The Supreme Court, Polygamy and the Enforcement of Morals in Nineteenth Century America: An Analysis of Reynolds v. United States

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HISTORIANS HAVE PAID only slight attention to the relationship between law and public morality in nineteenth century America.[1] Lawyers and philosophers, on the other hand, have made the enforcement of morals a major issue, particularly in recent times.[2] The central question is to what extent, if at all, should the criminal law concern itself with the enforcement of morals and the punishment of sin or immorality?

This essay examines whether the criminal law should be or can be used to enforce morality in marriage. It does so by examining the most fundamental, intense and prolonged challenge to that institution in our history: the Mormon practice of polygamy. Based in part on sources heretofore closed to scholars, the essay focuses on the efforts of the Mormon leaders to establish polygamy in America and the efforts by the Supreme Court to place the religiously motivated practice of polygamy beyond the protection of the First Amendment in *Reynolds v. United States* (1879), the case in which Jefferson's famous phrase "wall of separation between Church and State" first entered into American law.

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This need for greater understanding of the relationship between law and morality is buttressed by our rapidly changing mores regarding marriage, adultery and homosexuality generally and growing social and legal toleration of polygamous marriages particularly.[3] Until recently the immorality of polygamy was unquestioned, but several states have legalized all sexual conduct between consenting adults, and bigamy laws are seldom enforced anywhere, including Utah.[4] Foreign polygamous marriages have long been recognized in the United Kingdom and are becoming recognized in the United States. Both the wives and the children of illegal polygamous marriages are beginning to be treated as if polygamy were in fact legitimate.[5] Given these rapidly changing and considerably softer public attitudes, it is time for a fresh look at the source of basic premises on the prohibition of the practice of polygamy.

First, a brief excursion to the historical setting in which this conflict between the Mormons and the law occurred is useful. During the last half of the nineteenth century, the American religious community was in tension with the secular culture that surrounded it.[6] Despite rising church membership, the vast majority of Americans were adapting their religious beliefs to American cultural trends and reinterpreting those beliefs in terms of the characteristics of that age. Stow Persons has called this process of adaptation "modernization"; others have called it "privatization"; but usually it is called "secularization."[7] Religion was being relegated from a central to a peripheral role in American society. The ingredients of secularization were a shifting emphasis from the Diety to the individual; greater reliance on experience than authority; the down-grading of miracles and the upgrading of rationalized theology; a more critical attitude toward the scriptures; and a growing belief that change, almost any change, was the equivalent of improvement. Modernity meant transcending the religiously oriented past for a more secularly oriented future. In short the mainline, denominational religions of America were learning how to "coexist" with the state.

The Mormons were decidedly not part of this process of coexistence and adaptation; they opposed it vehemently. Their position was, in many respects, like that of their Catholic contemporaries in Prussian Germany during the *Kulturkampf*—one of open and intense conflict with the state. The German Catholics, fearing a decline in faith because of humanism, cultural relativity and Marxism, wished to reverse the process of secularization among the faithful (which had gone much further in Europe than in America), and to get the state to recognize that God and not Caesar was preeminent in worldly affairs.[8] The Prussian state, on the other hand, believed that the Catholic Church was attempting to arrogate too much political power to itself so that loyalty to the state was to take precedence over loyalty to the church.

The Mormons believed they had been commissioned by God to create the perfect society, one which would ultimately supplant all others, including the United States government. As John Taylor succinctly put it: "We are the people of God; we are his government."[9] The quintessence of the govern-

ment's side of this conflict was best captured by Vice President Schuyler Colfax, following a visit in 1869 to Salt Lake City: "It is time to understand whether the authority of Brigham Young is the supreme power in Utah; whether the laws of the United States or the laws of the Mormon Church have precedence within its limits."[10]

Congressman McClernand of Illinois expressed a not atypical attitude on this subject when he told Congress in 1860:

> As to polygamy, I charge it to be a crying evil; sapping not only the physical constitution of the people practicing it, dwarfing their physical proportions and emasculating their energies, but at the same time perverting the social virtues, and vitiating the morals of its victims. It originated in the house of Lamech . . . and in the family of . . . Cain. It is often an adjunct to political despotism; and invariably begets among the people who practice it the extremes of brutal bloodthirstiness or timid and mean prevarication. . . . It is a scarlet whore. It is a reproach to the Christian civilization; and deserves to be blotted out.[11]

During the 1860 Congressional debate on polygamy, a majority of the congressmen who spoke argued that polygamy was degrading to women, an adjunct to political despotism and that it encouraged promiscuity and broke up the family circle. Equally important, polygamy was against the moral sentiments of Christendom, and those who practiced this form of marriage tended to be poor, recent immigrants, submissive and uneducated. Without the slightest hint of religious bigotry, several congressmen indicated that polygamy simply went beyond what was tolerable in America and that for a society to be considered moral, lines had to be drawn somewhere. If Congress and Americans generally believed polygamy, like slavery, was a "relic of barbarism,"[12] the Mormons publicly accepted polygamy as one of the most holy and immutable commandments of God. Privately, Joseph Smith went much further. To the inner circle he taught that polygamy was "*the* most holy and important doctrine ever revealed to man on the earth."[13]

The origins and purposes of Mormon polygamy have been well described elsewhere.[14] For several years following its public announcement in 1852, there was no question among the Mormons as to the legality or the constitutionality of polygamous marriages. Because it was a commandment from God, Mormons assumed polygamy was immune from governmental interference because the First Amendment guaranteed the "free exercise" of religion. Once Congress took steps to proscribe polygamy, however, the Mormon attitude toward polygamy hardened considerably. Most worthy male Mormons, not just the elite, were now to enter into the covenant, and the eternal nature of this doctrine was emphasized over and over again. Increasingly, the non-Mormon world was described by the more arduous Mormon spokesmen as wicked, adulterous and corrupt. Monogamy was pejoratively described as "the one-wife-system" or "serial marriage" where one spouse had died and a new marriage was performed. Even the "heathen," if polygamous, were considered by the most pious as more virtuous than

monogamous American families. Great pains were taken by Mormon leaders to portray polygamy as a holy religious duty rather than, as most Americans thought, a lecherous sexual activity. The more careful students have tended to side with the Mormons on this point.[15]

By the late 1870s the position of the Mormon leadership toward the *legality* of polygamy was somewhat softer than its strident advocacy of the principle itself. Given the Free Exercise Clause in the First Amendment and their firm belief that the Constitution had been divinely inspired, the Mormon leadership maintained that federal proscription of polygamy could be constitutionally justified only if it could be demonstrated beyond reasonable doubt that the practice of polygamy was somehow injurious to the legal rights of nonpolygamists.[16] The church leaders never questioned the right of Congress to regulate the morals of its constituents, and the Mormon view of the Supreme Court, despite numerous negative judicial experiences in the past (especially in the aborted trial of the accused assassins of Joseph and Hyrum Smith), was one of general respect and trust. So certain in fact was the leadership that its position was sound and would be vindicated by the courts that Brigham Young agreed to a test case to settle the matter once and for all.

During the summer of 1874, Mormon leaders and the United States Attorney in Salt Lake City agreed to arrange for a test case to determine the constitutionality of the antipolygamy act of 1862. According to George Q. Cannon, a Utah territorial delegate, there was a "universal belief" among the Mormons that the act of 1862 was unconstitutional with the Mormon position supported by "many eminent lawyers, both in and out of Congress."[17] George Reynolds, personal secretary to Brigham Young, former editor of the *Millennial Star*, and husband of two wives, Mary Ann Tuddenham and Amelia Jane Schofield, was selected for this case. According to Reynolds' diary, he was simply told on the street by George Q. Cannon, who was by then Second Counselor to the President of the Church, that the First Presidency had chosen him to test the law.[18]

Reynolds was indicted for bigamy in October 1874 by a grand jury empanelled according to the provisions of the act of 1862 and on the basis of testimony from witnesses he himself supplied. Proving Reynolds guilty of bigamy was surprisingly difficult for a case which began as a cooperative effort. Fifteen witnesses were called, including Reynolds' father, mother, the witnesses Reynolds himself supplied to the grand jury and the mayor of Salt Lake City who had actually married Reynolds to his second wife a few weeks earlier.[19] None either knew or could remember anything. Finally Amelia Jane was subpoenaed She made a dramatic entrance into the court and admitted to the marriage.

A jury of seven Mormons and five non-Mormons quickly convicted Reynolds as charged, but this conviction was overturned by the territorial supreme court on the grounds that the jury had been improperly constituted. One year later, Reynolds was again indicted and convicted on the basis of the second wife's testimony given at the first trial; the jury was composed of both Mormons and non-Mormons. He was fined $500 and sentenced to two years imprisonment at hard labor (a provision not included in the statute).[20]

In Reynolds' second trial in Utah's Third District Court, procedural matters took up most of the time,[21] but of far more importance than these procedural intricacies was Chief Justice Alexander White's charge to the jury which became the basis for much of the Supreme Court's opinion later. White told the jury,

> In matters of opinion, and especially in matters of religious belief, all men are free. But parallel with and dominating over this is the obligation which every member of society owes to that society; that is, obedience to the law.[22]

When the Hindu mother casts her newborn infant into the Ganges, White continued, she may be acting out of religious belief but is still guilty of a crime. When the Fiji Islander leaves his aged parents in the woods to starve, he does so out of custom, and when the Indian widow is placed upon the funeral pyre of her deceased husband, she, too, is acting from deeply held beliefs, he said. All these examples branded polygamists by implication as uncivilized and barbaric and were to be used by the Supreme Court in its decision.

The Mormon leadership appealed the Utah court's decision and on 6 January 1879, Chief Justice Waite delivered the Supreme Court's opinion in *Reynolds v. the United States.*[23] About half of Chief Justice Waite's majority opinion dealt with procedural matters which have been well discussed elsewhere.[24] The root of the matter was "whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land."[25]

Justice Waite approached his problem from a wholly secular perspective. The meaning of "religious freedom" was best determined by "the history of the times."[26] No thought was given to the possibility of a higher law; that possibility was either assumed away or the law of the land was considered to be the highest applicable code. To George Cannon's mind this approach simply put "The Supreme Court of the United States on one side and the Lord on the other."[27] A more careful analysis suggests that the Court was not opposing God's law, if such there be, it was merely saying that the U.S. Constitution is as far as it will go in interpreting the law. Since the Constitution does not recognize a higher authority than itself, neither would the Court.

With the possibility of a higher law excluded, the Court then turned to earthly authorities—notably Thomas Jefferson and James Madison. After briefly noting how the colonists were taxed to support religions they did not subscribe to and were forced to go to churches they did not believe in, Waite then quoted the preamble of the Virginia Statute on Religious Freedom:

> [To] suffer the civil magistrate to intrude his powers into the field of opinion . . . is a dangerous fallacy which at once destroys all religious liberty. . . .[It] is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.[28]

"In these two sentences is found the true distinction between what properly belongs to the Church and what to the State," Waite declared. Legislative powers reach action only, not opinions, thus building "a wall of separation between Church and State."[29]

What seemed to be required was some proof that the religiously motivated acts in question had led to significant disruptions of "peace and good order," or that the existence or safety of the state was endangered. At a minimum, Waite's opinion to this point implies that to proscribe religious conduct someone's rights had to have been interfered with. If this had indeed been Waite's sole purpose, the Mormons would have had little to quarrel with in his decision. The Mormons felt that since polygamy did not injure anyone else, it should be constitutionally tolerated.[30]

But Waite went well beyond the category of injury to specific individuals. In effect, the Chief Justice assumed that Mormon polygamy in Utah territory was generally disruptive of peace and good order simply because polygamy was considered odious *everywhere else.* No one had charged George Reynolds or his wives with being in any way disorderly. In fact, much evidence existed at that time—from travelers' accounts to official judicial statements—that the Mormons were especially sober and, except for polygamy, usually law-abiding.[31] Nor did the Court lack authoritative statements had it wished to base its opinion on the "injury to others" test. Jefferson himself, in his notes on Virginia, had said,

> The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such actions only as are injurious to others. . . . Reason and free inquiry are the only effectual agents against error.[32]

Waite next turned to society's compelling interest in marriage. The Chief Justice did not choose to examine the sexual aspects of polygamy, which were certainly what most Americans associated with polygamy. To Waite, illicit sex was not the issue. The issue was illicit marriage.

Society was built upon marriage, Waite asserted, and whether monogamous or polygamous marriages are allowed will determine whether democracy can or cannot exist.[33] Since polygamy leads to patriarchy, and patriarchy to despotism, monogamy is the very foundation of the democratic state, Waite believed.[34] The idea that democracy rests on monogamy was widely held at this time, and Waite admittedly took it from the anti-Mormon political scientist, Frances Lieber, probably from Lieber's *On Civil Liberty and Self-Government,* published in 1874.[35] Waite did not quote Professor Lieber on religious liberty, however. On that question, Professor Lieber wrote in his 1839 *Manual of Political Ethics* that "if I believe that a certain service is essential to any religion, I have certainly an undoubted right to disobey the law [proscribing such conduct], and celebrate it in secret if I thereby do not injure anyone else."[36] If "service" could be read to include "commandment," the Mormons would certainly have agreed with Lieber, including Lieber's admonitions to practice his beliefs in secret (which the Mormons did until 1852).

No one today believes that democracy, however fragile, is dependent on the type of marriage that a society sanctions, but most still believe that polygamous wives are subservient to their husbands. Most of the Mormon women who practiced polygamy, however, did not openly admit that they were in a subservient status. What they actually believed may be another matter entirely. Richard Burton, a non-Mormon and perhaps the most dispassionate and experienced contemporary observer, put it most fairly when he wrote that Mormon polygamy, more than anything else, resembled "a European home composed of a man, his wife, and his mother."[37] Polygamous marriages, depending on the parties involved, were in fact "good, bad, and indifferent" and about equally hard on the husband as on the wife.[38] On this point Cannon quipped, "If I entertained the views that prevail outside of Utah . . ., I would think it punishment enough for men who married more wives than one, to have to live with them . . . ."[39] The possibility of *male* subservience in a household of several devout women seemed to have escaped Waite completely. Reynolds had minimized this possibility by having his wives live in separate homes and spending alternate weeks with each of them.

Waite next turned to the nature of polygamy itself, arguing whether such a practice should be given constitutional protection under the First Amendment.

> Suppose, one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pyre of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?[40]

The question seemed gratuitous to the Mormons since they never asserted that religion could be used as a defense against either criminal homicide or suicide. On this point Cannon indignantly declared: "In the name of common sense, what possible analogy can there be between the destruction of life and the solemnization of marriage, between practices which extinguish life and an ordinance which prepares the way for life. . . . Because human sacrifice is wrong, does it necessarily follow that human propagation is wrong?"[41]

Finally, having declared that polygamy was like wife-burning, so odious as to have been everywhere prohibited in America, that such nefarious marriages led to patriarchy and consequently ought to be prohibited under the "bad tendency" rubric, that polygamy was as barbaric as the worst offense imaginable, Waite returned to his original contention that the Constitution was framed to protect all religious belief but not all religiously motivated actions. "To permit [polygamy] would be to make the professed doctrines of religious belief superior to the laws of the land," the Chief Justice of the United States declared most emphatically.[42] This was truly the heart of the

matter—whether God or Caesar would rule America—and the bottom line of the ongoing *Kulturkampf*.

After an unsuccessful attempt to get President Hayes to pardon him on the grounds that his was merely a test case and an equally unsuccessful attempt to get a rehearing before the Supreme Court, George Reynolds was imprisoned in the federal prison at Lincoln, Nebraska and shortly thereafter sent back to Utah to serve his term in the territorial penitentiary.

Reynolds' internment was unusual in many respects. He received visitors—sometimes including "a wagon load" of his wives and children—almost every day and sometimes in such numbers that the prison warden threatened to move him out of the territory. He was also allowed to leave the prison and go home on five special occasions for a few hours each—twice when children were born to his polygamous wives. Shortly after the *Reynolds* decision was handed down, a reporter for the *New York World* interviewed George Reynolds for his reaction to the decision. Reynolds said that the Supreme Court's decision was a "nullification" of the Constitution, that the belief/conduct dichotomy was "twaddle," and that his second trial in Utah was grossly unfair because Judge White had helped the prosecutor from beginning to end. Reynolds was most disappointed over the Court's definition of the Free Exercise Clause. "Exercise means action, or it means nothing," he declared.[43]

The immediate reaction of the officials of the Mormon Church to the *Reynolds* decision was one of shock, bewilderment and defiance. On the day after the decision was announced, George Q. Cannon wrote in his diary:

> I had an important interview with Senator Edmunds of Vermont, Chairman of the Judicial Committee of the Senate . . . . [He] spoke formally of legislation to condone the past and to operate for the future . . . . [He asked,] "Will your people observe the law in the future?" Determined not to mislead or deceive I have given no assurance that they would . . . .[44]

On the following day, Cannon wrote to Apostle Taylor that the justices of the Supreme Court "appear willing to leave us to our fate, or the fate our enemies would mete out to us. Now it is up to the Lord to preserve us."[45]

Within a week after the *Reynolds'* decision President John Taylor was interviewed for his reaction by a correspondent of the *New York Tribune*. "I regard that a religious faith amounts to nothing unless we are permitted to carry it into effect," Taylor declared, and then went on to say that both Congress and the Supreme Court were now persecuting the Mormons as the Huguenots in France and the nonconformists in England had been persecuted.[46] When asked if religion could ever be a justification for breaking a criminal law, Taylor replied that it could in a country that had a constitutional guarantee of religious freedom. The government is the transgressor, not the Mormons, he declared.[47] After a lengthy defense of polygamy as compared to monogamy, Taylor dismissed Waite's belief/action dichotomy

as "so much bosh" and asserted that the main reason polygamy was proscribed in America was because Mormons were "but a handful of people."

Perhaps the strongest Mormon reaction to the *Reynolds* decision was expressed during the October 1879 general church conference where President Taylor thundered:

> God will lay his hand upon this nation . . . there will be more bloodshed, more ruin, more devastation than ever they have seen before. . . . We do not want these adjuncts of civilization. We do not want them to force upon us that institution of monogamy called the social evil. We won't have their meanness, with their foeticides and infanticides, forced upon us.[48]

The most extensive and scholarly reaction to *Reynolds v. United States* by a Mormon was George Q. Cannon's fifty-seven page review of the Court's decision published in 1879.[49] Cannon's main point was that so long as Mormon beliefs and practices do not interfere with the rights of their fellow men, they should be allowed under the First Amendment to practice their beliefs however nonconformist they might be. Reason, not force, is the only effectual agent against error, Cannon believed. No one had been wronged in this practice—neither the Mormon women nor their husbands—for they were not coerced. Nor were the polygamous children adversely affected, he wrote, for there was no approbrium placed upon them in the Mormon community. Nor had the nation been wronged, Cannon said, for Mormons are peaceable, industrious, frugal, thrifty and honest. "Our only fault," Cannon remarked wryly, "is that we are too much married."[50]

As one would expect the reaction of the major eastern newspapers was strongly supportive of the Supreme Court's decision. The *New York Times* called the Reynolds decision "a decided victory" against polygamy and a "great gain" for the nation.[51] Admitting that the law of 1862 had been passed solely to affect Mormons, the *Times* attempted to excuse this discriminatory approach on the basis that polygamy was really not a voluntary matter for Mormons, since all members of that faith who did not practice polygamy were regarded with distrust and suspicion. The *New York Tribune* took an even stronger stand, stating that this was the only possible way the Court could have decided this case. Calling polygamy an "abomination" which "stands on the same level with murder," Salt Lake City "a far off Sodom," and those who practice polygamy the "savage sultans of Utah," the *Tribune's* less restrained reaction was possibly more representative of the general public's reaction than that of the *Times*.[52]

The more distant aftermath of the *Reynolds* decision has been well examined elsewhere.[53] All branches of government rallied around the decision, and when it became clear that convicting polygamists of bigamy did not suffice, the government shifted its emphasis from prohibiting polygamy and incarcerating polygamists to the destruction of the Mormon Church itself. As President Chester A. Arthur put it, polygamy was the "cornerstone" of Mormonism, and in order to bring down this structure, the federal gov-

ernment's duty was to destroy the whole "barbarous system" which spawned it.[54]

With a century of hindsight and attitudes much more tolerant of deviant sexual behavior, a number of conclusions suggest themselves in this bitter conflict between what was then America's most despised sect and the elected and appointed representatives of the United States.

Chief Justice Waite's primary purpose of completely abolishing by judicial decision the "barbarous practice of polygamy" as the other "twin relic" had been abolished by war, did not, of course, succeed immediately. The Mormons simply ignored the *Reynolds* decision. Indeed, as anyone living today in Mormon Country knows, unsanctioned polygamy is still very much with us although not so openly evident and without the righteous fire that once aroused the nation to wrath. If prohibiting polygamy was insufficient as a means to end it, dissolving the Mormon Church, which the Supreme Court did in its *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States* (1890), was effective.[55] Faced with the choice of giving up their "most holy principle" or giving up their whole religious organization, the Mormons capitulated. Historical hindsight makes it seem inevitable that this small and extremely unpopular sect would lose its battle with the majority will, particularly when, as George Bancroft had pointed out earlier, majority rule was the compelling idea of nineteenth Century America.[56] Open and notorious sexual behavior which shocks the moral sensibilities of the whole nation will not be allowed, religiously motivated or not. This is the major lesson of *Reynolds*,[57] and it supports Lord Devlin's belief that society will not tolerate sustained rebellion against the established moral code.[58] The Mormons' position that they should be allowed to practice their religious beliefs so long as no one was harmed thereby might be an eminently reasonable one, and was in fact advocated by no less a figure that John Stuart Mill, but when public feelings run high, it does not seem to be a very practical one.

If the *Reynolds* decision was inevitable, was it also wise? Virtually everyone who has analyzed *Reynolds v. United States* has said so.[59] I am less sure. First, *Reynolds* was the initial constitutional step in a legal crusade, not just against polygamists but against Mormons generally. Nonpolygamists were denied the right to vote; private property was confiscated without compensation; polygamists who ceased living with their plural wives were prevented from offering them financial support. *Reynolds* laid the legal groundwork for a national crusade not just against polygamy, but against the Mormon religion itself. The effect of the *Late Church* decision was to declare all Mormons beyond the protection of the First Amendment whether they practiced polygamy or not.

Second, the belief-conduct distinction is a gross oversimplification of these complex issues. Where does one draw the line with this rule? At one extreme, virtually all religious conduct could be proscribed on the grounds that it is action, including *taking* the sacrament, *going* to Mass, and even *praying* in church. At the other, if religious conduct can be proscribed, can it also be required? Could a student be required, for example, to attend ROTC if his

religious scruples forbid it? Could another be required to salute the flag? Can an office holder be required to acknowledge a belief in God? Or suppose a polygamist merely taught his children the doctrine of polygamy. Would that be belief or conduct.?[60]

Third, the reasoning in *Reynolds* seems excessively eclectic. Waite sifted through both Jefferson's writings and Lieber's books to find what was supportive while rejecting equally compelling material from these same authors which supported the Mormons' case. Waite ignored Jefferson when Jefferson wrote that the legitimate powers of government extend only to actions injurious to others. He ignored Professor Lieber's teaching that people had a right to disobey the law for religious reasons. Nor did Waite tell his audience that Jefferson was not a Christian but a Deist, suspicious of all revealed religion, or that Lieber was as blatantly anti-Mormon as he was anti-Catholic—hardly unbiased sources on the duties of the faithful. Waite was wise, however, in opposing the notion that anything should be allowed so long as it is religiously motivated. Like speech, the reach of religion cannot be absolute.

If the High Court's performance in this instance seems less than perfect, so, too, was the performance of the Mormons. After the initial efforts at cooperation, there is little in the record to show that the Mormons really intended to abide by the *Reynolds* decision if it went against them. Nor were their shrill harangues against monogamists or their dire threats of impending calamity against the nation if the Mormons did not get their way either convincing or laudable. The Mormons also seemed especially slow in recognizing the inevitable force of the law. Fervor may be good for the soul, but it can cloud the mind. Nor were the Mormons especially tolerant of their own deviants. Mormon bishops who refused to practice polygamy because it was illegal after 1879 were frequently released from their offices, and those who openly criticized church leadership were usually excommunicated. Finally, the Mormons seemed unimpressed with the idea that states, too, have compelling interests and that "a wall of separation" which protects religious freedom sometimes requires religious compromise.

A final conclusion can be drawn from the *Reynolds* decision. In a society where deep religious significance is given to monogamous marriage, where as Waite said marriage is a "sacred obligation" and a distinctly "Christian" practice, the law prohibiting polygamy was a public attempt to protect the *religious* sentiments of the majority from what Louis B. Schwartz has called "psychic aggression."[61] Polygamy offended not only the moral but also the religious beliefs of Protestant and Catholic America. As the Committee on the Judiciary put it, polygamy "brings our holy religion into contempt" and to allow this "new Sodom and new Gomorrah" to continue "will invoke the vengence of heaven.[62] The first organized opposition to polygamy came from the evangelical churches, and ministers played a prominent part throughout the crusade.[63] Mormon officials believed that Protestant leaders were "the great power in Babylon" and behind the antipolygamy legislation.[64] *Reynolds* is therefore a prime example of using law to protect the majority against religious outrage.

This point can be made clearer by comparing the attitude of the Supreme Court and the public toward polygamy in George Reynolds' day and in ours. In the last few years, the Supreme Court has moved away from its earlier attempts to promote sexual morality. The older distinction between legitimate and illegitimate children is now largely gone; birth control and abortion decisions are now essentially private matters, and the number of alternatives to the traditional marriage relationship is increasing. John T. Noonan, Jr. even suggests that the Supreme Court has gone so far as to eliminate all of the unique legal privileges that have formerly adhered to heterosexual monogamy.[65] Nor does the practice of polygamy seem to matter much anymore to the American public at large. Having lost much of their metaphysical dread and having vastly broadened the bounds of what is tolerable sexually, sporadic revelations that polygamous groups are still among us do not alarm as they once did. The national press is, at most, ambivalent on the principle and generally amused by these incidents. On the whole, today's polygamists are viewed as quaintly deviant religious fanatics rather than criminals, and neighbors will neither report them to the authorities nor convict them if they are indicted. This secularized public attitude means that effective legal measures to eradicate polygamy are simply not available.

Given these changed public attitudes toward the sexually deviant, it may be only a matter of time before the *Reynolds* doctrine is modified. The Supreme Court may already have taken the first step in modifying *Reynolds* when it allowed the Old Order Amish to plead religious belief as a valid defense against a criminal prosecution for failure to send their children to school until the age of sixteen.[66] In the Amish case, Chief Justice Burger emphasized that the Amish desire to insulate themselves from the modern world was in many ways admirable and that the old belief/action dichotomy of *Reynolds* can no longer be confined to logic-tight compartments. Foregoing one or two years of schooling does not impair a child's ability to be self-supporting, and it causes no lasting harm to society, Burger felt; hence a state interest is not compelling against the clear language of the First Amendment. The Old Order Amish reject, for religious reasons, capitalism, public education beyond the age of fourteen, competition, intellectual achievement, telephones, automobiles, television and a host of other modern paraphernalia. Is the rejection of monogamous marriage for religious reasons substantially different in a society that no longer seems to care as deeply about polygamists as it once did? Apparently Justice Douglas does not think so. In his dissent in the Amish case, he predicted that "in time *Reynolds* will be overruled."[67]

If Justice Douglas is correct and *Reynolds* is eventually overruled, or if the increasingly permissive attitude of courts toward private sexual activity between consenting adults is continued, the Church might be required to face the issue of polygamy once again. Suppose, for example, that the Mormons were given the chance, should they care to do so, to practice a form of marriage their founder once described as the "most holy" and divine form of matrimony and a ritual absolutely essential to exaltation. Suppose that it could be shown that the manifestoes of 1890 and 1904 really were based on

illegality and public hostility at that time—as Wilford Woodruff and other Church leaders had said they were. Would Mormon leadership welcome the opportunity to reestablish polygamy? Would the leadership feel required to resume the *practice*? Since the Church has never renounced the *doctrine*, I strongly suspect this to be the last thing current church leaders would choose. Polygamy, it seems, is an acute embarrassment, something they absolutely never discuss in General Conference or in their numerous manuals of instruction. It is wholly out of character and exceedingly difficult to imagine today's conservative, business-oriented, carefully dressed corporate leaders even considering the earlier ways, especially as their focus shifts from Utah and the nineteenth century to the world of the twenty-first century. Nor is the leadership alone. To many Mormons, polygamy is now, as was once stated by their enemies, a "relic" of the distant past, and if not actually barbaric, a practice that educated, affluent and sophisticated Mormons no longer take seriously.

The irony of this lies in the fact that most of the descendants of those who suffered "the merciless rage of popular fury" have come to embrace the very concepts their grandparents so abhored. If Brigham Young and John Taylor were to view Salt Lake City today, I suspect their consternation on this issue would be considerable. They saw polygamy as a "true and everlasting principle" of transcending value and eternal and inexorable force. Contemporary Mormons, at least on this issue, see truth and even revealed truth not so much as transcendent and eternal but as important and worthwhile to *this* generation. The rhetoric may still be there, but neither the courts nor the American people have been very upset by Mormon rhetoric. The point is that Mormons now willingly conform to the ideals of monogamy. The idea of returning to their earlier ways is as abhorent to them as it once was to their detractors. This is perhaps the most enduring lesson of *Reynolds* for Mormons.

NOTES

The writer wishes to thank George Funk for his assistance in gathering materials and suggesting improvements in an earlier draft of this article. Also helpful were Davis Bitton, David Brion Davis, John Flynn, Robert Hine, and Brigham Madsen.

[1]For an excellent discussion of this relationship in colonial times see David H. Flaherty, "Law and the Enforcement of Morals in Early America," *Perspectives in American History*, vol. V (1971), p. 203.

[2]See especially Lord Patrick Devlin, *The Enforcement of Morals* (Oxford, 1965); H.L.A. Hart, *Law, Liberty and Morality* (Stanford, 1963); and Ronald Dworkin, *Taking Rights Seriously* (Boston, 1977).

[3]See Mary Ann Glendon, "Marriage and the State: the Withering Away of Marriage," *Virginia Law Review*, vol. 62 (1976), pp. 663 and 673; John T. Noonan, Jr., "The Family and the Supreme Court," *Catholic Univ. Law Review*, vol. 23 (1973), p. 255; and Robert G. Dyer, "The Evolution of Social and Judicial Attitudes Towards Polygamy," *The Utah Bar Journal*, vol. 5 (1977), p. 35.

[4]Glendon, p. 674.

[5]Illegitimate children of polygamous marriages and former polygamous wives increasingly have been given legal rights to financial support, according to Glendon, p. 674.

[6]The best single account of this conflict is Stow Persons, "Religion and Modernity, 1865–1914," in James Ward Smith and A. Leland Jamison, *The Shaping of American Religion* (Princeton, 1961), vol. 1, p. 369. Also excellent is Martin Marty, *The Modern Schism* (New York, 1969), chap. 4.

[7]See Persons, p. 374; Marty, p. 96; and Jacque Ellul, *The New Demons* (New York, 1975), chap. 2

[8]On this topic I have followed Karl Bachem, *Vorgeschichte, Geschichte and Politik der Deutschen Zentrums-Partei*, 9 vols. (Köln, 1938), especially vol. 4; Ernest Rudolf Huber, *Deutsche Verfassungs-geschichte Seit 1789*, 4 vols. (Stuttgart, 1969), vol. 4, beginning at p. 814; and H. Bornkamm, "Die Staatsidee im Kulturkampf," *Historische Zeitschrift*, CLXX (1950), pp. 41 and 273.

[9]*Journal of Discourses*, vol. 5, p. 187. Hereafter *JD*.

[10]Quoted in *New York Independent*, December 2, 1869, under "The Mormon Question."

[11]See *Congressional Globe*, 36th Cong., 1st Sess., 1860, p. 1514. McClernand's "sapping" idea was a common one at that time. See also G. J. Barker-Benfield, *The Horrors of the Half-Known Life* (New York, 1976), chap. 15 "The Spermatic Economy."

[12]This phrase first appeared in the 1856 Platform of the Republican Party.

[13]From a sworn statement made in 1874 by William Clayton, private secretary to Joseph Smith and the man who first copied the revelation on plural marriage. The full quotation is worth preserving here:

> "After the revelation on celestial marriage was written Joseph continued his instructions, privately, on the doctrine, to myself and others, and during the last year of his life we were scarcely ever together, alone, but he was talking on the subject, and explaining that doctrine and principles connected with it. . . . From this I learned that the doctrine of plural and celestial marriage is the most holy and important doctrine ever revealed to man on the earth, and that without obedience to that principle no man can ever attain to the fullness of exaltation in celestial glory." *The Historical Record*, vol. VI (1887), p. 226.

[14]The best single documentary source on Mormon polygamy is Gilbert Fulton, ed., *The Most Holy Principle*, 4 vols. (Murray, Utah, 1970–1975), a massive collection of contemporary references to polygamy from the inception of the doctrine to the present. See also, Davis Bitton, "Mormon Polygamy: A Review Article," *The Journal of Mormon History*, vol. 4 (1977), p. 101.

[15]See Kimball Young, *Isn't One Wife Enough* (New York, 1954), p. 446; Bernard DeVoto, *Forays and Rebuttals* (Boston, 1936), p. 80 ff; and B. H. Roberts, *Celestial Marriage* (Salt Lake City, 1885), p. 52.

[16]The fullest discussion of this point is George Q. Cannon, *A Review of the Decision of the Supreme Court of the United States in the Case of George Reynolds v. the United States* (Salt Lake City, Utah, 1879), beginning at p. 9.

[17]George Q. Cannon "Letterbook," LDS Church Archives, January 10, 1879.

[18]"Journal of George Reynolds," 6 vols., LDS Church Archives, vol. 5, entry for October 21, 1874. Reynolds began his diary in 1861 and continued it until 1906.

[19]"Journal of George Reynolds," vol. 5, pp. 85–87.

[20]See Orma Linford, "The Mormons and the Law," *Utah Law Review*, vol. 9 (1965), p. 334.

[21]See *United States v. Reynolds*, 1 Utah 319 (1876) for the entire record.

[22]See "Charge to the Jury," *Deseret Evening News*, December 10, 1875, for the full account.

[23]98 U.S. 145 (1879).

[24]See C. Peter Magrath, "Chief Justice Waite and the 'Twin Relic': Reynolds v. United States," *Vanderbilt Law Review*, vol. 18 (1965), p. 507; and Roy Jay Davis, "Plural Marriage and

Religious Freedom: the Impact of Reynolds v. United States," *Arizona Law Review*, vol. 15 (1973), p. 287.

[25]98 U.S. 145 (1879) at p. 162. [26]*Ibid.*

[27]George Q. Cannon, *A Review of the Decision*, p. 6.

[28]98 U.S. 145 at p. 162. [29]*Ibid.*

[30]Cannon's *A Review of the Decision*, note 17 at p. 19, goes to great length to show how the Mormons could live with this test.

[31]See especially, Richard Burton's *City of the Saints* (New York, 1861).

[32]Cannon made much of this point, *A Review of the Decision* note 17 beginning at p. 19.

[33]98 U.S. 145 at p. 166.

[34]This was a common belief among political scientists, according to Magrath, "Chief Justice Waite, p. 530, n. 25.

[35]Lieber declared Mormonism a "stupendous outrage" and the greatest "absolutism" that has ever existed. Monogamy he called "the very first principle. . . of our whole western civilization." See the fourth edition of this work published in 1901, at pp. 99 and 288.

[36]Francis Lieber, *Manual of Political Ethics*, 2 vols. (Boston, 1839), vol. 2, p. 304. Lieber went on to say that whenever laws clash, we must obey the *superior* in preference to the *inferior*—precisely what the Mormons thought they were doing.

[37]See Richard Burton, *City of the Saints* (New York, 1963 edition), p. xxiii.

[38]See Young, *Isn't One Wife Enough*, chaps. 3 and 14, n. 16.

[39]Cannon, *A Review of the Decision*, p. 43, n. 17.

[40]98 U.S. 145 at p. 166. The funeral pyre analogy may have come from the Mormons themselves. Orson Pratt, in an address to 10,000 saints in 1869, used this image as an example of what religious freedom should *not* include. To Pratt only a religion based on the Bible should be tolerated in America. Judge White, who was in the city at that time, may have heard of this analogy and, with delicious irony, incorporated it in his Supreme Court opinion.

[41]Cannon, *A Review of the Decision*, p. 34, n. 17.

[42]98 U.S. 145, at p. 167.

[43]George Reynolds Papers, Brigham Young University Special Collections, Mss. #10.

[44]"George Q. Cannon Journal," entry for 7 January 1879, located in the Office of the First Presidency of the LDS Church, Salt Lake City. (Closed).

[45]George Q. Cannon "Letterbook," LDS Church Archives, Salt Lake City, 8 January 1879.

[46]O. J. Hollister, *The Supreme Court Decision in the Reynolds Case*, Salt Lake City, 13 January 1879, Bancroft Library.

[47]*Ibid.*, p. 6. [48]*JD* 20: 316ff.

[49]See *A Review of the Decisions of the Supreme Court of the United States in the Case of Geo. Reynolds v. the United States* (Salt Lake City, 1879).

[50]*Ibid.*, p. 43. [51]*New York Times*, 8 January, p. 4, col. 4.

[52]*New York Tribune*, 8 January, p. 4, col. 5.

[53]See Magrath, "Chief Justice Waite," pp. 534 to 543, n. 25; Ray Jay Davis, "The Polygamous Prelude," *American Journal of Legal History*, vol. 6 (1962), p. 1; Linford, "The Mormons and the Law, pp. 317–370, n. 21; and Ray Jay Davis, "Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States," *Arizona Law Review*, vol. 15 (1973), pp. 287 and 306.

[54]See James D. Richardson, ed., *Compilation of the Messages and Papers of the Presidents,* 1789–1897, 10 vols. (New York 1969), vol. 8, p. 57.

[55]136 U.S. 1.

[56]See Lawrence Veysey, *Law and Resistance: American Attitudes Toward Authority* (New York, 1970), p. 39.

[57]A judgment concurred in by Leo Pfeffer, *Church, State and Freedom* (Boston, 1953), p. 532; Philip B. Kurlan, *Religion and the Law* (Chicago, 1961), p. 22; and Loren P. Beth, *The American Theory of Church and State* (Gainsville, 1958), p. 82.

[58]See Devlin, *The Enforcement of Morals,* pp. 9–10, n. 2.

[59]See Young, *Isn't One Wife Enough,* p. 376, n. 16; Linford, "The Mormons and the Law," p. 340, n. 21; Magrath, "Chief Justice Waite," p. 543, n. 25; and Davis, "Plural Marriage" p. 305, n. 54.

[60]In 1955 the Utah Supreme Court held this to be "action" and made a polygamist's children wards of the state. See *In re Black,* 283 P. 2d 285.

[61]Quoted in Richard A. Wasserstrom, ed., *Morality and the Law* (Belmont, California, 1971), p. 93.

[62]"Polygamy in the Territories of the United States," Committee on the Judiciary, 36th Cong., 1st. Sess., Report 83, 14 March 1860, p. 4.

[63]Gustive O. Larson, *The Americanization of Utah for Statehood* (San Marino, California, 1971), p. 53.

[64]For a typical example see "George Q. Cannon Letterbook," 1871–1879, LDS Church Archives, Salt Lake City, entry for 16 January 1879, wherein Cannon and Taylor discuss the *Reynolds* case in confidence.

[65]See Noonan, "The Family and the Supreme Court," p. 265, n. 3.

[66]See *Wisconsin v. Yoder,* 406 U.S. 205 (1972). [67]*Ibid.,* at p. 227.