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## Tom Green, Common-law Marriage, and the Illegality of Putative Polygamy

### I. INTRODUCTION

In October 1878, the United States Supreme Court issued the landmark decision of *Reynolds v. United States*,<sup>1</sup> wherein the Court gave constitutional legitimacy to the federal government's attempts to eradicate the practice of polygamy in the Utah territory. Though procedurally based on notions of federal control over the territories,<sup>2</sup> the *Reynolds* decision was substantively grounded on a common-law derived, Judeo-Christian inspired denunciation of the inherent evils of polygamous marriage.<sup>3</sup> The Court has never repudiated the *Reynolds* holding.

The subsequent history of anti-polygamous litigation has been sparse. Due in large part to the LDS church's 1890 repudiation of polygamy as a religious practice,<sup>4</sup> the post-*Reynolds* polygamy litigation has been largely confined to a few early ratifications of the *Reynolds* holding<sup>5</sup> and a scattered array of subsequent applications by lower courts that were confronting very specific ancillary problems.<sup>6</sup>

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1. 98 U.S. 145 (1878).

2. *Id.* at 153-54 (noting that, due to the fact that Utah was still a federal territory, the case was appropriately governed by federal law).

3. The *Reynolds* Court specifically noted in defense of the anti-polygamy legislation that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void . . . . By the statute of 1 James I (c.11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death." *Id.* at 164, 165. The Court further noted that "polygamy leads to the patriarchal principle, and . . . when applied to large communities, fetters the people in stationary despotism . . . ." *Id.* at 166.

4. 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, 205 n.49 (1988).

5. *See, e.g.* Davis v. Beason, 133 U.S. 333 (1890); Romney v. United States, 135 U.S. 1 (1890).

6. *See, e.g.* Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985), *cert. denied*, 474 U.S. 849 (1985) (holding that a city's dismissal of a police officer on the grounds that the officer had violated the state's ban on polygamy was not a violation of the officer's right to the free exercise of religion). *See also* Oliverson v. West Valley City, 875 F. Supp. 1465 (D. Utah 1995) (holding that, based on the *Reynolds* rationale, Utah's criminalization of adultery and fornication is constitutional); *In re Black*, 283 P.2d 887 (Utah 1955) (resolving a custody dispute arising from the 1953 raid on the

In May 2001, however, the practice of polygamy was again thrust into the judicial arena through Utah's prosecution of Tom Green on multiple counts of bigamy. Believed by many to be the first prosecution of a polygamist in over fifty years,<sup>7</sup> the Green prosecution differed markedly in form and substance from the polygamist prosecutions of the nineteenth century. Whereas the Reynolds prosecution had relied on an expansive set of federal anti-polygamist statutes that were directly applicable to the facts of the case, the prosecution of Tom Green was instead a state prosecution hampered by the defendant's concerted efforts to avoid the ostensibly limited definitional confines of Utah's anti-polygamy laws.

This paper will analyze the resultant legal battle. It will ultimately argue that the conviction of Tom Green on bigamy charges was based upon a fundamentally flawed legal premise. Part II of this paper will provide a brief backdrop to the trial, showing how the prosecution of Tom Green was a historical anomaly that was seemingly provoked more by Tom Green's efforts to garner publicity than by his efforts to live in a state of putative polygamy. Part III will provide a brief discussion of the resulting prosecution, specifically focusing on how the prosecutors were forced to combine two seldom-used statutes in order to establish the basic merits of their case. Part IV will analyze the legal premise upon which the convictions were obtained, arguing that the prosecution was based on a fundamentally flawed legal foundation that sets a dangerous and highly problematic precedent for future cases. Part V will offer a brief conclusion.

## II. THE SMALL-TOWN POLYGAMIST, THE SMALL-TOWN PROSECUTOR, AND THE CRIMINAL CONSEQUENCES OF GLOBAL EXPOSURE

In many respects, Tom Green is the prototype of the twenty-first century American polygamist. A former missionary for the LDS Church,<sup>8</sup> Green was excommunicated from the LDS Church when he decided to adopt the practice of plural marriage.<sup>9</sup> Like most of America's estimated 30,000 to 60,000 polygamists, Green's decision to live the illegal polygamist lifestyle forced him to move his family into an isolated enclave in rural Utah.<sup>10</sup> Though Green's first wife refused to

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Short Creek polygamous community).

7. Julie Cart, *Polygamy Verdict Set Precedent*, LOS ANGELES TIMES, May 20, 2001, at A18.

8. Patrick O'Driscoll, *Utah Steps Up Prosecution of Polygamists in a Pre-Olympic Games Crackdown*, USA TODAY, May 14, 2001, at 5A.

9. *Dateline NBC* (NBC television broadcast, Jan. 2, 2001).

10. *Id.*

follow him into this practice and subsequently divorced him,<sup>11</sup> Green eventually settled down with five polygamous wives in a multi-trailer-home compound in rural Greenhaven, Utah.<sup>12</sup> Given the unofficial, decades-long moratorium on arrests or prosecutions of polygamists that followed the disastrous 1953 raid on the Short Creek polygamist communities of northern Arizona,<sup>13</sup> it is likely that, had things gone normally, Tom Green could very well have faded into the neo-rustic anonymity that marks the typical twenty-first century polygamist family.

Tom Green's embrace of polygamy, however, was far from normal. Instead of fading into obscurity like so many others, Green decided to take his beliefs about a divinely-ordained commandment of plural marriage to the masses. Beginning in the late 1980's, Green and several of his wives began appearing on a string of local and national radio and television shows.<sup>14</sup> Calling himself "a defender of faith, a soldier in the fight for religious freedom,"<sup>15</sup> Green and his wives willingly discussed all aspects of their polygamous lifestyle with the media.<sup>16</sup>

Though initially reticent to revive the decades-dormant practice of prosecuting polygamists,<sup>17</sup> the Juab County Attorney, David Leavitt,<sup>18</sup>

11. State v. Green, No. 001600036 at 2 (4th Dist. Ct. Utah July 10, 2000) (memorandum decision). See also Geoffrey Fattah, *History Piqued Green's Interest*, THE DESERET NEWS, Aug. 22, 2001, at B1.

12. O'Driscoll, *supra* note 8, at 5A.

13. See Kevin Cantera & Michael Vigh, *Latest in Green Saga: Prison Term*, THE SALT LAKE TRIBUNE, Aug. 25, 2001, at A1.

14. O'Driscoll, *supra* note 8, at 5A. This string of appearances included stints on such evening news shows as NBC's *Dateline NBC*, ABC's *20/20*, and CNBC's *Rivera Live*, on such syndicated daytime talk shows as *The Sally Jesse Raphael Show*, *Queen Latifah*, and *The Jerry Springer Show*, and even in a documentary made by a French television station. The combined effect of these appearances, in the words of the state prosecutors, was to make "over 500,000,000 people aware of his lifestyle." State v. Green, No. 001600036 at 4 (4th Dist. Ct. Utah, filed on Oct. 17, 2000) (The State's Memorandum in Support of Its First Motion in Limine).

15. *Dateline NBC*, *supra* note 9.

16. A typical example of the unabashed candor with which the Green clan discussed its polygamist lifestyle was the extended colloquy between NBC reporter Margaret Larson and a "panel" of his wives regarding how "head wife" Linda fulfills her "duty" of "mak[ing] sure [that] each of the five wives get their fair share of Tom's nights." *Id.*

17. Different rationales have been suggested by various sources as to why it took the county attorney's office over a decade to file charges against Green. Perhaps the most commonly suggested excuse by government officials was that the delay was caused by a lack of resources in the rural community for such a complicated investigation and prosecution. In explaining the situation to *Dateline NBC*, Juab County Sheriff David Carter thus noted that he had "only eight deputies to cover more than 35 square miles" and stated that "[w]e have a lot of higher priorities. If it became a high priority, if it became something that we felt was absolutely necessary, we needed to work on, then we would work on it." In the same *Dateline* segment, County Attorney David Leavitt took a slightly different approach, blaming the prosecutorial silence on a lack of evidence. "The question is not, 'Can you find someone forced to be a polygamist?'" he asked. "The question is, 'Can you prove that in court?'" *Dateline NBC*, *supra* note 9. Interestingly, and perhaps not surprisingly, Leavitt has steadfastly denied that the delay was in any way caused by the unofficial, decades long moratorium on prosecutions of polygamists that has marked the western law enforcement community's reaction

eventually became convinced that Green's was a case worthy of prosecution. Perhaps convinced by the increasingly loud publicity generated by Green's repeated television appearances,<sup>19</sup> or perhaps by concerns over the ancillary problems of welfare fraud and child rape that often accompany the modern polygamous lifestyle, an official investigation was launched, ultimately resulting in the decision to prosecute Tom Green on charges of bigamy. Tom Green was thus officially charged with four counts of bigamy, one count of criminal nonsupport, and one charge of child rape (stemming from his marriage to then-thirteen year old Linda Kunz).

### III. THE PROSECUTION OF TOM GREEN

Though Tom Green initially raised the standard *Reynolds*-redux First Amendment defense to the charges of bigamy, more problematic for the prosecution was his surprisingly novel defense of actual innocence to the charges of bigamy. In contrast to the unquestionably polygamist defendants of such seminal polygamy prosecutions as the *Reynolds* prosecution,<sup>20</sup> Tom Green raised as a defense the contention that he was *not* in fact a polygamist. Despite having appeared on national and international television touting the virtues of having more than one wife, it quickly became apparent that Tom Green himself *did not* in fact have more than one legal wife.<sup>21</sup> In a carefully constructed attempt to create and ride through a potential loophole in the legal prohibitions on polygamy, Green had orchestrated a system whereby he would only be *legally* married to one woman at a time. Green accomplished this by

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to the polygamist communities. *Id.* See also David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 71 (1997). Instead, Leavitt has repeatedly insisted that it was always his intent to prosecute Tom Green—and presumably others—“solely” because of the fact that these polygamists “broke the law.” Kevin Cantera & Michael Vigh, *Green Guilty on All Counts*, THE SALT LAKE TRIBUNE, May 19, 2001, at A1.

18. Interestingly, one of David Leavitt's first jobs as a young public defender was a defense of a polygamist, wherein he planned to argue that laws against polygamy violated the First Amendment. The charges, however, were dropped before the case reached trial. Tom Gormon, *Prosecutor Now Sees Other Side of Bigamy*, LOS ANGELES TIMES, May 27, 2001, at A17.

19. Significantly, Leavitt told *The Salt Lake Tribune* that he “did not know Green existed until he saw him bragging on *Dateline NBC* about his living arrangements.” Cantera & Vigh, *supra* note 17, at A1.

20. For a discussion of the historical debate regarding whether George Reynolds voluntarily agreed to become a test case for American polygamy, see FIRMAGE & MANGRUM, *supra* note 4, at 138. It does seem clear from the record, however that Reynolds did not ever raise the Tom Greenesque questions as to whether he *was* a polygamist, but rather seemed content to rest his case on his belief that he had a constitutional right to *be* a polygamist.

21. Given the specific nature of this defense, some question arose in the court's proceedings as to whether it was thus appropriate to refer to the women as Green's “wives.” For purposes of convenience and clarity, I have followed the common pattern of referring to the women as Green's wives.

marrying each of his wives in Utah and then almost immediately obtaining divorce decrees for those marriages in Nevada. Though the nature of the lifestyle arrangements and relationships never appeared to change from before or after the divorces, Green was thus able to claim that, though he was still living with five women who each called themselves his “wives,” he was legally nothing more than a monogamist. In explaining this pattern to Matt Lauer on NBC’s *Today* show, Green declared that “I’ve never had . . . more than one [marriage license] at the same time. I always terminated one in a legal divorce before I got a new one.”<sup>22</sup>

Given the fact that Green and his wives still considered themselves spiritually bound through the power of the religious ceremonies, Green thus believed that he had effectively navigated the perceived dichotomy between the civil validity of a marriage and the spiritual validity of a marriage. He therefore testified at trial that “[i]n the eyes of the government, I consider myself single. . . . In the eyes of God, I consider myself married.”<sup>23</sup> The resultant battle of semantics that dominated the ensuing prosecution is perhaps best exemplified by the following colloquy that arose during the cross-examination of Tom Green by co-prosecutor Monte Stewart:

Q (from co-prosecutor Monte Stewart): “Isn’t it true that Linda Kunz is your wife when it suits your purposes and not your wife when it doesn’t suit your purposes?”

A (from Green): “Linda Green is my wife by my definition all the time, but by the government’s definition I don’t think she is my wife.”<sup>24</sup>

Though the prosecutors made some arguments as to the actual validity of this scheme of marriages and divorces,<sup>25</sup> the legal foundation upon which the prosecution ultimately sought to close Green’s putative legal loophole rested on a use of Utah’s little-used common-law marriage

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22. *Today* (NBC television broadcast, May 21, 2001). For a chronological breakdown of the extraordinarily complicated chain of marriages and divorces that was thus ultimately involved in the case, see *State v. Green*, No. 001600036 at 2-4 (4th Dist. Ct. Utah July 10, 2000) (memorandum decision). For a concise listing of the specific states and counties wherein each marriage and divorce was effectuated, see *State v. Green*, No. 001600036 at 3-4 (The State’s Memorandum in Support of Its First Motion in Limine) (4th Dist. Ct. Utah, Oct. 17, 2000).

23. *Polygamist Denies Charges*, THE ORLANDO SENTINEL, May 19, 2001, at A21.

24. Cantera & Vigh, *supra* note 17, at A1.

25. Prosecutor David Leavitt thus complained to the court that “Green has intentionally made very complex his legal relationships to his wives . . . . He has done so exactly to make any bigamy prosecution very difficult.” Michael Janofsky, *Polygamy Case Raises Thorny Issues*, CHICAGO TRIBUNE, May 15, 2001, at N9. Co-prosecutor Monte Stewart repeatedly referred to the divorces as “sham[s]” that were part of a “continuing criminal enterprise.” Greg Burton, *Polygamy Case Set for Courtroom Showdown*, THE PLAIN DEALER, May 21, 2000, at 24A.

statute.<sup>26</sup> Like most such statutes, Utah's common-law marriage statute allows for the solemnization as marriages of relationships that have not passed through the typical marriage process under the laws of the state. The prosecutors realized that, based on the unique, ongoing, and ultimately marriage-like relationships that Tom Green continued to enjoy with each of his wives, it would therefore be possible to establish that a state of legal marriage had continued to exist under the terms of the common-law marriage statute—Nevada divorce decrees notwithstanding. If such a marriage could be established and solemnized with one of the wives, it would then be possible to obtain a conviction for bigamy based on Tom Green's relationships with the other four wives.<sup>27</sup> In this manner, the fact that Green and his wives had obtained legal divorces would ultimately prove irrelevant—as long as the state could establish that first common-law marriage.

The prosecutors thus filed a motion before a state district court judge requesting that the court issue an order recognizing a valid common-law marriage between either Tom Green and “head wife” Linda Kunz or between Tom Green and second polygamous wife Shirley Beagley.<sup>28</sup>

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26. UTAH CODE ANN. § 30-1-4.5 (1998) (hereinafter referred to in the text as “the common-law marriage statute”) states in relevant part that:

(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between two consenting parties who:

- a. are capable of giving consent;
- b. are legally capable of entering a solemnized marriage under the provisions of this chapter;
- c. have cohabited;
- d. mutually assume marital rights, duties, and obligations; and
- e. who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

27. *Id.* at 12. Utah's bigamy statute is found at UTAH CODE ANN. § 76-7-101 (1999). It states, in relevant part, that:

(1) A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.

It is important to note here that the elements required to establish a conviction for bigamy are much less detailed than are those that are required to create a common-law marriage. Thus, whereas a party seeking to establish a common-law marriage must show consent, legal capability, cohabitation, an assumption of marital rights, duties, and obligations, *and* the creation and maintenance of a uniform marital reputation, a prosecutor seeking a conviction on a charge of bigamy need *only establish extra-marital cohabitation*. Thus, if the Green prosecutors could first establish a valid common-law marriage, the resultant burden that would have to be met at a trial for bigamy would simply be that of showing that Green had continued to *cohabit* with each of the other wives—irregardless of whether he was in fact still married to any of them.

28. Although it is not entirely clear why the State chose to focus its efforts on these two particular relationships, it is highly instructive to note that in the eventual ruling on the motion, Judge Eyre stated that “[t]he Court notes that although the State has chosen to find a valid marriage without solemnization between the Defendant and Linda Kunz, the Defendant's actions relative to a valid marriage without solemnization could conceivably apply to any of his cohabitants.” *State v. Green*, No. 001600036 at 10 (4th Dist. Ct. Utah, July 10, 2000) (memorandum decision).

This motion was bitterly contested, with separate legal counsel being retained by Tom Green and by his two putatively common-law wives.<sup>29</sup> The motion was ultimately successful, however, and on July 10, 2000, Judge Donald J. Eyre issued a retroactive<sup>30</sup> order declaring that a valid common-law marriage had existed between Tom Green and Linda Kunz as of November 2, 1995.<sup>31</sup> With the now solemnized marriage to Linda Kunz as a foundation, Judge Eyre then found probable cause to bind over Tom Green on charges that his relationships to his other four “wives” were in violation of Utah’s anti-bigamy statute.<sup>32</sup>

Based upon these grounds, the case went to trial, and on May 18, 2001, Tom Green was convicted by a jury of four counts of bigamy and one count of criminal nonsupport.<sup>33</sup> On August 24, 2001, he was sentenced to five years in state prison.<sup>34</sup> In October 2001, Green filed notice of appeal with the Utah Court of Appeals, alleging twenty-six separate trial errors.<sup>35</sup> At the time of this writing, the case is still pending before the appellate courts.

#### IV. THE FUNDAMENTAL FLAWS IN THE COMMON-LAW/BIGAMY CONSTRUCT

Regardless of the eventual outcome of the appeal, it seems clear that

29. John Bucher represented Tom Green, while longtime polygamist lawyer Grant W.P. Morrison represented Linda Kunz and Shirley Beagley. *Id.* at 1.

30. Possible questions about the retroactive nature of the order were answered in the order with reference to the Utah Supreme Court’s holding in *Whyte v. Blair*, 885 P.2d 791, 793 (Utah 1994), wherein the court held that “if the elements of section 30-1-4.5 subsections (1)(a) through (e) are established, then a lawful marriage may be found to have existed prior to the entry of the order by a court or administrative body.”

31. The selection of November 2, 1995 as the date on which the common-law marriage was determined to have begun seems to have been based on the fact that Tom Green’s official divorce from his last remaining state-sanctioned marriage (to Hannah Bjorkman) had been obtained on November 1, 1995. Given that the common-law marriage statute requires that the parties be legally capable of obtaining consent, the court therefore determined that Tom Green and Linda Kunz would not have been legally capable of giving consent to a valid common-law marriage until Tom was officially divorced from all previous wives and therefore capable of entering into a valid common-law marriage with a new wife. *State v. Green*, No. 001600036 at 9 (4th Dist. Ct. Utah July 10, 2000) (memorandum decision). This raises the interesting theoretical question of what would have been the status of Tom’s common-law marriage to Linda Kunz had he then officially married another woman in January 1996, but such a question falls victim to the practical reality of the situation. Under such a scenario, the state’s impetus for establishing the common-law marriage—to successfully prosecute Tom Green for bigamy—would have been rendered moot and unnecessary by virtue of the fact that the a bigamy prosecution could now simply be based on the officially solemnized marriage to the new wife.

32. *Id.* at 11-12.

33. Cantera & Vigh, *supra* note 17, at A1.

34. Geoffrey Fattah, *Green Heads to Utah Prison*, THE DESERET NEWS, Aug. 25, 2001, at A1.

35. Kevin Cantera, *Green Appeals Conviction for Bigamy, Nonsupport*, THE SALT LAKE TRIBUNE, Oct. 26, 2001, at B2.



the core legal foundation of the Tom Green prosecution rested on shaky legal ground. In order to overcome Green's protestations of actual innocence to the charges of bigamy, the prosecutors were forced to combine the state's common-law marriage and bigamy statutes in a manner that had heretofore never been attempted. This novel usage of these two disparate statutes presents several problems. First, the use of the common-law marriage statute to effectuate the eventual ratification of—and prosecution for—a polygamous marriage stands in violation of the legislative intent surrounding the passage of the common-law marriage statute. Second, the use of the common-law marriage statute to establish the foundation for a prosecution on charges of bigamy necessarily presupposes a state of mens rea on the part of the defendant that is pragmatically impossible. Third, the unique combination of these two statutes sets a dangerous, marriage-weakening precedent whereby other seemingly innocent behaviors could in fact be prosecuted under the common-law marriage/bigamy construct.

#### *A. The Common-law Marriage Statute*

The first significant problem with the prosecution's case against Tom Green lies in the fact that its statutory foundation is predicated on a usage of the common-law marriage statute in a manner that was specifically rejected by the Utah State Legislature.

Utah's common-law marriage statute, originally proposed as Senate Bill 156,<sup>36</sup> was passed by the legislature in February 1987.<sup>37</sup> As explained by Senator Stephen Reese (the bill's senate sponsor) in its introduction on the floor of the Utah State Senate, the bill was designed to combat a very specific type of welfare fraud. Specifically, the state had become concerned about the large number of cases in which a man and a woman would live together in a quasi-marital relationship. In these cases, the couple would share a home, raise a family, and hold themselves out to the community as man and wife, yet never actually solemnize their relationship as a legally ratified marriage. By doing so, the woman could claim that she was a single mother and qualify for the accordant welfare benefits, all the while enjoying the benefits of living with her income-earning partner in the unofficial, quasi-marital relationship.

Prompted by a report from the Utah Department of Social Services about this type of welfare fraud, Senator Rees proposed that Utah adopt a common-law marriage statute. The express purpose of this proposal was

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36. Utah S. 47th Legis. Sess. Day 36 (Feb. 16, 1987 afternoon sess.).

37. UTAH CODE ANN. § 30-1-4.5 (1998).

to allow the state to have these quasi-marital relationships ratified as marriages, thereby precluding these couples from taking advantage of the state welfare system in this fraudulent manner. In advocating passage of this bill before the Utah State Senate, Senator Rees therefore testified that

[O]ne of the most glaring problems that the department of social services has had over the years has been the problem where you have a man and woman living together—the man having a good paying job and the woman receiving . . . welfare and the Department of Social Services has not been able to . . . count the man's income in figuring the eligibility of the recipients. . . . In efforts to try and plug up this . . . loophole we've looked at many, many alternatives. . . . [I]t's been decided that the only way to address these problems is . . . to institute . . . a common-law marriage, and that's what this bill does. It's estimated that there is several hundred thousand dollars a year that can be saved, and when you include federal money, we're looking at over a million dollars . . . that can be saved because it is further estimated that there are about three hundred plus situations that we're looking at the present time. If you were to talk to some of the secretaries in the Department of Social Services . . . they would tell you that this is a complaint that we get very often, and a complaint that maybe . . . gives a lot of bad publicity to the Department of Social Service because of the abuse that takes place.<sup>38</sup>

When questioned about various scenarios under which the bill might or might not apply, Senator Rees repeatedly emphasized the specific nature and intent of the bill, explaining that, due to such concerns, the bill had been narrowly tailored so as to *only* cover situations involving the specific type of welfare fraud that was being targeted by the bill.<sup>39</sup> In making this point, Senator Rees specifically acknowledged that though “there has been some concern about . . . the number being included and who's not included,” such concerns could be alleviated by reference to the fact that “the main enforcement will come into play in the department of social services.”<sup>40</sup>

It is important to note that in terms of both timing and purpose, Utah's common-law marriage statute stands as an anachronistic anomaly in the canon of state common-law marriage provisions. Perhaps the most basic manner in which Utah's statute differs from other such statutes has to do with its timing. The overwhelming majority of the state common-

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38. Utah S. 47th Legis. Sess. *supra* note 36. One commentator has specifically noted that the Legislature expected to reap savings of at least \$323,500 a year from the bill. David F. Crabtree, *Development, Recognition of Common-Law Marriages*, 1988 UTAH L. REV. 273, 281 n.43.

39. Utah S. 47th Legis. Sess. *supra* note 36.

40. *Id.*

law marriage statutes were passed in the nineteenth century. Beginning with New York's passage of a common-law marriage statute in 1809,<sup>41</sup> thirty-four states passed such statutes by the turn of the century.<sup>42</sup> The practice soon fell into disfavor, however, and by 1987, the year in which Utah passed its law, only a dozen states still acknowledged common-law marriages.<sup>43</sup> As of 2000, only ten states still recognized such marriages.<sup>44</sup> Regarding Utah's anomalous place amidst this sharp downward trend, it is important to note that among the states that have passed such a law, Utah is the *only* state to have done so in the twentieth century.<sup>45</sup>

Perhaps the clearest explanation for why Utah could so clearly deviate from the common-law trend has to do with the unique intentions behind Utah's particular statute. As opposed to the explicit, welfare-fraud oriented nature of Utah's statute, the typical nineteenth century common-law marriage statute was constructed to make it easier for distance and procedure-precluded frontier couples to obtain the benefits of marriage.<sup>46</sup> As the modern transportation and social system developed and progressed, however, the impediments of distance and procedure that had prevented many of these couples from being able to obtain a valid marriage license gradually disappeared,<sup>47</sup> thereby helping to explain the downward trend in terms of states accepting common-law marriages.

By virtue of its timeframe and intent, Utah's common-law marriage statute thus stands in stark contrast to the ostensibly similar statutes passed by other states, meaning that consideration of this statute and of its uses must be strictly tailored so as to recognize its unique, welfare-fraud oriented nature. When the potential for a possible application of Utah's common-law marriage statute to the polygamous context was

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41. *Fenton v. Reed*, 4 Johns. 52, 53 (N.Y. Sup. Ct. 1809).

42. Crabtree, *supra* note 38, at 275 n.12 (listing the thirty-four states that, as of 1934, still had common-law marriage statutes).

43. *Kelley v. Kelley*, 9 P.3d 171, 183 (Utah Ct. App. 2000) (Jackson, J. dissenting).

44. *Id.*

45. Robyn E. Blumner, *A Common Law Marriage Is Not a Consensual Act*, ST. PETERSBURG TIMES, June 3, 2001, at D1.

46. *Kelley*, 9 P.3d at 183 (explaining the development of the common-law marriage doctrine by noting that "[i]n medieval England and the expanding American frontier it was virtually impossible for couples wanting to marry to find authorized persons to issue marriage licenses and perform ceremonies. . . Common-law marriage was viewed as one means of solving these procedural difficulties.") (citations omitted). See also Blumer, *supra* note 45, at D1 (noting that "[t]here may have once been a valid justification for recognizing common-law marriage. During the covered wagon days, when people were often many days['] travel from the nearest place of public record or minister, common-law marriage was a pragmatic recognition of a pioneer's reality. It helped to protect rights of property and inheritance.").

47. *Kelley*, 9 P.3d at 183 (noting that "[i]n modern America, the impediments to ceremonial marriage present in life on the frontier have long since disappeared. Transportation, communication, and hosts of legal administrators are readily available to help those wanting to marry.").

presented to the 1987 legislature, such an application was openly rejected as a legal impossibility. In the February 17, 1987 morning session of the Utah State Senate, Senator Darrel Renstrom repeatedly voiced concern that passage of Senate Bill 156 would in effect “countenance” as “marriages” the otherwise non-valid relationships enjoyed by many of the polygamists in southern Utah. Senator Renstrom thus stated that

We do know and have a number of people in this state that are polygamists and are living out of wedlock with three or four different women in the same household and he is representing, the man and woman are representing that they are husband and wife. He's representing that these four are my wives . . . he's never been legally married but he's living with four women . . . is the State of Utah then in essence saying or giving give him some color of authority to say now the State has given me four wives? . . . I would think at first blush as I look at this bill, if I indeed were a polygamist living with three or four women, that I would welcome this bill and say that the State of Utah has just sanctioned my polygamy<sup>48</sup>

In response to this concern, Senator Rees stated that such an application to a polygamous relationship would be impossible. Explaining this impossibility, Senator Rees carefully noted that the terms of Senate Bill 156 require that the two individuals who enter into the common-law relationship be legally able to do so. Based on the fact that polygamous relationships are in fact illegal, Senator Rees thus stressed that the common-law marriage statute would not ever be able to be used to ratify a polygamous relationship.<sup>49</sup> When the bill came up again for debate two days later, Senator Renstrom again objected to its passage on these grounds, wondering this time whether a court could come in and determine that a polygamist and one of his unofficial wives were in fact married. Senator Rees responded by stating that, after having consulted with counsel,

it was clear that the passage of the bill doesn't legalize polygamy—the bill requires that two persons must be legally capable of being married. So I guess then that if such a situation arose we would have to determine which one was involved first . . . being married to one, none of the others would be considered to be legally capable of being considered married, so it would in no way promote or condone polygamy of any type.<sup>50</sup>

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48. Utah S. 47th Legis. Sess. Day 37 (Feb. 17, 1987 morning sess.).

49. *Id.* Interestingly, Senator Renstrom then continued his objection by questioning Senator Rees as to who would be allowed to then “choose which one of them is (the polygamist husband's) wife,” to which Senator Rees responded by stating that “that's not my problem, that's his” (presumably referring to the polygamist, and not to state officials or prosecutors). *Id.*

50. The Utah S. 47th Legis. Sess. Day 39 (Feb. 19, 1987 morning sess.). Closely tied to this,

Having again received this assurance that the bill would not be used to ratify polygamist marriages, Senator Renstrom and others who shared his objection finally relented and agreed to vote for the bill.<sup>51</sup>

Unfortunately for Tom Green, Senator Renstrom and his like-minded colleagues in the senate did not codify the explained answers to their concerns and thereby insert explicit language into the bill that would either limit its application or confine its enforcement to the Department of Social Services. As a result, the bill that was passed contained such non-specific wording that its subsequent applications have been disparate and wide-ranging.

The bill's ambiguity, in part, caused Judge Norman Jackson of the Utah Court of Appeals to strongly criticize it in his dissent in *Kelley v. Kelley*.<sup>52</sup> In *Kelley*, a husband and wife had worried about the financial impact the sale of the husband's company would have on their stockholdings. To minimize the financial risk involved, the husband and wife agreed to place the stock in the wife's name and obtain a legal divorce, while nevertheless agreeing at the same time to continue living as they had before.<sup>53</sup> Several years later, problems in the relationship caused the parties to separate. The (ex-) wife then sued for a modified divorce decree based on the premise that the parties had continued to live in a state of common-law marriage. Both the trial court and the Court of Appeals agreed and declared that such a marriage had in fact existed.<sup>54</sup>

In dissenting from the Court of Appeals' majority ruling, Judge Jackson first noted the historical trends *away* from recognizing common-law marriages. Given this trend, he argued, it would seem strange for a legislature to choose to take a position contrary to this overwhelming trend without having a clear and compelling reason to do so.<sup>55</sup> According to Judge Jackson's analysis, the singular purpose given by the Utah legislature—that of pre-empting a specific, narrow type of welfare

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the "consent" aspect of why such a usage would be legally impossible, would be an argument based upon § 30-1-4.5(1)'s usage of the word "contract." Specifically, subsection (1) states that a common-law marriage is established when there is a "*contract* between two consenting parties" to live in a state of common-law marriage. *Id.* (emphasis added). Under this line of analysis, the common-law marriage statute would therefore be inapplicable to a polygamist marriage insofar as it is legally impermissible to contract to do something illegal. Given that a second or third marriage would be illegal under Utah law, it therefore seems clear that one could not "contract" to create such a marriage under the terms envisioned by the common-law marriage statute.

51. Utah S. 47th Legis. Sess. Day 39 (Feb. 19, 1987 morning sess.).

52. *Kelley*, 9 P.3d at 182.

53. In fact, such was the clarity of the Kelley's intention to maintain the status quo in terms of their relationship that they managed to keep the fact of their divorce secret from their children or associates. *Id.* at 174-75.

54. *Id.* at 171-181.

55. *Id.* at 183 (noting with some puzzlement that the legislature has chosen to "inject[ ] the Utah judiciary into a debate that has raged for two centuries.").

fraud<sup>56</sup>—was clearly insufficient to warrant such a radical departure from common-law trends in the area of family law.<sup>57</sup> When considered alongside its potential impact on a number of other fields of law, however, this move seems particularly foolhardy. Judge Jackson noted the potentially wide-ranging implications of the statute when he argued that there is a particular

concern about which the statute is silent, i.e., who may file a petition to create a common-law marriage . . . . This statutory silence leaves an opening for . . . third parties to initiate a marriage recognition proceeding for the couple. Potential third parties include insurers, heirs, creditors, prosecutors, tax collectors, and those who have contractual relationships with the cohabitants. See *In re Marriage of Gonzalez*, 2000 UT 28, ¶¶1-4, 1 P.3d 1074 (plurality) (involving intervention of issuer of homeowner's insurance policy in putative wife's attempt to establish common-law marriage to insured); *Whyte v. Blair*, 885 P.2d 791, 792 (Utah 1994) (involving participation of insurance company in case in which putative husband tried to establish common-law marriage to insured).<sup>58</sup>

In effect, the statutory silence as to initiatory rights or responsibilities for initiating the common-law marriage proceedings has allowed a string of interested parties to take what was at its inception a narrowly tailored remedy for a specific administrative law problem and turn it into a catch-all means of creating and imposing legally binding relationships on parties who might very well have been openly and aggressively insistent that such a relationship did *not* in fact exist. Insurance companies have used it, litigious decedents fighting in probate court have used it, even convicted sex offenders have used it.<sup>59</sup>

56. *Id.* at 183 (noting that “[t]he legislative history behind Utah’s common-law marriage statute reveals a narrow, singular focus: preventing welfare fraud to save money for the various administrative agencies involved.”).

57. In discussing the implications of the statute with The Salt Lake Tribune, Judge Jackson said that “[m]y concern is the institution of marriage is under attack from many sides. This is just another way to denigrate marriage and make it so that anybody who goes out and lives together can say that constitutes a marriage . . . . [t]hose relationships are generally frowned on by society, and here we are elevating them by giving them status.” Hilary Groutage Smith, *Common-Law Marriage Still on Books, But It Doesn’t Mean Much*, THE SALT LAKE TRIBUNE, Aug. 14, 2000, at A1.

58. *Kelley*, 9 P.3d at 185. Among the other attempted uses of the common-law marriage statute noted by Judge Jackson was a case wherein “a convicted child sex abuser had argued that he had a common-law marriage to his victim’s mother” so as to attempt to “secure probation under a statute allowing probation in limited circumstances for a child’s stepparent.” *Id.* (citation omitted).

59. Interestingly, perhaps the one body that has seemingly *not* used it has been the Department of Social Services. After conducting a review of the statute in conjunction with the Tom Green case, *The Salt Lake Tribune* concluded that there is no evidence that the statute has ever been used to disqualify a fraudulently unmarried couple from receiving benefits. “Today, people who apply for welfare benefits are simply asked their marital status. Answers are not questioned,” said Curt Stewart, state Department of Workforce Services spokesman, “and no one knows whether the

In the present case, the state used it, and did so for a purpose that was in violation of the legislature's intent.<sup>60</sup> Though it is expected that pieces of legislation will eventually be used in manners unforeseen by the sponsors, it is nevertheless troubling when such usages stand in direct contradiction to the stated legislative intent. As repeatedly emphasized by its sponsors, Utah's common-law marriage statute was intended to serve as a narrowly applicable administrative remedy to combat welfare fraud. Further, it was not intended to engender official ratification of the quasi-polygamous relationships that exist in rural Utah. Therefore, its usage in this manner was ill-advised and fundamentally flawed.

### *B. Mens Rea and Bigamy*

The second problem with the prosecution's case against Tom Green lies in the strained manner in which the prosecution was forced to establish the mens rea requirement on the bigamy charges.

Despite common perceptions, Utah's bigamy statute does not in fact require a second marriage. Instead, the bigamy statute simply states that the prosecution must establish that an already married first party either "purports to marry another person *or* cohabits with another person."<sup>61</sup> In the present context, the prosecutors therefore simply needed to establish that Tom Green had "cohabited"<sup>62</sup> with his other wives in a state of common-law marriage to Linda Kunz.<sup>63</sup> No proof of second marriage

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law has ever saved the state a cent." Smith, *supra* note 57, at A1 (internal quotes omitted). What is perhaps even more striking is to note that, even if the state had been concerned enough about welfare-fraud to attempt to crack-down on it, it is not entirely clear that the common-law marriage statute was even necessary. According to one columnist, "the loophole never existed since welfare rules already excluded benefits where there was an adult male wage-earner in the household." Blummer, *supra* note 45, at D1.

60. Though it is clear that, in its discussions regarding the possible applications to polygamy, the legislature was contemplating a somewhat different scenario—those situations whereby a polygamist would attempt to use the statute to ratify his marriages, rather than situations such as the Green litigation in which the state as a party was attempting to ratify those marriages for the polygamist—such a distinction nevertheless fails to alleviate the fact that the specific concerns regarding the bill's usage in the polygamy context were put down through the insistence by the bill's sponsor that "the main enforcement would come from the Department of Social Services," and that it would be the polygamist husband (*not* the state) that would be ultimately choosing which—if any—of his polygamous wives would be recognized as a common-law wife in the eyes of the law. Utah S. 47th Legis. Sess. *supra* note 49.

61. UTAH CODE ANN. § 76-7-101(1) (1999) (emphasis added).

62. Regarding the legal definition of cohabitation, Judge Eyre noted that "[i]n *Haddow v. Haddow*, 707 P.2d 669 (Utah 1985), the [Utah Supreme] Court defined cohabitation to include two elements: common residency and sexual contact evidencing a conjugal association. Common residency means the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time. *Id.* Sexual contact means participation in a relatively permanent sexual relationship akin to that generally existing between husband and wife. *Id.*" State v. Green, No. 001600036 at 8 (4th Dist. Ct. Utah July 10, 2000) (memorandum decision).

63. Given the retroactive capability of the common-law marriage statute, the relevant inquiry

was required.

The absence of a second-marriage requirement in the Utah bigamy statute is not as unique as it might at first seem. A review of the various states' criminal codes shows that of the forty-four states that have explicitly criminalized bigamy, only twenty of them explicitly require proof of a second marriage to establish a conviction for bigamy.<sup>64</sup> By contrast, nineteen states allow a conviction upon a showing of *either* a second marriage or of some other element (typically cohabitation or a showing that the party "purported to marry") in order to establish a conviction for bigamy,<sup>65</sup> while only five states make no mention of a second marriage in their definition of criminal bigamy.<sup>66</sup>

What was particularly difficult about the use of Utah's bigamy statute in a prosecution of Tom Green, however, was the specific nature of its mens rea requirement. Under the terms of the Utah bigamy statute, the prosecution must establish that the defendant "knew" that the first marriage was valid.<sup>67</sup> This specific mens rea requirement is buttressed by the statute's explicit provision for a mens rea related affirmative defense, wherein "[i]t shall be a defense to bigamy that the accused reasonably believed he and the other person were legally eligible to

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therefore focused on whether Tom Green had cohabited with his other wives subsequent to the November 2, 1995 starting point for his common-law marriage to Linda Kunz.

64. ARIZ. REV. STAT. ANN. § 13-3606 (West 2001); CAL. PENAL CODE § 281 (West 2001); FLA. STAT. ANN. § 826.01 (West 2001); IDAHO CODE § 18-1101 (Michie 2000); IND. CODE ANN. § 35-46-1-2 (West 2001); IOWA CODE ANN. § 726.1 (West 2001); MD. ANN. CODE. ART. 27, § 18 (1957); MICH. COMP. LAWS ANN. § 551.5 (West 2001); MINN. STAT. ANN. § 609.355 (West 2001); MISS. CODE ANN. § 97-29-13 (2001); NEB. REV. STAT. § 28-701 (1977); NEV. REV. STAT. ANN. 201.160 (Michie 2001); N.H. REV. STAT. ANN. § 639:1 (2001); N.M. STAT. ANN. § 30-10-1 (Michie 2001); N.C. GEN. STAT. § 14-183 (2001); OKLA. STAT. ANN. TIT. 21 § 881 (West 2001); S.C. CODE ANN. § 16-15-10 (Law Co-op. 2001); S.D. CODIFIED LAWS § 22-22-15 (Michie 2001); W. VA. CODE ANN. § 61-8-1 (Michie 2000); WYO. STAT. ANN. § 6-4-101 (Michie 2001).

65. See ALA. CODE § 13A-13-1 (2001); COLO. REV. STAT. ANN. § 18-6-201 (West 2001); CONN. GEN. STAT. ANN. § 53A-190 (West 2001); DEL. CODE ANN. TIT. 11, § 1001 (2000); GA. CODE ANN. § 16-6-20 (2001); 720 ILL. COMP. STAT. ANN. 5/11-12 (West 2001); KAN. STAT. ANN. § 21-3601 (2000); LA. REV. STAT. ANN. § 14:76 (West 2001); ME. REV. STAT. ANN. TIT 17-A, § 551 (West 2001); MONT. CODE ANN. § 45-5-611 (2001); N.J. STAT. ANN. § 2C: 24-1 (West 2001); N.Y. PENAL LAW § 255.15 (McKinney 2001); OHIO REV. CODE ANN. § 2919.01 (West 2001); OR. REV. STAT. § 163.515 (1999); 18 PA. CONS. STAT. ANN. § 4301 (West 2001); R.I. GEN. LAWS § 11-6-1 (2000); VT. STAT. ANN. TIT. 13 § 206 (2000); WASH. REV. CODE ANN. § 9A.64.010 (West 2001); WIS. STAT. ANN. § 944.05 (West 2001).

66. ARK. CODE ANN. § 5-26-201 (Michie 2000); KY. REV. STAT. ANN. § 530.010 (Banks-Baldwin 2001); MO. ANN. STAT. § 568.010 (West 2000); TENN. CODE ANN. § 39-15-301 (2000); UTAH CODE ANN. § 76-7-101 (2001).

67. Specifically, Utah's bigamy statute states that a person is "guilty of bigamy when, *knowing* he has a husband or wife or *knowing* the other person has a husband or wife, the person purports to marry another person or cohabits with another person." UTAH CODE ANN. § 76-7-101(1) (1999) (emphasis added). The language employed by most other state statutes is similar. DEL. CODE. ANN. TIT. 11, § 1001 (2000) ("a person is guilty of bigamy when the person contracts or purports to contract a marriage with another person *knowing* the person has a living spouse, or *knowing* the other person has a living spouse.") (emphasis added).



remarry.”<sup>68</sup>

Given the staccato-like, extraordinarily brief periods of time in which Tom Green actually held valid marriage licenses with his various wives, it does not seem clear how the mens rea requirement could ever be established in this case. It is seemingly for this reason that the prosecution went to such lengths to establish the common-law marriage with Linda Kunz. Even assuming that the common-law marriage was appropriately established, and acknowledging upfront that the common-law marriage statute can be retroactively applied in the administrative or civil contexts, it still does not follow that Tom Green actually *knew* about the statute and its application during the crucial 1995-2000 period for which he was charged with bigamy. Further, it certainly does not follow that Tom Green knew about it to such a degree so as to satisfy the more strict protections afforded to criminal defendants.

In order to establish that Tom Green *knew* that he was married during the 1995-2000 period sufficient to support a criminal conviction, the terms of Utah’s bigamy statute therefore required the prosecution to prove:

1. that Tom Green *knew* beyond a reasonable doubt that there was a common-law marriage statute capable of solemnizing his relationship with one of the wives;
2. that Tom Green *knew* beyond a reasonable doubt that he had in fact met each of its requirements;
3. that Tom Green *knew* beyond a reasonable doubt which relationship it would eventually be applied to; and
4. and that Tom Green *knew* beyond a reasonable doubt that the common-law marriage statute’s retroactive capabilities would allow it to toll from the day after his last legal divorce.

Without proof—beyond a reasonable doubt—of each of these elements, a prosecution of Tom Green would necessarily fail. Therefore, in proving this crucial element of mens rea, the prosecution thus faced the daunting requirement of having to retroactively prove a man’s knowledge about the result of a future court proceeding. The prosecution did this by relying in large part upon proof that they claimed showed that, among his many activities, Tom Green was actually a capable legal scholar with a very specific knowledge of the workings of Utah’s common-law marriage statute. Specifically, the prosecution showed that Tom Green had done some work in the late 1980’s and 1990’s as a paralegal. The prosecution then introduced as evidence a letter that Tom

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68. UTAH CODE ANN. § 76-7-101(3) (1999).

Green had written to Dave Leavitt in the late 1990's. This letter, written by Tom Green after he had learned of Dave Leavitt's interest in pursuing a prosecution on bigamy charges, contains a carefully detailed exposition of why the common-law marriage statute would not legally be applicable to Tom Green's situation. Based on this letter, the prosecution attempted to show that Green was aware of the common-law marriage statute, that he was aware of how it worked, and that, as a capable paralegal, he therefore would have known that it could one day be applied to him.

The basic premise behind this argument seems fundamentally flawed. The very fact that Tom Green wrote the letter to Dave Leavitt stressing the common-law marriage statute's inapplicability must by nature stand for one of two propositions: it either means that the statute and its application are subjects about which reasonable minds could differ, or it means that Tom Green's legal skills were so faulty that he did not fully understand the statute's crystal clear reality. Under *either* approach, it still cannot be shown that Tom Green knew *beyond a reasonable doubt* that he was in fact married. If the statute's applicability is ambiguous, then he reasonably could have concluded that it did not apply to him. If the statute's applicability was unambiguous, however, then the letter stands as proof that Green did not appreciate its clarity and therefore lacked knowledge of the validity of his heretofore unsolemnized marriage.

Though the prosecution did point out that ignorance of a law is not an appropriate defense to most criminal charges, this argument seems to ultimately act as a red herring. The particular question is not whether Tom Green knew or didn't know about a criminal law. The question before the court was instead whether he knew, sufficient to establish mens rea on a specific-intent crime, that a civil law would be applied in a particular manner. Given the adversarial nature of our judicial system, such a foreknowledge of future judicial action is, for all practical purposes, impossible. Suppose, for example, that there was a popular football star who brutally murdered his wife and her friend in the front yard. Suppose that the killings had happened in such a sloppy and violent manner that all sorts of potentially damning DNA evidence was left at the scene of the crime. Though the football player might very well know that he killed the two people, it would be impossible for him to *know* that he would be guilty of first-degree murder until a jury had actually pronounced a guilty verdict. Lawyers are paid to expose weaknesses in cases; juries and judges are given the freedom to make whatever decision they deem appropriate. *Even if* Tom Green was a competent legal scholar, and even supposing that he had written a letter to Dave Leavitt arguing that the common-law marriage statute *would* apply to him, it is

thus clear from the language of the statute that he still could not “know” that he was married to his first wife until the judge officially pronounced judgment. As such, it does not seem from the facts of this case that *mens rea* could possibly have been established beyond a reasonable doubt.

### *C. Future Applications*

On a more fundamental level, the prosecution of Tom Green using the common-law/bigamy construct carries with it a troubling implication for the legal state of relationships in general. This implication was perhaps best illustrated in a column written by nationally syndicated columnist Steven Chapman. Mr. Chapman began his September 4, 2001 column with the following hypothetical:

Let’s say Tom Green is a handsome young NBA star with a lusty nature and some irresponsible habits. He has prolonged sexual relationships with several different women, and over the years he manages to father a couple dozen children.

In those circumstances, no one would be surprised if Mr. Green’s conduct earned him widespread scorn and ridicule. But we’d be very surprised if it got him sent to jail.

The real Tom Green is a bit different. He’s a pot-bellied, 53-year old salesman, not a glamorous professional athlete. Instead of having affairs with an assortment of partners, he’s been living with five different wives in a polygamous household in the Utah desert, along with most of their 29 children. And no one seems shocked that last week, a Utah court sentenced him to five years in prison on four counts of bigamy. . . .

In an era of sexual freedom, there’s something quaint about prosecuting someone because he insists on formalizing his relationships with multiple women and the children he’s fathered with them. We generally no longer enforce laws against fornication, adultery, and sodomy, which are regarded as infringements on the right of people to live their lives as they choose. Still, though a man may have five girlfriends, the law says spouses are one to a customer.<sup>69</sup>

The hypothetical raised by Mr. Chapman is a compelling one, raising in a common sense fashion the ultimate precedential problem posed by the Tom Green prosecution. The dilemma ultimately posed by the Tom Green prosecution is that if it is now possible to make an unmarried Tom Green into a married bigamist by imposed legislative fiat, then it would

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69. Steve Chapman, *It’s Not Our Place to Persecute Polygamists*, THE BALTIMORE SUN, Sept. 4, 2001, at 13A.

be similarly possible to turn other non-married persons into unwillingly married bigamists. When I asked John Bucher (Tom Green's lead attorney) what the ultimate implication of the Tom Green conviction would be, his almost immediate response was that it would allow prosecutors to go after married men who were having long-term affairs on charges that those affairs actually constituted bigamy. Thus, the potential bigamization of having a mistress.

The potential application of this problem actually extends beyond the specific confines of a mistress situation. Suppose, for example, that we are not dealing with a mistress, but rather with a period of marital separation in which a husband leaves his wife and temporarily lives with an ex-girlfriend. If that arrangement continues for a long enough period of time,<sup>70</sup> and if it can be established that the husband and his ex-girlfriend are cohabiting during that shared residency, then it is entirely conceivable that a court could find the second relationship to be bigamous under the common-law/bigamy construct. Similarly, an unmarried young couple who chooses to live together might be unaware that, if they do not carefully explain to all neighbors, coworkers, and creditors that they are not actually married, the fact that they are in a long term, committed relationship in which others might perceive them to be married could conceivably set them up for an imposed marriage that, under the right circumstances, would potentially expose them to charges of bigamy relating to any future relationships. Finally, many divorced ex-wives still use their ex-husband's last name. If such a woman attempted reconciliation with her husband, only to then separate again, would the husband's subsequent attempt at remarriage become legally invalid by his newfound common-law remarriage to the first wife?

The immediate response to such hypothetical applications might be that such relationships would not satisfy the requirement of § 30-1-4.5(3) that the parties "have acquired a uniform and general reputation as husband and wife."<sup>71</sup> If this truly is the only requirement preventing an application of the common-law marriage statute to such scenarios, then the implications of the statute are frightening indeed. It would mean that

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70. It should be noted here that the period of time necessary to trigger the cohabitation element of the bigamy statute is at this time still undefined. As noted above, the *Haddoway* language simply states that the parties have to consider the place of residence their principal domicile for "more than a temporary or brief period of time." What that means in exact terms is anyone's guess. Using the marital separation situation as our hypothetical, the question would be how long the husband could stay with his old girlfriend before he exceeded the allowable "temporary or brief period of time." Would that be one week? One month? Six months? One year? There is no precise answer yet. It is largely on these grounds that the ACLU has thus decided to file an amicus brief in the Tom Green appeal arguing that Utah's bigamy statute unconstitutionally vague. See Cantera, *supra* note 35, at B2.

71. See *supra* note 26 for the full text of the common-law marriage statute.

parties who are going to divorce now have an active duty to inform all of their creditors, friends, acquaintances, and neighbors that they are divorced, lest the belief of the non-informed parties regarding their marriage later be used to establish that a reconciliation attempt in fact qualified as a marriage. Further, parties who wish to attempt a reconciliation but who are not ready to declare it a marriage would have a similar duty to make sure that all those around them know that the remarriage had not in fact occurred.

From a broader and much more troubling perspective, however, the conjunction of the common-law marriage and bigamy statutes to effectuate the Tom Green prosecution seems to seriously weaken the basic strength of the marriage concept. Ultimately, the chief and most legally significant difference between Tom Green and the typical philandering male is simply one of semantics. The young NBA star who sleeps around refers to the women he sleeps with as his “girlfriends” or as his “women.” By contrast, Tom Green used the word “wife.” It is presumably this word choice that allowed the state to contend that Tom and Linda Green had acquired a “general reputation as man and wife” pursuant to § 30-1-4.5(3). Thus, for no other reason than that Tom Green used the word “wife”—and not the word “girlfriend”—he therefore became eligible for an imposed common-law marriage and for subsequent prosecution on bigamy charges.

Paradoxically, had Tom Green gone on *The Jerry Springer Show* and said that “these are my five girlfriends,” the state would have been definitionally unable to show that Tom Green and Linda Kunz had “acquired a general reputation as husband and wife,” and he would still be a free man today. Had Tom Green gone on *The Jerry Springer Show* and simply said that “these are my five partners,” he’d still be a free man today. Had Tom Green gone on *The Jerry Springer Show* and said that “these are my five companions,” he’d still be a free man today. Instead, Tom Green went on *The Jerry Springer Show* and said that “these are my five wives,” and because of his choice to use that one particular word, he somehow became a bigamist.

The ultimate effect of the state’s prosecution of Tom Green has thus been to take marriage out of the hands of the state and its agents and instead place it squarely in the hands of the people. People are now married based on nothing more concrete than the fact that they say they are. A man is now in jail because he simply used the wrong word to describe his relationships.

Among the rights that society has jealously reserved for its governing bodies has been the right to marry. In no less authoritative a source than the *Reynolds* decision, the United States Supreme Court

stated:

[m]arriage, while from its very nature a sacred obligation, is nevertheless, in . . . civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.<sup>72</sup>

The ultimate implication of the Tom Green prosecution is that marriage is no longer a jealously reserved function of the state. Instead, marriage is a mere description, to be employed or discarded—seemingly at whim—by those who need possess no other authority than the ability to live together and use the words “man” and “wife.” No official authorization is heretofore required.

The danger that the common-law marriage statutes set in the realms of family law have been apparent to many commentators from the legal,<sup>73</sup> academic,<sup>74</sup> and cultural<sup>75</sup> spheres of our society. The decision by the Tom Green prosecutors to use such a statute in pursuit of a criminal prosecution for bigamy only amplifies that danger.

The ultimate absurdity of this attempt was perhaps recognized most clearly by columnist Robyn Blumner in the St. Petersburg Times. In a column published shortly after Green’s conviction, Ms. Blumner wrote as follows:

Leave it to Utah to put a new twist on the shotgun wedding. Rather than getting the reluctant groom to commit at the point of a gun, Utah merely issues a decree of common-law marriage. Men no longer have to utter the phrase “I do”—the state does it for them.<sup>76</sup>

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72. *Reynolds*, 98 U.S. 145 at 165.

73. Judge Norman Jackson could not have been more prescient when he stated to The Salt Lake Tribune that “My concern is the institution of marriage is under attack from many sides. This is just another way to denigrate marriage and make it so that anybody who goes out and lives together can say that constitutes a marriage. Those relationships are generally frowned on by society, and here we are elevating them by giving them status.” Smith, *supra* note 57, at A1.

74. “The question posed by the cohabitation cases is what to make of couples, in a state requiring a license and ceremony, who have obtained neither but come before a court on claims arising from their relationships. . . . In granting a remedy, the court thus establishes that formal marriage is not the only socially approved sexual relationship with rights and duties attaching; an alternative, informal type of marriage may also exist.” Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1839 (1987).

75. “Human relationships, especially those between men and women, are often ambiguous. Common-law marriage draws courts into an impossible morass of second-guessing what men and women intended by living together. How are judges going to be able to do what shelves full of relationship advice books by psychiatrists and Ph.D.’s cannot? In our Mars-Venus world we should be sticking with what we know is true: Getting married is a terrific indicator of one’s intention to be married. It’s a bright line test with no danger of being misunderstood by the state or one’s partner.” Blumner, *supra* note 45, at D1.

76. *Id.*

## V. CONCLUSION

Some might dismiss the relevance of the aforementioned hypothetical applications of the common-law/bigamy construct by arguing that, though such prosecutions might in fact be possible, surely they are not probable enough to warrant serious concern. After all, what would be the incentive for the state to prosecute such potential offenders?

The same question might very well be asked of the Tom Green situation. Just what was the state's incentive to prosecute the father and ostensible financial supporter of twenty-nine children and conceivably put in him in jail for a period of up to twenty years? If it was to stop him from pursuing relationships with underage girls, then the proper response would be to charge him with statutory rape. If it was to stop him from abusing the state's food stamp and welfare system, then the proper response would be to charge him with criminal non-support. If the incentive was to stop him from engaging in live-in relationships with several different women, however, and if such an incentive truly makes one worthy of a bigamy prosecution, then there simply is no reason that the men of the aforementioned hypotheticals would not also be liable for prosecution.

For whatever reason was ultimately persuasive, the state *did* prosecute Tom Green. The resultant legal effort required the prosecutors to (1) take a narrowly proscribed administrative law remedy, (2) apply it to a specific criminal context for which it was expressly designed to be inapplicable, (3) convince a jury that the defendant knew that this administrative law remedy existed and could in fact be so used, and (4) further convince the jury to send that defendant to jail because of that purported knowledge. All this was done while implicitly acknowledging that the retroactively created relationship would in fact have been legal had the defendant simply changed his exact wording when describing his other relationships. In an ultimate ironic twist, it now seems that the government is determined not just to eradicate polygamy where it exists, but also to create it where it doesn't exist in order to then attempt to eradicate it. Whether the appellate courts will countenance such a state-sanctioned plan of imposed marriage creation followed by subsequent prosecution ultimately remains to be seen.

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