrie, *supra* note 88.

140. *See generally* Hunt, *supra* note 122 (discussing letter sent by anti-polygamist group to Utah county prosecutors, urging prosecution of polygamists because of the sexual abuse, rape, and fraud that thrives in polygamist communities); *Investigative Reports*, *supra* note 89 (narrator and members of anti-polygamy group state that polygamous communities are places where physical and sexual abuse can thrive).

141. *See* Harrie, *supra* note 88.

142. *See id*. Utah Representative Tammy Rowan, during debate on the House floor, said that if the word "polygamist" were replaced with the words "Islamic" or "Hispanic," the proposed legislation would unquestionably be considered religious discrimination. *Id*. Utah Representative Matthew Throckmorton called the prosecution of polygamists "the ultimate hypocrisy." *Id*.

143. *Id*.

to garner workman's compensation benefits from her recently deceased husband? Or plural wives married in a foreign country who are now suing for equitable distribution of their husband's estate in the United States? What about polygamous families who wish to adopt? Or purchase land? In these cases, principles of equity and public policy against unjust enrichment would seem to outweigh the "public morality" justifications for voiding these marriages. Courts that have dealt with these precise matters, however, seem to be blinded by the sometimes unjustified moral condemnation of bigamy, and fail to use any kind of balancing test of legitimate public policy objectives in determining whether or not to recognize these marriages.

Because general "public morality" justifications lead courts to unfairly deny benefits to victims of crimes in polygamous communities, criminal bigamy statutes are open to criticism. This potential demonstrates a need for courts in the criminal context to specifically recognize legitimate public policy justifications in order to avoid harming victims in the non-criminal context. For instance, if a judge can recognize fraud as a legitimate public policy justification, then the judge may be more likely to rule in favor of a polygamous wife in the probate context. The case law, as discussed below, illustrates how courts have weighed the criminal nature of polygamy against other equitable concerns.

A. In re Dalip Singh Bir's Estate*: The Probate Context*

In one of the earlier cases dealing with polygamy and equities, the question arose as to whether polygamous marriage should be recognized for the purpose of probate. In the case of *In re Dalip Singh Bir's Estate*,[144] the intestate was a native of India who entered into legal plural marriage overseas. The lower court ruled that public policy mandated that the state only recognize one of the intestate's wives for purposes of estate distribution. The California District Court of Appeals reversed, stating that no public policy would be affected by dividing the estate between the two surviving wives, particularly since the only interested parties were the wives, neither of whom contested the right of the other to share the estate.[145] The majority based its decision largely on the fact that the plural marriage took place in a jurisdiction where plural marriage was recognized as legal.[146] Here, the court properly weighed the fairness concerns involved without go-

144. 188 P.2d 499 (Cal. Dist. Ct. App. 1948).
145. *Id*. at 502.
146. *Id*. at 501–02.

ing so far as to recognize plural marriage as lawful within its jurisdiction. Other courts that have dealt with earlier plural marriage issues, however, did not always reach such informed and well-reasoned decisions.

B. Toler *and Workman's Compensation*

In *Toler v. Oakwood Smokeless Coal Co.*,[147] the plaintiff Martha Toler sued her deceased husband's employer under the Workman's Compensation Act to recover benefits allegedly due after her husband, Raymond Toler, died in a work-related accident.[148] She had married Raymond after hearing that her first husband, J.M. Lawson, had been killed.[149] Lawson, in fact, was still alive.[150] Because no divorce proceedings between Martha and Lawson ever took place, the court found Martha to have been a member of a polyandrous marriage.[151] In an opinion that focused almost exclusively on moral considerations, Virginia's highest court affirmed the Industrial Commission's denial of benefits. In the course of Justice Spratley's opinion, references are made to the repugnancy of polygamy to "the moral sense of Christendom" and to the essential nature of traditional marriage as "the foundation of human society."[152] Ironically, the Virginia anti-polygamy statutes cited by the court also contained language that outlawed miscegenation,[153] perhaps indicating that the court's reasoning rested on prejudicial grounds.

The many flaws in the *Toler* opinion are common among modern analyses of polygamy law. *Toler* presented a situation in which a woman was denied compensation on an otherwise valid workman's compensation claim for no reason other than the protection of the moral sanctity of marriage. In contrast to the Ezeonu and Kingston examples, *Toler* did not turn on facts indicating abuse or exploitation. An economic policy argument may have existed, however, in that premiums would rise and insurance litigation would assume a new complexity if insurance companies were required to provide benefits to multiple beneficiaries in polygamous and polyandrous marriages. This concern, in turn, could be adequately addressed through legislation that restricts the maximum benefits available for members of po-

147. 4 S.E.2d 364 (Va. 1939).
148. *See id*. at 365.
149. *Id*.
150. *Id*.
151. *Id.* at 366–67.
152. *Id*.
153. *See id*. at 367.

lygamous relationships. Nevertheless, the court did not hint at policy aspects that approach this level of legal reasoning, and instead all but omitted the public policy component of "public morality."

C. Barlow *and Discrimination Against Polygamists in the Purchase of Real Estate*

The harsh views toward polygamy in a non-criminal setting continued in the more recent case of *Barlow v. Evans*.[154] Here, plaintiffs Henry, Mark, and Hyrum Barlow sued defendants Neal and Barbara Evans for their refusal to perform an agreement to sell real property in central Utah.[155] The Barlows claimed that the Evans's refusal to sell the property was based upon the belief that the Barlows were polygamists and thus violated the Federal Fair Housing Act (FHA).[156] The court, in dismissing the complaint, chose not to question the state of the law, but accepted *Reynolds* and those decisions like it that cast polygamy as "one of those rare religious practices that is contrary to the interests of society and undeserving of constitutional protection."[157] The court held that the FHA's protection against religious discrimination in the purchase of property did not extend to religious practices that are both against the criminal law and not entitled to First Amendment protection.[158]

In weighing the interests of the sellers against those of the buyers, the court reached an equitable outcome consistent with the current state of the law. Just as a homeowner would have the right to refuse to sell property to a vagrant or a drug user, the Evans family chose not to sell to a family that was under suspicion of carrying on criminal activity. This feature of the case was central to the balancing of equities—the court had to weigh the rights of property owners who wish not to sell their property to lawbreakers against the interests of polygamists who wish to escape this type of lawful discrimination. Unless the United States Supreme Court reverses its stand on *Reynolds*, behavior like that of the Evans family remains lawful. According to the Utah Supreme Court, however, fairness in other situations—adoption, for example—mandates that *per se* labeling of polygamists as criminals is not appropriate.

154. 993 F.Supp. 1390 (D. Utah 1997).
155. *Id*. at 1391.
156. 42 U.S.C. § 3604 (1994). Subsection (a) of the FHA prohibits refusal to sell real estate on the grounds of religion. *Id*. § 3604(a).
157. *Barlow*, 993 F.Supp. at 1394.
158. *Id*.

D. *Johanson and the Question of Polygamous Adoption*

On June 30, 1987, Vaughn and Sharane Fischer filed an adoption petition in Utah's Washington County.[159] The Fischers were legally married and cohabited with one Katrina Stubbs, who was the third wife in the Fischers' plural marriage.[160] The trial judge dismissed the adoption petition, ruling that, as a matter of law, the Fischers' criminal conduct in teaching and practicing polygamy made them ineligible to adopt children.[161] In essence, the court held that the standards governing interests of the child under Utah adoptions could never be met when the adoption places the child in a home where polygamy is taught or practiced.[162]

The Utah Supreme Court reversed the dismissal.[163] Writing for the majority, Justice Christine Durham stated that the petitioners' practice of plural marriage was one factor the trial court should consider in determining the fitness of the Fischers as adoptive parents.[164] Yet the lower court erred, explained the opinion, by concluding that the practice of polygamy was a *per se* disqualifying factor for adoption: "[N]either the [Utah adoption] statute, the constitution, nor good public policy justifies a blanket exclusion of polygamists from eligibility as adoptive parents."[165]

The *Johanson* opinion is indicative of the increasing willingness of Utah state courts to view polygamy with a less hostile eye. The court implicitly reasoned that there are other factors that, if present, could make polygamous families satisfactory candidates for adoption. While Utah's high court performed what it considered to be a just balancing of equities, its analysis may have failed to consider the interests of adoptive children who would be raised in a household that lives in open defiance of the law.[166]

E. Final Analysis: Do the Equities Matter in a Strict Scrutiny Analysis?

The discussion of the four cases above shows that judicial treatment of polygamy in the non-criminal context has varied. In some

159. Johanson v. Fischer, 808 P.2d 1083 (Utah 1991).
160. *Id*. at 1083.
161. *Id*. at 1084.
162. *Id*.
163. *Id.* at 1083.
164. *Id*. at 1086.
165. *Id*.
166. *See id*. at 1089 (Howe, A.C.J., dissenting) (arguing that no factor or combination of factors would be able to outweigh fact that ongoing criminal conduct is taking place in home of prospective adoptive parents).

cases, courts have weighed equities and interests of fairness to the parties in order to reach a decision irrespective of the illegality of plural marriage. In other contexts, the court has found that the illegality and inherent moral repugnance of polygamy is sufficient to rule against the party engaged in polygamous marriage, regardless of other equitable considerations. The fact that courts have shown a willingness to use discretion in non-criminal cases strengthens the state's interest in using the penal system to deter the hidden evils such as physical and/or sexual abuse that may increasingly occur in plural marriages. A balancing test in non-criminal cases allows courts to weigh fairness concerns against the state interests involved. These interests must be clear and understood by judges in order to protect children and women from arbitrary and harmful results in the non-criminal context. As a result, the state's interest in criminalizing polygamy is most likely strong enough to pass constitutional muster under any of the modern levels of constitutional scrutiny applied to criminal polygamy statutes.

VI
Utah's Criminal Polygamy Statute Analyzed under the Applicable Levels of Scrutiny: A Summary

A. The Smith *and* Lukumi *Standards*

If scrutinized under *Smith*, Utah's criminal bigamy statute would likely withstand constitutional scrutiny. The text of the statute is facially neutral with regard to religious practice and is generally applicable to a type of conduct. As a result, the only argument that could result in the statute's failure under *Smith* is a claim of pretextual neutrality under *Lukumi*, given the historical prejudices underlying the passage of the statute and the prohibition of polygamy in the state constitution. No court has ever applied the *Lukumi* animus test to a statute simply because of historical context—it appears that actual legislative history of the statute would be needed for a successful challenge on the basis of animus. Since none exists, the statute would also likely be upheld under *Lukumi*.

B. The Compelling State Interest Test Under Sherbert *and* Hobbie

Applying this standard, the statute would still likely survive constitutional scrutiny upon proof of a higher potential for child abuse in plural marriages. While other crimes that take place in polygamous communities may be used to bolster the argument for a compelling state interest, it is unlikely that a flat-out ban on polygamy would meet the "least restrictive means" requirement of *Sherbert* and *Hobbie*. For example, tax and welfare fraud within polygamous communities could be remedied with more rigorous auditing practices. Given the high court's zeal in protecting minors, as illustrated in the preceding cases and anecdotes, the suggestion that plural marriage communities have higher rates of physical or psychological harm to children would likely be enough to withstand the strictest level of review.

Conclusion

The judiciary has historically done an unsatisfactory job in building up a record based on public policy interests in order to sustain criminal bigamy laws against Free Exercise challenges. Instead, the courts have relied on a "public morality" rhetoric to justify the criminalization of polygamy. A continued reversion to this "public morality" justification by the courts leaves anti-polygamy statutes vulnerable to constitutional challenge. In determining whether Utah's criminal bigamy law is constitutional, under either the strict scrutiny standard of *Sherbert* and *Hobbie*, or the test used in *Smith*, it is necessary to understand the real harms women and children suffer in polygamous societies. Using such policy justifications from the criminal and non-criminal arenas, Utah's criminal bigamy statute would likely survive constitutional review.