

MARRYING POLYGAMY INTO TITLE VII

*Hope Marie Deutsch**

Polygamy, a word of Greek origin, the literal translation of which is “often married,”¹ is a hotly contested practice often subject to misinterpretation.² Polygamy (sometimes called “plural marriage”)³ is the marriage or union of multiple partners, which can manifest as one husband with multiple wives or one wife with multiple husbands.⁴ In modern day society, polygamy almost exclusively takes the form of polygyny, the practice of one husband with multiple wives, as opposed to polyandry, the practice of one wife with many husbands.⁵ The generation-spanning taboo associated with plural marriage has kept polygamy out of sight and out of mind until recently, when the influx of high profile lawsuits challenging anti-polygamy laws⁶ and television shows such as *Big Love*⁷ ever so delicately reminded us of the age old practice that we all know we oppose, but are just not sure why.

Polygamy is distinguishable from polyamory insofar as polygamous partners participate in either legal or spiritual marriages while polyamorous partners partake in a variety of relationship styles such as dating or commitment to exclusivity but do not have the ideal or goal of marriage.⁸ More specifically, polyamory denotes a relationship of love which is grounded in the

* Associate Editor of Research and Writing, Rutgers Journal of Law and Religion; J.D. Candidate May 2015, Rutgers School of Law.

¹ MIRIAM KOKTVEDGAARD ZEITZEN, POLYGAMY: A CROSS-CULTURAL ANALYSIS 3 (2008).

² Thom Brooks, *The Problem with Polygamy*, 37 PHIL. TOPICS 109 (2009), available at <http://dro.dur.ac.uk/10785/1/10785.pdf>.

³ This Note will use “polygamy” and “plural marriage” interchangeably to mean the same thing.

⁴ Brooks, *supra* note 2, at 109.

⁵ *Id.*

⁶ See generally *State v. Green*, 99 P.3d 820 (Utah 2004) (infamous polygamist Tom Green challenged Utah polygamy statute as unconstitutional but the Utah Supreme Court upheld the statute as constitutional). See also *Brown v. Herbert*, 850 F. Supp. 2d 1240 (D. Utah 2012) (the family starring in reality television show *Sister Wives* has filed suit challenging the constitutionality of Utah’s polygamy law, relying in part on the holding in *Lawrence v. Texas*).

⁷ Besides scripted television shows depicting polygamous practices, reality shows such as *Sister Wives* and *My Five Wives* are airing to show the reality of plural marriage.

⁸ Maura Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U.L. REV. 439, 455 (2003).

belief that no one individual can meet all the needs of any other individual and, therefore, multiple partners or “loves” are necessary in order for an individual to be able to reach their full sexual, emotional, intellectual and spiritual potential.⁹ Polygamy is also distinguishable from bigamy, which is criminalized in every state and is generally defined in each state statute as the crime of attempting to legally marry one individual while still legally married to another individual.¹⁰

This note will examine lawful and unlawful employment discrimination against individuals who participate in the practice of polygamy and, specifically, when (if ever) polygamy should be recognized as a legally protected religious practice under Title VII of the Civil Rights Act of 1964. Section I will begin with a discussion of the history and development of polygamy along with the religious aspects of plural marriage in Western culture. Section II will take a look at the Supreme Court’s landmark decision in *Lawrence v. Texas* and its implications for polygamy. Section III will consider protected religious practices under Title VII in comparison with polygamy and its exclusion under Title VII. Section IV will examine relevant case law and attempts therein to include polygamy as a protected religious practice in the employment context, in both public sector and private sector jobs. Section V will examine a recent Utah District Court decision regarding the constitutionality of Utah’s anti-polygamy statute. Finally, Section VI will offer an argument that legally permissible employment discrimination based on polygamy in the public sector cannot and should not be recognized as lawful discrimination on the same grounds in the private sector and, further, that under Title VII’s broad construction of “religion,” a narrow exception should be carved out for polygamy to allow for legal protection against discrimination in both the public and private sector employment context.

I. THE BIRTH OF POLYGAMY AND DEVELOPMENT OVER THE YEARS

Once branded the “twin relics of barbarism,”¹¹ the practice of polygamy has a long-standing and unsurprising reputation as distasteful. While the exact origin of the practice of plural

⁹ *Id.*

¹⁰ See, e.g., N.J. STAT. ANN. § 2C:24-1 (1979).

¹¹ Richard A. Vazquez, *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 (2001).

marriage is unknown, the Old Testament of the Bible contains favorable references to polygamy, as many of the central biblical figures were polygamists.¹² The Jewish Talmud also contains favorable references to polygamy, evidenced by certain passages that discuss how to handle the estate of a man who has passed away and left behind several wives.¹³ The religion of Islam also indicates acceptance of polygamy, as Prophet Muhammed had at least four wives and Sharia law now recognizes the right to plural marriage, although limiting the number of allowable wives at one time to four.¹⁴

The birth of polygamy in the United States can be traced back to 1830, when a twenty-four year old New York farmer by the name of Joseph Smith founded the Church of Christ, later known as the Church of Jesus Christ of Latter-Day Saints (LDS Church), whose followers became known as Mormons.¹⁵ According to Mormon scripture, Joseph had a vision at the age of fourteen while praying in the woods behind his home.¹⁶ He testified that Jesus and God appeared to him, and told him not to join any existing church because none followed the path of Jesus.¹⁷ Seven years after his first vision, Mormon doctrine holds, an angel gave Joseph gold plates containing God's writings.¹⁸ Essentially, Joseph derived the principles of the LDS Church from a significant focus on the Bible's Old Testament as well as his own interpretation of the Old Testament, which led him to the conclusion that the practice of polygamy was essential to what he called the

¹² Complaint at Plaintiffs 69-70, *Brown v. Herbert*, 850 F.Supp.2d 1240 (D. Utah 2012) (No. 2:11 Civ. 652), 2011 WL 2739555 [hereinafter *Brown Complaint*] (central biblical figures who practiced polygamy "includ[e] Abraham, who had three wives (*Genesis* 16:1, 16:3, 25:1); Moses, who had two wives (*Exodus* 2:21, 18:1-6; *Numbers* 12:1) and David, who had eighteen wives (1 *Samuel* 18:27, 26:39-44; *Samuel* 3:3, 3:4-5, 5:13, 12:7-8, 12:24, 16:21-23)).

¹³ *Id.* at 76 (citing passages in the Babylonian Talmud, Tractate Kethuboth 93a-93b).

¹⁴ *Id.* at 78-80.

¹⁵ Vazquez, *supra* note 11, at 227.

¹⁶ Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101, 109 (2006).

¹⁷ *Id.*

¹⁸ *Id.*

“restitution of all things;”¹⁹ consequently, the taking of multiple wives was “one of the religions most crucial theological tenets.”²⁰

Leaders of the LDS Church, or informally the Mormon Church,²¹ made the important announcement in 1852 that Mormons believed in and practiced polygamy as a central precept of their faith, bringing the practice of polygamy into the center of public eye for the first time.²² Unsurprisingly, public opposition to the practice quickly formed and many urged those in positions of power to put an end to the practice.²³ Everyone from Clergymen to women's leaders, even newspaper editors called on national leaders to wipe out the practice.²⁴ In response to the criticism and rejection of Non-Mormon Christians, which often led to violent clashes, the Mormons became self-sufficient, preferring to separate themselves from other Christian communities.²⁵ To escape condemnation, they moved further west to desolate territories, and in 1847, eventually settled in the scarcely populated Salt Lake Valley region.²⁶

A federal campaign against the practice of polygamy ensued soon after, championed in part by American presidents, beginning with James Buchanan in 1857.²⁷ In 1857, President Buchanan authorized a \$15 million invasion of Utah intended to intimidate the Mormon leadership and cause them to revoke the practice.²⁸ Congress quickly jumped on board as well, enacting legislation “criminalizing polygamists, disenfranchising them, and, ultimately, toppling the financial holdings” of the LDS Church due to its support of the practice of polygamy.²⁹ In 1862, Congress

¹⁹ Vazquez, *supra* note 11, at 227.

²⁰ Jason D. Berkowitz, *Beneath the Veil of Mormonism: Uncovering the Truth About Polygamy in the United States and Canada*, 38 U. MIAMI INTER-AM. L. REV. 615, 616 (2007).

²¹ *Who Are the Mormons?*, THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, <http://mormon.org/faq/topic/about-mormons/question/the-mormons> (last updated Feb. 21, 2012).

²² Vazquez, *supra* note 11 at 227.

²³ *Id.*

²⁴ Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1322 (1998).

²⁵ Chatlani, *supra* note 16, at 110.

²⁶ *Id.*

²⁷ Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 102 (2006).

²⁸ Harmer-Dionne, *supra* note 24, at 1322.

²⁹ Sigman, *supra* note 27, at 102-103.

passed the 1862 Morrill Anti-Bigamy Act, but lack of enforcement undermined the law, which was ultimately repealed in 1910.³⁰

A. The Reynolds Groundwork for the Criminalization of Polygamy

The landmark polygamy decision still followed today, *Reynolds v. United States*,³¹ originally commenced as a challenge to the above-mentioned Morrill Act.³² It was in this case that the Supreme Court laid the foundation for over one hundred years of rulings against the claims of practicing polygamists,³³ and it now serves as the backdrop to any challenge of anti-polygamy legislation.³⁴ In the *Reynolds* case, the Supreme Court was faced with the question of whether George Reynolds, a man who subscribed to the Mormon faith and attempted to marry a second wife, could overcome his criminal guilt by way of religious justification under the Free Exercise Clause of the Constitution.³⁵

In holding that states could criminalize polygamous marriage, the Supreme Court noted that pursuant to the enactment of the First Amendment, “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”³⁶ The Court then found that polygamy prohibitions fell into the latter, rather than the former category; polygamy was, and remained, a crime contrary to social normalcy.³⁷ In so holding, the Supreme Court essentially crafted a “public morality” justification, casting the practice of plural marriage as a historical abomination, “odious among the northern and western nations of Europe” and equating the sanctity of marriage with its legal characteristics as a civil contract properly regulated by law. The Court went on to state that to except a polygamist from the recognized regulation of marriage would create an unstable society of individuals that valued religious practice above “the law of the land.”³⁸ Therefore, the Court wrote that it would defy logic to

³⁰ Harmer-Dionne, *supra* note 24, at 1322-23.

³¹ *Reynolds v. United States*, 98 U.S. 145 (1878).

³² Joseph Bozzuti, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409, 420 (2004).

³³ Sigman, *supra* note 27, at 227.

³⁴ Bozzuti, *supra* note 32, at 420.

³⁵ *Id.* at 421.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Vazquez, *supra* note 11, at 229.

suggest that the enactment of the First Amendment was intended to put a stop to the prohibition of polygamy – instantly transforming it from a social evil into a religious right.³⁹ The poignant and forceful *Reynolds* opinion espoused its criminalization of polygamy by appealing to the popular religious views, biases, and opinions on morality held in the United States growing throughout the 1800s and culminating by the time of the *Reynolds* decision.⁴⁰

In the years following *Reynolds*, there have been numerous cases regarding the Free Exercise and Establishment Clause, but the Supreme Court has never revisited polygamy in light of contemporary precedent.⁴¹ Thus, *Reynolds* remains a significant hurdle to litigants challenging anti-polygamy statutes.⁴² Additionally, Congress responded to the judicial condemnation of polygamy in *Reynolds* by enacting legislation preventing polygamists from seeking political office or serving on a jury and requiring a man to take an oath affirming that he was not a polygamist before he was allowed to vote.⁴³ Left with no choice, the Mormon Church eventually relented to pressure from the judiciary, the legislature, and the public. In 1890, Mormon President Wilford Woodruff “issued a Manifesto declaring that because the laws forbidding polygamy . . . had been upheld as constitutional, the Church would submit to the laws of the land, and he would use his influence to discourage Mormons from plural marriage.”⁴⁴

Pursuant to the Manifesto issued by LDS Church President Woodruff, the Mormon religion began to advocate monogamy both over the pulpit and through the press.⁴⁵ On an exceptional basis, some new plural marriages were performed between 1890 and 1904, especially in Mexico and Canada, outside the jurisdiction of U.S. law; a small number of plural marriages were also performed within the United States during those years.⁴⁶ However, in 1904,

³⁹ Bozzuti, *supra* note 32, at 421-22.

⁴⁰ *Id.*

⁴¹ *Id.* at 423.

⁴² *Id.*

⁴³ Vazquez, *supra* note 11, at 230.

⁴⁴ *Id.*

⁴⁵ *Plural Marriage and Families in Early Utah*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <http://www.lds.org/topics/plural-marriage-and-families-in-early-utah?lang=eng&query=polygamy> (last visited Jan. 3, 2014).

⁴⁶ KATHRYN M. DAYNES, *MORE WIVES THAN ONE: TRANSFORMATION OF THE MORMON MARRIAGE SYSTEM, 1840–1910* 208–9 (2001); THOMAS G. ALEXANDER,

the LDS Church strictly prohibited new plural marriages and today, any person who practices plural marriage cannot become or remain a member of the Church.⁴⁷ The LDS Church cites many possible purposes for why it believes that God, through His prophets, instituted plural marriage for a short period of time, including increasing the number of children born, increasing the per-capita wealth of households, and promoting ethnic inter-marriages and thereby diversifying the population.⁴⁸

B. Polygamy in Modern Times

Presently, and since 1904, the Mormon Church does not recognize polygamy as an accepted practice, and in fact, practicing polygamy is now grounds for excommunication from the LDS Church.⁴⁹ In fact, the LDS Church has strongly and publicly disapproved of the practice of polygamy, evidenced by the statements of LDS Church President Gordon B. Hinckley in the Church's worldwide General Conference in 1998, "[i]f any of our members are found to be practicing plural marriage, they are excommunicated, the most serious penalty the Church can impose."⁵⁰ Hinckley noted that to engage in polygamy would violate both civil law and the law of the LDS Church and referenced the Manifesto, stating:

[m]ore than a century ago God clearly revealed unto His prophet Wilford Woodruff that the practice of plural marriage should be discontinued, which means that it is now against the law of God. Even in countries where civil or religious law allows polygamy, the Church teaches that marriage must

MORMONISM IN TRANSITION: A HISTORY OF THE LATTER-DAY SAINTS, 1890–1930 60-73 (1986); *Manifesto of 1890*, BYU, http://eom.byu.edu/index.php/Manifesto_of_1890 (last visited Feb. 10, 2015).

⁴⁷ *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#5> (last visited Feb. 10, 2015).

⁴⁸ *Id.*

⁴⁹ *Mormons Seek Distance From Polygamist Sects*, NBC, http://www.nbcnews.com/id/25396937/ns/us_news-faith/t/mormons-seek-distance-polygamist-sects#.UthDpv0nXwI (last visited Jan. 3, 2014).

⁵⁰ Gordon B. Hinckley, *What Are People Asking About Us?*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, (Oct. 1998), <https://www.lds.org/general-conference/1998/10/what-are-people-asking-about-us?lang=eng> (last visited January 3, 2014).

be monogamous and does not accept into its membership those practicing plural marriage.⁵¹

It would be naïve to suggest that that all polygamy simply ended; while Church leaders publicly condemned polygamy, they privately authorized it and some continued to engage in polygamous behavior.⁵² The Manifesto itself was suspect to the Mormons as religious doctrine, because it did not follow the customs of other Church documents (e.g., it was unsigned by leaders and contained a different type of opening statement).⁵³ In addition, the Manifesto never declared polygamy to be “wrong;” rather, it stated that because of Congress and the Court’s interpretation of the laws, polygamy should not be practiced.⁵⁴

Following the Mormon Church’s public rejection of plural marriages, several breakaway sects continued to practice polygamy in furtherance of their faith, such as the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS). The FLDS, a small group of polygamists, has continued to fight for the principle of plural marriage.⁵⁵ The LDS Church is not associated with the FLDS, though the two are often confused and many believe that FLDS is indicative of the Mormon religion as a whole, when it is actually a breakaway sect of the Mormon Church.⁵⁶ Because LDS and the Mormon religion no longer encourages or permits polygamy, the LDS Church wishes to be recognized as a distinct religion and draw a line between the LDS Church and the FLDS Church.⁵⁷

Over the years, the scorn against polygamy and the related perceived threat against social order has pacified, allowing practicing polygamists to generally go unnoticed.⁵⁸ Currently, although the actual practice of polygamy, and specifically polygyny, is relatively small, as much as a third of the world’s population belongs to a community that allows it – approximately eighty-three percent of human societies permit it.⁵⁹ At least in the Western United States and Canada alone, 30,000 people practice

⁵¹ *Id.*

⁵² Sigman, *supra* note 27, at 134.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 135.

⁵⁶ *Id.*

⁵⁷ Sigman, *supra* note 27, at 135.

⁵⁸ Jaime M. Gher, *Polygamy and Same Sex Marriage – Allies or Adversaries Within the Same Sex Movement*, 14 WM. & MARY J. WOMEN & L. 559, 561 (2008).

⁵⁹ *Id.*

polygamy.⁶⁰ Additionally, there are ten times more Mormon fundamentalists living in polygamous marriages presently than in the original Mormon community in 1862.⁶¹ However, the stigma and public opposition to polygamy is still alive and well; in fact, a poll taken in May 2003 showed that “ninety-two percent of adults surveyed nationwide considered ‘polygamy, when one husband has more than one wife at the same time’ – or, more precisely, polygyny – to be ‘morally wrong.’”⁶² Despite that significant statistic, telling recent events seem to point toward the practice of polygamy taking a liberal left hand turn toward modern day acceptance.

II. THE *LAWRENCE V. TEXAS* SAGA

The landmark decision in *Lawrence v. Texas* evoked a firestorm of national controversy when it struck down a Texas sodomy law on substantive due process and right to privacy grounds.⁶³ Given the morality-driven topic at issue, emotions ran high between the justices and the lengthy majority opinion holding that homosexuals enjoy a constitutionally protected right to engage in private intimate conduct⁶⁴ sparked fury from the dissenting justices. The Supreme Court was fiercely divided on this issue: Justice Kennedy delivered the majority opinion in which Justices Stevens, Souter, Ginsburg, and Breyer joined; Justice O’Connor filed a concurring opinion; Justice Scalia filed a fiery dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined; and Justice Thomas also filed his own dissenting opinion.⁶⁵

The majority opinion began with an examination of *Griswold v. Connecticut*,⁶⁶ where the Court recognized the “right to

⁶⁰ *Id.*

⁶¹ *Id.* at 577.

⁶² Sigman, *supra* note 27, at 104.

⁶³ *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in a consensual act considered sodomy under statute in the privacy of their own home).

⁶⁴ *Id.* at 578 (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government”).

⁶⁵ *Id.* at 561.

⁶⁶ 381 U.S. 479 (1965).

make certain decisions regarding sexual conduct extends beyond the marital relationship”⁶⁷ and *Eisenstadt v. Baird*,⁶⁸ where the Court reasoned that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁶⁹ While this analysis does not seem to reach polygamy, these cases are important because they establish that decisions about marriage are perhaps worthy of even more protection than other personal choices. This sentiment is also bolstered by other leading cases dealing with marriage.⁷⁰

The majority opinion then considered its decision in *Bowers v. Hardwick*,⁷¹ then a mere seventeen years old, and ultimately overruled it, much to the dismay of Justice Scalia.⁷² It is in this decision where polygamists can potentially gain the most ammunition from *Lawrence's* majority opinion.⁷³ In examining *Bowers*, Justice Kennedy seemingly chose to look at the case's big picture rather than scrutinize the Court's prior reasoning, looking more to the positive rights of homosexuals rather than to the states' ability to infringe upon their freedoms.⁷⁴ Although much of the majority's opinion is phrased in terms of sexual relations, which does not necessarily equate with marriage, it still acknowledged unequivocally that states should go to great lengths to avoid interfering with a citizen's personal sphere of liberty rights.⁷⁵ In fact, Justice Kennedy, writing for the court, stated “[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of

⁶⁷ *Lawrence*, 539 US at 565.

⁶⁸ 405 U.S. 438 (1972).

⁶⁹ *Id.* at 453.

⁷⁰ *See, e.g.*, *Turner v. Safley*, 482 U.S. 78 (1987) (overturning severe restrictions placed on inmate marriages and stating that prison officials must have strong reasons before limiting inmates' rights to marry); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (reasoning that depriving citizens the right to marry based upon race “is surely to deprive all the State's citizens of liberty without due process of law.”).

⁷¹ *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), overruled by *Lawrence*, 539 U.S. at 578.

⁷² *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (noting that “I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine.”).

⁷³ Bozzuti, *supra* note 32, at 426.

⁷⁴ *Id.* at 426.

⁷⁵ *Id.*

the criminal law”⁷⁶ and quoted the court’s language in *Planned Parenthood v. Casey*, noting “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”⁷⁷

In fact, Justice Kennedy quoted from *Planned Parenthood v. Casey* extensively in the *Lawrence* opinion, much to the pleasure of polygamists seeking potential constitutional protection for plural marriage. One particular passage stands out, “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment” also noting that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁷⁸ The Court’s use of this language not only aids polygamists in their struggle to declare state prohibitions on polygamy unconstitutional, it arguably aids all litigants seeking to shield any asserted interest under the guise of the right to privacy.⁷⁹

But it was Justice Antonin Scalia, often labeled the Supreme Court’s “most notorious dissenter,” whose opinion recognized the consequences that the majority’s holding would have on other morally driven prohibitive laws such as anti-polygamy laws. Although many of Justice Scalia’s opinions are “unpopular and out of sync with our nation’s politically correct social posture,” many admire his “unfeigned, straightforward approach to jurisprudence.”⁸⁰ At the time of the *Lawrence* opinion,

⁷⁶ *Lawrence*, 539 U.S. at 571.

⁷⁷ *See id.* at 571 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

⁷⁸ *Planned Parenthood*, 505 U.S. at 851.

⁷⁹ *Bozzuti*, *supra* note 32, at 428.

⁸⁰ *Id.* at 409-10. Occasionally, Scalia’s ideology puts him at odds with even his fellow conservative justices. One commentator observed:

Justice Scalia writes passionately, artfully, and sharply. His wit is often barbed and his criticism scathing. He also tends to aim his sharpest and most vocal denunciations not at those more liberal members on the Court with whom he disagrees routinely, but instead at those more conservative members of the Court whenever they fail to live up to Scalia’s own conservative standards. He openly ridicules their legal reasoning, casts doubt on their morality, and even sometimes appears to call into question both their intellectual capacity and personal integrity.

many wondered whether Justice Scalia's seemingly outlandish predictions would prove him a "punchline or a prophet."⁸¹

Justice Scalia's emotionally charged dissent predicted that in overruling *Bowers*, the majority in *Lawrence* had essentially decriminalized any current law based on *Bowers'* ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation.⁸² To support this notion, Justice Scalia cited numerous cases, whose holdings relied solely on the moral principle established in *Bowers*.⁸³ In fact, Justice Scalia fervently believed that overturning *Bowers* would result in the demise or at least "massive disruption"⁸⁴ of current social order because "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices."⁸⁵ He further went on to note that:

[e]very single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding . . . [t]he impossibility of distinguishing homosexuality from other traditional 'morals' offenses is precisely why *Bowers* rejected the rational-basis challenge.⁸⁶

⁸¹ *Id.* at 409.

⁸² *Lawrence*, 539 U.S. at 590-91 (Scalia, J., dissenting).

⁸³ *See, e.g.*, *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality . . . indisputably is a legitimate government interest under rational basis scrutiny."); *Milner v. Apfel*, 148 F.3d 812, 814 (7th Cir. 1998) (citing *Bowers* for the proposition that "[l]egislatures are permitted to legislate with regard to morality . . . rather than confined to preventing demonstrable harms."); *Holmes v. Cal. Army National Guard*, 124 F.3d 1126, 1136 (9th Cir.1997) (relying on *Bowers* in upholding the federal statute and regulations banning from military service those who engage in homosexual conduct); *Owens v. State*, 724 A.2d 43, 53 (Md. 1999) (relying on *Bowers* in holding that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage."); *Sherman v. Henry*, 928 S.W.2d 464, 469-473 (Tex. 1996) (relying on *Bowers* in rejecting a claimed constitutional right to commit adultery).

⁸⁴ *Lawrence*, 539 U.S. at 590-91 (Scalia, J., dissenting).

⁸⁵ *Id.* at 590 (Scalia, J., dissenting).

⁸⁶ *Id.* (Scalia, J., dissenting).

Justice Scalia feared that the majority's holding in *Lawrence* would pave the way for decriminalization of anti-polygamy laws (among other morally-driven prohibitive laws). Whether or not his prediction will come true remains to be seen, but there have been several attempts to challenge polygamy laws under the argument advanced in the Scalia dissent.⁸⁷ The general argument asserted in these cases is based on the *Lawrence* holding, which protected an individual's decisions concerning the intimacies of physical relationships as a fundamental right and upheld the individual's right to privacy.⁸⁸ These cases argue that the *Lawrence* decision was sufficiently broad to shield the practice of polygamy from the intruding hand of the state and further argue that the *Lawrence* protections can be extended to include formal recognition of the right of consenting adults of majority age to engage in polygamous practices behind the closed doors and in the privacy of their own home.⁸⁹ As of late, these attempts have not been successful, but it is only a matter of time until this heated issue makes its way up to the Supreme Court, especially considering it will likely be propelled by the recent legalization of same-sex marriage.

A. The Demise of DOMA and Subsequent Legalization of Same Sex Marriage; Reliance on Lawrence v. Texas

The overruling of Proposition 8 (Prop 8)⁹⁰ and portions of the Defense of Marriage Act (DOMA)⁹¹ and subsequent legalization of same sex marriage in many states is indicative of the strong change in the tides of our society and accepted cultural norms. The issue of whether same-sex marriage should be permitted and recognized as legal by both the federal and state governments was perhaps one of, if not the most controversial topics in recent times and the cases deciding these issue have quickly become landmark decisions. In yet another divided opinion, the Supreme Court held in *United States v. Windsor* that Section 3 of DOMA's principal effect was to "identify and make

⁸⁷ See, e.g., *Brown v. Herbert*, 850 F. Supp. 2d 1240 (D. Utah 2012); *State v. Fischer*, 199 P.3d 663, 671 (Ariz. Ct. App. 2008); *State v. Holm*, 137 P.3d 726 (Utah 2006); *Bronson v. Swenson*, 394 F. Supp. 2d 1329 (D. Utah 2005).

⁸⁸ See generally *Brown*, 850 F. Supp. 2d at 1240l; *Fischer*, 199 P.3d at 671; *Holm*, 137 P.3d at 726; *Bronson*, 394 F. Supp. 2d at 1329.

⁸⁹ *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

⁹⁰ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁹¹ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

unequal a subset of state-sanctioned marriages [by] depriv[ing] some couples married under the laws of their State, but not others, of both rights and responsibilities, creating two contradictory marriage regimes within the same State.”⁹²

Unsurprisingly, Justice Scalia filed a scorching dissent in which he recounted before the Court how his predictions in his *Lawrence v. Texas* dissent were now essentially proven true by the Court’s decision in *Windsor*. Justice Scalia first noted “the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.”⁹³ He then irritably pointed out to the majority that although the majority in *Lawrence* had declared the holding narrow and assured that the decision there had “nothing at all to do with ‘whether the government must give formal recognition to any relationship that homosexual persons seek to enter,’”⁹⁴ the majority in *Windsor* “[n]ow [tells us] that DOMA is invalid because it ‘demeans the couple, whose moral and sexual choices the Constitution protects.’”⁹⁵ Ironically, the very thing that the majority claimed *Lawrence* could not and would not be used for – formal recognition of homosexual relationships – was exactly what it was used for.

Justice Scalia further went on to argue that the majority’s holding in *Windsor*, ostensibly limited in application to the federal government, opened the road to a slippery slope whereby it would be “easy” even “inevitable” to strike down state law denying same-sex couples marital status using the majority’s reasoning in *Windsor*.⁹⁶ This dire warning sounds curiously similar to those Justice Scalia wielded in *Lawrence*, which the majority substantiated in its *Windsor* decision. In the words of Justice Scalia, “no one should be fooled; it is just a matter of listening and waiting for the other shoe.”⁹⁷ If Justice Scalia’s proven track record is any indication, the reasoning of the *Windsor* decision will in fact serve as the basis to strike down state laws prohibiting same sex marriage;⁹⁸ if this happens, it may open the door for

⁹² *Id.* at 2681.

⁹³ *Id.* at 2707 (Scalia, J., dissenting).

⁹⁴ *Id.* at 2709 (Scalia, J., dissenting) (quoting *Lawrence*, 539 U.S. at 578).

⁹⁵ *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

⁹⁶ *Id.* at 2709-10 (Scalia, J., dissenting).

⁹⁷ *Id.* at 2710. (Scalia, J., dissenting).

⁹⁸ It seems Justice Scalia is right again, and the other shoe has dropped . . . many times. See *Bourke v. Beshear*, 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (holding that Kentucky’s denial of recognition of same sex

many other morally-driven prohibitive laws, including and especially anti-polygamy laws, may be struck down on the same basis.

Many polygamists are hopeful that the legalization of same-sex marriage will “blaze the marriage equality trail” for state recognition of plural relationships and marriages.⁹⁹ Indeed, both opponents and proponents of polygamy alike recognize that the rulings on same-sex marriages could and will have a significant impact on the moral acceptance, or at least legalization, of plural marriage. In fact, the arguments in support of same-sex marriage can be extended to polygamous marriages, as well. For example, both groups have a parallel interest in reducing the government regulation of extra-marital sex and the freedom to build a larger alternative family recognition movement, thus making room for more diverse family forms, not just ones mirroring monogamous heterosexuality.¹⁰⁰ Additionally, advocates of same-sex marriage and advocates of polygamous marriage may “take issue with the use of relationships as a legal proxy for societal evils, as it leads to unmerited persecution and perpetuates prejudice”¹⁰¹ by attempting to overturn legislation that criminalizes their relationships by instead promoting enforcement of laws that “target feared harms (i.e., child abuse, neglect, domestic violence, sexual assault),”¹⁰² which can occur within all types of relationships, not just same-sex or polygamous relationships.

Likewise, opponents of polygamous relationships also fear that the same-sex rulings will open a new door for polygamists. In

marriages violated Fourteenth Amendment equal protection); *Obergefell v. Wymyslo*, 1:13-CV-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013) (holding that Ohio's constitutional and statutory bans on recognition of same-sex surviving spouses' already-existing legal marriages on their partners' death certificates violated their substantive due process rights to those marriages); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014) (holding that Virginia's prohibition against same-sex marriage did not further compelling interests in protecting and supporting children, in violation of due process); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (holding that Utah's prohibition against same-sex marriage was unconstitutional noting that all citizens, regardless of their sexual identity, have a fundamental right to liberty, and this right protects an individual's ability to marry and the intimate choices a person makes about marriage and family).

⁹⁹ Steven Nelson, *Polyamory Advocate: Gay Marriage 'Blazing the Marriage Equity Trail'*, U.S. NEWS (June 24, 2013), <http://www.usnews.com/news/articles/2013/06/24/polyamorous-advocate-gay-marriage-blazing-the-marriage-equality-trail>.

¹⁰⁰ Gher, *supra* note 58, at 599.

¹⁰¹ *Id.*

¹⁰² *Id.*

fact, some adversaries believe that the legalization of same-sex marriage sets a dangerous precedent, which could lead to unintended consequences because it represents a paradigm shift in the understanding of marriage; polygamy is one of the feared outcomes.¹⁰³ In fact, Justice Scalia in another apoplectic dissent,¹⁰⁴ went so far as to analogize polygamy to homosexuality as similarly “reprehensible” conduct to which the state could exhibit “animus.”¹⁰⁵ Whether or not the legalization of same-sex marriage will pave the way for the decriminalization has yet to be seen, but it has certainly evoked heated debate over the future of plural marriage.

III. THE EXCLUSION OF POLYGAMY UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 was the first comprehensive federal employment discrimination regulation, and most states have modeled their antidiscrimination laws after Title VII.¹⁰⁶ The enactment of Title VII was due in large part as an attempt to address the widespread discrimination in the employment context that was taking place in the United States in the mid-20th Century.¹⁰⁷ The Civil Rights Act and Title VII were the response to a social movement stemming from the United States Supreme Court's decision in *Brown v. Board of Education*¹⁰⁸ and the outrage that came as a response to the lack of progress after *Brown* in dismantling Jim Crow segregation.¹⁰⁹ Title VII provides that “it shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion.”¹¹⁰ Title VII provided for, among other things, protection against employment discrimination

¹⁰³ *Gay Marriage Plan Paves Way for Polygamy Says Lord Carey*, BBC NEWS (June 4, 2013, 12:03 PM), <http://www.bbc.co.uk/news/uk-politics-22727808>.

¹⁰⁴ *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

¹⁰⁵ Gher, *supra* note 58, at 571.

¹⁰⁶ Michael Moberly, *Bad News for Those Proclaiming the Good News? The Employer's Ambiguous Duty to Accommodate Religious Proselytizing*, 42 SANTA CLARA L. REV. 1, 1-2 (2001).

¹⁰⁷ *Id.* at 2.

¹⁰⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1955).

¹⁰⁹ *Labor & Employment Law Forum*, AULABORLAWFORUM.ORG, <http://aulaborlawforum.org> (last visited Feb. 10, 2015).

¹¹⁰ 42 U.S.C.A. § 2000e-2(a)(1) (2014).

on a number of bases, including religious observances, practices, and beliefs.¹¹¹

The initial motivation behind the passage of Title VII was not religious discrimination; rather, the motivation was primarily to protect against racial discrimination. In fact, President Johnson's remarks upon signing the Civil Rights Act of 1964 focused almost solely on racial issues, noting that the law was intended to widen opportunities, provide equal treatment, preserve unalienable rights, and secure entitlement to the blessing of liberty for "Americans of every race and color," and to "close the springs of racial poison."¹¹²

Although the enactment of Title VII was driven mainly by the need to address the extensive racial discrimination taking place, arguably at least, religion was only included as a protected class only "by virtue of the nation's long history of considering [religious observance] a fundamental right."¹¹³ Regardless of the reason for the inclusion of religion, this protected class perhaps enjoys a more auspicious treatment than some other classes, in that Title VII not only prohibits employers from discriminating against former, present, and prospective employees on the basis of religion, it also places an affirmative obligation on employers to accommodate employee's religious beliefs, observances, and practices.¹¹⁴

Title VII itself does not provide much guidance with respect to how to define a religion; it merely states that: "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."¹¹⁵ Although

¹¹¹ Moberly, *supra* note 106, at 2.

¹¹² Lyndon B. Johnson, Radio and Television Remarks upon Signing the Civil Rights Bill (Jul. 2, 1964), in II PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: LYNDON B. JOHNSON, 1963-64, 842-44 (1965), available at <http://www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/640702.asp>.

¹¹³ Kenneth G. Frantz, *Religious Discrimination in Employment: An Examination of the Employer's Duty to Accommodate*, 19 DET. C. L. REV. 205, 206 (1979); cf. *Am. Motors Corp. v. Dep't of Indus., Labor & Human Relations*, 305 N.W.2d 62, 72 (Wis. 1981) ("Congress, without bothering seriously to consider or to document the problem, included religious discrimination as one of the employment practices proscribed by Title VII.") (emphasis omitted) (quoting Harry T. Edwards & Joel H. Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 600 (1971)).

¹¹⁴ Moberly, *supra* note 106, at 3-4.

¹¹⁵ 42 U.S.C. § 2000e(j) (2006).

Title VII construes the meaning of religion very broadly to include “all aspects of religious observance and practice as well as belief,”¹¹⁶ the United States Equal Employment Opportunity Commission (EEOC), the administrative agency responsible with administering Title VII, further interpreted Title VII’s religion definition to include “religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.”¹¹⁷

This extremely broad construction was expanded even more by the EEOC’s declaration that:

[a] belief is ‘religious’ for Title VII purposes if it is ‘religious’ in the person’s own scheme of things . . . [and] even if the employee is affiliated with a religious group that does not espouse or recognize that individual’s belief or practice, or if few – or no – other people adhere to it.¹¹⁸

EEOC further notes that an employer must only accommodate the religious belief if it is “sincerely held,” which, for obvious reasons, is only relevant to religious accommodation claims, not to religious-based disparate treatment or harassment.¹¹⁹

EEOC further cemented this in its Decision No. 85-3¹²⁰ which, although not controlling in any jurisdiction, is given

¹¹⁶ See *id.* See also *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978) (the statutory language “all aspects of religious practice and belief” is interpreted broadly; “to restrict the act to those practices which are mandated or prohibited by a tenet of the religion, would involve the court in determining not only what are the tenets of a particular religion, which by itself perhaps would not be beyond the province of the court, but would frequently require the courts to decide whether a particular practice is or is not required by the tenets of the religion.”).

¹¹⁷ EQUAL EMP’T OPPORTUNITY COMM’, PUB. NO. 915.003, EEOC COMPLIANCE MANUAL, SECTION 12: RELIGIOUS DISCRIMINATION (2008), available at http://www.eeoc.gov/policy/docs/religion.html#_ftn20 (last visited Feb. 8, 2015).

¹¹⁸ *Id.* EEOC’s interpretation comes after reviewing the following decisions: *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981) (“religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (although animal sacrifice may seem “abhorrent” to some, Santerian belief is religious in nature and is protected by the First Amendment); *U.S. v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995) (“one man’s religion will always be another man’s heresy.”).

¹¹⁹ *Id.*

¹²⁰ EEOC Decision No. 85-3, 37 Fair Empl. Prac. Cas. (BNA) 1883, (1985),

substantial deference by courts.¹²¹ Decision No. 85-3 involved a police officer's challenge that his termination due to his status as a practicing polygamist was unlawful under Title VII.¹²² In this administrative decision, EEOC denied the police officer's challenge to his termination, finding that it was in fact lawful.¹²³ Interestingly, EEOC based this decision solely on the existing case law, finding that since polygamy was held not to be protected by the First Amendment's guarantee of religious freedom in *Reynolds v. United States*,¹²⁴ that polygamy would consequently not be considered a federally recognized religious practice within the meaning of Title VII.¹²⁵

Courts also struggle with how to interpret the meaning of "religion" under Title VII. Besides issues surrounding "traditional" religions, courts have had to decide whether an employee's beliefs in veganism, Wicca, "Confederate Southern Americanism," and other belief systems constituted "religions" protected by Title VII.¹²⁶ Courts have struggled with how to determine whether a belief constitutes a protected religious belief under Title VII. For example, an appeals judge determined that the relevant test should be an examination of three factors where: (1) "the nature of the ideas in question," which focuses not on truth or orthodoxy, but rather on whether the subject matter of the ideas is consistent with religion; (2) the comprehensiveness of the religious belief, meaning that the belief system should answer

available at <http://www.aele.org/law/2005FPDEC/eeoc-polygamy.html>.

¹²¹ Whenever an employee wishes to challenge their employer, potential employer, or former employer's action under Title VII, the employee is required to first file a claim with the EEOC. The EEOC will investigate and either attempt to remedy the problem through informal conciliation; if unable to remedy the problem, the EEOC will issue a right to sue letter whereby the claimant can seek relief from courts.

¹²² See EEOC Decision No. 85-3, 37 Fair Empl. Prac. Cas. (BNA) 1883, *supra* note 120. .

¹²³ *Id.*

¹²⁴ *Reynolds*, 98 U.S. 145.

¹²⁵ *Id.*

¹²⁶ See, e.g., *Chaplin v. Du Pont Advance Fiber Sys.*, 293 F. Supp. 2d 622, 629 (E.D. Va. 2003) (concluding that the plaintiffs who claimed religion-based discrimination suffered no adverse action based on their status as "Confederate Southern Americans."); *Van Koten v. Family Health Mgmt., Inc.*, 955 F. Supp. 898, 902-03 (N.D. Ill. 1997), *aff'd*, 134 F.3d 375 (7th Cir. 1998) (concluding that Wicca is a religion); *Friedman v. S. Cal. Permanente Med. Grp.*, 25 Cal. Rptr. 2d 663, 685-86 (Ct. App. 2002) (concluding that veganism is not a religion for purposes of state law). *But see Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004) (declining to decide whether being a "Confederate Southern American" entitled the plaintiff to protection).

more than one question; and (3) whether the ideas have “any formal, external, or surface signs that may be analogized to accepted religions.”¹²⁷

Despite the broad language of Title VII’s definition of “religion”, and the EEOC’s broad interpretation of “religion” under Title VII, the practice of plural marriage is not recognized as a legally protected religious practice under Title VII, due in large part to the fact that the practice of polygamy is presently criminalized in every state.¹²⁸ Consequently, discrimination against polygamists in the employment setting has been upheld, at least in terms of public sector jobs.¹²⁹ However, that is not to say that Title VII as a whole has retained the rigid reading from when it was first enacted fifty years ago. In fact, times have changed dramatically during the half a century of Title VII’s life, giving rise to new “classes” of people who were left unprotected under the old, somewhat “traditional” protected classes of Title VII.¹³⁰

For example, individuals who are gay, lesbian, bisexual, or transgendered experience significantly higher rates of discrimination in the employment context, yet there is no listed class in Title VII to protect individuals of those statuses. As a result, Title VII has been expanded by the EEOC and construed to also include such classes under the protected class of “sex,” offering these individuals equal protection.¹³¹ Some of the new

¹²⁷ *Malnak v. Yogi*, 592 F.2d 197, 208-10 (3d Cir. 1979) (Adams, J., concurring).

¹²⁸ Barbara Bradley, *Some Muslims in U.S. Quietly Engage in Polygamy*, NATIONAL PUBLIC RADIO (May 27, 2008) <http://www.npr.org/templates/story/story.php?storyId=90857818>

¹²⁹ See discussion of case law in Section III. The terminations based on plural marriage have been upheld in public sector employment due to the public official’s violation of his oath to abide by and enforce the State’s constitution, which prohibits polygamy.

¹³⁰ New classes have developed since 1964, such as classes based on: sexual orientation, transgendered, or gay, lesbian, and bisexual individuals, all of which were left unprotected under the 1964 definitions. Additionally, classes that existed in 1964 but the need to recognize them as such was not yet clear include: status as a parent, status based on political affiliation, or marital status. See, e.g., *Facts About Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status*, EQUAL OPPORTUNITY EMP’T COMM’N, <http://www.eeoc.gov/federal/otherprotections.cfm> (last visited Feb. 8, 2015).

¹³¹ See *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (2012), available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt> (holding that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is covered under Title VII of the Civil

“classes” are quite surprising and interesting considering they have always existed, they have just never been thought of as a “class” needing protection under Title VII. For example, a new mother’s right to breastfeed or pump breast milk during work was found to be a protected “behavior” under Title VII.¹³²

Title VII has also been significantly expanded in terms of protected religious practices, creating several new classes of protection within the meaning of Title VII through various court cases.¹³³ Besides the “traditional” religions such as the various denominations of Christianity and Judaism and other “mainstream” religions, as well as the expansion of religion under the EEOC interpretation, there have been some instances in which individuals who practice nontraditional religions have also sought Title VII protection.¹³⁴

It is a remarkable position in which individuals who choose to practice polygamy find themselves in today’s workplace. Under the current state of affairs, a polygamist’s coworker who chooses to engage in a homosexual relationship outside of the workplace enjoys protection against employment discrimination under Title

Rights Act of 1964). *See also* *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (2011), available at <http://www.eeoc.gov/decisions/0520110649.txt>; *Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (2011); (EEOC holding that claims by lesbian, gay, and bisexual individuals alleging sex-stereotyping state a sex discrimination claim under Title VII).

¹³² Nicole Kennedy Orozco, *Pumping at Work: Protection from Lactation Discrimination in the Workplace*, 71 OHIO ST. L.J. 12822, 1283-84 (2010). The enactment of the Patient Protection and Affordable Care Act now requires employers to accommodate the needs of lactating employees. The healthcare reform came a year after the Ohio Supreme Court’s decision in *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622 (Ohio 2009), where the court held that an employee’s termination for taking an unauthorized break to pump her breast milk was lawful under Title VII (due in part to the fact that Ohio did not have a law explicitly protecting the “behavior” of milk expression in the workplace).

¹³³ Lawrence D. Rosenthal, *Title VII’s Unintended Beneficiaries: How Some White Supremacist Groups Will Be Able to Use Title VII to Gain Protection from Discrimination in the Workplace*, 84 TEMP. L. REV. 443, 444 (2012).

¹³⁴ For example, plaintiffs have brought claims of religion-based discrimination in cases involving the “Church of Body Modification,” *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004); the “power of dreams,” *Toronka v. Cont’l Airlines, Inc.*, 649 F. Supp. 2d 608 (S.D. Tex. 2009); the Wiccan religion, *Van Koten v. Family Health Mgmt., Inc.*, 955 F. Supp. 898 (N.D. Ill. 1997); beliefs associated with veganism (under state law), *Friedman v. S. Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663 (Ct. App. 2002); and, in one case, a claim based on an individual’s “religious” belief that centered on his consumption of cat food, *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977), *aff’d*, 589 F.2d 1113 (5th Cir. 1979).

VII.¹³⁵ A polygamist's coworker who adheres to the religious belief of the "power of dreams" is protected against employment discrimination under Title VII.¹³⁶ Even a mother's "milk expression" in the workplace must be accommodated under Title VII.¹³⁷ Yet, an individual's choice to engage in a private and intimate polygamist relationship of consenting adults *outside* of the workplace can subject him to lawful termination under Title VII.

However, one recent turn of events may be an indication of changes to come regarding Title VII's exclusion of polygamy as a protected religion. In 2009, President Barack Obama nominated a woman by the name of Chai Feldblum for one of the five seats on the Equal Employment Opportunity Commission (EEOC).¹³⁸ Feldblum's nomination was a hot-button topic due to her public backing of allowing polygamy, evidenced by her outspoken support for states' obligation to support relationships other than heterosexual and partnerships in which there is more than one conjugal partner.¹³⁹ Feldblum has also written "[t]he same moral duty that requires the state to support marriage relationships and non-marital sexual relationships should be extended to support [nonsexual domestic partners],"¹⁴⁰ a term coined by Feldblum which refers to the numerous intimate social arrangements that exist today among individuals for purposes of support and connection which include no sex at all.

In fact, Feldblum is now much more than a mere nominee; she is a Commissioner on the EEOC.¹⁴¹ So, what does this mean for polygamists? This remains to be seen, but we do know that "[h]er place on the five-person panel of the Equal Employment Opportunity Commission will give Feldblum a powerful perch from which to pursue her 'new strategic vision.'" ¹⁴² Feldblum's

¹³⁵ Orozco, *supra* note 132, at 1283-84.

¹³⁶ *Toronka v. Cont'l Airlines, Inc.*, 649 F. Supp. 2d 608, 611-12 (S.D. Tex. 2009).

¹³⁷ *Lawrence*, 539 U.S. 558.

¹³⁸ Deal W. Hudson, *Obama's Nominee for EEOC Promotes Polygamy and Homosexuality*, CRISIS MAGAZINE (Oct. 20, 2009), <http://www.crisismagazine.com/2009/obamas-nominee-for-eeoc-promotes-polygamy-and-homosexuality>.

¹³⁹ *Id.*

¹⁴⁰ *Feldblum: What About 'Nonsexual Domestic Partners?'*, WORLDNET DAILY (Oct 5, 2009), <http://www.wnd.com/2009/10/112084>.

¹⁴¹ For Chai Feldblum's biography see *Chai Feldblum*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/history/45th/ada20/feldblum.cfm> (last visited Feb. 27, 2014).

¹⁴¹ Hudson, *supra* note 138.

¹⁴² *Id.*

nomination and subsequent position in the EEOC are indicative of the change to come; it seems that the days of criminalizing polygamy may be nearing an end, it is just a matter of time. The future of polygamy remains uncertain, but changes like this one indicate the possibility of a new beginning for polygamists.

IV. CASE LAW ADDRESSING POLYGAMY UNDER TITLE VII

A. Litigation Surrounding Polygamy-Related Termination in Public Sector Employment

One of the first and perhaps most important cases to address whether polygamy should be recognized as a legally protected practice under Title VII was *Potter v. Murray City*,¹⁴³ a case stemming from the EEOC Decision No. 85-3.¹⁴⁴ Royston Potter, a Murray City police officer who happened to be a practicing polygamist, was terminated after his employer learned of his status as a polygamist.¹⁴⁵ Like all other police officers in the State of Utah, Potter had taken the requisite oath to support, obey and defend the Utah Constitution, in order to be sworn in as a police officer. As such, the City based the discharge on the grounds that by participating in a plural marriage, Officer Potter had failed to support, obey and defend Article III of the Constitution of the State of Utah, which expressly forbade polygamy.¹⁴⁶

Potter argued that his termination was unlawful and violated his First Amendment right of free exercise of religion, infringed on his fundamental right of privacy,¹⁴⁷ and violated the constitutional guarantees of due process and equal protection because Utah's laws prohibiting plural marriage had long been in

¹⁴³ *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985).

¹⁴⁴ EEOC Decision No. 85-3, 37 Fair Empl. Prac. Cas. (BNA) 1883, (1985), available at <http://www.aele.org/law/2005FPDEC/eeoc-polygamy.html>.

¹⁴⁵ *Potter*, 760 F.2d. at 1066.

¹⁴⁶ Utah Const. Art. 3 states, “[p]erfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.” Utah CONST. art. III.

¹⁴⁷ Perhaps Potter was ahead of his time, as this is the same argument advanced in *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in the consensual act of sodomy in the privacy of home). This argument is now the central theme of many recent lawsuits challenging anti-polygamy laws following the ruling in *Lawrence*.

desuetude.¹⁴⁸ The court disagreed with Potter, rejecting all of his arguments, including his contention that his constitutional right to privacy prohibits the State of Utah from sanctioning him for entering into a polygamous marriage, stating that, “[w]e find no authority for extending the constitutional right of privacy so far that it would protect polygamous marriages.”¹⁴⁹

The *Potter* court, in holding that the City’s termination of Potter was lawful, declared that “monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built.”¹⁵⁰ The court further stated that “[p]olygamy has been prohibited in our society since its inception . . . [t]he prohibitions continue in full force today. We cannot agree that the discharge of plaintiff for engaging in bigamy violated any constitutional guarantee.”¹⁵¹ The *Potter* decision raises two important questions: first, whether the holding would have been different had this case had come before the court subsequent to the decision in *Lawrence v. Texas* (and according to Justice Scalia’s predictions) and second, whether the holding would have been different had Potter been a private sector employee (who was not required to take an oath upholding the state’s constitution) rather than a public employee.

Shortly after the *Potter* decision, Samuel Barlow, the deputy town marshal for Colorado City, Arizona was terminated on the same grounds as Office Potter.¹⁵² Colorado City is a small community in northern Arizona that adjoins the city of Hildale, Utah, at the Utah/Arizona border and many of the residents of these two communities are members of the Fundamentalist Church of Jesus Christ of Latter Day Saints (Fundamentalist Mormon Church).¹⁵³ Many Fundamentalist Mormons in the Colorado City area believed that their religion required the practice of polygamy, and pursuant to the religious teachings, the man would enter into one licensed marriage valid under the laws of Arizona and with the permission of his legal wife, he would then take one or more “plural wives” in permanent relationships.¹⁵⁴ The Fundamentalist Mormon Church recognized these

¹⁴⁸ *Potter*, 760 F.2d at 1067.

¹⁴⁹ *Id.* at 1070.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1071.

¹⁵² *Barlow v. Blackburn*, 798 P.2d 1360, 1366 (Ariz. Ct. App. 1990).

¹⁵³ *Id.* at 1361.

¹⁵⁴ *Id.*

relationships as “celestial marriages.”¹⁵⁵ Like many other Colorado City residents, Barlow was a member of the Fundamentalist Mormon Church and in accordance with his religious beliefs, he practiced polygamy.¹⁵⁶ Barlow's family consists of one legal wife, two plural wives, and thirty-six children by these relationships.¹⁵⁷

In 1987, Arizona Law Enforcement Officer Advisory Council (ALEOAC) voted to consider revocation of Barlow's status as a certified law enforcement officer pursuant to A.A.C. R13-4-07(A)(6)¹⁵⁸ alleging that Barlow openly admitted the practice of polygamy in Arizona having three wives and thirty-six children and that (similar to *Potter*) this conduct violated his oath of office.¹⁵⁹ Barlow challenged the ALEOAC's consideration of revocation arguing that the free exercise of religion clause of the first amendment prevents ALEOAC from inquiring into or threatening to revoke his peace officer certification because of his practice of polygamy.¹⁶⁰

The trial court agreed with Barlow and concluded that the state could enforce Arizona's constitutional prohibition of polygamy only when doing so would not interfere with genuine religious practices.¹⁶¹ The trial court further found that ALEOAC failed to show a compelling state interest sufficient to outweigh Barlow's first amendment right to religious freedom and ordered ALEOAC to dismiss the pending administrative proceedings against Barlow and to reimburse Barlow for his attorneys' fees and costs.¹⁶² ALEOAC appealed the decision and the appeals court reversed the holding of the trial court.¹⁶³

The appeals court specifically noted that “[l]aw enforcement officers hold a unique position within society. The state entrusts them with power to enforce the laws upon which society depends and demands much from them.”¹⁶⁴ The court further went on to

¹⁵⁵ *Id.* at 1362.

¹⁵⁶ *Id.*

¹⁵⁷ Barlow, 798 P.2d at 1362..

¹⁵⁸ A.A.C. R13-4-07(A)(6) states, in relevant part: “[e]ach of the following constitutes cause for the Council to revoke, refuse or suspend certified status of any person as a peace officer, including a reserve peace officer . . . [a]ny conduct or pattern of conduct that would tend to disrupt, diminish or otherwise jeopardize public trust and fidelity with regard to the law enforcement profession.”

¹⁵⁹ *Barlow*, 798 P.2d at 1362.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1367.

¹⁶⁴ *Barlow*, 798 P.2d. at 1366.

state that a police officer is the “most conspicuous representative of government, and to the majority of the people he is a symbol of stability and authority upon whom they can rely.”¹⁶⁵ Because of this, the court held that “the conduct of an officer, on or off duty, may reflect upon the Department, an officer must at all times conduct himself in a manner which does not bring discredit to himself, the Department, or the City.”¹⁶⁶ Because of this, the court believed that the state “surely ha[d] an overriding interest in assuring that law enforcement officers fulfill reasonable certification requirements,” including the conduct that “ALEOAC has defined as requiring conduct that, in essence, evidences respect for the very laws and constitution that peace officers have sworn to uphold.”¹⁶⁷ The court cited the *Potter* decision in support of its upholding of the revocation of Barlow’s status as a certified law enforcement officer.¹⁶⁸

Over two decades after the *Potter* holding, a justice court judge Walter K. Steed who had been serving for more than a quarter of a century faced the same fate as Officer Potter.¹⁶⁹ Judge Steed had been serving in the predominately polygamous community of Hildale, Utah since his appointment by the town council in 1980.¹⁷⁰ At the time of his appointment, Judge Steed had one wife to whom he was legally married, and one to whom he believed himself to be married according to the traditions of their mutual religious faith.¹⁷¹ In 1985, a third wife was added to this “plural marriage” relationship by the same religious ceremony.¹⁷² Judge Steed and his wives were all consenting adults at the time of their marriage relationships and lived together as a family, with their thirty-two children.¹⁷³

Similar to the police office in *Potter*, Judge Steed took the legally prescribed oath of office as a judge, by which he pledged himself to obey and defend the Utah constitution, at the time of his original appointment to the bench, and at each subsequent time of reappointment by the Hildale town council.¹⁷⁴ The Utah

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1364.

¹⁶⁹ John Hollenhorst, *Utah Supreme Court Hearing Case of Polygamous Judge*, KSL (Nov. 2, 2005, 4:40 PM), <http://www.ksl.com/?nid=148&sid=124782>.

¹⁷⁰ *In re Steed*, 131 P.3d 231 (Utah 2006).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

constitution prohibited bigamy and Judge Steed's plural family obviously violated that prohibition.¹⁷⁵ After filing a Complaint and investigating Judge Steed, the Judicial Conduct Commission recommended to the Utah courts that Judge Steed be removed from office.¹⁷⁶

The removal recommendation was founded upon the Commission's conclusion that Judge Steed's behavior violated canon 2A of the Code of Judicial Conduct, which requires a judge to respect and comply with the law.¹⁷⁷ The Commission concluded that Judge Steed violated canon 2A through his "flaunting of the prohibitions of the bigamy statute for more than twenty-five years" which was admitted by Judge Steed and was believed by the Commission to be "conduct prejudicial to the administration of justice," essentially "bring[ing] the judicial office into disrepute."¹⁷⁸ As the "final straw," Judge Steed indicated that he intended to continue his "plural marriage" arrangement.¹⁷⁹

In its decision to remove Judge Steed from the bench, the Utah Supreme Court noted the special obligations and responsibilities of judges, stating that "[c]ivil disobedience carries consequences for a judge that may not be applicable to other citizens. The dignity and respect accorded the judiciary is a necessary element of the rule of law."¹⁸⁰ The Utah Supreme Court further noted that "[w]hen the law is violated or ignored by those charged by society with the fair and impartial enforcement of the law, the stability of our society is placed at undue risk."¹⁸¹ Judge Steed was disappointed with the Utah Supreme Court's ruling, stating that he "had hoped that the court would see my case as an opportunity to correct the injustices that are caused by the criminalization of my religious beliefs and lifestyle, and I am disappointed that the court did not reach those issues in my case."¹⁸²

¹⁷⁵ *In re Steed*, 131 P.3d 231.

¹⁷⁶ *Id.* at 232.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *In re Steed*, 131 P.3d at 232.

¹⁸¹ *Id.*

¹⁸² Hollenhorst, *supra* note 169.

B. Litigation Surrounding Polygamy-Related Termination in Private Sector Employment

There is substantially less case law and general litigation surrounding employment termination due to an individual's participation in polygamy or status as a polygamist in the private sector than in public sector employment. In the cases of public sector employment termination discussed above, the basis for the termination had been the employee's failure to uphold his oath to abide by the constitution of the state that prohibited polygamy. Generally speaking, even in the cases of public sector employment, the employees did not bring their claims under Title VII.

Polygamist public sector employees and private sector employees alike generally do not bring claims under Title VII because it is well established that polygamy is not a protected religious practice under Title VII. This is mainly due to the 1985 decision issued by the EEOC, which essentially stated that the practice of polygamy would not be considered a protected religious practice for purposes of Title VII.¹⁸³ In coming to this decision, the EEOC relied on the Supreme Court's holding in *Reynolds v. United States* in its conclusion that since polygamy is not protected under the First Amendment, it likewise would not be considered a protected religion under Title VII.¹⁸⁴ As such, employees fired for being polygamists usually bring wrongful termination claims challenging the state constitution itself.

There is one recent instance of a private sector employee bringing a wrongful termination claim against her employer, with a twist – the employee claims she was fired on the basis of the employer's participation in polygamous practices, rather than her own. Sabrina Rafi, a recent graduate of American University, Washington College of Law, has filed suit against her former

¹⁸³ EEOC Decision No. 85-3, 37 Fair Empl. Prac. Cas. (BNA) 1883, (1985), available at <http://www.aele.org/law/2005FPDEC/eoc-polygamy.html>.

¹⁸⁴ *Id.* In rendering this decision, the EEOC also relied on several other cases. See, e.g., *Cf. Cleveland v. United States*, 329 U.S. 14 (1946), reh'g denied (Court refused to hold that polygamy practiced in accordance with religious views was excluded from the Mann Act); *State v. Barlow*, 107 Utah 292 (1944), appeal dismissed, 324 U.S. 829 (1945), reh'g denied, 324 U.S. 891 (1945) (state can enact legislation prohibiting polygamy); *Davis v. Beason*, 133 U.S. 333 (1890) (Court upheld territorial legislation requiring persons to take antipolygamy oath as a condition to vote); *Murphy v. Ramsey*, 114 U.S. 15 (1885) (Court sustained federal statute barring polygamists from voting or serving on a jury); and *Miles v. United States*, 103 U.S. 304 (1881) (conviction under same antipolygamy statute as in *Reynolds* upheld, and religious basis for polygamy practice rejected as a defense).

employer, a prominent Manhattan attorney named James Ray.¹⁸⁵ Rafi alleges that Ray “used the depressed market to take advantage of novices to the profession” and “seiz[ed] the opportunity to take advantage of a young, soon-to-be attorney” hiring her as a paralegal.¹⁸⁶ Ray paid Rafi a mere \$800.00 monthly, below the minimum hourly rate mandated by law, and required her to work fifty to fifty-five hour workweeks.¹⁸⁷

Rafi claims that when she began working for Ray, he would talk to her daily about his “love for polygamy” and the “benefits of having sexual relationships with multiple partners at a time.”¹⁸⁸ Rafi claims that Ray endorsed a polygamist system in the United States and at one point remarked that he had been “married to multiple women.”¹⁸⁹ Rafi alleges that on several instances Ray would try to convince her to engage in a polygamist lifestyle and she believed he was “propositioning [her] to engage in a polygamist lifestyle with him.”¹⁹⁰

According to Rafi, she “vehemently opposed” the advances and “made known to Ray that she was not comfortable engaging in conversations on these topics.”¹⁹¹ Ray’s actions led Rafi to believe that engaging in the conversations or possibly the underlying propositions was a “term and condition of her employment, the objection to which would cost her the job.”¹⁹² Rafi alleges that she found out Ray had been having similar conversations with another female employee, he had forced the other employee to go out to dinner with him, and then fired her for failing to reciprocate his advances.¹⁹³ With this employee gone, Rafi claims Ray turned his attention to her and would “frequently glare at and ogle [her] body, openly staring at her for stretches of time and in situations that were anything but appropriate.”¹⁹⁴

Rafi further alleges that Ray demanded she go to dinner with him and she felt obligated to go “knowing what had just happened to her fired colleague and needing her job to support

¹⁸⁵ Complaint, *Rafi v. Ray*, No. 13 Civ. 2442 (S.D.N.Y. Apr. 11, 2013) [hereinafter *Rafi Complaint*], available at <http://www.scribd.com/doc/136027548/Complaint-Rafi-v-Ray>.

¹⁸⁶ *Id.* at 9, 16.

¹⁸⁷ *Id.* at 10.

¹⁸⁸ *Id.* at 20.

¹⁸⁹ *Id.*

¹⁹⁰ *Rafi Complaint* at 21.

¹⁹¹ *Id.* at 22.

¹⁹² *Id.*

¹⁹³ *Id.* at 23.

¹⁹⁴ *Id.* at 24.

herself and pay her loans.”¹⁹⁵ Rafi claims that at dinner Ray spent the entire time talking about polygamy and advised her that he wanted her to be his “third wife.”¹⁹⁶ Rafi states that when she told Ray she had a boyfriend and was in a committed relationship, he told her that she should date older men such as himself.¹⁹⁷ Rafi claims that following this incident she began wearing several layers of clothes at work to ensure that her skin was completely covered from Ray’s view and Ray expressed displeasure with her change of dress.¹⁹⁸ Rafi further alleges that shortly after that, Ray realized she would never acquiesce to his “sexual demands” and terminated her employment without reason.¹⁹⁹

Rafi brought various claims against Ray and his firm, mostly related to wage violations under New York City Human Rights Law (NYCHRL). She also brought a sexual harassment and discrimination claim under NYCHRL. Perhaps the reason that Rafi did not bring a claim under Title VII is if Ray’s law firm did not qualify as an employer within the meaning of the statute. Title VII specifies that for the purposes of the statute, an “employer” is “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”²⁰⁰ If Ray’s firm did not have fifteen or more employees, then Rafi would be unable to bring a claim under Title VII. This may be another reason there is so little case law surrounding polygamy-related employment termination in private sector jobs.

V. THE *BROWN* CASE: ARE THE TIDES BEGINNING TO TURN?

Kody Brown and his family skyrocketed to fame, or notoriety at least, when they agreed to star in the controversial TLC reality series *Sister Wives*, documenting their lives as a plural family.²⁰¹ The Brown family identifies themselves as “Fundamentalist Mormons” although they are “not in the FLDS

¹⁹⁵ *Rafi Complaint* at 25.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 26.

¹⁹⁹ *Id.* at 29.

²⁰⁰ 42 U.S.C. § 2000e(b) (2006).

²⁰¹ *See Sister Wives*, TLC, <http://www.tlc.com/tv-shows/sister-wives> (last visited Jan. 20, 2014).

church which is also a group of Fundamentalist Mormons²⁰² but rather members of the Apostolic United Brethren (AUB).²⁰³ Kody Brown, the husband and father, has four “wives:” Meri, with whom he has one child; Janelle, with whom he has six children; Christine, with whom he has six children; and Robyn with whom he has one child (although she brings three other children to the family from her previous marriage).²⁰⁴ Despite the fact that they consider themselves a plural family, only the marriage between Kody and Meri is legally recognized by an official marriage license; the other marriages are “spiritual” or “religious” marriages and are not recognized by the State of Utah or the federal government as legal or official marriages.²⁰⁵

Following the premiere of *Sister Wives*, the State of Utah publically announced a criminal investigation of the Brown family for their violation of anti-polygamy laws,²⁰⁶ not because they sought multiple marriage licenses or sought to have their marriages legitimized by the State in any way, but rather because they called themselves a family in the eyes of their church.²⁰⁷ State and County prosecutors cited the fact that the Brown family chose to appear on the *Sister Wives* reality show as the impetus for the criminal investigation and possible prosecution.²⁰⁸ The Browns allege that they suffered personal injuries as a result of the potential prosecution, including termination of employment.²⁰⁹

The Brown family quickly fled Utah and moved to Nevada to avoid prosecution in the State of Utah; since their church, relatives, and connections remained in Utah, the Browns wished to return but feared prosecution.²¹⁰ In fact, due to the low number of AUB members in Nevada, the Browns were unable to fully perform their religious practices outside of Utah and had to return to Utah to engage in certain religious practices.²¹¹ However, even after the Brown family moved to Nevada, the Utah County

²⁰² Mandy Robinson, *Meri Brown Confirms the Religion of the Stars of Sister Wives*, EXAMINER (Nov. 25, 2012), <http://www.examiner.com/article/meri-brown-confirms-the-religion-of-the-stars-of-sister-wives>.

²⁰³ *Id.*

²⁰⁴ See THE OFFICIAL WEBSITE OF THE KODY BROWN FAMILY, <http://www.kodybrownfamily.com> (last visited Dec. 20, 2014).

²⁰⁵ *Brown Complaint* at 7-8.

²⁰⁶ *Id.* at 22.

²⁰⁷ *Id.* at 8.

²⁰⁸ *Id.* at 205.

²⁰⁹ *Id.* at 23.

²¹⁰ *Brown Complaint* at 25-28.

²¹¹ *Id.* at 27.

Attorney publically stated that despite the move, his office “may still opt to prosecute the Browns.”²¹² As such, the Brown family filed a complaint in the United States District Court for the District of Utah requesting declaratory and injunctive relief against enforcement of Utah’s laws banning and criminalizing polygamy.²¹³

The Utah statute challenged by the Brown family states in relevant part that “[a] person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.”²¹⁴ The language of this statute therefore criminalizes both purporting to marry another when one is already married as well as cohabiting with another, or as alleged by the Brown complaint, “[the statute] contravenes the right of consenting adults to create a family environment of their choosing – whether it is based on religious or non-religious values – including but not limited to the mere cohabitation of adults in a single household.”²¹⁵

Although the complaint filed by the Browns presented seven different claims for relief, one of the most important grounds was the due process argument advanced by the Browns.²¹⁶ This argument relied primarily on the holding of *Lawrence v. Texas* to argue that the Browns’ choice to engage in a polygamous relationship should be within a sphere of privacy protected from government intrusion.²¹⁷ Specifically, the complaint alleged that the Utah statute criminalized the private conduct of adults exercising their liberty under the Due Process clause and denied individuals the protected right to freely make personal decisions relating to procreation, contraception, family relationships, and child rearing.²¹⁸

Judge Clark Waddoups of the United States District Court for the District of Utah agreed with many of the arguments advanced by the Brown family when he struck down parts of the Utah statute that criminalized polygamy, specifically the provision that prohibited cohabitation.²¹⁹ The comprehensive ninety-one

²¹² *Id.* at 167.

²¹³ *Id.* at 24.

²¹⁴ UTAH CODE ANN. § 76-7-101(1) (2013).

²¹⁵ *Brown Complaint* at 24.

²¹⁶ *See generally, Brown Complaint.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 180-82.

²¹⁹ *See generally Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah, 2013).

page opinion published on December 12, 2013, is particularly interesting because Judge Waddoups specifically addresses the legal, practical, moral, and ethical implications of the choice to rule against the Browns by acknowledging that he could simply default to *Reynolds v. United States*, but chose instead to address the “much developed constitutional jurisprudence that now protects individuals from the criminal consequences intended by legislatures to apply to certain personal choices, though such legislatures may sincerely believe that such criminal sanctions are in the best interest of society.”²²⁰

In discussing the implications of simply defaulting to *Reynolds*, Judge Waddoups boldly noted:

the court believes that *Reynolds* is not, or should no longer be considered, good law, but also acknowledges its ambiguous status given its continued citation by both the Supreme Court and the Tenth Circuit as general historical support for the broad principle that a statute may incidentally burden a particular religious practice so long as it is a generally applicable, neutral law not arising from religious animus or targeted at a specific religious group or practice.²²¹

The court therefore deferred to *Reynolds* on the grounds of the free exercise right to the actual practice of polygamy, but found *Reynolds* was not controlling on the issue regarding religious cohabitation.²²² The court found that since the Browns had entered into personal relationships which they used religious terminology to describe, and made no claim or effort of entering into a legal or official marriage, that *Reynolds* did not apply, holding that “the cohabitation prong of the Statute is not operationally neutral or of general applicability because of its targeted effect on specifically religious cohabitation. It is therefore subject to strict scrutiny under the Free Exercise Clause and fails under that standard.”²²³

Interestingly, Judge Waddoups stated that he found the Browns arguments “about the meaning and implications of *Lawrence* for the State’s ability to criminalize their private conduct

²²⁰ *Id.* at 1181.

²²¹ *Id.* at 1189-90.

²²² *Id.* at 1190.

²²³ *Id.*

of religious cohabitation [to be] very persuasive.”²²⁴ The Browns argued that the holding of *Lawrence v. Texas* established a “fundamental liberty interest in intimate sexual conduct, thus prohibiting the state from imposing criminal sanctions for intimate sexual conduct in the home” and described the asserted fundamental right here as “a fundamental liberty interest in choosing to cohabit and maintain romantic and spiritual relationships, even if those relationships are termed ‘plural marriage.’”²²⁵ Judge Waddoups acknowledged that the *Lawrence* opinion gave less guidance than would be desirable since it never explicitly identified the standard of review applied and, “though providing a substantive due process discussion that could fairly easily support an interpretation that heightened scrutiny was indeed applied, the Court used some terminology arguably characteristic of rational basis review in ruling Texas’ [statute] unconstitutional.”²²⁶

The court ultimately found that despite the moral and philosophical appeal of *Lawrence’s* discussion about the Fourteenth Amendment’s commitment to a concept of liberty that “protects the person from unwarranted government intrusions into a dwelling or other private places” because it “presumes an autonomy of self that includes . . . certain intimate conduct,” and therefore “gives substantial protection to adult persons in deciding how to conduct their lives in matters pertaining to sex,”²²⁷ paired with the Browns arguments that “this broadly outlined substantive due process liberty interest applies to the religious cohabitation at issue here,”²²⁸ the court found it was bound by the Tenth Circuit’s interpretation of *Lawrence* in *Seegmiller*. Still, the court found that it “need look no further than *Seegmiller* to find that such religious cohabitation does not qualify for heightened

²²⁴ *Brown*, 947 F.Supp. 2d at 1190.

²²⁵ *Id.* at 1198.

²²⁶ *Id.* See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (arguing that the majority applied “an unheard of form of rational basis review” to strike down Texas’ anti- sodomy law). But see Lawrence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1917 (2004) (arguing that “the strictness of the Court’s standard in *Lawrence*, however articulated, could hardly have been more obvious” and to assume that rational basis review was applied “requires overlooking passage after passage in which the Court’s opinion indeed invoked the talismanic verbal formula of substantive due process but did so by putting the key words in one unusual sequence of another . . .”).

²²⁷ *Brown*, 947 F.Supp. 2d at 1201.

²²⁸ *Id.*

scrutiny under the substantive due process analysis in the Tenth Circuit.”²²⁹

VI. THE FUTURE OF POLYGAMY AND TITLE VII

A. *What the Courts Have to Say About Polygamy*

It is well established in case law that it is the moral belief of our country that polygamy should be criminalized. The Supreme Court’s ruling in *Reynolds v. United States* set the framework for hundreds of rulings against the legalization of polygamy, basing the prohibition largely on the belief that it was a social evil contrary to public morality. The *Reynolds* case, decided over a century ago, remains good law today. In fact, it was the *Reynolds* ruling on which the EEOC based its decision to exclude polygamy from the list of protected religions under Title VII.

Furthermore, public sector employment terminations based on the individual’s status as a polygamist have largely been upheld. The challenge to a police officer’s termination in *Potter v. Murray City*, the case stemming from the EEOC’s decision not to include polygamy in its broad definition of protected religions, set the groundwork for many other similar decisions in the public employment context. The terminations have consistently been based on the fact that the public official or employee had taken the requisite oath to support, obey and defend the state constitution which prohibited polygamy. Under this line of analysis, it stands to reason that if polygamy were not prohibited in a state constitution, the termination might not be upheld.

The Supreme Court in *Lawrence v. Texas*, although striking down a Texas sodomy statute and paving the way for the legalization and recognition of same sex marriage, inadvertently laid the groundwork for the legalization of polygamy. Although the majority was careful to note that their holding in the *Lawrence* case was limited and did not “involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”²³⁰ this was largely rendered moot as a result of the decision in *United States v. Windsor*, as discussed more fully below.

Perhaps most valuable to polygamists was the Supreme Court’s act of overruling *Bowers v. Hardwick* in accordance with

²²⁹ *Id.*

²³⁰ *Lawrence*, 539 U.S. at 577.

the *Lawrence* decision. As Justice Scalia noted in his dissent, “state laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices.”²³¹ In doing so, the court recognized that states should go to great lengths to avoid interfering with a citizen's personal sphere of liberty rights, rights which the *Lawrence* decision expanded to protection of the privacy of consenting adults to engage in same-sex relations – rights which can easily be expanded to include the privacy of consenting adults to engage in polygamous relationships.

Also helpful to polygamists was the majority's use of language from *Planned Parenthood v. Casey*, essentially recognizing that matters which involve intimate and personal choices central to personal dignity and autonomy are at the heart of what the Fourteenth Amendment aims to protect. Polygamists can easily make the connection that the choice to participate in a polygamous relationship falls within the category and deserves protection under the Fourteenth Amendment.

The Supreme Court's decision ten years later in *United State v. Windsor* further cemented the movement toward the legalization of polygamy when it struck down Section 3 of DOMA and required the federal government to recognize same sex marriages. Not only did the *Windsor* decision pave the way for many states to strike down same-sex prohibitions, but it also validated many of Justice Scalia's fears voiced in the *Lawrence* opinion. Although the majority in *Lawrence* assured that its decision did not require the government to give recognition to homosexual relationships, the majority in *Windsor* cited the *Lawrence* decision in holding that Section 3 of DOMA demeans homosexual couples whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify.²³²

So, once again, Justice Scalia's predictions have seemingly come true. He warned that the decision in *Lawrence* would open the door to legalization of same-sex marriages and bigamy – so far one of those things has happened. It seems as though it is only a matter of time until polygamy is legalized. And in case we doubted Justice Scalia's glimpse into the future, he proved correct again in his prediction that the *Windsor* decision would result in

²³¹ *Id.* at 599 (Scalia, J., dissenting).

²³² *Windsor*, 133 S. Ct. 2675, 2694 (2013).

the striking down of many state laws denying same-sex couples, which happened almost immediately.

All things considered, it seems that polygamy is well on the road to legalization. In Utah at least, part of the anti-polygamy statute, the portions which prohibited polygamous cohabitation, were struck down in the recent *Brown v. Buhman* decision and others are sure to follow suit. Instead of defaulting to *Reynolds* and upholding the anti-polygamy statute, the court in *Brown* decided to address the issue given the legal, practical, and moral developments on the subject. In fact, the court relied heavily on the *Lawrence* ruling finding there may be a fundamental liberty interest in intimate sexual conduct, including polygamous relationships between consenting adults in the privacy of their own home.

B. The Future of Polygamy and Title VII

If the myriad of cases decided over the past decade or so is any indication, it seems that polygamy may be following in the same footsteps as same sex marriage and is seemingly on its way to legalization. If this happens, there will be significant repercussions for polygamy-based employment termination and Title VII claims. In fact, if polygamy is legalized, it could have a significant effect on the meaning of “religion” for purposes of Title VII; that is, polygamy could become a protected religion under the statute.

Title VII already construes the meaning of religion very broadly to include “all aspects of religious observance and practice as well as belief”²³³ and the EEOC has further interpreted Title VII’s religion definition to include “religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.”²³⁴ In fact, the EEOC even recognizes a belief as religious for purposes of Title VII if it is ‘religious’ in the person’s

²³³ See 42 U.S.C. § 2000e(j). See also *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978) (the statutory language “all aspects of religious practice and belief” is interpreted broadly; “to restrict the act to those practices which are mandated or prohibited by a tenet of the religion, would involve the court in determining not only what are the tenets of a particular religion, which by itself perhaps would not be beyond the province of the court, but would frequently require the courts to decide whether a particular practice is or is not required by the tenets of the religion.”).

²³⁴ EQUAL EMP’T OPPORTUNITY COMM’, PUB. NO. 915.003, *supra* note 117.

own scheme of things or if the person is affiliated with a religious group few or no other people adhere to.²³⁵

However, the EEOC's Decision No. 85-3²³⁶ specifically stated that polygamy would be excluded from the meaning of "religion" for purposes of Title VII was based solely on the existing case law, finding that since polygamy was held not to be protected by the First Amendment's guarantee of religious freedom in *Reynolds v. United States*, that polygamy would consequently not be considered a federally recognized religious practice within the meaning of Title VII.²³⁷ Given this extremely broad construction, it seems that the only reason for the exclusion of polygamy as a protected religion is its criminalization. If polygamy were decriminalized, it leads that it would be afforded protection under Title VII's broad definition of "religion."

Additionally, as the times have changed many people who were initially left unprotected under the old, somewhat "traditional" protected classes of Title VII were afforded protection in the form of new "classes" of people.²³⁸ Individuals who are gay, lesbian, bisexual, or transgendered were not protected under Title VII and historically experienced significantly higher rates of discrimination in the employment context. Although these "classes" of people have always existed, they were just never thought of as a "class" needing protection under Title VII. Once the need for protection became apparent, Title VII adjusted to accommodate the needs of these certain individuals.

There has also been considerable examination into the expansion of protected religions under the statute. Courts have reviewed religion-based discrimination in cases involving the Church of Body Modification, the power of dreams, and the Wiccan religion, to name a few. Presently, Title VII provides protection against employment discrimination in terms of both traditional

²³⁵ *Id.* EEOC's interpretation comes after reviewing the following decisions: *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (although animal sacrifice may seem "abhorrent" to some, Santerian belief is religious in nature and is protected by the First Amendment); *U.S. v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995) ("one man's religion will always be another man's heresy.").

²³⁶ EEOC Decision No. 85-3, 37 Fair Empl. Prac. Cas. (BNA) 1883, (1985), available at <http://www.aele.org/law/2005FPDEC/eeoc-polygamy.html>.

²³⁷ *Id.*

²³⁸ *See supra* note 130.

and nontraditional religions. Just as Title VII has adapted over the years to accommodate changing times and personal beliefs, it may be possible for it to again adapt to accommodate polygamists who need protection under the statute.

Taking into consideration the changing times and our society's growing acceptance of a consenting individual's right to engage in certain sexual conduct or relationships and the associated privacy that those individuals should be afforded, it seems as though polygamy is headed down a new path. The legalization of same-sex marriage and the reasoning used by the Supreme Court in arriving at its decisions seem to indicate that polygamy may be near moral acceptance, or at the very least, moral acceptance of an individual's right to privately partake in such a relationship. If polygamy is decriminalized, the basis for excluding it from Title VII will be called into question, and it seems likely that will result in the inclusion of polygamy as a protected class under the statute.

VII. CONCLUSION

The recent legalization of same-sex marriage is an important indicator of the rapidly changing times and broad acceptance of new moral norms in our country. It seems there is a chance that the recent social and legal acceptance of same sex marriage may blaze the trail for the acceptance of polygamous relationships. Such recognition, whether merely by society or by the legislature as well, will have a significant effect on the meaning of "religion" for purposes of Title VII. If, or when, polygamy is recognized as a protected religion under Title VII, polygamists who suffer employment discrimination for their actions outside their scope of employment may finally enjoy the same privacy rights deemed so fundamental and protected so dearly in *Lawrence v. Texas*. As Bob Dylan has so eloquently put it, the times they are a-changin'