A BRIEF LEGAL HISTORY OF UTAH LAW PROHIBITING BIGAMY AND POLYGAMOUS COHABITATION

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It was a situation which echoes strongly of the present one: In the summer of 1873, Ann Eliza Young apostatized, divorced Brigham Young, and went on the lecture circuit. She claimed that “the superficial harmony of Young’s households masked what was in fact a systematic torture of women, riven by jealousies, violence, and deception.” S.B. Gordon, THE MORMON QUESTION 112 (2002). Popular writers of the time howled in both fictional and non-fictional accounts over the “enslavement” of women. Congressmen raged that the church “has elevated lechery to the dignity of a religious dogma, and burns incense upon the altars of an unhallowed lust.” Cong. Globe, 42d Cong., 3d Sess. 948 (1873). Many argued that plural wives would escape if only they could, and built “safe houses” for that purpose. Id. at 164.

Then, as now, however, few plural wives attempted to “escape” their husbands. The safe houses stood largely empty, and those who came were more often leaving an incompatible relationship than escaping polygamy. As one of the first groups of women to be granted suffrage (in 1871), Mormon women consistently voted in favor of maintaining their local institutions. Id. at 97. They lied in court, they hid from authorities, they held rallies in favor of polygamy, and they even conducted public relations tours to Washington in defense of their faith. “[T]he recalcitrance of Mormon women battered theories of their involuntary sexual servitude.” Id at 164. In response, antipolygamists asserted that Mormon women were controlled in every aspect of their lives, and that the whole structure of marriage in the territory must be destroyed in order to destroy the power polygamous men held over their wives.

Even Blackstone’s assumptions about polygamy in 1783 were the result of a narrow consideration of social history and the superiority of western Christian ideals:

For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers: but in northern countries the very nature of the climate seems to reclaim against it; it never having obtained in this part of the world . . . .

4 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 163-64 (1783).
Utah’s bigamy statute is an archaic result of the bitter struggle for statehood, and the concomitant (and nearly successful) attempts by the federal government in the late 1800s to destroy the Mormon church. Mr. Holm subscribes to the teachings of the 19th century Mormon church as they relate to familial relations and procreation. Therefore, an examination of the history of the bigamy laws and plural marriage in this State is appropriate and necessary for a proper exposition of the issues in this case. It is a tale of legal persecution, majoritarian high-handedness, and intolerance cloaked in the disguise of morality that would be positively shocking if it were to occur today.

The principle of plural marriage was revealed to Joseph Smith in 1843. It is published in DOCTRINE & COVENANTS § 132.

The revelation proclaimed that the marriage of one man to more than one woman was “justified” by the example of Abraham. In these latter days, the heirs of Abraham were once again commanded to work “for their exaltation in the eternal worlds” (that is, the states of heaven) by siring “the souls of men.” Men called upon to enter the celestial principle were thus sanctified in their union with additional “virgins,” in the interest of procreation by righteous patriarchs as of old . . . The new covenant of celestial marriage celebrated on earth would endure for eternity, governing relations in heaven as in life, and dictating the degree of exaltation achieved in the afterlife. Only marriage celebrated in accord with the revelation would endure after death, and “whatsoever things” that did not conform to God’s Words “shall be shaken and destroyed.”

Gordon, supra, at 22 (2002). The early Mormon church, and the fundamentalists today, believe that the highest of the three orders of heaven can be attained only by living the law of celestial, or plural, marriage. D&C §131; 9 JOURNALS OF DISCOURSES 322 (statement of Brigham Young, July 6, 1862). The purpose of plural marriage is procreation, not sexual gratification. 9 JOURNALS OF DISCOURSES 36 (statement of Brigham Young, April 7, 1861).

The revelation remained secret for nearly ten years, but rumors that the Mormons were engaged in polygamous marriages fueled the persecution that eventually drove the Mormons west to what was then Mexico in 1847. Two years later, Mexico ceded the area to the United States following the Mexican-American War. The religiously cohesive nature of the Mormon settlers resulted in a theocratic government until Mormon church leaders established a civil form of government in March 1849. Society of Separationists, Inc. v. Whitehead, 870 P.2d 916, 921-22 (1993). The citizens of the region thereafter adopted and ratified a constitution,
styled the Constitution of the State of Deseret, as a bridge until the United States Congress could establish law in the territory. *Id.*

In July 1849, the Deseret Legislature met for the first time and immediately petitioned Congress for statehood. *Id.* at 922. The legal climate of the time sheds light on their actions. The persecution of the Mormons in Illinois and Missouri occurred despite local laws that should have protected them, and in spite of the national constitution’s guarantees of religious freedom. The Mormons had learned that federal guarantees did not bind the states, and that protection of the Mormons’ religious freedom and, importantly, control over the legal institution of marriage were matters exclusively within the control of the states. Statehood held the promise of release from the persecution that had tormented the Mormons, and the promise of control over the institutions of the law. *See* Gordon, *supra*, at 108-10.

The first petition for statehood failed. A political compromise in 1850 resulted in the admission of California into the Union as a “free” state, with Utah and New Mexico given territorial status instead. J. Flynn, *Federalism and Viable State Government—The History of Utah’s Constitution*, 1966 UTAH L. REV. 311, 316. As the law of the time also viewed slavery as a creature of local law, federal control over the territory meant that the balance of power in Congress would not be changed. In 1852, the church publicly announced and advocated the practice of polygamy as a religious ordinance, prompting intense legal and political opposition outside the territory. *Society of Separationists*, 870 P.2d at 923. Additional attempts at statehood failed in 1856, in 1862 at the outbreak of the Civil War, and in 1867. By that time, the primary obstacle to statehood had become polygamy. Gordon, *supra*, at 111; Flynn, *supra*, at 316, 318.

It was the law’s view that slavery and domestic relations were both matters of local concern, however, that held the legal keys to the undoing of Utah’s aspirations for statehood and the eventual destruction of the practice of polygamy. Nevertheless, because the influence of the Mormon church was predominant in early Utah, plural marriages were initially treated as valid in the territory. There were no territorial laws regarding marriage. *See* Testimony of Mr. Ferry, H.R. 4156, Admission of the State of Utah, 50th Cong. 2d Sess., March 2, 1889, at 102. Thus, the act incorporating the Mormon church, by which the rules of the church were recognized as valid, initially governed marriage in the territory. 1852 Laws of Utah p. 136 § 3. The territorial inheritance laws also recognized the rights of plural family members as co-equal with traditional family members. 1851 UTAH LAWS §§ 24 and 25, at 71; 1872 UTAH LAWS ch. 17, § 3, at 27.

Following the failure of the 1862 attempt to obtain statehood, Congress put to rest any notion that the Civil War had diverted attention from the Mormons and polygamy when it adopted the Morrill Antigbigamy Act, a move specifically d-
signed to "attack polygamy and the Mormon Church." *Society of Separationists*, 870 P.2d at 924. Among other things, the Morrill Act prohibited plural marriages in the territories, disincorporated the Mormon church, and restricted the church’s ownership of property to $50,000. Morrill Act, ch. 126, 12 Stat. 501 (1862) The Morrill Act was ineffective, in large part because local probate courts, established by the Mormons in the 1850s, had original jurisdiction in civil and criminal cases, and the local marshal, rather than a federal official, drew the jury lists. Gordon, *supra*, at 111.

In 1872, bolstered by Nevada’s successful petition for statehood, delegates from the Utah territory submitted yet another statehood petition to Congress, this time with a constitution modeled after the document submitted by Nevada as part of its successful campaign. *Society of Separationists*, 870 P.2d at 924. Nevertheless, admission to the Union was again denied because the new constitution failed to abolish polygamy—making clear again that polygamy was the primary roadblock to statehood. *Id.* at 924-25.

In 1874, Congress attempted to more directly assert federal control in Utah Territory. Despite intense opposition from Mormons in Utah, Congress passed the Poland Act, ch. 469, 18 Stat. 253 (1874), which reduced the powers of the territory’s probate judges and provided for jury pools to be selected by federal officers. In response to resultant pressure on Mormon leaders by emboldened federal prosecutors, Mormons decided to construct a case to test the constitutionality of the Morrill Act. In the spring of 1875, George Reynolds was convicted of bigamy and sentenced to imprisonment for a term of two years at hard labor.

Mr. Reynolds and the church turned to the United States Supreme Court to find support for the free exercise of their faith, including the right to practice polygamy. However, in *Reynolds v. United States*, 98 U.S. 145 (1878), the Court upheld the constitutionality of the Morrill Act against a free exercise challenge, rejecting Mr. Reynolds’ claim that Congress’ prohibition of polygamy in the territories ran afoul of his constitutional rights to the free exercise of his religion. In an opinion that foreshadowed the Court’s later explicit reliance on principles of Christianity in upholding laws targeting Mormons, the Court reasoned:

"Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."

98 U.S. at 164.
In 1882, emboldened by the *Reynolds* decision upholding antipolygamy laws, Congress passed the Edmunds Act, ch 47, 22 Stat. 30 (1882). The Edmunds Act amounted to a series of amendments to the Morrill Antigamy Act. Senator Edmunds acknowledged that the purpose of the law was “to exterminate polygamy in Utah.” George F. Edmunds, “Political Aspects of Mormonism,” *Harper’s Magazine* 64 (January 1882): 287. The Act targeted polygamy by undermining the control the Mormon church held over institutions of public power in the Utah territory. The Edmunds Act created the new offense of “unlawful cohabitation,” and stripped polygamists of their rights to vote, to serve on juries, and to hold public office.

The Mormons again sought refuge from these federal laws in statehood. They assembled in 1882 yet another constitutional convention with hopes that statehood would provide a means of avoiding the growing federal antipolygamy legislation, which applied only to the territories. *Society of Separationists*, 870 P.2d at 926. The church also saw statehood as a vehicle for avoiding the *Reynolds* decision’s interpretation of First Amendment jurisprudence, which had not yet been deemed to apply to the states through the Fourteenth Amendment. The 1882 convention drafted a constitution similar to the 1872 version and introduced it before the House of Representatives in June 1882. In keeping with what had become an established historical trend, the 1882 petition died in committee. *Id.*

With Mormons excluded from juries and prohibited from voting as a result of the Edmunds Act, polygamists increasingly faced criminal indictments in the federal courts. Once again, the church turned to the Supreme Court for protection. The Court dealt the Mormons additional setbacks, however, when it upheld the disenfranchisement of polygamists, *Murphy v. Ramsey*, 114 U.S. 15, 44-47 (1884), and criminal convictions for polygamy and cohabitation under the territorial Acts. *Cannon v. United States*, 116 U.S. 55, 78-79 (1884); *Clawson v. United States*, 114 U.S. 477, 487-88 (1884).

In 1887 Congress dealt a “final, devastating blow to the Mormon Church” when it passed the Edmunds-Tucker Act, designed to eradicate polygamy by compromising the viability of the Mormon Church. *Society of Separationists*, 870 P.2d at 926-27. The Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887), created the crimes of fornication and adultery, opening the door to prosecution of women participating in plural marriages. The Act annulled the church’s charter, escheated the church’s property, and turned control of the territory over to the non-Mormon minority by requiring an oath of obedience to the Edmunds Act as a prerequisite to voting. The Act further directed that all Church property not exclusively devoted to the worship of God was to be sold, with the proceeds used to support public schools in the territory. Openly acknowledging the Act’s purpose to destroy the Mormon church, Rep. Tucker averred, “We dissolve tribal relations of the Indians in order to
make the Indian a good citizen; so we shatter the fabric of this church organization in order to make each member a free citizen of the Territory of Utah.” 49 Cong., 2d sess. 694.

The territory organized another convention and adopted a new constitution in July 1887. The new constitution included for the first time a provision prohibiting polygamy and making it a misdemeanor. The 1887 constitution also provided that any amendment to the polygamy ban would have to be approved by the President of the United States and Congress. Outside Utah, however, this statehood proposal was viewed as a ploy to return control of polygamy prosecutions to loyal state prosecutors. Gordon, supra, at 213.

The Senate Committee on Territories considered the 1887 constitution and supporting materials in early 1888, and submitted a resolution to the full Senate, stating in relevant part:

[I]t is the sense of the Senate that the Territory of Utah ought not be admitted into the Union as a State until it is certain beyond doubt that the practice of plural marriages, bigamy, or polygamy, has been entirely abandoned by the inhabitants of said Territory and until it is likewise certain that the civil affairs of the Territory are not controlled by the priesthood of the Mormon Church.

19 Cong. Rec. 433, 2391 (1888).

Meanwhile, legal challenges to the Edmunds-Tucker Act made their way through the courts. In Davis v. Beason, 133 U.S. 333, 348 (1890), the Court upheld disenfranchisement of those in the Idaho territory who taught or advocated religious polygamy. Then, in Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890), the Court delivered the final blow, upholding confiscation of Church property under the Edmunds-Tucker Act. The Court characterized religiously based polygamy as “a nefarious system ... repugnant to our laws and to the principles of our civilization ...” 136 U.S. at 49. Referring to the church’s missionary work, the Court said, “[t]he existence of such a system of propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity had produced in the Western world.” Id. The Court concluded that the church was dedicated to the overthrow of civilization through the corruption of marriage, and this conduct justified its destruction. Id. at 63-64.

The church’s very existence now could be saved only by renouncing the practice of polygamy. Flynn, supra, at 321. Four months after the Supreme Court
decision in *Late Corporation*, church President Wilford Woodruff officially announced the end of polygamy as a Mormon practice in a document popularly known as the "Manifesto." President Woodruff acknowledged that the Manifesto was a direct response to these pressures:

The question is this: Which is the wisest course for the Latter-day Saints to pursue—to continue to attempt to practice plural marriage, with the laws of the nation against it and the opposition of sixty millions of people, and at the cost of the confiscation and loss of all the Temples, and the stopping of all the ordinances therein, both for the living and the dead, and the imprisonment of the First Presidency and Twelve and the heads of families in the Church, and the confiscation of personal property of the people; ... or, after doing and suffering what we have through our adherence to this principle to cease the practice and submit to the law . . . .

*Deseret Weekly*, Nov. 14, 1891 (statement at Cache Stake Conference, Logan, Utah, Sunday, November 1, 1891). The Mormon-dominated Utah territorial legislature thereafter further strengthened church claims that polygamy was no longer accepted in the territory when it criminalized the practice and related conduct in 1892. *Society of Separationists*, 870 P.2d at 927-28.

These actions had their intended result, as both houses of Congress passed a bill the following year providing for Utah’s admission to the Union. *Id.* at 928 n.25. Legislation was simultaneously introduced to restore church property seized under the Edmunds-Tucker Act. *Id.* Passage of the bill allowing statehood finally signaled that “the renunciation of polygamy by the Mormon Church had been accepted by Congress.” *Id.* at 928.

President Grover Cleveland signed the Utah Enabling Act into law in July 1894. *Id.* One section of the Act required that Utah’s constitution include various provisions, “collectively known as the ‘ordinance,’ which were irrevocable without the consent of the United States and the people of Utah.” *Id.* The “irrevocable ordinance” was then incorporated in Article III of the Utah Constitution, which remains unmodified today:

First:—Perfect 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.

The polygamy prohibition enacted by the Territorial Legislature in 1892 remained essentially unchanged until 1935, providing in relevant part that, “[i]f any
male person, hereafter cohabits with more than one woman, he shall be guilty of a misdemeanor.” 1892 UTAH LAWS ch. 7, § 2. Upon Utah becoming a state, the territorial statute became a law of the State of Utah, with minor alterations in language but without alteration in meaning, and was codified at Sec. 4209 of R.S.U. (1898). See State v. Barlow, 153 P.2d 647, 651 (Utah 1944). In 1933, the provision was incorporated into Sec. 103-51-2, R.S.U., with the original language employed in the 1892 statute. The provision was again amended in 1935 to make polygamy a felony.

In its current form, which dates to 1973, cohabitation is now part of Utah’s bigamy statute, which provides:

(1) 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.

(2) Bigamy is a felony of the third degree.

(3) It shall be a defense to bigamy that the accused reasonably believed he and the other person were legally eligible to remarry.

UTAH CODE ANN. § 76-7-101. The only notable change in the substance of the law since 1892 is that the statute now provides an express defense to prosecution where the accused reasonably believed both parties were legally eligible to remarry—providing, in essence, a mistake of fact defense for individuals who believed they were legally divorced or believed their spouses were deceased. Id.

No written legislative history exists for any of the various bigamy or polygamy provisions, and recordings maintained by the State of the 1973 floor and committee discussions concerning the codification of the current statute are generally inaudible. The dearth of legislative history surrounding Utah’s plural marriage statutes is confirmed, at least in part, by dicta contained in Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985), in which the Tenth Circuit relied on representations submitted by “counsel for the State of Utah” (presumably the Attorney General) that:

As nearly as I can determine at this point, Utah has never seriously considered on a policy basis whether these particular laws [prohibiting polygamy] are wise or not. Utah has not had occasion, because of the federal mandate reflected in the Constitution, to give public policy consideration to these particular issues.
It is deeply ironic that those who violate nineteenth century mores in the name of religion lack the protection now afforded those who do the same thing in the name of choice, personal freedom, or lifestyle. In a thorough study published in 1996, professors Irwin Altman and Joseph Ginat concluded:

[S]ome of these new forms of close relationships—including plural families among contemporary Mormon fundamentalists—are here to stay in American and Western society. They are not likely to “go away;” they are not fads or fancies; they are not aberrations. They will be part of the family life scene well into the future.

We must therefore learn about them, learn from them, and even help people live the lifestyles of their choice. Doing so increases the probability that participants in emerging forms of close relationships will contribute to the well-being and quality of life in American society at large. Not doing so, and viewing these family lifestyles as inherently immoral, wrong, and unacceptable, increases the probability that American society will fragment, with a declining sense of community and civility in our public and private lives.