

155. MFL

Draft

Printed in *Ecclesiastical Law Journal* 11 (2009): 72-75

The Legal Challenges of Religious Polygamy

John Witte, Jr.

Abstract

This brief article shows the limits of arguments against religious polygamy that are based on the Bible, tradition, public health, child welfare, or public policy. It instead argues that polygamy is a malum in se offense, something that is inherently wrong or too often the cause, consequence, or corollary of wrongdoing. Polygamy cannot be countenanced in a modern democracy, even if it is pressed on religious freedom grounds. The author has developed these themes at length in The Western Case for Monogamy over Polygamy (Cambridge University Press, 2015).

Keywords: Polygamy; Mormonism; First Amendment; Marriage; Constitutional Law; Malum in se.

A century and a half ago, Mormons made national headlines by claiming a First Amendment right to practice polygamy, despite criminal laws against it. In four cases from 1879 to 1890, the United States Supreme Court firmly rejected their claim, and threatened to dissolve the Mormon church if they persisted. Part of the Court's argument was historical: the common law has always defined marriage as monogamous, and to change those rules "would be a return to barbarism." Part of the argument was prudential: religious liberty can never become a license to violate general criminal laws "lest chaos ensue." And part of the argument was sociological: monogamous marriage "is the cornerstone of civilization," and it cannot be moved without upending our whole culture.¹ These old cases are still the law of the land, and most Mormons renounced polygamy after 1890.

The question of religious polygamy is back in the headlines – this time involving a fundamentalist Mormon group on a Texas ranch that has retained the church's traditional polygamist practices. Many of the legal questions raised since this group was raided are easy. Under-aged and coerced marriages, statutory rape, and child abuse are all serious crimes. If any of those adults on the ranch committed these

¹ Reynolds v. United States, 98 U.S. 145 (1879); Murphy v. Ramsey, 114 U.S. 15, 45 (1885); Davis v. Beason, 133 U.S. 333 (1890); Church of Jesus Christ of Latter Day Saints v. United States together with Romney v. United States, 136 U.S. 1 (1890). See similar result in Cleveland v. United States, 329 U.S. 14 (1946).

crimes, or intentionally aided and abetted them, they are going to prison. They will have no claim of religious freedom that will excuse them, and no claim of privacy that will protect them. Dealing with the children, ensuring proper procedures, sorting out the evidence, and the like are all practically messy and emotionally trying questions, but not legally hard. The recent decision by the Texas court of appeals² ordering the return of the 450 plus children who had been seized from their homes during the raid underscores a further elementary legal principle – that decisions about child custody and about criminal liability must be done on an individual basis so much as possible.

The harder legal question is whether criminalizing polygamy is still constitutional. Texas and all other states still have criminal laws against polygamy on their books. Can these criminal laws withstand a challenge that they violate an individual's constitutional rights to private liberty, equal protection, and religious liberty? In the nineteenth century, none of these rights claims was available. Now they are, and they protect every adult's rights to consensual sex, marriage, procreation, contraception, cohabitation, sodomy, and more. May a state prohibit polygamists from these same rights, particularly if they are inspired by authentic religious convictions? What rationales for criminalizing polygamy are so compelling that they can overcome these strong constitutional objections?

Theologians often cite the Bible which says that “two” -- not three or four – parties must join in “one flesh” to form a marriage. Others remind us that early biblical polygamists did not fare well. Think of the problems confronted by Abraham with Sarah and Hagar, or by Jacob with Rachel and Leah. Or think of King Solomon with his thousand wives; their children ended up killing each other. This may be a strong foundation for a church or synagogue to prohibit polygamy among its voluntary members, but can arguments straight from the Bible prevail in a pluralistic nation that prohibits the establishment of religion?

Feminists pose equal protection arguments: Why should the state permit one man to have several wives, but not one woman to have several husbands? After getting past the jokes about which husband would control the television remote or which woman would be so crazy, does this equal protection argument sound any stronger than that of polygamists who just want the same right of private association as everyone else?

Public health experts raise concerns about communicable diseases among children within the extended household, and transmittable sexual diseases within the rotating marital bed. But what about all those other group gatherings – schools, churches, and dorms -- that children occupy: must they be closed, too, for fear of contagion? And isn't self-contained polygamous sex much safer than casual sex with multiple partners which is constitutionally protected?

Political scientists raise worries about administrative inefficiency. After all, so much of our law presupposes a single definition of marriage and family life. What would

² In re Steed, 2008 WL 2132014 (May 22, 2008).

we do if the man dies, or one of the wives files for divorce? There are no guidelines about how to allocate the marital property, military or social security benefits, life insurance, and the like. But we have found a way to do this for the vast numbers of single, mixed parent, and multiple generation households that today collectively far outnumber families with two parents and their natural children. This is administratively doable.

Child experts raise serious concerns about the development of children of polygamy. Won't these children be confused by the mixed parental signals and attachments, and by the inevitable rivalries and rancor with their half siblings? And won't these children be stigmatized by their peers for being different? These arguments have some bite. But how different is the polygamous lifestyle in our current pluralistic culture? Children are raised by live-in grandparents, nannies, and day care centers. They live in large blended families and boarding schools. Their parents may be gay and lesbian couples, or their families may have religious dress or dietary codes that set them apart from their peers. Are children of polygamy so differently positioned?

The strongest argument against polygamy is the argument from moral repugnance. Polygamy is inherently wrong -- "just gross" as my law students say, "*malum in se*" as we law professors put it. Many states legislate against a lot of activities -- slavery, indentured servitude, gambling, prostitution, obscenity, bestiality, incest, sex with minors, self-mutilation, organ-selling, and more -- just because those activities are wrong or because they will inevitably foster wrongdoing. That someone wants to engage in these activities voluntarily for reasons of religion, bravery, custom, or autonomy makes no difference. That other cultures past and present allow such activities also makes no difference. For nearly two millennia, the Western tradition has included polygamy among the crimes that are inherently wrong. Not just because polygamy is unbiblical, unusual, unsafe, or unsavory. But also because polygamy routinizes patriarchy, jeopardizes consent, fractures fidelity, divides loyalty, dilutes devotion, fosters inequity, promotes rivalry, foments lust, condones adultery, confuses children, and more. Not in every case, to be sure, but in enough cases to make the practice of polygamy too risky to condone.

Furthermore, allowing religious polygamy as an exception to the rules is even more dangerous, because it will make some churches and mosques a law unto themselves. Again, some religious communities and their members might well thrive with the freedom to practice polygamy. But inevitably closed repressive regimes like the Texas ranch compound will also emerge -- with under-aged girls duped or coerced into sex and marriages with older men, with women and children trapped in sectarian communities with no realistic access to help or protection from the state and no real legal recourse against a church or mosque that is just following its own rules. We prize liberty, equality, and consent in America too highly to court such a risk. If you're not sure, just ask some of those moms and kids on the Texas ranch.