

# THE POSITIVE EFFECTS OF LEGALIZING POLYGAMY: “LOVE IS A MANY SPLENDORED THING”

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## INTRODUCTION

Long thought to be a hidden, rare, and cultish phenomenon, polygyny is in fact practiced by an estimated 30,000 to 100,000 people in North America.<sup>1</sup> It has recently been the focus of an FBI “Most Wanted” national manhunt, a raid in a small Texas town, an issue in political elections, and even the subject of a hit TV show “Big Love.” Although “polygamy” is defined as “the state or practice of having more than one spouse simultaneously,”<sup>2</sup> most polygamists in the United States engage in “polygyny,” or, “the condition or practice of having more than one wife at the same time.”<sup>3</sup>

Polygynists<sup>4</sup> in the United States are generally Mormon fundamentalists who believe they are “the true keepers of the faith.”<sup>5</sup> Though formally excommunicated by the Church of Jesus Christ of Latter-day Saints (“LDS”), fundamentalists continue to follow its founder Joseph Smith’s belief, known as “the principle” or “the marriage revelation,” that “a man need[s] at least three wives to attain the ‘fullness of exaltation’ in the afterlife.”<sup>6</sup> More specifically, women “sealed with men for eternity” grant men the ability to reach the third and highest level of heaven where they become gods.<sup>7</sup>

There is no reliable census data on the number of polygynists living in the United States,<sup>8</sup> but it is believed that thirty to fifty thousand fundamentalist Mormons live in polygynist families and communities in the western U.S.

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1. Jason D. Berkowitz, *Beneath the Veil of Mormonism: Uncovering the Truth about Polygamy in the United States and Canada*, 38 U. MIAMI INTER-AM. L. REV. 615, 617 (2006–2007).

2. BLACK’S LAW DICTIONARY 1197 (8th ed. 2004).

3. *Id.* at 1198.

4. Polygynists prefer the term “plural marriage” as opposed to “polygamy.” This paper will, however, use either the more specific terms “polygyny” or “polygamy” where appropriate.

5. Eve D’Onofrio, *Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States* 19 INT’L J.L.POL’Y & FAM. 373, 375 (2005).

6. JOHN KRAKAUER, UNDER THE BANNER OF HEAVEN 6 (2003).

7. Stephen A. Kent, *A Matter of Principle*, 10 NOVA RELIGIO: THE J. OF ALTERNATIVE AND EMERGENT RELIGIONS 7, 17 (2006).

8. Lou Cannon, *Plural Marriages Flourish Out West*, WASH. POST, Aug. 8, 1977, at A14.

alone.<sup>9</sup> A joint report issued by the attorneys general of Utah and Arizona estimated that 37,000 or more Mormon fundamentalists currently practice polygyny in those two states alone.<sup>10</sup> Tapestry Against Polygamy, a group formed by women who fled polygynous relationships and families, believes there may be as many as 100,000 practicing polygynists nationwide.<sup>11</sup> These fundamentalist sects flourish in Utah, Arizona, Idaho, California, and, more recently, Texas. The practice is illegal, and according to many, these theocracies foster incest, underage marriage, sexual abuse, rape, physical abuse, non-consensual marriage, birth defects, welfare fraud, poverty, and a deprivation of education and other opportunities.<sup>12</sup> Not surprisingly, these problems overwhelmingly affect women and children.

Yet despite universal anti-polygamy legislation, state and federal governments have generally chosen not to take legal action against polygynists. Instead, government officials typically ignore polygynist communities and the abuses that occur therein with “a lot of secular eye-winking.”<sup>13</sup> This paper will argue that state governments’ failures to implement anti-polygamy laws have adversely affected polygynist women and children. In other words, by turning a blind eye to polygamy’s negative ramifications, state governments indirectly condone and thus perpetuate abuse and neglect. Thus, if there is to be a rational policy in this area, it should consider the legalization of polygamy, thereby allowing greater regulation of the practice, compelling polygynous communities to emerge from the shadows, and openly assisting the women and children who live in them.

## I. A BRIEF HISTORY OF POLYGAMY IN THE UNITED STATES

### A. Polygamy in the Mormon Religion

On April 6, 1830 in Fayette, New York, Joseph Smith, Jr., along with five of his followers, founded the Mormon Church.<sup>14</sup> Smith had been inspired to establish the Church when an angel led him to gold plates, chronicling the story of ancient inhabitants from Israel who settled in the Western Hemisphere.<sup>15</sup> This experience was the basis of the Book of Mormon, which, along with the Bible and the Doctrine of Covenants, serves as the sacred text of the Church.<sup>16</sup> According to the Doctrine, in a revelation first received in 1831:

As pertaining to the law of the priesthood - if any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the

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9. *Id.*

10. Felicia R. Lee, *Real Polygamists Look at HBO Polygamists; In Utah Hollywood Seems Oversexed*, N.Y. TIMES, Mar. 28, 2006, at E1.

11. *Id.*

12. Tom Kenworthy, *Spotlight on Utah Polygamy; Teenager’s Escape from Sect Revives Scrutiny of Practice*, WASH. POST, Aug. 9, 1998, at A3.

13. *Id.*

14. KATHRYN M. DAYNES, MORE WIVES THAN ONE, 18 (2001).

15. Timothy Egan, *The Persistence of Polygamy*, N.Y. TIMES MAG., Feb. 28, 1999, at 54.

16. *Id.*

second, and they are virgins, and have vowed to no other man, then is he justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him; therefore is he justified.<sup>17</sup>

This particular revelation was not recorded until 1843 because Smith and other church leaders wanted to keep their polygynous marriages secret to avoid attacks by outsiders.<sup>18</sup>

After Smith was killed by a mob in Nauvoo, Illinois, in 1847, Brigham Young led most of the remaining Church adherents west to the Great Basin of Utah where he established “the state of Deseret.” Isolated, the Mormons felt free to engage in the religious practices they believed God had commanded; and in 1852, polygyny was officially declared a tenet of the church. Apostle Orson Pratt publicly announced polygyny on August 29, 1852, at the end of a special conference held by Young. Pratt offered five reasons justifying the practice: (1) to fulfill God’s commandment that Adam and Eve should “multiply and replenish the Earth;” (2) to embody God’s covenant with Abraham to make his seed righteous and as plentiful as the sands of the seashore; (3) to demonstrate that monogamy was merely a historical “exception;” (4) to reform the world morally and socially, as opposed to monogamy, which invites immorality; and (5) to recognize that the spirit children of God wait for earthly “noble parentage” who help them “usher in the Kingdom of God.”<sup>19</sup> At the same time, however, Pratt emphasized that only the prophet had the authority to perform “celestial marriages,” and anyone who practiced polygyny had to bear great moral responsibility.<sup>20</sup>

In reality, the vast majority of Mormons never practiced polygyny. Even at its peak in the 1950s, no more than twenty percent of Mormons had polygynous relationships – although the practice was more prevalent among wealthy church leaders than the masses.<sup>21</sup>

## B. Early Federal Legislation and Supreme Court Decisions Affecting Polygamous Practice

From the time it was officially endorsed by the Church in 1852, polygyny encountered strong federal opposition. In 1856, John Charles Fremont, the first Republican presidential candidate, made conquering the “twin relics of barbarism – polygamy and slavery” the focus of his campaign.<sup>22</sup> Although Fremont lost the election to James Buchanan, President Buchanan was also hostile to the Mormons’ dominance in the Utah Territory. In June 1857,

17. *Doctrine of Covenants*, 132: 61–62.

18. Jessie L. Embry, *Effects of Polygamy on Mormon Women*, 7 *FRONTIERS: A J. OF WOMEN STUD.*, No. 3, *WOMEN ON THE WESTERN FRONTIER* 56, 57 (1984).

19. David J. Whittaker, *The Bone in the Throat: Orson Pratt and the Public Announcement of Plural Marriage*, 18 *W. HIST. Q.* 293, 303 (July 1987).

20. *Id.*

21. Cannon, *supra* note 8.

22. Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 *CORNELL J.L. & PUB. POL’Y* 101, 114–15 (Fall 2006).

Buchanan appointed non-Mormons as government officials to reestablish federal order over the Territory. Twenty-five hundred federal troops accompanied the judicial and administrative officials to their new posts.<sup>23</sup> Young saw the arrival of the troops as an invasion, and the resulting “Mormon War” of 1857 stranded the U.S. Army near Salt Lake for the winter.<sup>24</sup>

The hegemony of the Republican Party during the Civil War paved the way for federal anti-polygamy legislation. In 1862, Senator Justin Morrill (R-VT) succeeded in passing the Morrill Act for the Suppression of Polygamy, which punished bigamy in any territory under federal jurisdiction with a “fine not exceeding five hundred dollars, and . . . imprisonment for a term not exceeding five years.”<sup>25</sup> For good measure, the Act tried to further cripple Mormonism by revoking the Church’s incorporation and strictly limiting the Church’s ability to hold real property.<sup>26</sup>

Angered by such government intrusion, the Mormons decided to challenge the constitutionality of the act. George Reynolds, a practicing polygynist and Brigham Young’s personal secretary, agreed to be indicted for polygyny provided his punishment would be waived were he convicted. After several appeals, the Supreme Court agreed to hear *Reynolds v. U.S.*; and in 1878, eight justices, with one justice concurring, agreed that polygamy was illegal, declaring it an “odious” practice that offends society.<sup>27</sup> The Court found no constitutional right to practice polygamy, and assumed that Congress had the constitutional authority to pass the law. Looking to the Framers’ intent, the Court noted that the colony of Virginia had accepted King James I’s statute banning polygamy.<sup>28</sup> Given this brief history, the Court concluded that the Framers would never have intended the Freedom of Religion Clause to sanction polygamy. Finally, the Court distinguished between religious beliefs and actions, holding that the government can enact laws that restrict religious actions, but not beliefs. However, citing the practice of a widow burning herself on her husband’s funeral pyre, the Court held that even the “professed doctrines of religious belief” cannot be superior to federal law.<sup>29</sup>

Despite the government’s success in the Supreme Court, the Morrill Act failed to eradicate polygamy. To the contrary, Mormons grew more steadfast in their defense of what they perceived to be their fundamental religious beliefs. Ironically, perhaps, the local revolt against federal authority was endorsed by Mormon women. In 1870, the Utah Territory passed the Female Suffrage Bill, making it one of the first states or territories to grant the right to vote to all women. These newly enfranchised women then voted to maintain polygamy.

In 1874, Congress tried again, this time passing the Poland Act, which revoked the jurisdiction of the Utah county courts in all areas other than divorce. The act was intended to prevent Mormons from bringing their cases to

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23. *Id.* at 116.

24. *Id.* at 117.

25. The Morrill Act, Pub. L. No. 37-126, § 1, 12 Stat. 501, 501 (1862) (repealed 1910).

26. Sigman, *supra* note 22, at 119.

27. 98 U.S. 145, 164 (1878).

28. *Id.*

29. *Id.* at 166-67.

county probate courts where Mormon ecclesiastical leaders served as judges.<sup>30</sup> Again, however, the Poland Act did not resolve the two problems inherent in convicting polygynists: first, that no witnesses would come forward to attest to polygynous behavior; and second, that no jury comprised of Mormons would convict a peer for a practice they condoned.

In 1882, Senator George Edmunds (R-VT) attempted to address these issues with the Edmunds Anti-Polygamy Act. The act prohibited mere cohabitation, thus relieving prosecutors of the burden of proving an actual marriage between a husband and another wife. The act further stated that any juror in a bigamy, polygamy, or cohabitation trial could be removed with “sufficient cause” if the juror himself was committing bigamy, engaging in polygamy, unlawfully cohabitating during the trial, or simply believed such practices were “right.”<sup>31</sup> Finally, the act disenfranchised any polygamist, bigamist, or person illegally cohabitating. Prior to the Edmunds Act, the government had brought only seventy-eight indictments for polygyny.<sup>32</sup> After the Act, 1,300 Mormons were prosecuted.<sup>33</sup>

The Mormons challenged the jury restriction portion of the Edmunds Act, but the Supreme Court upheld a polygyny conviction and the jury selection process in *Clawson v. U.S.*<sup>34</sup> That same year, the Court upheld the Edmunds Act’s disenfranchisement provision in *Murphy v. Ramsey*.<sup>35</sup> This era of prosecutions, known as “The Raid” to Mormons and “The Crusade” to non-Mormons, forced many Mormons into hiding, allowing men to avoid prison and ensuring women did not have to testify against their husbands.<sup>36</sup> In response, Congress passed the Edmunds-Tucker Act, which, in 1887, criminalized fornication and adultery in an effort to arrest and indict women and thereby secure testimony against their husbands.<sup>37</sup> Almost 200 Mormon women were indicted within three years of the act’s passage.<sup>38</sup> The act’s final provision unincorporated the Church and forfeited its property to the federal government, creating a receivership to manage the Church’s estate and ensure that the Church was crippled financially.<sup>39</sup>

Finally, in 1888, the Supreme Court heard *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U.S.*<sup>40</sup> The Court rejected the Mormons’ argument that unincorporation was an unconstitutional repudiation of contract since more than thirty years had passed between the Church’s creation and

30. Sigman, *supra* note 22, at 121.

31. The Edmunds Act, Pub. L. No. 1, 5, § 8, 22 Stat. 30, 31 (1882) (repealed 1983).

32. Sigman, *supra* note 22, at 127.

33. *Id.* at 128.

34. 114 U.S. 477, 479 (1885).

35. 114 U.S. 15 (1885) (holding that the Edmunds Act was not an ex post facto law because it prohibited any continuing bigamy or polygamy). *See also* *Davis v. Beason*, 133 U.S. 333 (1890) (holding that Idaho’s voter registration rule barring practicing polygamists and bigamists from voting was legal).

36. Embry, *supra* note 18, at 57.

37. Sigman, *supra* note 22, at 131.

38. *Id.*

39. *Id.*

40. 136 U.S. 1 (1890).

revocation.<sup>41</sup> This case was the final federal court decision regarding polygamy and the Mormon Church. It also signaled the end of the mainstream Church's fight for the right to practice polygyny openly. The Church's next battle was for statehood.

### C. State legislation and court decisions affecting polygamous practice

Throughout the latter half of the Nineteenth Century, the Utah Territory petitioned six times for statehood, but every application was denied. The leaders of the Church knew Congress would never allow Deseret (renamed Utah by Congress) into the Union until it officially repudiated polygamy. On September 25, 1890, Wilford Woodruff, then president of the Church, "acting for the temporal salvation of the church," issued an official statement known as "the Manifesto."<sup>42</sup> Viewed as a new revelation from God, the Manifesto advised Mormons to discontinue the practice of polygyny.<sup>43</sup> On October 6, 1890, the General Conference of the Church formally accepted the Manifesto.

To emphasize their compliance with the federal government's stance on polygamy, the Utah territorial assembly passed, in 1892, an anti-cohabitation law similar to the Edmunds Act.<sup>44</sup> In 1896, Utah was granted statehood, but the Utah provisional government was forced to prohibit polygamous marriage in the state's constitution, thus permanently disassociating polygyny from the Mormon religion.<sup>45</sup> Utah's criminal code likewise made bigamy a third-degree felony.<sup>46</sup> When some Mormons continued the practice nonetheless, Joseph D. Smith, then-Church President, announced a 1904 Manifesto that promised to excommunicate such members.<sup>47</sup>

Several other states with fundamentalist Mormon populations have also instituted criminal penalties for bigamy and polygamy. In Idaho, bigamy is a felony punishable by up to three years of incarceration,<sup>48</sup> and five years in Oklahoma.<sup>49</sup> In Arizona, bigamy is a class five felony.<sup>50</sup> However, states did not rely on legislation alone to combat polygamy; numerous state courts decided cases convicting polygynists. Oregon, Massachusetts, and Utah all affirmed polygyny convictions in their supreme courts.<sup>51</sup>

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41. *Id.* at 65.

42. Embry, *supra* note 18, at 57.

43. John R. Christiansen, *Contemporary Mormons' Attitudes toward Polygynous Practices*, 25 MARRIAGE & FAM. LIVING 167, 167 (May 1963).

44. Ray Jay Davis, *The Polygamous Prelude*, 6 AMER. J. OF LEGAL HIST. 1, 17 (Jan. 1962).

45. See UT CONST. art. III.

46. UTAH CODE ANN. § 76-7-101 (1953).

47. Embry, *supra* note 18, at 57.

48. IDAHO CODE ANN. § 18-1103 (1972).

49. OKLAHOMA CRIM. CODE § 21-883 (1999).

50. ARIZ. REV. STAT. ANN. § 13-3606 (1978).

51. *Commonwealth v. Ross*, 142 N.E. 791 (Mass. 1924); *State v. Locke*, 151 P. 717 (Or. 1915); *State v. Hendrickson*, 245 P. 375 (Utah 1926).

#### D. The Short Creek Raid

In the first half of the Twentieth Century, state, and sometimes federal, officials engaged in periodic raids of polygamous sects. The most infamous, and the turning point in state enforcement of polygamy laws, was the Short Creek Raid in 1953. Short Creek – a sliver of land above the Grand Canyon now known as the border town of Hildale, Utah and Colorado City, Arizona – was first raided by Arizona law enforcement in 1935. Policemen arrested the then-prophet along with two other men and three of their wives. Two of the men were convicted of cohabitation and were imprisoned for a year.<sup>52</sup> In 1944, the federal government joined forces with Utah, Arizona, and Idaho enforcement authorities to raid Short Creek again. This time, the raid resulted in the arrests of forty-six men and women.<sup>53</sup>

In 1953, Arizona began planning the largest raid yet. Code named “Operation Seagull,” the incursion was funded by \$50,000 ostensibly appropriated for grasshopper control.<sup>54</sup> Presumably the irony of the code name was not lost on Mormon elders who commemorate a flock of seagulls that saved Young’s outpost farm from a grasshopper plague a century earlier.<sup>55</sup> It was also rumored that the LDS Church promised to give the state \$100,000 if it acted against Short Creek.<sup>56</sup> As a result of the *Salt Lake City Tribune’s* coverage of the preparations, fundamentalists were not surprised when, on July 27, 1953, armed law enforcement officials, national guardsmen, Arizona’s Attorney General, judges, nurses, newspapermen, and other administrative personnel descended on the small town.

The Short Creek Raid produced 107 defendants, but only twenty-six fundamentalists ever went to trial. All pled guilty to conspiracy as part of a mass plea agreement.<sup>57</sup> Fifteen of the seventeen women arrested were married and under the age of eighteen. An incredible 263 children from Short Creek were placed in foster care, some for as long as two years.<sup>58</sup>

Short Creek was a public relations disaster.<sup>59</sup> Although the “outside world” did not approve of polygamy, images of the raid seemed to show the state’s insensitivity to the fundamentalists and their families. While the Assistant Attorney General of Arizona insisted that “[t]he principal objective [of the raid was] to rescue these children from a life-time of immoral practices,” photographs of children being torn from their parents convinced the public otherwise.<sup>60</sup> *Life Magazine* quoted one polygynist father lamenting, “that we are

52. Sigman, *supra* note 22, at 136.

53. Sigman, *supra* note 22, at 137.

54. Kenworthy, *supra* note 12.

55. *Westward Migration*, MORMONWIKI, [http://www.mormonwiki.com/Westward\\_Migration](http://www.mormonwiki.com/Westward_Migration).

56. Sigman, *supra* note 22, at 137.

57. Kent, *supra* note 7, at 12.

58. *Id.*

59. For more information on the Short Creek Raid see *Juvenile Delinquency (Plural Marriages): Hearing on S. Res. 62 Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 84th Cong. (1955).

60. MARTHA SONNTAG BRADLEY, *KIDNAPPED FROM THAT LAND* 131 (1993).

never going to see our children again.”<sup>61</sup> The raid was especially costly for Arizona Governor Howard Pyle, who lost a 1954 bid for reelection.

#### E. Enforcement after Short Creek

In the half century since the Short Creek Raid, states have generally taken a more tolerant approach to polygynists and their communities. Although state courts occasionally convict individuals of polygyny per se,<sup>62</sup> enforcement officials more often focus their attention on different and independent crimes stemming from polygyny, such as child abuse, statutory rape, welfare fraud, and incest.

In 1998, the Utah Legislature raised the age for statutory rape from sixteen to seventeen in an effort to stem the trend towards younger “brides.”<sup>63</sup> Similarly, a year later, it raised the legal age of marriage from fourteen to sixteen.<sup>64</sup> In 2007, polygyny once again took center stage when Warren Jeffs, the self-proclaimed prophet of the Fundamentalist Latter Day Saints (“FLDS”) Church was captured after a nation-wide manhunt, and convicted and sentenced to ten years for being an accomplice to the rape of one of his fourteen-year-old followers. He also faces charges in Arizona for performing underage marriages.<sup>65</sup>

More recently, Texas authorities raided the Yearning for Zion Ranch, an FLDS compound home to over 400 children, and several hundred adults.<sup>66</sup> Authorities entered the compound with several warrants after receiving two phone calls from a sixteen-year-old girl claiming she was married to a much older man who had fathered her child. If true, the act would be a violation of Texas law, which was recently amended to make marriage to a girl under the age of sixteen a felony. The state is retaining temporary custody of the 416 children, who were removed from the compound, and a judge has ordered that the children undergo maternal and paternal testing. Yet while these isolated court cases, federal actions, and legislation bring some occasional media attention to polygyny and the crimes that can stem from the practice, such actions have done little to prevent crimes against women and children in polygynous communities, and, in some cases, have only driven the practitioners further underground.

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61. Sigman, *supra* note 22, at 139.

62. See *Utah v. Holm*, 137 P.3d 726 (Utah 2006) (affirming the conviction of Holm who married two sisters, one of whom was underage at the time of marriage); *Utah v. Green*, 99 P.3d 820 (Utah 2004) (holding that Utah’s bigamy statute did not violate Green’s right to free exercise of religion); *Barlow v. Blackburn*, 798 P.2d 1360 (Ariz. Ct. App. 1990) (holding that Barlow, a peace officer who practiced polygamy, failed to comport with state law, and thus could have his status as a certified law enforcement officer revoked).

63. James Brooke, *Utah Struggles with a Revival of Polygamy*, N.Y. TIMES, Aug. 23, 1998 at §1, at 12.

64. UTAH CODE ANN. § 30-1-2 (1999).

65. John Dougherty & Kirk Johnson, *Sect Leader Is Convicted as an Accomplice to Rape*, N.Y. TIMES, Sept. 26, 2007, at A18.

66. Kirk Johnson, *Texas Polygamy Raid May Pose Risk*, N.Y. TIMES, Apr. 12, 2008, at A12.

## II. THE EFFECTS OF THE FAILURE TO IMPLEMENT ANTI-POLYGAMY LAW

## A. Driving Polygyny Underground

The Short Creek Raid, the infrequent court cases highlighting polygynous behavior, and the publicity these episodes generated forced polygynists underground. One woman who escaped her polygynist upbringing spoke of the constant fear of detection: “We were always taught to hide. We couldn’t play in the front yard. When we drove somewhere, it was always ‘Duck!’ when you passed a police car.”<sup>67</sup> Polygynist communities today are rarely seen by the public or law enforcement officials. Reporters who enter the communities are shadowed by the local police and Church bodyguards in pickup trucks.<sup>68</sup>

Currently, there are at least four major polygynist clans – all living a shadowy existence beyond effective government control. The Apostolic United Brethren (AUB), led by Owen Allred, has approximately 5,000 members who reside in Bluffdale, about forty minutes south of Salt Lake City.<sup>69</sup> The Kingston clan, a second polygynist community, is led by one of the largest and wealthiest families in Utah and is believed to be worth more than \$150 million. The clan has about 1,500 members who own and operate various business enterprises including casinos and restaurants.<sup>70</sup> The third group is the LeBaron family. Also known as the Church of the Lamb of God, the LeBarons have around 500 members throughout Mexico and the Western United States.<sup>71</sup> Finally, the most well-known polygynist enclave thrives where Short Creek once stood, and is occupied by members of the FLDS. That community, formerly led by Warren Jeffs, occupies Colorado City, Arizona and Hildale, Utah, and is estimated to include around 5,000 members.<sup>72</sup> The FLDS has an additional 5,000 followers living in Bountiful, British Columbia;<sup>73</sup> and since their leader’s arrest many members of the Utah and Arizona clan moved to Eldorado, Texas – the site of the most recent raid.<sup>74</sup> Another 15,000 polygamists live as independents and do not recognize any one prophet.<sup>75</sup>

## B. The State’s Failure to Prosecute Polygamy Effectively

The Short Creek Raid and anti-polygamous legislation have not only served to push these communities further underground, but have also indirectly hampered legal efforts to prosecute polygyny-related abuses. There are several

67. Timothy Egan, *Polygamous Community Defies State Crackdown*, N.Y. TIMES, Oct. 25, 2002, at A15.

68. *Id.*

69. *Id.*

70. *Id.*

71. UT and Ariz. Att’y Gen. Offices, THE PRIMER, (June 2006), at 22, [http://www.attorneygeneral.utah.gov/polygamy/The\\_Primer.pdf](http://www.attorneygeneral.utah.gov/polygamy/The_Primer.pdf).

72. Egan, *Polygamous Community*, *supra* note 67.

73. Sigman, *supra* note 22, at 139.

74. Simon Romero, *Wary Texans Keep Their Eyes on the Compound of a Polygamous Sect*, N.Y. TIMES, Nov. 14, 2004, at A20.

75. Sigman, *supra* note 22, at 140.

“evidentiary hurdles” the state must overcome to prosecute polygyny successfully.<sup>76</sup>

First, family members and other polygynists are virtually always unwilling to testify against one another.<sup>77</sup> Children in these communities are indoctrinated that if they cooperate with law enforcement, they will be taken from their parents and placed in foster care.<sup>78</sup> As Jon Bunderson, the prosecutor for Box Elder County, the home of the Kingston clan, said, “No one ever comes forward with evidence.”<sup>79</sup> In 2006, a prosecutor was forced to postpone or dismiss cases against eight polygynists charged with sex offenses because authorities could not find the witnesses they needed to serve.<sup>80</sup>

Second, there is no paper trail for unlawful marriages.<sup>81</sup> Typically, a polygynist’s initial marriage is recorded with the state. Subsequent marriages, however, are “celestial” partnerships, and the state has no record of those relationships. Children born into polygynous marriages likewise often have no birth certificates, and are delivered by local midwives who are part of the community.<sup>82</sup>

Third, in the case of the FLDS community which straddles the Arizona-Utah border, prosecutors have trouble identifying where abuses occurred and thus in which jurisdiction they should even be prosecuted.<sup>83</sup> Fourth, local police in the fundamentalist communities are often themselves corrupt and have “aided and abetted” in residents’ criminal activities.<sup>84</sup> For example, Arizona Attorney General Terry Goddard recently asked the Justice Department to intervene because the Hildale-Colorado City police discouraged witnesses from testifying in sexual abuse cases.<sup>85</sup> In fact, a third of the Hildale-Colorado City police force has been decertified by both Utah and Arizona.<sup>86</sup>

Fifth, law enforcement and political officials are concerned about acting too aggressively against a practice some see as a protected religious activity. Mike Leavitt, Utah’s former governor, openly speculated that polygamists might be protected by the Constitution’s Free Exercise Clause.<sup>87</sup> Although he was later forced to retract this comment, his misperceptions show that such beliefs are not held merely by local police officers. On the other hand, there are real constitutional issues. Many legal experts argue that Utah’s definition of

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76. *Id.*

77. *Id.* at 180.

78. *Id.*

79. Kenworthy, *supra* note 12.

80. *8 Polygamy Trials May Be Called Off*, N.Y. TIMES, June 25, 2006, [http://www.nytimes.com/2006/06/25/us/25polygamy.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/06/25/us/25polygamy.html?_r=1&oref=slogin).

81. Kenworthy, *supra* note 12.

82. Cannon, *supra* note 8.

83. Michael Janofsky, *The 2002 Campaign: Arizona; Polygamy Jolts Campaign for Governor*, N.Y. TIMES, Oct. 13, 2002, §1, at 24.

84. Egan, *Polygamous Community*, *supra* note 67.

85. *Id.*; see also Katherine Biele, *On Polygamy, A Crackdown and a Bid for Legitimacy*, CHRISTIAN SCI. MONITOR, Jan. 30, 2004, at 2.

86. Egan, *Polygamous Community*, *supra* note 67.

87. *USA: Polygamy Practiced by Mormons and Tolerated in Utah*, 24 WOMEN’S INT’L NETWORK NEWS 77 (Autumn 1998).

“cohabitation” is unconstitutionally vague, making it difficult to determine whether a crime took place.<sup>88</sup>

Finally, polygyny is often ignored because, as the spokesman for the Utah Attorney General’s office acknowledged, busy prosecutors place greater focus on what they consider more serious offenses.<sup>89</sup> Indeed, local law enforcement officials are increasingly apathetic towards polygyny.<sup>90</sup> Arizona Attorney General Terry Goddard conceded that, “in the past, because of their remote location and their unusual beliefs, [polygynists] have been left alone.”<sup>91</sup> Citing the evidentiary hurdles in prosecuting polygamy, Jane Graham, Utah’s former attorney general, advised prosecutors to ignore bigamy cases, and focus instead on crimes that “surround polygamy.”<sup>92</sup> Ultimately, many Mormon law enforcement officials are simply unwilling to charge consenting adults for religious beliefs their Mormon ancestors shared.<sup>93</sup> Furthermore, there has been little public sentiment to crack down on polygamy. In 1998, the *Salt Lake City Tribune* published a survey asking local residents whether they supported prosecuting polygamists. Only 54% of 1000 residents polled responded positively.<sup>94</sup>

Evidently, more than fifty years later, the shadow of the Short Creek Raid also continues to impact state legal action against polygynists. As Utah attorney general Mike Shurtleff said, “Would you truly have us arrest every polygamist? Do you want a Short Creek again? We barely have the resources to prosecute crimes within these organizations.”<sup>95</sup> Shurtleff added that even if the state had the resources to convict polygamists, he would not support an effort to incarcerate all practitioners, and place “20,000 kids in foster care.”<sup>96</sup> Paul Van Dam, former Utah attorney general agreed, arguing that prosecuting polygamy would be like “opening one Pandora’s box after another.”<sup>97</sup> In a 1990 television documentary Paul Van Dam explained to Utah residents why Utah law enforcement does not prosecute polygamy:

Every law enforcement officer in Utah knows there are tens of thousands of polygamists in the area, and they are clearly violating the law. Yet if we prosecute these men and women, we know from Short Creek that we will

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88. See Editorial, *Prosecuting Polygamists a Dilemma*, DAILY HERALD (Provo, UT), Jan. 26, 2001, at A6.

89. Michael Janofsky, *Mormon Leader Is Survived by 33 Sons and a Void*, N.Y. TIMES, Sept. 15, 2002, §1, at 22; Michael Janofsky, *Young Brides Stir New Outcry on Utah Polygamy*, N.Y. TIMES, Feb. 28, 2003, at A1.

90. See Brooke, *supra* note 63; D’Onofrio, *supra* note 5; Judy Mann, *The Brutal Truth about Polygamy*, WASH. POST, Aug. 12, 1998, at D13; Sigman, *supra* note 22, at 182.

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

92. Brooke, *supra* note 63.

93. Janofsky, *Mormon Leader*, *supra* note 89.

94. Brooke, *supra* note 63.

95. Sigman, *supra* note 22, at 141.

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

97. Dirk Johnson, *Polygamists Emerge from Secrecy, Seeking Not Just Peace But Respect*, N.Y. TIMES, Apr. 9, 1991, at A22.

produce an incredible social disruption. Thousands of children must be cared for emotionally and otherwise, and that's a terribly expensive proposition.<sup>98</sup>

Texas officials did not heed this warning when they recently raided the Yearning for Zion Ranch, an action some feel is akin to Short Creek. Though the public has not reacted as they did with Short Creek, some state officials are already beginning to question the efficacy of the raid. Both Utah and Arizona's attorneys general have spoken out. Attorney general Mark Shurtleff believes the raid has not only pushed the polygynists back underground, but it has made it harder for victims, like the sixteen-year-old girl, to come forward.<sup>99</sup> Terry Goddard, Arizona's attorney general, more directly compared the Texas raid to Short Creek saying, "The last time something of this scale happened was Short Creek, and connections with the communities broke off for almost 50 years after that. I personally think we will have to redouble our efforts now."<sup>100</sup> Thus, Short Creek continues to dampen state action against polygamy to this day.

### C. The Consequences of State Inaction

Public reaction to Short Creek, anti-polygamous legislation and judicial opinions, have not only driven polygamy underground, but have also created a situation in which the authorities are incapable of investigating and enforcing criminal statutes against polygynous clans.<sup>101</sup> These abuses against women and children are, by most accounts, rampant. The polygynous sects demand strict adherence to the community's norms and values: women are taught that if they defy the prophet, they "forfeit [their] chance at the afterlife."<sup>102</sup> As a result they obey not only the prophet, but the entire male hierarchy as well. Such women in polygynist communities have no sexual autonomy; are exposed to sexual, physical, and verbal abuse; have limited access to education and other opportunities; are unable to gain or maintain financial independence; and all too often live in poverty.

Perhaps the most publicized problem in polygynous communities is underage marriage. Although the Utah Legislature has raised the legal age of marriage from fourteen to sixteen,<sup>103</sup> underage marriages continue to occur. Those who have escaped the FLDS reported that Warren Jeffs routinely forced teenage girls into marriages with fifty or sixty-year-old men.<sup>104</sup> The incident which was the basis for the Jeffs criminal trial is but one example.<sup>105</sup> In 1998, a fifteen-year-old daughter of John Daniel Kingston, a member of the Kingston clan described above, was forced to become the fifteenth wife of her thirty-two-

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98. MARTHA SONTAG BRADLEY, *KIDNAPPED FROM THAT LAND: THE GOVERNMENT RAIDS ON THE SHORT CREEK POLYGAMISTS* 182 (1993).

99. Kirk Johnson, *Texas Polygamy Raid May Pose Risk*, *supra* note 66.

100. *Id.*

101. Sigman, *supra* note 22, at 182.

102. John Dougherty, 'Jane Doe' Testifies as Trial of Polygamist Leader Begins, N.Y. TIMES, Sept. 14, 2007, available at <http://www.nytimes.com/2007/09/14/us/14jeffs.html>.

103. UTAH CODE ANN. § 30-1-9 (2000).

104. Nick Madigan, *Leader of Polygamous Sect Faces Rebellion*, N.Y. TIMES, Jan. 27, 2004, at A15.

105. Dougherty, 'Jane Doe' Testifies, *supra* note 102.

year-old uncle.<sup>106</sup> The girl escaped, but was recaptured twice. On both occasions her father abused her; she lost consciousness during the second beating after her father had whipped her with a belt.<sup>107</sup> Both the girl's father and uncle ultimately pled no contest to charges of child abuse, incest, and unlawful sexual conduct. Yet no bigamy charges were ever filed, and there was no further investigation into the family.<sup>108</sup>

Many similar cases have gone unpunished. In the FLDS community, girls in their teens are married against their will to older men who already have multiple wives.<sup>109</sup> Most female members of the Kingston clan are married by sixteen.<sup>110</sup> Given the secrecy of polygynist communities and the lack of marriage records for most fundamentalist women, it is difficult to estimate the percentage of polygynist women and girls married as teenagers and without their consent. According to a 1987 study of polygynists, however, sixty percent of the 224 wives surveyed were married as teenagers.<sup>111</sup> In a 1996 study, the rate of teenage marriages had only decreased slightly to fifty-five percent of women surveyed out of a sample of twenty-six polygynist families. The vast majority of these marriages were to men over thirty.<sup>112</sup> These marriages not only violate young girls' sexual autonomy, but the marital contracts often lack informed consent.<sup>113</sup>

These marriages, in turn, cause high-risk pregnancies for the extremely young wives. Pediatric research shows that pregnant girls younger than fifteen have a sixty percent higher maternal mortality rate than older women.<sup>114</sup> Many children in polygynist communities likewise suffer from birth defects, including severe mental retardation, as a result of incestuous relationships.<sup>115</sup>

Women's lack of sexual autonomy and inability to choose a spouse also have a devastating impact on the younger male members of these polygynist communities. Known as "lost boys," many teenage boys are forced out of their communities because of the "mathematical reality" of polygyny.<sup>116</sup> Over the last six years, hundreds of teenage boys have left FLDS alone. One lost boy estimated that of the one hundred boys from his school class, about seventy percent were expelled from the FLDS community. Many were forced out for

106. Sigman, *supra* note 22, at 179.

107. Brooke, *supra* note 63.

108. Richard A. Vasquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 240-42 (2001).

109. Kenworthy, *supra* note 12.

110. KATHLEEN TRACY, *THE SECRET STORY OF POLYGAMY* 95-96 (2002).

111. RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 91 (2d ed. 1989).

112. IRWIN ALTMAN & JOSEPH GINAT, *POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY* 466 (1996).

113. D'Onofrio, *supra* note 5, at 378.

114. Kent, *supra* note 7, at 18.

115. Mann, *supra* note 90.

116. The "mathematical reality" of polygyny is that as older men take more wives, there are fewer women for younger men to marry, leaving these younger men without families and support networks. Erik Eckholm, *Boys Cast Out by Polygamists Find New Help*, N.Y. TIMES, Sept. 9, 2007, at A1.

seemingly minor offenses such as watching a movie or talking to a girl.<sup>117</sup> Such boys often turn to drugs or alcohol, living together in a state of homelessness.<sup>118</sup>

Another highly publicized problem in these polygynous communities is the use of corporal punishment, domestic violence, and religious, verbal, and emotional abuse on women and children.<sup>119</sup> As one woman who escaped the Kingston clan reported, "There is lots of fear, all of the time. Fear of not being good enough. Many wives have eating disorders and chemical imbalances."<sup>120</sup> As a result of numerous childbirths, polygynous women often gain weight and struggle to lose it; yet the FLDS prophet told the women of his sect that "they couldn't keep sweet with a cumbersome body, and stressed that women who were obese must know better than to complain if their husbands found it a trial fulfilling their procreating duties."<sup>121</sup> Vicky Prunty, a co-director of Tapestry Against Polygamy, warns that "[a]nyone who tells you women are not being hurt . . . forced into allowing their husbands to take on other wives in the name of religion, getting married too young to men much older, being hit or worse – are not being truthful."<sup>122</sup>

Another woman who fled the FLDS community described incest as "common" and said that physical abuse is not limited to husbands beating their wives; sister-wives, women married to the same husband, are also physically and emotionally abusive toward one another, as well as towards the children of their fellow sister-wives: "Children were beaten and locked in rooms. On several occasions younger children would be smothered by one of the mothers until they choked or gasped for air."<sup>123</sup> Moreover, because women and children are seen as property of the church, they are constantly at risk of being reassigned. If a male disciple disobeys the prophet, his wives and children can be given to another family.<sup>124</sup> More than fifty FLDS families have been "busted apart" in the last few years.<sup>125</sup>

The women in these communities also have only limited access to educational and employment opportunities. They generally cannot work outside of the home, and are not allowed to practice birth control.<sup>126</sup> In some instances wives must ask for permission even to leave the house.<sup>127</sup> As one critic said, woman's primary responsibility is to "serve their husbands, conceive as

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117. Angie Wagner, *Expelled by Church, Not Welcome at Home; Polygamist Mormon Offshoot Has Kicked Out Hundreds of Boys for Minor Offenses*, WASH. POST, Nov. 14, 2004, at A8.

118. John Dougherty, *Bound by Fear: Polygamy in Arizona*, PHOENIX NEWS TIMES, Mar. 13, 2003, available at <http://www.phoenixnewtimes.com/2003-03-13/news/bound-by-fear-polygamy-in-arizona/>.

119. Mann, *supra* note 90.

120. *Id.*

121. DEBBIE PALMER & DAVE PERRIN, *KEEP SWEET: CHILDREN OF POLYGAMY* 375 (2004).

122. Scharnberg & Brachear, *supra* note 96.

123. Dougherty, *Bound by Fear*, *supra* note 118.

124. John Dougherty, *After Polygamist Leader's Arrest, Community Carries On*, N.Y. TIMES, Sept. 4, 2006, at A10.

125. Dougherty, *Bound by Fear*, *supra* note 118.

126. Egan, *The Persistence of Polygamy*, *supra* note 15.

127. Dougherty, *Bound by Fear*, *supra* note 118.

many babies as possible, and raise those children to become obedient members of the religion.”<sup>128</sup>

Many children in the underground world of polygamy are home-schooled, further insulating them from the outside world. In 2000, the FLDS forced families on a wholesale basis to remove their children from kindergarten through high school.<sup>129</sup> The public school in the area lost around 1000 children, amounting to more than two-thirds of their enrollment. Moreover, since the sect constitutes the majority of the voting population in that school district, it continues to control the school board and any government funding directed at the school.<sup>130</sup> Of the more than \$4 million in public funds given each year to the Colorado City public school district<sup>131</sup>, much has been funneled to the church, and then used to purchase an airplane and to support an administrative staff almost four times larger than staffs of comparably-sized Arizona districts.<sup>132</sup> Former sect members, known as apostates, have reported that they received no sex education, were taught that the Holocaust never happened, and that “the government fabricated the story of man landing on the moon in order to hide tax money.”<sup>133</sup> And, of course, the children raised in this society learn the same values on which the fundamentalist community thrives, thus perpetuating beliefs of inequality and injustice.

This lack of education, in turn, limits women’s ability to join the workforce, and instead they are required to focus on learning to become “dutiful wives and nurturing mothers.”<sup>134</sup> Women who do work outside of the home turn their salary over to their husbands who distribute it among the various wives.<sup>135</sup> As a result, many women live with their children in poverty. Few men can support the large families they have created, even as the FLDS has enforced tithing to the Church. Many followers are forced to give \$1000 per month to church coffers, while the remaining families must tithe ten percent of their income.<sup>136</sup> The church also owns approximately eighty-five percent of the land in Colorado City and Hildale. The land is given to disciples as the church sees fit, but if families leave or are forced out of the community the land is given to other adherents.<sup>137</sup>

Some polygynous families avoid abject poverty only because the “spiritual wives,” who do not take their husband’s surname, typically qualify for government assistance as single mothers. In 2002, sixty-six percent and seventy-eight percent of the Hildale and Colorado City residents, respectively, received food stamps.<sup>138</sup> Polygynous communities are also known to advocate “bleeding the beast,” which is defined as abusing or exploiting federal government

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128. KRAKAUER, *supra* note 6, at 31.

129. Egan, *Polygamous Community*, *supra* note 67.

130. *Id.*

131. Berkowitz, *supra* note 1, at 637.

132. Egan, *Polygamous Community*, *supra* note 67.

133. The Primer, *supra* note 71, at 18.

134. D’Onofrio, *supra* note 5, at 377.

135. *Id.* at 380.

136. Egan, *Polygamous Community*, *supra* note 67.

137. Janofsky, *Mormon Leader*, *supra* note 89.

138. The Primer, *supra* note 71, at 18.

assistance programs. Some polygynist groups believe that “bleeding the beast” is a righteous cause because it helps God defeat the government.<sup>139</sup> Both Hildale and Colorado City rank in the top ten cities in western states for the amount of federal aid they receive for poor women and children. Hildale also has the lowest average federal tax return of any Utah town—\$651 for each filer in a community where the average household has 8.5 people.<sup>140</sup> In Colorado City, residents receive roughly eight dollars in government subsidies for every tax dollar they pay.<sup>141</sup> Tom Green, another well-documented polygynist who was convicted on four counts of bigamy and one count of criminal nonsupport<sup>142</sup>, owed the state of Utah nearly \$80,000 in welfare payments used to support his wives and twenty-six children.<sup>143</sup>

Even in the wealthy Kingston family, worth more than \$150 million, women and children live in poverty and rely on food stamps to survive.<sup>144</sup> In 1981, J.O. Kingston, the clan’s leader, reported \$30 million in land sales yet only paid \$800 in income tax.<sup>145</sup> Indeed, the clan not only evades income tax payments, but also simultaneously collects hundreds of thousands of dollars in welfare. The Kingston clan’s welfare fraud was labeled by one prosecutor as “the largest welfare-fraud case in the nation.”<sup>146</sup> At the time, at least four of Mr. Kingston’s wives and twenty-nine of his children had collected hundreds of thousands of dollars in government assistance for a decade.<sup>147</sup> In an out-of-court settlement, the state recovered \$250,000 from the Kingston clan, and the state assistance agency has obtained a further \$100,000 in judgments against ten other Kingston clan members for welfare payments directed at forty children.<sup>148</sup> Yet it is believed that the clan alone collected \$1 million in food stamps, Medicaid, and Supplemental Security Income from 1972 to 1983.<sup>149</sup>

Despite large amounts of state and federal assistance, some Kingston women and children continue to live in poverty and homes that one prosecutor described as “rat dumps.”<sup>150</sup> Many of the disciples work for the clan’s business enterprises for minimal wages, forcing them and their families to survive on garbage collected from supermarket dumpsters.<sup>151</sup> Kingston clan children who were born with birth defects as a result of inbreeding continue to receive

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139. The Primer, *supra* note 71, at 7.

140. Brooke, *supra* note 63.

141. Berkowitz, *supra* note 1, at 638.

142. State v. Green, 99 P.3d 820, 822 (Utah 2004).

143. Michael Janofsky, *Utahan Is Sentenced to 5 Years in Prison in Polygamy Case*, N.Y. TIMES, Aug. 25, 2001, at A9.

144. Brooke, *supra* note 63.

145. Ken Wells, *Sharing the Wealth: A Utah Polygamy Clan Is Rich, but Women Draw Welfare Benefits – State Recovers Part of Aid from Patriarch, Who Runs a Business Empire – Lives of Extreme Frugality*, WALL ST. J., Feb. 12, 1985, at 1.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Ken Wells, *Sharing the Wealth: A Utah Polygamy Clan Is Rich, but Women Draw Welfare Benefits – State Recovers Part of Aid from Patriarch, Who Runs a Business Empire – Lives of Extreme Frugality*, WALL ST. J., Feb. 12, 1985, at 1.

thousands of dollars of Social Security disability despite the fact that their fathers are clan men who could financially contribute to their children's medical bills.<sup>152</sup> Yet, states have trouble demonstrating that fathers can afford to repay child welfare benefits because establishing paternity is difficult. Without any official record of the "celestial" marriages, states continue to dole out food stamps and assistance at an alarming rate, supporting families and communities in which polygyny and related abuses are widespread.

When women do manage to escape fundamentalist families and communities, they often cannot obtain child support or alimony because their marriages are not legally recognized.<sup>153</sup> Polygynist women thus find it difficult to care for their many children. A study of twenty-seven polygynous families found that 78.3 percent of wives had four or more children, 43.3 percent had seven or more children, and 18.3 percent had eleven or more children.<sup>154</sup> These women generally do not know how to drive nor do they have access to vehicles, making escape from geographically isolated polygynous communities difficult. Colorado City and Hildale, for example, are 12 miles from the nearest town and 45 miles from a city with at least 50,000 people.<sup>155</sup> Moreover, these women do not have the education or skills necessary to perform even menial work. One woman analogized leaving her polygynist clan to moving to another country.<sup>156</sup>

Women who do escape often live in secrecy and isolation because they are taught that the outside world is a "big bad place."<sup>157</sup> Members of these communities, once they have escaped their fundamentalist upbringing, have no idea how to live in a modern world. Finally, disciples who escape the polygynous clans must choose between "family and free agency," which forces anyone who flees to cease communication with friends and family who decide to remain in the community.<sup>158</sup>

In sum, the status quo – the state's general disregard for polygynist communities and the abuses that occur therein – has resulted not only in the continued practice of such crimes, but also sends the message that the state tacitly condones such practices. Furthermore, the widespread welfare fraud prevalent in these communities indicates that the state not only implicitly approves of the abuse against women and children, but in some ways funds the environment in which they occur.

### III. LEGALIZING AND REGULATING POLYGAMY

Public policy need not be constrained by an overriding, universally held, moral conclusion. Rather, public policy, to be effective, should be practical, and more moderately developed because Americans, over time, often change their minds on matters they once considered immoral. Consider alcohol consumption

152. *Id.*

153. D'Onofrio, *supra* note 5, at 381.

154. Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 400 (2002–2003).

155. The Primer, *supra* note 71, at 29.

156. Mann, *supra* note 90.

157. *Id.*

158. The Primer, *supra* note 71, at 17.

and prostitution. Both practices are now considered legal in certain localities or all of the U.S., in part because the state and local governments recognized that these acts were going to continue regardless of whether they were legalized. When alcohol was banned nationwide during Prohibition it continued to be widely available, and the law was often violated.<sup>159</sup> John D. Rockefeller, a teetotaler, ironically spurred the repeal of the Eighteenth Amendment because he believed that prohibition had led to an increased disregard for the law.<sup>160</sup>

The illegality of these acts merely drove the practitioners underground, exacerbating the practices' negative effects. Prohibition spawned bootleggers, speakeasies, the sale of poisonous alcohol, and created a lawless liquor industry largely run by the mafia.<sup>161</sup> In the case of prostitution, many scholars believe the laws against the practice have only helped make life more difficult for prostitutes because the laws exclude them from legal protection, encouraging predators to take advantage of their "powerlessness."<sup>162</sup> Polygamy, like prostitution and alcohol consumption, is another area in which public policy could reflect practicality, not morality, and, in turn, allow for more effective regulation.

Most importantly, legalizing polygamy could positively affect polygynist women and children. Polygynists, like monogamists, are diverse and vary in their beliefs and practices.<sup>163</sup> While some polygynists may struggle to survive in hovels, others ponder how to expand the size of their 12,000-square-foot homes to ensure that all of their wives are comfortable.<sup>164</sup> Not all polygynists marry teenage brides, beat their children, or commit welfare fraud. One study concluded that these abuses are the result of "particularly dysfunctional" polygynist families rather than problems inherent to polygyny.<sup>165</sup> Condemning every practicing polygynist to prevent the abuses of some may be counterintuitive. Some law enforcement officials agree. One FBI agent familiar with polygynous sects said, "At least 99% of all polygamists are peaceful, law-abiding people, no threat to anybody. It's unfortunate that they're stigmatized by a band of renegades."<sup>166</sup>

Moreover, the number of polygynists in the United States is climbing. In Utah, the polygynous community grew tenfold over the last fifty years, and polygynists now constitute two percent of the state's population.<sup>167</sup> In Colorado City alone, the town's number of polygynous residents has doubled every

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159. Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 THE MILBANK Q. 461, 464 (1991).

160. DANIEL OKRENT, GREAT FORTUNE: THE EPIC OF ROCKEFELLER CENTER 247 (2003).

161. *Id.*

162. Scott A. Anderson, *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, 112 ETHICS 748, 749 (Jul. 2002).

163. Irwin Altman, *Husbands and Wives in Cotemporary Polygamy*, 8 J.L. & FAM. STUD. 389, 392 (2006).

164. See Florence Williams, *A House, 10 Wives: Polygamy in Suburbia*, N.Y. TIMES, Dec. 11, 1997, at F1.

165. Strassberg, *supra* note 154, at 398.

166. Bella Stumbo, *No Tidy Stereotype; Polygamists: Tale of Two Families*, L.A. TIMES, May 13, 1988, Part 1, at 1.

167. Brooke, *supra* note 63.

decade since the 1930s.<sup>168</sup> Not only will polygynists maintain their rate of growth due to high birth rates and conversions, but fundamentalist Mormons will continue to embed themselves in the “American scene.”<sup>169</sup> Polygynists undeniably have a place in American history; and for good or ill, they believe strongly in their right to practice what they consider to be a core religious belief. They have fought for their culture and way of life against societal and government pressure and persecution, and there is no indication that they will yield.<sup>170</sup> As Utah’s Attorney General Mark L. Shurtleff admits, “The thinking is this: This is a big group of people. They are not going away. You can’t incarcerate them all. You can’t drive them out of the state. So they are here. What do we do about it?”<sup>171</sup> Simply put, polygynists are “here to stay.”<sup>172</sup>

While legalizing polygamy will not address all of the current problems discussed above, legalization could alleviate some of the abuses prevalent in polygynous communities because it will lead to greater regulation and bring polygynous communities more into the open. Legalizing polygamy should lead to greater regulation because several aspects of current state and federal law will have to be altered and new laws and policies adopted to support alternative family models. Moreover, legalization and corresponding regulation will encourage these communities to emerge and acclimate to society because they will no longer fear criminal charges for their lifestyle choices.

First, legalizing polygamy should help prosecutors overcome the evidentiary hurdles inherent in prosecuting related abuses. As noted above, the government currently struggles to find witnesses willing to testify against fellow polygynists because the witnesses are worried that they too will be prosecuted for their way of life.<sup>173</sup> Following legalization, witnesses should be more likely to appear in court because they will know that their lifestyle is legally protected.

Legalizing polygamy will also create a paper record of celestial marriages by making these relationships official. As compared to the current situation where only the first wife receives a marriage certificate, and the government has no record of any sister wives, once legalized, state and federal governments could draft regulations requiring every multiple marriage to be documented with a proper certificate. The government could also revise the tax code or create other economic benefits programs tailored to polygamous families to encourage couples to register their marriages. Thus, if monetary and social privileges are attached to the legal registration of polygamous relationships, fundamentalist polygynists and other individuals now ignoring the law may be more inclined to abide by new regulations.

Legalizing polygamy should also eliminate any remaining First Amendment concerns. As a co-director of Principle Voice, a pro-polygamy

168. Johnson, *Polygamists Emerge*, *supra* note 97.

169. ALTMAN & GINAT, *supra* note 112, at 60.

170. *Id.*

171. John Pomfret, *Polygamists Fight to Be Seen As Part of Mainstream Society*, WASH. POST, Nov. 21, 2006, at A1.

172. ALTMAN & GINAT, *supra* note 112, at 60.

173. Michael Janofsky, *Conviction of a Polygamist Raises Fears Among Others*, N.Y. TIMES, May 24, 2001, at A14.

group, said, "It would be all about going after the crimes, not the culture."<sup>174</sup> As shown above, many law enforcement officials, including a former attorney general of Utah, have been confounded in their enforcement policies by the perceived conflict between anti-polygamy laws and the First Amendment. Legalization would also provide state and federal governments an opportunity to rewrite and clarify bigamy statutes and other polygamy-related laws that many deem to be confusing. Clearer laws would also be easier to enforce. Even law enforcement officials in heavily Mormon areas would be more likely to prosecute crimes against their peers if they believed it was polygamists' actions, and not their core religious beliefs, that were being judged.

Legalizing polygamy should also promote further collaboration between polygynous sect leaders and state law enforcement officials. The Office of Utah's Attorney General has created a program called Safety Net, which, on a monthly basis, brings together representatives from various polygynous sects and law enforcement officers.<sup>175</sup> Legalizing polygamy would provide for greater use and expansion of this program because more practicing polygynists would be willing to come forward and work with law enforcement officials if they felt they would not be persecuted for their lifestyle choices.

Finally, legalizing polygamy would help prosecutors clear one final hurdle – a lack of prosecutorial resources. As noted above, prosecutors often claim that they are simply too busy to prosecute polygamy per se and want to focus their energy on more serious crimes. Legalizing polygamy would eliminate a further issue that prosecutors would be expected to address otherwise, allowing them more time to examine and prosecute other abuses that are endemic in certain polygynist sects.

On a more practical level, greater regulation, as a result of legalizing polygamy, could also help alleviate the problems of underage marriage and welfare fraud. As noted, greater regulation would require all polygynist marriages to be documented and official. Requiring couples to appear before an independent civil authority, such as a town clerk or Justice of the Peace, allows someone from outside the family circle to express concerns about, and even refuse to approve, a marriage. Purely religious ceremonies that currently result in "celestial" marriages do not provide such an opportunity for an outside unbiased observer to ensure that the marriage is consensual and legal.<sup>176</sup>

Recording marriages could also alleviate the devastating welfare fraud discussed above. Forcing patriarchs to register their multiple marriages will allow the government to accurately calculate with much greater accuracy whether each family is eligible for aid, and if so, how much. One commentator reasoned that making fundamentalist men legally recognize their multiple wives "would force the patriarch to provide independently for his family or to marry fewer women."<sup>177</sup> But this strategy would only work if patriarchs were convinced that the various benefits the government attaches to polygynous

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174. Scharnberg & Brachear, *supra* note 96.

175. Pomfret, *supra* note 171.

176. Strassberg, *supra* note 154, at 369.

177. Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment*, 38 FAM. L.Q. 711, 728 (Fall 2004).

marriage registration were worth the loss of illegal welfare payments. Thus, state and federal governments must work together to create a practical set of regulations that benefits and is specifically tailored to polygamist families.

Legalizing polygamy would also force polygynist communities into the open. As the veil is removed, society could learn to tolerate and eventually accept polygynists and their way of life. Several local towns are already being forced to acclimate to polygynists. In St. George, Utah, for example, economics has necessitated the hiring of polygynist construction workers. Known for their work ethic rather than their beliefs, these particular polygynists are creating family-run construction companies, and town residents are adapting well. A new town café, called Merry Wives, has acknowledged polygamy through its name; some residents have started to believe that polygamists should be “left alone.”<sup>178</sup> Legalizing polygamy, and thus encouraging polygynist communities to emerge from hiding, could thus enhance the transition from public tolerance to acceptance.

Many argue the underground nature of polygynous communities enables the abuses that occur therein.<sup>179</sup> The state’s failure to regulate and prosecute polygynists for sexual and physical abuse has created geographic and social pockets where these abuses occur unfettered. By legalizing polygamy, these communities could be introduced into mainstream society and fall under state and federal laws, thus enabling law enforcement to crack down on underage marriage, incest, abuse, and nonconsensual marriage.<sup>180</sup> Opening up these communities should also assist the government and law enforcement officials in studying how polygyny leads to these abuses in some, but not all, cases. This learning opportunity could then aid the legislature in tailoring regulations and laws to address polygynist communities’ weaknesses and give law enforcement the chance to understand how to handle the potential dangers or abuses that can occur in certain polygynous households.<sup>181</sup> Over time, law enforcement could learn to identify recognizable patterns of behavior that lead to abuse, allowing them to intervene and prevent ill-treatment at an earlier stage than would have been possible otherwise.

Finally, exposing polygynous communities could positively affect women by providing them with greater opportunities in the “outside world.” Women will no longer be confined to the home or small town in which they were born and raised. Instead, women could be freer to leave their communities for school, work, errands, and any other activity. This contact with society will encourage both polygynists and the greater population to adapt and learn from one another. Both groups may then draw mutually acceptable lines for certain behavior. For example, polygamists and society may come to agree that consensual polygamist marriage is acceptable, but that polygynist marriage with a 16-year-old girl, though ostensibly “consensual,” is unacceptable.<sup>182</sup>

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178. Kirk Johnson, *In Polygamy Country, Old Divisions Are Fading*, N.Y. TIMES, Sept. 10, 2007, at A18.

179. Scharnberg & Brachear, *supra* note 96.

180. Rower, *supra* note 177, at 728.

181. See Strassberg, *supra* note 154, at 358.

182. *Id.* at 357.

In other words, governments legalizing polygamy could turn the Supreme Court's "rights vs. actions" argument employed in *U.S. v. Reynolds*<sup>183</sup> on its head. Polygamy could be re-defined as a right, rather than an action, and therefore legitimated. Abuses that occur as a result of polygamy, on the other hand, would be considered actions, and thus would still be illegal regardless of their association with a religious right.

#### CONCLUSION

State law enforcements' failure to implement anti-polygamy laws has perpetuated abuses against women and children in fundamentalist sects. Legalizing polygamy could alleviate some of this cruelty by helping states overcome the evidentiary burdens endemic to prosecuting polygyny, promoting the adoption of regulations to adapt to new family models, and providing opportunities for polygynist communities to assimilate with society.

Many scholars, however, believe that reforming polygamy can never be achieved unless Mormon fundamentalist beliefs are also reshaped.<sup>184</sup> While legalizing polygamy and properly regulating it will help women and children escape the negative effects of polygynous families, the real solution to many polygyny-related abuses lies in separating the practice of polygyny from fundamentalist Mormonism. Fundamentalist Mormons place "premiums on secrecy, loyalty, obedience, patriarchy and deference, and family."<sup>185</sup> Fundamentalist sects are arguably founded on the belief that women are lesser beings.<sup>186</sup> "Women in the polygamist culture are looked at as property, as a piece of meat . . . We're not looked upon as human beings with rights," a former polygynist's wife said.<sup>187</sup> These abuses are not only a result of fundamentalist beliefs, but they are disseminated by fundamentalist leaders.<sup>188</sup> Yet, in the Nineteenth Century, the LDS Church applied "divine sanctions, restraints, and regulations" to polygynous marriage.<sup>189</sup> The Church only authorized polygyny for men of good character and with the financial capability to support a large family.<sup>190</sup> But, this standard has eroded over time in part because of the underground nature of the current situation. Perhaps if the practice were legalized, the Church could play a role in regulating the practice in accordance with its early beliefs.

On the other hand, it is not merely fundamentalist beliefs that promulgate these abuses, but the combination of this extreme form of faith and individual criminality. One academic anthropological study found that Mormon polygyny

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183. 98 U.S. 145, 166–67 (1878).

184. D'Onofrio, *supra* note 5, at 391.

185. Martha Bradley, *Cultural Configurations of Mormon Fundamentalist Polygamous Communities*, 8 NOVA RELIGIO: THE J. OF ALTERNATIVE AND EMERGENT RELIGIONS 1, 16–17 (July 2004).

186. *Id.* at 377.

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

188. See Adam Liptak, *Polygamist's Custody Fight Raises Many Issues*, N.Y. TIMES, June 16, 2002, at A14.

189. Davis, *supra* note 44, at 4.

190. *Id.*

is “no more likely” to entail abuse than monogamy.<sup>191</sup> The study concluded that abuse in polygynous sects is a result of individuals who possess personalities that would be abusive towards others in mainstream society as well. Therefore, it is not the fundamentalist Mormon religion, but certain practitioners, that need to be prosecuted.

Regardless of whether polygamy is legalized, polygynists will continue to practice polygyny in whichever way they choose for as long as they want. Much like the prohibition against alcohol or prostitution, the government has tried to eliminate the dangers and abuses of polygyny by eliminating the act itself. Yet, polygyny and related abuses will persist outside of the boundaries established by the government. In other words, polygynists will continue to advocate for “group rights against the nation’s laws.”<sup>192</sup> Government should create and adapt a legal framework around polygyny to better regulate truly deviant practitioners.

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191. JANET BENNION, *WOMEN OF PRINCIPLE: FEMALE NETWORKING IN CONTEMPORARY MORMON POLYGyny* 154 (1998).

192. Tim Wu, *American Lawbreaking*, SLATE, Oct. 17, 2007, <http://www.slate.com/id/2175730/entry/2175741/>.