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Philippa Meek[†]

From Loving to Obergefell and Beyond: Plural Marriage as the Next Sexual Justice Issue

In 1967, the Supreme Court of the United States unanimously ruled that anti-miscegenation laws were unconstitutional, citing the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.¹ The ruling struck down laws in sixteen states that banned inter-racial marriage and overturned an earlier 1883 Supreme Court ruling; *Pace v. Alabama*.² Richard Loving, a white man, and his wife Mildred, a woman of colour, had been sentenced to a year in prison for marrying contrary to Virginia law; their sentence was suspended upon condition that they leave the state and not return for at least twenty-five years.³ Their 1958 marriage, which took place in the District of Columbia where inter-racial marriage was legal, was considered invalid in Virginia and the couple were arrested after establishing their marital home in the Virginian county in which they grew up.⁴ With the support of the American Civil Liberties Union, the Lovings appealed their convictions and took their case all the way to the Supreme Court of the United States, resulting in the landmark ruling that concluded,

[†] This is where you can put the author's attributions.

¹ *Loving v. Virginia*, 388 U.S. 1 (1967).

² *Loving*, 388 U.S. 1 at 6; *Pace v. Alabama*, 106 U.S. 583 (1883).

³ *Loving* 388 U.S. 1 at 3.

⁴ *Loving* 388 U.S. 1 at 2.

‘marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival’.⁵

In 2015, the Supreme Court ruled, with a five to four, majority that state laws preventing the issuance of marriage licences to same-sex couples, and recognition of marriages carried out in a state where such unions were legal, were unconstitutional, again citing the Due Process and Equal Protection clauses of the Fourteenth Amendment.⁶ James Obergefell and John Arthur lived together as a committed couple for over twenty years before Arthur was diagnosed with amyotrophic lateral sclerosis, a degenerative disease with no cure. Following Arthur’s diagnosis, the couple decided to travel to Maryland, where same-sex marriage was legal, from their home in Ohio, where it was not, in order to marry.⁷ When Arthur died a few months after their marriage, Obergefell discovered that because their marriage was not legally recognised in the State of Ohio, he was not able to be recognised as Arthur’s surviving spouse.⁸ Obergefell brought a suit against the state arguing that refusal to recognise him as a surviving spouse was unconstitutional. A number of related cases from Ohio, Tennessee, Michigan, and Kentucky were brought together with Obergefell’s in a class action suit that made its way to the Supreme Court, resulting in another landmark ruling that decided, ‘same-sex couples may exercise the fundamental right to marry in all States’, that the plaintiffs, ‘ask for equal dignity in the eyes of the law. The Constitution grants them that right’.⁹ Dissenting arguments questioned whether the ruling would restrict states in retaining, ‘the definition of marriage as a union between two people’, suggesting that the ruling in *Obergefell*, could open the door to those seeking the right to plural marriage.¹⁰

The cases of *Loving v. Virginia* and *Obergefell v. Hodges* are two examples of civil rights cases in which those in committed and loving relationships, sought to have their right to legally marry under federal and state law permitted and recognised, and afforded the same rights that

⁵ *Loving*, 388 U.S. 1 at 12.

⁶ *Obergefell v. Hodges*, 135 U.S. 2584 (2015).

⁷ *Obergefell*, 135 U.S. 2584 at 4-5.

⁸ *Obergefell*, 135 U.S. 2584 at 5.

⁹ *Obergefell*, 135 U.S. 2584 at 28.

¹⁰ *Obergefell v. Hodges*, 135 U.S. 2584 (2015), Chief Justice Roberts, with whom Justice Scalia and Justice Thomas join, dissenting at 20.

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heterosexual couples of the same race were already privileged to enjoy. In the years since both of these landmark Supreme Court rulings, the numbers of mixed-race and same-sex marriages have risen consistently, with support for such unions rising too. This paper aims to demonstrate that in light of *Loving*, *Obergefell*, and other examples of case law, as well as longitudinal survey data gauging public opinion, the fight for the decriminalisation and legal recognition of plural marriage in the United States is the next civil rights issue relating to marriage and sex in the United States.

The fight for the rights of those who practice plural marriage is a social justice issue that would lead to the recognition of the rights of non-legally recognised spouses, and children of those spouses, who currently have few legal rights with regard to inheritance, in the case of death of a non-legally recognised spouse, and alimony or child support in the event of a non-legally recognised marriage breaking down. For many who practice plural marriage in the United States today, decriminalisation and legalisation for them is not simply about gaining the right to marry whomever they wish, and have those marriages recognised as in the cases of *Loving* and *Obergefell*, but is also about gaining the right to practice something that is a central tenet of their faith, something that is protected by the First Amendment of the United States Constitution, but has been prohibited in the country since the nineteenth century. Polygamy advocates have therefore used Fourteenth Amendment arguments like those used in *Loving* and *Obergefell*, as well as arguments based on the First Amendment.

SUPPORT AND JUSTICE FOR INTER-RACIAL MARRIAGE

At the time of the *Loving* decision, only 3% of new marriages in the United States were between individuals of different racial identities, by 2015 that number had risen to 17%.¹¹ Likewise, the Pew Research Center found in its analysis of data from the General Social Survey that those who would oppose a relative marrying someone of a different race dropped in number

¹¹ Gretchen Livingston and Anna Brown, 'Intermarriage in the U.S. 50 Years After Loving v. Virginia' *Pew Research Center*, 18th May 2017, <http://www.pewsocialtrends.org/2017/05/18/intermarriage-in-the-u-s-50-years-after-loving-v-virginia/>.

significantly, particularly when it came to a relative marrying a black person. In 1990, 63% of non-blacks surveyed stated that they would oppose a relative marrying someone who was black; by 2016 this number had dropped to only 14% of non-black people surveyed.¹² Additionally, the number of Americans surveyed who said that inter-racial marriage was good for society has also risen in recent years. In 2010 24% of those surveyed stated that they thought people of different races marrying each other was generally good for society; by 2017, this number had risen to 39%.¹³ Between 2011 and 2017, the number of those who stated it did not make much difference dropped from 64% to 52%.¹⁴

Gallup polls have also demonstrated the same trends. In 1959, the year after Richard Loving married Mildred Jeter, only 4% of Americans polled approved of marriages between blacks and whites. By 1968, the year after the *Loving* ruling, 20% of Americans polled approved of such unions. By 2013, 87% of Americans polled approved of marriages between blacks and whites; support increased year on year since the question was first asked in 1958, with a significant jump in support occurring in the 1990s.¹⁵ Significantly, the same report found that support for inter-racial marriage was highest amongst younger generations suggesting that trends will continue as the current population ages. In the eighteen to twenty-nine year old age group, 96% approved of marriage between blacks and whites, compared to only 70% among those aged sixty-five or older; support for inter-racial marriage is almost universal among younger generations.¹⁶

In the decennial census carried out in the United States, respondents are asked questions about the racial make-up of their household. Data from the United States Census Bureau shows that according to the 2010 census, 7% of American households were made up of an inter-racial married couple; additionally 14% of households were made up of inter-racial unmarried

¹² Livingston and Brown, '50 Years After Loving', 2017.

¹³ Livingston and Brown, 'Intermarriage in the U.S. 50 Years After Loving v. Virginia: Public Views on Intermarriage' *Pew Research Center*, 18th May 2017, <http://www.pewsocialtrends.org/2017/05/18/2-public-views-on-intermarriage/>.

¹⁴ Livingston and Brown, 'Public Views on Intermarriage', 2017.

¹⁵ Frank Newport, 'In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958', *Gallup*, 25th July 2013, <https://news.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx>.

¹⁶ Newport, '87% Approve of Black-White Marriage', 2013.

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couples.¹⁷ Comparatively, results from the 1960 census showed that only 0.4% of households were comprised of inter-married couples, increasing to 0.7% in the 1970 census, and to 2% in the census of 1980.¹⁸ A Census Bureau report attributes the rise in inter-racial marriages, in part, to the rising number of marriages between U.S. citizens and non-U.S. citizens.¹⁹ Nevertheless, marriage between individuals of different races in the United States demonstrates a rising trend.

The longitudinal survey data detailed above demonstrates how attitudes towards inter-racial marriage have changed positively since the ruling in *Loving*, with indications that trends will continue to show support for inter-racial unions. Additionally, U.S. Census data demonstrates that the number of such unions has increased over time and that this trend is also likely to continue. Americans are now more likely than ever to marry someone of a different race, and opposition to a relative marrying someone of another race is at an all-time low. One could argue, that with inter-racial marriage being supported by the vast majority of Americans, with particular support among younger generations, the issue of inter-racial marriage as a social justice and civil rights issue, is now settled, with few objecting to the practice.

SUPPORT AND JUSTICE FOR SAME-SEX MARRIAGE

While the ruling in *Obergefell* found that same-sex couples had the same rights to marriage as couples of the opposite sex, this was not the first landmark ruling in the fight for sexual civil rights for same-sex couples. In 2003, the Supreme Court ruling in the case of *Lawrence v. Texas* invalidated anti-sodomy laws in Texas, and other states, that outlawed sexual relations between men. The Supreme Court ruled that anti-sodomy laws were unconstitutional under the Due Process and Equal Protection clauses of the

¹⁷ Daphne Lofquist, Terry Lugailla, Martin O'Connell, and Sarah Feliz, 'Households and Families: 2010: 2010 Census Brief', (United States Census Bureau, 2012), 17.

¹⁸ United States Census Bureau, 'Historical Census Data', *United States Census Bureau*, 10th June 1998, <https://www.census.gov/data/tables/time-series/demo/marriage-and-divorce/interracial-couples.html>.

¹⁹ Luke J. Larsen and Nathan P. Walters, 'Married Couple Households by Nativity Status: 2011: American Community Survey Briefs', (United States Census Bureau, 2013).

Fourteenth Amendment.²⁰ The six to three majority ruling overturned an earlier Supreme Court decision that upheld the ban.²¹ The *Lawrence* case has been cited by polygamists as precedent in arguments stating that private consensual behaviour, such as the marital practices of polygamists, ought not to be an issue for the law to interfere with.²² Pro-plural marriage arguments cite *Lawrence* as evidence that authorities ought to stay out of polygamist's bedrooms so long as relations are private and between adults who give full and free consent, however, courts have been reluctant to apply *Lawrence* in this way.²³

In longitudinal surveys carried out by the Pew Research Center, in which participants were asked if they approved of same-sex marriage, only 35% of respondents in 2001 were in favour of same-sex unions, with 57% opposed.²⁴ By 2011, for the first time, those who supported same-sex marriage overtook those who opposed it with 46% being in favour, and 45% against.²⁵ In 2015, the year the Supreme Court ruled in *Obergefell v. Hodges*, 55% of Americans surveyed stated that they were in favour of same-sex marriage; by 2017 that number had risen to 62%.²⁶ As with inter-racial marriage, support for same-sex marriage is highest among younger populations. Pew found that in 2017, among those born after 1980, 74% of those surveyed supported same-sex marriage, up from 53% in 2007 from those in the same demographic. Comparatively, of those born between 1928 and 1945, only 41% supported same-sex marriage in 2017, compared to 24% in 2007.²⁷ This demonstrates that particularly amongst the younger generations, support for same-sex

²⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²¹ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²² *State v. Holm*, 2006 UT31, 137 P. 3d 726, (2006).

²³ *Holm*, UT31, 137 P. 3d 726 at 13.

²⁴ Pew Research Center, 'Changing Attitudes on Gay Marriage: Public Opinion on Same-sex Marriage', *Pew Research Center*, 26th June 2017, <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

²⁵ Pew Research Center, 'Support for Same-sex Marriage Grows, Even Among Groups that had been Skeptical', *Pew Research Center*, 26th June 2017, <http://www.people-press.org/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical/>.

²⁶ Pew Research Center, 'Changing Attitudes on Gay Marriage', 2017.

²⁷ Pew Research Center, 'Support for Same-sex Marriage Grows', 2017.

marriage is high, and support is likely to continue to grow as the population ages.

As with the case of inter-racial marriage, Gallup longitudinal polls also show the same trends as Pew survey data. When asked the question, ‘Do you think marriage between same-sex couples should or should not be recognised by the law as valid, with the same rights as traditional marriage?’, only 27% of respondents said that same-sex marriage should in 1996 when the question was first asked. By 2018, this had risen to 67%.²⁸ In 1996, 67% of respondents were opposed to same-sex marriages being afforded the same legal validity as traditional marriage, but opposition had dropped to 31% by 2018. This data demonstrates a complete flip of public opinion in just twenty-two years. In the first poll following Massachusetts becoming the first state to legalise same-sex marriage in 2004, only 37% of Americans in the poll supported the move, compared to 59% who opposed legalising same-sex marriage.²⁹ In just a decade, these figures would change considerably.

In 2015, the year the Supreme Court ruled in *Obergefell*, the numbers had also flipped compared to a decade earlier when Massachusetts legalised same-sex unions; 60% of Americans polled now thought same-sex unions ought to have the same legal rights as traditional marriage, compared to 37% who did not.³⁰ The same study concluded that 10.4% of LGBT adults were married to someone of the same gender, meaning that Americans were more likely than ever to know someone in a same-sex marriage. The study concluded that this, in part, likely contributed to changing views, supposing that if an individual knows someone in a same-sex marriage they are more likely to be supportive of such unions.³¹ In 2017, 72% of Americans polled by Gallup thought that same-sex sexual relations between consenting adults should be legal, compared to only 43% in 1978 when the question was first asked. Support for legal sexual relations between same-sex couples dropped to an all-time low during the period of the survey in the 1980s, perhaps

²⁸ Gallup, ‘Marriage’, *Gallup*, 2018, <https://news.gallup.com/poll/117328/marriage.aspx>.

²⁹ Justin McCarthy, ‘Two in Three Americans Support Same-sex Marriage’, *Gallup*, 23rd May 2018, <https://news.gallup.com/poll/234866/two-three-americans-support-sex-marriage.aspx>.

³⁰ McCarthy, ‘Two in Three Americans’, 2018.

³¹ McCarthy, ‘Two in Three Americans’, 2018.

attributable to public perceptions during the AIDS crisis; support in 1986 was as low as 32%.³²

The same 2017 analysis argued that since the ruling in *Obergefell*, public debate of the same-sex marriage issue had waned as activists moved on to other LGBT issues such as transgender bathroom access, although the same-sex marriage debate was still continuing in some states to a lesser degree.³³ Success for gay rights in the form of *Lawrence v. Texas* and *Obergefell v. Hodges*, has firmly solidified equal rights for same-sex couples in United States law. Despite ongoing issues such as the recent case in which a baker in Colorado refused to bake a wedding cake for a same-sex wedding celebration citing religious objection, same-sex couples are enjoying more rights and support than ever before. In the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court found that baker Jack Phillips, had a constitutional right under the Free Exercise clause of the First Amendment to refuse to bake a cake for a gay couple based on his religious beliefs.³⁴ An earlier ruling in *Mullins v. Masterpiece Cakeshop Inc.*, in a lower court, found in favour of Charlie Craig and David Mullins, the couple who requested the cake to celebrate their same-sex marriage, however the Supreme Court decision in 2018 overturned this ruling.³⁵ Craig and Mullins were supported by the American Civil Liberties Union in their legal fight, and the ACLU later collaborated with the Colorado Civil Rights Commission when Phillips took his appeal to the Supreme Court.

While census data is not yet available on the number of households with same-sex married couples, there have been a significant number of same-sex weddings since the practice became legal, first in Massachusetts in 2004, and throughout the United States in 2015. While support for inter-racial marriage is almost universal today in the United States, there is still a significant minority of Americans who oppose same-sex marriage, particularly among older generations. While arguably the civil rights and social justice issue that is same-sex marriage is firmly decided in United States law, there is

³² Justin McCarthy, 'U.S. Support for Gay Marriage Edges to New High', *Gallup*, 15th May 2017, <https://news.gallup.com/poll/210566/support-gay-marriage-edges-new-high.aspx>.

³³ McCarthy, 'U.S. Support for Gay Marriage', 2017.

³⁴ *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

³⁵ *Mullins v. Masterpiece Cakeshop Inc.*, 2015 COA 115 (2015).

still a small way to go in the court of public opinion. Ultimately though, the civil rights fight for equal rights among same-sex couples is over from a legal perspective, leaving one to question what the next civil rights movement from a sexual justice point of view might be in the United States.

This is the question to which this paper now turns. *Loving v. Virginia* and *Obergefell v. Hodges* redefined how marriage was understood and accepted in the United States. Moving away from nineteenth century norms of marriage tradition being between a man and a wife of the same race, the United States now allows inter-racial and same-sex unions, affording marriage rights to those outside of the heterosexual racially endogamous norms that once were. Cases such as *Lawrence v. Texas*, which preceded that of *Obergefell*, show that questions of sex between consenting adults, often precedes questions of non-traditional marital unions in the twenty-first century. Comparatively, at the time of *Loving*, both sexual relations between whites and people of colour and marriage between whites and people of colour were outlawed in many states. The ruling in *Loving* overturned prohibitions on inter-racial sex alongside its ruling on inter-racial marriage.³⁶

Whereas once, sex outside of marriage was socially unacceptable, today the majority of Americans are permissive of sex outside of marriage between consenting adults; 68% of Americans in a Gallup poll stated that sex between an unmarried man and woman was morally acceptable in 2018.³⁷ With the permissibility of a range of sexual relationships being accepted by the majority of Americans today, a natural progression from the issues of inter-racial and same-sex relations, moves to questions around the permissibility of polyamorous relationships and plural marriage. While polyamorous sexual relationships are permitted under United States law, marriage between more than two people is not.

SUPPORT AND JUSTICE FOR PLURAL MARRIAGE

In the United States there are two distinct groups that make up the majority of practicing polygamists: Muslims and fundamentalist Mormons. A minority of Sephardic Jews, those identifying as Christian polygamists, as well

³⁶ *Loving*, 388 U.S. 1.

³⁷ Gallup, 'Marriage', 2018.

as a small minority of individuals who practice polygamy from a secular perspective, also have a vested interest in plural marriage rights. Most polygamists in the United States practice polygyny; one man married to multiple women. Polyandry, or one woman married to multiple husbands, is relatively rare, not only in the United States, but globally as well. While the rights of Muslims who wish to practice plural marriage in the United States, particularly among immigrants in plural marriages solemnised overseas, is somewhat of a recent issue, Mormon polygamists have had a tense relationship with legislators and courts since plural marriage was first practiced by the Church of Jesus Christ of Latter-day Saints (LDS Church) in the nineteenth century. The mainstream LDS Church, under pressure from the federal government, publicly renounced polygamy in an 1890 statement known as The Manifesto, although privately the message was somewhat different and plural marriage approved by the Church continued to be practiced somewhat surreptitiously until the early twentieth century. This reversal on the Church's view of plural marriage caused a schism, resulting in a number of fundamentalist groups emerging over the course of the twentieth century; these groups continue to practice Mormon polygyny today.

Fundamentalist Mormon groups in the United States today include the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS); the Centennial Park group, which emerged in an FLDS schism in the 1980s following leadership disputes, also known as the Second Ward in an acknowledgment of the division between it and the FLDS, The Work of Jesus Christ, or simply The Work; the Apostolic United Brethren (AUB) also known as the Allred Group; and the Latter Day Church of Christ also known as the Davis County Cooperative Society and also often referred to as the Kingston Clan. These are just a some of the largest, and most well-known, groups that exist today. Some groups extend beyond the United States, for example, the FLDS also has a branch in Canada and the AUB has a small number of members in Western Europe and a larger community in Mexico.

A fifth group, which has been known by several names following periods of change and transition such as, the Church of the Firstborn of the Fulness of Times, the Church of the Firstborn of the Lamb of God, the Church of the Lamb of God, and often referred to as the LeBaron group, is now mostly based in Mexico, although most of its members retain, or acquire

through naturalisation, United States citizenship.³⁸ It is possible that many in the LeBaron group currently living in Mexico would return to the United States if changes to the law occurred. Additionally, there are many smaller fundamentalist Mormon groups, as well as a growing number of families who identify as independent Fundamentalist Mormons who practice plural marriage but do not claim membership of any particular group. Most of these groups have formed due to schisms or leadership disagreements with larger groups or have simply emerged separately. While these Mormon fundamentalist groups and independents differ in some of their doctrinal beliefs and the hierarchical structures of church leaders, they all encourage or require their members to practice polygyny.

Most Mormon polygamists in the United States attempt to circumvent laws preventing plural marriage by only having one legal marriage, usually between the husband and first wife, with subsequent marriages being simply spiritual unions, celebrated in their faith tradition. In the state of Utah, anti-bigamy laws prevent individuals from legally marrying, or purporting to marry and cohabitating with, more than one person.³⁹ Other states, however, define bigamy in a way that requires multiple legal marriages at once in order for individuals to fall foul of the law.⁴⁰ In these states, polygamists are able to stay within the spirit of the law by only having one legal marriage, with additional marriages being simply religious unions only.

Somewhat ironically, if polygamists did not have any legal marriages, and only had spiritual marriages between the husband and each of his wives, no laws would be broken; some secular polygamists and Muslims practice in this way by having their own marriage ceremonies which lack legal documentation. For many polygamists practicing from a religious perspective, the recognition of their marriage by their faith tradition is enough to insure the spiritual needs of their family, however, the lack of legal recognition means their other needs are not protected. Practicing polygamy in this way has implications for things such as health insurance coverage or inheritance rights, particularly for children.

³⁸ Janet Bennion, *Polygamy in Primetime: Media, Gender, and Politics in Mormon Fundamentalism*, (Waltham, MA: Brandeis University Press, 2011), 29-30; 35; 43-44.

³⁹ UT Code § 76-7-101 (2017).

⁴⁰ For example NM Stat §30-10-1 (2016).

The first hints of public support for Mormon polygamy came in the 1950s following a 1953 raid on a fundamentalist Mormon community known as Short Creek which straddles the Utah and Arizona state border, made up mostly of members of the FLDS. During the raid, authorities arrested thirty-six men, and took 192 women and children into state care in Phoenix, Arizona, almost 400 miles from their homes.⁴¹ Law enforcement officials were depicted negatively by the press when images emerged of happy families torn apart simply for practicing their faith. The American public sympathised with parents who had children taken from them, and with the children taken from loving homes and placed into the care of strangers.⁴² The raid was a public relations nightmare for authorities who were accused of interfering with religious practices, for the cost of the raid, and related legal cases which resulted in only a few convictions for minor crimes. Courts found insufficient evidence to continue separating children from their parents, and Howard Pyle, the Arizona governor, later stated that he regretted his decision to sign off on the raid.⁴³

In 2008 a similar raid on an FLDS compound in Eldorado, Texas also saw public opinion favour the polygamist families. Acting on an anonymous, and unverified, tip, authorities raided the community, arrested a number of men, and took 129 women and 468 children to a large state holding centre.⁴⁴ Children were later separated from their mothers and placed into the Texas care system.⁴⁵ Media reports again depicted law enforcement officials negatively and criticised the raid when it emerged that the tip off was a hoax, for the lack of substantive prosecutions that resulted, and the cost of the operation which ran into millions of dollars.⁴⁶ The children taken into care

⁴¹ Brian C. Hales, *Modern Polygamy and Mormon Fundamentalism: The Generations after the Manifesto*, (Salt Lake City, UT: Greg Kofford Books 2006), 312.

⁴² Hales, *Modern Polygamy and Mormon Fundamentalism*, 315.

⁴³ Hales, *Modern Polygamy and Mormon Fundamentalism*, 315.

⁴⁴ Cardell K. Jacobson with Lara Burton, eds., *Modern Polygamy in the United States: Historical, Cultural, and Legal Issues*, (Oxford: Oxford University Press 2011), xvii.

⁴⁵ Linda F. Smith, 'Child Protection Laws and the FLDS Raid in Texas', in Cardell K. Jacobson with Lara Burton, eds. *Modern Polygamy in the United States: Historical, Cultural, and Legal Issues*, (Oxford: Oxford University Press 2011), 306-7.

⁴⁶ Dan Glaister, 'Families Welcome Back 400 Children Taken From Sect', *The Guardian*, 3rd June 2008, <https://www.theguardian.com/world/2008/jun/03/usa.religion>; Ben Winslow, 'A Decade Later, Hildale Reflects on the FLDS Raid that Became the Nation's Largest Child

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were not used to the lifestyles practiced by their foster families, most suffered more trauma in their foster homes than they had ever experienced with their own families, were exposed to things not compatible with their religion, and questions were raised as to why children were split from their mothers, who had not been accused of any crimes.⁴⁷ The legal fight to have children returned to their parents was supported by groups such as Liberty Legal Institute, an advocacy group supporting parental rights and religious freedoms, and the American Civil Liberties Union.⁴⁸

In recent years a number of polygamists have come forward into public life in order to demonstrate the realities of plural marriage. They have done this in order to dispel stereotypes and misconceptions about their beliefs and practices. Among these figures is Kody Brown, who along with his wives and children, feature in a reality television show called *Sister Wives*.⁴⁹ The show attempts to depict the normalcy of the Brown family, that they are like any other American family, suffer the same financial stresses when their children head off to college, and have the same marital disputes as other Americans; the only difference being that in the case of the Browns and other polygamist families, these trials of family life are multiplied by the number of wives and children in the marriage. Joe Darger and his family have also used the public gaze to show the normalcy of their family life. The Dargers have featured in a number of documentary films and published a book on their lifestyle; *Love Times Three: Our True Story of a Polygamous Marriage*.⁵⁰ In 2016 Joe Darger ran for mayor in Herriman, Utah, and dared the Utah authorities to arrest him for breaking Utah bigamy laws.⁵¹

Custody Case', *Fox*, 31st March 2018, <https://fox13now.com/2018/03/31/a-decade-later-hildale-reflects-on-the-flds-raid-that-became-the-nations-largest-child-custody-case/>.

⁴⁷ Jacobson and Burton, *Modern Polygamy in the United States*, xx.

⁴⁸ Smith, 'Child Protection Laws and the FLDS Raid', 313; 315.

⁴⁹ *Sister Wives*, TLC, 2010-.

⁵⁰ Joe Darger, Alina Darger, Vicki Darger, Valerie Darger, and Brooke Adams, *Love Times Three: Our True Story of a Polygamous Marriage*, (New York, NY: Harper One 2011).

⁵¹ Nate Carlisle, 'He's Dared Utah to Prosecute him for Polygamy. Now He's Running for Mayor. What if Someone Calls his Bluff?', *Salt Lake Tribune*, 5th July 2017, <https://www.sltrib.com/news/polygamy/2017/07/05/hes-dared-utah-to-prosecute-him-for-polygamy-now-hes-running-for-mayor-what-if-someone-calls-his-bluff/>.

Both the Browns and the Dargers have actively fought for plural marriage rights at a state and federal level. In 2011, following the airing of the first season of *Sister Wives*, the Browns found out they were being investigated by law enforcement in their hometown in Lehi, Utah when Jeffrey R. Buhman, the County Attorney for Utah County, stated that his office was investigating the Browns on suspicion of breaking state bigamy laws.⁵² Fearing arrest and prosecution, the family moved to Nevada, a state in which their marital arrangements would not risk investigation. According to court documents, Utah Attorney General, Mark Shurtleff, swore under penalty of perjury that his office would only seek to prosecute polygamists under the Utah bigamy statute if other crimes were evident, such as ‘child or spouse abuse, domestic violence, [and] welfare fraud’ and that his office would not, ‘prosecute polygamists under Utah’s bigamy statute for just the sake of their practicing polygamy’.⁵³

The Browns sought public support for their legal campaign which was initially successful in 2013 in a district court in Utah, when a judge ruled that portions of the state’s bigamy law were unconstitutional. However, a later decision in the Tenth Circuit Court of Appeal overturned the lower court decision, arguing that the judgement should not have been made in that case as the fact that the Browns moved out of the state of Utah, in addition to statements from the Utah Attorney General stating that the Browns did not face a real risk of prosecution, rendered the case moot.⁵⁴ The Browns appealed to the United States Supreme Court, but the justices denied their petition for writ of certiorari in 2017.⁵⁵ Had their case been heard in the Supreme Court and had it been successful, it would have nullified laws banning plural marriage throughout the United States and would have overturned the 1879 Supreme Court decision in *Reynolds v. United States* which ruled the practice of polygamy illegal.⁵⁶

When the Tenth Circuit overturned the 2013 decision which had stuck down the Utah statute, Utah legislators worked to reinstate bigamy laws

⁵² *Brown v. Herbert*, 850 F. Supp. 2d 1240 (2012).

⁵³ *Brown v. Buhman*, 822 F. 3d 1151 (2016) at 7.

⁵⁴ *Brown*, 822 F. 3d 1151.

⁵⁵ *Brown v. Buhman*, 137 S. Ct. 828 (2017).

⁵⁶ *Reynolds v. United States*, 98 U.S. 145 (1878).

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with the introduction of House Bill 99 in 2017.⁵⁷ Hundreds of polygamists, and pro-polygamy advocates protested outside of the Utah State Capitol against the bill. One protester held a sign reading, 'If Adam and Steve can be together, then why can't Adam, Eve, and Lily? #familiesnotfelons'.⁵⁸ Those opposing the bill objected to the clause in the bill that included purporting to marry and cohabitation, as being covered by the umbrella of bigamy.⁵⁹ One reason why Joe Darger has dared the state to arrest him on bigamy charges is because he would then have the legal standing to act as a test case against the constitutionality of laws preventing polygamous marriages between consenting adults. The Browns lacked this legal standing because they were never indicted, despite being investigated. This ultimately led to the decision in the Tenth Circuit court, which rendered the lower court ruling invalid because their case, lacking actual charges of bigamy, was moot because they never faced prosecution.

Public support for those who wish to practice polygamy has grown over time, arguably helped by positive depictions of plural marriage on television, in the form of shows like *Sister Wives*, and the HBO drama, *Big Love*.⁶⁰ These portrayals counter negative news stories that cover the cases of individuals like Warren Jeffs, who was once on the FBI's Ten Most Wanted list and is currently serving life plus 20 years in prison for crimes including child sex abuse.⁶¹ Indeed, a Gallup longitudinal poll on polygamy saw a slight drop in support for plural marriage following the conviction of Jeffs.⁶² Pro-polygamy advocates aim to educate the public by reassuring them that cases like that of Warren Jeffs are rare, and not endemic within polygamy.

In fact, abuse is no more likely in polygamous marriages, than it is in monogamous unions.⁶³ The fact that women have close support networks with their sister-wives makes abuse less likely than in monogamous marriages

⁵⁷ H.B. 99, Bigamy Offence Amendments, 2017 General Session.

⁵⁸ Ben Winslow, 'Sister Wives' Kody Brown and Wives Join March against Polygamy Bill on Utah's Capitol Hill', *Fox*, 10th February 2017, <https://fox13now.com/2017/02/10/sister-wives-kody-brown-and-wives-join-march-against-polygamy-bill-on-utahs-capitol-hill/>.

⁵⁹ UT § 76-7-101, 2017.

⁶⁰ *Big Love*, HBO, 2006-2011.

⁶¹ Bennion, *Polygamy in Primetime*, 32.

⁶² Gallup, 'Marriage', 2018.

⁶³ Bennion, *Polygamy in Primetime*, 37.

where a woman may be isolated from others by an abusive husband. Executive producers of *Big Love*, Will Sheffer and Mark V. Olsen, saw comparisons between their own quest for gay rights, they are themselves partners in life as well as in business, and those of polygamists.⁶⁴ Similarities can be drawn between the frequent stereotypes of abuse within fundamentalist Mormon polygamy, and the stereotypes of gay men as sexual deviants in the twentieth century.⁶⁵ Comparisons can be drawn between the treatment of the gay community during the AIDS crisis, and the polygamous community following the widely publicised conviction of Warren Jeffs. Evidence of this can be drawn from survey data noted above that shows drops in support for the legalisation of gay sex in the 1980s, and of polygamy following the conviction of Jeffs.

In a Gallup longitudinal poll, only 7% of Americans responded that they felt polygamy was morally acceptable in 2003. By 2018, that number had risen to 19% of those polled.⁶⁶ The poll data indicate a jump from 7% in 2010, to 11% in 2011 after the first season of *Sister Wives* aired. While this may simply be a coincidence, the data does show that support for polygamy has risen since real life polygamists have used the media and television to educate American audiences about their lifestyle. This upward trend shows no signs of reversing or slowing down. The results are significant when compared to the views on inter-racial marriage discussed above. In the year after the ruling in *Loving v. Virginia*, 20% of Americans polled by Gallup approved of marriages between blacks and whites. In 2018, with 19% of those polled by Gallup approving of plural marriage, support for such unions is at the same level it was at for inter-racial marriage when it was legalised throughout the United States. While the 16% rise in support for inter-racial marriage in the nine years between 1959 and 1968 occurred faster than the 12% rise in support for plural marriage in the nine years between 2009 and 2018, obvious similarities can be seen between the trends. When one considers the boost in support for inter-

⁶⁴ Felicia R. Lee, 'Big Love': Real Polygamists Look at HBO Polygamists and Find Sex', *The New York Times*, 28th March 2006,

<https://www.nytimes.com/2006/03/28/arts/television/28poly.html>.

⁶⁵ Grace M. Jantzen, 'AIDS, Shame, and Suffering', in Marvin M. Ellison and Kelly Brown Douglas, eds., *Sexuality and the Sacred: Sources for Theological Reflection*, 2nd ed., (Louisville, KY: Westminster John Knox Press, 2010), 338.

⁶⁶ Gallup, 'Marriage', 2018.

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racial marriage that may have occurred immediately after *Loving*, it is easy to defend an argument that a similar boost might occur if plural marriage were to be legalised today.

A 2011 Pew poll of members of the LDS Church asked respondents about their views on polygamy, given that the LDS Church no longer permits the practice and those found to be in plural marriages face excommunication from the Church, the results are interesting. In the poll, 13% of respondents stated that polygamy was either not a moral issue, or was morally acceptable, compared to 86% of LDS Church members who agreed with Church doctrine that it was morally unacceptable. While the overwhelming majority of LDS Church members in the poll agreed with the Church that polygamy was morally wrong, it is significant that 13% of Latter-day Saints polled disagreed with Church teachings and are somewhat supportive of the practice.⁶⁷ In the 2016 Next Mormon Survey, an online public opinion survey conducted by Jana Riess and Benjamin Knoll, the same question was asked of former and current members of the LDS Church.⁶⁸ In the survey 69% of all current Latter-day Saints surveyed stated they found polygamy morally wrong, compared to 86% in the Pew poll just five years earlier.⁶⁹ While this data comes from two different surveys meaning comparisons should be considered with caution, it still indicates a significant change in view in just five years.

There is evidence to suggest that some members of the LDS Church consider polygamy as an option for them, and there are some reports of Latter-day Saints practicing or trying out plural marriage, albeit surreptitiously.⁷⁰ Recent evidence suggests that members of the mainstream LDS Church are building working relationships with fundamentalist Mormons, and some Latter-day Saints, such as Connor Boyack, are coming

⁶⁷ Pew Research Center, 'Pew Forum on Religion & Public Life Mormon Survey', *Roper Center Collaboration*, 2011, https://ropercenter.cornell.edu/psearch/question_view.cfm?qid=1801750&pid=50&ccid=50#top.

⁶⁸ Jana Riess, *The Next Mormons: How Millennials are Changing the LDS Church*, Oxford: Oxford University Press, 2019, 179.

⁶⁹ Riess, *The Next Mormons*, 185.

⁷⁰ Nancy Ellsworth, 'I Do... to You and You and You', in Holly Welker, ed, *Baring Witness: 36 Mormon Women Talk Candidly about Love, Sex, and Marriage*, (Urbana, IL: University Press of Illinois, 2016), 135-141.

forward to openly support the rights of fundamentalist Mormons in their endeavours to fight for plural marriage rights.⁷¹ The 2016 Next Mormon Survey, published in 2019, found that fewer millennial Latter-day Saints, than members of previous generations surveyed, felt that having more than one wife was morally wrong, with only 63% of millennials stating this compared to 76% of Latter-day Saints in the baby boomer and silent generations, and 68% of generation X Latter-day Saints.⁷² Younger generations of Latter-day Saints are becoming more tolerant and accepting of plural marriage despite LDS Church opposition to the practice.

Many comparisons have been drawn between the fight for same-sex marriage, and the current fight for plural marriage. In 2004, a Pew Research Center poll found that among those opposed to legalising same-sex marriage, 51% were opposed to it because they felt it would open the door for polygamous marriages.⁷³ For some, it was seen as a slippery slope that would erode what they considered to be traditional marriage; that is, marriage between one man and one woman. Indeed, as mentioned above, in dissenting comments in the *Obergefell v. Hodges* Supreme Court decision, Chief Justice Roberts argued that the legal arguments used in *Obergefell*, could be equally applied to plural marriage. A number of scholars and commentators have seen the show *Big Love* as an analogy for same-sex relationships at a time when the fight for same-sex marriage was still ongoing.⁷⁴

CONCLUSIONS

⁷¹ Nate Carlisle, 'How younger Latter-day Saints and 'Fundamentalist Mormons' are Building Bridges, Looking Past their Differences', *Salt Lake Tribune*, 14th October 2018, <https://www.sltrib.com/religion/2018/10/14/how-younger-latter-day/>.

⁷² Riess, *The Next Mormons*, 179.

⁷³ Pew Research Center, 'Pew Internet & American Life Project Poll', *Roper Center Collaboration*, 2004, https://ropercenter.cornell.edu/psearch/question_view.cfm?qid=1611983&pid=50&ccid=50#top.

⁷⁴ Kyra Hunting, 'Love Between Sisters: Queering Polygamy in *Big Love*', *The Journal of Popular Culture*, 47, No. 1, (2014), 129-152; Jessica Kean, 'A Stunning Plurality: Unravelling Hetero- and Mononormativities Through HBO's *Big Love*', *Sexualities*, 18, (2015), 698-713.

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While the legal fights for inter-racial and same-sex marriage have been won, and public support for such unions is growing every year, the fight for plural marriage is still ongoing. Support for plural marriage is still relatively low, with only around a fifth of Americans supporting the practice. However, the current level of support is similar to the level of support for inter-racial marriage in 1968; the year after the Supreme Court found that anti-miscegenation laws were unconstitutional. In 1996, a little over a quarter of Americans were in support of same-sex marriage, should the support for plural marriage continue on its current course, support for plural marriage will reach the level of support that same-sex marriage had in the 1990s in less than a decade.

However, in the cases of inter-racial marriage and same-sex marriage, laws had already been passed in a number of states that allowed inter-racial and same-sex couples to obtain marriage licences in order for legally recognised weddings to be performed. The fight in *Loving* and *Obergefell* was, in part, to have legal marriages entered into in some states recognised in others. Currently no states legally allow those wishing to enter into plural marriages to legally acquire multiple marriage licences. In other words, simply put, polygamy is currently illegal throughout the United States. While some states turn a blind eye to consenting adults practicing plural marriage, so long as only one legal marriage exists and no evidence of other crimes exists, those who practice plural marriage have few legal protections and no legal recognition for additional spouses. The implications being that women are often denied alimony and child support upon the break-down of a marriage if they are not legally married to their husband, and like the case of James Obergefell, are denied the right to be named as a surviving spouse in the event of their husband's death.

So far attempts by polygamists, such as Kody Brown, to appeal current laws have been unsuccessful, and given the reluctance that some states have in bringing charges against openly practicing polygamists, such as Joe Darger, the prospects of a suitable test case on the issue seem slim in today's climate. Many states are making efforts to work with polygamous groups and in 2004 the offices of the Utah and Arizona Attorney's General collaborated on a guide for law enforcement officials known as *The Primer*. The document, last updated in 2011, aims to educate law enforcement officials who may interact with polygamous families about the practices and beliefs of fundamentalist

Mormons.⁷⁵ Efforts such as this aim to foster an environment in which law enforcement and practicing polygamists can work together and build positive working relationships. The basis of these efforts is to adopt an approach in which law enforcement officials do not target practicing polygamists simply for practising plural marriage. It could be argued that an official position of tolerance is emerging, in which polygamists are allowed to practice their lifestyle without fear of prosecution, so long as they otherwise comply with the law.

In my opinion, this is a positive step on the road to decriminalisation, and ultimately legalisation of polygamy. Given that prosecution against polygamists is increasingly unlikely, the move to decriminalisation is unlikely to come from a test case making its way to the Supreme Court in an effort to have *Reynolds v. United States*, and state bigamy laws preventing polygamy, overturned. But instead, decriminalisation is more likely on a state by state basis, with legislators changing the language in bigamy statutes in order to exclude cases of polygamy in which consenting adults enter into the relationships freely, and that bigamy laws be only used in cases where deception is involved with one individual having multiple spouses who are unaware of the existence of the others. Polygamists could then be free to seek legal marriage licences between each dyadic couple, or group licences covering all individuals in the marriage. Legal experts, such as Adrienne Davis, have suggested ways in which plural marriage could be regulated, suggesting a model based on commercial partnership law.⁷⁶

Once polygamy is legal in at least one state, polygamists would find themselves in the same position as the Lovings and James Obergefell, in which their legally entered into marriages are recognised in some states, but not others. They would then have a good legal standing to bring a case based on the Fourteenth Amendment's Due Process and Equal Protection clauses of the Constitution, as in *Loving* and *Obergefell*. Additionally, Mormon polygamists, and others who practice plural marriage for religious reasons,

⁷⁵ Mark Shurtleff, Tom Horne, and Bonnie L. Peters, *The Primer: A Guidebook for Law Enforcement and Human Services Agencies Who Offer Assistance to Fundamentalist Mormon Families*, (Utah Attorney General's Office and Arizona Attorney General's Office, 2011).

⁷⁶ Adrienne D. Davis, 'Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality', *Columbia Law Review*, 110, No. 8, (2010), 1955-2046.

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could find legal arguments in the Free Exercise and Freedom of Speech clauses of the First Amendment. The steps that polygamists would have to go through on the road to legalisation would follow in the footprints of those who fought for the right of inter-racial and same-sex marriage. Like the Lovings and Obergefell, polygamists have support from organisations such as the American Civil Liberties Union whose lawyers support the rights of those wishing to practice plural marriage legally.

This paper has demonstrated similarities in the legal strategies and cases between those arguing for inter-racial and same-sex marriage rights, and those that have, and could, be used in the fight for plural marriage rights. Additionally, this paper has demonstrated the changes in public attitudes toward plural marriage and how changes in attitudes toward polygamy mirror those towards inter-racial and same-sex unions. Today support for inter-racial marriage is almost universal in the United States, and support for same-sex marriage is at an all-time high. Likewise, support for plural marriage is also at an all-time high and evidence discussed above shows that support is growing. With these facts in mind, I believe that the fight for the right to marry polygamously in the United States is the next civil rights issue in the fight for sexual justice. With support from the ACLU and others, fundamentalist Mormons are in a good position to explore legal avenues and continue gaining support for their right to plural marriage.