

The Story of *Reynolds v. United States*: Federal “Hell Hounds” Punishing Mormon Treason

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“We do not feel like being pissing posts for every hell hound that is sent here as governor, judge, marshall [sic], & tc. But we should all, I hope, be on hand to do just when the Lord requires, be it in accord with our feelings or not.”¹

— George Reynolds

Introduction

George Reynolds penned these words in a letter to his father in 1870, four years before his arrest and trial for bigamy and midway through the sixty-year national controversy over Mormon polygamy. He could hardly have known that the Mormon Church would select him to be the defendant in *Reynolds v. United States*, the case brought to determine whether Mormon polygamy was constitutionally protected as the free exercise of religion.² Nor that he would spend eighteen months in prison. But his words anticipate the case, conveying the simultaneously beleaguered and defiant posture of nineteenth-century Mormons as well as the deep religious faith that allowed them to survive decades of extraordinary federal hostility.

From 1862 to 1887, Congress passed four different statutes criminalizing Mormon polygamy, and in an unprecedented display of federal authority over private authority, asserted control over the Territory of

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¹ Letter from George Reynolds to his father (1870), quoted in Bruce A. Van Orden, *Prisoner for Conscience' Sake: The Life of George Reynolds* 39 (1992).

² 98 U.S. 145 (1878).

Utah to enforce that ban.” The U.S. Supreme Court affirmed the statutes’ constitutionality in *Reynolds v. United States* and other cases,⁴ decisions which enabled Congress to force the Mormon Church to choose between polygamy and its continued existence. The Church chose the latter, and renounced the practice of what many nineteenth century Americans called “celestial marriage” in 1890, shortly after federal authorities had seized the church’s property and wound down its affairs. Once the polygamy controversy was resolved, Utah became a state in 1896. The nineteenth-century battle over polygamy is embalmed in the “irrevocable ordinance” of Utah’s constitution, which provides that while the state guarantees “perfect toleration of religious sentiment, . . . polygamous or plural marriages are forever prohibited.”⁵

Although *Reynolds v. U.S.* is sometimes regarded as a law school relic—reduced to a note in leading family and constitutional law casebooks⁶—in recent years there has been something of a *Reynolds* resurgence. The case’s relevance now seems to turn on its association with same-sex marriage, and gay rights generally. Judicial opinions, legislators, and the mainstream press trumpet the parallel.⁷ Just as President

³ The statutes are: The Morrill Act, 12 Stat. 501 (1862); the Poland Act, 18 Stats. 253 (1874); the Edmunds Act, 22 Stats. 30 (1882); and the Edmunds–Tucker Act, 24 Stats. 635 (1887). Each statute attacked Mormon polygamy in a different way. For example, the Morrill Act criminalized bigamy, while the Poland Act placed the Utah judiciary in federal hands to ensure enforcement of the Morrill Act.

⁴ *Reynolds* upheld the constitutionality of the 1862 Morrill Act, a prosecution made possible by the Poland Act’s procedural provisions. Eleven years later, in *The Late Corporation Case*, the Supreme Court upheld the constitutionality of the Edmunds–Tucker Act, which, among other things, took the vote away from Utah women, reaffirmed the Morrill Act’s revocation of the Mormon Church’s corporate status, and directed the Attorney General to wind up the corporation’s affairs and seize church property. *Late Corporation v. U.S.*, 136 U.S. 1 (1890).

⁵ Utah Const. art. III, § 1. While the Mormon Church formally condemns polygamy today, its religious doctrine continues to recognize plural marriage as a legitimate family form in some ways. Under Mormon doctrine, a man and woman “sealed” in a temple marriage ceremony are married for “time and eternity,” meaning life on earth and in the hereafter. If a man dies, his widow cannot be sealed to another man for time and eternity, but only for “time,” or life on earth. In contrast, Mormon doctrine allows widowers to be sealed for time and eternity to a second wife. In short, Mormon doctrine seems to reflect a belief that polygamy exists in the hereafter. Church of Jesus Christ Latter-day Saints, Church Handbook of Instructions: Book 1: Stake Presidencies and Bishoprics 73 (1988), avail at <<<http://www.provocation.net/chi/chi08.htm>>> (last visited Oct. 5, 2007).

⁶ See, e.g., Judith Areen, *Cases and Materials on Family Law* (3d ed. 1992); Laurence H. Tribe, *American Constitutional Law* 1271 (1988). In contrast, casebooks on law and religion recognize its importance. See, e.g., Leslie C. Griffin, *Law and Religion: Cases and Materials* 1 (2007); and Michael W. McConnell, John H. Garvey & Thomas C. Berg, *Religion and the Constitution* 113 (2d ed. 2006).

⁷ *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery,

George W. Bush sought to amend the Constitution to prohibit state recognition of same-sex marriage, nineteenth-century presidents Buchanan, Lincoln, Grant, Hayes, Garfield, and Arthur each actively opposed Mormon polygamy.⁸ Just as the 2004 Republican party platform included a Protecting Marriage plank, affirming marriage as “the unique and special union of one woman and one man,”⁹ the 1856 Republican party platform denounced polygamy, along with slavery, as “twin relics of barbarism.”¹⁰ President Grant’s 1871 address to Congress echoed a similar need for federal action to combat the influence of marriage law run amok: “In Utah there still remains a remnant of barbarism, repugnant to civilization, to decency, and to the laws of the United States.”¹¹

This renewed interest in *Reynolds* in relation to same-sex marriage invites a close examination of the case to determine whether it has any relevance to same-sex marriage or gay rights more generally. Two sections of the Supreme Court’s opinion in *Reynolds* reflect that decision’s grounding in nineteenth-century conversations about race and governmental form. The Court reasoned that polygamy was not protected under the Free Exercise clause because of its association with “Asiatic and African peoples” and “stationary despotism”:

fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision.”); *Goodridge v. Department Pub. Health*, 798 N.E.2d 941, 996–97 (2003) (Cordy, J. dissenting). Indeed, the Utah Supreme Court recently rejected a polygamist’s argument that *Lawrence v. Texas* limited the state’s power to criminalize plural marriage. *State v. Holm*, 137 P.3d 726 (Utah 2006), cert. denied, 127 S.Ct. 1371 (2007). See Statement of Rep. Marilyn Musgrave of Colorado, on the Marriage Protection Amendment, 152 Cong. Rec. H 5287 (July 18, 2006); Jeffrey Rosen, *How To Reignite the Culture Wars*, N.Y. Times Magazine, Sept. 7, 2003; Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. Rev. L. & Soc. Change 277 (2004).

⁸ Van Orden, *supra* note 1, at 146. President Garfield’s 1881 Inaugural Address explicitly condemned the practice of Mormon polygamy as offending “the moral sense of manhood,” preventing “the administration of justice through ordinary instrumentalities of law,” and endangering “social order.” He concluded that the church should not “be safely permitted to usurp in the smallest degree the functions and powers of the National Government.” The Avalon Project at Yale University, available at <http://www.yale.edu/lawweb/avalon/president/inaug/garfield.htm>.

⁹ Rick Klein & Brian C. Moody, *GOP Hardens Stance Against Gay Marriage*, Boston Globe, Aug. 26, 2004.

¹⁰ Sarah Barrington Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* 55 (2002).

¹¹ President Ulysses S. Grant’s 1871 address to Congress, quoted in Edwin Brown Firmage & Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints 1830–1900* 141 (2001).

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 African people.¹²

and

Polygamy leads to the patriarchal principle, and which, when applied to larger communities, fetters the people in stationary despotism.¹³

Decoding this language helps determine the relevance of *Reynolds* for same-sex marriage, and also for the constitutionality of criminalizing polygamy itself if polygamists seek to overturn *Reynolds* in light of the Court in *Lawrence v. Texas*,¹⁴ limiting states' power to criminalize consensual adult sexual conduct. Such a challenge recently failed in Utah state courts, but Chief Justice Christine Durham's dissenting opinion may provide a blue print for another court to extend constitutional protection to polygamy,¹⁵ whether practiced by Mormon fundamentalists or by various immigrant communities in the U.S.¹⁶

¹² *Reynolds*, 98 U.S. at 164.

¹³ *Reynolds*, 98 U.S. at 165–66.

¹⁴ *Lawrence*, 539 U.S. at 590. Even before *Lawrence*, some scholars contended that *Reynolds* should not survive constitutional challenge. Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values* 241 (1997). For discussions of First Amendment issues in future challenges to *Reynolds*, see Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990), and Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DePaul L. Rev. 1197 (2005).

¹⁵ *State v. Holm*, 137 P.3d 726 (Utah 2006), *cert. denied*, 127 S.Ct. 1371 (2007). In a concurring opinion, Justice Nehring expressed his concern that legal protection would harm the judiciary's institutional legitimacy and embarrass Utah:

No matter how widely known the natural wonders of Utah may become, no matter the extent that our citizens earn acclaim for their achievements, in the public mind Utah will forever be shackled to the practice of polygamy. . . . I have not been alone in speculating what the consequences might be were the highest court in the State of Utah the first in the nation to proclaim that polygamy enjoys constitutional protection. These musings have left me with little doubt that the predominant reaction to a holding in keeping with the Chief Justice's dissent would be highly charged and unflattering.

. . . [A]n outcome that is wholly defensible as a product of intellectual rigor and principled application of the law could, at the same time, be so much at odds with widely and deeply held cultural values that it would not only undermine the legitimacy of the ruling but call into question the institutional legitimacy of the court.

Id. at 753 (Nehring, concurring).

¹⁶ Polygamous communities continue to exist in Utah, Arizona, and Idaho. See Irwin Altman & Joseph Ginat, *Polygamous Families in Contemporary Society* (1996). See also Nina Bernstein, *In Secret, Polygamy Follows Africans to N.Y.*, N.Y. Times, Mar. 23, 2007.

The story of *Reynolds* demonstrates its limited relevance to same-sex marriage and gay rights. In contrast to the practice and preferences of nineteenth-century Mormons to separate, if not fully secede, from American law and culture, same-sex marriage is fundamentally an assimilationist move for gay people to further integrate into American life. Moreover, thinking about *Reynolds* in terms of its relation to twenty-first century marriage wars misses much of what was important about the case on its own terms in the nineteenth century. Another limitation on *Reynolds*' precedential force is its grounding in nineteenth-century ideologies of white supremacy, reflected in the Court's linking polygamy to "Asiatic and African people." I develop the race-related story of *Reynolds* more fully elsewhere, and here simply note that many nineteenth-century Americans viewed polygamous Mormons as traitors to the white race.¹⁷ This chapter, however, focuses more on the relation between polygamy and a different form of Mormon treachery, namely political treason.

This political element of the case, which reframes the case as one about Mormon treason rather than merely about polygamy, is evident in the Supreme Court's linking of Mormon polygamy to "stationary despotism".¹⁸

In fact, according as monogamous or polygamous of marriages are allowed, do we find the principles on which the government of the people, to a greater or lesser extent, rests. Professor Lieber [a leading political scientist of the day] says, polygamy leads to the patriarchal principle, and which, when applied to larger communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. . . . [T]here cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to

¹⁷ Martha M. Ertman, *Contract, Polygamy and Race Treason* (draft on file with the author). The Supreme Court reaffirmed its racialized view of polygamy in a 1946 case in which it quoted with approval *Reynolds*' association of polygamy with "the life of Asiatic and of African people," in contrast to English law, which treated polygamy "as an offense against society." *Cleveland v. United States*, 329 U.S. 14, 18 (1946). In *Cleveland*, the Court upheld convictions of fundamentalist Mormons under the Mann Act by linking polygamy to barbarism:

"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 has produced in the western world." . . . The establishment or maintenance of polygamous households is a notorious example of promiscuity. The permanent advertisement of their existence is an example of the sharp repercussions which they have in the community.

Id., quoting *Late Corporation v. U.S.*, 136 U.S. 1, 49 (1890).

¹⁸ *Reynolds*, 98 U.S. at 164.

determine whether polygamy or monogamy shall be the law of social life under its dominion.¹⁹

This language linking polygamy to despotism is key to understanding the case. Close examination of the historical record shows that the Court's political claim about despotism was tied to another form of political wrongdoing: treason. This association of Mormon polygamy with treason was common in the nineteenth century. Many Americans at the time of *Reynolds* viewed the Mormons' establishment of a separatist culture in the Territory of Utah as traitorous. Accordingly, as we shall see, the federal government was deeply concerned with the Mormon Church's extraordinary control over the legislature, executive branch, and courts as well as its control over political, social, and commercial life. Indeed, these differences led to an armed conflict known as the Mormon War fought between the Mormons and the federal government between 1857 and 1858.

We cannot understand *Reynolds* without understanding the nature of the nineteenth century dispute between the federal government and the Mormon Church. Two intertwined questions help us understand this extraordinary assertion of federal power:

- (1) What was the relation between Mormon polygamy and treason?
- (2) How did George Reynolds become the plaintiff in this test case?

This chapter addresses each question in turn. It tells a story about political, legal, economic, military, and social clashes between Mormons and the rest of the United States, and demonstrates that the controversy over Mormon polygamy was as much about the seemingly traitorous conduct of Mormons as it was about plural marriage. I set the stage for the discussion with a brief introduction to the case and to George Reynolds, convicted bigamist.

Conviction and Prison Time

George Reynolds was convicted of bigamy in 1875. He was sentenced to two years in prison and fined \$500. He appealed to the Territorial Supreme Court, contending, among other things, that he married two women pursuant to the dictates of his religious faith. That court upheld Reynolds' conviction, dismissing his religious freedom claim out of hand as "based upon neither reason, justice nor law."²⁰

Reynolds then appealed to the U.S. Supreme Court. Here too he faced an uphill battle as just about everyone in America (other than a handful of Southern states-righters and Mormons themselves) rejected this definition of marriage. Reynolds' lawyers filed a fifty-page brief. The

¹⁹ *Id.* at 165–166.

²⁰ U.S. v. Reynolds, 1 Utah 226, 227 (1875).

government made its case in just six pages, dismissing Reynolds' religious freedom contentions in a single sentence: "None of these last mentioned exceptions call for any remark."²¹ Yet, despite the government's confidence, unanimity was not a foregone conclusion. Chief Justice Morrison Waite's papers document that on November 16, right after the hearing, the court was split five to four in favor of affirming Reynolds' conviction. But by January the justices resolved any concerns of those four justices and issued a unanimous decision affirming Reynolds' conviction.²²

Reynolds served eighteen months of his two-year prison sentence, the first month in the federal penitentiary in Lincoln, Nebraska, and the rest in the Utah Territorial Penitentiary in Salt Lake City, just five miles from his home.²³ He paid his \$500 fine with the help of nickels contributed by Mormon Sunday School children. Conditions in the Utah Penitentiary were punishing. His first four months were spent in an iron cage, waiting for a lumber bunkhouse to be completed. The completed bunkhouse offered its own discomforts: there were cracks between the boards and prison rules forbade fires out of fear that the prisoners would torch the place. Reynolds' incarceration spanned two hot, dry summers and a severe winter in which the temperature dipped down to thirty below zero over Christmas. Even wrapped in blankets, he often woke to find his beard frozen solid. Despite these conditions, Reynolds' only permanent physical impairment from his incarceration was the loss of many teeth, pulled by a man Reynolds referred in the "Correspondence" column of a Mormon newspaper as a "first class tooth puller" who was "always nigh, nigh at hand."²⁴

Reynolds' prison experience tells us about his character, his community, and his family. Mormon Church leaders described him as "trustworthy, diligent, friendly and capable of keeping confidences,"²⁵ to which I would add productive, learned, even-tempered, completely enmeshed in his Church, and a tad obsessive. Consider the busy schedule Reynolds created for himself while in prison. He ran a school for fellow prisoners, teaching reading, writing, arithmetic, grammar, and geography—knowl-

²¹ Transcript of Record, Brief for the United States at 6, *Reynolds v. U.S.*, 98 U.S. 145 (1878).

²² Van Orden, *supra* note 1, at 86.

²³ *Id.* at 108. According to his obituary in the Deseret Evening News, he was released early for good behavior. *Passing of George Reynolds*, Deseret Evening News, Aug. 10, 1909. His biographer reports that a Congressional act shortened Reynolds' sentence to eighteen months. Van Orden, *supra* note 1, at 93.

²⁴ *Id.* at 102, (quoting *Correspondence*, Millennial Star, Sept. 29, 1879).

²⁵ Van Orden, *supra* note 1, at 28.

edge he held as one of the most well-educated people in Utah.²⁶ He also received a constant flow of visitors, including his family, members of his Church, Sunday School groups from across the city, the Territorial Governor George Emery, Willard Chase from the Department of Justice, and journalists. Sometimes as many as five to ten people visited each day, often bringing food and blankets. Six months into his sentence the number of visitors diminished, however, when rumors of him being “only nominally imprisoned,” going home frequently, and riding around town with the federal marshal led to federal threats to ship him back to Nebraska.²⁷

In addition, Reynolds maintained robust correspondences with friends, colleagues, and family—including his two wives, to whom he wrote two letters each per week and received one weekly letter and visit from each in return. In one letter Reynolds tried to soothe his second wife, Amelia, when she worried that he wrote more frequently to his first wife, Polly. The letter reveals how carefully he managed his family life:

You have two or three times of late intimated that I write oftener to Polly than I do to you. I have never paid any special attention to the matter, but since I returned from Lincoln I have kept a memorandum in my pocket book of all letters I receive and write. . . . I have written in that time (not including this one) twenty letters to you and sixteen to Polly, or five to you for every four to her. So you see your complaints on that score are not just. Some weeks you have got the most, some weeks she has. But in the total you are ahead.²⁸

He apparently enjoyed all this correspondence, since he asked family members to write, and even requested letters from readers of a Mormon newspaper.²⁹

Incarceration did not prevent Reynolds from participating in important family occasions. Both of his wives were pregnant when he went to prison and both gave birth during his incarceration. Amelia gave birth to Susanna Alberta (Bertie), four months after her one-year-old Charlie died. Polly, Reynolds' first wife, gave birth prematurely to Julia a month after Charlie's death, and nearly died herself shortly after delivering. Julia, who was frail from the start, died at 7 months, while Reynolds was still in prison. On each of these occasions, the births and the deaths, Reynolds was permitted to return home.³⁰ In addition, he visited his home six more times in the last two months of incarceration.

²⁶ *Id.* at 33, 103.

²⁷ *Id.* at 103, 104, 98–99.

²⁸ *Id.* at 110 (quoting letter from George Reynolds to Amelia Reynolds, Oct. 9, 1879).

²⁹ *Id.* at 104 (quoting “Correspondence,” *Millennial Star*, Sept. 29, 1879).

³⁰ Van Orden, *supra* note 1, at 110, 111, 112. By the end of Reynolds' life he had fathered thirty-two children over thirty-seven years, eleven with Polly, twelve with Amelia,

But as with the rest of his life, most of Reynolds' time in prison was spent on spiritual matters. In addition to reading one or two books of scripture every day of his term, he wrote some eighteen articles for Mormon periodicals and began writing a concordance of the sacred text, the *Book of Mormon*.³¹ This last project included transcribing as many as 350 passages each day. All told, he completed 25,000 entries in the concordance by his release from prison in January, 1881.

In short, Reynolds remained faithful to both family and church while in prison. He was such a model prisoner that the warden reported "Reynolds was worth more than all the guards in preserving good order among the prisoners."³² Indeed, for the last three months of his sentence, he was accorded the special privilege of working in the guards' dining room during the day. But if Reynolds himself posed no threat to prison society, his polygamous way of life, followed pursuant to the dictates of the church that controlled virtually all aspects of life for its members, apparently presented an extraordinary threat to the nation. To understand the nature of the threat, it helps to understand Mormon history and their trek westward to Utah.

The Rise of Mormonism

Mormons were notorious almost from Joseph Smith's founding of the Church of Jesus Christ of Latter-day Saints in upstate New York in 1830. His followers quickly became known as Mormons after their holy scripture, *The Book of Mormon*, a set of revelations discovered by Smith in a field. In 1844, only fourteen years after establishing the Mormon Church, Smith declared himself "king" and ran for president of the United States as a proponent of what he called "theodemocracy." This political theory accorded Smith, as a representative of God, the power and duty to use his office to usher in the kingdom of heaven on earth.³³

Mormonism was not the only new and eccentric religious movement that emerged in late eighteenth- and nineteenth-century America. In New England, Kentucky, and Ohio in the eighteenth and nineteenth centuries, the Shakers practiced gender equality and celibacy, living communally and sometimes dancing all night in frenzied devotional

and nine with Mary, his third wife. Six died before the age of five, and twenty-six survived to adulthood. App. B, *id.* at 237-39.

³¹ *Id.* at 108. These articles were published in journals such as the *Juvenile Instructor*, the *Woman's Exponent*, the *Contributor*, the *Millennial Star*, and the *Deseret News*. Reynolds modeled his concordance on Alexander Cruden's *Famous Complete Concordance to the Old and New Testaments*. *Id.*

³² *Id.* at 103, 108.

³³ Gordon, *supra* note 10, at 23. According to another source, Smith adopted the title "King of the Kingdom of God." McConnell et al., *supra* note 6, at 112.

services.³⁴ The Oneida Perfectionists lived communally in Vermont and New York in the mid-nineteenth century, practicing a form of nonmonogamy described as “complex marriage” in which every man was deemed married to every woman, and vice versa.³⁵ For a good part of 1843, transcendentalists led by Bronson Alcott, father of *Little Women* author Louisa May Alcott, lived communally on a farm they called Fruitlands in western Massachusetts. There they sought to purify their souls by avoiding contact with money, eschewing goods produced through slavery such as cotton, and avoiding stimulants such as alcohol, warm water, and sex.³⁶

But what might have passed as one more radical new religious movement in upstate New York—an area known as the “burned over district” for its many revivals—during the Second Great Awakening instead attracted considerable enmity from the communities in which Mormons settled. Mormons were set apart not only by their intense evangelism but also by their growing political and economic power. Doctrine required members to cede control of their everyday lives, and often their property, to the church. One community after another responded by running them out of town.

George Reynolds’ personal story illustrates the intensity of Mormon evangelism and why it may have irritated non-Mormon neighbors more than that of other churches. Born and raised in England, George converted to the Church at age ten, after sneaking behind his parents’ backs to attend Mormon meetings. Sending him to Paris for a year to get

³⁴ The Shaker experiment was founded by Mother Ann Lee after she received revelations in the 1770s that lust was the root of all economic, social, and political corruption. It lasted throughout the nineteenth century. Lawrence Foster, *Religion and Sexuality: Three American Communal Experiences of the Nineteenth Century* 21–71 (1981).

³⁵ The Perfectionists’ charismatic founder John Humphrey Noyes sometimes used the term “free love,” but more frequently described the social arrangements in his utopian community as “complex marriage.” His community included 300 people at its height, and lasted thirty-two years from 1848 to 1879. Noyes’ ideas about “male continence” added complexity by mandating coitus interruptus unless a committee found the parents sufficiently fit to procreate. Foster, *supra* note 35, at 72–122; Kephart, William M. & William W. Zellner, *The Oneida Community*, in *Extraordinary Groups: An Examination of Unconventional Life-Styles* 50–93 (1994).

³⁶ In addition to the Alcott family, the twelve members included a nudist, a farmer, a man who inverted his name to proclaim his freedom from social control, a cooper who had previously been in an insane asylum, and a man who rebelled against the status quo by swearing at everyone he met. After Ann Page was expelled for eating a piece of fish, Abby Alcott was burdened with all the woman’s work. When a visitor asked if there were beasts of burden at Fruitlands, she replied “Only one woman.” The experiment lasted seven months. Clara Endicott Sears, *Bronson Alcott’s Fruitlands* (1915); Geraldine Brooks, *Orpheus at the Plough: The Father of “Little Women,”* *New Yorker*, Jan. 10, 2005; Louisa May Alcott, *Transcendental Wild Oats and Excerpts from the Fruitlands Diary* (Harvard Common Press, 1995) (1873).

him away from the Mormons did not deter him from joining. Once he did, he set to the London streets to convert others. Like other Mormons, Reynolds' evangelical fervor was not limited to living people. Then, as now, Mormons baptize the spirits of dead relatives. Along the same lines, they "marry by proxy" the spirits of dead people, believing that this will "seal" the spirit of the dead person to the living person in the hereafter.³⁷

Reynolds immigrated to the U.S. in 1865, at the urging of the Church. After he settled in Utah, he "married" six dead women in Church ceremonies. In February 1874, eight months before his arrest for polygamy, Reynolds was "sealed" in a Mormon ceremony to Rosalie Cundle, a second cousin and his "childish sweetheart," and to distant cousins Alice, Kate, Liza Ann, and Henriette Francis Tautz. Their common last name suggests these women were sisters, and Reynolds' own sister Julia acted as proxy for these women in the ceremonies. Similarly, when he was prevented from marrying the sister of his third wife Mary, one Amelia Ann, as a fourth wife due to Amelia Ann's death from typhoid, Mary stood in as proxy for Amelia in the ceremony sealing George to the departed woman.³⁸ Thus although the thirty-two year old Reynolds had only two living wives at the time of the bigamy prosecution against him, he had numerous spirit wives.

Determining the meaning of polygamy for Mormons and Mormonism is no simple matter. Mormons themselves claimed to be directed by God to engage in the practice based on LDS founder Joseph Smith's announcement of a revelation on plural marriage the same day he took a woman living in his household as a second wife. Some scholars contend that polygamy was a central tenet of the LDS faith as it reflected Mormon belief about re-establishing the one true church based on the practices of the Old Testament patriarchs. Others focus on polygamy's social, political, and economic impact of creating family alliances and centralizing power among a small group of elite Mormons. Still others contend that it was less crucial.³⁹ Personally, I think that Mormon insistence on practicing and defending polygamy in the face of unprecedented federal measures to deter the practice also served to strengthen the identity of the newly-minted religious group, in particular by facili-

³⁷ Daniel H. Ludlow, ed., *Encyclopedia of Mormonism*, Vol. 2 at 857-59 (entry on *Eternal Marriage*) and Vol. 3 at 1289 & 1257-59 (entries on *Temple Sealings and Salvation of the Dead*) (1992).

³⁸ Van Orden, *supra* note 1, at 156.

³⁹ For a discussion of various views of the role of polygamy see Christine Talbott, *Mormon Polygamy and the American Body Politic: Contested Citizenship, 1852-1890*, especially Chapter 2 (pp. 106-144) (Ph.D dissertation, University of Michigan 2006).

tating a discourse of understanding themselves as victims of an oppressive majoritarian government.

The Move to Utah

In addition to their aggressive evangelism, Mormons comprised a large and ever-expanding religious community that tended to take over the towns where they settled. Mormons voted as a block, formed their own militia, and only did business with other Mormons. All of this had a profound impact on their non-Mormon neighbors,⁴⁰ and helps explain the continued expulsions as they moved further and further westward, from New York to Ohio, Ohio to Missouri, and then on to Illinois. When the Mormons fled Illinois after an angry mob killed their prophet Joseph Smith (who had been imprisoned for ordering the destruction of a printing press used to disseminate anti-Mormon ideas), they hoped to find isolation in the arid region that is now Utah. In 1849, the Mormons requested that the Territory be named "Deseret," a term that signaled Mormons' separatism. Derived from the Book of Mormon, Deseret was a Mormon-created word meaning "honeybee," purportedly from the language of a group the Mormons called the Jaredites, whom they believed had traveled to America at the time of the construction of the Tower of Babel. Brigham Young further sought to create a separate world for Mormons by proposing a Deseret Alphabet based on 38 symbols corresponding to the basic number of sounds in English. It didn't take. Nor did the Mormons get to choose the name of their Territory. Congress refused to call the territory "Deseret," instead naming it after the Ute Indians, or "people of the mountains." The federal government also significantly cut it down from the size the Mormons had requested, a parcel that would have represented fully one-sixth of the United States.

In Utah, which Mormons also called Zion, they established their own courts and tailored Utah legislation to conform to Mormon doctrine. Some of these statutes expressed hostility to traditional rule of law and legal practice on the grounds that it could interfere with Church policies and practices. For example, one statute provided that church decisions regarding marriage "could not be legally questioned," another rejected common law (equitable principles being more consistent with Church doctrine), and a third attempted to minimize the role of attorneys in the Territory by providing that attorneys did not have a right to collect their

⁴⁰ Gordon, *supra* note 10, at 24. The *New York Times* article at Brigham Young's death conveys the common concern about the complete control of Mormon leaders: "Every man had a vote, but all were supposed to vote by direction and counsel of the Lord, through His prophet, Brigham Young. Socially the Mormons were no better off than a horde of peasants, bound to obey the bidding of suzerain." *Death of Brigham Young*, *N.Y. Times*, Aug. 30, 1877.

fees.⁴¹ The Mormon Church controlled all branches of territorial government, resisting any federal interventions. Mormon doctrine justified—indeed required—such comprehensive governance on the ground that their church was the one true church, established to usher in the kingdom of heaven on earth.

Mormon Treason

The so-called Mormon Question engaged the nation for the second half of the nineteenth century.⁴² What was the relation of this expanding, separatist, economically self-sufficient religious community and its sizable turf to the United States? At its core, the Mormon Question asked whether American pluralism could accommodate, or even tolerate, a separatist theocracy in its midst. This issue was explored through a nearly constant national focus on the Mormons and their activities and personalities. When Mormon president Brigham Young died in 1877, the *New York Times* published a lengthy, front-page obituary, and other papers followed suit.⁴³ Newspapers in New York, Philadelphia, San Francisco, Cincinnati, and other cities reported on Mormon polygamy. Popular magazines such as the *Wasp* and the *Judge* published cartoons lampooning Mormon polygamy, and an entire genre of melodramatic fiction engaged readers in lurid tales of polygamy's excesses.⁴⁴ When one of Brigham Young's wives, Ann Eliza Young, left him and sued for divorce, she published a book, *Wife No. 19*, and addressed rapt audiences across the nation.⁴⁵ President Grant, his wife, and numerous members of Congress attended her lecture in Washington, D.C.⁴⁶

But why was the entire nation, indeed much of the English speaking world, obsessed with Mormon polygamy?⁴⁷ The Mormons were a quirky sect in a remote part of the country, and nineteenth-century Americans had seen lots of experiments in new religions and what we might now call alternative lifestyles. Granted, polygamy created highly unconven-

⁴¹ Gordon, *supra* note 10, at 26, 74; Firmage & Mangrum, *supra* note 11, at 218.

⁴² Gordon, *supra* note 10, at 3, 14, 29–58.

⁴³ *Death of Brigham Young*, N.Y. Times, Aug. 30, 1877. The *New York Times* obituary occupied a full column of the front page, and nearly two full columns of page two.

⁴⁴ Gordon, *supra* note 10, at 3, 14, 29–58.

⁴⁵ *Id.* at 112; Ann Eliza Young, *Wife No. 19; or, The Story of a Life in Bondage, Being a Complete Expose of Mormonism, and Revealing the Sorrows, Sacrifices and Sufferings of Women in Polygamy*, by Brigham Young's Apostate Wife (Kessinger Publishing 2003) (1875).

⁴⁶ Gordon, *supra* note 10, at 112.

⁴⁷ John Stuart Mill incorporated Mormon polygamy into his defense of liberalism three years before Congress passed its first antipolygamy statute. John Stuart Mill, *On Liberty* 160–62 (2d ed. 1974) (originally published 1859).

tional families. Brigham Young had 27 wives and 56 children. Nonconformity, especially coupled with sexual excess, is always of interest.

Another possibility focuses more on politics than prurient interests. In this view, the nation cared about Mormon polygamy not only because it was distasteful to majority cultural preferences, but also, or even mainly, because democracy itself depended on monogamy, according to the political theories and public rhetoric of the day.⁴⁸ On this view, polygamy, even though a private practice, threatened the national government. The relation between the quality of marriage and that of the state was not unfamiliar in the mid-nineteenth century. Debates about slavery and Reconstruction often employed the metaphor of the national household, suggesting that the national union could be understood in terms of marriage. Under this reasoning, in a climate where coverture relegated women to subordinate status, one region expressing independence undermined national unity. In another context, Abraham Lincoln famously mined this metaphor when he asserted that "a house divided against itself cannot stand."⁴⁹ The *Reynolds* opinion explicitly compares polygamy to "stationary despotism," relying on work by Francis Lieber, the leading political scientist of the day.⁵⁰

The connection made in *Reynolds* between polygamy and despotism was all the more salient and troubling to a nation that had just experienced a civil war—a war viewed by the victorious North as ending the despotic institution of slavery in order to preserve American democracy. Indeed, abolitionist literature often focused on despotic aspects of slaveholder households, including sexual license of white slaveholders over female slaves and attendant degradation this infidelity imposed on slaveholders' wives.⁵¹ While early twenty-first century readers may hesitate to equate the inhumanity of slavery with polygamy, nineteenth-century Americans often linked slavery and polygamy as "twin relics of barbarism."⁵² Legal historian Sarah Gordon uses the link to develop the argument that the federal assault on Mormon polygamy constituted a second Reconstruction—an assertion of federal power in the West in the wake of federal withdrawal from the South in the 1870s.⁵³ At the time of the *Reynolds* case, the parallels between the federal government's at-

⁴⁸ Gordon, *supra* note 10, at 178.

⁴⁹ Created Equal? The Complete Lincoln-Douglas Debates of 1858, at 2 (Paul M. Angle ed., 1958).

⁵⁰ Gordon, *supra* note 10, at 140, quoting *Reynolds*, 98 U.S. at 166.

⁵¹ Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* 27 (1998); Davis, *supra* note 14, at 175, 179.

⁵² Gordon, *supra* note 10, at 55-58.

⁵³ *Id.* at 120.

tempt to control slavery and to control polygamy were pointed out by George Washington Biddle, an ardent Democrat whom the Mormon Church retained to represent Reynolds in the Supreme Court appeal. Biddle argued there that the 1857 *Dred Scott* case, which held that Congress's "powers over person and property" did not extend to the Territories (thus mandating the return of a slave to his owner), similarly limited Congress's power to eradicate slavery's "twin," polygamy.⁵⁴

Just as the Southern states' insistence on preserving the institution of slavery led to threats of secession from the Union, the Mormons' adherence to their faith and religious practices raised similar concerns of treason. Indeed, the Mormons were charged with actual treason, as defined in the United States' Constitution as "levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort."⁵⁵ Joseph Smith and other Mormon leaders were indicted for treason against the state of Missouri in 1838, and Smith was arrested again for treason against Illinois in 1844.⁵⁶

By the late 1850s, tensions had escalated to the point where Utah was virtually in a state of rebellion against the federal government, a conflict known as the Mormon War.⁵⁷ In the fall of 1857, President Buchanan dispatched 3,000 federal troops to Utah. In response, Mormon president and Utah Territorial Governor Brigham Young essentially proclaimed war against the United States. In September 1857, in the presence of a federal officer, Young declared:

This people are free; they are not in bondage to any government on God's footstool. We have transgressed no law . . . as for any nation's coming to destroy this people, GOD ALMIGHTY BEING MY HELPER, THEY CANNOT COME HERE.⁵⁸

⁵⁴ *Id.* at 123-24.

⁵⁵ U.S. Const. art. III, § 3, cl. 1.

⁵⁶ James Willard Hurst, *The Law of Treason in the United States: Collected Essays* 264 (1971).

⁵⁷ It is also called the Utah War. Ray B. West, *Kingdom of the Saints: The Story of Brigham Young and the Mormons* 254-264 (1957). The discussion of the Mormon War in Brigham Young's obituary in the *New York Times* twenty years later illustrates its continued significance on the national stage. *Death of Brigham Young*, *N.Y. Times*, Aug. 30, 1877. Some historians contend that the federal government incited the rebellion by sending troops to Utah. See e.g., Richard N. Ostling & Joan K. Ostling, *Mormon America: The Power and the Promise* 53 (1999).

⁵⁸ West, *supra* note 57, at 256 (emphasis in original). Two weeks later, on September 29, Young wrote to a U.S. Army Colonel, "By virtue of the authority thus invested in me [as governor of Utah], I have issued, and forwarded to you a copy of my proclamation forbidding the entrance of armed forces into this territory. This you have disregarded. I now further direct that you retire forthwith from the territory." *Id.* at 258.

Young's instructions forbidding U.S. troops to enter Utah and urging Mormons to repel any federal aggression were put into action by the Mormon militia (known as the Nauvoo Legion) by burning two federal forts and federal supply trains on their way to Utah.⁵⁹ Young also made veiled threats to secede from the Union, an especially incendiary threat in light of the portentous rumblings from the Southern States and the fact that important trails to the west coast ran through Utah.⁶⁰ Although it did not involve direct resistance to the federal government, the Mountain Meadows Massacre of September 1857, in which Mormons and Indians murdered some 127 Arkansas settlers traveling through Utah, greatly contributed to tensions in the Mormon War.⁶¹ The federal government placed Utah under martial law, and only the onset of a severe winter prevented federal troops from engaging in battle with 2,500 soldiers from the Mormon army.⁶² As a result of the Mormon War, Young and sixty-five other Mormon leaders were indicted for treason.

By spring of 1858, the Mormons had negotiated a compromise with the federal government. The Mormons allowed the federal army to march through Salt Lake City to headquarters forty miles outside the city and tolerated the replacement of Brigham Young with a non-Mormon governor. This new governor declared in June 1858 that "peace is restored to our Territory."⁶³ President Buchanan pardoned the sixty-five Mormon defendants accused of treason in the Mormon War of 1857.⁶⁴ However, the truce was temporary, perhaps predictably, given Young's belligerent attitude in accepting the presidential pardon. The pardon extended amnesty to "all who will submit themselves to the authority of the federal government." Young responded to this language by publicly declaring: "If a man comes from the moon and says he will pardon me for kicking him in the moon yesterday, I don't care about it, I'll accept his pardon."⁶⁵

During the 1860s, the Civil War diverted the federal government's attention away from its dispute with the Mormons. Indeed, President Lincoln is reputed to have compared the Mormon Church to a log that was "too hard to split, too wet to burn and too heavy to move, so we

⁵⁹ Firmage & Mangrum, *supra* note 11, at 244.

⁶⁰ Firmage & Mangrum, *supra* note 11, at 213.

⁶¹ Juanita Brooks, *The Mountain Meadows Massacre* 146 (2d ed. 1966).

⁶² *Id.* at 74-75.

⁶³ *Id.* at 159.

⁶⁴ Firmage & Mangrum *supra* note 13, at 244; Brooks, *supra* note 36, at 159.

⁶⁵ Edward W. Tullidge, *The History of Salt Lake City and Its Founders* 136 (1886). Notably, George Reynolds was Secretary of the Revising Committee of this history.

plowed around it . . . You go tell Brigham Young that if he will let me alone, I will let him alone."⁶⁶ But once the Civil War was over, the federal government turned its attention back to the Mormons. One element of its attempt to force the Mormons to renounce polygamy was another "treason and rebellion" prosecution that involved people close to Reynolds himself. In 1870, the Mormons resisted the federally-appointed Utah governor's challenge to Latter-day Saints' control of the Nauvoo Legion in an action known as the Wooden Gun Rebellion. Reynolds' own regiment participated in the Rebellion, but he was not charged with "treason and rebellion," as were eight Nauvoo Legion officers.⁶⁷

What kept the federal government from fully pursuing treason claims against the Mormons? The 1838 Missouri prosecution fizzled because the defendants had escaped, possibly with the cooperation of their captors. And the 1844 Illinois prosecution was truncated by Smith's murder by a mob after his arrest. These prosecutions may not have resulted in conviction given the strength of Mormon self-defense arguments, but even the official history of the Mormon Church concedes that "technically speaking," the Mormons levied war against the United States in 1857-1858.⁶⁸ Maybe, in the wake of the Civil War, the federal government wanted to consolidate its power and the Union without directly raising the thorny issues of local control just barely resolved through that war. Polygamy may have been more winnable, while jurisdictional, factual, and doctrinal barriers weakened a treason case. In any case, the federal decision to pursue Mormons through polygamy prosecutions does not eradicate the role of treason in the cases.⁶⁹ While sending troops against the federal army and destroying federal property likely constituted "levying war" against the United States, military action was merely one event in the larger treason of establishing a theocratic government in Utah apart from the rest of the country.

The Treason of Polygamy

An 1870 sermon by Brigham Young defending autocratic families and government exemplified the kind of talk that inflamed public concerns about Mormonism as a despotic institution threatening democracy.

⁶⁶ Firmage & Mangrum, *supra* note 11, at 139.

⁶⁷ Van Orden, *supra* note 1, at 32; 1 Andrew Jenson, *Latter-Day Saint Encyclopedia* 208 (1901). Nor was Reynolds incarcerated at Fort Douglas with the participants in the Wooden Gun Rebellion. Firmage & Mangrum, *supra* note 13, at 245.

⁶⁸ *Id.* quoted from 4 B.H. Roberts, *Comprehensive History of the Church of Jesus Christ of Latter-Day Saints* 411 (photo reprint 1965) (1957).

⁶⁹ Similarly, when the government sues the Mob for tax evasion, the underlying offense bleeds through.

After asserting that polygamous husbands' power extended beyond the family to "my neighbors and the people around me," Young referred to himself as a "king" controlling his wives and children by fiat:

If I am controlled by the Spirit of the Most High, I am a king, I am supreme so far as the control of self is concerned; and it also enables me to control my wives and children . . . They will be perfectly submissive to my dictates.⁷⁰

Suffrage provided one important context for debating the submissiveness of Mormon wives. In 1870, Utah became one of the first jurisdictions to give women the vote.⁷¹ Anti-polygamists saw the move as a bid to consolidate Mormon control over the Territory as newcomers poured in on the recently completed transcontinental railroad. Mormons argued that enacting women's suffrage showed that plural marriage did not subordinate women.⁷² Yet in practice women's voting patterns were determined by the Church.⁷³ As a Mormon bishop told a San Francisco newspaper:

The women of Utah vote, and they never desert the colors of the church; they vote for the tried friends of the church. . . . Utah will be admitted as a polygamous State, and the other Territories we have peacefully subjugated will be admitted also. We will then hold the balance of power, and will dictate to the country.⁷⁴

Anti-polygamist politicians heard treason in this kind of talk. Vermont Sen. George Edmunds in 1882 declared that polygamy was a "crime against the political institutions of our country."⁷⁵ President Hayes echoed this sentiment in his diary the day he denied Territorial Delegate George Q. Cannon's request that Hayes pardon George Reynolds:

Now the Territory [of Utah] is virtually under theocratic government of the Mormon Church. The union of Church and State is complete. The result is the usual—the usurpation or absorption of all temporal authority and power by the Church. Polygamy and

⁷⁰ Gordon, *supra* note 10, at 105.

⁷¹ Beverly Beeton, *Women Vote in the West: The Woman Suffrage Movement, 1869-1896*, at 157-58 (1986).

⁷² Gordon, *supra* note 10, at 97. As with other conflicts with the federal government, Mormons lost, and Congress ultimately took away Utah women's vote in the Edmunds-Tucker Act.

⁷³ Gordon, *supra* note 10, at 167-70.

⁷⁴ *Id.* at 169-70, quoting Angelina French Newman, *Woman Suffrage in Utah* 5 in *Miscellaneous Documents* 49 Cong., 1 Sess., S. Doc. 122 (June 8, 1886).

⁷⁵ *Id.* at 150-51 (quoting George F. Edmunds, *Political Aspects of Mormonism*, *Harper's Magazine*, Jan. 1882).

every other evil sanctioned by the Church is safe. To destroy the temporal power of the Mormon Church is the end in view.⁷⁶

President Hayes' journal entry demonstrates that polygamy was only one element in the federal government's case against the Mormons. Indeed, establishing a theocracy which threatened American political and social life may have been an even greater offense. Ultimately, destroying "the temporal power of the Mormon Church" was "the end in view."

Without a doubt, the taint of treason informed polygamy prosecutions. In 1871, three years before Reynolds' bigamy case, federal prosecutors in Idaho (then a Territory) sought to charge Brigham Young with treason for "lewd and lascivious cohabitation" in violation of a Territorial statute. Judge McKean declared:

While the case at the bar is called "The People *versus* Brigham Young," its other and real title is "Federal Authority *versus* Polygamic Theocracy." The government of the United States, founded upon a written constitution, finds within its jurisdiction another government—claiming to come from God—*imperium in imperio*—whose policies and practices, are, in grave particulars, at variance with its own. The one government arrests the other, in the person of its chief, and arraigns it at this bar. A system is on trial in the person of Brigham Young. Let all concerned keep this fact constantly in view; and let that government rule with out a rival which shall prove to be in the right.⁷⁷

Along the same lines, in 1886, nearly a decade after Reynolds lost in the Supreme Court, Mormon leader John W. Taylor was charged in Idaho Territory with inciting rebellion against the laws of the United States by encouraging Mormons to practice polygamy.⁷⁸ A Utah Territorial Court similarly melded treason to bigamy charges against one William Felstad in 1886. According to the *Deseret News*, "the Judge said that a man had no right to recognize in the covenants or laws of any organization a

⁷⁶ Van Orden, *supra* note 1, at 90 (quoting Hayes' diary entry of June 13, 1879). Thirty-one thousand people signed the petition seeking presidential pardon on the ground that Reynolds should be excused from punishment because he had cooperated in the test case by providing the names of witnesses. *Id.* at 89.

⁷⁷ West, *supra* note 57, at 320. The rest of Judge McKean's statement, reprinted at the time in a Utah newspaper, provides; "If the learned counsel for the defendant will adduce authorities or principles from the whole range of jurisprudence, or mental, moral or social science, proving that the polygamic practices charged in the indictment are not crimes, this court will at once quash this Indictment." *U.S. v. Young, Motion to Quash Indictment*, Sept. 1871, 3d Dist. Ct. for Territory of Utah, quoted in Editorials, *Deseret News* (Weekly ed.), Oct. 18, 1871.

⁷⁸ *Free Speech*, Ogden Daily Herald, Aug. 19, 1886; *A Precious Document: The Indictment Against Apostle John W. Taylor*, Ogden Daily Herald, Nov. 2, 1886. The case was continued until the following April. *Deseret News*, Nov. 17, 1886.

higher allegiance than that which he owed to the government. Treason consisted in an attempt to overthrow the laws of the government. The defendant, in refusing to promise obedience to those laws, sought to overthrow them."⁷⁹

These cases show the thread of treason running through the government's polygamy prosecutions, suggesting that when the *Reynolds* Court accused Mormons of fettering their members in stationary despotism, that political charge included, sub rosa, a claim of treason. In short, by establishing a theocracy independent of American law and culture, Mormons had traitorously departed from American political, legal, and social norms.

George Reynolds' Case

There are short and long answers to the question of why George Reynolds was the defendant in the Mormon polygamy test case. The short reason is that the Church told him to do it. Reynolds described how his good friend and Congressional Delegate George Q. Cannon informed him that he would be the defendant in the test case as Reynolds and his second wife Amelia were walking in downtown Salt Lake City:

On the evening of Wednesday Oct. 21st, I, accompanied by my wife Amelia visited bro Edwin Dowden, on my return, whilst passing the south side of the temple block I met bro Cannon, who informed me (in substance) that it had been decided among the brethren of the Presidents Council to bring a test case of the law of 1862 (Anti-Polygamy Act) before the court and that it had been decided to present my name before the grand jury.⁸⁰

The short answer leads to the longer, which addresses the reasons why the Church chose Reynolds. Just thirty-two years old, having married his second wife Amelia only two months earlier, Reynolds countered stereotypes of grizzled, old, and autocratic polygamists with numerous wives.⁸¹ But it was Reynolds' character as well as his characteristics that made him the right man. Reynolds' life was defined by his loyalty to the Church. How he expressed that loyalty in matters both intimate and public reveals both why the Church picked him for the test case, and why the Church's control over Utah and its members unsettled many Americans.

⁷⁹ *To the Penitentiary*, Deseret News (Weekly ed.), Sept. 22, 1886.

⁸⁰ Van Orden, *supra* note 1, at 62.

⁸¹ Gordon, *supra* note 10, at 114. A photograph of Reynolds appears at <http://personal.atl.bellsouth.net/wj/wol3/reynog1.htm>.

Starting with the intimate, Reynolds ended his first engagement because his fiancée, Sarah Burrell, wanted him to walk her home after they finished a church activity, but he wanted to continue "priesthood work" into the evening. Reynolds told her, "[i]f ever such a thing occurs again, I will break off our engagement. The priesthood must with me stand first."⁸² They parted ways, unwillingly on Sarah's part, as she still wanted to marry him. (Reynolds got permission from Mormon President Brigham Young to marry Polly Tuddenham only after Young determined that Reynolds was not obliged to marry Sarah.)

The Church later returned Reynolds' devotion, supporting the Reynolds family while he was in prison so well that one child remembers Polly and Amelia frequently saying "you will not fare as well when your Father is released."⁸³ Upon his release, the Church further helped Reynolds by giving him \$1,415.28 gathered from Church employees and members, the amount he would have earned in a year. He used the money to build a house for Amelia next door to the house that was bursting at the seams with Polly, Amelia, eight children, and George's mother, sister, and brothers.⁸⁴ George apparently suffered migraines from the pressure of keeping peace in his household, and tried to alleviate tension by taking each wife out separately to concerts or plays.

However, neither the social complexity of domestic life nor the continued threat of arrest deterred Reynolds from taking a third wife. In April 1885, four years after his release from prison, with Mormon polygamy on the rise, Reynolds married Mary Goold, a maid in Mormon President John Taylor's house.⁸⁵ At this time, both his first two wives were pregnant and he was living underground to evade arrest. The

⁸² *Id.* at 17.

⁸³ *Id.* at 112.

⁸⁴ *Id.* at 56, 113. Polly's descendants claimed that she was increasingly perturbed by Amelia's surly attitude toward Polly and her children.

⁸⁵ *Id.* at 148-50. While Reynolds' biographer describes the Church permission for marrying Polly, Amelia, and Mary, it is unclear whether Reynolds complied with the Mormon requirement that existing wives consent to the husbands' taking additional wives. Reynolds' biographer asserts: "No doubt George involved Polly in the decision [to marry Amelia], for he would have been fully conversant with the 'law of Sarah,' which provided that the first wife agree to the second marriage and help select the second wife." Van Orden, *supra* note 1 at 55, citing Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints at 132:34: 61-65. It is surprising that he did not record conferring with Polly prior to marrying Amelia, given his extraordinary attention to detail in his journals. Reynolds obsessively recorded details such as the 1863 statistics for number of converts to Mormonism in Europe (3,979), Mormons immigrating to America (3,646), excommunications (1,125), and deaths (203) in his journal. He also recorded personal matters in his journal, such as a flirtation with Mary Tilley between his broken engagement with Sarah and his marriage to Polly. The absence of any indication by Reynolds of his asking Polly's permission to marry Mary suggests that Polly may not have known of this third marriage.

ceremony, performed by Mormon authorities, remained secret even to family members, and perhaps even to his first two wives. Eight months later, shortly before Polly gave birth to her eleventh child (who survived only one day), she apparently told George that she could no longer live around Amelia, and charged the newly married Mary with the care of her own children.⁸⁶

The Church defined the contours of Reynolds' public life as well as his private life. By the time he died in 1909 at the age of sixty-seven, he had spent all but his first decade fully immersed in the work of the Mormon Church. Describing himself in an evaluation he wrote as a nineteen-year-old missionary in England, he confessed, "I find considerable difficulty in presiding, being better able to do as I am told than to tell others what to do."⁸⁷ Indeed, from the time he converted against his parents' wishes, Reynolds spent his life in church-related work, doing what he was told to do. He began his career with a church mission in his home country, England, and returned there for a second mission after immigrating to Utah. Over the years Reynolds worked as a secretary to several Mormon presidents, including Brigham Young. This was a particularly important position, since it included transcribing revelations that the president dictated as he received them directly from God.⁸⁸ He also served as second lieutenant and secretary of his regiment in the Nauvoo Legion, as assistant editor of the Mormon newspaper *Deseret Evening News*,⁸⁹ as bookkeeper and director for the Zion Cooperative Mercantile Institution (still known as "ZCMI", a cooperative store where Mormons bought and sold goods, often with scrip to keep funds within the community),⁹⁰ as regent for the University of Deseret (now the University of Utah), as editor of Mormon newspapers the *Millennial Star* and *Journal of Discourses*, as a representative of the Mormon-controlled People's Party on the Salt Lake City Council, as Mormon Sunday School superintendent, treasurer, and author of numerous Mormon Sunday School materials, and also as director on the board of Mormon businesses such as the Deseret Telegraph Company and Zion's Savings Bank and Trust Company.⁹¹ This catalogue of commitment shows why the Church chose Reynolds as its representative to test the constitutionality of Mormon polygamy.

⁸⁶ Van Orden, *supra* note 1.

⁸⁷ *Id.* at 13.

⁸⁸ Young assigned his secretaries secular and ecclesiastical tasks, rotating assignments to minimize authority of any particular secretary. *Id.* at 37.

⁸⁹ *Id.* at 37. He was assistant editor under George Q. Cannon.

⁹⁰ *Id.* at 64. Firmage & Mangrum, *supra* note 11, at 222.

⁹¹ Van Orden, *supra* note 1, at 79.

In agreeing to be the defendant in the case, Reynolds understood that conviction and a prison sentence were likely, since the Church had decided to cooperate with the prosecutors on this test case in exchange for the federal government dismissing a bigamy charge against Territorial Delegate George Q. Cannon. This strategy allowed Cannon to return to Congress the next session, which he would not have been able to do with a criminal case pending against him. Moreover, the Church sought to avoid the inevitable press coverage of such a trial. Reynolds' prompt and enthusiastic engagement with the plan to assist in his own conviction was surely a great relief to Cannon. True to Reynolds' reputation as obedient and precise, Reynolds delivered a list of trial witnesses to Cannon by early the next morning.

To amplify the publicity and effectiveness of its polygamy prosecutions, the federal government timed Reynolds' trial to take place in the middle of several other high profile cases in the spring of 1875. Reynolds' trial was sandwiched between Brigham Young's divorce from Ann Eliza and John D. Lee's trial arising out of the Mountain Meadows Massacre. Young's divorce case had garnered national news due to Ann Eliza Young's lecture tour, treating the nation to details of Brigham Young's domestic life such as his considerable wealth (she alleged he was worth \$8,000,000 and enjoyed a \$40,000 monthly income, while he claimed he was worth \$600,000 and received only a \$6,000 monthly income).⁹² It was also notable (and much noted) that the leader of the Mormon Church contended in his own divorce case that he should not be liable for alimony since his marriage to Ann Eliza was not legally recognized, in direct contradiction to the Church's claims regarding the legitimacy of plural marriage.⁹³ One month before Reynolds' trial, on February 25, 1875, the trial court ordered Brigham Young to pay his former "wife" \$9,500 for attorneys' fees, alimony, and the education of her children, an amount six times larger than the annual income of a Salt Lake City wage-earner.

The spectacle of the Young divorce case had not yet faded from the national spotlight when Reynolds' first trial began on March 31, 1875. Lee's first trial for participating in the Mountain Meadows Massacre followed in July 1875.⁹⁴ Echoing the Judge's language in the 1871 prosecution against Brigham Young for lewd and lascivious cohabitation that the real title of the case was "Federal Authority *versus* Polygamic Theocracy,"⁹⁵ the prosecutors in Lee's trial similarly sought to implicate

⁹² Firmage & Mangrum, *supra* note 11, at 249; Van Orden, *supra* note 1, at 67.

⁹³ Firmage & Mangrum, *supra* note 11, at 249-50.

⁹⁴ Lee was acquitted the first trial, then re-tried and sentenced to death. Firmage & Mangrum, *supra* note 11, at 248.

⁹⁵ See *supra* note 77.

the Mormon Church and Brigham Young in the massacre, asserting to the jury, "it is the Mormon Church that is now on trial."⁹⁶ Five months after the Lee trial, in December 1875, Reynolds was tried and convicted again for violating the Morrill Act.⁹⁷ Even in the midst of this intense public scrutiny of Church leaders and Reynolds' own faith and practices, his biographer noted that "George did not complain, at least not publicly nor in his private journal. His first loyalty was to God and the Church's leaders."⁹⁸

In agreeing to be the defendant in the case, George understood he was assisting in his own conviction. Without cooperation from Mormon witnesses, polygamy prosecutions generally ended in acquittal because the federal government could not prove the essential fact of a second marriage. Plural marriages were not publicly recorded, and most Mormon witnesses conveniently forgot that a husband had married more than one woman, that a woman had married a man who already had a wife, or that a leader had performed the wedding ceremony. Only the threat of the national spectacle of Delegate George Q. Cannon on trial or in prison—and in either case unable to return to Congress—had prompted the Church to cooperate and agree to provide the witnesses necessary for the conviction of someone. Church leadership selected George Reynolds. In return for this cooperation, the government promised not to prosecute Cannon himself.

However, the agreement collapsed just a month after Reynolds' arrest, when the federal government broke its promise and arrested Cannon.⁹⁹ Reynolds and Church authorities responded by throwing every possible roadblock in the way of Reynolds' conviction. At the first trial, members of his household—witnesses drawn from the same list Reynolds had provided to the prosecution six months earlier—testified that they did not know if Reynolds was married to the women who lived in his house. For example, Reynolds' sister Julia, who lived with George, Polly, Amelia, and their children, testified that she knew Polly lived with them but did not know if Polly and George were married. Even the man who performed the marriage could not recall doing so.¹⁰⁰ The prosecution then called Reynolds' second wife, Amelia, who was not on the witness list

⁹⁶ Leonard J. Arrington, *Crusade Against Theocracy: The Reminiscences of Judge Jacob Smith Boreman of Utah, 1872-1877*, at 24 Huntington Libr. Q. 1, 43, n.60 (1960).

⁹⁷ George Reynolds' final journal entry for that year was "This year has been one of the most eventful of my history," which Van Orden describes as characteristically understated. Van Orden, *supra* note 1, at 78.

⁹⁸ Van Orden, *supra* note 1, at 64.

⁹⁹ *Id.* at 63 (describing Cannon's second arrest on Nov. 12, 1874).

¹⁰⁰ *Id.* at 69.

and had not been prepped on the strategy of obfuscation. Amelia entered the courtroom, visibly pregnant. When she testified that she had married George Reynolds in a ceremony performed by the man who had just testified that he did not recall performing one, the courtroom erupted into pandemonium.¹⁰¹

Conceding defeat on the facts, Reynolds' lawyers decided to raise their religious freedom arguments in defense.¹⁰² The trial judge refused to consider the arguments as irrelevant,¹⁰³ and the jury, comprised of seven Mormons and five non-Mormons, returned a guilty verdict after only half an hour's deliberation.¹⁰⁴ The Territorial Supreme Court reversed this verdict on the ground that the grand jury had been impaneled improperly. By the time the federal prosecutors arrested and charged Reynolds a second time, Amelia was in hiding and unavailable to testify. Undeterred, the prosecution read her testimony from the first trial into evidence at the second trial, and the jury returned another guilty verdict, again after half an hour's deliberation. This time the Territorial Supreme Court affirmed the bigamy conviction.

Conclusion

Reynolds v. United States is not merely a case about polygamy as a religious practice, but also about a unique form of nineteenth-century treason. Understood in this historical context, the case is of limited relevance to today's disputes regarding same-sex marriage. *Reynolds* is less about unconventional relationships, than about how nineteenth-century Americans viewed the Mormons' establishment of a separatist theocracy as political treason. The story of *Reynolds v. United States* thus turns on the particular threat posed by Mormons' separatist practices—legal, social, political, economic, and military—in the decades before and after the Civil War. In contrast, same-sex marriage is markedly assimilationist. Moreover, gay people have not gone to war against the American government. In short, the story of *Reynolds v. United States* reveals that any attempt to use *Reynolds* to justify a ban on same-sex marriage is misguided.

¹⁰¹ Gordon, *supra* note 10, at 115; Van Orden, *supra* note 1, at 70.

¹⁰² Sutherland, Reynolds' counsel read the following statement to the court:

They believe it to be a divine institution, and they will be indebted for their highest happiness in another life to their fidelity and obedience to it in this; ... that this defendant holds their faith ... and that it was his solemn duty to obey it ... They are willing to bear [pains and penalties of the law] rather than lose the high estate in another life to be gained by celestial marriage.

Van Orden, *supra* note 1, at 70.

¹⁰³ Gordon, *supra* note 10, at 115.

¹⁰⁴ *Id.* at 115. Van Orden, *supra* note 1, at 68.