



The Evolution of Social and Judicial Attitudes Towards Polygamy

By Robert G. Dyer

Graduated Brigham Young University Law School, April 1977. J. Reuben Clark Scholar. Note & Comment Editor, *BYU Law Review*. Currently associated with the law firm of Lillick, McHose & Charles, Los Angeles, California.

In 1874 George Reynolds, personal secretary to Brigham Young, was indicted for bigamy. The jury found him guilty and an appeal was eventually taken to the United States Supreme Court.¹ Among other things, the appeal alleged that it was error for the trial court not to have charged the jury that a sincere religious belief in polygamy was a valid defense to prosecution under the statute.² The Supreme Court admitted that no law prohibiting the free exercise of religion could be enacted,³ but determined that the Free Exercise Clause of the First Amendment protected beliefs only and not conduct. The Court held that Congress was "free to reach actions which were in violation of social duties or subversive of good order."⁴ In affirming the conviction of Reynolds, the Court apparently decided that polygamy was subversive of good order or a violation of one's social duties.

The decision of the Court has become a key one in cases involving allegations of restriction on the free exercise of religion. It has been examined by legal commentators frequently for its legal implications. However, judicial

attitudes towards polygamy, a likely reflection of the more general prevailing social attitudes of the day, cannot have failed to have had some influence on the decision. Assuming that social attitudes as reflected in popular opinion and legislative decision have some influence on judicial decisions over a period of time, it would be profitable to examine such social attitudes with respect to polygamy and religion in the *Reynolds* era and compare them with the social attitudes prevailing today.

Attitudes of Nineteenth Century Legislators

The legislative debates over the passage of the anti-polygamy bill are replete with indications of the nineteenth century attitude towards polygamy. The bill was enacted July 1, 1862 with little discussion. Mr. Morrill of Vermont, when introducing the bill for the vote of the House, said, "I presume there is no member of the House who desires to discuss this measure"⁵ Legislative condemnation of polygamy was apparently unanimous. Although some discussion followed, the situation was very much different from the circumstances surrounding an attempt to pass a nearly identical bill two years earlier.

¹*Reynolds v. United States*, 98 U.S. 145 (1878).

²The statute in question was R.S. 5352, 12 Stat. 501 (1862).

³98 U.S. at 162.

⁴*Id.* at 164.

⁵*Cong. Globe*, 37th Cong., 2d Sess. 1847 (1862).

On February 15, 1860, Mr. Morrill of Vermont introduced a bill to punish and prevent the practice of polygamy in the Territories.⁶ The original bill included a statement in its preamble that no principle could justify the practice of such moral pollution as polygamy.⁷ The delegates made much of the fact that the Republican platform that year made reference to the abolishment of the "twin relics of barbarism" in the United States — polygamy and slavery.⁸ The debates were not only spiced with invectives against polygamy, but also against Mormons and Mormonism in general. It was suggested that Mormons might be unfit for self-government,⁹ and plans were made to split up the Utah Territory in order to break up the organization of the Mormons.¹⁰ However, even with the diverse discussion that went on about the bill, there seemed to be a consensus that something had to be done about polygamy. The discussion merely went to the particulars of how best to stamp out the blight. Such sentiments were expressed by Mr. Millson of Virginia:

I think that discussion can only be desired here for the purpose of improving the provisions of the bill, adjusting its details, &c. I can hardly persuade myself that there will be any gentleman, and if any, but very few, who will object to the great objects contemplated by the bill.¹¹

Mr. Thayer of Massachusetts likewise commented on the fact that here, at

last, was a question upon which all of the representatives from every section of the country could agree, regardless of their sectional loyalties.¹²

While all were agreed that polygamy must be eradicated, apparently some of the southern members of Congress took the position that Congress might not have the power to legislate on such a matter in the territories. They were evidently concerned that if Congress were successful in regulating polygamy in the territories, it would attempt to do the same with respect to slavery.¹³ The absence of those southern members of Congress two years later, after the Civil War was in full bloom, was probably responsible for the subsequent bill's passage with little argument. Likewise, these same concerns about slavery were probably responsible for the first measure's death in the Judiciary Committee on June 13, 1860.¹⁴

The members of Congress seem to have equated polygamy with free love and promiscuity.¹⁵ It was termed the "scarlet superstition of Mormonism."¹⁶ Polygamists were considered to pollute the atmosphere of Utah.¹⁷ Polygamy was termed a nauseating and disgusting crime offensive to the moral sense and enlightened spirit of the age, as well as offensive to religion.¹⁸ Utah, it was feared, would become a Sodom & Gomorrah.¹⁹ The evil effects of polygamy were alleged to include: a sapping effect on the constitutions of its practitioners; dwarfism in the progeny; emasculation of energies;

⁶Cong. Globe, 36th Cong., 1st Sess. 793 (1860).

⁷*Id.* at 1410.

⁸*Id.* (Remarks of Mr. Branch).

⁹*Id.* at 1410-11 (Remarks of Mr. Taylor).

¹⁰*Id.* at 1411 (Remarks of Mr. Hindman). It was suggested that the name of one of the territories split off from Utah should be Jeffersonia. *Id.* (Remarks of Mr. Logan).

¹¹*Id.* at 1412.

¹²*Id.* at 1519.

¹³*Id.* at 1494 (Remarks of Mr. Millson).

¹⁴*Id.* at 2909 (Remarks of Mr. Bayard).

¹⁵*Id.* at 1494 (Remarks of Mr. Millson).

¹⁶*Id.* at 1496 (Remarks of Mr. Pryor).

¹⁷*Id.* at 1497 (Remarks of Mr. Etheridge).

¹⁸*Id.* at 1500 (Remarks of Mr. Etheridge).

¹⁹*Id.*

perversion of social virtues; vitiation of the morals of its victims. It was condemned because: it originated with Lamech, the second murderer known to history; it was often an adjunct to political despotism; it begot among its practitioners the extremes of blood-thirstiness or unusual timidity; it was a scarlet whore; it was a reproach to Christian civilization; and the Greeks and Romans did not practice it during the period of their prosperity.²⁰ It is safe to say that these attitudes, expressed when polygamy had only relatively recently been publicly declared to be a tenet of the Mormon belief,²¹ had not softened by 1878 when *Reynolds* was decided. In fact, it is more likely that such attitudes had become more common and more entrenched as a result of Mormon efforts to avoid the consequences of the anti-polygamy law.

It is interesting to note that during the debates on the anti-polygamy bill in 1860 and 1862 not one remark is recorded to the effect that the bill might be an infringement upon the constitutionally protected right of free exercise of religion.

Societal Attitudes Towards Polygamy

The periodicals, newspapers, and books published during the latter half of the nineteenth century give one a flavor of the kinds of things that were influencing public opinion and an indication of the shape that public opinion was taking.

A deputy U.S. Marshal who spent three years enforcing the anti-polygamy laws in Idaho and Utah described the effects of polygamy as degrading to the level of the beasts of the field,

²⁰*Id.* at 1514 (Remarks of Mr. McClelland).

²¹Polygamy was first publicly preached by the Mormon Church in the mid-1850's.

polluting whole communities, tainting the young mind, breeding infamy, and ridiculing virtue.²²

Allegations of incest were common in the material published on polygamy.²³ They seem to have been caused by the propensity of Mormon polygamous men to marry sisters and even in one case a mother and daughter.²⁴

The subjugation of women in polygamy was another favorite theme of the anti-polygamy writers.²⁵ Comments were made to the effect that there were no beautiful women in Utah because of the low level of moral faculties.²⁶ Books on polygamy were commonly filled with illustrations bearing titles such as: *The Neglected Wife and the New Wife*;²⁷ *Pleading With a Young Husband not to Take Another Wife*;²⁸ *A Mormon's Daughter Pleading to be Saved from Polygamy*;²⁹ and beneath an illustration of a young woman holding an infant in her arms — *I Promised to Spend the Evening with my Other Wife*.³⁰

Writers alleged as factual the trading of whole families, promiscuity, the forcing of young girls into polygamy, proliferation of divorces, and the passing around of young girls to the various leaders of the church.³¹ A high infant mortality rate — brought on by lack

²²F. Bennett, *Fred Bennett The Mormon Detective or Adventures in the Wild West* 18 (1887).

²³E.g., *id.* at 189.

²⁴John D. Lee of Mountain Meadow Massacre fame was married to a mother and one of her daughters. *K. Young, Isn't One Wife Enough* 127 (1954).

²⁵*Id.*

²⁶J. Beadle, *Polygamy or the Mysteries and Crimes of Mormonism* 215 (1882).

²⁷*Id.* at 243.

²⁸*Id.* at 275.

²⁹*Id.* at 240.

³⁰*Id.* at 259.

³¹*Id.* at 251.

of attention and a weak constitution was also reported to be a result of polygamy.³² Polygamy was viewed as so evil that some felt prostitution to be preferable.³³

Religious writers of the day took on with fervor the task of disproving that polygamy could be scripturally supported. Their response to Mormon efforts to point out scriptural examples of polygamy was to say that polygamy and idolatry are mentioned in the scriptures for the same reason — to point out their evil effects.³⁴ The sins in the families of Jacob and David were attributed to the polygamous relationships maintained by those men.³⁵

Polygamy, though usually thought of as a Mormon innovation, had made periodic appearances in the Western world for many years.³⁶ As early as 1682 a book advocating polygamy was published.³⁷ Another publication attacking polygamy begins by noting that the author feels compelled to write about it because "polygamy is a doctrine daily defended in common conversation, and often in print, by a great variety of plausible arguments"³⁸

Newspaper accounts likewise vilified the practice of polygamy. According to the reports, women were treated like animals, no one trusted his wife with his brothers, and women were traded as articles.³⁹ The question of polygamy

was termed a great social evil — one which had passed beyond the field of discussion.⁴⁰ It was considered a seed evil to be watched so that it would not fasten hold of the country as slavery, aristocracy, and state religions had in other circumstances.⁴¹

According to newspaper reports, the House Committee on the Judiciary found that polygamy had been a part of almost every system of heathenism and barbarism; it was a subversion of the true marriage relation; it was deemed one of the highest crimes against society by common consent of all Christian nations; it destroyed the divine constitution of society; it was destructive of the family and state; it was abhorrent to the moral sense of the nation; and it was the embodiment of all that is wicked and debasing in social life.⁴² The newspapers also carried reports of officials in Utah to the effect that polygamy was an institution founded in the lustful and unbridled passions of men, was devised by Satan himself, and went hand-in-hand with murder, idolatry, and all abominations.⁴³

While *Reynolds* was before the Supreme Court the newspapers reported the arguments made by the attorneys for the defendant but commented, "[I]t is not likely that the fine-spun ethics of the case, as presented by the Mormon advocates, will greatly move the United States Supreme Court."⁴⁴ They were correct, and Reynolds was sentenced to 2 years in the Detroit Penitentiary and a fine of 500 dollars.⁴⁵

³²*Id.* at 269.

³³*Id.* at 449.

³⁴8 *Christian Quarterly Review* 497, 501 (Oct. 1889).

³⁵*Id.* at 518-19. See P. Dublinensis, *Reflections Upon Polygamy* (1722).

³⁶See J. Cairncross, *After Polygamy Was Made Sin — The Social History of Christian Polygamy* (1974).

³⁷T. Aletheo, *Polygamia Triumphatrix* (1682).

³⁸P. Dublinensis, *Reflections Upon Polygamy* (1722).

³⁹N. Y. Times, April 17, 1860, at 2, col. 6.

⁴⁰*Id.*, June 19, 1862, at 4, col. 2.

⁴¹*Id.*, Dec. 21, 1865, at 4, col. 4.

⁴²*Id.*, Mar. 2, 1867, at 2, col. 7.

⁴³*Id.*, Feb. 18, 1870, at 5, col. 2.

⁴⁴*Id.*, Jan. 8, 1879, at 4, col. 4.

⁴⁵*Id.*, June 15, 1879, at 1, col. 6. Reynolds actually served part of his sentence at the Nebraska State Penitentiary, *id.*, June 19, 1879, at 5, col. 3, and was later transferred to an

Judicial Attitudes with Respect to Polygamy

The great bulk of material published on polygamy during the nineteenth century was filled with invectives like those that have been discussed. Only occasionally was a voice heard from the non-Mormon sector urging a less emotional analysis of polygamy.⁴⁶ In such an atmosphere of pervasive emotional attacks on polygamy it is not surprising that judicial opinions seemed to reflect it. In *Reynolds*, Chief Justice Waite who wrote the majority opinion, compared polygamy with human sacrifice and Sutteeism.⁴⁷ Polygamy, he said, had always been odious among the northern and western nations of Europe.⁴⁸ Waite cited a Professor Lieber who claimed that "polygamy leads to the patriarchal principle, and . . . when applied to large communities, fetters people in stationary despotism . . ."⁴⁹ The apparent gist of all of these statements was to characterize polygamy as a religious activity that was subversive of good order so that it could be regulated by Congress. However, in light of the modern Court's dependence on detailed social science and psychological studies that often accompany briefs today, the evidence of social disorder in the *Reynolds* case seems to amount to little more than assertions based on popular opin-

ion. It is interesting to note that Chief Justice Waite's biographer quotes the Chief Justice as characterizing the *Reynolds* opinion as his "sermon on the religion of polygamy."⁵⁰

Cases decided subsequent to *Reynolds* demonstrate the same type of anti-polygamy rhetoric. In *Davis v. Beason*⁵¹ Justice Field, writing for the majority, said that polygamy tends to destroy the purity of the marriage relation, disturb the peace of families, degrade women, and debase man. In his view, few crimes were more pernicious to the best interests of society or received more justly deserved punishment.⁵² Justice Field viewed the kind of religion protected by the First Amendment as one's views of his relation to his Creator and warned against confusing the *cultus* or form of worship of a particular sect with such religion.⁵³

Mormon Church v. United States,⁵⁴ reveals the attitude of Justice Bradley towards polygamy. It was, he said, a crime against the laws and abhorrent to the sentiment and feelings of the civilized world. Referring to Mormon missionaries, he lamented the fact that emissaries were engaged in many countries of the world propagating the "nefarious doctrine." The existence of such propaganda was declared a blot on our civilization and a return to barbarism. Finally, after comparing it to Thugism⁵⁵ and Sutteeism,⁵⁶ Justice

adobe hut prison 4½ miles from Salt Lake City where he served the rest of his sentence. *Id.*, July 15, 1879, at 1, col. 2.

⁴⁶For such a discussion see "The Mormon Problem," a letter to the Massachusetts Members of Congress on Plural Marriage, Its Morality and Lawfulness, by a citizen of Massachusetts (1882) (on file at the Brigham Young University Library).

⁴⁷It was the practice among members of the Suttee sect in India for the widow to throw herself upon her husband's funeral pyre. 98 U.S. at 166.

⁴⁸*Id.* at 164.

⁴⁹*Id.* at 166.

⁵⁰B. Trimble, *Chief Justice Waite*, Defender of the Public Interest 244 n. 18 (1938), cited in 15 Ariz. L. Rev. 287, 301 (1973).

⁵¹133 U.S. 333 (1890).

⁵²*Id.* at 341.

⁵³*Id.* at 342.

⁵⁴136 U.S. 1 (1890).

⁵⁵Thugs were members of a Hindu sect who performed ritual stranglings as part of their religious beliefs.

⁵⁶See note 47 supra.

Bradley declared that the State has a perfect right to prohibit polygamy and all other open offenses against the enlightened sentiment of mankind.⁵⁷

As late as 1946 the Supreme Court quoted some of the same language with approval. In *Cleveland v. United States*,⁵⁸ the conviction of members of an apostate Mormon sect, believing in polygamy, for a violation of the Mann Act, in that they transported their polygamous wives across state lines for "immoral purposes," was affirmed. Justice Douglas was the author of the majority opinion. His opinion, however, evidences little of the concern for individual liberties that is so apparent in his later opinions.⁵⁹ After quoting with approval previous judicial characterizations of polygamy,⁶⁰ Justice Douglas adds that the establishment of polygamous households is a notorious example of promiscuity.⁶¹

The Utah Supreme Court continued to reflect similar attitudes towards polygamy in 1955. In determining that the teaching and practicing of polygamy in the home was grounds to declare the children of the polygamous marriage wards of the state because of neglect, the court waxed eloquent upon the social evils of polygamy.⁶²

⁵⁷136 U.S. at 48-50.

⁵⁸329 U.S. 14 (1946).

⁵⁹His lack of concern for individual liberties in *Cleveland* may be because his ideas along those lines were not yet fully developed, or because his ardor for individual liberty was overcome by his distaste for organized religion. It is difficult to rationalize Douglas' statement that "[w]ether an act is immoral within the meaning of the statute is not to be determined by the accused's concepts of morality. Congress has provided the standard . . .", *id.* at 20, with his later pronouncements on privacy and individual liberty.

⁶⁰*id.* at 18-19.

⁶¹*id.* at 19.

⁶²State in Interest of Black, 3 Utah 2d 315, 283 P.2d 887, 910 (1955).

Judge Henriod, however, had some interesting things to say in dissent that may have been harbingers of things to come.⁶³

At the same time that the courts and society were proselyting against polygamy practiced for religious purposes, other aspects of polygamy were receiving very different treatment. At first, in England, polygamous marriages were not recognized as any marriage at all for purposes of estate succession, divorce, etc., even though the marriage may have been valid where contracted.⁶⁴ However, during the nineteenth century, much of the British Empire practiced polygamy, as did other large areas of the world. Subsequently, the courts of England have dealt more generously with polygamy.⁶⁵

In the United States it appears that the courts have long recognized the right of Indians to practice polygamy as part of their social culture on the reservation. In *United States v. Quiver*,⁶⁶ the Supreme Court said:

There is [no statute] dealing with bigamy, polygamy, incest, adultery, or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws and to such preventive and corrective measures as reasonably could be taken by the administrative officers.⁶⁷

Other cases have likewise recog-

⁶³*id.* at 314. See note 96 and accompanying text *infra*.

⁶⁴*Hyde v. Hyde*, L. R. 1 P. & D. 130 (1866).

⁶⁵See Morse, *Polygamists and the Crime of Bigamy*, 25 Int. & Comp. L. Q. 229 (1976); Furnston, *Polygamy and the Wind of Change*, 10 Int. & Comp. L. Q. 180 (1961); Hartley, *Polygamy and Social Policy*, 32 Mod. L. Rev. 155, 160 (1969).

⁶⁶U. S. v. Quiver, 241 U.S. 602 (1915).

⁶⁷*id.* at 605.

nized Indian polygamous marriages.⁶⁸ Why polygamy could be left to tribal customs among the Indians and not to religious customs among the Mormons, is not apparent. The rationale of the disparate treatment of polygamy among Mormons and Indians may lie in the fact that the nation must have felt a good deal more threatened by the unusual social customs of an expanding, dynamic, and powerful ecclesiastical organization, than by an ethnic group of shrinking size that had been ostracized from the mainstream of society.

Courts in the United States have sometimes recognized foreign polygamous marriages for certain purposes if they were validly contracted. In *Dalip Singh Bir's Estate*,⁶⁹ the California Supreme Court recognized two women as legitimate spouses of the decedent for succession purposes. The marriages had been contracted in India where polygamy was lawful. On the other hand, the United States Court of Appeals for the Ninth Circuit denied citizenship to a woman who had been born as issue of a polygamous marriage contracted validly abroad by an American citizen.⁷⁰

Modern Societal Attitudes

In recent years, however, there have been rapid developments in the area of personal liberty and rapid changes in opinion about sexual matters. Several states have legalized all consenting sexual behavior between adults, including homosexuality, adultery, and

⁶⁸See *Rogers v. Cordingley*, 212 Minn. 546, 4 N.W. 2d 627 (1942); *Hallowell v. Commons*, 210 F. 793 (8th Cir. 1914); *Ortley v. Ross*, 78 Neb. 339, 110 N.W. 982, 983 (1902); *Campo v. Jackson Iron Co.*, 50 Mich. 578, 16 N.W. 295 (1883).

⁶⁹188 P.2d 499 (1948).

⁷⁰*Ng Suey Hi v. Weedon*, 21 F.2d 801 (9th Cir. 1927).

sexually deviant behavior.⁷¹ There have been efforts to decriminalize such "victimless" crimes as prostitution and gambling.⁷² One need only compare the movies of 10 years ago with today's movies to arrive at the conclusion that public attitudes with regard to obscenity have undergone a radical change. Unusual marriage styles have become almost a vogue.⁷³ A recent newspaper article of wide circulation described the lifestyle of a couple which had taken up mate-swapping. It is alleged that this is a practice experienced by possibly 8 million Americans. Clubs, as well as national referral services have been organized to facilitate meeting new partners.⁷⁴ Patricia Schiller, executive director of the American Association of Sex Educators, Counselors, and Therapists is quoted by the article as saying,

The boundaries of marriage have been changing since World War II. The rules of society still call for monogamy, although in recent years people [have been experiencing] more freedom and growth than ever before.⁷⁵

Perhaps the most noteworthy aspect of the article is that in spite of some very clear descriptions of the manner in which this couple engaged in prom-

⁷¹Oregon and California are among others that have done so. See Note, California "Consenting Adults" Law: The Sex Act in Perspective, 13 S. Diego L. Rev. 439 (1976); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 Mich. L. Rev. 1613 (1974).

⁷²See Wachtler, *The High Cost of Victimless Crimes*, 28 Rec. A. B. City N.Y. 357 (1973); Boruchowitz, *Victimless Crimes: A Proposal to Free the Courts*, 57 Judicature 69 (1973).

⁷³See sources cited, David, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 15 Ariz. L. Rev. 287, 302 nn. 75 & 76 (1973).

⁷⁴The Washington Post, Nov. 15, 1976, at B1, col. 2.

⁷⁵*Id.* at B6, col. 1.

iscuous adultery,⁷⁶ not one word of condemnation or invective is used. On the whole, a very sympathetic picture of the "swingers" is painted — not at all like the pictures painted of the nineteenth century polygamists.

One cannot help but wonder whether polygamy, or "swinging," is the more destructive of the social duty or good order that was used as the criterion for the decision in *Reynolds*.⁷⁷ Polygamy on the one hand encourages marital fidelity, strong loyalty among family members, and the meeting of responsibilities to wives and children. On the other hand, "swinging" generally finds its beginnings in a marriage that is dissatisfying. The relationships it develops are not deep founded and persevering. There is no economic duty that runs with the relationships developed by "swinging." "Swinging" frequently seems to lead to other deviant forms of sexual behavior such as group sex, bisexualism, and sado-masochistic sex.⁷⁸

Changes are occurring in the attitudes toward polygamy in other countries. In Tanzania, where Christian monogamists live side by side with Moslem and pagan polygamists, the Christians could be prosecuted for

polygamy while the others could not. In order to make the system more equitable, a marriage reform act was passed informally in 1970 that would permit Christians to take more than one wife.⁷⁹ Algeria has long practiced polygamy⁸⁰ and Uganda has recently made it lawful.⁸¹

An article appearing in 1974 is indicative of changing American attitudes towards polygamy. It describes a raid that took place in 1953 on the polygamous community of Short Creek, Arizona.⁸² Virtually every man and woman in the settlement of 368 persons was arrested. When the men returned after posting bail they discovered that 154 children and their 38 mothers had been bussed to Phoenix and made wards of the state.⁸³ Although the men were given one-year suspended sentences, the women and children were dispersed to foster homes and forbidden from ever returning to Short Creek.⁸⁴ More interesting than the details of the raid conducted by some 200 law enforcement officers is the sympathetic light in which the families of Short Creek are painted. One finishes the article with shocked sensibilities — not because of the practice of polygamy among the inhabitants of Short Creek, but because of the inhumane treatment of individuals, the breakup of families, and the lack of respect for personal beliefs.⁸⁵ The raid on Short

⁷⁶The couple describes their first experience thus:

We didn't know what to do. How do you start something like that? Finally Barb went into the tent with the other couple. Later we paired off. I went into one sleeping bag with the guy's wife and Barb went into another with the husband.

It was a nice experience. We related to each other. We all became good friends.

Id. at 81, col. 2. They later described a "group grope" which they attended:

The place is nothing but rooms full of beds. In one room there were three couples and two single guys.

Id. at B1, col. 6.

⁷⁷98 U.S. 145, 162 (1878).

⁷⁸See *The Washington Post*, Nov. 15, 1976, at B1, col. 2.

⁷⁹It is not known whether the act was ever formally passed. 95 *Time* 35 (Ap. 20, 1970).

⁸⁰*The New York Times*, July 10, 1975, at 35, col. 3.

⁸¹*Id.*, July 8, 1973, at 31, col. 3.

⁸²11 *Am. West* 16 (Mar. 1974).

⁸³*Id.* at 61.

⁸⁴*Id.* at 62.

⁸⁵See *The Lonely Men of Short Creek*, 34 *Life* 35 (Sept. 14, 1953) a very sympathetic pictorial essay of Short Creek after the raid. It portrays the loneliness of the men who had been separated from their wives and families.

Creek appears to have been the last attempt at mass enforcement of the anti-polygamy laws⁸⁶ despite the fact that scattered throughout the western United States are many polygamous communities.⁸⁷

The most recent indicator of the manner in which public opinion about polygamy has changed is seen in the saga of Alex Joseph, an excommunicated Mormon who founded his own church and practiced polygamy by marrying 12 wives. Joseph was in the public limelight for several months as he and a small band of followers fought a government order evicting them from land in southern Utah which they desired to homestead. In addition to newspaper and magazine articles in which he appeared with his 12 wives, he was interviewed on television talk shows and openly admitted having married the 12 women. Despite such notoriety and his legal battles with the government, no prosecution for polygamy was ever brought. Kane County Sheriff Norman Swapp seemed to voice the prevailing attitude when he said, "Sure it's against the law, but I can't even prove he's married to all those women."⁸⁸ Evidently Joseph was not intimidated by the prospects of being prosecuted for polygamy. He may have had the attitude of one polygamist who said, "I feel that in today's relaxed atmosphere, the conviction of one of us would be rejected by the higher courts."⁸⁹

⁸⁶M. Merrill, *Polygamist's Wife* (1975).

⁸⁷Series aired by local television station KUTV, Salt Lake City, Utah, March and May 1975, on polygamy, on file with the station.

⁸⁸105 Time 74 (May 19, 1975).

⁸⁹*Utah's Mormon Polygamists*, 98 Time 25 (October 11, 1971). There may also be less impetus to jail polygamists since it causes an increased burden on the welfare system. M. Merrill, *Polygamist's Wife* 64 (1975).

Modern Judicial Attitudes

In light of the changes taking place in public opinion toward deviant sexual behavior, it is not surprising that judicial attitudes in recent years should exhibit the same kinds of changes. The term "immorality," once thought to have some concrete meaning among members of society, on many occasions recently has been found to be too vague to meet constitutional muster when personal rights are involved.⁹⁰ The definition of what constitutes obscene material has been left to be determined by community standards⁹¹ rather than by a nationwide standard. Privacy, especially when touching upon decisions such as contraception and abortion, which affect the marital relationship, has been elevated to a fundamental right accorded special constitutional protections.⁹²

Cases involving polygamy have been very scarce of late (not so much because polygamy is disappearing as because prosecution of polygamy is declining) but the dissents in *Cleveland*⁹³ and *State in Interest of Black*⁹⁴ are indicative of the shift in judicial opinion toward polygamy. Justice Murphy in *Cleveland* argued that polygamy as a form of marriage could not possibly be classed in the same category as prostitution and other forms of debauchery which the Mann Act was designed to help eradicate. Though he

⁹⁰*Compare Mutual Film Corp. v. Ohio Industrial Comm.*, 236 U.S. 230, 245-6 (1914) and *Commercial Pictures Corp. v. Regents of Univ. of N.Y.*, 113 N.E. 2d 502, 505 (N.Y. 1953) with *Burton v. Cascade School Dist. No. 5*, 512 F.2d 850 (9th Cir.), cert. denied, 96 S.Ct. (1975).

⁹¹*E.g. Roth v. United States*, 354 U.S. 476, 488-89 (1957).

⁹²*E.g. Griswold v. Connecticut*, 381 U.S. 479, 481-86 (1965).

⁹³329 U.S. 14 (1946).

⁹⁴283 P.2d 887 (Utah 1955).

subscribed to the position that monogamy was the preferred mode of marriage, he refused to consider polygamy to be on a par with prostitution or debauchery.⁹⁵ In *State in Interest of Black*, Judge Henriod went so far as to say, "I cannot say, as the main opinion seems to imply, that polygamy is morally wrong. . . . What is moral, or legal, depends in most part upon time, place and circumstance."⁹⁶

Other decisions have begun to undermine the reasoning of *Reynolds*. In *Wisconsin v. Yoder*,⁹⁷ the Supreme Court was faced with the refusal of Amish parents to send their children to secondary schools. The Amish claimed that to do so would endanger their salvation and that of their children in that the children would be exposed to much worldliness that their religion taught them to eschew.⁹⁸ The Court upheld the Amish refusal to send their children to school in the face of arguments by the state that it had a legitimate interest in seeing that all of its citizens were adequately educated. In doing so, it was forced to deal with the language in *Reynolds* indicating that while beliefs could not be proscribed, actions based upon religious beliefs could be. Rather than adhere to the old standard, whereby any action could be proscribed, the Court opted for a balancing test whereby the State must show that its regulatory action has no effect upon the free exercise of religion, or that the State's interest is of sufficient magnitude to override First Amendment protections.⁹⁹ The Court cast further doubt on the validity of the *Reynolds* action/belief

dichotomy when it said, "[I]n this context belief and action cannot be neatly confined in logic tight compartments."¹⁰⁰

Justice Douglas, although dissenting in part, agreed with the majority that religiously motivated actions are not always outside the protection of the First Amendment. He admitted that such a holding was a departure from *Reynolds*, long considered the doctrinal underpinning of religious freedom cases, and went further to say that, "[w]hat we do today . . . even promises that in time *Reynolds* will be overruled."¹⁰¹

It is notable, also, that a change in judicial perceptions of religion has taken place. Whereas the nineteenth century judges tended to require some sort of organized, long established, and recognized group with a formulated and recognized body of beliefs in order to qualify as a religion,¹⁰² in *United States v. Seeger*¹⁰³ the Supreme Court constructed a much broader and looser definition of religion for purposes of exemption from active military service. The Court said,

Within [the term "religion"] would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of the possessor a place parallel to that

¹⁰⁰*Id.* at 220. After *Reynolds*, the question had been raised periodically as to how one is free to exercise his religion if he can only think about it without interference from the government. If actions motivated by one's beliefs were prohibited, then it would seem that free exercise of religion was infringed.

¹⁰¹*Id.* at 247 (Douglas, J., dissenting).

¹⁰²See note 52 and accompanying text *supra*.

¹⁰³380 U.S. 163 (1965).

⁹⁵329 U.S. at 25-26.

⁹⁶283 P.2d at 914.

⁹⁷406 U.S. 205 (1972).

⁹⁸*Id.* at 209, 211.

⁹⁹*Id.* at 214.

filled by the God of those admittedly qualifying for the exemption, comes within the statutory definition.¹⁰⁴

Conclusion

The shift from shared values of the nineteenth century to subjectivization of values in the latter part of the twentieth century has important implications with respect to societal and judicial treatment of polygamy. More tolerant social attitudes toward homosexuality, adultery, obscenity, prostitution, and unusual marriage styles would make it difficult to attack polygamy as being violative of the peace and good order of society. Judicial attitudes towards obscenity, privacy, and the protection of individual freedoms, even if manifested in socially deviant behavior, have made necessary a clear showing of danger or detriment to other members of society in order for the conduct to be validly regulated. While there was much nineteenth century rhetoric concerning the evils of polygamy, there is no solid scientific data indicating that the practice is detrimental to society. In fact, the success with which many

¹⁰⁴*Id.* at 176.

nations have long lived with polygamy is indicative that it is only an alternate family style, no better and no worse, perhaps, than monogamy.

Judicial cognizance of the need to protect both religious beliefs and religious actions, if not contrary to the health or safety of society, would make the justification of polygamy upon religious convictions much more possible.¹⁰⁵ Admittedly, however, the practice of polygamy by an organized body such as the Mormon Church could engender opposition, especially in a day when zero population growth is popular. The expanding economic and political influence of such a group could well cause polygamy to be used as an excuse for efforts to curb the organization's power much as it must have done in nineteenth century Utah. Nevertheless, legalized polygamy may be one of the future shocks that will have to be faced in a rapidly changing society.¹⁰⁶

¹⁰⁵See Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 15 Ariz. L. Rev. 287, 302 (1973) for additional implications of the modern-day practice of polygamy.

¹⁰⁶A. Toffler, *Future Shock* 220 (1970).



"The fabric of justice should not be woven on any such involuted logic as to permit a party who is doing wrong to place the blame on another and recover therefor."

—Justice J. Allan Crockett
Rigtrup v. Strawberry Water Users Ass'n,
563 P.2d 1247