

CAN WE STILL CRIMINALIZE POLYGAMY: STRICT SCRUTINY OF POLYGAMY LAWS UNDER STATE RELIGIOUS FREEDOM RESTORATION ACTS AFTER *HOBBY LOBBY*

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State criminal polygamy laws substantially burden the religious polygamy practiced by Fundamentalist Mormons and others, and can be subjected to strict scrutiny in those states where mini-RFRAs have been enacted. Such strict scrutiny may be influenced by the Supreme Court's most recent RFRA case, Burwell v. Hobby Lobby Stores, Inc., which continues the Court's development of an even "stricter" form of scrutiny under the RFRA than it has applied in free exercise cases.

Defense of polygamy laws will initially require identification of a compelling state interest. The illegitimate, vague, and unsupported state interests previously provided in the Supreme Court case of Reynolds v. United States, as well as subsequent lower court and state cases, must be replaced by a more modern and empirical understanding of the harms of polygamy. This can be found in the recent Canadian case on the constitutionality of its criminal polygamy law, Reference re: Section 293 of the Criminal Code of Canada. Reference relied upon a statistical analysis of empirical data from 172 countries on the differential impact of monogamy versus polygamy; in addition to expert testimony from academics in the fields of evolutionary psychology, economic, political science, and nursing, from medical and psychological clinicians; and anecdotal evidence from husbands, wives, and children of polygamy. The goal was to specifically identify the harms of polygamy to women, children, men, and

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society at large. The Reference Court concluded that these harms outweighed burdens on religion and liberty. Avoiding these harms would be a compelling state interest, but there are questions as to whether the empirical evidence relied upon by Reference would be sufficient to satisfy the new RFRA requirement that the compelling state interest be specifically served by not exempting religious actors. In particular, it is not yet clear how the use of statistical evidence to satisfy this requirement would be evaluated.

If this obstacle can be overcome, criminalization must still be the least restrictive alternative. I consider, and ultimately reject, the possibility that refusing to legally recognize polygamous marriages could be a less restrictive and sufficiently effective way to keep polygamy in check, even in light of Hobby Lobby's suggestion that a less effective alternative may serve as a least restrictive alternative, given the recent trajectory from decriminalization of sodomy to same-sex marriage. I conclude that, while the Reference harms go a long way toward shielding state criminal polygamy laws from RFRA attacks, the ultimate result would depend upon the resolution of a number of novel questions about RFRA scrutiny itself.

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I. INTRODUCTION

Legal challenges to laws criminalizing polygamy have largely relied on free exercise arguments,¹ due to the importance of polygamous² marriage to Mormon fundamentalists.³ Under the free-exercise test announced in *Employment Division, Dept. of Human Resources of Ore. v. Smith*,⁴ in which neutral laws of general applicability are constitutional despite any burden on religious exercise, free-exercise challenges to laws criminalizing polygamy have been unsuccessful, with one notable exception that I believe was wrongly decided.⁵ The Religious Freedom Restoration Act of 1993⁶ (“RFRA”), however, expanded free-exercise protection by reinstating, as a matter of statutory law, the pre-*Smith* free-exercise requirement:⁷ burdensome government action must “further[] . . . a compelling government interest . . . [by] the least restrictive means.”⁸ Because the most burdensome laws regulating polygamy are state statutes criminalizing polygamy, once the Supreme Court found that RFRA could not constitutionally limit state actions in *City of Boerne v. Flores*,⁹ the relevance of RFRA to polygamy was essentially eliminated.

1. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878); *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013), *vacated*, *Brown v. Buhman*, 2016 WL 2848510 (10th Cir. May 13, 2016) (holding the case moot).

2. Polygamy, both in the United States and globally, is almost exclusively polygyny—one husband with multiple wives. In considering the harms of polygamy below, the word polygamy should therefore be understood to refer to polygyny and not polyandry. Polyamory is an entirely different practice that may or may not fall under criminal polygamy laws. See Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439 (2003); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS L. REV. 353 (2003).

3. See *infra* Part II.

4. 494 U.S. 872, 888–89 (1990) (holding that a neutral and generally applicable state law criminalizing peyote use did not unconstitutionally impinge upon free exercise of religion).

5. *Brown*, 947 F. Supp. 2d at 1221, *vacated*, *Brown*, 2016 WL 2848510 (finding Utah’s bigamy statute neither neutral nor generally applicable and holding that it failed strict scrutiny); see Maura I. Strassberg, *Scrutinizing Polygamy: Utah’s Brown v. Buhman and British Columbia’s Reference Re: Section 293*, 64 EMORY L.J. 1815 (2015) (arguing both that Utah’s bigamy law was neutral and generally applicable and that it could survive strict scrutiny).

6. 42 U.S.C. § 2000bb–2000bb-4 (1993).

7. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760–61 (2014) (describing the enactment of RFRA as an attempt to reinstate the test in *Sherbert v. Verner*, 374 U.S. 398 (1963)).

8. 42 U.S.C. § 2000bb–1(b) (1993).

9. 521 U.S. 507, 534–37 (1997) (holding that application of RFRA to state actions was unconstitutional).

In the wake of *City of Boerne*, twenty-one states have passed “mini-RFRAs,”¹⁰ and ten additional states introduced but did not pass such legislation in 2015.¹¹ Mini-RFRAs require state laws and governmental actions that burden religion to show that they further a compelling state interest and are the least restrictive means for doing so.¹² As a result, in all but one of the states with mini-RFRAs, laws criminalizing polygamy can be subject to strict scrutiny.¹³ Similarly, there are states that have found, or might in the future find, that their state constitution provides RFRA-like strict scrutiny for burdens on free exercise. In these contexts, RFRA cases may become important guidance for courts attempting strict scrutiny under state mini-RFRAs.

The significance of the Supreme Court’s most recent RFRA case, *Burwell v. Hobby Lobby Stores, Inc.*,¹⁴ in regard to a strict-scrutiny analysis of state polygamy laws under mini-RFRAs primarily arises out of its approach to the compelling state purpose and least restrictive alternative tests under RFRA. *Hobby Lobby* addressed the effect of RFRA on federal regulations issued under the Patient Protection and Affordable Care Act of 2010¹⁵ (“ACA”). These regulations required that employee insurance cover certain contraceptive methods¹⁶ that were religiously objec-

10. Alabama (ALA. CONST. art. I, § 3.01); Arizona (ARIZ. REV. STAT. ANN. § 41-1493.01 (2015)); Arkansas (ARK. CODE ANN. §16-123-404 (2015)); Connecticut (CONN. GEN. STAT. § 52-571b (2015)); Florida (FLA. STAT. §§ 761.01-.05 (2015)); Idaho (IDAHO CODE ANN. § 73-402 (2015)); Illinois (775 ILL. COMP. STAT. 35/1-30 (2015)); Indiana (IND. CODE §§ 34-13-9-0.7 to -11 (2015)); Kansas (KAN. STAT. ANN. §§ 60-5301-5305 (2015)); Kentucky (KY. REV. STAT. § 446.350 (West 2015)); Louisiana (LA. REV. STAT. ANN. §§ 13:5231-:5242 (2015)); Mississippi (MISS. CODE ANN. § 11-61-1 (2015)); Missouri (MO. REV. STAT. § 1.302 (2015)); New Mexico (N.M. STAT. ANN. §§ 28-22-1 to -5 (2015)); Oklahoma (OKLA. STAT. tit. 51, §§ 251-58 (2015)); Pennsylvania (71 PA. CONS. STAT. ANN. § 2406 (West 2016)); Rhode Island (R.I. GEN. LAWS §§ 42-80.1-1 to -4 (2015)); South Carolina (S.C. CODE ANN. §§ 1-32-10-60 (2015)); Tennessee (TENN. CODE ANN. § 4-1-407 (2015)); Texas (TEX. CODE ANN. §§ 110.001-.011 (2015)); Virginia (VA. CODE ANN. §§ 57-1-2.1 (2015)).

11. 2015 *State Religious Freedom Restoration Legislation*, NAT’L CONF. OF ST. LEGS. (Sept. 3, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx> (providing a table of unenacted RFRA legislation for Georgia, Hawaii, Maine, Michigan, Montana, Nevada, North Carolina, South Dakota, Utah and Wyoming).

12. *See id.*

13. Pennsylvania includes a provision that prevents the act from applying to “any criminal offense,” 71 PA. CONS. STAT. ANN. § 2406(b)(1) (West 2016), which means that the Pennsylvania bigamy offense, 18 PA. CONS. STAT. ANN. § 4301 (West 2016), which also covers polygamy, would not be subject to strict scrutiny. Kansas includes a provision that prevents the act from being construed to “authorize any relationship, marital or otherwise, that would violate section 16 of article 15 of the constitution of the state of Kansas.” KAN. STAT. ANN. § 60-5305(a)(2) (2015). Section 16 states: “Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.” KAN. CONST. art. XV, § 16(a). This exclusion would seem to be limited to the recognition of a marriage between more than one man and one woman, and would not seem to exclude the criminalization of polygamy from mini-RFRA scrutiny. A similar exemption is present in the Louisiana Law, with a presumed similar impact. LA. CONST. art. XII, § 15; LA. REV. STAT. ANN. § 13:5235(A) (2015).

14. 134 S. Ct. 2751, 2785 (2014) (finding requirements that employee insurance provided by closely held for-profit corporations cover certain contraceptive methods that are religiously objectionable to the owners of such corporations a violation of RFRA).

15. 26 U.S.C. § 5000A(f)(2) (2012).

16. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (re-

tionable to the owners of certain closely-held, for-profit corporations.¹⁷ The most contentious aspects of the decision are not relevant to polygamy laws.¹⁸ Polygamous marriage is a religious practice of individuals, not corporations, and appreciation of the role of polygamy in Fundamentalist Mormon theology makes it clear that criminalizing polygamy creates a substantial religious burden. Of more relevance was the Court's insistence that the government's compelling interests relate specifically to the case at hand.¹⁹

Although the *Hobby Lobby* majority ultimately assumed the government had a compelling interest in providing free access to the four contraceptive methods in question,²⁰ it suggested that, under the standard articulated in *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*,²¹ there might not in fact be a compelling interest in the *Hobby Lobby* case.²² *O Centro* held that it is not enough for the Government in a RFRA case to show that the rule creating the burden broadly serves important interests,²³ it must also show that "the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."²⁴ Essentially, this test requires the government to show that its compelling interests will not be served if a religious exemption is made for this particular group.²⁵ Applying this compelling-interest inquiry to the possible exemption of religious polygamists will reveal difficulties in using this test that were not encountered in either *O Centro* or *Hobby Lobby*.

Before the compelling interests served by polygamy can be subjected to this "more focused" inquiry,²⁶ it is first necessary, however, to set out what these compelling interests are. In the United States, our understanding of the harms of polygamy has largely been dictated by the reasoning in the Supreme Court's first polygamy decision in 1879, *Reynolds*

quiring insurance coverage for all "approved contraceptive methods") (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

17. *Hobby Lobby*, 134 S. Ct. at 2759 ("We must decide in these cases whether . . . RFRA . . . permits . . . HHS to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners.").

18. *Hobby Lobby* held that closely-held, for-profit corporations are protected by RFRA. *Id.* *Hobby Lobby* also found that the employer provision of insurance covering religiously objectionable contraceptives would be a substantial religious burden. *Id.* at 2778–79.

19. Kathryn E. Kovacs, *Hobby Lobby and the Zero-Sum Game*, 92 WASH. U. L. REV. 255, 256 (2014).

20. *Hobby Lobby*, 134 S. Ct. at 2780.

21. 126 S. Ct. 1211 (2006).

22. *Hobby Lobby*, 134 S. Ct. at 2780 ("The objecting parties contend that HHS has not shown that the mandate serves a compelling government interest, and it is arguable that there are features of ACA that support that view.").

23. *O Centro*, 126 S. Ct. at 1220 ("RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach.").

24. *Id.*

25. Kovacs, *supra* note 19, at 265.

26. *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *O Centro*, 546 U.S. at 430–31).

v. United States,²⁷ which enforced federal law in the territories.²⁸ The *Reynolds* opinion suffers from a number of deficits attributable to its era, including racist attitudes and dependence on nineteenth century theory that preceded the development of rigorous and objective social science. With no signal from the Court, however, that this decision has become suspect,²⁹ there has been little reason for a deeper understanding of the prohibition of polygamy to evolve. In addition, because all subsequent constitutional polygamy cases have involved only Mormon polygamists, any new state justifications for criminalizing polygamy beyond those stated in *Reynolds* have focused on limited law enforcement experience with isolated polygamous communities and anecdotal critiques and exposés by ex-community members.³⁰ As a result, no American court has articulated state justifications for criminalizing polygamy that are based on the most contemporary social scientific evidence of the consequences of this practice.

In contrast, the first constitutional evaluation of Canada's criminal polygamy law came in 2011, when the government of British Columbia referred a question,³¹ in the absence of the "case or controversy" that would have been required under United States law,³² on the constitutionality of this law to the British Columbia Supreme Court.³³ After forty-two days of hearings,³⁴ ninety affidavits and expert reports,³⁵ and "Brandeis Brief materials. . . . comprise[d of] several hundred legal and social science articles, books, and DVDs,"³⁶ the court issued a 228-page opinion in *Reference re: Section 293 of the Criminal Code of Canada* ("*Reference*") setting out the psychological, sociological, economic, and political impacts of polygamy worldwide, and holding that these harms were sufficient to justify criminalization despite the resulting infringements on liberty and freedom of religion guaranteed by the Canadian Charter of

27. 98 U.S. 145 (1879) (holding that free exercise did not protect religious polygamy from criminal prosecution).

28. The Morrill Act, ch. 126, § 1, 12 Stat. 501 (1862) (repealed 1910) (criminalizing polygamy in the territories).

29. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (citing *Reynolds* for the proposition that "a social harm may have been a legitimate concern of government for reasons quite apart from discrimination" against religion); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (citing *Reynolds* as one of a few cases where government interests were "so compelling as to allow even regulations prohibiting religiously based conduct").

30. See, e.g., *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985); *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1226–27 (D. Utah 2013), *vacated*, *Brown v. Buhman*, 2016 WL 2848510 (10th Cir. May 13, 2016); *State v. Holm*, 137 P.3d 726, 748 (Utah 2006); *State v. Green*, 99 P.3d 820, 830 (Utah 2004).

31. See Const. Question Act, R.S.B.C. 1996, c. 68, s. 1 (Can.) (empowering the government to refer constitutional questions to the courts).

32. U.S. CONST. art. III, §§ 1–2; see also *Osborn v. Bank of the United States*, 22 U.S. 738, 819 (1824) ("[W]hen the subject is submitted to it by a party who asserts his rights in the form prescribed by law[,] . . . [i]t then becomes a case . . .").

33. *Reference re: Sec. 293 of the Crim. Code of Can.*, 2011 BCSC 1588, paras. 15–16 (Can.).

34. See *id.* (reporting "[t]rial [d]ates" between Nov. 22, 2010, and Apr. 15, 2011).

35. *Id.* para. 28.

36. *Id.* para. 32.

Rights and Freedoms.³⁷ This Article uses the rigorous *Reference* analysis of the harmful effects of polygamy to articulate the compelling state purposes for the criminalization of polygamy.

The final potential expansion of RFRA, signaled by *Hobby Lobby*,³⁸ was the Court's suggestion that a viable less restrictive alternative to the ACA mandates was for the Government to "assume the cost of providing the four contraceptives" itself.³⁹ This, of course, would only be an alternative when the burden in question involves a mandated provision of goods or services. It has no direct relevance to the burden created by criminal polygamy statutes, which forbid private conduct. Nonetheless, the broader significance of the Court's suggestion might be, as criticized by Justice Ginsberg in dissent, that a court should consider a wider scope of less restrictive government actions, even if such actions might not as effectively further the government's interests.⁴⁰ Viewed in this light, it might be possible to argue that state governments already have a less restrictive way of deterring polygamy in place. States already discourage polygamy by refusing to legally recognize polygamous marriages. While non-recognition is presumably not as effective at deterring polygamy as criminal sanctions, we must consider whether it could be the less efficient, less restrictive alternative that *Hobby Lobby* may open the door for in RFRA cases.

II. THE RELIGIOUS BASIS OF THE FUNDAMENTALIST MORMON PRACTICE OF POLYGAMY

Mormon/Latter-day Saint ("LDS") theology states that all human beings are God's embodied spirit children, whose life on earth is an opportunity to grow worthy of returning to God's celestial kingdom.⁴¹ The most worthy humans can achieve "exaltation,"⁴² or eternal life in the celestial kingdom, which is the highest degree of glory after death⁴³ and the

37. *Id.* para. 1359.

38. Kovacs, *supra* note 19, at 256–57.

39. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

40. *Id.* at 2802 (Ginsburg, J., dissenting) (internal quotation marks omitted) (quoting Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39888 (July 2, 2013)) (arguing that requiring women to separately access a government program to provide these contraceptives free of charge would undermine the purpose of the ACA to provide preventive services with "minimal logistical and administrative obstacles").

41. THE FIRST PRESIDENCY AND COUNCIL OF THE TWELVE APOSTLES OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *The Family: A Proclamation to the World*, THE CHURCH OF JESUS CHRIST LATTER-DAY SAINTS (Sept. 23, 1995), <https://www.lds.org/topics/family-proclamation?lang=eng&cid=PA0414-02> ("In the premortal realm, spirit sons and daughters knew and worshipped God as their Eternal Father and accepted His plan by which His children could obtain a physical body and gain earthly experience to progress toward perfection and ultimately realize their divine destiny as heirs of eternal life.").

42. *Eternal Life*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.lds.org/topics/eternal-life?lang=eng> (last visited July 16, 2016) ("Eternal life, or exaltation, is to live in God's presence.").

43. *Celestial Kingdom*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.lds.org/topics/celestial-kingdom?lang=eng&query=celestial+Kingdom> (last visited July 16, 2016) (em-

ultimate religious goal for all Mormons/LDS, both mainstream and fundamentalist.⁴⁴ Exaltation is limited to those who follow the “laws and ordinances” of the Mormon Church,⁴⁵ including entering into a marriage sanctioned and conducted by the church,⁴⁶ known as a “celestial marriage.”⁴⁷

Polygamy increases the number of progeny a man can have. For the early Mormons, it served as a way to ensure that more of God’s spirit children awaiting embodiment by birth would be born to Mormon fathers in Mormon homes, where they would have the opportunity to become exalted themselves and enter the kingdom of their heavenly father, God.⁴⁸ For Fundamentalist Mormons, polygamous marriages are the only marriages that are “celestial” and offer the possibility of eternal life.⁴⁹ For those holding these beliefs, the only way to enter the celestial kingdom is to serve God by maximizing the number of children born to the limited number of men who can achieve exaltation (righteous fundamentalist men). To deny a Fundamentalist Mormon the opportunity to enter into polygamous marriage is, therefore, to prevent both service to God and access to his own exaltation.⁵⁰

phasis added) (describing the celestial kingdom as “[t]he highest of the three degrees or kingdoms of glory in *heaven*”).

44. “Mainstream” is a reference to LDS, which largely stopped performing polygamous marriages in 1890 and began excommunicating those who subsequently performed or entered into polygamous marriages in 1904. *The Manifesto and the End of Plural Marriage*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.lds.org/topics/the-manifesto-and-the-end-of-plural-marriage?lang=eng> (last visited July 16, 2016). It is the LDS church that is followed by the vast majority of Mormons today. “Fundamentalist” is a reference to the sects that broke away from the LDS as a result of the *Manifesto* and continue to practice polygamy today as the only form of “celestial marriage.” See *infra* note 49.

45. Russell M. Nelson, *Salvation and Exaltation*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Apr. 2008), <https://www.lds.org/general-conference/2008/04/salvation-and-exaltation?lang=eng> (“[E]xaltation [] is a conditional gift[] . . . qualifying conditions include . . . remaining faithful to the ordinances and covenants of the temple.”).

46. See *Doctrines and Covenants* 131:1-4, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.lds.org/scriptures/dc-testament/dc/131.1-4?lang=eng> (last visited July 16, 2016) (alteration in original) (“‘And in order to obtain the highest, a man must enter into this order of the priesthood [meaning the new and everlasting covenant of marriage]; And if he does not, he cannot obtain it.’”).

47. Russell M. Nelson, *Celestial Marriage*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.lds.org/general-conference/2008/10/celestial-marriage?lang=eng> (last visited July 16, 2016) (“A temple marriage is also called a celestial marriage.”).

48. *Plural Marriage and Families in Early Utah*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.lds.org/topics/plural-marriage-and-families-in-early-utah?lang=eng> (last visited July 16, 2016) (second alteration in original) (“The Book of Mormon identifies one reason for God to command [plural marriage]: to increase the number of children born in the gospel covenant in order to ‘raise up seed unto [the Lord]’ (*Jacob* 2:30).”).

49. *Is Plural Marriage Required for Exaltation?*, MORMONFUNDAMENTALISM.COM, <http://www.mormonfundamentalism.com/archive/NEWFILES/IsPMRequiredToday.htm> (last visited July 16, 2016) (“Modern polygamists . . . assert[] that plural marriage is always required . . . [and] [t]hat . . . God has always expected His people to practice polygamy or suffer eternal consequences.”); see also JANET BENNION, *WOMEN OF PRINCIPLE: FEMALE NETWORKING IN CONTEMPORARY MORMON POLYGYNY* 151–52 (1998) (describing fundamentalist Mormon beliefs that plural marriage is essential to receive “the highest rewards” and, especially for women, failure to enter into plural marriage can result in “losing their place in the kingdom,” “damnation,” or losing their “exaltation”).

50. BENNION, *supra* note 49, at 151–52.

Statutes criminalizing polygamy put individuals with these beliefs to a hard choice. They can choose to avoid the practice of polygamy, thereby giving up the possibility of exaltation/eternal life. Alternatively, they can practice their religion under the threat of criminal conviction,⁵¹ using strategies to avoid such prosecution. Some polygamous families have left the country altogether.⁵² Those who have stayed in mainstream society have either imposed extreme secrecy on family members or have kept each sub-family (a wife and her children) widely separated to avoid suspicion.⁵³ Others have moved to isolated, homogenous communities where there is no one to report them to the authorities.⁵⁴ Each of these strategies in turn has its own negative psychic, economic, and social consequences. These consequences are without doubt a substantial burden on religious practice, even without the expansion provided by *Hobby Lobby*.⁵⁵

III. THE COMPELLING STATE INTEREST IN PREVENTING POLYGAMY

A. Reynolds

The discussion of the harms of polygamy in *Reynolds* is confined to two paragraphs of the decision, and problematically begins with a blatantly racist disparagement of polygamy as always having 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.”⁵⁶ In the subsequent case of *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,⁵⁷ the Court described polygamy as “a return to barbarism” and “contrary to the spirit of Christianity and of the civilization which Christianity has produced in the western world.”⁵⁸ *Brown* quite properly characterized these statements as an example of “Orientalism,”⁵⁹ an appeal to the racial

51. DOROTHY ALLRED SOLOMON, DAUGHTER OF THE SAINTS 156–57 (2003) (presenting the daughter’s description of the imprisonment of her father, Apostolic United Brethren sect leader Rulon Allred, in 1945).

52. *Id.* at 78–79 (describing an attempt to set up a colony for Mormon polygamists in 1890); *id.* at 104–12 (describing the hardships endured in Mexico until they were forced to leave by the Mexican revolution); *id.* at 165–70 (describing how Rulon Allred moved his polygamous family to Mexico in 1947 to avoid violating his probation and returning to prison); *id.* at 191–95 (describing how the families with children born after Rulon Allred’s prison term had to go to Mexico to avoid incriminating their father).

53. *Id.* at 177, 204–11 (describing the scattering of wives and children to different states to avoid further prosecution in 1955).

54. *See, e.g., id.* at 179–80.

55. *Cf.* Reference re: Sec. 293 of the Crim. Code of Can., 2011 BCSC 1588, paras. 1091–93 (Can.) (holding that the Canadian law burdens religion).

56. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

57. 136 U.S. 1 (1890) (upholding the revocation of the corporate charter of the Church and the seizure of its property due to its promotion of polygamy).

58. *Id.* at 49.

59. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1182–83 (D. Utah 2013), *vacated*, *Brown v. Buhman*, 2016 WL 2848510 (10th Cir. May 13, 2016) (describing what Professor Edward Said called

and moral superiority of the West over the Orient, and dismissed these justifications for government actions against polygamy as inconsistent with the Supreme Court's modern "religious freedom, due process, [and] equal protection" jurisprudence.⁶⁰ *Brown* ultimately viewed the social harm of polygamy identified in *Reynolds* and *Late Corp.* as "introducing a practice perceived to be characteristic of non-European people—or non-white races—into white American society,"⁶¹ and would have found *Reynolds* "no longer . . . good law," but for the continued citation of *Reynolds* by both the Supreme Court and Tenth Circuit.⁶²

1. *Harm to Society*

There is, however, more to the critique of polygamy in *Reynolds* than *Brown* is willing to give it credit for. As I have argued in more depth elsewhere,⁶³ two potentially viable state interests can be found in the brief *Reynolds* discussion. The first interest is in avoiding harm to the (otherwise monogamous) society of the United States. The Court described society as "built" upon marriage,⁶⁴ and polygamy as "an offence against society,"⁶⁵ but failed to explain how polygamy will "disturb the social condition" of the monogamous society around it.⁶⁶ Contemporary courts addressing constitutional challenges to criminalization of polygamy have echoed this state interest in monogamous marriage as a crucial building block of society,⁶⁷ but also fail to explain in what way polygamy is harmful to American society.

As the recently resolved legal battle over same-sex marriage demonstrates, more is required to show a compelling state interest sufficient to impair a fundamental right. Even though the right at issue in

"Orientalism," a 19th century ideology of "Western superiority and Oriental inferiority," and attributing the decision in *Reynolds* to that ideology) (internal quotation marks omitted).

60. *Id.* at 1188.

61. *Id.*

62. *Id.* at 1189.

63. See Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. Rev. 1501, 1515–37 (1997) [hereinafter Strassberg, *Distinctions*] (discussing the connection made between polygamy and despotism in *Reynolds* and tracing it back to the work of Francis Lieber and G.W.F. Hegel); Strassberg, *supra* note 5, at 1822–28 (arguing that while *Reynolds* did identify two state interests, it did not show that prohibition of polygamy was essential to these interests but rather simply concluded that this was the case).

64. *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

65. *Id.*

66. *Id.* at 166 ("An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it . . .").

67. See, e.g., *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) ("Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built."); *State v. Holm*, 137 P.3d 726, 743–44 (Utah 2006) ("Our State's commitment to monogamous unions is a recognition that decisions made by individuals as to how to structure even the most personal of relationships are capable of dramatically affecting public life The people of this State have declared monogamy a beneficial marital form and have also declared polygamous relationships harmful."); *State v. Green*, 99 P.3d 820, 830 (Utah 2004) (mentioning "the State's interest in regulating marriage as an important social unit."); cf. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) ("[T]his Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order.").

Obergefell was a fundamental right to marriage itself,⁶⁸ rather than the statutorily protected free exercise of religion that would be at issue in RFRA-based polygamy challenges, the general requirement of a compelling state interest in both analyses is the same. The States in *Obergefell* argued that the institution of marriage for opposite-sex couples would be harmed because allowing same-sex partners to marry would result in fewer opposite-sex partners choosing to marry because marriage would no longer be primarily about natural procreation.⁶⁹ The Court did not address whether maximizing the number of opposite-sex partners who marry was actually a compelling state interest, indeed it did not even use the language of compelling state interests. Rather, it focused on the States' failure to show the likelihood of a negative impact on decisions to enter opposite-sex-marriage by legal recognition of same-sex marriage, describing it as "counterintuitive"⁷⁰ and "wholly illogical,"⁷¹ presumably informed by their own personal experiences either as members of an opposite-sex married couple and/or as observers of the opposite-sex couples around them.⁷²

The lack of "a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe"⁷³ was fatal to the States' attempt to continue to prohibit same-sex marriage. At the same time, the States did at least identify a specific harmful outcome they were trying to avoid: decreased participation in marriage by procreation-capable, sexually involved opposite-sex couples.⁷⁴ Neither *Reynolds* nor subsequent cases specify what the claimed harmful effects of polygamy on "society" are. Nor is it the case that these harms are intuitively obvious. Without more specifics as to what the harm is, it is impossible to evaluate the foundation for the claim that polygamy causes these harms. Consequently, as thus far developed by American case law, a state interest in avoiding harm to society would not succeed as a compelling state interest.

2. *Monogamy is the Foundation of Liberal Democracy*

The second state interest suggested by *Reynolds* concerns what the Court saw as the political consequences of different forms of marriage: a society built on a marital structure of polygamy will have fundamentally

68. *Obergefell*, 135 S. Ct. at 2604–05 (holding that the fundamental right to marriage includes same-sex marriage).

69. *Id.* at 2606–07.

70. *Id.* at 2607.

71. *Id.* (quoting *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014)).

72. *See id.*; *see, e.g.*, Mark Sherman, *How Supreme Court Justice Anthony Kennedy's Gay Mentor Influenced His Views, Beliefs*, HUFFINGTON POST (Apr. 14, 2015, 2:52 PM), http://www.huffingtonpost.com/2015/04/14/justice-anthony-kennedy-gay-mentor_n_7064016.html.

73. *Obergefell*, 135 S. Ct. at 2607.

74. *See supra* notes 69–71 and accompanying text.

different political principles than a society built upon monogamy.⁷⁵ Specifically, the Court stated that polygamy is the natural foundation of political despotism, while monogamy is antithetical to such despotism.⁷⁶ Given its understanding that marriage shapes the very political principles that inform governmental structure, *Reynolds* concluded that “there cannot be a doubt that . . . it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion,”⁷⁷ unless that power is “restricted by some form of constitution.”⁷⁸

Certainly, the need to preserve our non-despotic government would seem to be both a specific and compelling state interest. The problem with this interest, however, is the link to criminalizing polygamy. The basis for the Court’s conclusion was the writing of Professor Francis Lieber, a nineteenth-century intellectual who is considered the “founder of American political science,”⁷⁹ but would seem to modern social scientists to be a political or anthropological philosopher. His work was strongly influenced by, and derived from, Georg W.F. Hegel’s social and political philosophy.⁸⁰ I have detailed the relationship of both these theorists to each other and the *Reynolds* opinion elsewhere,⁸¹ and have even attempted to update this analysis to be consistent with modern American political principles of gender and sexual orientation equality.⁸² As noted by the *Reference* court, however, scholarly attempts to connect monogamy to the emergence of democracy, and ultimately gender equality, still remain more speculative than empirical.⁸³ In the absence of empirical evidence that polygamy is incompatible with democracy, it might well be the case that this specific and admittedly compelling state interest would be found to suffer from a “foundation” problem similar to the losing argument in *Obergefell*. This suggests it is not likely to survive strict scrutiny.

75. *Reynolds v. United States*, 98 U.S. 145, 165–66 (1878) (“In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.”).

76. *Id.* at 166 (“[P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.”).

77. *Id.*

78. *Id.*

79. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1187 (D. Utah 2013), *vacated*, *Brown v. Buhman*, 2016 WL 2848510 (10th Cir. May 13, 2016) (quoting EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 155 (1988)) (internal quotation marks omitted).

80. Strassberg, *Distinctions*, *supra* note 63, at 1523 & n.120 (showing that Lieber’s attendance at German universities overlapped not only with lecture series given by Hegel but the growing influence of his thought).

81. *Id.* at 1515–37.

82. *Id.* at 1547–56.

83. Strassberg, *supra* note 5, at 1827–28 (detailing the testimony on the relationship between monogamy and the development of egalitarian democracy and suggesting that this theory would not be sufficient for strict scrutiny).

B. Contemporary American Justifications

1. Protecting Women and Children from Abuse

More recent polygamy opinions have identified the avoidance of one specific harm that is certainly a compelling state interest: protecting women and children from crimes such as “incest, sexual assault, statutory rape, and failure to pay child support.”⁸⁴ In *State v. Green*, the Utah Supreme Court found that these crimes “often coincide[d]” with polygamy,⁸⁵ that polygamy “provides a favorable environment in which crimes of physical and sexual abuse can thrive,”⁸⁶ and that “the closed nature of polygamous communities makes obtaining evidence of and prosecuting these crimes challenging.”⁸⁷ Both times, however, that the Utah Supreme Court turned to the avoidance of abuse of women and children as a state interest sufficient to turn back a constitutional challenge to the criminalization of polygamy, the level of scrutiny applied was no more than rational basis.⁸⁸ The evidence of a causal connection between polygamy in general and these crimes was largely anecdotal in nature and limited to Fundamentalist Mormon polygamy in the Western part of the United States. In *Green*, the court noted that Green was convicted of criminal nonsupport and rape of a child, in addition to polygamy,⁸⁹ and similar criminal charges were proven in a subsequent constitutional challenge, *State v. Holm*.⁹⁰ In addition, media publicity, combined with anti-polygamy websites⁹¹ and exposé books by ex-polygamous community members describing the presence of systematic incest, sexual abuse, rapes, statutory rape, beatings, and financial exploitation and control,⁹²

84. *State v. Holm*, 137 P.3d 726, 744 (Utah 2006) (quoting *State v. Green*, 99 P.3d 820, 830 (Utah 2004)); *Green*, 99 P.3d at 830; see also Strassberg, *supra* note 2, at 369–75, 377–89, 407–11 (arguing polygamy is the foundation for “insular and theocratically governed communities” that “shelter criminal abuse of other community members from government observation and sanction.”).

85. *Green*, 99 P.3d at 830.

86. *Id.* (quoting Richard A. Vazquez, Note, *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, 243 (2001)) (internal quotation marks omitted).

87. *Id.*

88. *Holm*, 137 P.3d at 742, 745 (holding Utah’s anti-polygamy statute did not burden a fundamental liberty for Due Process purposes and was facially neutral for Equal Protection purposes); *Green* 99 P.3d at 830 (upholding Utah’s anti-polygamy statute under rational basis review).

89. *Green*, 99 P.3d at 830 n.14 (citing *State v. Kingston*, 46 P.3d 761 (Utah Ct. App. 2002)) (affirming the conviction of a polygamist for incest and sexual conduct with a sixteen-year-old).

90. 137 P.3d at 730, 732, 749 (Utah 2006) (affirming conviction for polygamous marriage and unlawful sexual conduct with a minor).

91. See JANET BENNION, POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM 238 (2012) [hereinafter BENNION, POLYGAMY IN PRIMETIME] (describing the now defunct anti-polygamy website *Tapestry Against Polygamy*).

92. See, e.g., BRENT W. JEFFS WITH MAIA SALAVITZ, LOST BOY 67–69 (2009) (describing his rape at age five by his uncle, Warren Jeffs, prior to Warren Jeffs’ leadership of the FLDS); FLORA JESSOPS & PAUL T. BROWN, CHURCH OF LIES 1–2 (2009) (detailing her molestation and rape by her father and numerous escape attempts while growing up in the FLDS); CAROLYN JESSOP & LAURA PALMER, ESCAPE 1 (2007) (describing her escape with eight children from a coerced and abusive FLDS polygamous marriage); ELISSA WALL & LISA PULTZER, STOLEN INNOCENCE: MY STORY OF GROWING UP IN A POLYGAMOUS SECT, BECOMING A TEENAGE BRIDE, AND BREAKING FREE OF

had created a general linkage between polygamy and crimes against women and children. In both *Green* and *Holm*, this evidence was sufficient to turn back a constitutional challenge.

In contrast, the state interests justifying the criminalization of polygamy were subjected to strict scrutiny in *Brown v. Buhman*.⁹³ Although I have argued elsewhere that this level of scrutiny was not constitutionally justified because the Utah bigamy law was both operationally neutral and generally applicable to both religious and non-religious practitioners of polygamy,⁹⁴ the strict scrutiny applied in that case is analogous to what would occur in a RFRA case. The main reason given in *Brown* for the failure of the compelling state interest in protecting women and children from abuse to survive strict scrutiny was that the state of Utah “provided no competent evidence appropriate for summary judgment that could influence the court’s consideration.”⁹⁵ To be clear, it was not that the court judged the evidence provided to be insufficient, rather the State provided “no admissible evidence” of the “social harms” of polygamy in Utah,⁹⁶ perhaps because the State assumed that the prior decisions by the Utah Supreme Court in *Green* and *Holm* on this point were sufficient to establish this. Quoting a dissent to *Holm*, however, *Brown* noted the paucity of evidence in *Green* showing “a causal relationship or even a strong correlation between the practice of polygamy, whether religiously motivated or not, and the offenses of ‘incest, sexual assault, statutory rape, and failure to pay child support.’”⁹⁷ In essence, *Brown* concluded that there is a lack of “foundation” for the claim that polygamy leads to abuse of women and children and this is fatal to the ability of this potentially compelling state interest to be upheld under strict scrutiny.

What sort of foundation for this claim is currently available? There are three major polygamous Mormon sects operating in the United States, as well as numerous small groups and independent families.⁹⁸ Much of the recent negative publicity about polygamy has been about Warren Jeffs and the Fundamentalist Latter-Day Saints (“FLDS”) communities he has shaped and established, such as the Yearning for Zion

WARREN JEFFS (2009) (autobiography of a FLDS woman who was coerced at age fourteen to marry her cousin, and who later became center of the criminal case against Warren Jeffs).

93. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1203 (D. Utah 2013), *vacated*, *Brown v. Buhman*, 2016 WL 2848510 (10th Cir. May 13, 2016).

94. Strassberg, *supra* note 5, at 1849–56 (arguing that *Brown*’s holding that the Utah bigamy law was the equivalent of a “religious gerrymander” improperly excluded from consideration the prosecution of non-religious bigamists’ improperly conflated marital cohabitation and adultery; inaccurately assumed that there was no practice of secular marital cohabitation distinct from adultery; and failed to recognize that the evidentiary significance of religious marriage ceremonies for proof of polygamy is based on the contractual aspects of the ceremony).

95. *Brown*, 947 F. Supp. 3d at 1220 n.64, *vacated*, *Brown*, 2016 WL 2848510.

96. *Id.* at 1177.

97. *Id.* at 1120 (quoting *State v. Holm*, 137 P.2d 730, 775 (Utah 2006) (quoting *Utah v. Green*, 99 P.3d at 822, 830 (Utah 2004))) (Durham, J., dissenting).

98. JANET BENNION, HISTORY, CULTURE, AND VARIABILITY OF MORMON SCHISMATIC GROUPS, in MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL AND LEGAL ISSUES 102–07 (2011) [hereinafter BENNION, MODERN POLYGAMY].

(“YFZ”) Ranch in Texas and the town of Short Creek, Utah. The FLDS is the second-largest of the three major polygamous Mormon sects that operate in the United States.⁹⁹ More than anecdotal evidence of a connection between FLDS polygamy and statutory rape exists after the Texas raid on the YFZ Ranch led to convictions for ten FLDS men, including Jeffs, for having sex with their underage plural wives.¹⁰⁰ The relatively few convictions for statutory rape involving the FLDS community in Short Creek, Utah, can be explained by the fact that there is an atmosphere that made it clear the victims of such abuse would be better off remaining silent,¹⁰¹ with most child sexual abuse cases being reported to the church rather than law enforcement or social services.¹⁰² Another smaller sect, the Kingstons, “are known for the large number of underage marriages they perform, the highest number of incestuous marriages, and the highest natural birth rate of any of the Fundamentalist Mormon groups.”¹⁰³ Most of the abuse convictions of polygamists since 2000 have come from the FLDS community under the leadership of Warren Jeffs (twenty-one),¹⁰⁴ with a smaller number coming from the Kingstons (two).¹⁰⁵

99. *Id.* at 103–04 (estimating the FLDS to have 8,000 members as of 2008).

100. *See, e.g.*, Jeffs v. State, No. 03-11-00568-CR, 2012 WL 1068797, at *1 (Tex. App. Mar. 29, 2012) (FLDS prophet Warren Jeffs convicted of aggravated sexual assault of a child and sexual assault of a child); Jessop v. State, 368 S.W.3d 653, 664–65 (Tex. App. 2012) (holding the evidence of a thirty-two-year-old’s celestial marriage to a fifteen-year-old girl followed by the birth of a child shown by DNA testing to be the husband’s child when she was sixteen was sufficient to prove the elements of sexual assault of a child); Jeffs v. State, No. 03-10-00781-CR, 2012 WL 1660612, at *1 (Tex. App. May 10, 2012) (thirty-four-year-old man convicted of sexual assault on a child for marriage to fourteen-year-old girl who had his child at age sixteen); Jeffs v. State, No. 03-10-00272-CR, 2012 WL 601846, at *1 (Tex. App. Feb. 24, 2012) (affirming conviction for sexual assault on a child); Keate v. State, No. 03-10-00077-CR, 2012 WL 896200, at *1 (Tex. App. Mar. 16, 2012) (fifty-three-year-old man convicted of sexual assault on a child for marriage to fifteen-year-old girl who had his child at age sixteen); Emack v. State, 354 S.W.3d 828, 834–39 (Tex. App. 2011) (sexual assault of a child and bigamy); Matthew Waller, *Progress: FLDS Prosecutions, Plea Deals Keep Courts Busy*, STANDARD-TIMES (Feb. 26, 2011), www.gosanangelo.com/news/flds-prosecutions-plea-deals-keep-courts-busy (describing the conviction of Merrill Leroy Jessop for sexual assault of a fifteen-year-old child, a plea by Lehi Barlow Jeffs to bigamy, and the conviction after trial of FLDS member Keith William Dutson of sexual assault of a fifteen-year-old child); Matthew Waller, *Sect Member Gets 7 Years*, STANDARD-TIMES (Nov. 1, 2011), <http://www.gosanangelo.com/news/flds-member-leroy-johnson-steed-sentenced-to-7> (Leroy Johnson Steed pled “no contest to two counts of bigamy and one count of child sexual assault” involving a sixteen-year-old child).

101. David Kelly & Gary Cohn, *Blind Eye to Culture of Abuse*, L.A. TIMES, May 12, 2006, <http://www.latimes.com/news/la-na-sect12may12-story.html#page=2> (recounting that a sexual abuse victim “never once considered going to the police” and light jail sentences for perpetrators, such as thirteen days for a repeated sexual abuse of five daughters between the ages of twelve and nineteen, and thirty days for molestation of a four-year old); JEFFS, *supra* note 92, at 67–69, 159, 212 (describing his repeated rapes at ages five through seven years old by Warren Jeffs, and the rapes of two of his brothers, and Warren Jeffs’ threat that Brent would go to hell if he told anyone).

102. Kelly & Cohn, *supra* note 101 (describing the polygamist police chief who did not report twenty to twenty-five child sex abuse cases).

103. BENNION, POLYGAMY IN PRIMETIME, *supra* note 91, at 40.

104. *See, e.g.*, State v. Holm, 137 P.3d 726, 749 (Utah 2006); BENNION, MODERN POLYGAMY, *supra* note 98, at 116; *see also supra* note 95 and accompanying text.

105. State v. Kingston, 46 P.3d 761 (Utah Ct. App. 2002) (affirming the conviction of David Ortell Kingston for incest and sexual conduct with a minor for his marriage to his sixteen-year-old niece); Linda Thomson, *Kingston Pleads Guilty to Incest Charge*, DESERET NEWS (Oct. 31, 2003, 12:00 AM),

The Apostolic United Brethren (“AUB”), the largest polygamist Mormon sect, with about ten thousand members,¹⁰⁶ has had only one conviction since 2000,¹⁰⁷ although in the 1990s, four highly-placed leaders of the AUB were accused, and in some cases convicted, of child molestation.¹⁰⁸ Twenty-three other cases of incest during the 1990s, in an eight-hundred person AUB community in Montana, were not reported to the police.¹⁰⁹ A former Allred polygamist and long-time deputy sherriff specializing in sex crimes stated that prior to 2002, based on his experience, “there is a greater frequency rate of child molest [sic] among polygamists than in society in general.”¹¹⁰

Yet, anthropologist Janet Bennion, who has observed polygamous family life in the AUB and in the LeBaron sect in Mexico, argues that the practice of fundamentalist polygamy should not be equated with the abuses found in the FLDS and the Kingstons,¹¹¹ and that well-functioning families and communities can be found¹¹² within the “rich diversity of polygamist lifestyles.”¹¹³ In particular, she notes that the “AUB is currently considered by law officials to be one of the more ‘progressive’ groups,”¹¹⁴ as in recent years they have become more open to law enforcement,¹¹⁵ have emphasized that “child and spousal abuse and incest [were] . . . serious sins,” and have encouraged “victims . . . to report the incidents to

<http://www.deseretnews.com/article/525034698/Kingston-pleads-guilty-to-incest-charge.html?pg=all> (Jeremy Ortell Kingston pled guilty to incest for marriage to his fifteen-year-old first cousin).

106. BENNION, MODERN POLYGAMY, *supra* note 98, at 103–04.

107. Associated Press, *Utah Mother Sentenced for Sexual Abuse of Daughters*, KSL (Mar. 21, 2003, 12:39 PM) <http://www.ksl.com/?nid=148&sid=91382> (describing the conviction of Gustavo Palacios for the sexual abuse of his two stepdaughters, the conviction of his wife and the children’s mother for encouraging the abuse, and the leniency shown by the judge due to the mother’s own sexual abuse as a child in a polygamous family); *see also infra* note 108 (naming Cherval or Shevroll Palacios, whose real name was Gustavo, as a member of the UAB Priesthood Council).

108. Janet Bennion, *Abbas Raptus: Exploring Factors that Contribute to the Sexual Abuse of Females in Rural Mormon Fundamentalist Communities*, FORUM ON PUB. POL’Y at 10–13 (2006) <http://www.forumonpublicpolicy.com/archive06/bennion.pdf> (naming John Jay, Joe Thompson, and Cherval Palacios) [*hereinafter Abbas Raptus*]; *The Apostolic United Brethren (Allred Group)*, MORMON FUNDAMENTALISM, www.mormonfundamentalism.com/ChartLinks/AUB.htm (last visited July 16, 2016) (“Within the Priesthood Council over the past decade, several members were accused of child molestation causing the release of Joseph Thompson in 1994 (Thompson was the last Council member called in 1952 by Joseph Musser), George Maycock in 1998, and Shevroll Palacios in 2002.”); *see also* Jon Adams, *The Allreds on Living and Leaving Polygamy*, USU REASON (Nov. 17, 2010), <http://usureason.com/2010/the-allreds-on-living-and-leaving-polygamy/> (recounting a speech by Vance Allred, son of Rulon Allred, the leader/prophet of the UAB from 1954-77, in which he stated that he discovered that leaders of the UAB were “guilty of incest and child molestation”).

109. Bennion, *Abbas Raptus*, *supra* note 108, at 7.

110. John R. Llewellyn, *FAQ on Polygamy*, HELP THE CHILD BRIDES, <http://helpthechildbrides.com/llewellyn.htm> (last visited July 16, 2016).

111. BENNION, MODERN POLYGAMY, *supra* note 98, at 101–02 (protesting “the attempts made by the government to enact policies against entire communities . . . [without taking into account] the variability and complexity in Mormon fundamentalism . . .”).

112. BENNION, POLYGAMY IN PRIMETIME, *supra* note 91, at 8–9 (describing “a happy little polygamous, self-sustained community whose members lived contentedly off the grid” with “many examples of female autonomy, achievement, and contentment.”).

113. BENNION, MODERN POLYGAMY, *supra* note 98, at 101.

114. *Id.* at 116.

115. BENNION, POLYGAMY IN PRIMETIME, *supra* note 91, at 36–37.

the police.”¹¹⁶ In addition, the AUB has formally repudiated both underage and arranged marriages.¹¹⁷

Unfortunately, whether or not the AUB is truly establishing a polygamy free of these abuses cannot be determined by current reports or convictions for these crimes. It is only in the future, when adults eventually feel safe to report their childhood abuse, that the presence or absence of such abuse can be assessed. For example, the daughter of the current leader of the AUB, Lynn Thompson, has recently alleged that her father molested her more than twenty years ago.¹¹⁸ It can take decades for intra-familial abuse to be revealed. Furthermore, neither the sects themselves nor their policies are stable. The current AUB prohibition on underage and arranged marriages could be changed by a subsequent AUB leader, and the community would either accept their leader’s commands as revelation, or the group would itself splinter. In fact, there is a general “tendency to fission” within Mormonism due to the Mormon belief that “any individual can commune with God and experience a ‘revelation.’”¹¹⁹

In addition, survey data from 2008 showed that about fifteen thousand out of then-estimated thirty-eight thousand Fundamentalist Mormons either living in or believing in polygamy were independents not affiliated with any of the organized sects.¹²⁰ With less community connections and oversight, these families may be fertile ground for abuse. There has been one sexual-abuse conviction of an “independent”¹²¹ Mormon polygamist not affiliated with any of the three main sects: Tom Green. The mere existence of so many independents vastly complicates any attempt to empirically assess the connections between Fundamentalist Mormon polygamy and abuse.

In her study of abuse in the polygamous community, Bennion concluded that the following conditions, rather than polygamy itself, contributed to the abuse: “a rural environment, frequent absence of the father from the home, lack of a female network, isolated locations with national geographical barriers to escape, overcrowded households, and the presence of “father worship” . . . [c]ombined with . . . a strict code [of] . . . obedience.”¹²²

116. *Id.* at 37.

117. UTAH ATTORNEY’S GENERAL OFFICE ET AL., THE PRIMER: A GUIDEBOOK FOR LAW ENFORCEMENT AND HUMAN SERVICES AGENCIES WHO OFFER ASSISTANCE TO FUNDAMENTAL MORMON FAMILIES 12 (2011) [hereinafter THE PRIMER], <https://www.azag.gov/sites/default/files/sites/all/docs/Criminal/victims-rights/victims-services/The%20Primer.pdf>.

118. Associated Press, *Polygamy Group Launches Investigation of its Leader After His Daughter-Star of TLC’s ‘My Five Wives’-Claims He Molested Her When She Was 12*, DAILY MAIL (Dec. 4, 2014), www.dailymail.co.uk/news/article-2859686/Polygamy-group-investigates-abuse-allegations.html.

119. MIRIAM KOKTVEDGAARD ZEITEN, POLYGAMY: A CROSS-CULTURAL ANALYSIS 94 (2008); see also THE PRIMER, *supra* note 117, at 11–14.

120. *Survey Finds Increase in Polygamous Communities*, KSL.COM, (Sept. 28, 2009, 1:45 PM), <http://www.ksl.com/?sid=8093904>.

121. BENNION, POLYGAMY IN PRIMETIME, *supra* note 91, at 52 (describing Tom Green as an “unaffiliated independent polygamist”).

122. *Id.* at 15.

A particularly strong argument arising out of these findings is that it is the criminalization of polygamy itself that makes abuse more likely, by motivating polygamists to locate in isolated rural environments where women have less ability to find supportive law enforcement, and also are unable to just leave.¹²³ In addition, she notes that the “[m]ale dominance . . . often associated with abusive conditions” is not a necessary feature of polygamy, but rather a result of “extreme fundamentalist” or “patriarchal beliefs.”¹²⁴ She observed polygamous households where “the husband is open to female decision-making and autonomy and is willing to use a more feminist approach to family structures and policies.”¹²⁵ Even Bennion, however, agrees that her observations of polygamy do not provide the final answer as to the connection between polygamy and abuse, and that “a thorough investigation of polygamy must be made to clarify whether only a few miscreants are guilty of abuse or all polygamous families contain abuse.”¹²⁶

Two questions arise here: is the existing evidence sufficient to establish, first, a compelling state interest in criminalizing Fundamentalist Mormon polygamy and, second, a compelling state interest in criminalizing all practices of polygamy? As will be discussed further below, the Supreme Court has not had much experience with the evaluation of empirical evidence to establish compelling state interests, thus it is impossible to know what might or might not be sufficient to create the foundation between harms that the state does have a compelling interest in preventing and the conduct which they target to accomplish this.

2. *State Support of Polygamous Families*

The Utah Supreme Court found, under a rational basis analysis,¹²⁷ the state’s “interest in preventing [both] the misuse of government benefits associated with marital status” as well the crime of “failure to pay child support” to be a sufficient state interest in *Green*,¹²⁸ but it failed to explain precisely what the misuse was. In fact, the state interest in criminalizing polygamy to avoid “welfare fraud” or failure to pay child support could rest on one or more of several ways that polygamy may be connected to what might be considered or perceived as improper use of state benefits.

First, it is important to understand that the collection of benefits by polygamous wives with children at issue here is their application for benefits as single parents, despite being religiously married to, and possibly

123. *Id.* at 16 (“[I]t is my belief that forcing polygamous families to the fringes of society facilitates instances of abuse taking place outside the watchful eye of law enforcement.”).

124. *Id.* at 17.

125. *Id.*

126. *Id.*

127. *State v. Green*, 99 P.3d 820, 830 (Utah 2004).

128. *But see State v. Holm*, 137 P.3d 726, 743–45 (Utah 2006) (showing that the Utah Supreme Court subsequently left out misuse of government benefits in its substantive due process scrutiny of the criminalization of polygamy).

living together with, their husband and the children's father. *Brown* noted that the collection of benefits for unmarried parents by polygamous wives was not fraudulent since the wives are not legally permitted to be married to their husband.¹²⁹ The fraud arises, however, less from their presentation as unmarried, but rather from their failure to identify the known father of their children and his relationship to the family; thereby ensuring the burden of supporting children will shift from their father to the state, which will lack the information it needs to investigate and recover support from fathers who have available resources.¹³⁰

For example, the family of John Ortell Kingston, a leader of the Kingston sect, "received \$1 million in food stamps, Medicaid, and Supplemental Security income for nearly ten years, from 1972–83,"¹³¹ although Kingston had \$30 million dollars in personal land sales and a share in family wealth estimated at \$150 million during that period.¹³² Kingston was sued by the State of Utah in the 1980's for welfare fraud and paid \$250,000 to settle the case and avoid blood tests of his twenty-nine alleged children.¹³³ Other members of the Kingston family paid \$100,000 for similarly improperly obtained welfare benefits.¹³⁴ Tom Green, an independent polygamist, was convicted of criminal non-support and owed the state almost "\$80,000 for welfare payments fraudulently collected to support his five wives and twenty-six children."¹³⁵ With very large families and low incomes, some polygamous families receive a total of \$50–60,000 a year in combined Medicaid and food stamp benefits.¹³⁶ Seventy-eight percent of the inhabitants of an FLDS town in Arizona were described as receiving food stamps in 2002, and sixty-six percent of the neighboring FLDS town in Utah received federal assistance.¹³⁷ Observation of some AUB families in 1993 showed that about twenty-five percent of these families were engaged in such "welfare fraud."¹³⁸

At the same time, it must be acknowledged that one reason why polygamous wives might conceal the identity of their children's father and their religious marriage to him is precisely because polygamy is a crime and, if more than one wife seeks benefits, revealing this information would provide evidence of this crime. Therefore, to the extent the criminalization of polygamy itself contributes to this fraud, it cannot justify the criminalization. On the other hand, it is not the criminalization of polyg-

129. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1234 (D. Utah 2013), *vacated*, *Brown v. Buhman*, 2016 WL 2848510 (10th Cir. May 13, 2016).

130. Julia Cart, *Utah Paying a High Price for Polygamy*, L.A. TIMES (Sept. 9, 2001), <http://articles.latimes.com/2001/sep/09/news/mn-43824>.

131. BENNION, POLYGAMY IN PRIMETIME, *supra* note 91, at 219.

132. *Id.*

133. Ray Rivera, *Utah Attorneys Key Figures in Polygamist Kingston Clan*, SALT LAKE TRIBUNE, July 19, 1998, available at <http://culteducation.com/group/1099-polygamist-groups/16630-utah-attorneys-key-figures-in-polygamist-kingston-clan.html>

134. BENNION, POLYGAMY IN PRIMETIME, *supra* note 91, at 219.

135. *Id.*

136. *Id.* at 220.

137. *Id.* at 219.

138. *Id.* at 38, 108.

amy that leads women to apply for, or have the need to apply for, such benefits. It is a lack of or insufficient support from the fathers of their children, either because the fathers refuse to use their resources for the support of their children or because they lack the resources to support their children. Determining whether there is any connection between polygamy and such lack of support is essential for evaluating benefit fraud and non-support as a compelling state interest supporting the criminalization of polygamy.

One practice associated with polygamy that substantially contributes to the need of polygamous wives and their children for state support arises out of the fundamentalist “law of consecration,”¹³⁹ which requires the uniting of all resources into a single economic unit, called a “united order,”¹⁴⁰ that the church then administers and redistributes.¹⁴¹ This united economic order means the church or its secular alter-ego owns “most of the property and businesses of members,”¹⁴² and most men, women, and children are employed by these church-owned and controlled enterprises,¹⁴³ often for wages that are below market or legal minimums in exchange for in-kind services and donations by the order.¹⁴⁴ Thus, even if a polygamous husband’s assets and income were to be included in benefit eligibility determinations, this may not necessarily fully reflect the family’s access to financial resources or in-kind support. Government investigation of similar arrangements present in the Hutterite¹⁴⁵ King Colony

139. THE PRIMER, *supra* note 117, at 24.

140. *Id.* at 32.

141. *Fundamentalist Church of Jesus Christ of Latter-day Saints v. Wisan*, 773 F. Supp. 2d 1217, 1230 (D. Utah 2011), *vacated and remanded*, 698 F.3d 1295 (10th Cir. 2012) (quoting the FLDS United Effort Plan trust document as requiring participants to “consecrate their lives, times, talents and resources to the building and establishment of the Kingdom of God on Earth under the direction of the President of the Church and his appointed officers.”).

142. *Wisan*, 773 F. Supp. 2d at 1222 (describing the FLDS United Effort Plan Trust as owning “virtually all” the property in the twin FLDS communities of Hildale, Utah and Colorado, Arizona, “comprising approximately 700 houses, and various farms, dairies, and other businesses and operations . . . [with] a value of \$100,000,000.00.”); BENNION, POLYGAMY IN PRIMETIME *supra* note 91, at 90–92 (describing the AUP’s “United Order” as “control[ling] and redistribute[ing] property and businesses in the form of stewardships[.]” which are given to community men and women according to their familial or other ties to the leaders of the AUB); *Id.* at 63–64 (describing the assets held by the Kingston’s David County Cooperative Society); *Id.* at 98–99 (describing the houses in FLDS Colorado City and AUB Pinesdale as “communally owned”); Joe Pavlish, *Polygamy in Montana*, MONTANA KAIMIN (Apr. 1, 2011), http://www.montanakaimin.com/features/article_63931470-4478-5240-9eb7-07faf7cc55f4.html (describing the AUB as owning the land in Pinesdale and allowing church members to build on it).

143. *Wisan*, 773 F. Supp. 2d at 1232 (describing 5,000 FLDS members as having “resided in homes belonging to the Trust, [and] worked in fields and factories and dairies belonging to the Trust, and [having] had many of their personal wants and needs involving food and shelter provided by the Trust.”).

144. D. Michael Quinn, *Plural Marriage and Mormon Fundamentalism*, in *FUNDAMENTALISMS AND SOCIETY: RECLAIMING THE FAMILY, THE SCIENCES, AND EDUCATION* 248–50, (Martin E. Marty & R. Scott Appleby, eds. 1993) (describing the reduction of paychecks for employees of the Davis County Cooperative in exchange for goods and services, apartments and homes).

145. The Hutterites are an Anabaptist Christian sect dating back to the 16th century who live in communities of about fifteen families and believe in a “community of goods, in which all material goods are held in common.” *Our Beliefs*, HUTTERIAN BRETHREN, <http://www.hutterites.org/our-beliefs/> (last visited July 16, 2016).

Ranch in Montana, where for religious reasons all assets and “all earning are held communally and funding and necessities are distributed according to one’s needs,” led to the conclusion that personal income had to be augmented by their share in the communal assets,¹⁴⁶ thus making the individual colony members ineligible for Medicaid.¹⁴⁷

The use of government benefits programs by Fundamentalist Mormon sect members may therefore be seen as part of a community-wide fraud that conceals income from the government, directs this income to instead support religious activities and institutions, and replaces/supplements this income with government support for raising children. While there is more than a contingent connection between religious beliefs in polygamy and the united economic order for the Fundamentalist Mormon sects, it is not clear there is any such connection for polygamy in general. The non-trivial existence of perhaps fifteen thousand independent Mormon polygamists and an unknown number of non-Mormon polygamous families—as to whom there is no reason to believe that they recognize any obligation to transfer their assets to some kind of united economic order—suggests there is no necessary connection between polygamy and this kind of benefit fraud. Indeed, while the Hutterites are communal in this way, they are not polygamous.¹⁴⁸

This leaves two remaining possibilities for a benefit-related compelling state interest: either inadequate support is a structural feature of polygamy itself, or intentional paternal avoidance of such support is non-contingently associated with polygamy. Certainly, it seems self-evident that even a father who maximized his personal income and devoted it fully to his polygamous family might well not be able to even minimally meet their basic needs. Indeed, we might wonder how any large polygamous family, with at least four wives and twenty to forty children, could possibly survive financially without assistance from the government. Assuming this is the case with some proportion of polygamous families, the problem with the collection of benefits by such polygamous families is not that it is fraudulent. The state concern here is with the fact that polygamy is likely to involve an increased need for state support, even in the absence of asset-diversion, simply because of the reduced number of adults available to support the children of each wife. Here the problematic choice is simply the father’s decision, for religious reasons, to be polygamous and accumulate as many wives and children as possible without regard for his ability to support them. This would suggest that the state interest in criminalizing polygamy is to reduce the burden on state resources.

146. *Hofer v. Montana Dept. of Public Health and Human Services*, 124 P.3d 1098, 1100 (Mont. 2005) (while members had personal incomes of less than \$3,000 and personal resources of less than \$3,000, the Ranch itself was worth \$2.1 million).

147. *Id.* at 1106 (finding that the Ranch assets were held in an express trust for the colony members and were potentially available resources that might make members ineligible for Medicaid).

148. *Marriage*, HUTTERIAN BRETHREN, <http://www.hutterites.org/our-beliefs/marriage/> (last visited July 16, 2016).

This, however, cannot in itself be a *compelling* state interest. While conserving public funds is a legitimate state interest sufficient to establish a rational basis for legislative distinctions in the equal protection context,¹⁴⁹ when greater scrutiny is justified, fiscal conservation is understood to be a means of such discrimination rather than an independent purpose that might justify it: “appellants must do more than show that denying welfare benefits to new residents saves money. The savings of welfare costs cannot justify an otherwise invidious classification.”¹⁵⁰ Indeed, the Supreme Court has specifically concluded that “a concern for fiscal integrity is no[t] [a] . . . compelling justification.”¹⁵¹ Since a compelling state interest would be required to justify a burden on religious practice in the context of a mini-RFRA challenge to the criminalization of polygamy,¹⁵² it seems likely that a mere state purpose of saving money by deterring the practice of polygamy would not be sufficient. Indeed, the suggestion in *Hobby Lobby* that another less restrictive alternative might have been for the federal government to pick up the cost of such contraceptive coverage for employees of the religiously objecting employers¹⁵³ implies that avoiding costs to the government is not necessarily a compelling interest for imposing a religious burden, especially if the costs might be considered “minor” in relation to overall costs.¹⁵⁴ Thus, we might like to know the estimated cost of supporting religiously polygamous families through welfare, food stamps, Medicaid, Supplemental Security Income, and Social Security Disability Benefits compared to the overall national budget for these items. If this cost was “minor” relative to the whole, then from a RFRA perspective it might be insufficient to justify a burden on religion.

Another economic basis for criminalizing polygamy might be to avoid the economic inequity of having tax-paying monogamous families inevitably subsidize polygamous families. To the extent that modern-day benefit programs will necessarily end up helping polygamous families based on real or apparent need, this might be seen as inequitable if polygamists are not contributing to tax revenues in proportion to their numbers and income. Indeed, whether taxes are avoided by fraud, by asset and income-reduction strategies, or by a market income that is simply

149. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (“We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program.”).

150. *Id.* at 633 (holding that saving money was an impermissible state purpose for denying welfare benefits to indigents who had resided in the state for less than a year).

151. *Graham v. Richardson*, 403 U.S. 365, 375 (1971) (finding the exclusion of resident aliens from those qualified to receive state assistance was a denial of equal protection). *See also* *Mass. v. U.S. Dept. of Health*, 682 F.3d 1, 14 (1st Cir. 2012) (holding § 3 of the Defense of Marriage Act unconstitutional because, among other things, a claimed state purpose of saving money “undermin[ed] rather than bolster[ed] the distinction” between same and opposite-sex couples).

152. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791 n.9 (2014).

153. *Id.* at 2780–81 (“RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens’ religious beliefs.”).

154. *Id.* at 2781 (noting that there was no estimate of what this would cost the government, but that it seemed likely it would be “minor when compared with the overall cost of the ACA”).

insufficient for the needs of a very large family,¹⁵⁵ there is evidence that tax revenue from polygamous communities is minimal and not in proportion to the benefits collected.¹⁵⁶ Avoiding the use of tax revenue, however, by needy citizens who have not equally contributed to this revenue has not been found to be a compelling state interest.¹⁵⁷ Therefore, a state interest in limiting a disproportionate burden placed on state resources by polygamous families in comparison to their tax contributions would also not be likely to survive strict scrutiny.

This leaves the intentional diversion of available paternal resources away from family support as the remaining basis for criminalizing polygamy. Paternal failure to support their children—despite having the assets to do so—is surely not unique to polygamous families, but it is especially costly to the government when it is engaged in by polygamous families. Keeping in mind that it is not unheard of for the leaders of the fundamentalist sects to have almost seventy wives, the amount of money such a family can collect in government benefits can exceed \$1 million.¹⁵⁸ So, while such fraud is a concern with regard to all families receiving benefits, fraud involving a single, polygamous family is much more expensive to the state than fraud involving a single monogamous family. Thus, a non-contingent connection between polygamy and fraudulent avoidance of support by fathers might be proposed as a foundation for criminalization of polygamy. Evidence of this would need to come primarily from the independent Fundamentalist Mormon polygamous community, who do not practice asset diversion through consecration, and from the non-Mormon polygamous community.

There actually is some statistical evidence that, globally, polygamous fathers do not support their wives and children, but expect them to be self-supporting, and that paternal resources are instead directed toward the acquisition of more wives.¹⁵⁹ Whether this, together with the asset-diverting practices of the Fundamentalist Mormon polygamous sects, is enough to provide a foundation between polygamy and what could be a compelling state interest in preventing a large and avoidable shift in the burden of support for polygamous families from fathers to the state, is difficult to say. Certainly, the state has not made a serious attempt to either present such an argument or support it with available data.

155. BENNION, POLYGAMY IN PRIMETIME, *supra* note 91, at 219.

156. *Id.* (noting that FLDS communities of Hildale/Colorado City “pay very little tax (\$651 for each adult who files a tax return), have the highest average household count in the Intermountain West (8.5 people), and yet they get the most benefits (\$8 per each tax dollar).”).

157. *See* Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (“[L]imitation of welfare benefits to those regarded as contributing to the State is [not] a constitutionally permissible state objective.”).

158. BENNION, POLYGAMY IN PRIMETIME, *supra* note 91, at 243–45 (noting that the family of Kingston prophet John Ortell Kingston collected over a million dollars over ten years in food stamps, Medicaid, Supplemental Security and Social Security disability benefits, in addition to \$250,000 or more in welfare benefits).

159. *See infra* Part III.C, *Reference* data discussion.

3. *Summary*

Of all the potential compelling state interests mentioned by courts, the most viable appear to be avoiding abuse of women and children and avoiding large-scale benefit fraud made possible by the combination of united economic orders or other paternal diversion of assets and extraordinarily large families. Each of these purposes are probably compelling if a sufficient foundation or connection to polygamy can be shown. The problem is that while strong connections may be present for polygamy as practiced by some or all of the Fundamentalist Mormon sects, these connections are less clearly shown or even known to be present for the independent Mormon polygamists and non-Mormon American polygamists.¹⁶⁰ This may mean there is an insufficient foundation for criminalizing all polygamy to avoid these evils.

C. *The Reference Account of the Harms of Polygamy*

1. *The Evidentiary Basis of the Findings*

The *Reference* court's finding that polygamy is harmful to "women, children and to society"¹⁶¹ was largely grounded on the testimony of three expert witnesses: an evolutionary psychologist,¹⁶² whose testimony was based on "an extensive review of the academic literature on polygyny in the sciences and social sciences;"¹⁶³ an economist, who was an expert in the economic effects of polygyny,¹⁶⁴ and a political scientist,¹⁶⁵ who conducted a statistical analysis using a unique 172-country dataset with ten years of data about women and children and the countries themselves.¹⁶⁶ *Reference* found that there was a "striking" "convergence of the evidence"¹⁶⁷ at every possible level of analysis,¹⁶⁸ showing that polygyny is harmful and that "the harms of polygyny do not depend upon a particu-

160. David Kelly & Gary Cohn, *Blind Eye to Culture of Abuse*, L.A. TIMES (May 12, 2006) <http://www.latimes.com/news/la-na-sect12may12-story.html>.

161. *Reference* re: Sec. 293 of the Crim. Code of Can., 2011 BCSC 1588, para. 1331 (Can.).

162. *Id.* para. 495 (describing Dr. Joseph Henrich as an "Associate Professor in the Psychology and Economics Departments at the University of British Columbia," and noting that "[h]e also holds a prestigious Tier 1 Canada Research Chair in Culture, Cognition and Evolution," and "was qualified as an expert in psychology, particularly evolutionary psychology, in economics and in anthropology, as well as in the interdisciplinary field of culture, cognition and co-evolution.").

163. *Id.* para. 496.

164. Dr. Shoshana Grossbard, Professor of Economics at San Diego State University. *Id.* para. 588.

165. Dr. Rose McDermott, Professor of Political Science at Brown University. *Id.* para. 580 ("She also holds an M.A. in Experimental Social Psychology from Stanford University.").

166. *Id.* paras. 609–15 (describing the WomanStats Project Database and another database). See also Rose McDermott & Jonathan Cowden, *Polygyny and Violence Against Women*, 64 EMORY L.J. 1767 (2015).

167. *Reference*, 2011 BCSC 1588, para. 492.

168. *Id.* ("[F]rom high level predictions based on human evolutionary psychology, to the recurring harms identified in intra-cultural and cross-cultural studies, to the 'on the ground' evidence of polygyny in contemporary North America.").

lar regional, religious, or cultural context. They can be generalized, and they can be expected to occur wherever polygyny exists.”¹⁶⁹

2. *The Harms of Polygamy*

a. Harms to Individuals

Understanding the harms of polygamy begins with some simple arithmetic: “when some men are able to have multiple wives simultaneously, other men will be unable to find wives.”¹⁷⁰ This can be illustrated as follows:

Imagine a society of 40 adults, 20 males and 20 females . . . Suppose those 20 males vary from the unemployed high-school drop outs to CEOs, or billionaires . . . Let’s assume that the twelve men with the highest status marry 12 of the 20 women in monogamous marriages. Then, the top five men (25% of the population) all take a second wife, and the top two (10%) take a third wife. Finally, the top guy takes a fourth wife. This means that of all marriages, 58% are monogamous. Only men in the top 10% of status or wealth married more than two women. The most wives anyone has is four. The degree of polygynous marriage is not extreme in cross-cultural perspective . . . but it creates a pool of unmarried men equal to 40% of the male population.¹⁷¹

Statistics show that in the real world, “polygyny causes the proportion of young unmarried men [to unmarried women] to be high, up to a ratio of 150 men to 100 women.”¹⁷² The unmarried men are most likely to be low-status.¹⁷³

Another consequence of this arithmetic is greater competition among men for wives than is found in monogamy. This competition results in women getting married at younger and younger ages.¹⁷⁴ Early marriage has the effect of depressing the socioeconomic advancement of polygynous wives,¹⁷⁵ as they receive less education,¹⁷⁶ have lower literacy levels, and participate less in the labor market.¹⁷⁷ In addition, polygynous marriage is linked to a greater number of children born to each wife as compared to monogamous wives.¹⁷⁸ The combination of early marriage with increased pregnancies negatively impacts the health of polygynous wives, including an increased likelihood of dying in childbirth and a

169. *Id.* para. 624.

170. *Id.* para. 505.

171. *Id.* (omissions in original).

172. *Id.* para. 586.

173. *Id.* paras. 500, 505, 555.

174. *Id.* para. 779. *See also id.* para. 499 (women are more likely to “marry[] before age 18, or be[] ‘promised’ in marriage prior to age 18”).

175. *Id.* paras. 621, 784.

176. *Id.* paras. 622, 789.

177. *Id.* para. 533.

178. *Id.* para. 621.

shortened lifespan.¹⁷⁹ Polygyny further adds the stresses of “co-wife conflict,”¹⁸⁰ insufficient financial support,¹⁸¹ marital dissatisfaction and issues of self-esteem,¹⁸² and is associated with “higher rates of depressive disorders and other mental health issues.”¹⁸³

This competition also leads to increased control of women by men as women come to be perceived as valuable commodities:¹⁸⁴ “men (as fathers, husbands and brothers) . . . seek to exercise more control over the choices of women, increasing gender inequality and undermining female autonomy and rights. This is exacerbated by larger age disparities between husbands and wives.”¹⁸⁵ Some of the numerous effects of this control and commodification include higher fertility arising from a lack of reproductive autonomy,¹⁸⁶ less divorce and more domestic violence,¹⁸⁷ genital mutilation and sex trafficking,¹⁸⁸ and “discrimination under the law.”¹⁸⁹

Overall, children do not fare as well in polygynous families either: men’s ability to invest temporally, emotionally, and monetarily in their offspring is reduced as the number of wives and offspring increase.¹⁹⁰ Furthermore, the competition for wives motivates men to direct their resources towards the acquisition of more wives rather than to the support of existing wives and children.¹⁹¹ Harms to children found by the court include:

higher infant mortality[;] . . . more emotional, behavioural and physical problems, as well as lower educational achievement . . . [arising out of] higher levels of conflict, emotional stress and tension in polygynous families[;] . . . inability of fathers to give sufficient affection and disciplinary attention to all of their children[;] [and] . . . enhanced risk of psychological and physical abuse and neglect.¹⁹²

For young men and boys, “[t]he sex ratio imbalance inherent in polygyny means that young men are forced out of polygamous communities to sustain the ability of senior men to accumulate more wives. These young men and boys often receive limited education[,] . . . few life skills[,] and

179. *Id.* para. 782.

180. *Id.* paras. 584, 604.

181. *Id.* para. 782.

182. *Id.*

183. *Id.*; *see also id.* paras. 603, 607–08, 696, 699–700, 780.

184. *Id.* para. 532; *see also id.* para. 322 (describing how a previous policy allowing FLDS women to decide who they would marry led to thirteen-year old girls choosing the youngest suitors. This prevented church leaders from obtaining additional young wives, and led to a new policy of church-controlled marriages in the 1950’s, ensuring church leaders would get the wives they wanted).

185. *Id.* para. 779.

186. *Id.* paras. 621, 782.

187. *Id.* paras. 532–33, 584, 621.

188. *Id.* para. 621.

189. *Id.* para. 622.

190. *Id.* para. 783.

191. *Id.* para. 779.

192. *Id.* para. 783; *see also id.* para. 603.

little social support.”¹⁹³ The lower education levels associated with polygyny for men (and women, as above) means that when they do enter the labor force, their level of employment will be low as well.¹⁹⁴

b. Harms to Society

Reference was also able to identify ways in which polygamy negatively impacts society more broadly. For reasons mentioned above, polygynous societies will have greater levels of familial poverty.¹⁹⁵ When basic needs are not met, the human resources that societies need to grow are not available, and such lack of growth can result in the imposition of more authoritarian government to avoid the political instability arising from poverty and lack of opportunity.¹⁹⁶ In fact, economic modeling of the impact of imposing monogamy on highly polygynous states showed an increase in per capita GDP.¹⁹⁷ Further, “[s]tates with higher levels of polygyny display fewer political rights and civil liberties for both men and women than those with less polygyny.”¹⁹⁸

At the same time, the high cost of marriage in a society with such commodification of women pushes the many men who are unmarried due to their lack of resources and prospects “to take substantial risks so they can eventually participate in the mating and marriage market.”¹⁹⁹ This can take the form of increased antisocial behaviors such as violence and crime, which are in fact statistically more prevalent in polygamous societies.²⁰⁰ “States with higher levels of polygyny [also] spend more money per capita on defence [sic], particularly on arms expenditures,”²⁰¹ which in turn reduces resources available for “domestic infrastructure and projects geared toward health and education.”²⁰² Dr. Henrich speculated that polygamy may promote military aggression²⁰³ for a number of reasons, such as excluding outside men from the already competitive marriage market, expanding the marriage market by bringing women in from outside, or externalizing the antisocial behavior of unmarried men and reduce their numbers.²⁰⁴

A final harm of polygamy concerns the potential impact of a legitimated practice of polygamy on monogamous marriage. The *Reference* court found that monogamy provides benefits not provided by polygamy:

193. *Id.* para. 785.

194. *Id.* para. 586.

195. *Id.* para. 787.

196. *Id.*

197. *Id.* para. 535.

198. *Id.* para. 621.

199. *Id.* para. 505.

200. *Id.* paras. 499, 507–12, 587, 787.

201. *Id.* para. 621.

202. *Id.* para. 790.

203. *Id.* paras. 534, 536.

204. *Id.* para. 536.

[E]xclusive and enduring monogamous marriage is the best way to ensure paternal certainty and joint parental investment in children. It best ensures that men and women are treated with equal dignity and respect, and that husbands and wives (or same sex couples), and parents and children, provide each other with mutual support, protection and edification through their lifetimes.²⁰⁵

If the practice of polygamy were to increase because it was decriminalized, then there would be less monogamous marriage, and the benefits of monogamy would decrease at the same time that the harms of polygamy would increase.²⁰⁶

Relying, in part, on the experience of France, which saw its polygamous population swell during the forty-to-fifty-year period it allowed immigrants to continue the practice,²⁰⁷ the *Reference* court found that decriminalization would in fact increase polygamy at the expense of monogamy.²⁰⁸ First, it would increase immigration by polygamists to Canada.²⁰⁹ Second, it would free citizens with polygamous backgrounds, whether cultural or religious, to reinstate the practice.²¹⁰ Third, it would remove a brake on a natural propensity of humans “towards a polygynous mating system.”²¹¹ Finally, the population of people raised in polygamous families would grow at a more rapid rate than that of people raised in monogamous families, thus continually increasing the number of people who are more likely to choose polygamous marriage over monogamous marriage.²¹² Even assuming polygamy would never completely replace monogamy, a significant population of polygamous families would also produce the social impacts described above, which will in turn affect even those in monogamous families.²¹³

With this specification of the harms to society provided by the *Reference* Court, the next question is whether avoiding these harms is sufficiently important to be a compelling state interest. If providing cost-free access to contraception can be assumed to be a compelling state purpose in *Hobby Lobby*, it is difficult to imagine that avoiding the much greater lack of reproductive autonomy that comes from the polygamous commodification of women—along with all the other negative health, educa-

205. *Id.* para. 884.

206. *Id.* paras. 1290, 1317.

207. *Id.* paras. 562–64 (France changed its immigration policy after the polygamous population swelled to 200,000, revealing “co-wife competition, spousal neglect and coercion into marriage at a young age,” and overcrowding of living quarters due to inability to afford separate living quarters in an industrialized economy).

208. *Cf. Potter v. Murray City*, 585 F. Supp. 1126, 1139–40 (D. Utah 1984) (arguing that should polygamy be decriminalized, and perhaps even legally recognized, it would be difficult to contain).

209. *Reference re: Sec. 293 of the Crim. Code of Can.*, 2011 BCSC 1588, paras. 555, 557, 558, 560, 567–68, 570, 573, 1317.

210. *Id.* paras. 309, 559, 575 (including immigrant citizens and their children with pre-immigration familiarity or involvement in polygamy, as well as a sizeable portion of the mainstream LDS church, which continues to believe that polygamy is required by God when legal conditions make it possible).

211. *Id.* paras. 500–01, 555–56, 575, 1304.

212. *Id.* paras. 555, 621, 649.

213. *Id.* paras. 508–09.

tional, economic, and legal consequences for women and children described above—would not certainly be a compelling state interest. In addition, avoiding the broader social impacts of an increased practice of polygamy, which can include economic stagnation, more authoritarian government, and greater military aggression, should also qualify as compelling state interests.

D. Would Exempting Religious Polygamists from Criminal Penalties Produce the Reference Harms?

Once compelling state interests have been identified, *O Centro* requires a showing that it is necessary to burden the religious practice in order to serve the compelling state interest.²¹⁴ This is easier to do when the law has no exemptions at all.²¹⁵ The presence of such exemptions was fatal to establishing a compelling state interest in both *O Centro*²¹⁶ and *Hobby Lobby*.²¹⁷

1. Are There Existing Exemptions to the Criminalization of Polygamy?

In the context of a RFRA-type challenge to criminal polygamy laws, the government could easily show that these laws do not have any statutory exceptions. It is, however, a peculiar feature of criminal polygamy laws that they are rarely enforced.²¹⁸ In many states, this is probably because polygamous marriages are not licensed and therefore such marriages rarely come to the attention of law enforcement. Yet, in states with large Fundamentalist Mormon populations that live in relatively isolated, homogenous communities, law enforcement is well aware that certain communities practice polygamy.²¹⁹ Current lack of enforcement in these states is more a matter of prosecutorial discretion.²²⁰ For example, Utah law-enforcement officials now have a policy that they do not prosecute religious polygamists, unless there is a marriage involving a minor or there is evidence of an associated crime such as domestic/child abuse or

214. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428 (2005).

215. *See, e.g., United States v. Lee*, 455 U.S. 252, 260 (1982) (finding, under pre-*Smith* First Amendment strict scrutiny, that “the tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”).

216. *O Centro*, 546 U.S. at 433 (noting the waiver authority for the Attorney General within the Controlled Substances Act, plus codification and expansion of a long-standing exemption for peyote use to all “members of every recognized Indian Tribe,” rebutted government arguments that the effectiveness of the Act to protect public health and safety would be undercut if not uniformly applied).

217. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764 (2014) (noting that since more than one-third of 149 million employees with employer-sponsored health insurance were in exempted grandfathered plans and that an additional thirty-four million employees worked for small employers not covered by the ACA, the government could not claim that only uniform application of the contraceptive mandate would protect women’s health and provide gender equity).

218. *See, e.g., Brown v. Buhman*, 947 F. Supp. 2d 1170, 1178 (D. Utah 2013), *vacated*, *Brown v. Buhman*, 2016 WL 2848510 (10th Cir. May 13, 2016).

219. *Id.* at 1178.

220. *Id.* at 1179.

statutory rape.²²¹ Could this lack of enforcement be viewed as the equivalent of an exemption that reveals a lack of a compelling state purpose for criminalizing religious polygamists?

In *Brown v. Buhman*,²²² a recent federal district court opinion holding Utah's criminal bigamy law unconstitutional as applied to religious polygamists (since vacated for mootness),²²³ the court viewed Utah's selective prosecution as one of several indications that the law was not generally applicable, thus justifying Free Exercise strict scrutiny under the Court's *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*²²⁴ line of precedents.²²⁵ Once strict scrutiny was justified, *Brown* found that the selective prosecution "alone supports the 'conclusion that a blanket criminal prohibition on religious polygamous unions is not necessary to further the state's interests, and suggests that a more narrowly tailored law would be just as effective.'"²²⁶ I would, however, argue that selective prosecution of religious polygamists actually reflects prosecutorial issues unique to polygamy, as well as the vague or seemingly overgeneralized justifications previously provided to explain the criminalization of polygamy.

Prosecutions of polygamists often require the state to take custody of the children.²²⁷ For religious reasons,²²⁸ each polygamous wife will have as many children as she can. Prosecuting even one polygamous father, and possibly his wives as well, means leaving many children without one or more parents. Enforcing the law against a polygamous community just multiplies this consequence. Indeed, current non-enforcement policies were preceded by a period in which state authorities intensively investigated polygamists and put them in prison, with these problematic consequences. A 1953 attempt by the State of Arizona to enforce its criminal polygamy law against the polygamous town of Short Creek required Arizona to take custody of 236 children.²²⁹ The 2008 action against the Yearning for Zion Ranch in Texas resulted in 468 children being taken in to state custody.²³⁰ Aside from being very expensive for the state,²³¹ there

221. *Id.* at 1179–80.

222. *See id.* at 1217.

223. *Brown v. Buhman*, 2016 WL 2848510, at*12–19.

224. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (holding city ordinances effectively prohibiting ritual slaughter of animals for religious purposes, but exempting other kinds of animal killing and slaughter, were not operationally neutral or generally applicable, and would not survive strict scrutiny).

225. *But see* Strassberg, *supra* note 5, at 1852–66 (arguing that *Brown's* determination that Utah's criminal bigamy law targets religious polygamy is incorrect and that strict scrutiny of this or any other criminal polygamy statute is not justified as a matter of federal free exercise law).

226. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1217 (D. Utah 2013), *vacated*, *Brown v. Buhman*, 2016 WL 2848510 (10th Cir. May 13, 2016) (quoting *State v. Holm*, 137 P.3d 726, 775 (Utah 2006) (Durham, C.J., dissenting in part)).

227. Strassberg, *supra* note 5, at 1866.

228. *See* Reference re: Sec. 293 of the Crim. Code of Can., 2011 BCSC 1588, para. 273.

229. BENNION, POLYGAMY IN PRIMETIME, *supra* note 91, at 27.

230. *In re* Texas Dep't of Family and Protective Servs., 255 S.W.3d 613, 613–15 (Tex. 2008) (holding that a culture of polygamy was an insufficient basis for a grant of emergency custody of all 468 children living at the ranch).

is considerable potential for psychological harm to the children. In addition, public perception of such prosecutions is largely negative as the public reacts to media images of children being torn from the arms of their mothers.²³² In light of the fact that neither the public nor the prosecutors may be clear about the real reasons for criminalizing polygamy, all this suffering may well seem to be unjustified. Limiting prosecution of polygamists to cases involving abuse of women or children—such as statutory rape of underage brides, coerced marriages, or domestic violence—as Utah has done,²³³ puts the prosecution on the side of those who are otherwise seen as victims of the polygamy, and is much more easily understood by the public.

Prosecutors may also be concerned about the legality of pure polygamy prosecutions, either under mini-RFRAs or under the sodomy and same-sex marriage precedents that have culminated with *Lawrence v. Texas*²³⁴ and *Obergefell v. Hodges*,²³⁵ or simply the public perception that these prosecutions may no longer be legally legitimate. Justice Scalia first made the point that legal normalization of homosexuality would make continued prosecution of polygamy potentially problematic in *Romer v. Evans*,²³⁶ and this point was made again by Chief Justice Roberts in his *Obergefell* dissent.²³⁷ Prosecutors are not immune to these public perceptions, particularly when they must be re-elected to their positions.²³⁸ In the face of these legal developments and the absence of a clear articulation of the harms of polygamy, it is understandable why both prosecutors and the public might be wary of such prosecutions. The exercise of prosecutorial discretion, however, which exists for all crimes, does not have the same impact on compelling state interest analysis as would a specified legislative exemption.

231. Mark Shurtleff, *Religion and Non-State Governance: Warren Jeffs and the FLDS*, 2010 UTAH L.REV. 115, 120–21 (quoting the Utah Attorney General as stating, “I don’t have the resources to put you all in prison and take away all your kids, thousands and thousands of children. Texas couldn’t handle five hundred; we couldn’t handle tens of thousands.”).

232. JEFFS, *supra* note 92, at 207 (describing how “images of chastely dressed women and weeping toddlers” arising out of the raids on Short Creek and later the YFZ Ranch created negative publicity).

233. Shurtleff, *supra* note 231, at 121 (“But you cannot commit crimes against women and children, or we will prosecute you.”).

234. *Lawrence v. Texas*, 539 U.S. 558, 575–78 (2003) (holding criminalization of sodomy unconstitutional).

235. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (holding prohibitions against and non-recognition of same-sex marriage unconstitutional).

236. 517 U.S. 620, 648–52 (1996) (Scalia, J., dissenting).

237. *Obergefell*, 135 S. Ct. at 2621–22 (Roberts, C.J., dissenting).

238. Debra Weyermann, *FLDS continues abusive polygamist practices in Utah and Arizona*, HIGH COUNTRY NEWS (June 18, 2012), https://www.hcn.org/issues/44.10/flds-continues-abusive-polygamist-practices-in-utah-and-arizona?b_start:int=1#body (quoting David Leavitt, who prosecuted Green for bigamy and child rape and lost re-election bid shortly thereafter, as saying that this prosecution “cost me my job”).

2. *Would Exempting Religious Polygamists Still Cause Harm?*

a. What is the Standard for Finding Harm?

The fact that no exceptions have been made does not mean no exceptions could be made without sacrificing the compelling purpose of such statutes. The necessity of uniformity can only be proven by “scrutiniz[ing] the asserted harm of granting specific exemptions to [these] particular religious claimants.”²³⁹ There are two potential ways for the criminalization of religious polygamy to survive this particularized scrutiny: first, show that the practice of polygamy does produce the identified harms within the population of those who have a religious belief in such polygamy, and second, show that allowing religious polygamy will result in these harms being suffered by the non-polygamous public.

b. Harm to the Religiously Polygamous

Our consideration of whether the religiously polygamous would suffer the *Reference* harms if allowed to practice polygamy is complicated by the reality that not every individual in every polygamous family will suffer these harms. The *Reference* harms to individuals were shown by statistical analyses of conglomerated polygamous populations.²⁴⁰ A statistical showing that polygamous wives marry at a younger age than monogamous wives will not mean that all polygamous wives marry at a younger age; some individuals will still marry at a more mature age, but there will be less of them. For every *Reference* harm, there will be anecdotal evidence that supports it and anecdotal evidence that does not. Indeed, the *Reference* Court was presented with academic studies of Fundamentalist Mormon polygamists giving accounts of highly functional families well supported by the husband, with apparently healthy psychological adjustment of children, educational success by both wives and children, and female autonomy in and outside the home.²⁴¹ Conversely, it was presented with academic studies and clinical treatment accounts of abuse, curtailed and limited education, difficulty adjusting to mainstream society, health and mental health problems, and extreme control of all facets of life.²⁴² Both kinds of outcomes have also been backed by insider accounts.²⁴³

239. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 431, 437–38 (2006) (finding that the Government did not meet its burden of showing that the use of *hoaca* by church members was either dangerous to the health of those who used it under Church supervision or posed a threat of diversion of the substance to the general public).

240. *Reference re: Sec. 293 of the Crim. Code of Can.*, 2011 BCSC 1588, paras. 611–13 (Can.).

241. *Id.* paras. 749–51.

242. *Id.* paras. 654–64 (recounting the testimony of sociologists Stephen Kent and Timothy Dunfield, and clinical psychologist Lawrence Beall, who treated thirty patients who had left polygamous communities).

243. *E.g. id.* paras. 652, 683, 690–91 (recounting FLDS, AUB, and Kingston witness testimony that emphasized the positive aspects of polygamous family life, which for children included “camaraderie and bond, a richness of people, an ‘unloneliness,’” parties, participation in sports and no experi-

We do not really know how the Supreme Court would deal with a complex and non-uniform experience of harm within the potentially exempted population. This was not the case in *O Centro*, because none of the individual members of the O Centro church were found to need this government protection. This issue could have arisen in *Hobby Lobby*, if the Court had not assumed the presence of a compelling state interest, because there would have been one group whose health would not have been advanced by this mandate and another group whose health would have been advanced.²⁴⁴ The individual owners of these corporations²⁴⁵ bore the religious burden of the contraceptive mandate and would not have been benefited by access to these believed abortifacient contraceptive methods, as their personal religious beliefs would have prohibited such use.²⁴⁶ Nevertheless, their women employees and the female dependents of all their employees, some of whom would not have shared the owners' religious beliefs, would have benefited from the cost-free access to such contraceptive methods. A similar issue might have arisen in *Wisconsin v. Yoder*,²⁴⁷ but was avoided because the record did not show any such conflict between Amish parents and their children,²⁴⁸ and the children were not a party to the litigation. As a result, the Court did not have to consider the "possible competing interests of parents, children, and the State" that would arise if there were Amish children who wished to attend high school and who were prevented from doing so by their parents.²⁴⁹

It is the case that many criminalized behaviors can be indulged in by some individuals without creating the harm sought to be avoided, such as use of marijuana or driving without a license. Statistically significant evidence of harm is ordinarily sufficient to justify the criminalization of these behaviors because most criminal statutes are not subject to strict scrutiny. Yet, does an ordinary showing of a statistically significant greater risk of harm to those living in polygamous families suffice to create a

ence of abuse, and for wives included "[r]ich relationships among sister wives[, g]reater autonomy . . . [e]xpanded support networks," as well as masters and professional degrees); *id.* paras. 649, 667–74 (recounting witness testimony and journalist accounts that emphasized the negative aspects of polygamous family life, including lack of parental attention from a father with nineteen wives and seventy-five children, arranged marriage of younger women to much older men, co-wife conflict and abuse of other wives' children, sexual abuse within the family, depression and nervous breakdowns of wives, under-education and expulsion of excess boys from their families and communities, training children to be obedient and subservient, training girls to believe their life's purpose is to have children, cross-border (US and Canada) trafficking of children for marriage and discipline, devaluation of education, lack of reproductive control, inequality of women, separation of boys and girls, and dominance of favorite wives).

244. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

245. *Id.* at 2769 (equating the corporation with the individual owners).

246. *Id.* at 2775.

247. 406 U.S. 205, 218, 231 (1972) (finding the requirement of public education through age sixteen for Amish adolescents severely burdened the free exercise of both the "Amish community" and individual Amish parents and children, while failing to advance the self-sufficiency and preparation for citizenship of Amish children).

248. *Id.* at 231–32, n.21.

249. *Id.* at 231.

foundation for a compelling state interest in avoiding this harm, or does strict scrutiny require a higher level of statistical significance showing an even greater risk of harm from polygamy? Cases like *Lawrence* or *Obergefell*, where either the compelling state interest or the connection between the prohibited behavior and the claimed harm sought to be avoided essentially ‘evaporated’ under scrutiny, cannot provide any guidance here. Prior precedent involving strict scrutiny simply does not make it clear how large the risk of harm must be to the class seeking a religious exemption to show that a compelling state interest exists.

A second potential obstacle to successfully showing that harm to religious polygamists would result from a religious exemption arises from the nature of the data underlying the 172-country statistical analysis relied upon by *Reference*. It used data from countries where polygamy is legal or tolerated and compared it to data from countries (such as Canada and the United States) where only monogamy is legal.²⁵⁰ Data specifically showing outcomes for the entire religiously polygamous population of various American states were not available.²⁵¹ Nor can we imagine such data will become available, primarily because the criminalization of polygamy makes it difficult to identify, contact, and get cooperation from such families. Indeed, scholars cannot even determine clearly how many Fundamentalist Mormons are living in polygamous families in the United States.²⁵² *Reference* considered this lacuna in the statistical data, but ultimately decided that it was compensated for in a number of ways. First, the analysis had reasonably controlled for the lack of Canadian evidence re Canadian polygamists by controlling for Gross Domestic Product.²⁵³ In addition, there was specific statistical evidence from the Canadian FLDS polygamous community of Bountiful showing higher than expected numbers of teen births,²⁵⁴ a greater age difference between parents,²⁵⁵ significant teen births to women who had been born in American FLDS communities,²⁵⁶ and lower educational outcomes for secondary and post-secondary enrollment. Finally, the court was most convinced by the “congruity . . . in the dangers of polygamy found in the African and Middle Eastern based empirical studies (many undertaken by the prolific Dr. Al-Krenawi), those predicted by Dr. McDermott’s [172 country statisti-

250. *Reference* re: Sec. 293 of the Crim. Code of Can., 2011 BCSC 1588, paras. 489-91 (Can.).

251. *Id.* para. 641 (noting that the statistical evidence regarding polygamy outcomes came from “cultures far removed from North America”).

252. D. Michael Quinn, *Plural Marriage and Mormon Fundamentalism*, *DIALOGUE: A JOURNAL OF MORMON THOUGHT* 1, 5-7 (1998) (noting claims of 30,000, 50,000, 60,000 Fundamentalist Mormon polygamists, but asserting that there are only 21,000 Fundamentalist Mormons, many of whom are living in monogamy).

253. *Reference*, 2011 BCSC 1588, paras. 618, 642 (finding that the statistically significant correlations between polygyny and negative outcomes that existed after controlling for GDP provided meaningful information about polygyny itself).

254. *Id.* paras. 711-23.

255. *Id.* para. 722.

256. *Id.* paras. 724-25.

cal] work, and those found ‘on the ground’ and anecdotally in North America.”²⁵⁷

An additional concern likely to be raised at this point in the analysis is that it may be the criminalization of polygamy, rather than polygamy itself, that is responsible for the negative outcomes that have been anecdotally reported as arising from Fundamentalist Mormon polygamy. Criminalization has required polygamous families to hide their status through extreme secrecy.²⁵⁸ Where polygamous families have lived as a unit among non-fundamentalist Mormons, it is necessary for everyone, including the children, to lie about the shape of their family to avoid the possible arrest of both the wives and the husband.²⁵⁹ This results in psychological trauma for the children, a constant sense of alienation from the world around them, and distrust of the government.²⁶⁰ Even a trip to the doctor or a hospital must be carefully negotiated and weighed against the possible consequences of discovery.²⁶¹ This is also a particularly effective environment for abusers to operate.²⁶² Polygamous families have also responded to the threat of arrest by putting sufficient geographic distance between the wives so that neighbors will not know that the husband has another family elsewhere.²⁶³ This isolates the wives from their sister-wives, who create crucial support networks for each other that make their otherwise largely single parenting more like parenting by a “village.”²⁶⁴ Establishing numerous, separate households is also more costly and leaves fewer resources for food, clothes, healthcare, and education.²⁶⁵ Children and wives will also have less regular time with their father and husband, as he will be present only on periodic visits.²⁶⁶

The third response of polygamous families to the threat of arrest has been to create or move to isolated polygamous communities where family members can be open about their family structure.²⁶⁷ Political and economic power in these communities is easily held by church leaders, and police power and educational institutions are structured to accommodate polygamy in general and the power of church leaders in particular. Isolation from secular governmental authorities allows abusers to

257. *Id.* para. 643.

258. SOLOMON, *supra* note 51, at 326.

259. *Id.* at 12, 177, 195.

260. Reference re: Sec. 293 of the Crim. Code of Can., 2011 BCSC 1588, paras. 667(f), 690, 707 (Can.) (testimony of an American polygamous wife, children raised in polygamous households, and a witness from the FLDS community in Bountiful, Canada).

261. *Id.* para. 707.

262. SOLOMON, *supra* note 51, at 13 (“The secrecy imposed by an illegal lifestyle further undermines individual development, increasing the likelihood of abuse and exploitation.”).

263. *Id.* at 177.

264. *See id.* at 156–57 (describing how her father’s wives gathered together to share work, ideas and strength even when they had their own apartments); *Reference*, 2011 BCSC 1588, para. 704 (describing the support a wife working outside the home got from her sister wives and the ability they all had to specialize in areas of housework and childcare that they enjoyed and excelled at).

265. SOLOMON, *supra* note 51, at 157, 205–07, 210–11, 333.

266. *Id.* at 178.

267. *Reference*, 2011 BCSC 1588, para. 310.

operate unchecked, making it difficult for those who are abused or oppressed to escape.²⁶⁸ Indeed, considerable evidence on the negative impact of criminalization on Fundamentalist Mormon polygamy was presented to the *Reference* Court by those supporting the challenge to the law.²⁶⁹ Again, it was the congruity between the statistical evidence on the outcomes of polygamy coming from countries where polygamy was not criminalized, and the statistical and anecdotal evidence coming from Canada and the United States that convinced the *Reference* Court that polygamy itself is responsible for the most problematic negative outcomes.

When Justice Roberts described RFRA scrutiny in *Hobby Lobby* as evaluating “the marginal interest in enforcing the [law]”²⁷⁰ against religious practitioners, he did not have an opportunity to explain what amount of harm avoided would create such an interest. Nor is it clear what impact a conflict both within and between different kinds of evidence of harm— anecdotal, clinical, anthropological, statistical—should have on a possible conclusion that polygamy in the United States is responsible for harms to those who practice it. Should either of these issues be viewed as undermining claims for a compelling state interest in protecting practicing individuals from these harms, the weight of the scrutiny would shift to the necessity of protecting the non-polygamous public from the harms of polygamy.

c. Harms to the Non-Polygamous Public

Even if the evidence showing that polygamy harms those who practice it is not sufficient to meet the strict scrutiny of compelling state purposes required by RFRA, this scrutiny can be satisfied if it is shown that exempting religious polygamists from criminal polygamy laws will impose the harms of polygamy on the American monogamous public and society in general.²⁷¹ The *Reference* Court found that decriminalization of polygamy would expand the practice of polygamy in Canada “non-trivially,”²⁷² thereby increasing the individual and social harms of polygamy and decreasing the individual and social benefits of monogamy.²⁷³ Would an exemption for religious polygamists in the United States have the same effect?

268. *Id.* para. 598 (recounting the testimony of Professor Angela Campbell that “criminalized polygamy gives rise to insularity, and that women in such communities may be more vulnerable to abuse.”).

269. *Id.*

270. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014).

271. *Reference*, 2011 BCSC 1588, paras. 881–83.

272. *Id.* para. 576.

273. *Id.* para. 885.

d. Polygamy Will Increase at the Expense of Monogamy

An initially small polygamous population will naturally increase fairly rapidly. Indeed, in the 125 years since the mainstream LDS church stopped polygamy, a small group of holdout fundamentalists has produced an American population of somewhere between 21,000–50,000 individuals, who view polygamy as an on-going, divine mandate for the worthy, with some part of this population actually practicing polygamy.²⁷⁴ While conversion has contributed to this growth, seventy-five percent of the population is estimated to have been born into fundamentalism.²⁷⁵ Given this growth occurred while the practice was criminalized, it certainly seems likely that providing a religious exemption from criminal prosecution would accelerate the increase of the Fundamentalist Mormon population, and within that the polygamous population. Fundamentalist Mormon polygamists who have emigrated from the United States due to the criminalization²⁷⁶ would likely return.

A much greater expansion of polygamy could come from mainstream LDS church members entering into polygamy. Today, there are over six million American LDS members.²⁷⁷ Worldwide, as of 2014, there were over fifteen million LDS members.²⁷⁸ The LDS church continues to view polygamy as a divinely mandated practice for the early years of the church, which was subsequently suspended.²⁷⁹ Decriminalization could be interpreted as a sign of a new divine mandate for polygamy to return, just as 19th century Congressional efforts to stop polygamy eventually produced a revelation to the Prophet that the requirement of polygamy was over.²⁸⁰ While eighty-six percent of American LDS members in 2011 said polygamy is morally wrong, thirteen percent said it was either not a moral issue or morally acceptable.²⁸¹ That is close to one million LDS members who might be open to polygamy if a religious practice were exempted from criminalization.²⁸²

274. Quinn, *supra* note 252, at 5.

275. *Id.* at 23.

276. BENNION, MODERN POLYGAMY, *supra* note 98, at 104–07 (describing the Canadian FLDS polygamists in Bountiful and Creston, Canada and the LeBaron sect which moved to Mexico in the 1950's).

277. *Facts and Statistics*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <http://www.mormonnewsroom.org/facts-and-statistics/country/united-states> (last visited July 16, 2016) (6,466,267 American church members).

278. *Id.* (15,372,337 church members worldwide).

279. *Plural Marriage and Families in Early Utah*, *supra* note 48.

280. *Id.*

281. *Mormons in America—Certain in Their Beliefs, Uncertain of Their Place in Society*, PEW RES. CTR. (Jan. 12, 2012), <http://www.pewforum.org/2012/01/12/mormons-in-america-executive-summary/> (reporting on a survey of over 1000 Mormons in 2011).

282. Zoe Mintz, *Utah Polygamy Ban Reversal 'Bad News' for LDS Church: Mormon Scholar*, INT'L BUS. TIMES (Aug. 29, 2014, 4:17 PM), <http://www.ibtimes.com/utah-polygamy-ban-reversal-bad-news-lds-church-mormon-scholar-1673848> (suggesting that the decriminalization of polygamy in Utah resulting from *Brown* will pressure the LDS church to accept polygamy or encourage LDS members to affiliate with polygamous Mormon sects).

Mormons are not the only religion with a claim to polygamy, however. Although the *Reference* Court found that, under the Qur'an, polygamy was "neither obligatory nor promises any sort of spiritual reward in the afterlife,"²⁸³ it concluded that since polygamous Muslims "may justify their acts by reference to the Qur'an and subsequent legal doctrines,"²⁸⁴ the criminalization of polygamy was "a breach of their religious liberty."²⁸⁵ The *Reference* Court also concluded that the same was true for Wiccans, based on testimony that for Wiccans, "all forms of consensual sexual and emotional ties that adults freely enter into are sacred, or at a minimum, are potentially routes to an encounter with the sacred."²⁸⁶ The *Reference* Court did not consider the potential religious liberty claims of such Christian Fundamentalists, as Preacher Don Milton, the owner of various Christian polygamy websites,²⁸⁷ who describes polygamy as a "spiritual necessity."²⁸⁸ Milton finds permission for polygamy in the Bible at Isaiah 4:1KJV and views polygamous marriage as the divinely ordained way for men to satisfy their "God given desires."²⁸⁹ Undoubtedly, more possible religious bases for polygamy currently exist or could come to exist in the future. These non-Mormon claims for a religious exemption to practice polygamy would also almost certainly be recognized as a protected "exercise of religion"²⁹⁰ under the broadened definition enacted by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").²⁹¹ Under the modifications made by RLUIPA, RFRA does not require a practice be "compelled by, or central to, a system of religious belief."²⁹² Thus, so long as some religious underpinning can be provided for polygamy, RFRA will provide maximally "broad protection."²⁹³ Thus, a religious exemption for polygamy could potentially be claimed by 2.7 million American Muslims,²⁹⁴ a number that is expected to more than double in the next forty years,²⁹⁵ and an unknown number of

283. Reference re: Sec. 293 of the Crim. Code of Can., 2011 BCSC 1588, para. 249 (Can.).

284. *Id.* para. 1092(b). This is a reference to Qur'an 4:3: "If you fear that you will not be just to the orphans, then marry women of your choosing, either a second, third, or fourth." *Id.* para. 242. "This passage has been interpreted as providing men with a license to marry up to four wives as long as they treat those wives justly." *Id.* para. 243.

285. *Id.* para. 1091.

286. *Id.* para. 1092(c) (quoting the testimony of a Wiccan expert).

287. CHRISTIAN POLYGAMY, <http://christianpolygamy.com> (last visited July 16, 2016).

288. *Id.*

289. *Id.*

290. 42 U.S.C. §2000bb-1(a) (2012).

291. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc *et seq.* (2012)).

292. *Id.* at § 8(7)(A).

293. *Id.* at § 5(g).

294. *Religious Composition by Country, 2010–2050*, PEW RES. CTR. (Apr. 2, 2015), <http://www.pewforum.org/2015/04/02/religious-projection-table>; see also Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR (May 29, 2008, 11:39 AM), <http://www.npr.org/templates/story/story.php?storyId=90857818> (noting that academic estimates for the number of Muslims living in polygamous families in the U.S. ranged from 50,000 to 100,000).

295. *Id.* (projecting that Muslims will grow from .9% of the population in 2010 to 2.1% in 2050).

American Wiccans,²⁹⁶ Christians, Jews, and members of other current or future religious groups.

The challenge to the Canadian criminalization of polygamy, if successful, would have decriminalized polygamy not just for religious adherents to the practice, but for all Canadians.²⁹⁷ The *Reference* Court considered whether the general public, consisting of those who currently have no religious or cultural inclination toward polygamy, would be drawn to polygamy rather than monogamy if criminal sanctions were removed from the practice, thus further expanding the practice in Canada. Noting that evolutionary biology suggests human beings have a natural tendency toward polygyny,²⁹⁸ it concluded that decriminalizing polygamy would also result in the conversion of some of the existing monogamous public.²⁹⁹

The RFRA/mini-RFRA challenge considered here would not lead to total decriminalization of polygamy, but would require only a religious exemption for polygamy. Given the ease by which religious bases for polygamy can be identified, from views of sex as sacred to the polygamy found in the Bible, it seems likely that the natural propensity toward polygamy will push additional individuals to find a way to take advantage of the religious exemption. As the district court judge in *Potter* noted in 1984:

[i]t would be the height of naivete to suppose that the lawful practice of polygamy thus could be limited to those of the plaintiff's faith, leaving aside the problem of the false assertion of religious motivation for physical gratification. The gate would be open by the developing trend of decision to everyone who might desire more than one wife at a time on the basis of his own particular religious belief.³⁰⁰

A similar expansion³⁰¹ of what may have once been a discreet religious practice to the mainstream public can be seen in the way a religious exemption meant to allow Christian Scientists³⁰² to avoid mandatory vac-

296. *Estimates of the Number of Wiccans in the U.S.*, RELIGIUSTOLERANCE.ORG, http://www.religioustolerance.org/wic_nbr2.htm (last updated Apr. 4, 2008) (gathering estimates from 1972 through 2008 which range enormously from tens of thousands to several million adherents).

297. Reference re: Sec. 293 of the Crim. Code of Can., 2011 BCSC 1588, para. 133 (Can.) (noting that challenges were made based upon “freedom of religion, expression, association, and equality as protected by the *Charter* . . . [and] the principles of fundamental justice.”).

298. *Id.* paras. 555, 575.

299. *Id.* paras. 1290, 1333, 1336.

300. *Potter v. Murray City*, 585 F. Supp. 1126, 1139 (D. Utah 1984), *modified and aff'd*, *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985).

301. Josh Levs, *The Unvaccinated, by the Numbers*, CNN (Feb. 4, 2015, 8:05 PM), <http://www.cnn.com/2015/02/03/health/the-unvaccinated> (showing that in states such as Colorado, where philosophical as well as religious exemptions are allowed, eighty-two percent of children were vaccinated for measles, compared to 99.7% in Mississippi, where neither religious nor philosophical exemptions are available).

302. Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of Thy Lord in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1556 (2014) (noting that religious exemptions were established in the 1960s for Christian Scientists).

cinations³⁰³ led to exemptions for parents with “personal” objections in some states³⁰⁴ and easily claimed religious beliefs in others.³⁰⁵ It may also be the case that non-religious, morally based claims to polygamy would have to be given the same exemption under Equal Protection doctrine.³⁰⁶

The next question is how many American men and women might be interested in polygamy. Men’s potential interest in polygamy can be gauged in part by their current rates of divorce and remarriage or cohabitation,³⁰⁷ adultery,³⁰⁸ cheating in unmarried relationships,³⁰⁹ unwillingness to commit to long-term relationships,³¹⁰ and unmarried fathering of children with multiple women.³¹¹ This data suggests that availability of polygamy might well attract a fair amount of interest from monogamously raised men. On the other hand, one might think that monogamously raised women would be strongly opposed to polygamy. Because, however, polygamy has the possibility of ensuring women a high-status mate, whether the status is based on achievements, talents, wealth, physical attractiveness, or any other features important to women, women may be

303. Aleksandra Sandstrom, *Nearly All States Allow Religious Exemptions for Vaccinations*, PEW RES. CTR. (July 16, 2015), <http://www.pewresearch.org/fact-tank/2015/07/16/nearly-all-states-allow-religious-exemptions-for-vaccinations/> (stating forty-six states have religious exemptions for vaccinations, seventeen of those also allow an exemption for “personal reasons”).

304. *Id.*; see also Reiss, *supra* note 302, at 1567–68 (describing how limits on the exemption to members of an organized faith were mostly struck down as a violation of equal protection and the establishment clause); *id.* at 1569–70 (describing how having state administrators decide what was and was not a sincere religious belief also became unworkable).

305. Sandstrom, *supra* note 303 (noting that state requirements range from “a notarized affidavit stating that a sincere belief in “a Supreme Being” is the reason for the exemption request,” to no requirement “to provide detailed reasons for claiming exemptions”). See also *Vaccine Laws*, NAT’L VACCINE INFO. CTR., <http://www.nvic.org/vaccine-laws.aspx> (last visited July 16, 2016) (describing, from an anti-vaccine perspective, what may be required to demonstrate a sincerely held religious belief).

306. *March for Life v. Burwell*, No. 14-CV-1149 (RJL), 2015 WL 5139099, at *6 (D.D.C. Aug. 31, 2015) (holding that refusing to provide the religious employer exemption from the ACA contraceptive mandate for a secular non-profit organization that was morally opposed to abortion and whose employees were universally opposed to such contraception was a violation of Equal Protection).

307. GRETCHEN LIVINGSTON, PEW RESEARCH CTR., *FOUR-IN-TEN COUPLES ARE SAYING “I DO,” AGAIN: GROWING NUMBER OF ADULTS HAVE REMARRIED 5* (2014), available at http://www.pewsocialtrends.org/files/2014/11/2014-11-14_remarriage-final.pdf (stating sixty-five percent of previously married but currently unmarried men are open to remarriage and sixty-four of previously married men have remarried, while forty-three percent of previously married but currently unmarried women are open to remarriage and fifty-two percent of previously married women have remarried).

308. Alexia Elejalde-Ruiz, *Unmarried and Unfaithful*, CHI. TRIB. (Oct. 15, 2013), http://articles.chicagotribune.com/2013-10-15/features/sc-fam-1015-infidelity-20131015_1_infidelity-facebook-friend-facebook-profile (citing a 2012 survey stating nineteen percent of married men and 12.3% of married women engaged in adultery).

309. Amanda M. Maddox Shaw et al., *Predictors of Extradyadic Sexual Involvement in Unmarried Opposite-Sex Relationships*, 50 J. SEX RES. 598, 604 (2013) (finding that fifteen percent of men and 13.8% of women cheated on their partner during a twenty-month period).

310. Kristen Harknett, *Mate Availability and Unmarried Parent Relationships*, 45 DEMOGRAPHY 555, 556–57 (2008) (noting when there is a shortage of males in a marriage market, “men may perceive that many opportunities for romantic partners are available to them; consequently, they may be less willing to commit to fatherhood or marriage,” while “women may be more willing to have a child with a man who is unemployed or earns a low wage.”).

311. Karen Benjamin Guzzo & Frank F. Furstenberg, Jr., *Multipartnered Fertility Among American Men*, 44 DEMOGRAPHY 583, 589 (2007) (describing a 2002 survey in which seventeen percent of fathers had children with multiple women).

surprisingly open to becoming a second, third, etc. wife to the right man.³¹² Indeed, we see this already in the willingness of women to become involved with married men with little hope of eventual marriage, or to be one of many women having children with a star athlete.³¹³ As for the openness of monogamously married women to the addition of further wives, if they already have children, they might well prefer continued marriage to divorce.³¹⁴ Furthermore, there are geographic and ethnographic areas in the United States where single women outnumber marriageable men and the solution of polygamy is already being tried or proposed.³¹⁵

These factors all suggest that the possibility Americans raised in monogamous homes and traditions might choose polygamy would be, as the *Reference Court* put it, “non-trivial.”³¹⁶ As described above, the negative impacts of polygamy on society include: more familial poverty, citizens with limited ability to contribute to the advancement of society due to a lack of investment in them by their fathers, resulting in lower GDP, less political stability, increased gender inequality, more authoritarian government, and increased anti-social behaviors and military aggression.³¹⁷ Thus, the impact of decriminalizing polygamy on the non-polygamous population could be considerable. The social impact of more families being deprived of the benefits of monogamy together with a less favorable marriage market for all men, both of which are uncontestable

312. Reference re: Sec. 293 of the Crim. Code of Can., 2011 BCSC 1588, para. 555 (Can.) (describing a survey Dr. Henrich made of his undergraduate students in which seventy percent said they would choose to be the second wife of a billionaire rather than the first and only wife of a “regular guy”); see also ZEITEN, *supra* note 119, at 72 (in Malaysia, where polygamy is legal, women choose to become second wives “for material reasons, primarily to get financial support from the husband or become wealthy; for status reasons, to be married to a powerful man; for personal reasons, such as love or particular circumstances such as pregnancy; and for temporal reasons, as some women prefer to have a husband for a few days a week only, giving them more time on their own.”).

313. For example, consider the six women who have had children with football star Adrian Peterson. Michael Zennie, *Six Kids with Six Mothers*, DAILY MAIL (Oct. 7, 2014, 5:46 AM), <http://www.dailymail.co.uk/news/article-2782871/Six-kids-six-mothers-allegations-rape-booze-fulled-orgy-under-age-brother-tens-thousands-missing-charity-The-seedy-world-NFL-star-Adrian-Peterson-BEFORE-arrested-child-abuse-charges.html>.

314. Irum Sarfaraz, *The Muslim Woman’s Achilles Heel the Second Wife*, MUSLIM MATTERS.ORG (Feb. 10, 2008), <http://muslimmatters.org/2008/02/10/the-muslim-womans-achilles-heel-the-second-wife/> (noting that the author has not met a Pakistani woman who would not object to her husband’s second marriage, but that it is better than divorce both for her and her children); cf. Harknett, *supra* note 310, at 557 (“Women’s greater attachment to children and their custodial responsibility for children decreases women’s utility outside of marriage and makes women’s investments in their relationship relatively insensitive to marriage market conditions. Qualitative research supports the asymmetry in bargaining power in relationships when children are involved.”).

315. Barbara Bradley Hagerty, *Philly’s Black Muslims Increasingly Turn to Polygamy*, NPR (May 28, 2008, 5:11 PM), <http://www.npr.org/templates/story/story.php?storyId=90886407> (reporting on single African-American Muslim women who reluctantly turn to polygamy due to a shortage of marriageable African-American men caused by incarceration and AIDS); Lauren Kay, *Why NYC Women Should Consider Flying Across the Country to Find Men*, HUFFINGTON POST (Mar. 4, 2014, 10:37 AM), http://www.huffingtonpost.com/lauren-kay/why-nyc-women-should-consider-flying-across-the-country-to-find-men_b_4894602.html (describing New York City as having 150,000 more single women than men).

316. *Reference*, 2011 BCSC 1588, para. 576.

317. See *supra* Part III.C.2.b.

consequences of decriminalizing polygamy, should be sufficient to show that the state has a more than “marginal interest” in criminalizing polygamy. We may not know precisely what the *Reynolds* opinion meant when it said that even “an exceptional colony of polygamists under exceptional leadership” would eventually “disturb the social condition of the people who surround it,”³¹⁸ but *Reference* shows precisely in what ways decriminalized polygamy would likely negatively impact American society today.

E. Is Criminalizing Polygamy the Least Restrictive Means of Avoiding the Harms of Polygamy?

RFRA also requires that the means chosen by the state, here criminalization, be “the least restrictive means of furthering that compelling governmental interest,”³¹⁹ which means considering whether there is another way to deter polygamy in both the populations that do and do not currently practice it. A similar analysis was made by the *Reference* Court under the concept of “overbreadth”³²⁰ and “minimal impairment,”³²¹ although it is difficult to determine how closely these tests match the “exceptionally demanding” least-restrictive-means test required by RFRA. The ease by which the criminalization of polygamy passed these tests in *Reference* suggests, however, that the court would have come to the same conclusion under an even more exacting standard. The challengers argued that there already existed criminal laws, such as laws against statutory rape, child abuse, and domestic violence, that specifically target the harms said to arise from polygamy, thus a blanket prohibition against polygamy is unnecessary to address these harms.³²² Furthermore, to the extent existing statutes do not cover all these harms, additional narrowly focused criminal statutes could be adopted instead of just criminalizing polygamy.³²³ The court found, however, that any existing or proposed criminal statutes could not address the wide range of both individual and social harms that arise from polygamy: “the other discrete offences do not ‘occupy the field’ of harms associated with polygamy as an institution.”³²⁴ “[T]he positive objective of the measure [is] the protection and preservation of monogamous marriage. For that, there can be no alterna-

318. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

319. 42 U.S.C. § 2000bb-1(b)(2) (2012).

320. *Reference*, 2011 BCSC 1588, paras. 1187–1205 (finding no overbreadth in the prosecution of adults, but finding overbreadth in subjecting minors to possible criminal prosecution when they are simultaneously victims of polygamy the law seeks to protect).

321. *Id.* paras. 1299–1300 (describing the “minimal impairment” test as “the law must be carefully tailored so that rights are impaired no more than necessary,” but also noting that perfection is not required and the possibility of an “alternative which might better tailor objective to infringement” does not ensure overbreadth, although a failure to “explain why a significantly less intrusive and equally effective measure was not chosen” may result in failing this test (quoting *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, paras. 53–54 (Can.))).

322. *Id.* paras. 1191–92.

323. *Id.* para. 1305.

324. *Id.* para. 1194.

tive to the outright prohibition of that which is fundamentally anathema to the institution.³²⁵ Since polygamy itself is harmful as a competitor and a threat to monogamy, there is no less restrictive means to control polygamy than a law that targets polygamy itself.

In considering whether a law is the least restrictive alternative, the effectiveness of the existing law is relevant because alternatives will be judged by their comparative effectiveness.³²⁶ In *Reference*, the challengers pointed to Fundamentalist Mormon polygamy as an indication of the ineffectiveness of polygamy laws as a deterrent.³²⁷ Normally, the ineffectiveness of a law at achieving the specified state interest would undermine the initial claim that this was a compelling state interest.³²⁸ In the case of polygamy, however, the claimed ineffectiveness is not the result of under-inclusiveness; criminalizing polygamy targets all polygamy, regardless of the motivation behind it. Polygamy laws seem ineffective only because Fundamentalist Mormons are still engaging in polygamy. This, however, is simply the ineffectiveness that all criminal law suffers; there are always people who, for whatever reason, are not deterred from committing crimes by the threat of possible conviction.³²⁹ Furthermore, in the absence of this criminalization, twenty to thirty percent³³⁰ of the entire Mormon population would have continued to engage in polygamy for the next 150 years. Instead of under fifty thousand Mormon polygamists in the United States today, there could have been as many as two million. At the same time, the criminalization kept in check any tendencies the non-Mormon population may have had to move toward polygamy. Arguably, the law has actually been quite effective.

A final argument that might be made in this context is that a less burdensome and equally effective alternative to criminalizing polygamy is already on the books: the prohibition of legal recognition of more than one marriage. As discussed earlier,³³¹ however, decriminalization would likely provide a significant boost to the practice of polygamy among several distinct American populations. Even the possibility suggested by *Hobby Lobby*, that a less effective alternative might be sufficient to

325. *Id.* para. 1343.

326. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct 2751, 2782 (2014) (“The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none.”).

327. *Reference*, 2011 BCSC 1588, paras. 1295, 1338.

328. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543–47 (1993) (reasoning that when ordinances that prohibited Santeria animal sacrifice failed to cover all slaughter or killing of animals that presented the same risks to public health risks and of cruelty to animals, this suggested that the stated interests were not compelling).

329. *Reference*, 2011 BCSC 1588, para. 1338 (“The so-called ‘ineffectiveness’ is simply another way of characterizing the refusal of people in the appellants’ position to comply with the law. It is difficult to see how that refusal can be elevated to a constitutional argument against validity based on the invocation of fundamental principles of justice.” (quoting *R. v. Malmö-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74, para. 178 (Can.))).

330. Quinn, *supra* note 252, at 4 (estimating the rate of polygamy in the LDS church prior to the Manifesto at twenty to thirty percent).

331. See *supra* Part III. D.2.c.

make a more effective, but more burdensome, government action a violation of RFRA,³³² would not advance non-recognition as an alternative to criminalization. Not unlike the acceptance of same-sex marriage after some period in which same-sex relationships were decriminalized, it might well be difficult to explain why polygamous relationships are insufficiently harmful to be criminalized, but too harmful to be recognized, particularly in the face of actual wives and children whose legal status to their husband/father is ineffectively dealt with by the law. As the Supreme Court noted in *Reynolds*, “out of [marriage’s] . . . fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.”³³³ Legal non-recognition of polygamous marriages is not an alternative to criminalization if decriminalization will likely lead to legal recognition.

IV. CONCLUSION

The Article considers the impact of new insights into the demands of strict scrutiny under RFRA, and potentially under state mini-RFRAs, suggested by *Hobby Lobby* together with the more modern and empirical understanding of the harms of polygamy provided by the Canadian *Reference* for potential mini-RFRA scrutiny of laws that burden the religious polygamy practiced by Fundamentalist Mormons and others. While avoidance of the *Reference* harms would certainly be a compelling state interest for criminalizing polygamy, there are questions about whether the global empirical evidence is sufficiently strong to create the necessary foundation between polygamy and these harms, given the lack of statistical data on the outcomes of polygamous Americans and the negative impacts of criminalization itself. A second concern is whether the prediction that decriminalization for religious practitioners will result in a non-trivial growth in the polygamous population in the United States is sufficiently convincing. This is relevant both to the issue of whether there is a compelling state interest in not exempting religious practitioners and whether the only possible less restrictive alternative to criminalization, legal non-recognition of polygamous marriages, would be a sufficiently effective way to keep polygamy in check. If, however, the decriminalization of same-sex marriage is a good analogy, then there is evidence that decriminalization will lead to legal recognition, making legal non-recognition an entirely ineffective alternative. If these questions can be successfully resolved, state criminal polygamy laws can survive the strict scrutiny required by mini-RFRAs that follow federal RFRA jurisprudence. Regardless of the outcome, what emerges from this analysis is that

332. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2802 (2014) (Ginsburg, J., dissenting) (expressing concern that the dictum in the majority opinion suggesting that a separate government funded contraceptive health benefit would be a less restrictive alternative would open the door to less-effective less-restrictive alternatives).

333. *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

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scrutinizing polygamy poses difficult questions for RFRA strict scrutiny
itself.

