Liberty, Equality, Polygamy?

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Jonathan Turley, The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions 64 **Emory L.J.** 1905 (2015).

Since the 2003 Lawrence v. Texas (539 U.S. 558) decision in which the United States Supreme Court overruled the criminalization of private homosexual conduct in the United States, the argument that the ruling would lead to same-sex marriage and also to the recognition of polygamous marriage has been made with regularity by Supreme Court Justices and law professors. Most recently, in the 2015 Obergefell v. Hodges decision, the Court proved Justice Scalia right and extended the fundamental right to marry to same-sex partners. (*Obergefell v. Hodges*, 576 U.S. __ (2015)). In his dissent in *Obergefell*, Justice Roberts reprised the Scalian slippery slope argument and asked whether "States may retain the definition of marriage as a union of two people….Indeed from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world." (*Id.* (Roberts, J., dissenting).) Invariably, when asked to legally justify the prohibition of polygamy against constitutional challenge, proponents of exclusively monogamous marriage rely on a host familiar Orientalist tropes as well as assertions of social dangers with little empirical proof.

Regardless of whether one agrees with the practice of plural marriage or same-sex marriage as a moral matter, it has become a requirement in the marriage cases, at least from Perry, Windsor, and now *Obergefell,* that objections to legalization be based on logical, discernible evidence rather than vague suppositions or, worse, stereotypes. Professor Jonathan Turley's article *The Loadstone Rock*: *The Role of Harm in the Criminalization of Plural Unions* examines and challenges the proffered justifications for continuing the criminalization of polygamy. Using two cases, one from Canada that he refers to as "The Bountiful" (*Reference re: Section 293 of the Criminal Code of Can.*, 2011 BCSC 1588), and Brown v. Buhman[1] from the United States (947 F. Supp. 2d. 1170 (D. Utah 2013)), Turley argues that post-*Lawrence*, the ability to show harm from specifically consensual, adult plural marriages is very difficult if not impossible.

The article begins with a brief overview of the Canadian reference and the *Brown* case. The laws being questioned in both cases are remarkably similar, which makes for an excellent comparative analysis. In both contexts, though the law affects other communities, the state's criminal prohibition is directed at Mormon polygyny. The similarity notwithstanding, the different analyses of harm undertaken by the courts result in polar opposite outcomes: The *Brown* court found that Utah's ban on informal polygamous unions in which the parties never seek state licensing or recognition does not implicate harms that are compelling enough for the state to invade consenting adults' privacy. Women and children are protected by other laws like domestic violence and child abuse laws, and these harms cannot be assumed as necessarily arising in all polygamous unions to ban their informal practice. The Canadian court, on the other hand, was persuaded by expert testimony of significant harm arising from polygamy, particularly to women and children, to justify a criminal ban of the practice.

While the discussion of these cases is fascinating particularly for those of us who teach comparative family law, the real contribution of the article is in the challenge to the use of harm in continuing the ban on polygamy. Turley suggests that the harm principle as articulated by Utilitarian philosophers and specifically John Stuart Mill was once a favored argument of conservative Liberal supporters of privacy. Mill's harm principle restricted government regulation only to those actions that directly harmed others, therefore removing consensual acts from its purview. Turley argues that the way that this principle has been deployed in some recent feminist scholarship has begun to take an illiberal turn reminiscent of an entirely different philosophical tradition—that of Lord Patrick Devlin. Turley argues that these feminist

uses of the harm principle to argue that polygamy results in social rather than individual harm forces a particular choice upon all citizens resulting in what he calls “compulsive liberalism,” “where harm is defined broadly to subsume consensual acts that foster discrimination or stereotypes.” (P. 3.)

Resting on moral conceptions of harm, in short, returns us circularly to illiberal theories like that of Devlin, who argued that moral harm alone was a sufficient basis for state action such as criminalization, in opposition to the Millian harm principle. Turley asserts that compulsive liberalism is eroding some of the most fundamental rights of individuals in a liberal society, tracing this trend from the early argument made by Catherine MacKinnon that pornography always and inevitably subjugates women to current attempts to regulate speech and expression via hate-speech legislation and attempts to protect religious sentiments. One might add the proscription against holocaust denial, activism for Palestinian rights, and regulation of Islamic dress to Turley’s examples indicating that it is not only liberal feminists engaging in this sort of compulsory liberalism. Nevertheless, Turley argues persuasively that illiberal regulation of free speech based on conceptions of societal harm—perhaps even espoused as a threat to the public order—reintroduces morality alone as an adequate basis for criminal regulation.

The polygamy cases, Turley argues, “fall on the very fault line between compulsive liberalism and libertarian theories over the function of criminal sanctions.” (P. 1943.) Examining the expert testimony on harm supporting continued criminalization in the *Bountiful* and *Brown* cases, Turley asserts that in *Bountiful* there was a willingness to rely on theoretical claims of social harm even when the unions were “consensual, and reveal[ed] no cognizable harm to the participants. It was the threat of its very existence to the fabric of marriage as an institution that [Chief Justice] Bauman saw as a credible basis for criminal sanctions.” (P. 1944.) The possible harm to women, children, and the institution of monogamous marriage sounds very much like the harms offered by opponents of same-sex marriage. Moreover, they resuscitate Lord Devlin’s argument that the law does not protect individuals but society.

Even if we do not espouse the view that all the law should do is protect individuals from other individuals or from an overreaching state consonant with Libertarianism, Turley’s exploration of the expert testimony raises the question of whether these are, indeed, harms to society causally related to the polygamous structure or form of marriage. The reliance on harm to women in the face of consent and, indeed, choice, raises questions whether feminist opponents of polygamy value autonomy even when they do not agree with its ultimate outcome. Can women choose polygamy freely? Can women choose to dress modestly? Or are these choices always compelled by the invisible hand of the patriarchy from which the only escapes are those authorized by liberal feminist orthodoxy? Turley rightly points to a conundrum at the heart of this kind of feminist project: the possibility that freedom will not look like what the majority wants and will reflect norms that are not typically white, upper-middle class, and European in origin.

Ultimately, Turley challenges the idea that a polygamous marriage treated on equal terms with a monogamous marriage is a threat to women’s equality. It is questionable that a *form* of marriage is *inherently* unequal. As I have argued, monogamous marriage historically suffered from serious gender inequality until the mid-twentieth century and in many respects continues to do so.[2] Abuses within these marriages were tolerated with equanimity by the law. Only after the women’s movement of the 1960s onwards have we been able to rehabilitate monogamy into a more egalitarian form through legal enactments like domestic violence, child abuse, and age of consent laws. Even if we focus on polygyny in its more extreme forms, there are means by which we can legally structure these marriages to distribute the rights and obligations and, indeed, even the legal status of marital partners, more equally among all the spouses. And certainly, as Turley points out, family structures with multiple partners are not restricted to polygyny but include polyamory and polyandry. These relationships can be egalitarian and cooperative, or not—just as monogamous marriages. But that does not preclude them from being valid choices by both men and women.

The animus that has been directed at polygamy from religious conservatives to liberal feminists has failed to respond to the problem of the disparate treatment of people in plural marriages or those who want to form them (and this is not necessarily always a heterosexual arrangement) from those in monogamous marriages. What is the feminist response to multiple-partner gay or lesbian relationships? Surely these do not implicate gender inequality. As Turley argues most persuasively, using the state’s power to criminalize plural-partner marriages by reducing these to extreme polygyny

and then basing the argument for prohibition on moral disgust or fear of prospective societal disintegration alone takes us back to 1950s: it is going backwards and should not be mistaken for progress towards greater equality and freedom.

1. The decision in Brown was subsequently vacated for mootness by the United States Federal Court of Appeals for the Tenth Circuit. *Brown v. Buhman*, No. 14-4117 (April 11, 2016). [?]
2. *See generally*, Cyra Akila Choudhury, *Between Tradition and Progress: A Comparative Perspective on Polygamy in the United States and India*, 83 **U. Colo. L. Rev.** 101 (2012). [?]

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