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## Why Two in One Flesh? The Western Case for Monogamy over Polygamy

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## WHY *TWO* IN ONE FLESH? THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY

John Witte, Jr.\*

### ABSTRACT

*Questions about polygamy are likely to dominate Western family law in the next generation. Two generations ago, contraception, abortion, and women's rights were the hot topics. This past generation, children's rights and same-sex rights have dominated public deliberation and litigation. On the frontier of Western family law are hard questions about extending the forms of valid marriage to include polygamy and extending the forums of marital governance to include religious and cultural legal systems that countenance polygamy. This Article analyzes the 1,850 year tradition of Western laws against polygamy and the growing constitutional and cultural pressures to reform these laws today. I show how the traditional Western cases against polygamy and same-sex unions used strikingly different arguments drawn from the Bible, nature, rights, harm, and symbolism. I conclude that, because these arguments are so different, Western nations can responsibly hold the line against polygamy, even if they choose to accept same-sex marriage and its accompanying norms of sexual liberty, domestic autonomy, equality, and nondiscrimination. I reject ideological arguments, pro and con, that anti-polygamy laws are a form of traditional Christian morality. I reject slippery slope arguments, from the right and the left, that acceptance of same-sex marriage must inevitably lead to acceptance of polygamous marriage. And I reject arguments from domestic and international sources that religious freedom norms command the accommodation, if not validation, of*

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*religious polygamy. The West may, and in my view should, politely say no to polygamy. An Appendix to the Article provides a detailed guide to different forms and terms of plural marriage discussed and prohibited in the West—real polygamy, constructive polygamy, successive polygamy, and clerical polygamy.*

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## INTRODUCTION

For more than 2,500 years, the Western legal tradition has defined lawful marriage as the union of one man and one woman with the fitness, capacity, and freedom to marry each other. This was the dominant normative teaching of ancient Greeks and Romans, first millennium Jews and Christians, medieval Catholics and early modern Protestants, modern Enlightenment philosophers and liberals, common law and civil law jurists alike. While monogamous marriage is neither good for everyone nor always good, all these traditions have argued, in general and in most cases, monogamous marriage brings essential private goods to the married couple and their children, and vital public goods to society and the state.<sup>1</sup>

For more than 1,850 years, in turn, the Western legal tradition has declared polygamy<sup>2</sup> to be a serious crime; indeed, it was a capital crime in much of the West from the ninth to the nineteenth centuries. While a few Western writers and rulers have allowed polygamy in rare individual cases of urgent personal, political, or social need, virtually all Western writers and legal systems have denounced polygamy as an alternative form of marriage and have denounced the occasional polygamous experiments of early Jewish aristocrats,<sup>3</sup> medieval Muslims,<sup>4</sup> early modern Anabaptists,<sup>5</sup> nineteenth-century Mormons,<sup>6</sup> and modern-day immigrants to the West.<sup>7</sup>

The historical sources commended monogamy on various grounds.<sup>8</sup> The most common argument was that exclusive and enduring monogamous marriages were the best way to ensure paternal certainty and joint parental investment in children, who are born vulnerable and utterly dependent on their parents' mutual care and remain so for many years. Monogamous marriages, furthermore, were the best way to ensure that men and women were treated

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<sup>1</sup> For detailed sources and discussion, see John Witte, Jr., *The Nature of Family, the Family of Nature: The Surprising Liberal Defense of the Traditional Family in the Enlightenment*, 64 EMORY L.J. 591 (2015).

<sup>2</sup> I am using the term "polygamy" colloquially to include both polygyny (one man with two or more wives) and polyandry (one woman with two or more husbands). Classically, the term "polygamy" covered all manner of other forms of plural union, too, some of which had their own distinct names. See the Appendix herein, *infra* notes 357–86 and accompanying text, for an overview of the shifting and confusing terminology.

<sup>3</sup> See JOHN WITTE, JR., *THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY* 36 (2015).

<sup>4</sup> See *id.* at 158–64.

<sup>5</sup> See *id.* at 218–23.

<sup>6</sup> See *id.* at 429–41.

<sup>7</sup> See *infra* notes 63–66, 112–16.

<sup>8</sup> See JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (2d ed. 2012).

with equal dignity and respect within the domestic sphere and that husbands and wives, and parents and children provided each other with mutual support, protection, and edification throughout their lifetimes, adjusted to each person's needs at different stages in the life cycle. This latter logic now applies to same-sex couples, too, who have gained increasing rights in the West in recent years, including the rights to marry, adopt, and parent in some places.

The historical sources condemned polygamy on a number of grounds. The most common argument was that polygamy was unnatural, unfair, and unjust to wives and children—a violation of their fundamental rights in modern parlance.<sup>9</sup> Polygamy, moreover, was also too often the cause, corollary, or consequence of sundry other harms, crimes, and abuses.<sup>10</sup> And polygamy, according to some more recent writers, was a threat to good citizenship, social order, and political stability, even an impediment to the advancement of civilizations toward liberty, equality, and democratic government.<sup>11</sup> For nearly two millennia, the West has thus declared polygamy to be a crime and has had little patience with various arguments raised in its defense.

With the growing liberalization of traditional Western norms of sex, marriage, and family life in recent decades, and with the escalating constitutional battles over same-sex marriage, these traditional Western criminal laws against polygamy are coming under increasing pressure. The first cases challenging the constitutionality of these laws have been filed—with an American federal district court in Utah striking first in declaring partly unconstitutional Utah's state laws against polygamy.<sup>12</sup> The first sustained scholarly arguments for legal toleration if not state recognition of polygamy have been pressed—with various liberals and libertarians, Muslims and Christians, philosophers and social scientists, multiculturalists and counterculturalists finding themselves on the same side.<sup>13</sup> The first wave of popular media portrayals of good polygamous families in America has now

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<sup>9</sup> See *infra* Part II.C.

<sup>10</sup> See *infra* Part II.D.

<sup>11</sup> See WITTE, *supra* note 3, at 389–439 (citing the ideas of Francis Lieber, Arnold Heeren, and Henry Lewis Morgan).

<sup>12</sup> *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013) (granting summary judgment for the Browns and holding that Utah's prohibition on polygamous cohabitation is unconstitutional); see also *Brown v. Herbert*, 850 F. Supp. 2d 1240 (D. Utah 2012) (holding that Kody Brown and his sister wives faced a credible threat of prosecution for bigamy from Utah authorities and thus had standing to press a federal constitutional case against the county attorney for chilling their First Amendment free speech rights in airing their show and advocating their polygamous lifestyle).

<sup>13</sup> See *infra* notes 166–79 and accompanying text.

broken with shows like *Big Love* and *Sister Wives* stoking the cultural imagination and sympathy much like *Ozzie and Harriet* and *Little House on the Prairie* had done for prior generations of urban and rural families.<sup>14</sup> Just as same-sex advocates moved first against the criminalization of sodomy and then for the recognition of same-sex unions and marriage, so pro-polygamy advocates aim first to repeal traditional criminal laws against polygamy and then to include polygamy as an alternative form of valid marriage recognized by the state.<sup>15</sup>

This Article, largely drawn from a new 500-page monograph on the topic,<sup>16</sup> puts these looming questions in larger historical and comparative perspective. In Part I, I analyze the current Western laws against polygamy and the growing constitutional and cultural pressures to reform them. In Part II, I show how the traditional Western cases against polygamy and same-sex unions used strikingly different arguments drawn from the Bible, nature, rights, harm, and symbolism. While same-sex relationships were traditionally prohibited as unnatural sexual taboos that violated biblical norms, polygamy was prohibited as an abusive, harmful, and socially deleterious institution that violated the equal dignity of the marital partners. I conclude that, because these arguments are so different, Western nations can responsibly hold the line against polygamy, even if they choose to accept same-sex marriage and its accompanying norms of sexual liberty, domestic autonomy, equality, and nondiscrimination. I reject ideological arguments, pro and con, that anti-polygamy laws are a form of traditional Christian morality. I reject slippery slope arguments, from the right and the left, that acceptance of same-sex marriage must inevitably lead to acceptance of polygamous marriage. And I reject arguments from domestic and international sources that religious freedom norms command the accommodation, if not validation, of religious polygamists. The West may, and in my view should, politely say no to polygamy.

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<sup>14</sup> See, e.g., JANET BENNION, POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM 167 (2012).

<sup>15</sup> Already in 1972, the National Coalition of Gay Organizations advocated the repeal of “all legislative provisions that restrict the sex or number of persons entering into a marriage unit and exten[sion of] legal benefits of marriage to all persons who cohabit regardless of sex or numbers.” William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 941 (1997) (quoting State Demand No. 8 of the 1972 Gay Rights Platform, available at <http://www.freerepublic.com/focus/news/908140/posts>) (internal quotation mark omitted). My thanks to Professor Risa L. Goluboff for bringing this text to my attention.

<sup>16</sup> WITTE, *supra* note 3.

## I. TRADITIONAL LAWS AGAINST POLYGAMY AND MODERN CHALLENGES

### A. *Polygamy in America Law*

A century and a half ago, American Mormons made international headlines by claiming the religious right to practice polygamy, despite federal criminal laws against it.<sup>17</sup> In four main cases from 1879 to 1890, the United States Supreme Court firmly rejected their claims and threatened to dissolve the Mormon Church if they persisted.<sup>18</sup> Part of the Court's argument was historical: the common law has always defined marriage as monogamous, and to change those rules would be "a return to barbarism."<sup>19</sup> Part of the argument was prudential: religious liberty can never become a license to violate general criminal laws lest chaos ensue.<sup>20</sup> And part of the argument was sociological: monogamous marriage is the cornerstone of civilization, and it cannot be moved without upending our whole Western culture.<sup>21</sup> Contemporaneous European courts and legislatures were equally dismissive of Mormon and other polygamists' claims.<sup>22</sup> These old cases remain the law of the West. Most Mormons renounced polygamy in 1890, and in 1906, Mormon Church leaders made polygamy a ground for excommunication from their church.<sup>23</sup>

The question of religious polygamy is back in the headlines, now involving a Fundamentalist Mormon group that has retained the church's traditional polygamist practices. The Fundamentalist Latter-day Saints (FLDS) are a

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<sup>17</sup> On early Mormon polygamy, see 1 BRIAN C. HALES, *JOSEPH SMITH'S POLYGAMY: HISTORY* (2013); GEORGE D. SMITH, *NAUVOO POLYGAMY* (2008).

<sup>18</sup> *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Reynolds v. United States*, 98 U.S. 145 (1879). For context and case analysis, see SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002).

<sup>19</sup> *Latter-Day Saints*, 136 U.S. at 49.

<sup>20</sup> See *Reynolds*, 98 U.S. at 167 ("To permit [polygamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

<sup>21</sup> See *id.* at 165–66.

<sup>22</sup> For England, see, for example, *Hyde v. Hyde*, [1866] 1 L.R.P. & D. 130; *In re Bethell*, (1888), 38 Ch.D. 220. For Scotland, see F.P. WALTON, *SCOTCH MARRIAGES: REGULAR AND IRREGULAR* (Edinburgh, William Green & Sons 1893); *Polygamous Marriages: Capacity to Contract a Polygamous Marriage and the Concept of the Potentially Polygamous Marriage* 107–12 (Scottish Law Comm'n, Working Paper No. 83, 1982), available at [http://www.scotlawcom.gov.uk/download\\_file/view/845/126/](http://www.scotlawcom.gov.uk/download_file/view/845/126/) [hereinafter *Polygamous Marriages*]. For Ireland, see *Offenses Against the Person Act*, 24 & 25 Vict. c. 100, § 57 (1861). For the Continent, see *infra* notes 94–110.

<sup>23</sup> See IRWIN ALTMAN & JOSEPH GINAT, *POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY* 37–38 (1996); RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 168 (2d ed. 1989).

Mormon splinter group that was created in 1890 and has operated continuously in various subgroups since then. Their early founders rejected the mainline Mormon Church's departure from its traditional polygamous teachings and practices.<sup>24</sup> The FLDS regarded polygamy as a central religious practice and important to their own salvation.<sup>25</sup> Seeking to escape social stigma and criminal prosecution, the church members withdrew into small, isolated, and often religiously controlled communities scattered throughout the thinly populated American West, as well as in Western Canada and Mexico.<sup>26</sup> The largest such community today, under the leadership of Owen Allred, has 7,500 members. Total FLDS membership in America today is roughly 10,000, though exact numbers are elusive.<sup>27</sup> These FLDS communities are now coming into the public eye. The *New York Times Magazine* had a major exposé on them in 1999.<sup>28</sup> *National Geographic* carried a cover story and national television feature on them in 2010.<sup>29</sup> Popular television shows like *Sister Wives* and *Big Love*, popular magazines like *People* and *Time*, and a spate of tell-all biographies and television appearances are making the polygamous lifestyle look mainstream, even edgy and glamorous.<sup>30</sup>

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<sup>24</sup> See Cardell K. Jacobson & Lara Burton, *Prologue to MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL, AND LEGAL ISSUES*, at xvii, xx (Cardell K. Jacobson & Lara Burton eds., 2011) [hereinafter MODERN POLYGAMY].

<sup>25</sup> See Martha Sonntag Bradley, *A Repeat of History: A Comparison of the Short Creek and Eldorado Raids on FLDS*, in MODERN POLYGAMY, *supra* note 24, at 3, 6.

<sup>26</sup> Janet Bennion, *The Many Faces of Polygamy: An Analysis of the Variability in Modern Mormon Fundamentalism in the Intermountain West*, in MODERN POLYGAMY, *supra* note 24, at 163; Jacobson & Burton, *supra* note 24, at xxi–xxii fig.1, map 1 (featuring a map of FLDS communities); see also MARTHA BAILEY & AMY J. KAUFMAN, POLYGAMY IN THE MONOGAMOUS WORLD: MULTICULTURAL CHALLENGES FOR WESTERN LAW AND POLICY 69–132 (2010); BENNION, *supra* note 14, at 25–27; ANGELA CAMPBELL ET AL., POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN—A COLLECTION OF POLICY RESEARCH REPORTS (2005), available at <http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf>.

<sup>27</sup> See Jacobson & Burton, *supra* note 24, at xxi fig.1; see also Joanna Walters, *Fleeing the FLDS: Followers are Abandoning the Notorious Sect in Drove*, ALJAZEERA AM. (Mar. 16, 2015, 5:00 AM ET), <http://america.aljazeera.com/multimedia/2015/3/fleeing-the-flds-sect.html>.

<sup>28</sup> Timothy Egan, *The Persistence of Polygamy*, N.Y. TIMES, Feb. 28, 1999, § 6 (Magazine), at 50, available at <http://www.nytimes.com/1999/02/28/magazine/the-persistence-of-polygamy.html>.

<sup>29</sup> See Scott Anderson, *The Polygamists*, NAT'L GEOGRAPHIC, Feb. 2010, at 34, available at <http://ngm.nationalgeographic.com/2010/02/polygamists/anderson-text>; see also *Inside Polygamy: Life in Bountiful* (National Geographic broadcast Feb. 10, 2010), available at <http://channel.nationalgeographic.com/episodes/inside-polygamy-life-in-bountiful/>.

<sup>30</sup> Belinda Luscombe, *I Do, I Do, I Do, I Do: Polygamy Raises Its Profile in America*, TIME, July 26, 2012, <http://healthland.time.com/2012/07/26/i-do-i-do-i-do-i-do-i-do-polygamy-raises-its-profile-in-america>; Alex Tresniowski, *This is Home*, PEOPLE, Mar. 23, 2009, at 60, available at <http://www.people.com/people/archive/article/0,,20271208,00.html>; see also BAILEY & KAUFMAN, *supra* note 26, at 69–70; BENNION, *supra* note 14.

But, for all this new experimentation, the legal reality is that polygamy is still a crime in every state in the United States, and those who practice it risk criminal punishment.<sup>31</sup> This is precisely what happened on April 3, 2008, when state authorities raided an FLDS community in Eldorado, Texas, called the Yearning for Zion Ranch. The authorities were acting on preliminary evidence that underage girls were being forced into sex and spiritual marriages with men two or three times their age.<sup>32</sup> They eventually removed 439 children from the ranch and put them into state protective custody. They found twelve girls, aged 12–15, who had been forced into marriages, seven of them already with child.<sup>33</sup> They found 262 other children—in 91 of the 146 families on the Ranch—who were themselves victims of child abuse, statutory rape, or neglect, or had witnessed or been exposed to the sexual abuse, assault, or rape of another child within their household.<sup>34</sup> Eleven men, including leader Warren Jeffs, were eventually charged with polygamy, sexual assault, and child abuse. Warren Jeffs's associates have been convicted—with punishments ranging from seven to seventy-five years.<sup>35</sup> Warren Jeffs, the prophet of this FLDS community, was also convicted and sentenced to life imprisonment plus twenty years for forcing two underage girls into spiritual marriages with others and for forcing a fifteen-year-old girl to join his harem and bear his child.<sup>36</sup> He faces further accomplice bigamy charges both in Utah and Texas for presiding over other spiritual marriages of minors in other FLDS communities.<sup>37</sup>

Many of the legal questions raised by the Texas ranch case are easy. Coerced marriages, statutory rape, sexual assault, and other abuses of children

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<sup>31</sup> See, e.g., *State v. Fischer*, 199 P.3d 663, 665 (Ariz. Ct. App. 2008); *State v. Holm*, 137 P.3d 726, 730 (Utah 2006); *State v. Green*, 99 P.3d 820, 822 (Utah 2004); see also Matthew Waller, *No Parole for Former FLDS Bishop*, STANDARD TIMES (Nov. 30, 2012 8:41 PM), <http://www.gosanangelo.com/news/no-parole-for-former-flds-bishop>.

<sup>32</sup> See TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., ELDORADO INVESTIGATION 3 (2008), available at [http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22\\_Eldorado.pdf](http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22_Eldorado.pdf). For an earlier study of marriage demographics in FLDS communities, see ALTMAN & GINAT, *supra* note 23, at app. B 460–78.

<sup>33</sup> TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., *supra* note 32, at 4–5.

<sup>34</sup> *Id.* at 3–4.

<sup>35</sup> See, e.g., *Jessop v. State*, 368 S.W.3d 653, 662 (Tex. App. 2012); *Keate v. State*, No. 03-10-00077-CR, 2012 WL 896200, at \*1 (Tex. App. Mar. 16, 2012).

<sup>36</sup> *Jeffs v. State*, No. 03-11-00568-CR, 2012 WL 1068797, at \*1 (Tex. App. Mar. 29, 2012).

<sup>37</sup> BAILEY & KAUFMAN, *supra* note 26, at 116–20; Linda F. Smith, *Child Protection Law and the FLDS Raid in Texas*, in MODERN POLYGAMY, *supra* note 26, at 301. In a separate case in Utah, Jeffs was convicted as an accessory to two counts of statutory rape for presiding over a compelled spiritual marriage of a fourteen-year-old girl to her cousin in another FLDS community. The case was reversed, however, and remanded for a new trial because of erroneous jury instructions. *State v. Jeffs*, 243 P.3d 1250, 1260 (Utah 2010); see also STEPHEN SINGULAR, WHEN MEN BECOME GODS: MORMON POLYGAMIST WARREN JEFFS, HIS CULT OF FEAR, AND THE WOMEN WHO FOUGHT BACK (2008).

are all serious crimes. The adults on the ranch who committed these crimes, or were complicit in them, are criminals. They have no claim of privacy that will protect them from prosecution and no claim of religious freedom that will excuse them if duly convicted. Dealing with the children, ensuring proper procedures, and sorting out the evidence are all practically messy and emotionally trying questions, but they are not legally hard. The order of the Texas courts to return most of the children who had been seized from their homes during the raid underscores a further elementary legal principle: decisions about child custody and about criminal liability must be done on an individual basis as much as possible.<sup>38</sup>

The harder legal question is whether criminalizing polygamy is still constitutional. Texas criminal law makes marriage to two or more persons at once a felony—a first-degree felony if one of the parties is younger than sixteen.<sup>39</sup> Every other American state has comparable criminal prohibitions on the books against polygamy or bigamy. These criminal prohibitions have been in place in America since its earliest colonial days<sup>40</sup> and have been part of Western criminal law since the third century.<sup>41</sup> Polygamy was, in fact, a capital crime, and American states were still executing a few of the most brazen polygamists until the 1830s, though most convicted polygamists were sent to prison.<sup>42</sup> Can these 1,850-year-old prohibitions on polygamy withstand a challenge that they violate an individual's constitutional rights to privacy and sexual liberty, to marriage and domestic autonomy, and to equal protection and non-discrimination—in addition to the rights to religious liberty?

In the nineteenth century, when the first Mormon cases reached the federal courts on religious liberty grounds alone, none of these additional constitutional rights claims was yet available to pro-polygamy litigants. Now they are, and the Supreme Court has used them to uphold every adult citizen's

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<sup>38</sup> *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*1 (Tex. App. May 22, 2008), *aff'd sub nom. In re Tex. Dep't of Family & Prot. Servs.*, 255 S.W.3d 613 (Tex. 2008).

<sup>39</sup> TEX. PENAL CODE ANN. § 25.01 (West 2011). Texas (and other states like Utah and Colorado with FLDS polygamists) extends the definition of bigamy to include parties who cohabit with, purport to marry, or maintain the appearance of being married to a second spouse, while still married to a first. *Id.* This provision was designed to preclude bigamists like Tom Green, who divorced each of his wives before marrying the next one, yet kept all of them in his harem. Utah sent him to prison. *See State v. Green*, 99 P.3d 820, 822 (Utah 2004); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 28–32 (2011).

<sup>40</sup> *See WITTE, supra* note 3, at 389–402.

<sup>41</sup> *See infra* notes 218–19 and accompanying text.

<sup>42</sup> *See, e.g., State v. Norman*, 13 N.C. (2 Dev.) 222, 227 (1829); *Ewell v. State*, 14 Tenn. (6 Yer.) 364, 365 (1834).

rights to consensual sex, cohabitation, marriage, divorce, contraception, abortion, sodomy, and same-sex relations if not marriage.<sup>43</sup> Do Texas and other states have strong enough reasons to uphold their traditional criminal prohibitions of polygamy against such constitutional claims, especially if made by a party with deep religious convictions? May a religious polygamist at least get a religious liberty exemption from compliance with these laws? That would make polygamy a tolerated practice for these religious parties—a “de facto” form of marriage, as lawyers call it. The state would not prosecute them for polygamy. But the state would also not enforce their polygamous marriage contracts, provide them with family services or protections, or accord the spouses any of the thousands of rights and privileges available to state-recognized families. No state burdens, no state benefits: polygamous families and their religious communities under this arrangement would become “a law unto themselves.”<sup>44</sup>

That raises a harder legal question—whether a state legislature could or should go further, by not only decriminalizing polygamy but legalizing it as a valid marriage option for its citizens. In one sense, this move from toleration to recognition, from “de facto” to “de jure” polygamy, seems like a small step. After all, American states today, viewed together, already offer several models of state-sanctioned domestic life for their citizens: straight and same-sex marriage, contract and covenant marriage, civil union and domestic partnership.<sup>45</sup> Each of these off-the-rack models of domestic life has built-in rights and duties that the parties have to each other and to their children and other dependents. And the parties can further tailor these built-in rights and duties through private prenuptial contracts.<sup>46</sup> With so much marital pluralism and private ordering already available, why not add a further option—that of polygamous marriage? Why not give to polygamous families the same rights and duties, privileges and protections that are afforded to other domestic

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<sup>43</sup> See *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>44</sup> *Romans* 2:14 (King James). On the role of religious communities as legal actors, see the burgeoning literature illustrated in *MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION* (Joel A. Nichols ed., 2012) [hereinafter *MARRIAGE AND DIVORCE*].

<sup>45</sup> See, e.g., CAL. FAM. CODE §§ 300–310 (West Supp. 2015); DEL. CODE ANN. tit. 13, §§ 101–218 (2014); NEV. REV. STAT. ANN. § 122A.500 (West 2013).

<sup>46</sup> See Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIMONIAL LAW. 249, 249 (2010).

unions recognized by state law? Wouldn't that be better than consigning polygamists to a shadow-marriage world controlled by religious authorities, who have none of the due process constraints that the constitution imposes on governmental authorities?

Once we contemplate decriminalizing, or even legalizing polygamous marriage, that raises a still harder question—whether polygamy should be reserved to religious parties alone. If we leave religious liberty claims aside, are the other constitutional claims of privacy, autonomy, equality, and the like strong enough on their own to grant any consenting adult the right to enter a polygamous marriage, regardless of religious conviction? Indeed, won't a policy of restricting polygamy to religious parties alone inevitably trigger a claim of discrimination by the nonreligious? Why should religious polygamists alone get special treatment? After all, the argument goes, what's at issue are the fundamental rights to marriage and its attendant constitutional protections and statutory benefits. Shouldn't these rights and benefits be available to all citizens regardless of their religious status?

These questions are not unique to members of the Fundamentalist Latter-day Saints Church. In the United States, various Muslim, Vietnamese Hmong, and Native Americans, as well as various émigrés from Africa, Asia, and the Middle East have been quietly practicing polygamy under the supervision of religious and cultural leaders and in defiance of state criminal laws.<sup>47</sup> Various “poly communities” have also emerged in America—from sundry free love polyamorists and “pantagamists” on the left<sup>48</sup> to conservative Muslims in the inner cities who see polygamous households as the only way to deal with the massive numbers of single mothers and non-marital children in their communities who need male support.<sup>49</sup> It's only a matter of time before

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<sup>47</sup> See, e.g., MIRIAM KOKTVEDGAARD ZEITZEN, POLYGAMY: A CROSS-CULTURAL ANALYSIS 165–84 (2008); Katharine Charsley & Anika Liversage, *Transforming Polygamy: Migration, Transnationalism and Multiple Marriages Among Muslim Minorities*, 13 GLOBAL NETWORKS 60, 61–63 (2013); see also Ann Laquer Estin, *Unofficial Family Law*, in MARRIAGE AND DIVORCE, *supra* note 44, at 92, 115–16; Nina Bernstein, *Polygamy, Practiced in Secrecy, Follows Africans to New York*, N.Y. TIMES, Mar. 23, 2007, at A1, available at <http://www.nytimes.com/2007/03/23/nyregion/23polygamy.html>.

<sup>48</sup> For examples of their literature, see LOVING MORE, <http://www.lovemore.com/> (last visited May 17, 2015); see also PHILIP L. KILBRIDE & DOUGLAS R. PAGE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 79–81 (2d ed. 2012); Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 442 (2003); Mark Goldfeder, *Chains of Love in Law: Revisiting Plural Marriage* 125–33 (2013) (unpublished SJD dissertation, Emory University School of Law) (on file with Emory Law Library).

<sup>49</sup> See, e.g., Barbara Bradley Hagerty, *Philly's Black Muslims Increasingly Turn to Polygamy*, NPR (May 28, 2008, 10:59 AM ET), <http://www.npr.org/templates/story/story.php?storyId=90886407>. See generally

these groups press for state recognition of their plural marriages, especially if they are targeted for prosecution. It's also only a matter of time before litigants press for reform of America's immigration ban on polygamists, in place since 1875, that bars polygamists from naturalization and even entry into the country.<sup>50</sup>

Even if these anti-polygamy laws are not openly challenged on federal or state constitutional grounds, they may well slowly become dead letters on the books. The status of being in a polygamous marriage itself, while formally prohibited by criminal law in every state, now rarely moves law enforcement authorities to action. Most state prosecutors today will move on polygamous individuals or groups only if they engage in other criminal activities, such as coerced marriages or sex involving children, or if they seek to engage in social welfare, social security, or tax fraud to support their multiple wives and children.<sup>51</sup> Indeed, the state attorney general in Utah recently issued a formal declaration, condoned by the governor, that his office would not prosecute even brazen public polygamy per se.<sup>52</sup> This declaration came despite the fact that Utah has one of the few American state constitutions to prohibit polygamy, a vestige of its early experiments with Mormon polygamy.<sup>53</sup> Utah today, like other American states, treats polygamy mostly as an aggravant to other crimes. It is a point of leverage for prosecutors to pursue attendant sexual or social welfare crimes, and it gives judges power to impose heavier punishments on the duly convicted.

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PATRICIA DIXON-SPEAR, WE WANT FOR OUR SISTERS WHAT WE WANT FOR OURSELVES: AFRICAN AMERICAN WOMEN WHO PRACTICE POLYGYNY BY CONSENT (2009) (providing an extensive overview of this societal development).

<sup>50</sup> See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005); Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382, 393–94 (2009).

<sup>51</sup> See generally Jennifer Weismann, *Killing Polygamy Softly: Blanket Policies Not to Prosecute Polygamy Must Be Abandoned* (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2587200](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587200) (arguing for the enforcement of criminal polygamy laws).

<sup>52</sup> See *id.* (manuscript at 6–8). This policy was already being discussed in 1998. See James Brooke, *Utah Struggles with a Revival of Polygamy*, N.Y. TIMES, Aug. 23, 1998, § 1, at 12, available at <http://www.nytimes.com/1998/08/23/world/utah-struggles-with-a-revival-of-polygamy.html>.

<sup>53</sup> UTAH CONST. art. III, para. 1; see also ARIZ. CONST. art. XX, para. 2; IDAHO CONST. art. I, § 4; N.M. CONST. art XXI, § 1; OKLA. CONST. art I, § 2.

### B. Polygamy in Other Common Law Lands

Most of America's common law cousins<sup>54</sup> have comparable criminal prohibitions against polygamy and face comparable pressure to remove these prohibitions, or at least grant exemptions from them for religious and cultural minorities.<sup>55</sup> In Canada, for example, an FLDS group in Bountiful, British Columbia, supported by a wide spectrum of pro-polygamy groups, pressed for the repeal of Canada's traditional criminal law against polygamy on grounds of liberty, privacy, autonomy, equality, non-discrimination, self-determination, freedom of religion, freedom of association, and other rights set out in Canada's Charter of Rights and Freedoms and in various international human rights instruments to which Canada is a signatory. In a closely watched 2012 case,<sup>56</sup> the British Columbia Supreme Court came down resolutely in support of Canada's traditional criminal law against polygamy.<sup>57</sup> Drawing on empirical, historical, and comparative arguments and data, the court held that

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<sup>54</sup> South Africa, which blends common law with Roman-Dutch law, recognizes "customary African polygamy," but not Muslim polygamy. See Recognition of Customary Marriages Act 120 of 1998 §§ 1–2(1) (S. Afr.); see also Johan D. van der Vyver, *Multi-Tiered Marriages in South Africa*, in MARRIAGE AND DIVORCE, *supra* note 44, at 200, 203–07 (discussing the act); Tracy E. Higgins, Jeanmarie Fenrich & Ziona Tanzer, *Gender Equality and Customary Marriage: Bargaining in the Shadows of Post-Apartheid Legal Pluralism*, 30 FORDHAM INT'L L.J. 1653, 1684 (2007). Likewise, India, which draws in part on the common law, recognizes Muslim polygamous marriages. See TAHIR MAHMOOD, STATUTE-LAW RELATING TO MUSLIMS IN INDIA: A STUDY IN CONSTITUTIONAL & ISLAMIC PERSPECTIVES 128–29 (1995); WERNER F. MENSKI, MODERN INDIAN FAMILY LAW 139–47 (2001). Kenya, a former English colony that maintains portions of the common law, also recently passed a law authorizing a man to have an unlimited number of wives, while still prosecuting a woman for having two husbands. See Faith Karimi & Lillian Leposo, *New Kenya Law Legalizes Polygamy; Women's Group Applauds It*, CNN (May 1, 2014, 5:41 AM ET), <http://www.cnn.com/2014/05/01/world/africa/kenya-polygamy-law/index.html>.

<sup>55</sup> See BAILEY & KAUFMAN, *supra* note 26, at 69–132.

<sup>56</sup> See Affidavit of Karen Ann Detillieux, Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (No. S-097767) (Can.). For full disclosure, I was an expert witness in the case called by the Attorney-General of Canada. See Expert Report Prepared for the Attorney General of Canada by John Witte, Jr., Reference, 2011 BCSC 1588 (No. S-097767) (Can.), available at <http://stoppolygamyincanada.files.wordpress.com/2011/01/expert-report-of-john-witte-jr-filed-july-19-2010.pdf>; see also BJ Wray, Keith Reimer & Craig Cameron, *The Most Comprehensive Judicial Record Ever Produced: The Polygamy Reference*, 64 EMORY L.J. 1877 (2015).

<sup>57</sup> Criminal Code, R.S.C. 1985, c. C-46, s. 293(1) (Can.) ("Every one who (a) practises or enters into or in any manner agrees or consents to practise or enter into (i) any form of polygamy, or (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years."). This law builds on two laws: Offences Relating to the Law of Marriage, R.S.C. 1886, c. 161 (Can.), amended by S.C. 1890, c. 37, § 11; and the Criminal Code, S.C. 1953–54, c. 51, s. 243. For an analysis of the statutory history and context, see Martha Bailey, *Canada, Polygamy and Unmarried Cohabitation*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 123 (Bill Atkin ed., 2011).

legalizing polygamy would visit inevitable and disproportionate harms on women, children, and society and that granting religious exemptions to practice polygamy privately would give untoward power to religious authorities who are not bound by due process or other rule of law constraints in the treatment of their members.<sup>58</sup> The constitutionality of polygamy will likely come before the Supreme Court of Canada in due course. The outcome before this high court, famous for its avant-garde opinions, is by no means clear.<sup>59</sup>

A decade before the British Columbia case, the Canadian provinces of Ontario and Quebec faced a strong push by Muslims and other groups to establish Shari'a arbitration tribunals for governance of Muslim marriages, as a part and product of Canada's firm commitment to multiculturalism.<sup>60</sup> That proposal was thoroughly debated but ultimately defeated. But the stated concern was not so much about the legalization of polygamy as about giving religious authorities and religious laws a role in the governance of the family lives of Canadian citizens.<sup>61</sup> Since then, Canadian multicultural theorists have pushed hard to develop nonreligious arguments in favor of a "multi-conjugal" society that would include state-recognized polygamy and other forms of polyamory subject to private ordering norms.<sup>62</sup>

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<sup>58</sup> Reference, 2011 BCSC 1588, at paras. 1048–1094. For a careful case analysis, see Thomas Buck, Jr., Comment, *From Big Love to the Big House: Justifying Anti-Polygamy Laws in an Age of Expanding Rights*, 26 EMORY INT'L L. REV. 939 (2012). For more critical readings, see POLYGAMY'S RIGHTS AND WRONGS: PERSPECTIVES ON HARM, FAMILY, AND LAW (Gillian Calder & Lori G. Beaman eds., 2014) [hereinafter POLYGAMY'S RIGHTS AND WRONGS]; Angela Campbell, *Bountiful's Plural Marriages*, 6 INT'L J.L. CONTEXT 343 (2010); Angela Campbell, *Bountiful Voices*, 47 OSGOODE HALL L.J. 183 (2009); Julia Chamberlin & Amos N. Guiora, *Polygamy: Not "Big Love" but Significant Harm*, 35 WOMEN'S RTS. L. REP. 144, 171–85 (2014) (discussing harm arguments within FLDS, noting three specific harms, "child-brides, lost boys, and polygamy" exacted through "verbal, sexual, or physical abuse").

<sup>59</sup> For contrary arguments, see, for example, ANGELA CAMPBELL, *SISTER WIVES, SURROGATES AND SEX WORKERS: OUTLAWS BY CHOICE?* 49–96 (2013); Nicholas Bala, *Why Canada's Prohibition of Polygamy is Constitutionally Valid and Sound Policy*, 25 CANADIAN J. FAM. L. 165 (2009). For further historical context, see SARA CARTER, *THE IMPORTANCE OF BEING MONOGAMOUS: MARRIAGE AND NATION BUILDING IN WESTERN CANADA TO 1915* (2008).

<sup>60</sup> See MARION BOYD, *DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION* 3–6 (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>.

<sup>61</sup> For different perspectives, see Jean-François Gaudreault-DesBiens, *Religious Courts, Personal Federalism, and Legal Transplants*, in SHARI'A IN THE WEST 159 (Rex Ahdar & Nicholas Aroney eds., 2010); Ayelet Shachar, *Faith in Law? Diffusing Tensions Between Diversity and Equality*, in MARRIAGE AND DIVORCE, *supra* note 44, at 341.

<sup>62</sup> For various perspectives, see Daniel Cere, *Canadian Conjugal Mosaic: From Multiculturalism to Multi-Conjugalism?*, in MARRIAGE AND DIVORCE, *supra* note 44, at 284; Mohammad H. Fadel, *Political Liberalism, Islamic Family Law, and Family Law Pluralism*, in MARRIAGE AND DIVORCE, *supra* note 44, at 164; see also Lisa M. Kelly, *Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy*, U. TORONTO FAC. L. REV., Winter 2007, at 65.

Australia and New Zealand likewise face challenges from various Aboriginal groups as well as Asian, African, and Middle Eastern immigrants who have been pressing for the right to practice polygamy under the governance of their own religious customs and courts.<sup>63</sup> Both countries have had firm criminal prohibitions against polygamy since colonial days, and these laws have been confirmed in recent criminal law and family law statutes and cases.<sup>64</sup> Neither country recognizes Aboriginal polygamous unions as valid marriages,<sup>65</sup> nor do they accept polygamous marriages that were contracted abroad, though they grant some social welfare benefits to known polygamists. In Australia, the human rights case for polygamy is harder to press since the country lacks a national bill of rights, and the international human rights norms to which Australia is a signatory have not been interpreted to support a right to practice polygamy.<sup>66</sup>

These Canadian, Australian, and New Zealand criminal prohibitions on polygamy, like those of America, were all modeled in part on traditional English criminal laws against polygamy that went to back to Anglo-Saxon laws that called for polygamists to be subject to “hell-fire.”<sup>67</sup> The English

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<sup>63</sup> See, e.g., AUSTRALIAN LAW REFORM COMM’N, REPORT NO. 57, MULTICULTURALISM AND THE LAW paras. 1.15–1.18 (1992), available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc57.pdf>; AUSTRALIAN LAW REFORM COMM’N, REPORT NO. 31, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS paras. 95–124 (1986), available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC31.pdf>; Ann Black, *In the Shadow of Our Legal System: Shari’a in Australia*, in SHARI’A IN THE WEST, *supra* note 61, at 239; Abdullah Saeed, *Reflections on the Establishment of Shari’a Courts in Australia*, in SHARI’A IN THE WEST, *supra* note 61, at 223.

<sup>64</sup> For Australia, see *Marriage Act 1961* (Cth) s 94 (Austl.), available at <http://www.comlaw.gov.au/Details/C2011C00192/Html/Text>; *Wold v. Kleppir* [2009] FamCA 178 (Austl.); *Dohm v. Acton* [2008] FamCA 482 (Austl.) (discussing the Act). For New Zealand, see *Crimes Act 1961*, §§ 205–206 (N.Z.); *Rangi Kerehoma v. Pub. Tr.* [1918] NZLR 903 (SC) (discussing Aboriginal polygamous unions in New Zealand); see also Nan Seuffert, *Shaping the Modern Nation: Colonial Marriage Law, Polygamy and Concubinage in Aotearoa New Zealand*, 7 L. TEXT CULTURE 186, 207–12 (2003). I am grateful to Professor Rex Ahdar of the University of Otago, New Zealand for his help with these Australian and New Zealand sources.

<sup>65</sup> See *supra* note 64.

<sup>66</sup> See FREEDOM OF RELIGION UNDER BILLS OF RIGHTS (Paul Babie & Neville Rochow eds., 2012).

<sup>67</sup> Cnut the Great, *The Laws of Canute* (c. 1018 C.E.), reprinted in THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I 135, 163 (A.J. Robertson ed. & trans., Cambridge Univ. Press 1925) (“[A man shall] have no more wives than one, and that shall be his wedded wife, and he who seeks to observe God’s law aright and to save his soul from hell-fire shall remain with the one [wife] as long as she lives.”). In addition to the laws of King Canute, the laws of King Ethelred provided, “And let it never be, that a Christian man . . . have more wives than one, but be with that one, as long as she may live; whoever will rightly observe God’s law, and secure his soul from the burning of hell.” Æthelred II, *The Laws of Ethelred* (c. 994 C.E.), reprinted in ANCIENT LAWS AND INSTITUTES OF ENGLAND 119, 135–36 (Benjamin Thorpe ed., London, G.E. Eyre & A. Spottiswoode 1840).

Parliament renewed these old laws in the 1604 Polygamy Act,<sup>68</sup> which again declared polygamy to be a capital crime, punishable in the Old Bailey and other criminal courts.<sup>69</sup> Parliament made polygamy a serious, but noncapital, crime in the 1861 Offences Against the Person Act, the basic criminal law code that remains on the books, now with ample supplements and amendments.<sup>70</sup> These English laws on polygamy also continue to influence the laws of many of the fifty-three sovereign nations that are part of the British Commonwealth today and share a common law heritage.

While England rarely prosecutes polygamists today,<sup>71</sup> it does not recognize polygamous marriages; only the first marriage will count as valid. A 2004 English statute empowers immigration officers to arrest without warrant any person seeking to enter the United Kingdom who is suspected of bigamy or polygamy.<sup>72</sup> Polygamy remains an issue especially in contested inheritance and marital property cases, where the first wife and her children almost always get priority.<sup>73</sup> Nonetheless, England, like some other common law countries, does provide some public assistance and social welfare benefits to the wives, children, and dependents of polygamous families.<sup>74</sup> While England's 1998 Human Rights Act provides protection for the fundamental rights to marriage

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<sup>68</sup> An Act to Restrain All Persons from Marriage Until Their Former Wives and Former Husbands Be Dead, 1604, 1 Jac. 1, c. 11 (Eng.) (“Be it therefore enacted . . . [t]hat if any Person or Persons within his Majesty’s Dominions of *England* and *Wales*, being married, or which hereafter shall marry, do at any Time at the End of the Session of this present Parliament, marry any Person or Persons, the former Husband or Wife being alive; That then every such Offence shall be [a] Felony, and the Person and Persons so offending shall suffer Death as in Cases of Felony, [] and the Party and Parties so offending shall receive such and the like Proceeding, Trial, and Execution in such County where such Person or Persons shall be apprehended, as if the Offence had been committed in such County where such Person or Persons shall be taken or apprehended.”).

<sup>69</sup> See BERNARD CAPP, *WHEN GOSSIPS MEET: WOMEN, FAMILY, AND NEIGHBOURHOOD IN EARLY MODERN ENGLAND* (2003); REBECCA PROBERT, *MARRIAGE LAW AND PRACTICE IN THE LONG EIGHTEENTH CENTURY: A REASSESSMENT* 39, 191 (2009); see also *The Proceedings of Old Bailey, 1674–1913*, OLD BAILEY PROC. ONLINE, <http://www.oldbaileyonline.org/> (last visited May 17, 2015) (follow “Search” hyperlink; then select “Offence” drop bar for “Sexual Offences > bigamy” and then follow “Search” hyperlink below) (showing a total of 2,384 criminal cases of bigamy from 1674 to 1911). For analysis of typical Old Bailey cases, see WITTE, *supra* note 3, at 305–21.

<sup>70</sup> Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, § 57 (U.K.); see also Matrimonial Proceedings (Polygamous Marriages) Act, 1972, c. 38, §§ 2–3 (U.K.); Private International Law (Miscellaneous Provisions) Act, 1995, c. 42, §§ 5, 7 (U.K.); WITTE, *supra* note 3, at 324–30.

<sup>71</sup> For a recent polygamy conviction, see *R v. Seed*, [2007] EWCA (Crim) 254 (Eng.).

<sup>72</sup> Asylum and Immigration (Treatment of Claimants, etc.) Act, 2004, c. 19, § 14 (U.K.).

<sup>73</sup> See, e.g., *Rampal v. Rampal*, [2001] EWCA (Civ) 989 (Eng.); *Whiston v. Whiston*, [1995] Fam. 198 at 200 (Eng.).

<sup>74</sup> See, e.g., *Din v. Nat’l Assistance Bd.*, [1967] 2 Q.B. 213 (Eng.) (granting a polygamist assistance); see also BAILEY & KAUFMAN, *supra* note 26, at 150–58, 181–83. *But see* *Bibi v. Chief Adjudication Officer*, [1997] EWCA (Civ) 1967 (Eng.) (denying a polygamist assistance).

and association, to privacy and family life, and to thought, conscience, and belief, so far these provisions have not been used successfully to challenge England's traditional prohibitions on polygamy.<sup>75</sup> Comparable laws and restrictions are in place in Scotland,<sup>76</sup> Wales,<sup>77</sup> Ireland,<sup>78</sup> and Northern Ireland,<sup>79</sup> though some courts and commentators in those lands are pressing for the relaxation if not rejection of traditional criminal laws against polygamy.<sup>80</sup>

Anglican Archbishop Rowan Williams did set off a firestorm on February 7, 2008, by suggesting that some "accommodation" of Muslim family law was "unavoidable" in the United Kingdom.<sup>81</sup> His speech was nuanced and qualified, carefully discussing the "growing challenge" of "communities which, while no less 'law-abiding' than the rest of the population, relate to something other than the British legal system alone."<sup>82</sup> But the Archbishop was strongly denounced for his open queries about "what degree of accommodation the law of the land can and should give to minority communities with their own strongly entrenched legal and moral codes."<sup>83</sup> England, his critics charged, will be beset by "licensed polygamy," barbaric punishments, and brutal violence against women encased in suffocating burkas if official sanction is given to Shari'a courts and Muslim family law.<sup>84</sup> This parade of horrors has not come to pass in the United Kingdom: Anti-polygamy laws remain firmly in place, and Muslim mediators and arbitrators are forbidden from knowingly presiding over polygamous unions

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<sup>75</sup> Human Rights Act, 1998, c. 42, §§ 8–9, 11–12, sch. 1 (U.K.), available at <http://www.legislation.gov.uk/ukpga/1998/42/data.pdf>.

<sup>76</sup> *Polygamous Marriages*, *supra* note 22, at 107–12.

<sup>77</sup> Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, § 57 (U.K.).

<sup>78</sup> IR. CONST., 1937, art. 41, available at <http://www.irishstatutebook.ie/en/constitution/index.html>; PAUL WARD, *FAMILY LAW IN IRELAND* 86 (2010) ("Only monogamous marriages may be validly entered into in Ireland.").

<sup>79</sup> *See, e.g.*, LAW REFORM ADVISORY COMM. FOR N. IR., DISCUSSION PAPER NO. 6: MARRIAGE LAW (2000); *see also* The Polygamous Marriages (Northern Ireland) Order, 1995, SI 1995/3211 (N. Ir. 20) art. 3.

<sup>80</sup> *See* ISLAM AND ENGLISH LAW: RIGHTS, RESPONSIBILITIES AND THE PLACE OF SHARI'A (Robin Griffith-Jones ed., 2013).

<sup>81</sup> Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, in *ISLAM AND ENGLISH LAW*, *supra* note 80, at 20, 32–33; *see also* Dominic McGoldrick, *Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws*, 9 *HUM. RTS. L. REV.* 603 (2009).

<sup>82</sup> Williams, *supra* note 81, at 20.

<sup>83</sup> *Id.* at 21.

<sup>84</sup> *See, e.g.*, Catherine Bennett, *It's One Sharia Law for Men and Quite Another for Women*, *GUARDIAN* (Feb. 9, 2008, 19:13 EST), <http://www.guardian.co.uk/commentisfree/2008/feb/10/religion.law>.

for fear of losing their licenses or being charged as accomplices to the crime of polygamy.<sup>85</sup>

### C. Polygamy in Civil Law Lands

Like Western common law countries, Western civil law countries forbid polygamy too.<sup>86</sup> Every Latin and Central American country has criminal prohibitions of polygamy on the books, which are sometimes also echoed in their family laws.<sup>87</sup> Statutory punishments for convicted polygamists range from fines or three months in prison (Cuba)<sup>88</sup> to seven years of prison (Belize and Guyana)<sup>89</sup> as well as hard labor (Haiti and Jamaica).<sup>90</sup> A few countries allow judges to take account of indigenous customs or cultural ignorance of the law of monogamy in their sentences.<sup>91</sup> But no Latin or Central American

<sup>85</sup> See Russell Sandberg et al., *Britain's Religious Tribunals: 'Joint Governance' in Practice*, 33 OXFORD J. LEGAL STUD. 263 (2013).

<sup>86</sup> See, e.g., PAULINO CAMPBELL CARVALLO, EL DELITO DE BIGAMIA ANTE LA JURISPRUDENCIA DE LOS TRIBUNALES CHILENOS [THE CRIME OF BIGAMY IN THE JURISPRUDENCE OF THE CHILEAN TRIBUNALS] (1948); JOSÉ IRURETA GOYENA, DELITOS DE ABORTO, BIGAMIA Y ABANDONO DE NIÑOS Y DE OTRAS PERSONAS INCAPACES [CRIMES OF ABORTION, BIGAMY, AND ABANDONING CHILDREN AND OTHER DEPENDENT PERSONS] 95–153 (1932) (Uruguay); ALBERTO ARTEAGA SANCHEZ, DE LOS DELITOS CONTRA LAS BUENAS COSTUMBRES Y BUEN ORDEN DE LAS FAMILIAS [OF THE CRIMES AGAINST GOOD CUSTOM AND ORDER OF THE FAMILY] 167–87 (1989) (Venezuela); ELVIRA CORALIA ESPARZA TORRES, EL DELITO DE BIGAMIA [THE CRIME OF BIGAMY] (1961) (Mexico); Claudia Ramirez Pizarro, *Implicaciones Civiles de la Bigamia* [Civil Implications of Bigamy] 172–84 (1990) (Colombia) (unpublished legal graduate thesis, Pontificia Universidad Javeriana) (on file with author and Emory Law Journal); José Aguilar Saldaña, *El Delito de Bigamia y su Responsabilidad Penal* [The Crime of Bigamy and Criminal Reasonability] (1955) (unpublished legal studies thesis, Universidad Nacional Autonoma de Mexico) (on file with author and Emory Law Journal). I am grateful to Elliott Foote for helping me with the translations of these Spanish and Portuguese sources and statutes.

<sup>87</sup> For example, Colombia punishes polygamy as a form of perjury or “falsifying public documents” with punishments ranging from four to nine years in prison. CÓDIGO PENAL [C. PEN.] art. 287 (Colom.); see also Pizarro, *supra* note 86, at 172–84.

<sup>88</sup> Ley No. 62, Código Penal de la República de Cuba [Criminal Code of the Republic of Cuba], art. 306, 29 de diciembre de 1987, available at <http://www.cepal.org/oig/doc/cub1987codigopenalley62.pdf>.

<sup>89</sup> Belize Criminal Code, ch. 101, art. 313 (2000), available at [http://www.oas.org/juridico/mla/en/blz/en\\_blz-int-text-cc.pdf](http://www.oas.org/juridico/mla/en/blz/en_blz-int-text-cc.pdf); Laws of Guyana, Criminal Law (Offences) Act, ch. 8:01, art. 83 (1998), available at [http://www.oas.org/juridico/mla/en/guy/en\\_guy-int-text-cl\\_act.pdf](http://www.oas.org/juridico/mla/en/guy/en_guy-int-text-cl_act.pdf).

<sup>90</sup> CODE PÉNAL [C. PÉN.] art. 288 (Haiti), available at [http://haitijustice.com/pdf/accesauxcodes/code\\_penal\\_haiti.pdf](http://haitijustice.com/pdf/accesauxcodes/code_penal_haiti.pdf); The Offenses Against the Person Act, art. 71 (Jam.), available at [http://moj.gov.jm/sites/default/files/laws/Offences%20Against%20the%20Person%20Act\\_0.pdf](http://moj.gov.jm/sites/default/files/laws/Offences%20Against%20the%20Person%20Act_0.pdf).

<sup>91</sup> See, e.g., Decreto Ley No. 10426, Código Penal Boliviano [Criminal Code of Bolivia], art. 39, 23 de agosto de 1972, available at [https://www.oas.org/juridico/mla/sp/bol/sp\\_bol-int-text-cp.html](https://www.oas.org/juridico/mla/sp/bol/sp_bol-int-text-cp.html); Código Penal de El Salvador [Criminal Code of El Salvador], ch. 3, art. 29 (2011), available at [https://www.unifr.ch/ddp1/derechopenal/obrasjuridicas/oj\\_20110507\\_01.pdf](https://www.unifr.ch/ddp1/derechopenal/obrasjuridicas/oj_20110507_01.pdf); Código Penal Federal [CPF] [Federal Criminal Code] art. 52, as amended, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.); Código Penal del Peru [Criminal Code of Peru], art. 15 (2008), available at [https://www.unifr.ch/ddp1/derechopenal/legislacion/l\\_20080616\\_75.pdf](https://www.unifr.ch/ddp1/derechopenal/legislacion/l_20080616_75.pdf).

country gives an outright exemption to indigenous polygamy in its penal code, and a few countries, including the influential country of Brazil, explicitly prohibit accommodation of indigenous or religiously based polygamy.<sup>92</sup> Intentional or fraudulently induced polygamy is more severely punished. But even negligently or mistakenly entered polygamy is still liable to criminal sanction. A number of countries also hold liable accomplices and government officials who knowingly issue marriage licenses to polygamists. The Penal Code of Honduras is typical:

Article 171. The person who contracts a second or subsequent marriage without having legitimately dissolved the previous, will be punished with a sentence of two to five years of imprisonment. The law imposes an equal sanction to a single person who knowingly contracts marriage with a married person.

. . . .

Article 173. The civil servants who authorize marriages prohibited by law, with full knowledge, or without the concurrence of any of the requisites of existence or of validity of the same, will be sanctioned with a fine of 50,000–100,000 lempiras and disqualification for four to six years.<sup>93</sup>

These prohibitions have been in place in Latin and Central America since sixteenth-century colonial days. They reflect the criminal laws of the Continental European mother countries that originally colonized them—Spain, Portugal, France, Germany, and the Netherlands especially. All these European mother countries share the civil law tradition that was founded on classical Roman law. Well before the advent of Christianity, the “ancient law”<sup>94</sup> of Rome required monogamous marriages and treated polygamy as “nefarious,”<sup>95</sup>

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<sup>92</sup> CÓDIGO PENAL [C.P.] art. 235 (Braz.).

<sup>93</sup> Decreto No. 144-83, Código Penal, arts. 171, 173 (Hond.), available at <http://www.ccit.hn/wp-content/uploads/2013/12/Codigo-Pena-Honduras.pdf>.

<sup>94</sup> The language is from CODE JUST. 7.15.2–3 (c. 534 C.E.), reprinted in 2 CORPUS IURIS CIVILIS 300 (Paul Krüger ed., Apud Weidmannos 1904) (1897) (translation by author); see also CODE JUST. 7.15.2–3, translated in 14 THE CIVIL LAW 138–39 (S.P. Scott ed., Cent. Trust Co. 1932) (providing alternative translation).

<sup>95</sup> G. INST. 1.63–64 (c. 161 C.E.), translated in THE INSTITUTES OF GAIUS AND JUSTINIAN: THE TWELVE TABLES, AND THE CXVIII<sup>TH</sup> AND CXXVII<sup>TH</sup> NOVELS 17–18 (T. Lambert Mears ed. & trans., London Stevens & Sons 1882) [hereinafter THE INSTITUTES OF GAIUS AND JUSTINIAN]; see also G. INST. 4.182, translated in THE INSTITUTES OF GAIUS AND JUSTINIAN, *supra*, at 245. Similar prohibitions recur in J. INSTIT. 1.10.6–7 (c. 533 C.E.), translated in JUSTINIAN’S INSTITUTES 43–44 (Paul Krüger ed., Peter Birks & Grant McLeod trans., Cornell Univ. Press 1987); see also RICCARDO ASTOLFI, STUDI SUL MATRIMONIO NEL DIRITTO ROMANO POSTCLASSICO E GIUSTINIANO [STUDIES OF THE ROMAN LAW OF MARRIAGE IN THE CLASSICAL PERIOD AND

a “barbarian custom or a mark of tyranny.”<sup>96</sup> Well before the Roman establishment of Christianity, the “pagan” Roman emperors beginning in 258 C.E. outlawed polygamy as a crime of “*infamia*.”<sup>97</sup> Later Christian emperors and Germanic kings passed ever firmer prohibitions against the infamous crime of polygamy, calling it a “wicked,” “unnatural,” “abominable,” and “treacherous” offense.<sup>98</sup> By the ninth century, Byzantine Emperor Theophilus, for the first time, declared real polygamy to be a capital crime whether committed by clergy or laity, citizens or slaves.<sup>99</sup> These capital laws against polygamy slowly multiplied in the secular civil law systems of the

AT THE TIME OF JUSTINIAN] 124–25 (2012); JOS. ZHISHMAN, *DAS EHERECHT DER ORIENTALISCHEN KIRCHE* [THE MARRIAGE LAW OF THE EASTERN CHURCH] 373–74 (Vienna, Wilhelm Braumüller 1864).

<sup>96</sup> Walter Scheidel, *A Peculiar Institution? Greco-Roman Monogamy in Global Context*, 14 *HIST. FAM.* 280, 283 (2009); see also WALTER ERDMANN, *DIE EHE IM ALTEN GRIECHENLAND* [MARRIAGE IN ANCIENT GREECE] 87–103 (Arno Press Inc. reprinted ed. 1979) (1934); CYNTHIA B. PATTERSON, *THE FAMILY IN GREEK HISTORY* (1998).

<sup>97</sup> CODE JUST. 9.9.18, reprinted in 2 *CORPUS IURIS CIVILIS*, *supra* note 94, at 375 (“There is no doubt that he who has two wives at the same time must be branded with infamy. Such cases must take into consideration not only the law that forbids a citizen to contract more than one marriage at the same time, but also the intention of the citizen [in forming the second marriage]. So, he who pretended to be single, but already had another wife living in the province can lawfully be accused of the crime of fornication (*stupri*). But you [the innocent second wife] are not liable because you thought that you were his wife. You can get back from the provincial governor all the property that you deplorably lost on account of the fraudulent marriage and which must be returned to you without delay.” (translation by author)); CODE JUST. 9.9.18, translated in 15 *THE CIVIL LAW*, *supra* note 94, at 12 (providing alternative translation); see also CODE JUST. 5.5.2, reprinted in 2 *CORPUS IURIS CIVILIS*, *supra* note 94, at 198; CODE JUST. 5.5.2, translated in 13 *THE CIVIL LAW*, *supra* note 94, at 155. “*Infamia*” was a legal black mark that precluded a party from holding public office or other positions of trust or authority and from exercising a number of private and public rights, even if they were citizens. See DIG. 3.2.1, 3.2.13, translated in 1 *THE DIGEST OF JUSTINIAN*, 81–82, 85 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pa. Press 1985); see also DIG. 23.2.1, translated in 2 *THE DIGEST OF JUSTINIAN*, *supra*, at 657; CODE JUST. 5.3.5, reprinted in 2 *CORPUS IURIS CIVILIS*, *supra* note 94, at 195; CODE JUST. 5.3.5, translated in 13 *THE CIVIL LAW*, *supra* note 94, at 140; JUDITH EVANS GRUBBS, *LAW AND FAMILY IN LATE ANTIQUITY: THE EMPEROR CONSTANTINE’S MARRIAGE LEGISLATION 167–69* (1999); ABEL HENDY JONES GREENIDGE, *INFAMIA: ITS PLACE IN ROMAN PUBLIC AND PRIVATE LAW* (Scientia Verlag Aalen reprinted ed. 1977) (1894).

<sup>98</sup> CODE JUST. 5.9.1, 5.27.2, 5.27.7 reprinted in 2 *CORPUS IURIS CIVILIS*, *supra* note 94, at 200–01, 216–17; CODE JUST. 5.9.1, 5.27.2, 5.27.7, translated in 13 *THE CIVIL LAW*, *supra* note 94, at 161–62, 214–15, 218 (providing alternative translation); CODE THEOD. 4.4.6 (c. 438 C.E.), reprinted in *CODIX THEODOSIANUS* 129–30 (Paul Krüger ed., Weidmann 1923); NOV. 12.1, 89.12.5 (c. 534 C.E.), translated in 16 *THE CIVIL LAW*, *supra* note 94, at 70, 334; see also ASTOLFI, *supra* note 95, at 123–34. For an alternative translation of the Novels of Justinian, see *JUSTINIAN’S NOVELS* (c. 534 C.E.), translated in *ANNOTATED JUSTINIAN CODE* (Fred H. Blume trans., c. 1952), available at <http://www.uwo.edu/lawlib/blume-justinian/ajc-edition-1/novels/index.html>.

<sup>99</sup> *INSTITUTIONUM GRAECA PARAPHRASIS THEOPHILO ANTECESSORI VULGO TRIBUTA AD FIDEM LIBRORUM MANU SCRIPTORUM RECENSUIT* [A GREEK RESTATEMENT OF THE INSTITUTES, USUALLY ATTRIBUTED TO THE PREDECESSOR THEOPHILUS AND EDITED IN ACCORDANCE WITH THE MANUSCRIPT BY CONTARDO FERRINI] 39 (E.C. Ferrini ed., Berolini, S. Calvary 1884).

medieval and early modern West—notably in Italy,<sup>100</sup> Spain,<sup>101</sup> the Holy Roman Empire,<sup>102</sup> and various Nordic lands,<sup>103</sup> which often duplicated these laws in the colonial Americas.

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<sup>100</sup> See, e.g., JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 477–500 (1987); JOANNIS MONTAIGNE, DE BIGAMIA [OF BIGAMY], in 9 TRACTATUS UNIVERSI JURIS [TRACTS ON UNIVERSAL LAW] 122–32 (Venice, 1584) (summarizing medieval laws and jurisprudence on polygamy); Statute of Ferrera (1287), *reprinted in* STATUTA FERRARI, ANNO MCCLXXXVII, at 271 (William Montorsi ed., 1955); Statute of Bologna of 1288, *reprinted in* STATUTI DI BOLOGNA DELL'ANNO 1288, at 197 (Gina Fasoli & Pietro Sella eds., 1937); see also BRUNDAGE, *supra*, at 539–40 (discussing later Italian statutes prohibiting polygamy, including making it a capital offense in Reggio Emilia). For later medieval statutes in Italy and beyond, see Anna Esposito, *Adulterio, concubinato, bigamia: testimonianze della normativa statutaria della Stato pontificio (secoli XIII-XVI)* [Adultery, Concubinage, Bigamy: Evidence from the Statutory Regulations of the Papal States (Thirteenth to Sixteenth Centuries)], in TRASGRESSIONI: SEDUZIONE, CONCUBINATO, ADULTERIO, BIGAMIA (XIV-XVIII SECOLO) [TRANSGRESSIONS: SEDUCTION, CONCUBINAGE, ADULTERY, BIGAMY (FOURTEENTH TO EIGHTEENTH CENTURIES)] 21 (2004); STEFANO RICCIO, LA BIGAMIA [OF BIGAMY] (1934).

<sup>101</sup> See Alfonso X, *Law XVI: What Penalty Those Deserve Who Knowingly Marry Twice* (c. 1256–1265), translated in 5 LAS SIETE PARTIDAS [THE SEVEN ITEMS] 1419, 1419–20 (Robert I. Burns ed., Samuel Parsons Scott trans., Univ. of Pa. Press 2001) (“Men who knowingly marry a second time while their first wives are living, commit manifest wickedness, and women do the same thing when aware that their first husbands are living. There are other men who, being betrothed by words relating to the present time, disregard this, and become betrothed to, and marry other women; and there are still others who being betrothed, as we stated above, although they do not marry, know when women to whom they are betrothed marry others, and keep silent and permit the marriages to take place; or they themselves marry them to others who are cognizant of this. And, for the reason that from such marriages against God arise many sins and injuries, and losses and great dishonor happen to those that are deceived in this way . . . [T]herefore we order that anyone who knowingly contracts matrimony in any of the ways we mentioned in this law shall be banished to some island for the term of five years, and shall lose whatever property he possessed in the place where he contracted the marriage, and it shall belong to his son or grandson, if he has any.”). Over time, this law became a capital offense, both in Spain and in Latin America. See María Lourdes Labaca Zabala, *La protección de la monogamia como elemento esencial de matrimonio: precedentes históricos* [The Protection of Monogamy as an Essential Element of Marriage: Historical Precedents], NOTICIAS JURIDICAS (Apr. 2005), <http://noticias.juridicas.com/articulos/45-Derecho-Civil/200504-36551325310511141.html> (Spain).

<sup>102</sup> See *Constitutio Criminalis Carolina*, art. 121 (1532), *reprinted in* DIE PEINLICHE GERICHTSORDNUNG KAISER KARLS V: CONSTITUTIO CRIMINALIS CAROLINA [THE IMPERIAL PENAL LAW OF EMPEROR CHARLES V: THE CRIMINAL CONSTITUTION CAROLINA] 63 (Josef Kohler & Willy Scheel eds., Buchhandlung des Waisenhauses 1900) (“When a married man takes another wife or a married woman another husband into holy marriage before their first marriage is over, this is a grave crime that is more serious than adultery. Although the imperial law has so far not imposed corporal sanctions on this crime, we proclaim that hereafter anyone who willingly and knowingly commits such a fraudulent crime, must be criminally punished at a level no less than an adulterer is punished [adultery was a capital offense at the time].” (translation by author)). For good discussion of the prototypes, applications, and local echoes of this important law, see IOANNES SAMUEL FRIDERICVS DE BOEHMER, MEDITATIONES IN CONSTITUTIONEM CRIMINALEM CAROLINAM [REFLECTIONS ON THE CRIMINAL CONSTITUTION CAROLINA] 469–82 (Halle/Madburg, Impensis Vidvae Gebaveri et Filii 1774).

<sup>103</sup> Medieval Swedish royal laws made intentional polygamy a capital crime to be punished by “decapitation for the male, stoning or burning for a female.” MIA KORPIOLA, BETWEEN BETROTHAL AND BEDDING: MARRIAGE FORMATION IN SWEDEN 1200–1600, at 14, 186, 213–17, 328–31 (2009).

These millennium-long laws against the crime of polygamy remained firmly in place during the modern legal liberalization and codification movements of the eighteenth and nineteenth centuries. Both the influential 1794 Prussian Civil Code and the 1810 Napoleonic Penal Code, for example, expressly prohibited polygamy. “Whoever, being engaged in the bond of wedlock, shall contract a second marriage, before the dissolution of the preceding one, shall be punished with hard labour for a time,” reads the Napoleonic Penal Code, which was duplicated in a number of European lands.<sup>104</sup> Likewise, the Bavarian Penal Code of 1813, the “first modern, rational, and liberal penal code,”<sup>105</sup> though it removed many traditional crimes, still prohibited polygamy for all parties. “Since the state recognizes as valid only a simple marriage, everyone is subject to the laws of bigamy in the state, even if the principles of his religion might allow him to practice polygamy.”<sup>106</sup> The 1871 Criminal Code of the German Empire similarly punished all intentional polygamists with “penal servitude up to five years.”<sup>107</sup> The Spanish Penal Code of 1848 also prohibited all citizens from practicing polygamy, including its many Muslim citizens; this continued a Spanish tradition of anti-polygamy laws going back to the seventh-century Visigothic Code<sup>108</sup> and several important medieval Spanish legal codes.<sup>109</sup> These criminal prohibitions remain on the books in the revised criminal statutes and codes of most Continental European lands today, though the punishments have lightened and the pace of prosecution has slackened in recent decades.<sup>110</sup>

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<sup>104</sup> THE PENAL CODE OF FRANCE 68 (London, H. Butterworth 1819); *see also* ALLGEMEINES LANDRECHT FÜR DIE PREUBISCHEN STAATEN [GENERAL TERRITORIAL LAW OF PRUSSIA] 5 (n.p. 1794).

<sup>105</sup> FEUERBACHS BAYERISCHES STRAFGESETZBUCH: DIE GEBURT LIBERALEN, MODERNEN UND RATIONALEN STRAFRECHTS [FEUERBACH'S BAVARIAN PENAL CODE: THE BIRTH OF LIBERAL, MODERN AND RATIONAL CRIMINAL LAW] (Arnd Kock et al. eds., 2014) [hereinafter FEUERBACH'S BAVARIAN PENAL CODE].

<sup>106</sup> The quote is from the author of the code, the distinguished German jurist and psychologist, Paul Johann Anselm von Feuerbach, who rejected the option of (religiously based) polygamy, citing Roman law and civil law precedents. *See* PAUL JOHANN ANSELM VON FEUERBACH, LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS [GENERAL TEXT ON THE APPLICABLE CRIMINAL LAW OF GERMANY] § 426, at 343–44 (Giessen, G.F. Heyer 1801).

<sup>107</sup> DAS STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH [THE PENAL CODE OF THE GERMAN REICH] 50 (Erlangen, Deichert 1876) (1871), *available at* <https://ia700408.us.archive.org/34/items/dasstrafgesetzb00germgoog/dasstrafgesetzb00germgoog.pdf>.

<sup>108</sup> *See* WITTE, *supra* note 3, at 113–14.

<sup>109</sup> *E.g.*, CÓDIGO PENAL (C.P.) art. 395 (1850) (Spain), *available at* <http://fama2.us.es/fde/codigoPenal1848.pdf>.

<sup>110</sup> *See* KATHARINA BOELE-WOELI ET AL., UTRECHT CTR. FOR EUROPEAN RESEARCH INTO FAMILY LAW, DE JURIDISCHE STATUS VAN POLYGAME HUWELIJKEN IN RECHTSVERGELIJKEND PERSPECTIEF [THE LEGAL STATUS OF POLYGAMOUS MARRIAGES: A COMPARATIVE LAW PERSPECTIVE] 11–12, 49–50, 77–78, 137, 152–57, 161–63 (2009), *available at* [https://www.wodc.nl/images/1815\\_volledige\\_tekst\\_tcm44-247785.pdf](https://www.wodc.nl/images/1815_volledige_tekst_tcm44-247785.pdf); *see*

#### D. Polygamy Laws in the European Union

Debates about the legal status of polygamy are sharpening on the Continent, however, with the rapid rise of new polygamous immigrants.<sup>111</sup> “In a lot of European countries, marriage is not just an aspect of the immigration problem; it *is* the immigration problem.”<sup>112</sup> For example, France is said to be home to more than 20,000 polygamous families, comprising more than 200,000 persons, despite firm new immigration and legal enforcement reforms enacted in 1993.<sup>113</sup> Smaller numbers of polygamists are scattered throughout the rest of the European Union—nearly a million persons all told, according to some estimates, though exact numbers are not known.<sup>114</sup> Many of these polygamous families hail from Africa, the Middle East, and Asia, and most of them are Muslims of various schools of thought and law. European nations will, as a matter of course and comity, recognize monogamous marriages contracted abroad, even in countries that formally recognize polygamy.<sup>115</sup> But they will routinely deny visas and bar entry to known polygamists, as well as to second wives and their children who are seeking to unite with a husband or father who has moved to Europe. While Continental lands rarely prosecute known polygamists, only the first marriage of a polygamous household will usually be recognized as valid, especially in disputes about marital property and inheritance. Like common law countries, civil law countries in Europe differ widely in their treatment of polygamous household members in the delivery of education, charity, social welfare, health care, and other state benefits that turn on marital status. Tensions over these domestic issues have heightened between European Muslims and non-Muslims in recent years—in part as a broader nativist reaction to new immigrants in Europe, in part as a

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*also* MARINO ALDO COLACCI, *IL DELITTO DI BIGAMIA* [THE CRIME OF BIGAMY] (1958); RICCIO, *supra* note 100. I am grateful to Rinaldo Cristofori for helping me with these Italian sources.

<sup>111</sup> A comprehensive European study of contemporary polygamy laws and their enforcement evidently remains a desideratum. For a partial study, see BOELE-WOEKLI ET AL., *supra* note 110.

<sup>112</sup> BAILEY & KAUFMAN, *supra* note 26, at 147 (quoting CHRISTOPHER CALDWELL, *REFLECTIONS ON THE REVOLUTION IN EUROPE: IMMIGRATION, ISLAM, AND THE WEST* 228 (2009)).

<sup>113</sup> *Polygamy in France: Many Wives' Tales*, *ECONOMIST*, May 6, 2010, at 55, available at <http://www.economist.com/node/16068972/>; see also GIOVANNI CAMPARIA & OLIVIA SALIMBENI, *BERLIN INST. FOR COMPARATIVE SOC. RESEARCH, MARRIAGE MIGRATION IN FRANCE: COUNTRY STUDY* (2004).

<sup>114</sup> See Veronica Federico, *Europe Facing Polygamy: Italy, France and the UK Accept the Challenge of Immigration* (presented at the IACL IX World Congress, Oslo, June 16–20, 2014) (unpublished manuscript), available at <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws6/w6-federico.pdf> (noting thousands of cases of bigamy and polygamy in France, the United Kingdom, and Italy).

<sup>115</sup> Leslie Lebl, *Sharia and the European Union*, AM. CENTER FOR DEMOCRACY (Apr. 3, 2015, 12:05 AM), <http://acdemocracy.org/sharia-and-the-european-union/>.

broader cultural backlash against Muslims occasioned by 9/11, Fort Hood, the English and Spanish train station bombings, and ongoing battles with jihadists at home and abroad.<sup>116</sup>

At the time of this writing, no major constitutional case in a European land has yet tested the constitutionality of Europe's anti-polygamy laws and regulations. The European Court of Human Rights has resisted arguments for the state recognition of polygamy, even if pressed on religious freedom, family rights, privacy, equality and non-discrimination, and other human rights grounds set out in the 1953 European Convention of Human Rights<sup>117</sup> (and echoed in the 2000 Charter of the Fundamental Rights of the European Union).<sup>118</sup> In the signature 2010 case of *Şerife Yiğit v. Turkey*, for example, the European Court upheld Turkey's law that required couples to marry monogamously in a civil ceremony before a state official. Turkish law does not recognize a religious marriage ceremony to be sufficient to create a valid marriage at state law, and it threatened prison to any religious official who presided over a marriage without a prior civil registration of the marriage.<sup>119</sup> The stated purpose of the Turkish law, as the European Court saw it, "was to protect women against polygamy. If religious marriages were to be considered lawful all the attendant religious consequences would have to be recognised, for instance the fact that a [Muslim] man could marry four women."<sup>120</sup> "Turkey aimed to put an end to a marriage tradition which places women at a clear disadvantage, not to say in a situation of dependence and inferiority, compared to men."<sup>121</sup> This Turkish prohibition of polygamy was thus not a violation of the European Convention's stated right to marriage and a family, the European Court concluded, nor a form of religious or gender discrimination.<sup>122</sup>

In a similar move, the European Council has made clear that "[t]he right to family reunification should be exercised in proper compliance with . . . the

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<sup>116</sup> See, e.g., ISLAM & EUROPE: CRISES ARE CHALLENGES (Marie-Claire Foblets & Jean-Yves Carlier eds., 2010).

<sup>117</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

<sup>118</sup> Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1.

<sup>119</sup> *Şerife Yiğit v. Turkey*, No. 3976/05, 2000 Eur. Ct. H.R. para. 40, *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101579>.

<sup>120</sup> *Id.* at para. 62.

<sup>121</sup> *Id.* at para. 81.

<sup>122</sup> *Id.* at para. 87.

rights of women and of children.”<sup>123</sup> “In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.”<sup>124</sup> The Council has condemned polygamy as an offense against the rights of women and the demands for gender equality<sup>125</sup>—a position also taken by the United Nations Committee on the Elimination of Discrimination Against Women.<sup>126</sup> The European Council has further grouped polygamy with “slavery . . . [and other] crimes in the name of honour or tradition, of violence, trafficking, female genital mutilation, forced marriage . . . or deprivation of identity (for example, when women are forced to wear the burka, the nigab, or a mask).”<sup>127</sup> Member States, the Council declared, must have “zero tolerance” for such offenses against the “indispensable” rights of individual women and children.<sup>128</sup>

### *E. Global Legal, Religious, and Cultural Patterns of Polygamy*

Outside the West, several other large and populous nations have also prohibited polygamy: Japan (1880),<sup>129</sup> the Soviet Union (1920s),<sup>130</sup> Thailand

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<sup>123</sup> Council Directive 2003/86, 2003 O.J. (L 251) 12, 13 (EC).

<sup>124</sup> *Id.* at 15, art. 4.4. Some scholars are concerned that this prescription against reunification of polygamous families may ultimately hurt the rights of women and children by leaving them in foreign lands without the support of their husband and father. See CLARE MCGLYNN, *FAMILIES AND THE EUROPEAN UNION: LAW, POLITICS, AND PLURALISM* 134–35 (2006).

<sup>125</sup> Report on a Roadmap for Equality between Women and Men, EUR. PARL. DOC. (A6-0033) 4 (2007) [hereinafter *Roadmap for Equality*].

<sup>126</sup> Comm. on the Elimination of Discrimination Against Women, Rep. on its 13th Sess., Jan. 17–Feb. 4, 1994, ¶ 14, U.N. Doc. A/49/38; GAOR, 49th Sess., Supp. No. 38 (Apr. 12, 1994), available at <http://www.un.org/documents/ga/docs/49/plenary/a49-38.htm> [hereinafter *General Recommendation No. 21*].

<sup>127</sup> *Roadmap for Equality*, *supra* note 125, at 4.

<sup>128</sup> *Id.*; see also *General Recommendation No. 21*, *supra* note 126, at art. 16, cmt. 14 (“Polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.”).

<sup>129</sup> See KEIHŌ [KEIHŌ] [PEN. C.] 1907, art. 184 (Japan), available at <http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf>; see also HIROSHI ODA, *JAPANESE LAW* 430–35, 457–58 (3d ed. 2009); Joseph Henrich, Robert Boyd & Peter J. Richerson, *The Puzzle of Monogamous Marriage*, 367 *ROYAL TRANSACTIONS ROYAL SOC’Y B* 757 (2012).

<sup>130</sup> See detailed sources in Harold J. Berman, *Soviet Family Law in the Light of Russian History and Marxist Theory*, 56 *YALE L.J.* 26 (1946). Today, the Russian Parliament (the Duma) is facing pressure to permit polygamy not only for its ample Muslim communities but as a remedy for its low birth rate and high rate of lonely singles. See Mira Katbamna, ‘Half a Good Man is Better than None At All,’ *GUARDIAN* (Oct. 26, 2009, 20.05 EDT), <http://www.theguardian.com/education/2009/oct/27/polygamy-study-russia-central-asia>.

(1935),<sup>131</sup> China (1950),<sup>132</sup> India for all but Muslims (1955),<sup>133</sup> and Nepal (1963).<sup>134</sup> Taken together, the 120 plus Western and non-Western countries that today criminally ban polygamy, or do not recognize polygamy as a valid form of marriage, represent the vast majority of the world's population.

Nonetheless, these nations represent only 15%–20% percent of the world's known cultures.<sup>135</sup> Anthropologists estimate that of the approximately 1,200 known cultures in the world, 75%–85% of them (depending on who is counting and what domestic forms are being counted) recognize polygamy as a valid form of marriage.<sup>136</sup> Many of these polygamous cultures, anthropologists tell us, are found in smaller tribal groups often living in “traditional, isolated, low-technology cultures” under the governance of customary laws.<sup>137</sup> Many have traditions of arranged marriages in which women in particular have little control over their choice of husband—though some women choose polygamy to gain access to the resources and protection of powerful men. Many of the women who enter polygamous unions voluntarily or involuntarily are rural, poor, and uneducated; they and their children provide vital labor for the

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<sup>131</sup> THAILAND CIVIL AND COMMERCIAL CODE, pt. III § 1452, available at <http://www.samuiforsale.com/law-texts/thailand-civil-code-part-3.html>.

<sup>132</sup> Zhong Hua Ren Min Gong He Guo Hun Yin Fa (中华人民共和国婚姻法) [Marriage Law of the People's Republic of China] (promulgated by the Chairman of the Cent. People's Gov't, May 1, 1950, effective May 1, 1950) (“Article 1: The feudal marriage system that allowed arranged or forced marriage, that admit man's superiority to woman and woman's inferiority to man, and that neglect children's interests shall be abolished. A new democratic marriage system based on marriage freedom for man and woman, monogamy, equality between man and woman, and protection of women and children's lawful rights shall be implemented. Article 2: Bigamy and concubinage shall be prohibited. Child brides shall be prohibited. Any interference with a widow's freedom of marriage shall be prohibited.”) (repealed 1981). My thanks to Professor Ruihua Zhong of Beijing for translating this text for me. For an alternative translation, see THE MARRIAGE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (2d prtg. 1975), available at <http://www.paulinoll.com/China/Mao/Marriage-Pages-1.html>. While the 1950 version of the law was repealed in 1981 and amended in 2001, the current law still prohibits polygamy. Zhong Hua Ren Min Gong He Guo Hun Yin Fa (2001 Xiu Zheng) (中华人民共和国婚姻法 (2001修正)) [Marriage Law of the People's Republic of China (2001 Amendment)] (promulgated by the Standing Comm. of the Nat'l People's Cong., Apr. 28, 2001, originally effective Jan. 1, 1981), arts. 1–2, 51 (Lawinfochina), <http://www.lawinfochina.com/display.aspx?id=1793&lib=law>.

<sup>133</sup> The Hindu Marriage Act, No. 25 of 1955, § 5, INDIA CODE (India), available at <http://indiacode.nic.in/fullact1.asp?tfnm=195525>.

<sup>134</sup> Marriage Registration Act 2028, § 4(a) (1971) (Nepal), available at <http://www.lawcommission.gov.np/site/sites/default/files/Documents/marriage-registration.pdf>.

<sup>135</sup> See *World Cultures Database*, EHRAF, <http://ehrafworldcultures.yale.edu/ehrafe/> (last visited May 17, 2015) (follow “Browse SUBJECTS” hyperlink; then search “polygamy” and note 595 resulting). This database is built on the work of GEORGE P. MURDOCK, ATLAS OF WORLD CULTURES (1981).

<sup>136</sup> See various studies summarized in Geoffrey A. Clark, Letter, *Human Monogamy*, 282 SCIENCE 1047, 1047–48 (1998); J. Patrick Gray, *Ethnographic Atlas Codebook*, 10 WORLD CULTURES 86, 89–90 (1998); Scheidel, *supra* note 96, at 281–82.

<sup>137</sup> ALTMAN & GINAT, *supra* note 23, at 40.

agricultural and other low-technology, labor-intensive household economies that are the common condition of these polygamous communities.<sup>138</sup> In addition to these groups, a number of Aboriginal or Indigenous Peoples in the Americas, Australia, New Zealand, and Oceania recognize polygyny (one husband with multiple wives) and very occasionally polyandry (one wife with multiple husbands).<sup>139</sup> Most of the time, anthropologists report, the polygamous practices of all these groups fade when their members are exposed to urbanization, technology, and mass media or when members leave the community.<sup>140</sup>

A good number of these polygamous cultures are found within the fifty-five Muslim majority countries in Africa, the Middle East, and Asia whose state laws recognize polygamy as a valid form of marriage—albeit with Turkey (since 1926) and Tunisia (since 1956) excepted.<sup>141</sup> But official recognition of polygamy by state law, custom, Islamic law, or some combination thereof, hardly means that all families in these countries are polygamous. In a comprehensive survey of polygamous practices in these lands as of 2010, Canadian scholars Martha Bailey and Amy Kaufman have shown that polygamy is a controversial and shrinking practice among many modern day Muslims in these regions, particularly among younger, educated, and urbanized Muslims who typically reject the practice.<sup>142</sup> To be sure, in the African “polygyny belt”<sup>143</sup> from Senegal to Tanzania, where customary laws and older traditions often combine with Islamic teachings, 30%–40% of all married men are thought to practice polygamy.<sup>144</sup> But in Muslim-majority

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<sup>138</sup> *Id.* at 40–41 (citing Human Relations Area Files); Alean Al-Krenawi, Vered Slonim-Nevo & John R. Graham, *Polygyny and Its Impact on the Psychosocial Well-Being of Husbands*, 37 J. COMP. FAM. STUD. 173, 177–78 (2006); Satoshi Kanazawa & Mary C. Still, *Why Monogamy?*, 78 SOC. FORCES 25 (1999); Scheidel, *supra* note 96, at 284–89 (summarizing more recent anthropological literature); see also Lakshman Marasinghe, *Conversion, Polygamy and Bigamy: Some Comparative Perspectives*, 4 ASIA PAC. L.J. 69 (1995) (providing additional comparative perspectives).

<sup>139</sup> See H.R.H. PRINCE PETER, A STUDY OF POLYANDRY (1963); Nancy E. Levine and Walter H Sangree, *Women with Many Husbands: Polyandrous Alliance and Marital Flexibility in Africa and Asia*, 11 J. COMP. FAM. STUD. 283 (1980).

<sup>140</sup> See PETER BRETSCHNEIDER, POLYGYNY: A CROSS-CULTURAL STUDY (1995); REMI CLIGNET, MANY WIVES, MANY POWERS: AUTHORITY AND POWER IN POLYGYNOUS FAMILIES (1970); ZEITZEN, *supra* note 47.

<sup>141</sup> For detailed country and regional studies and perspectives, see ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK (Abdullahi A. An-Na'im ed., 2002) [hereinafter ISLAMIC FAMILY LAW]; DAVID PEARL & WERNER MENKSI, MUSLIM FAMILY LAW (3d ed. 1998); WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM (Lynn Welchman ed., 2004).

<sup>142</sup> BAILEY & KAUFMAN, *supra* note 26, at 7–68.

<sup>143</sup> Scheidel, *supra* note 96, at 284.

<sup>144</sup> See REPRODUCTION AND SOCIAL ORGANIZATION IN SUB-SAHARAN AFRICA 338–59 (Ron J. Lesthaeghe ed., 1989) (collecting data and citing studies). For a collection of polygyny statistics, see STATCOMPILER,

Arab countries of northern Africa, such as Egypt, Algeria, Libya, and Morocco, polygamy is practiced in less than 3% of all households.<sup>145</sup> In the Middle East, countries like Jordan and Lebanon have comparably low rates,<sup>146</sup> while in others like Saudi Arabia, Yemen, and some of the Gulf states polygamy prevails in 10%–20% of all households—some of them elite and powerful families, most of them poor, rural, and tribal.<sup>147</sup> In Eurasia and South Asia, where more than 60% of Muslims of the world now live, most countries (including the largest Muslim country in the world, Indonesia) have polygamy rates under 10%.<sup>148</sup> Even in Asian countries such as Pakistan and Bangladesh, where polygamy is more common, state laws insist, on pain of fine and imprisonment, that a Muslim man may marry up to four wives only if the first wife consents and only if he can support his wives and children equally and fully.<sup>149</sup>

These latter restrictions on the practice of polygamy reflect common Muslim teachings, rooted ultimately in the sacred texts of Islam. Scholars of Islamic theology make clear that Islam regards marriage as an essential institution, and it encourages all faithful fit adults to marry.<sup>150</sup> Marriage, the Qur'an teaches, builds alliances among groups and families, produces and nurtures legitimate children, protects and supports orphaned or abandoned women, and most importantly provides an essential means for husband and wife to provide material, physical, emotional, and spiritual support for each

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<http://www.statcompiler.com/> (last visited May 17, 2015) (follow “Data Table” hyperlink; select “Select All” hyperlink under country selection option; select “Next” hyperlink; select “Complete List” tab; then select “Other Proximate Determinants of Fertility” drop bar; select “Number of co-wives” drop bar; select “Women-number of other wives” drop bar; check “Two or more wives” box; then follow “OK” hyperlink).

<sup>145</sup> See BAILEY & KAUFMAN, *supra* note 26, at 14–16, 22–23, 26–30.

<sup>146</sup> See *id.* at 48, 50–51.

<sup>147</sup> See *id.* at 38–45, 53–54.

<sup>148</sup> See *id.* at 54–68; June S. Katz & Ronald S. Katz, *Legislating Social Change in a Developing Country: The New Indonesian Marriage Law Revisited*, 26 AM. J. COMP. L. 309, 311 (1978) (“The actual practice of polygamy was not very widespread before the new law, accounting for only 5% of all marriages.”); see also ISLAMIC FAMILY LAW, *supra* note 141, at 210 (“[O]nly 5 to 7 per cent of Indian Muslims are engaged in polygynous marriages.”).

<sup>149</sup> See BAILEY & KAUFMAN, *supra* note 26, at 57–61; see also ISLAMIC FAMILY LAW, *supra* note 141, at 34, 73–74, 101, 160–61, 195–96, 210, 256–57, 289–90.

<sup>150</sup> See ISLAMIC FAMILY LAW, *supra* note 141.

other.<sup>151</sup> The strong assumption and preference of the Qur'an is for monogamy, not celibacy, and for monogamy, not polygamy.<sup>152</sup>

Polygamy is only an option, not an obligation, for Muslims. The only two Qur'anic verses on point aim to restrict rather than encourage polygamy—which most (though not all) scholars believe was a common practice in seventh-century Arabia where the Prophet Mohammed lived. One Qur'anic verse allows polygamy but only in the narrow context of protecting female orphans from the abuses of their guardians: “If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if you fear that you shall not be able to deal justly (with them), then only one.”<sup>153</sup> A second verse, however, questions whether justice can in fact be done to all women in a polygamous marriage:

You are never able to be fair and just as between women, even if it is your ardent desire. But turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air). If you come to a friendly understanding, and practice self-restraint, God is Oft-forgiving, Most Merciful.<sup>154</sup>

In the Hadith, the second most important sacred Muslim text after the Qur'an, the Prophet refused to allow his cousin Ali, who had married the Prophet's daughter Fatimah, to take a second wife for fear of harming or hurting her. “Fatimah is part of me,” the Prophet said; “whatever hurts her hurts me, and whatever harms her harms me.”<sup>155</sup>

More conservative schools of Islamic jurisprudence, particularly the Wahhabi and Hanafi schools, have long read these sacred texts together to allow for a limited right to practice polygamy for men of ample means, and this has persisted in some Islamic communities to this day, both in Muslim-majority lands and in dispersed Muslim communities throughout the world, including in the West.<sup>156</sup> In Muslim lands and communities that follow the more liberal teachings of the Malaki and Shaf'i schools of jurisprudence,

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<sup>151</sup> See, e.g., *Qur'an* 3:127, 4:1, 7:189, 16:72, 17:24, 24:32, 30:21. For more examples, see texts gathered in Azizah Y. Al-Hibri & Raja' M. El Habti, *Islam, in SEX, MARRIAGE, AND FAMILY IN WORLD RELIGIONS* 150 (Don S. Browning, M. Christian Green & John Witte, Jr. eds., 2006); see also Harald Motzki, *Marriage and Divorce, in 3 ENCYCLOPEDIA OF THE QUR'AN* 276 (Jane Dammen McAuliffe ed., 2003).

<sup>152</sup> See Al-Hibri & El Habti, *supra* note 151, at 186.

<sup>153</sup> *Id.* (quoting *Qur'an* 4:3).

<sup>154</sup> *Id.* at 187 (quoting *Qur'an* 4:129).

<sup>155</sup> *Id.* (quoting 7 *Hadith* bk. 62, no. 157, Sahih al-Bukhari 5230).

<sup>156</sup> *Id.* at 185–90; see also ISLAMIC FAMILY LAW, *supra* note 141, at 200–11.

however, polygamy is an unpopular and shrinking domestic practice, particularly for families in urban settings and more developed cultures.<sup>157</sup> A number of Muslim jurists within these schools have been openly critical of the practice because of concern for the treatment of women and children.<sup>158</sup>

Nobody knows the exact number of practicing polygamists around the world. In the nations where it is legal, polygamy tends to be either the prerogative of wealthy and powerful families or the practice of rural and undeveloped communities that follow customary law—though in some Muslim-majority countries, polygamy appeals to a wider cross-section of the population. In the nations where it is not legal, polygamy tends to be the practice of smaller indigenous, tribal, and religious communities, and the experimental practice of small and sometimes edgy countercultural groups on the far right and the far left. “[M]ost of the world has abandoned polygamy” over the past century, a trend hastened by colonization, globalization, urbanization, feminization, industrialization, Westernization, and Christianization.<sup>159</sup> But polygamy remains in place in parts of the world, and in a few places the practice is growing.<sup>160</sup> Martha Bailey and Amy Kaufman summarize the vast anthropological literature that seeks to explain why:

Because polygamy is often a deeply entrenched sociocultural practice, endorsed by Islam and traditional religions, law and policy makers find it difficult to eliminate or restrict the practice. Apart from any religious underpinnings, social conditions provide a climate within which polygamy can thrive. . . . Often a relatively small number of men control a disproportionate share of resources. These high-status males mate more often and leave more offspring. In these conditions, women may actually seek out polygamous marriages. A polygamous marriage may be an economic advantage for a woman with few options. Rural women with little or no education and low socioeconomic status are more likely to be in a polygamous marriage. Educated women of higher socioeconomic status have more options and are far less likely to be in a polygamous marriage. . . .

. . . Men in some areas desire large families to expand their alliances and bolster their standing in the society. As well, children may be needed to increase the labor supply within a kinship network. And in many polygamous regions there is a strong preference for

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<sup>157</sup> Al-Hibri & El Habti, *supra* note 151, at 185–90.

<sup>158</sup> *See id.* at 187–88.

<sup>159</sup> BAILEY & KAUFMAN, *supra* note 26, at 7–8.

<sup>160</sup> *See id.*

male children. Men may seek out additional wives if their first wives give birth to female children only or are barren. Men may also take additional wives for sexual satisfaction, particularly in societies with lengthy postpartum sexual taboos. In communities where families commonly arrange first marriages, men may seek out additional wives to satisfy their desire for a love match or to exercise their own choice. Polygamy is also found in closed cultures, where open displays of courtship and affection are shunned. In addition, polygamy has historically been used in place of divorce, particularly in countries that stigmatized divorce or that have limited grounds for divorce, and high thresholds for proving those grounds.<sup>161</sup>

Thus, in the cultures where it persists, polygamy almost always takes the form of polygyny and typically functions as a means to address problems related to shortages in material resources, labor, and socioeconomic status.

## II. RECONSTRUCTING THE MODERN WESTERN CASE AGAINST POLYGAMY

### A. *Framing the Questions*

Three sets of questions are now before us: First, given the modern global trends away from polygamy and given the social, economic, and psychological conditions that often attend the practice of polygamy, are there sufficiently compelling reasons to relax Western criminal laws against polygamy? Or, should Western states maintain and even strengthen these anti-polygamy measures, in part as an effort to enhance the equal rights and dignity of women, men, and children? Second, given the growing liberalization of Western norms of sex, marriage, and family life and the growing pluralization of state-sanctioned forms of domestic life, isn't state recognition of polygamy inevitable and state rejection of polygamy discriminatory, especially to religious polygamists? Or, are there sufficiently compelling reasons for Western states to reject polygamy options, even while accepting and supporting a constitutional culture of sexual and religious liberty? Third, given that most Western state constitutions have both disestablished Christianity and prohibited state prescriptions or proscriptions of religion, doesn't the Western case against polygamy inevitably collapse under the weight of the Christian tradition that so long supported it? Or, are the traditional Western arguments against polygamy, in original or reconstructed forms, cogent, just, and expedient in our post-Christian and postmodern Western culture?

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<sup>161</sup> *Id.* at 7–8 (endnotes omitted).

These questions about polygamy are likely to dominate Western family law in the next generation. Two generations ago, contraception, abortion, and women's rights were the hot topics of Western family law and the culture wars.<sup>162</sup> This past generation, it has been children's rights and same-sex rights that have dominated public deliberation and litigation.<sup>163</sup> On the frontier of modern Western family law are hard questions about extending the forms of valid marriage to include polygamy and extending the forums of marital governance to include religious and cultural legal systems that countenance polygamy. As I noted in the Introduction, the first new cases challenging the constitutionality of traditional Western criminal prohibitions against polygamy have been filed—with one recent federal court finding Utah's anti-polygamy law partly unconstitutional.<sup>164</sup> The first legal and cultural battles over the place of religious legal systems in modern liberal democracies have been waged—with strong new anti-Shari'a measures now being promoted and passed both in America and Europe.<sup>165</sup> And the first sustained scholarly arguments for legal toleration, if not state recognition, of polygamy have been pressed—with various liberals and libertarians, Muslims and Christians, philosophers and social scientists, multiculturalists and counterculturalists finding themselves on the same side.<sup>166</sup>

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<sup>162</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (extending the right to privacy to a woman's right to have an abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that obtaining contraceptives is protected under the right to marital privacy).

<sup>163</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the Defense of Marriage Act's definition of marriage as between one man and one woman); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (holding against proponents of California Proposition 8, which banned same-sex marriage); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a law criminalizing sodomy). On children's rights, see BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* (2008); *WHAT IS RIGHT FOR CHILDREN: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS* (Martha A. Fineman & Karen Worthington eds., 2009).

<sup>164</sup> *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013). For a contrary recent case, with a detailed distillation of literature about the inherent harms of polygamy, see Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (Can.). Kenya, a former English colony that maintains portions of the common law, also recently passed a law authorizing a man to have an unlimited number of wives, while still prosecuting a woman for having two husbands. See Karimi & Leposo, *supra* note 54.

<sup>165</sup> See Fadel, *supra* note 62, at 164–65; Tariq Modood, *Multicultural Citizenship and the Shari'a Controversy in Britain*, in *SHARI'A IN THE WEST*, *supra* note 61, at 33; see also Symposium, *Overlapping Jurisdictions: What Roles for Conscience and Religion?*, 4 FAULKNER L. REV. 299 (2013).

<sup>166</sup> For recent discussions and bibliographies, see MARK A. GOLDFEDER, *LEGALIZING PLURAL MARRIAGE: THE NEXT FRONTIER IN FAMILY LAW* (forthcoming 2015); *POLYGAMY* (Stefan Kiesbye ed., 2013); *POLYGAMY'S RIGHTS AND WRONGS*, *supra* note 58. Beyond these, I found helpful and challenging the various perspectives on polygamy in these recent sources: BAILEY & KAUFMAN, *supra* note 26, at 133–88; GARY S. BECKER, *A TREATISE ON THE FAMILY* 80–107 (enlarged ed. 1993); PHILIP L. KILBRIDE & DOUGLAS R. PAGE, *PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION?* (2d ed. 2012); DAN MARKEL, JENNIFER M.

Many modern liberals argue that the state must facilitate and support the consensual intimate relationships of all its citizens—straight or gay, temporary or permanent, sexual or nonsexual, monogamous or polygamous.<sup>167</sup> Many modern libertarians argue that the state has no business interfering in the private domestic lives of its citizens unless and until there is tangible harm to a victim.<sup>168</sup> Both schools of modern political thought—and the numerous variations on them—generally support the repeal of traditional criminal laws against polygamy.<sup>169</sup> Some liberals go further to call for state recognition of polygamy, too.<sup>170</sup> Feminist theorists, queer theorists, critical race theorists, and multicultural theorists offer all manner of variations on these basic arguments, though notable scholars in each of these schools of thought oppose state recognition of polygamy while supporting same-sex marriage.<sup>171</sup>

Many modern Muslims,<sup>172</sup> Fundamentalist Mormons,<sup>173</sup> and others add arguments from religious freedom and self-determination, religious equality, and nondiscrimination to press their case for polygamy. Every Western nation

COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 127–40 (2009); RICHARD A. POSNER, SEX AND REASON 243–59 (1992); Thom Brooks, *The Problem with Polygamy*, PHIL. TOPICS, Fall 2009, at 109; Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023 (2005); Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977 (2015); Andrew F. March, *Is There a Right to Polygamy? Marriage, Equality, and Subsidizing Families in Liberal Public Justification*, 8 J. MORAL PHIL. 246 (2011); Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101 (2006); Strassberg, *supra* note 48; Maura Strassburg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353 (2003); Gregg Strauss, *Is Polygamy Inherently Unequal?*, 122 ETHICS 516 (2012).

<sup>167</sup> Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004).

<sup>168</sup> See Vaughn Bryan Baltzly, *Same-Sex Marriage, Polygamy, and Disestablishment*, 38 SOC. THEORY & PRAC. 333 (2012).

<sup>169</sup> *Id.*; Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love is a Many Splendored Thing,"* 15 DUKE J. GENDER L. & POL'Y 315 (2008).

<sup>170</sup> David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 81 (1997).

<sup>171</sup> Within this vast literature, see, for example, SARAH SONG, JUSTICE, GENDER, AND THE POLITICS OF MULTICULTURALISM 142–68 (2007); Adrien Katherine Wing, *Polygamy in Black America, in CRITICAL RACE FEMINISM: A READER* 186 (Adrien Katherine Wing ed., 2d ed. 2003); Michèle Alexandre, *Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?*, 18 HASTINGS WOMEN'S L.J. 3 (2007); Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559 (2008); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

<sup>172</sup> Fadel, *supra* note 62, at 164; Gaudreault-DesBiens, *supra* note 61.

<sup>173</sup> Opening Statement by the FLDS Regarding Section 1 of the Charter, Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (Can.) (No. S-097767); see also Affidavit of James Older at para. 7, Reference, 2011 BCSC 1588 (No. S-097767) (“The FLDS and I intend to assert that s. 293 of the Criminal Code contravenes various Charter Rights of adherents to the FLDS faith.”).

(save Australia), they point out, has robust constitutional guarantees of religious freedom on the books for individuals and groups. Every Western nation, furthermore, is a signatory to the binding 1966 International Covenant on Civil and Political Rights, with its robust protections of freedom of thought, conscience, and belief for all peaceable believers—human rights norms that are echoed and elaborated in many other international human rights instruments, not least those guaranteeing religious and cultural self-determination.<sup>174</sup> Even if nonbelievers do not have the right to practice polygamy, the argument goes, surely the voluntary faithful of these religious communities must be given the right to follow the examples and instructions of their founding Prophets in taking multiple wives. Surely, the leaders of these religious communities should be respected if a polygamous family chooses to be governed by religious law rather than by state law.<sup>175</sup>

Some modern Christian missionaries have argued further that Western churches should accept new converts to the Christian faith who wish to maintain their polygamous households.<sup>176</sup> After all, many of these men would rather give up their multiple gods than give up their multiple wives who offer them sex, love, labor, prestige, and heirs. After all, marriage is only an earthly thing: in heaven “they neither marry nor are given in marriage,” Jesus said.<sup>177</sup> After all, the global church has found so many other ways to accommodate and enculturate the local customs of its new converts, at least as a stepping stone toward adoption of more common Christian practices in the next generation or two.<sup>178</sup> After all, Catholic and Protestant churches, especially since the 1960s,

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<sup>174</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). See discussion of later human rights instruments on religion in RELIGION AND HUMAN RIGHTS: AN INTRODUCTION (John Witte, Jr. & M. Christian Green eds., 2012).

<sup>175</sup> See, for example, the collection of articles and literature cited in MARRIAGE AND DIVORCE, *supra* note 44.

<sup>176</sup> See, e.g., EUGENE HILLMAN, POLYGAMY RECONSIDERED: AFRICAN PLURAL MARRIAGES AND THE CHRISTIAN CHURCHES (1975); Elijah M. Baloyi, *Critical Reflections on Polygamy in the African Christian Context*, 41 MISSIONALIA 164 (2013) (providing an overview of recent literature); Timothy Willem Jones, *The Missionaries' Position: Polygamy and Divorce in the Anglican Communion, 1888–1988*, 35 J. RELIGIOUS HIST. 393 (2011).

<sup>177</sup> *Mark* 12:25 (Revised Standard).

<sup>178</sup> See Buti Tlhagale, *Inculturation: Bringing the African Culture into the Church*, 14 EMORY INT'L L. REV. 1249 (2000); Johan D. van der Vyver, *State-Sponsored Proselytization: A South African Experience*, 14 EMORY INT'L L. REV. 779, 782–83 (2000).

have been champions of religious freedom and human rights for all.<sup>179</sup> How can the church deny religious freedom to its own new members?

It is not within my competence as a legal historian to analyze all these current arguments. My aim in this Part is more modest: to retrieve and reconstruct some of the main historical arguments about polygamy and try to checkmate some of the partial and distorted “law office” histories that have already gathered around this issue.

### *B. Biblical and Legal Arguments About Polygamy and Same-Sex Relations*

What the historical record makes abundantly clear is that the Western case against polygamy is markedly different from the Western case against sodomy and same-sex relations. The Western case against same-sex relations was (and for some still is) based first and foremost on the Bible. The Mosaic law commanded firmly: “You shall not lie with a male as with a woman; it is an abomination.”<sup>180</sup> “If a man lies with a male as with a woman, both of them have committed an abomination; they shall both be put to death.”<sup>181</sup> The Apostle Paul declared ominously that “the wrath of God is revealed from heaven against all ungodliness and wickedness” including specifically the acts of “sodomites,” “sexual perverts,” and others who succumbed to “dishonorable passions”: “women [who] exchanged natural relations for unnatural, and the men [who] likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own persons the due penalty for their error.”<sup>182</sup> While some modern scholars see ambiguity in these passages,<sup>183</sup> the Christian tradition until recently treated these texts as a clear condemnation of same-sex activities and unions, let alone marriages.<sup>184</sup>

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<sup>179</sup> See CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION (John Witte, Jr. & Frank S. Alexander eds., 2010).

<sup>180</sup> *Leviticus* 18:22 (Revised Standard).

<sup>181</sup> *Leviticus* 20:13 (Revised Standard).

<sup>182</sup> *Romans* 1:18–19, 24–27; 1 *Corinthians* 6:9–10; 1 *Timothy* 1:10.

<sup>183</sup> See, e.g., AUTHORIZING MARRIAGE: CANON, TRADITION, AND CRITIQUE IN THE BLESSING OF SAME-SEX UNIONS (Mark D. Jordan, Meghan T. Sweeney & David M. Mellon eds., 2006); DERRICK SHERWIN BAILEY, HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION (Longmans, Green & Co. 1975) (1955); JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 106–12 (1980); JOHN BOSWELL, SAME SEX UNIONS IN PREMODERN EUROPE (1994) [hereinafter BOSWELL, SAME SEX UNIONS]; WILLIAM STACY JOHNSON, A TIME TO EMBRACE: SAME-GENDER RELATIONSHIPS IN RELIGION, LAW, AND POLITICS (2006).

<sup>184</sup> See detailed references in BRUNDAGE, *supra* note 100, at 57, 73–74, 147–49.

It was thus the church, not the state, that led the first campaigns against same-sex activities and unions in the Western tradition. The early canons of the church prohibited sodomy, buggery, transvestism, and other stated forms of “fornication” and “perversion,” spiritually punishing such sins and excommunicating recalcitrant sexual sinners.<sup>185</sup> These prohibitions became more detailed and severe in the Germanic penitential literature that followed, and even more so in high medieval canon laws and scholastic texts.<sup>186</sup> Sex between men was singled out as a particularly vile form of “unnatural” sin, even more so if it involved a cleric.<sup>187</sup> While a few churchmen may have winked at occasional same-sex unions and even quietly blessed a few of them in special liturgies,<sup>188</sup> one cannot rewrite this history by anecdote. The overwhelming teaching and practice of the historical Christian churches was to condemn same-sex relations.

Roman law, for its first 1,000 years, allowed same-sex acts and relationships—though only heterosexual couples of the proper class could contract valid marriages and produce heritable children.<sup>189</sup> It was only after the fourth-century Christian conversion of Emperor Constantine that these biblically based laws against same-sex activities slowly soaked into Roman law.<sup>190</sup> By the sixth century, the Christian Roman Emperor Justinian called sex between men an “abominable,” “abhor[rent],” “diabolical,” and “reprehensible vice” that is so “contrary to nature” that the practice is “not committed [even] by beasts.”<sup>191</sup> Since the biblical days of Sodom, Justinian declared, such “impious and criminal acts” and “filthy practices” have brought “the wrath of God” unto any community that countenanced them.<sup>192</sup> “[S]evere measures” were thus needed to stamp out these acts for good.<sup>193</sup> This classic Christian condemnation of sodomy and same-sex activities was echoed and elaborated in the civil law, canon law, and common law traditions thereafter.<sup>194</sup> By the

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<sup>185</sup> See WITTE, *supra* note 3, at 101–43 (analyzing the treatment of polygamy in early canon law).

<sup>186</sup> See *id.* at 101–95 (analyzing polygamy in Germanic penitential rules and the medieval *ius commune*).

<sup>187</sup> See references in BRUNDAGE, *supra* note 100, at 212–14, 313–14, 398–400, 534–35.

<sup>188</sup> See BOSWELL, SAME SEX UNIONS, *supra* note 183; MARK D. JORDAN, BLESSING SAME-SEX UNIONS: THE PERILS OF QUEER ROMANCE AND THE CONFUSIONS OF CHRISTIAN MARRIAGE (2005).

<sup>189</sup> See WITTE, *supra* note 3, at 110–13; see also BRUNDAGE, *supra* note 100, at 48.

<sup>190</sup> GRUBBS, *supra* note 97, at 102.

<sup>191</sup> J. INST. 4.18.4 (c. 533 C.E.), translated in THE INSTITUTES OF JUSTINIAN 205 (J.B. Moyle trans., Oxford Univ. Press 5th ed. 1913); NOV. 12.1, 77.1, 89.12.5, translated in 16 THE CIVIL LAW, *supra* note 94, at 70, 288, 334; NOV. 141.1, translated in 17 THE CIVIL LAW, *supra* note 94, at 160–61.

<sup>192</sup> NOV. 141.1, translated in 17 THE CIVIL LAW, *supra* note 94, at 160–61.

<sup>193</sup> *Id.* at 161.

<sup>194</sup> See MARK D. JORDAN, THE INVENTION OF SODOMY IN CHRISTIAN THEOLOGY (1997) (examining the historical evolution of sodomy laws).

twelfth and thirteenth centuries, church and state courts worked together to mete out severe punishment against convicted “sodomists,” including death by burning, beheading, or hanging (by their testicles and penises, no less!) for egregious offenders.<sup>195</sup>

By marked contrast to same-sex relations, not a single command against “real polygamy”<sup>196</sup> appears in the Bible. The Mosaic law, in fact, contemplated polygamy in cases of seduction,<sup>197</sup> enslavement,<sup>198</sup> poverty, famine,<sup>199</sup> or premature death of one’s married brother,<sup>200</sup> and it made special provision for the maintenance and inheritance of multiple wives<sup>201</sup> and their children<sup>202</sup> in those cases. More than two dozen polygamists appear in the Hebrew Bible.<sup>203</sup> Almost all of them were good and faithful kings, judges, or aristocrats, and not one of them was punished for practicing polygamy per se.<sup>204</sup> While the New Testament condemned a wide range of sexual practices of the Jewish, Greek, and Roman cultures of the day, it, too, was silent on polygamy, save for its special rules that a bishop or deacon had to be “the husband of one wife”<sup>205</sup> and a deaconess “the wife of one husband.”<sup>206</sup> The laity were commanded to “flee fornication,”<sup>207</sup> but in all the long New Testament lists of sexual sins illustrating what “fornication” means, not a word appears about real polygamy.<sup>208</sup>

Accordingly, the Christian Church, for its first 1,000 years, said and did rather little about polygamy, though the practice persisted among first millennium Jews, seventh through tenth century Muslims, and various Indigenous groups in the Middle East, Africa, and Asia. A few early Church Fathers called polygamy a dangerous betrayal of the natural ideals of marriage

<sup>195</sup> BRUNDAGE, *supra* note 100, at 397–401, 472–74.

<sup>196</sup> See the Appendix for the definition of the term “real polygamy” as opposed to constructive, successive, and clerical polygamy.

<sup>197</sup> See *Exodus* 22:16–17; *Leviticus* 20:10, 20–22; *Deuteronomy* 22:22–29.

<sup>198</sup> See, e.g., *Exodus* 21:1–12; *Deuteronomy* 17:17, 21:15–16; 1 *Kings* 11:4.

<sup>199</sup> *Isaiah* 4:1, 13:12.

<sup>200</sup> *Ruth* 4:5–6, 13–21.

<sup>201</sup> *Exodus* 21:7–12.

<sup>202</sup> *Deuteronomy* 21:15–16.

<sup>203</sup> WITTE, *supra* note 3, at 36, 44 & n.52.

<sup>204</sup> King David was condemned for his adultery with Bathsheba and murder of her husband, not his polygamy. 2 *Samuel* 11:1–27. He still added Bathsheba to his harem, and she produced King Solomon, his successor. 2 *Samuel* 12:24.

<sup>205</sup> 1 *Timothy* 3:2–5.

<sup>206</sup> 1 *Timothy* 5:9.

<sup>207</sup> 1 *Corinthians* 6:18 (King James).

<sup>208</sup> WITTE, *supra* note 3, at 68–71, 80.

as a creation of “two in one flesh.”<sup>209</sup> Others criticized the spousal rivalries and family unrest of biblical and contemporary polygamists.<sup>210</sup> But in the fifth century, the preeminent Western Church Father, St. Augustine, called real polygamy a perfectly natural form of sexual interaction and an efficient means of procreation, too.<sup>211</sup> The Old Testament polygamists, said Augustine, committed no offense “against nature, [nor] against custom, [nor] against the [positive] law[.]”<sup>212</sup> “[F]or [polygamy] was no crime when it was the custom; and it is a crime now, because it is no longer the custom,” having been mostly stamped out by Roman criminal law.<sup>213</sup> By the same token, the early canon law of the church said virtually nothing against real polygamy. Only a few cryptic canons on point have survived from the first millennium, and they called for real polygamists in the church to be punished at about the same level as petty thieves.<sup>214</sup>

It was the state, not the church, that always led the campaign against real polygamy in the West. Already half a millennium before the advent of Christianity, both Greek and Roman laws treated polygamy as a form of “barbar[ism]” and domestic “tyranny” that violated the natural human need for pair-bonding.<sup>215</sup> “Love is born into every human being,” Plato wrote famously in the fourth century B.C.E.; “it calls back the halves of our original nature together; it tries to make one out of two and heal the wound of human nature. ‘Love’ is the name for our pursuit of wholeness, for our desire to be

<sup>209</sup> See *id.* at 99; *Genesis* 2:24; *Matthew* 19:5; *1 Corinthians* 6:16; *Ephesians* 5:31 (Revised Standard).

<sup>210</sup> WITTE, *supra* note 3, at 98–99, 107–08, 125–27.

<sup>211</sup> AUGUSTINE, *Two Books on Genesis Against the Manichees* 2.13.19, 2.24.37 (c. 388–418 C.E.), translated in ST. AUGUSTINE ON GENESIS 115, 132–34 (Ronald J. Teske trans., Catholic Univ. Press 1991) [hereinafter AUGUSTINE, *Genesis*]; GEORGE HAYWARD JOYCE, CHRISTIAN MARRIAGE: AN HISTORICAL AND DOCTRINAL STUDY 575 (2d ed. 1948) (quoting Augustine, *De Doctrina Christiana* [*On Christian Doctrine*] 3.12.20 (c. 397 C.E.)); see also AUGUSTINE, *City of God* 16.38 (c. 426 C.E.), translated in 2 BASIC WRITINGS OF SAINT AUGUSTINE 358–60 (Whitney J. Oates ed., Random House 1948) (relating the story of Jacob taking two wives and two concubines).

<sup>212</sup> AUGUSTINE, *Contra Faustum*, 21.47 (c. 400 C.E.), translated in 4 NICENE AND POST-NICENE FATHERS 289–90 (Wm. B. Eerdmans Publ’g Co. photo. reprint 1989) (Philip Schaff ed., 1887) [hereinafter NPNF]. See similar language in AUGUSTINE, *On the Good of Marriage* 17.25–26 (c. 410 C.E.), translated in 3 NPNF, *supra*, at 399–413, and in ST. AUGUSTINE: TREATISES ON MARRIAGE AND OTHER SUBJECTS 33–34, 49–51 (Roy J. Deferrari ed., Charles T. Wilcox et al. trans., 1955).

<sup>213</sup> AUGUSTINE, *Contra Faustum* 21.47, translated in 4 NPNF, *supra* note 212, at 289.

<sup>214</sup> See sources and discussion in WITTE, *supra* note 3, at 114–21.

<sup>215</sup> Scheidel, *supra* note 96, at 283; Walter Scheidel, *Monogamy and Polygyny*, in A COMPANION TO FAMILIES IN THE GREEK AND ROMAN WORLDS 108, 111 (Beryl Rawson ed., 2011). See sources in DANIEL OGDEN, GREEK BASTARDY: IN THE CLASSICAL AND HELLENISTIC PERIODS 72–75 (1996); DANIEL OGDEN, POLYGAMY, PROSTITUTES AND DEATH: THE HELLENISTIC DYNASTIES, at ix–x (1999).

complete.”<sup>216</sup> In extension of these ideas, early Roman laws also banned a man from having a wife and a concubine at the same time, even if they lived in separate households or cities.<sup>217</sup> By the third century C.E., the pre-Christian Roman emperors declared real polygamy to be a crime of infamy, whose punishment their imperial successors gradually escalated. Polygamy was declared a capital crime in the ninth century, and so it remained in much of the West until the nineteenth century.<sup>218</sup> With the exception of medieval England,<sup>219</sup> it was the state courts of the West that, for nearly two millennia, took the lead on punishing real polygamy.

It was only in the twelfth and thirteenth centuries, after the medieval church developed a robust sacramental theology and canon law of monogamous marriage, that it came to condemn polygamy clearly as a heretical violation of the exclusive and enduring marital sacrament.<sup>220</sup> It was only then that the scholastic thinkers of the day marshaled a refined arsenal of natural law and natural justice arguments against real polygamy.<sup>221</sup> It was only then that the

<sup>216</sup> PLATO, SYMPOSIUM (c. 385–370 B.C.E.), *translated in* PLATO: SYMPOSIUM 25–31 (Alexander Nehamas & Paul Woodruff trans., 1989).

<sup>217</sup> CODE JUST. 5.26.1, *reprinted in* 2 CORPUS JURIS CIVILIS, *supra* note 94, at 216 (quoting Constantine in 321 C.E.); CODE JUST. 5.26.1, *translated in* 13 THE CIVIL LAW, *supra* note 94, at 213 (same); *see* GRUBBS, *supra* note 97, at 294–304 (discussing the pre-Constantian sources of this prohibition).

<sup>218</sup> *See supra* note 99 and accompanying text.

<sup>219</sup> WITTE, *supra* note 3, at 155–56; *see also* CHARLES DONAHUE, JR., LAW, MARRIAGE, AND SOCIETY IN THE LATER MIDDLE AGES 70–72 (2007); R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 57–66 (1974).

<sup>220</sup> WITTE, *supra* note 3, at 144–95.

<sup>221</sup> *See, e.g.*, 5 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 2795 (Fathers of the English Dominican Province trans., Thomas Moore Publ’g 1948) (c. 1274) [hereinafter AQUINAS, ST] (“[A] husband would by no means be willing for his wife to have another husband. Therefore he would be acting against the law of nature, were he to have another wife in addition.”); X 4.19.8 (John T. Noonan, Jr. trans., 1967), *available at* <http://faculty.cua.edu/Pennington/Canon%20Law/marriagelaw.htm>. The Decretals of Gregory IX quote a pronouncement of Pope Innocent III in 1201:

It is read that the patriarchs and other just men, both before and after the Law, had many wives at once. The Gospel or Law does not seem to command the contrary. . . . But this seems contrary and hostile to the Christian faith. From the beginning one rib was turned into one woman, and divine Scripture testifies that for this case a man shall leave his father and mother, and cleave to his wife, and the two shall be one flesh. It did not say, “three or more”, but “two.” It did not say, “will cling to his wives,” but, “to his wife.” . . . That truth may prevail over falsehood, we assert without any hesitation that it was never lawful for anyone to have several wives at once, unless it was allowed them by divine revelation. . . . The true opinion is shown by the truthful testimony given witness to it in the Gospel, “Whoever puts away his wife, except for fornication, and marries another, commits adultery.” So if one cannot lawfully take another when a wife is sent away, even more obviously he cannot do so when she is kept. So it is evident that plural marriage is reprobated for either sex, since they cannot be judged differently.

X 4.19.8 (citations omitted).

church courts—and for a time the Inquisition, too—joined the state courts in punishing real polygamists.<sup>222</sup> And it was only then that polygamy was made a formidable “boundary marker” between true Christians of the West and various Jews, Muslims, Asians, Africans, heretics, and free thinkers who preached or practiced polygamy.<sup>223</sup>

But even then the Christian tradition wavered in its opposition to polygamy. Late medieval Catholic luminaries like Cardinal Cajetan went back to Augustine and said that polygamy was a “perfectly natural” option in cases of personal or political necessity.<sup>224</sup> Sixteenth-century Protestants like Martin Luther and Philip Melancthon went back to the Bible and ultimately considered consensual polygamy to be a better biblical option than brazen adultery or no-fault divorce to resolve hard marital cases.<sup>225</sup> The biblical texts on polygamy also led a few early modern Christian communities like the Anabaptists in Münster to experiment with biblical polygamy anew.<sup>226</sup> It also

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The Catholic Church’s most authoritative statement against polygamy came in the Council of Trent’s decree of 1563, directed in part against a few early Protestant polygamists and a few sympathetic apologists for polygamy, both Catholic and Protestant. See HEINRICH DENZINGER, ENCHIRIDION SYMBOLORUM, DEFINITIONUM ET DECLARATIONUM DE REBUS FIDEI ET MORUM [SYMBOLIC HANDBOOK, DEFINITION AND DECLARATION OF ARTICLES OF FAITH AND MORALS] (1954), translated in THE SOURCES OF CATHOLIC DOGMA 296 (Roy J. Deferrari trans., 1957) (discussion in item no. 972). In its *Decree Tametsi*, the Council declared that both the preaching and the practice of polygamy were serious crimes and heresies: “If anyone says that it is lawful for Christians to have several wives at the same time, and that is not forbidden by any divine law: let him be anathema.” *Id.* (citations omitted).

<sup>222</sup> See excellent analysis and detailed sources in SARA MCDUGALL, BIGAMY AND CHRISTIAN IDENTITY IN LATE MEDIEVAL CHAMPAGNE 37–41, 97–137 (2012); see also D.L. D’AVRAY, MEDIEVAL MARRIAGE: SYMBOLISM AND SOCIETY 142–43 (2005). For discussion of the inquisition’s punishment of polygamy, see RICHARD BOYER, LIVES OF THE BIGAMISTS: MARRIAGE, FAMILY, AND COMMUNITY IN COLONIAL MEXICO 7–9, 232 (1995); L. HENRY KAMEN, THE SPANISH INQUISITION: AN HISTORICAL REVISION 75–80, 201, 265–67 (1997); KIM SEIBENHÜMER, BIGAMIE UND INQUISITION IN ITALIEN 1600-1750 [BIGAMY AND THE INQUISITION IN ITALY FROM 1600 TO 1750] (2006).

<sup>223</sup> WITTE, *supra* note 3, at 158–63 (discussing medieval critiques on Muslim polygamy); see also Lisa Shirley Loughead, *The Perception of Polygamy in Early Modern England* 108 (2008) (unpublished Ph.D. dissertation, Dalhousie University).

<sup>224</sup> AUGUSTINE, *Genesis*, *supra* note 211. For Cajetan’s views on polygamy, see DENNIS DOHERTY, THE SEXUAL DOCTRINE OF CARDINAL CAJETAN 233–34 (1966).

<sup>225</sup> WITTE, *supra* note 3, at 205–18; WILLIAM WALKER ROCKWELL, DIE DOPPELEHE DES LANDGRAFEN PHILLIP VON HESSEN [THE DOUBLE MARRIAGE OF COUNT PHILLIP VON HESSEN] (1904); John A. Faulkner, *Luther and the Bigamous Marriage of Philip of Hesse*, 17 AM. J. THEOLOGY 206, 222 (1913).

<sup>226</sup> See JOHN CAIRNCROSS, AFTER POLYGAMY WAS MADE A SIN: THE SOCIAL HISTORY OF CHRISTIAN POLYGAMY 1–33 (1974); NORMAN COHN, THE PURSUIT OF THE MILLENNIUM: REVOLUTIONARY MILLENARIANS AND MYSTICAL ANARCHISTS OF THE MIDDLE AGES 261–80 (rev. & expanded ed. 1970); GEORGE HUNTSTON WILLIAMS, THE RADICAL REFORMATION 556–88 (3d ed. 1992).

led a few free thinkers such as Bernard Ochino,<sup>227</sup> John Milton,<sup>228</sup> and Martin Madan<sup>229</sup> to suggest further that allowing polygamy might be a better way to end prostitution, rape, fornication, prostitution, concubinage, adultery, and bastardy than insisting on monogamy alone.<sup>230</sup> It was only when the Council of Trent in 1563 issued its final confirmation of the sacramentality of monogamous marriage and its forceful anathema on the heresy of polygamy that this internal speculation about polygamy finally ended in Catholic circles.<sup>231</sup> In turn, it was only when Protestants came to treat marriage systematically as a divine covenant modeled on God's exclusive relationship with his elect<sup>232</sup> or as a "little commonwealth" at the foundation of the commonwealths of church and state<sup>233</sup> that Protestants had the theological machinery needed to declare anew that monogamy was the only valid form of marriage. Marriage, early modern Catholics and Protestants together now clearly said, was created as an enduring and exclusive "two in one flesh" union,<sup>234</sup> rooted in the natural order of creation and modeled on the mysterious relationship of God and his elect,<sup>235</sup> Christ and his church.<sup>236</sup> Western states responded by reconfirming their traditional capital laws against polygamy and strengthening their prosecution and punishment of polygamy.<sup>237</sup>

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<sup>227</sup> WITTE, *supra* note 3, at 223–37. For Ochino's text, see BERNARDINI OCHINI, *SENENSIS DIALOGI XXX* [SIENA DIALOGUE 30] 186 (Basel, 1563), translated as *A DIALOGUE ON POLYGAMY* (London, John Garfield 1657), and recently published again as *A DIALOG ON POLYGAMY: ORIGINALLY WRITTEN IN ITALIAN BY BERNARDINO OCHINO* (Don Milton ed., 2009).

<sup>228</sup> WITTE, *supra* note 3, at 330–35.

<sup>229</sup> See detailed sources from Milton in *id.* at 339–45.

<sup>230</sup> See, e.g., MARTIN MADAN, *THELYPHTHORA; OR, A TREATISE ON FEMALE RUIN, IN ITS CAUSES, EFFECTS, CONSEQUENCES, PREVENT, AND REMEDY* (London, J. Dodsley 1781).

<sup>231</sup> WITTE, *supra* note 3, at 150–89, 200, 226. See also the discussion of the *Decree Tametsi*, *supra* note 221.

<sup>232</sup> See discussion and sources in WITTE, *supra* note 3, at 218–20; see also 1 JOHN WITTE, JR. & ROBERT M. KINGDON, *SEX, MARRIAGE, AND FAMILY IN JOHN CALVIN'S GENEVA* (2005).

<sup>233</sup> For a discussion on the Anglican "commonwealth model of marriage," see WITTE, *supra* note 3, at 285–90 and WITTE, *supra* note 8, at 217–85.

<sup>234</sup> *Genesis* 2:24; *Matthew* 19:5; 1 *Corinthians* 6:16; *Ephesians* 5:31 (Revised Standard).

<sup>235</sup> See, e.g., *Isaiah* 1:21–22, 54:5–8, 57:3–10, 61:10–11, 62:4–5; *Jeremiah* 2:2–3, 3:1–25, 13:27, 23:10, 31–32; *Ezekiel* 16:1–62, 23:1–49; *Hosea* 2:2–23; *Malachi* 1, 2. For detailed analysis of these passages, see John Witte, Jr., *The Covenant of Marriage: Its Biblical Roots, Historical Influence, and Modern Uses*, 18 INTAMS REV. 147 (2012).

<sup>236</sup> *Ephesians* 5:32. See generally MICHAEL G. LAWLER, *MARRIAGE AND SACRAMENT: A THEOLOGY OF CHRISTIAN MARRIAGE* (1993) (on the making of the marital sacrament); PHILLIP LYNDON REYNOLDS, *MARRIAGE IN THE WESTERN CHURCH: THE CHRISTIANIZATION OF MARRIAGE DURING THE PATRISTIC AND EARLY MEDIEVAL PERIODS* (1994) (same).

<sup>237</sup> WITTE, *supra* note 3, at 200–01, 242–43.

So what!—a modern skeptic might well say to all this history. So what if, two plus millennia ago, sodomy happened to be born a biblical sin and polygamy a Roman crime. So what if the first millennium church took the lead in punishing sodomy, and the first millennium state took the lead in punishing polygamy. So what if it took until the High Middle Ages or even the early modern Reformation era for church and state to combine their forces coherently in condemning and punishing both sodomy and polygamy. The reality is that for at least half a millennium the Christian Church and the Christian state together branded sodomy and polygamy as unnatural sins and crimes and together condemned and punished as sexually deviant anyone who felt naturally drawn to same-sex or plural unions. Under the hot, bright lights of modern constitutional liberty, these centuries-old sex “crimes” look equally prejudiced and problematic. Since consensual sodomy and same-sex unions (if not marriages) are now constitutionally protected, consensual polygamy and other forms of polyamorous union should be protected, too. Clever reconstruction of the variant ancient pedigrees of these purported crimes avails us little today. Dusty historical arguments about what is natural and unnatural just aren’t good enough anymore.

### *C. Natural Arguments*

But there are striking differences between the traditional natural arguments against same-sex unions and those against polygamous unions. The heart of the traditional natural argument against same-sex relations was that they are by nature “non-generative.” However consensual and loving, same-sex intimacy simply cannot produce a child, which is the ultimate end and good of sexual intercourse.<sup>238</sup> And having a child is essential for the preservation of the human race and for the perpetuation of one’s own family name, business, identity, memory, and more. Like every other animal, Aristotle already put it in the fourth century B.C.E., a “male and female must unite for the reproduction of the species,” and humans are thus born with “the natural impulse . . . to leave behind them something of the same nature as themselves.”<sup>239</sup> Same-sex partners simply cannot procreate together, rendering their sexual intimacy unnatural.<sup>240</sup>

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<sup>238</sup> For good collections of medieval sources on point, see BRUNDAGE, *supra* note 100; REYNOLDS, *supra* note 236; see also John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019 (2001).

<sup>239</sup> ARISTOTLE, POLITICA 1.2.2 (c. 384 B.C.E.), translated in THE POLITICS OF ARISTOTLE 1, 3 (Ernest Baker ed. & trans., Oxford Univ. Press reprint ed. 1972).

<sup>240</sup> *See id.*

Moreover, the traditional natural argument went, even the beasts do not engage in same-sex activities, despite their lack of reason and conscience.<sup>241</sup> Many animals do kill and eat each other, take each other's homes, food, mates, and offspring, and ignore other creatures in peril, even those of their own species. All of this violates basic natural laws of homicide, theft, adultery, family, and charity that humans have discovered and learned to implement through the use of their reason and conscience. But even the beasts, following natural instincts alone, know that same-sex activities are unnatural, even repulsive. If even the beasts instinctually know better, the traditional argument went, even the most irrational and irresponsible humans should also know that same-sex desires, relations, and activities are unnatural.<sup>242</sup>

Finally, the human sexual body itself reflects what is natural, the tradition taught. A penis can slide into a vagina easily and comfortably, while anal penetration requires artificial lubrication and often causes pain. Vaginal intercourse can bring intense orgasmic pleasure to both parties in a way that oral sex cannot, absent simultaneous masturbation and "spilling of seed" by the party performing fellatio or cunnilingus. Face-to-face missionary vaginal sex brings the couple's whole bodies more closely together in intimacy than any other sexual positions. We might blush or roll at our eyes at these distinctions today, using our imaginations or the Internet to find exceptions and counterexamples. But, historically, those differences between male-female and same-sex intimacy were taken as important evidence that the natural end or telos of the human sexual body was for straight sex, not gay or lesbian sex.<sup>243</sup>

All of these traditional natural arguments against same-sex relations are seriously disputed today, and their erosion has helped topple traditional Western laws against consensual sodomy, same-sex unions, and in some places same-sex marriage.<sup>244</sup> But none of these traditional natural arguments applies

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<sup>241</sup> NOV. 141.1, translated in 17 THE CIVIL LAW, *supra* note 94, at 160–61.

<sup>242</sup> *See id.*

<sup>243</sup> *See* ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999); John Finnis, *Law, Morality, and "Sexual Orientation,"* in SAME SEX: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY 31 (John Corvino ed., 1997); *see also* 2 GERMAIN GRISEZ, THE WAY OF THE LORD JESUS 658 (1983), available at <http://www.twotlj.org/G-2-9-E.html> ("Complete nonmarital acts by the spouses, including contraceptive intercourse, are wrong in much the same way that fornication or sodomy is . . ."). For discussion on the "natural teleology of the body," *see* *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 87–117 (1996) (statement of Professor Hadley Arkes, Amherst College).

<sup>244</sup> *See, e.g.,* MICHAEL J. PERRY, CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT 93–130 (2009); MICHAEL J. PERRY, HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES 112–57 (2013). For a recent defense of these traditional natural arguments against same-sex and

to polygamy. Procreation is not only possible but is enhanced by having multiple wives rather than one. Polygamy is not only known in nature but is the predominant form of reproduction in most animals, including more than 95% of all higher primates. Pairing birds, voles, and a few other animals are the monogamous exception.<sup>245</sup> The human body is not only capable of having multiple sex partners but allows a man to impregnate several women in a night, though a woman can have only one pregnancy at a time no matter how many men she takes into her bed. That's why Augustine<sup>246</sup> and many later Western sages such as Hugo Grotius<sup>247</sup> thought that only polygyny, not polyandry, was a "perfectly natural" form of procreation. And that's why the current erosion of the traditional natural argument against same-sex relations has little bearing on the Western case against polygamy.

The traditional natural argument against polygamy was of a different order. Nearly eight centuries ago, the great Dominican scholar, Thomas Aquinas, put the argument clearly, and it became a commonplace of Western thought and law thereafter, especially among Enlightenment liberals and common law jurists who took it as axiomatic.<sup>248</sup> Human beings, Thomas argued, are distinct among the animals in having perennial sex drives rather than annual mating seasons.<sup>249</sup> They produce vulnerable babies who need the support of both their mother and father for a long time in order to survive and thrive.<sup>250</sup> Women bond naturally with children; men do so only if they are certain of their paternity.<sup>251</sup> Exclusive and enduring monogamous unions are the only way that humans can at once have regular sex, paternal certainty, and mutual caretaking for their young children.<sup>252</sup> Humans have thus learned by natural inclination

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alternative forms of marriage, see SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* (2012).

<sup>245</sup> See MELVIN KONNER, *THE EVOLUTION OF CHILDHOOD: RELATIONS, EMOTION, MIND* 452–62 (2010); MELVIN KONNER, *THE TANGLED WING: BIOLOGICAL CONSTRAINTS ON THE HUMAN SPIRIT* 268–70, 323–36 (2d ed. rev. 2002).

<sup>246</sup> WITTE, *supra* note 3, at 89–93.

<sup>247</sup> See 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 514, 526 (Richard Tuck ed., Jean Barbeyrac trans., Liberty Fund 2005) (1625); WITTE, *supra* note 3, at 352–57; see also GILBERT BURNET, *A Defence of Polygamy*, in *TWO DISSERTATIONS WRITTEN BY THE LATE BISHOP BURNET* 7–16 (E. Curl ed., London 3d ed. 1731); CHRISTIAN THOMASIIUS, *INSTITUTES OF DIVINE JURISPRUDENCE WITH SELECTIONS FROM FOUNDATIONS OF THE LAW OF NATURE AND NATIONS* 367–412 (Thomas Ahnert ed. & trans., Liberty Fund 2011) (1688).

<sup>248</sup> ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES*, bk. III, pt. II, at 147–52 (Vernon J. Bourke trans., Univ. of Notre Dame Press 1975) (c. 1260) [hereinafter AQUINAS, SCG]; 5 AQUINAS, ST, *supra* note 221, at 2699–700, 2794–801, 2806–07. See detailed discussion in Witte, *supra* note 1.

<sup>249</sup> 5 AQUINAS, ST, *supra* note 221, at 2699–700.

<sup>250</sup> *Id.*

<sup>251</sup> AQUINAS, SCG, *supra* note 248, at 150–52.

<sup>252</sup> *Id.* at 147–50.

and hard experience to the contrary to develop enduring pair-bonding strategies as the most effective means of reproduction.<sup>253</sup>

Polyandry (one wife with multiple husbands) is naturally unjust to children, Aquinas continued.<sup>254</sup> If a woman has sex with several husbands, it removes the likelihood that any child born to that woman will clearly belong to any one husband.<sup>255</sup> That will undermine paternal certainty and consequent paternal investment in their children's care.<sup>256</sup> The children will suffer from chronic neglect and deprivation, and the wife will be overburdened trying to care for them and trying to tend to her multiple husbands and their rampant sexual needs at once.<sup>257</sup>

Polygyny (one man with multiple wives) is naturally unjust to wives and children. It does not necessarily erode paternal certainty.<sup>258</sup> So long as his multiple wives are faithful to him alone, a man can be assured of being the father of any children born in his household.<sup>259</sup> But this requires a man to pen up his wives like cattle, isolating them from other roving males even when his own energies to tend to them are already dissipated over the several women gathered in his household.<sup>260</sup> It places half-siblings in competition for every scrap of food, shelter, and paternal attention, and sets their mothers against each other and especially against rival stepchildren in the household.<sup>261</sup> This is "not . . . an association of equals, but, instead, a sort of slavery on the part of the wife," said Aquinas.<sup>262</sup> It betrays the fundamental requirements of fidelity and mutuality of husband and wife, of the undivided and undiluted love and friendship that become a proper marriage.<sup>263</sup> It also betrays the fundamental bond between parents and children reflected in the Mosaic Commandment to "[h]onor your father and mother, [so] that your days may be long."<sup>264</sup> And it betrays the fundamental command of love of Jesus to "[l]et the children come"<sup>265</sup> to receive love, support, protection, nurture, and education from their

<sup>253</sup> 5 AQUINAS, ST, *supra* note 221, at 2806–07.

<sup>254</sup> AQUINAS, SCG, *supra* note 248, at 152; 5 AQUINAS, ST, *supra* note 221, at 2794–801.

<sup>255</sup> AQUINAS, SCG, *supra* note 248, at 152.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 147–48, 151–52.

<sup>258</sup> *See* 5 AQUINAS, ST, *supra* note 221, at 2794–805.

<sup>259</sup> *See* AQUINAS, SCG, *supra* note 248, at 150–51.

<sup>260</sup> *See id.*

<sup>261</sup> 5 AQUINAS, ST, *supra* note 221, at 2794–801.

<sup>262</sup> AQUINAS, SCG, *supra* note 248, at 148.

<sup>263</sup> *See id.* at 150–51.

<sup>264</sup> *See Exodus* 20:12 (Revised Standard).

<sup>265</sup> *See Mark* 10:14 (Revised Standard).

parents, families, and broader communities.<sup>266</sup> Polygamy is thus unnatural, unjust, and unfair, Thomas concluded. It violates the natural law of God.

Later Catholic and Protestant writers argued that polygamy violates not only the natural law of God but also the natural rights of wives and children. Calvinist jurist Theodore Beza put this argument clearly nearly five centuries ago.<sup>267</sup> Beza took the Ten Commandments of the Bible to be the best summary of the natural law, but he saw parallel commands in many other formulations of the natural law.<sup>268</sup> He argued that polygamy violates the commandments against adultery, theft, false testimony, and coveting all at once.<sup>269</sup> Polygamy is a form of adultery that breaches a man's duty to be faithful to his first wife alone.<sup>270</sup> It is a form of theft that breaches his duty to provide sufficient material support for his wife and their children even after his death.<sup>271</sup> It is a form of false witness that breaches his duty to honor his promise of marital fidelity.<sup>272</sup> And polygamy is a form of coveting that breaches a man's duty not to lust after his female neighbor, as the lustful King David did in drawing the already married Bathsheba into his already full harem.<sup>273</sup>

Each of these natural duties about fidelity, property, honesty, and respect rooted in the Decalogue has correlative natural rights that polygamy also breaches, Beza continued.<sup>274</sup> Polygamy breaches the first wife's natural rights to marital fidelity and trust, to ongoing marital property and material security, and to contractual expectations and reliance on her husband's fidelity to the marriage contract. It breaches the children's natural rights to proper support and inheritance and to the undiluted and unharried care, nurture, and education of their father and mother together. And polygamy breaches a neighbor's rights to have an equal opportunity to marry without having most of the eligible

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<sup>266</sup> See *THE CHILD IN THE BIBLE* (Marcia J. Bunge ed., 2008); *THE CHILD IN CHRISTIAN THOUGHT* (Marcia J. Bunge ed., 2001); see also JOHN WITTE, JR., *THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED* 73–104 (2009).

<sup>267</sup> See THEODORE BEZA, *TRACTATIO DE POLYGAMIA [A WORK ON POLYGAMY]* (Geneva, Apud Eustathium Vignon 1587) (1568).

<sup>268</sup> See discussion on Beza in WITTE, *supra* note 3, at 244, 254–62. For discussion of Beza's rights theories, see also JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* 81–142 (2007).

<sup>269</sup> See *Exodus* 20:14–17 (Revised Standard).

<sup>270</sup> See BEZA, *supra* note 267, at 12–14, 28–29.

<sup>271</sup> *Id.* at 12–16, 19, 24–25.

<sup>272</sup> *Id.* at 39–40.

<sup>273</sup> See 2 *Samuel* 11:27 (Revised Standard).

<sup>274</sup> See WITTE, *supra* note 3, at 257–60. See also sources in WITTE, *supra* note 268, at 57–58, 114–18, 139–40.

women horded in one harem or having his own wife or daughters subject to the covetous privations of a powerful polygamous neighbor. Polygamy was thus doubly unnatural, Beza concluded, a violation of natural law and natural rights alike.<sup>275</sup>

This was a critical shift in emphasis from the natural wrongs of polygamy to the natural rights that it violated. Polygamy was now viewed not only as objectively wrong but also subjectively harmful. It violated not only the natural law of God but also the natural rights of God's children.<sup>276</sup> Early modern Catholics and Protestants drew on these formulations in their critique of the polygamy of Old Testament patriarchs, Ottoman Turks, and traditional Africans and Asians alike.<sup>277</sup> Particularly during the age of discovery in the sixteenth to eighteenth centuries, both traveler's diaries and colonial chronicles were filled with observations about the unnatural practice of polygamy in the New World and the invectives against the natural rights violations of women and children that this practice occasioned.<sup>278</sup>

Liberal philosophers and common law jurists from the seventeenth century onward drew directly on these traditional natural law and natural rights arguments against polygamy, even while they supported the legal disestablishment of Christianity.<sup>279</sup> Most liberals posited natural rights as "inherent" in human nature or the state of nature rather than commanded in the Bible or the order of creation.<sup>280</sup> But they came to the same conclusion as earlier Christians that polygamy violated the natural rights and liberties especially of women and children. They opposed marital polygamy for the same reason they opposed political tyranny. Seventeenth-century English philosopher John Locke, for example, regarded polygamy as a violation of the natural-born equality of men and women, as well as the natural rights of children to be properly nurtured and fully supported by both their mother and father until they were fully emancipated.<sup>281</sup> For Locke, the natural laws

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<sup>275</sup> See WITTE, *supra* note 3, at 257–60, 273–74.

<sup>276</sup> *Id.*

<sup>277</sup> See *id.* at 158–63 (discussing critiques on Muslim polygamy); see also *id.* at 282–85 (discussing attacks on polygamists documented in travel diaries).

<sup>278</sup> See, e.g., JAMES MULDOON, *THE AMERICAS IN THE SPANISH WORLD ORDER: THE JUSTIFICATION FOR CONQUEST IN THE SEVENTEENTH CENTURY 78–95* (1994); *THE SPIRITUAL CONVERSION OF THE AMERICAS* (James Muldoon ed., 2004).

<sup>279</sup> See WITTE, *supra* note 3, at 348–88.

<sup>280</sup> *Id.*

<sup>281</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 165–66, 287–41, 318–19, 341, 350–51 (Peter Laslett ed., Cambridge Univ. Press 1964) (1690).

favoring monogamy trumped religious arguments for polygamy, and he would allow no religious-liberty exemptions from criminal prohibitions on polygamy.<sup>282</sup> A century later, leading common law jurist William Blackstone condemned polygamy as a “singularly barbaric” violation of the reciprocal natural rights and duties of husbands and wives, and parents and children, which no modern civilization could countenance.<sup>283</sup> Polygamy for him was a grave offense against public health and public order.<sup>284</sup> Eighteenth-century women’s rights advocate Mary Wollstonecraft castigated polygamy for privileging men and degrading women, forcing them to compete with other women, especially the more nubile and fertile young women whom their husbands would inevitably drag home to replace them when they grew barren or lost their good looks.<sup>285</sup> A woman is not just a temporary object of beauty or dispensable channel of procreation, Wollstonecraft insisted. A woman is a full citizen who must be given the right, education, and opportunity to choose her own public and private vocations and to enjoy her natural-born liberty and equality within her own monogamous home if she chooses to marry.<sup>286</sup> Marriage must be structured as a “dyadic friendship.”<sup>287</sup> Scottish philosophers Henry Home and David Hume argued that polygamy would breed tyrannical patriarchy or servile submissiveness in children, depending on their and their mother’s place in the polygamous home.<sup>288</sup> Children of polygamy simply cannot learn the healthy balances of authority and liberty, equality and respect, and property and responsibility that they need to survive, let alone thrive. For

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<sup>282</sup> See, e.g., JOHN LOCKE, *ESSAYS ON THE LAW OF NATURE* 171 (W. von Leyden ed., Oxford Univ. Press 1954) (1676); JOHN LOCKE, *A THIRD LETTER CONCERNING TOLERATION* (1692), *excerpted in* JOHN LOCKE: *A LETTER CONCERNING TOLERATION AND OTHER WRITINGS* 69, 84 (Mark Goldie ed., 2010); JOHN LOCKE, *AN ESSAY CONCERNING TOLERATION* (1667), *reprinted in* JOHN LOCKE: *A LETTER CONCERNING TOLERATION AND OTHER WRITINGS*, *supra*, at 105, 110–11.

<sup>283</sup> See 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*164; see also 1 *id.* at \*434–47 (discussing the reciprocal rights of parents and children).

<sup>284</sup> 4 *id.* at \*163–64.

<sup>285</sup> MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN* (1792), *reprinted in* OXFORD WORLD’S CLASSICS: *A VINDICATION OF THE RIGHTS OF WOMAN AND A VINDICATION OF THE RIGHTS OF MEN* 63, 100, 133, 141 (Janet Todd ed., 2d reprinted ed. 2008).

<sup>286</sup> *Id.* at 103, 106.

<sup>287</sup> This phrase is from EILEEN HUNT BOTTING, *WOLLSTONECRAFT, MILL AND WOMEN’S HUMAN RIGHTS* (forthcoming 2016).

<sup>288</sup> See 1 HENRY HOME, *SKETCHES OF THE HISTORY OF MAN: CONSIDERABLY ENLARGED BY THE LATEST ADDITIONS AND CORRECTIONS OF THE AUTHOR* 261–68, 287–311 (James A. Harris ed., Liberty Fund 2007) (1788); DAVID HUME, *ESSAYS: MORAL, POLITICAL, AND LITERARY* 181–90 (Eugene F. Miller ed., Liberty Fund rev. ed. 1987) (1777).

Home and Hume, and nineteenth-century American writers who echoed them,<sup>289</sup> this was no way to treat the natural rights of the child.

So what!—a modern skeptic again might say to all this talk about natural law, natural justice, or natural rights. Traditional “natural” arguments against polygamy are no more convincing than traditional “biblical” or “theological” arguments. After all, modern philosophers and linguists have made clear that “nature” talk is just a thin and movable cover for the imposition of underlying religious and cultural preferences and prejudices. They have proved that “irrefutable” principles of reason or “objective” facts of nature are always conditioned by a community’s levels of socialization and scientific knowledge. They have shown that “self-evident” truths are only temporary normative stopping points in endlessly evolving cultures.<sup>290</sup> Take the “naturalist” argument for exclusive and enduring heterosexual marriages that Thomas Aquinas introduced and nearly eight centuries of Western jurists and philosophers thereafter repeated.<sup>291</sup> Today, genetic testing has made paternity much easier to establish. Contraceptives have made extramarital sex much safer to pursue. Artificial reproductive technology, adoption, and surrogacy (maybe cloning soon, too) have made reproduction readily available to men and women, straights and gays, single and married, couples or communes. And the welfare state is there to help all these parents if they or their children have need. What Aquinas took as objective “natural” conditions about human sexuality and heterosexual pair-bonding strategies of reproduction were, in fact, conditioned by the level of science, economy, and politics of his day.<sup>292</sup> As the conditions changed, domestic arrangements have changed, too. LGBTQ advocates have used this evolutionary insight to open the door to same-sex equality and marriage. Polygamy advocates can and must do the same, the argument goes.

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<sup>289</sup> See FRANCIS LIEBER, *ESSAYS ON PROPERTY AND LABOR AS CONNECTED WITH NATURAL LAW AND THE CONSTITUTION OF SOCIETY* 18–19, 105–50 (New York, Harper & Bros. 1841); 2 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 103–04, 141–42 (Theodore D. Woolsey ed., Philadelphia, J.B. Lippincott, 2d ed. rev. 1890) [hereinafter LIEBER, *MANUAL*]; see also 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 65–80, 109–80 (New York, O. Halsted 1827).

<sup>290</sup> See recitation and critique of these arguments in Don S. Browning, *A Natural Law Theory of Marriage*, 46 *ZYGON* 733 (2011).

<sup>291</sup> See discussion of Aquinas in text accompanying *supra* notes 248–63. See repetition of his arguments by Protestants, WITTE, *supra* note 3, at 230, 273, Enlightenment philosophers, *id.* at 353, 356, 386, and American common lawyers, *id.* at 419–20.

<sup>292</sup> I respond to this argument in a forthcoming volume, *FROM CONTRACT TO COVENANT: ESSAYS ON CHURCH, STATE, AND FAMILY LIFE* (forthcoming 2016).

Shifting the discourse from “natural law” to “natural rights” arguments against polygamy only compounds the problem, the skeptical argument continues. For natural rights—or “universal human rights” as we now call them—are also cultural constructs. They are rooted in and reflective of the values and beliefs of the Western cultures that first named and used them.<sup>293</sup> Theodore Beza and other early modern Christians were at least honest in rooting these natural rights firmly in the Bible and the order of creation. But post-Christian liberals have rooted these rights in the shifting sands of human nature and the state of nature. Jeremy Bentham was perhaps a bit too harsh in calling all this “nonsense upon stilts.”<sup>294</sup> Oliver Wendell Holmes, Jr. was perhaps a bit too cynical in calling a human right “only the hypostasis of a prophecy,” a mere prediction of what might happen to “those who do things said to contravene it.”<sup>295</sup> But the reality is that human rights are just normative totems of a community’s ideals, procedural means to enforce a favored set of social and institutional relationships. Calling these rights “natural” or “human” does not change the reality that most purportedly “universal” human rights in vogue today are principally Western (Christian) constructions of value and belief. They have little salience or cogency in polygamous communities around the world that have chosen to reject rights talk, or at least Western formulations of human rights. How do you answer a sincere good faith Muslim who claims his or her right to practice polygamy under the Universal Islamic Declaration of Human Rights?<sup>296</sup> Or an African tribesman who anchors his claim to polygamy in the South African Bill of Rights?<sup>297</sup> Can you really tell them that their rights claims and documents are wrong? On what grounds? Maybe Bentham was on to something after all.<sup>298</sup>

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<sup>293</sup> See, e.g., *Foreword to THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS*, at xv (Karel Vasak ed., 1982); Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 *BUFF. HUM. RTS. L. REV.* 43 (1998); see also JOHN WITTE, JR., *GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* 63–113 (2006).

<sup>294</sup> 2 JEREMY BENTHAM, *ANARCHICAL FALLACIES; BEING AN EXAMINATION OF THE DECLARATION OF RIGHTS ISSUED DURING THE FRENCH REVOLUTION* (1843), reprinted in “NONSENSE UPON STILTS”: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 46, 53 (Jeremy Waldron ed., 1987).

<sup>295</sup> Oliver Wendell Holmes, Jr., *Natural Law*, 32 *HARV. L. REV.* 40, 42 (1918).

<sup>296</sup> See Islamic Council, *Universal Islamic Declaration of Human Rights*, at art. XIX (Sept. 19, 1981), available at <http://www.alhewar.com/ISLAMDECL.html>.

<sup>297</sup> See S. AFR. CONST. § 31; see also Recognition of Customary Marriages Act 120 of 1998 § 2(3) (S. Afr.), available at <http://www.justice.gov.za/legislation/acts/1998-120.pdf>; van der Vyver, *supra* note 293, at 55.

<sup>298</sup> I answer some of these arguments against (natural) rights talk in John Witte, Jr., *Introduction to CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION*, *supra* note 179, at 8; John Witte, Jr., *Rights and Liberties in Early Modern Protestantism: The Example of Calvinism*, in *CHRISTIANITY AND HUMAN RIGHTS:*

#### D. Harm Arguments

But even if we reject the validity of human rights, we cannot deny the reality of human wrongs. Even if we reject the capacity of the state to prohibit fault, we cannot deny the state the power to punish harm. And even if a global human rights campaign against polygamy might be out, a Western insistence on maintaining monogamy alone might still be in. For the most enduring argument in the Western tradition is that polygamy is too often the cause, consequence, or corollary of harm, especially to the most vulnerable populations.<sup>299</sup> And that argument about the harms of polygamy still has power today.

Some 1,800 years ago, ancient Jewish Rabbis<sup>300</sup> and early Church Fathers<sup>301</sup> alike warned that polygamy was “trouble,”<sup>302</sup> even when practiced by the most noble and God-fearing men and women. Think of Abraham with Sarah and Hagar,<sup>303</sup> Jacob with Rachel and Leah,<sup>304</sup> Elkanah with Hannah and Peninnah.<sup>305</sup> All of these biblical households suffered bitter rivalry between their wives, bitter disputes among their children over inheritance and political succession, deadly competition among the half-siblings that ultimately escalated to incest, adultery, kidnapping, enslavement, banishment, and more. Think of the great King David who lustfully murdered Bathsheba’s husband to add her to his already ample harem.<sup>306</sup> Or think of King Solomon with his thousand wives and concubines who led him into idolatry, and whose children

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AN INTRODUCTION, *supra* note 179, at 135; *see also* John Witte, Jr. & M. Christian Green, *Introduction to RELIGION AND HUMAN RIGHTS: AN INTRODUCTION*, *supra* note 174, at 3; John Witte, Jr. & Justin L. Latterell, *Christianity and Human Rights: Past Contributions and Future Challenges*, 30 J.L. & RELIGION (forthcoming Oct. 2015).

<sup>299</sup> On vulnerability theory, *see* Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713 (2012); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010).

<sup>300</sup> *See* sources in WITTE, *supra* note 3, at 35–36; Mark Goldfeder, *The Story of Jewish Polygamy*, 26 COLUM. J. GENDER & L. 234, 300, 310 (2014).

<sup>301</sup> *See* sources cited in WITTE, *supra* note 3, at 65–68 nn.1–9.

<sup>302</sup> The Hebrew word for a co-wife (*tzarah*) literally means “trouble.” Michael J. Broyde, *Jewish Law and the Abandonment of Marriage: Diverse Models of Sexuality and Reproduction in the Jewish View, and the Return to Monogamy in the Modern Era*, in MARRIAGE, SEX, AND FAMILY IN JUDAISM 88, 89 (Michael J. Broyde & Michael Ausubel eds., 2005).

<sup>303</sup> *Genesis* 16:1–6.

<sup>304</sup> *Genesis* 29:15–30.

<sup>305</sup> 1 *Samuel* 1:1–8.

<sup>306</sup> 2 *Samuel* 11:27.

ended up raping, abducting, and killing each other, precipitating civil war in ancient Israel.<sup>307</sup>

Some 800 years ago, William of Auvergne and other observers of Middle Eastern Muslim polygamy argued that the “bent love” of polygamy was inevitably, if not inherently, harmful.<sup>308</sup> Women are harmed because they are reduced to rival slaves within the household, exploited for sex with an increasingly sterile and distracted husband, sometimes deprived of the children they do produce and forced to make do for themselves and their children with too few resources as other women and children are added to the household against their wishes.<sup>309</sup> Children are harmed because their chances of birth and survival are diminished by their calculating fathers who might contracept, abort, smother, or sell them, and by their mothers who sometimes lack the resources, support, and protection to bring them to term, let alone to adulthood.<sup>310</sup> Men are harmed because they do not have the time, energy, or resources to support their polygamous households and because their minds and hearts cannot rest if they are always on the lookout for another woman to add to their harems or for another dangerous man who will abduct his women.<sup>311</sup> And societies are harmed because polygamy results in too many unattached men who become menaces to public order and morality, and creates too many ad hoc seats of domestic power which are based on sheer numbers rather than on legitimate political succession or election.<sup>312</sup>

Some 500 years ago, European critics of the Anabaptist town of Münster documented the harms done when religious leaders gained power over an isolated polygamous community.<sup>313</sup> There, a group of young men, giddy with lust and theocratic pretensions, combined charisma, brutality, and biblical platitudes to force a gullible Christian community to adopt their utopian vision of polygamy.<sup>314</sup> Old couples were forced to end their marriages and start again. Young girls and women were coerced into premature and unwanted marriages; even little prepubescent girls were fair game and were literally raped to

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<sup>307</sup> 1 *Kings* 11:1–6.

<sup>308</sup> See discussions of William of Auvergne’s views in PETER BILLER, *THE MEASURE OF MULTITUDE: POPULATION IN MEDIEVAL THOUGHT* 60–88 (2000); WITTE, *supra* note 3, at 161–63.

<sup>309</sup> BILLER, *supra* note 308, at 60–89.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> WITTE, *supra* note 3, at 200, 220–24; *see also* CAIRNCROSS, *supra* note 226, at 1–33, 57; LEO MILLER, *JOHN MILTON AMONG THE POLYGAMOPHILES* 20–21, 45–46, 205–08 nn.19–22 (1974).

<sup>314</sup> MILLER, *supra* note 313, at 45–46.

death.<sup>315</sup> Husbands collected wives like spiritual trophies, measuring their faith by the size of their harems and nurseries. Wives were used and then spurned when they were pregnant or nursing or when the next wife was added to the harem.<sup>316</sup> Polygamous households were filled with bickering wives and children, who were then cowed into silence with threats of the sword. Wives who still objected, or who rejected their husband's sexual advances to protest the unwanted polygamy, were summarily executed. Community dissenters and critics of these utopian excesses were summarily banished or executed.<sup>317</sup>

Some 150 years ago, American critics of Mormon polygamy found much the same thing on the Western frontier.<sup>318</sup> First, they charged, polygamy harmed young girls who were too often tricked, coerced, or commanded to enter spiritual marriages with older men and had too little education and too few means of escape when inevitably neglected or replaced by another favorite wife. Their plight was exacerbated by the practice of unilateral male divorce that allowed men to banish wives who failed to fall in line or who no longer offered children, labor, support, or sex. Women within the home were placed into competition with each other and the children for ever thinner resources and were reduced in effect to the status of slaves—bought and sold by wealthy and powerful men, hunted down and returned if they became fugitives, and put to hard work under unrelenting and unsupervised patriarchal discipline.<sup>319</sup> Second, polygamy licensed and encouraged male lust for sex and power. It induced inevitable restlessness on the part of some males to add more women to their harems. It invited inevitable repression and ostracism of rival males eager to find a wife or lover among the scant supply of women who were left to them. It favored marriage by the richest and most powerful, not necessarily the fittest and most virtuous males of the community.<sup>320</sup> And third, polygamy created religious power structures that rivaled the legitimate power of the state. Church leaders slowly gained control of the property, economy, and work force. They compelled their congregants, workers, and family members to support their polygamous policies and to vote for new officials who would do the same. They colluded to create laws and policies favoring polygamy and to

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<sup>315</sup> See CAIRNCROSS, *supra* note 226, at 15–17.

<sup>316</sup> *Id.* at 14–15.

<sup>317</sup> *Id.* at 16–19, 23–24.

<sup>318</sup> See detailed sources and analysis in GORDON, *supra* note 18, at 93, 96, 112, 262 n.19, 266 n.51; WITTE, *supra* note 3, at 429–39.

<sup>319</sup> GORDON, *supra* note 18, at 63–65.

<sup>320</sup> *Id.*; see JOAN SMYTH IVERSEN, *THE ANTIPOLYGAMY CONTROVERSY IN U.S. WOMEN'S MOVEMENTS, 1880–1925: A DEBATE ON THE AMERICAN HOME* 140, 145–46 (1997).

suborn the perjury and contempt of those polygamists who were sought by the authorities. And when government officials sought to restore legal and moral order in the territory, these communities confronted them with boycotts, guns, riots, and violence. This simply could not be countenanced in a democratic land dedicated to the separation of church and state.<sup>321</sup>

Today, observers of polygamous communities scattered about the West point to similar problems of higher than average incidences of arranged, coerced, and underage marriages of young girls to older men; rape and statutory rape; wife and child abuse; social and educational deprivation of women and children in polygamous households; abuse and ostracism of young boys and poorer men who compete for fewer brides; rampant social welfare abuses by oversized polygamous families; social isolation of polygamous communities; and dangerous conflation of religious and political authority.<sup>322</sup> Outside of the West, most polygamous cultures are rural, poor, and uneducated, with low technology and labor-intensive economies that require many children to do the work and that feature low survival rates among these children.<sup>323</sup> Or they are part of powerful political and religious families in Traditional tribal settings, Muslim settings, or both. But regardless of “whether it is practiced in a Western democracy or sub-Saharan Africa, polygamy produces harmful effects that ripple throughout a society,” Brown University political scientist Rose McDermott concludes after a thorough cross-cultural study of polygamy in over 170 countries. All these polygamous communities suffer from increased levels of physical and sexual abuse against women, increased rates of maternal mortality, shortened female life expectancy, lower levels of education for girls and boys, lower levels of equality for women, higher levels of discrimination against women, increased rates of female genital mutilation, increased rates of trafficking in women and decreased levels of civil and political liberties for all citizens.<sup>324</sup>

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<sup>321</sup> See H.R. REP. NO. 49-2735, at 7 (1886).

<sup>322</sup> See, e.g., ALTMAN & GINAT, *supra* note 23, at 41, 468; BAILEY & KAUFMAN, *supra* note 26; Scheidel, *supra* note 96; see also Chamberlin & Guiora, *supra* note 58.

<sup>323</sup> See *supra* note 138 and accompanying text.

<sup>324</sup> Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 616 (Can.); see Rose McDermott & Jonathan Cowden, *Polygyny and Violence Against Women*, 64 EMORY L.J. 1767 (2015). See also the detailed literature introduced in Professor McDermott’s expert opinion in the British Columbia case, Expert Report of Rose McDermott, *Reference*, 2011 BCSC 1588 (No. S-097767), available at <https://stoppolygamyincanada.files.wordpress.com/2011/04/mcdermott-report.pdf>.

The Western legal tradition has thus long regarded polygamy as a *malum in se* offense—something “evil in itself.”<sup>325</sup> Other *malum in se* offenses today include slavery, sex trafficking, prostitution, indentured servitude, obscenity, bestiality, incest, sex with children, self-mutilation, organ-selling, cannibalism, and more. Polygamy is usually regarded as less egregious than some other offenses on this list. But, like other *malum in se* offenses, polygamy is too often the cause, consequence, or corollary of other wrongdoing. That someone wants to engage in these activities voluntarily for reasons of religion, bravery, custom, or autonomy makes no difference. That other cultures past and present allow such activities makes no difference. That these activities don’t necessarily cause harm in every case also makes no difference. For nearly two millennia, the Western legal tradition has included polygamy among the crimes that are inherently wrong because polygamy routinizes patriarchy, deprecates women, jeopardizes consent, fractures fidelity, divides loyalty, dilutes devotion, fosters inequity, promotes rivalry, foments lust, condones adultery, harms children, and more—not in every case, to be sure, but in enough cases to make the practice of polygamy too risky to condone as a viable legal option.

Furthermore, allowing religious polygamy as an exception to the rules is even more dangerous, the Western tradition has concluded, because it will make some churches, mosques, tribes, and temples a law unto themselves. It is notable that no religious community in the West today regards polygamy as an absolute religious requirement.<sup>326</sup> It’s a custom not a command, an option not an obligation, for the faithful. It is also notable that some Western communities that once preached and practiced polygamy, namely, Jews and Mormons, and a number of Muslims, too, have now rejected the practice.<sup>327</sup> But even if polygamy were religiously obligatory, modern Western constitutional laws still empower states to prohibit behavior that the states consider harmful or dangerous. Again, some religious communities and their members might well thrive with the freedom to practice polygamy. But, inevitably, closed repressive and isolated regimes, like Anabaptist Münster<sup>328</sup> or the

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<sup>325</sup> See BLACK’S LAW DICTIONARY 1103 (10th ed. 2014).

<sup>326</sup> See GOLDFEDER, *supra* note 166.

<sup>327</sup> See WITTE, *supra* note 3, at 55–63 (explaining the restriction and eventual ban on polygamy in medieval Judaism); *supra* note 23 and accompanying text (explaining that after 1890 Mormons rejected polygamy and eventually made it a ground for excommunication); *supra* notes 150–61 and accompanying text (explaining Islamic law restrictions on polygamy, and the growing abandonment of the practice in world-wide Islam).

<sup>328</sup> See *supra* notes 313–17 and accompanying text.

Fundamentalist Mormon Yearning for Zion Ranch,<sup>329</sup> will also emerge—with underage girls duped or coerced into sex and marriages with older men, with women and children trapped in sectarian communities with no realistic access to help or protection from the state, and no real legal recourse against a religious community that is following its own rules. The West prizes liberty, equality, and consent too highly to court such a risk.

So what!—a skeptic might argue for the final time. Monogamous households are filled with many ugly harms, too: wife and child abuse, deprivation and abandonment of children, wastrel habits, welfare abuses, and, sadly, so much more. That has not led to the abolition of monogamy but only to the closer policing and punishment of each harm as it occurs. Why not do the same here? If polygamy really does cause or correlate with various harms, why not just punish those harms when they occur? If polygamous wives or children really do suffer from increased levels of abuse, neglect, or deprivation, why not give them model contracts with strong, built-in protections for the vulnerable that are scrupulously enforced? If religious leaders really do subvert due process, why not let polygamous parties just litigate their claims in state courts? If religious communities really do isolate their members at the risk of abuse, why not make polygamy more mainstream, transparent, and accountable? If *Big Love* and *Sister Wives* can make the polygamous family work, why can't everyone else be given a fair chance?

#### *E. Symbolic Arguments*

“Bad cases make bad law,” a familiar legal dictum has it, and so it is here. The compelling case for the lawfulness of polygamy is when three or more well-educated parties—similar in wealth, ability, and opportunity, eyes and doors wide open—choose to enter into a polygamous union. They can calculate and negotiate the costs and benefits, and the advantages and disadvantages, of their pending plural union. They can protect themselves through prenuptial and postnuptial contracts and through their own independent means. They can hire lawyers, accountants, private investigators, and security guards to help them if their partners betray or endanger them or their children. And they can hit the airwaves and social media to elicit sympathy and action if the state authorities don't respond quickly or fully enough. For these exceptional parties, the state criminal prohibition against polygamy hardly seems necessary.

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<sup>329</sup> See *supra* notes 31–37 and accompanying text.

But general criminal prohibitions against polygamy are designed not for the exceptional case, but for the typical case. And throughout Western history and still today, a typical case of polygamy too often involves vulnerable parties that do not have the knowledge, resources, or connections to engage in the kind of self-protection and self-help available to a *Big Love* or *Sister Wives* wife. And while every Western state has general laws on the books against wife and child abuse; coerced marriage and statutory rape of young girls; deprivation of food, shelter, and education of children; welfare abuse; and more, the reality is that these laws in action have provided far too little support and protection for these vulnerable populations, especially as state administrative agencies face shrinking budgets, dwindling personnel, and political disincentives to prosecute.<sup>330</sup> If the practice of polygamy is one root of these sundry domestic problems, why not enforce the criminal laws against this practice? If the legislatures have put and left polygamy laws on the books, by what right do state prosecutors or law enforcement officials simply ignore them?<sup>331</sup>

But these traditional criminal laws against polygamy are more than just prudential prophylactics against harm. They also play an important symbolic and teaching function that the state and its family laws still play in our lives.<sup>332</sup> Historically, in the West, the laws against polygamy were part of a broader set of family laws designed to support the classical Western ideal that the monogamous family was the most primal and essential institution of Western society and culture.<sup>333</sup> Aristotle and the Roman Stoics called the union of husband and wife, and parent and child, the “foundation of the polis” and “the private font of public virtue.”<sup>334</sup> The Church Fathers and medieval Catholics called the monogamous household the “seedbed” of the city, “the force that welds society together,” the sacrament that produces structural and symbolic stability.<sup>335</sup> Early modern Protestants and Anglo-American common lawyers

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<sup>330</sup> Chamberlin & Guiora, *supra* note 58; *see also* Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (Can.); Wray et al., *supra* note 56.

<sup>331</sup> Weismann, *supra* note 51 (noting that under elementary separation of powers principles, it is for the judiciary, not the executive branch, to be in the business of deciding which laws are enforceable under the state constitution).

<sup>332</sup> *See* CATHLEEN KAVENY, *LAW’S VIRTUES: FOSTERING AUTONOMY AND SOLIDARITY IN AMERICAN SOCIETY* 97–110, 219–42 (2012) (examining the “teaching” function of the law); WITTE, *supra* note 293, at 263–92.

<sup>333</sup> *See* WITTE, *supra* note 8, at 331–64 (listing detailed sources).

<sup>334</sup> *Id.* at 4.

<sup>335</sup> AUGUSTINE, *City of God* 15.16 (c. 426 C.E.), *translated in* AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS* 667 (R.W. Dyson ed. & trans., Cambridge Univ. Press 1998); JOHN CHRYSOSTOM, *HOMILY 20 ON EPHESIANS 5:22–33* (c. 386 C.E.), *translated in* ST. JOHN CHRYSOSTOM ON MARRIAGE AND FAMILY LIFE 43, 44 (Catharine Roth & David Anderson trans., 1986).

called the stable household a “little church,” a “little commonwealth,” the first school of love and justice, nurture and education, charity and citizenship.<sup>336</sup> John Locke and the Enlightenment philosophers called monogamous marriage “the first society” to be formed as men and women moved from the state of nature to an organized society dedicated to the rule of law and the protection of natural rights. In all these traditional metaphors, what was being celebrated and taught was a certain vision of the good life and the good society, with monogamous marriage at its core.<sup>337</sup>

For all of the advances in our contemporary Western understandings of liberty, autonomy, and equality, and for all our current wariness about totalitarian state power, we still look to the Western state among other institutions to teach and encourage activities or relationships that cater to private and public “health, safety, and welfare” and discourage activities and relationships that do not. In the area of marriage and family life, we have shrunk the domestic ideals traditionally taught and symbolized by the marital ideals of sacrament or covenant.<sup>338</sup> The modern state now allows and protects straight and same-sex relations, divorce and remarriage, marital and non-marital cohabitation, and more. And modern family law systems, among others, have moved away from many of the absolute “thou shalt” and “thou shalt not” commands of the past, as well as the harsh and sometimes brutal measures used to enforce them. But still, in the “soft law” between these two apodictic poles, the modern state still does its teaching work, “nudging” its citizens in one direction or another.<sup>339</sup> The state encourages, exemplifies, supports, funds, facilitates, and licenses certain behavior that conduces to the public and private health, safety, and welfare of the community. It discourages and warns against the opposite types of behavior and provides it with no funding, facilitation, licenses, or support.

The modern Western state does not require its citizens to get married, but it does “nudge” in that direction. It provides state marital licenses, tax and social security incentives, spousal evidentiary and health care privileges, and

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<sup>336</sup> WITTE, *supra* note 8, at 257.

<sup>337</sup> *Id.* at 284.

<sup>338</sup> See sources on the important symbolic function of marriage in society cited *supra* note 222. But note the recent resurgence of a covenant marriage movement described in COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE (John Witte, Jr. & Eliza Ellison eds., 2005).

<sup>339</sup> See, e.g., POSNER, *supra* note 166; JOSEPH RAZ, *The Functions of Law*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 163–89 (2d ed. 2009); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

hundreds of additional federal and state benefits and incentives.<sup>340</sup> It models monogamous marriage in its political officials. Most Western nations still look askance on the single political candidate or elected official who commits adultery (France and Italy excepted). In turn, the state still prohibits polygamy as a state-licensed form of marriage, but it increasingly tolerates *de facto* polygamy through much of the West. Constitutional norms of sexual liberty and domestic autonomy allow adults to live with multiple self-declared spouses so long as they all abide by the laws of adult consensual sex and so long as they do not seek marital licenses or welfare benefits from the state for more than one wife. The modern state also now provides the legal means to meet the traditional “necessity” arguments for polygamy. If a man wants more children than his wife can give him, he can adopt more, have them out of wedlock, or hire a surrogate. If a spouse is frustrated because his or her spouse cannot or will not have sex, unilateral divorce and remarriage options are now available. These steps are not costless or even easy, but they largely meet the concerns that historically justified polygamy in cases of necessity.

In a democratic polity, the judgment of whether the state should “nudge” for or against certain behavior—let alone prescribe or proscribe it—rests ultimately in the people. And, at least in the West, the “people” have decided that they still favor faithful monogamous marriage. “Two’s company, three’s a crowd,” a common Western adage has it. That speaks to the reality that in certain long-term social contexts—especially in the intimacies of bed, board, and bath—there’s something intuitively more attractive in being with one other person, not two or more. Yes, some say that dyadic attraction is a purely social construct, a routinization of habits that have gathered around an artificially privileged monogamous norm. They point to people who like living, sleeping, and bathing with several people at once; the commune, communal bath, and common bed are hardly anomalies among humans of various times and places. But these ample exceptions do not swallow the general preference for dyadic sexual pair-bonding in the West—especially among Western women, who have rarely practiced or condoned polyamory historically or today. Let’s face it: human polygamy is and always has been primarily about a small group of men seeking the social, moral, and legal imprimatur to have and to hold sundry females at once. But there’s plenty of empirical evidence to show that most men and women alike are instinctively attracted to single partner intimacy for the long term and instinctively repulsed and angered if forced to share their bed

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<sup>340</sup> See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000); Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129 (2003).

and partner with a third party. Despite our wide cultural acceptance of sexual liberty in the West, adultery or sexual infidelity still breaks marriage and intimate relationships more often than any other cause.<sup>341</sup>

While some elite scholars and media now find polygamy acceptable, and even desirable, the vast majority of people in the United States still find polygamy to be deeply objectionable, even though many traditional sexual taboos no longer rankle them. According to a 2013 Gallup poll, solid majorities of the American population now accept birth control (91%), divorce (68%), non-marital sex (63%), and having children outside of marriage (60%). Acceptance of abortion (42%) and gay and lesbian relations (59%) remains lower, owing to sustained beliefs and campaigns against both, but even those numbers are four times higher than they were fifty years ago. By striking contrast, only 14% of American people accept polygamy; this is double the number of 7% that accepted polygamy in 2001, perhaps owing to the growing media campaign for it, but that number is still remarkably low. Only adultery (6%) ranks lower in social acceptability.<sup>342</sup>

This suggests that, at least in the United States, any change in traditional polygamy laws must come from below, not from on high, by gradual democratic adjustments in each state, not by judicial pronouncements from the federal courts. The constitutional case for polygamy is weak compared to the cases supporting the liberalization of other traditional sex, marriage, and family laws; there are just too many serious concerns about harms and rights on the other side.<sup>343</sup> Forcing the issue by constitutional brinkmanship might well trigger a strong democratic backlash if the fallout from *Roe v. Wade* is any indication. There may come a time that the West will more readily accept polygamy as a valid marital option that is licensed and regulated by the state. Polygamy may eventually move from Stonewall to *Windsor*, as same-sex relations have done. But that cultural and legal pilgrimage, in my judgment, is still a long way off.

For the West to maintain its traditional stance against polygamy does not mean that it needs to trade in all the ugly rhetoric that has historically attended

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<sup>341</sup> See, e.g., GROWING TOGETHER: PERSONAL RELATIONSHIPS ACROSS THE LIFESPAN (Frieder R. Lang & Karen L. Fingerman eds., 2004) (giving various perspectives on dyadic relationships); THE CAMBRIDGE HANDBOOK OF PERSONAL RELATIONSHIPS (Anita L. Vangelisti & Daniel Perlman eds., 2006).

<sup>342</sup> Frank Newport & Igor Himelfarb, *In U.S., Record-High Say Gay, Lesbian Relations Morally OK*, GALLUP (May 20, 2013), <http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx>.

<sup>343</sup> See Den Otter, *supra* note 166.

this stance. We don't have to posit unilinear narratives of progress that brand polygamists as "barbarous" and "savages" lacking in virtue or value.<sup>344</sup> We don't have to say that the West is more "advanced" or progressive than the rest because of its monogamy.<sup>345</sup> We don't have to repeat the haughty and xenophobic arguments used by Graeco-Roman writers against their imperial subjects, by early Christians against Jews and Muslims,<sup>346</sup> by early modern Europeans against New World natives,<sup>347</sup> by nineteenth-century Americans against emancipated slaves, Native Americans, Asian workers, or traditional Mormons who practiced polygamy.<sup>348</sup> The West can now simply and politely say to the polygamist who bangs on its door seeking admission or permission to practice polygamy: "No thank you; we don't do that here," and close the door firmly.

### SUMMARY AND CONCLUSIONS

The Western case against polygamy is not just about how to maintain Christian traditions in "a secular age."<sup>349</sup> The reality is that the West's arguments against polygamy are both pre-Christian in origin and post-Christian in operation. They are "pre-Christian" in that the Bible has no clear prohibition against polygamy and includes more than two dozen polygamists among the biblical leaders of the faith. They are "pre-Christian," furthermore, because the Christian Church was rather slow to ban polygamy, even though it quickly condemned many other sexual practices of the Roman Empire in which the church was born. It was the "pagan" Roman emperors who criminalized polygamy in 258 C.E., more than a century before they established Christianity and nearly a millennium before church authorities finally issued comparably firm prohibitions against polygamy. The high medieval Catholic Church and early modern Protestant churches, too, eventually made these anti-polygamous sentiments a part of their theology, ethics, and religious norms, and added their own deep arguments that became important to the Western case against polygamy. But Christianity was as much a carrier as an inventor of the West's

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<sup>344</sup> See LEWIS H. MORGAN, *ANCIENT SOCIETY, OR RESEARCH IN THE LINES OF HUMAN PROGRESS FROM SAVAGERY, THROUGH BARBARISM TO CIVILIZATION* 3–18, 383–522 (New York, Henry Holt & Co. 1877); see also 1 GEORGE ELLIOTT HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* 132–51 (1904) (listing detailed sources, distilling this social science literature at the turn of the twentieth century).

<sup>345</sup> See, e.g., 1 LIEBER, *MANUAL*, *supra* note 289, at 103–04, 139, 141–42; Francis Lieber, *The Mormons: Shall Utah Be Admitted into the Union?*, *PUTNAM'S MONTHLY*, Mar. 1855, at 233.

<sup>346</sup> See sources in WITTE, *supra* note 3, at 55–57, 66–67, 85–92, 158–63.

<sup>347</sup> See MULDOON, *supra* note 278.

<sup>348</sup> See sources in WITTE, *supra* note 3, at 416–39.

<sup>349</sup> CHARLES TAYLOR, *A SECULAR AGE* (2007).

aversion to polygamy. And its normative stands against polygamy were as much philosophical and prudential in argument as they were theological and biblical.

Because of this, the Western tradition's aversion to polygamy eventually became decidedly "post-Christian" as well. Long after they disestablished Christianity and granted religious freedom to all peaceable faiths, Western nations in Europe and North America remained firmly opposed to polygamy. Indeed, some of the strongest Western arguments against polygamy came from eighteenth- and nineteenth-century Enlightenment liberals and modern common lawyers who firmly rejected Christianity but also firmly rejected polygamy as a betrayal of reason, nature, utility, fairness, liberty, and common sense.<sup>350</sup> And, they marshaled their strongest anti-polygamy arguments not so much against secular sexual libertines but against several avant-garde Christians who were pressing the case for polygamy on natural and utilitarian grounds—as a cure-all for all manner of sexual, social, and psychological ills both at home and abroad on the new colonial and foreign mission fields of Africa and Asia.

These arguments against polygamy are also not simply about how to maintain traditional morality in a new age of sexual liberty. To be sure, polygamy has long been included on a long roll of traditional sex crimes. That roll also included adultery, fornication, abortion, contraception, and sodomy, which have all now been eclipsed by modern constitutional and cultural norms of sexual liberty. It is thus easy to think that the crime of polygamy is vulnerable to the same generic logic of sexual liberty that undercut so many other traditional sexual norms. Anti-polygamists often trade in this simple morality-versus-liberty dialectic in warning against the dangers of the slippery slope. A good example is Justice Scalia's dissent in *Lawrence v. Texas*, the case that struck down traditional sodomy laws. "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . [all now] called into question," Justice Scalia wrote in an ominous warning that clatters loudly in the literature of conservative family groups to this day.<sup>351</sup> Pro-polygamists do the same thing by painting their opposition with the same broad brush of bigotry. The anti-polygamists of today, they argue, are just like the slaveholders,

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<sup>350</sup> See WITTE, *supra* note 3, at 348–88; see also Witte, *supra* note 1.

<sup>351</sup> *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting); see also *Romer v. Evans*, 517 U.S. 620, 648–50 (1996) (Scalia, J., dissenting).

chauvinists, and homophobes of the past, clutching to their traditional morality at the cost of true liberty for African-Americans, women, and same-sex partners.<sup>352</sup>

But traditional morality versus modern liberty is too blunt a dialectic to sort out the modern case for and against polygamy. It is too blunt, in part, because the modern logic of liberty and human rights was founded—in no small part—on traditional morality. Much of our modern Western rights structure was created by “traditional” Catholics and “traditional” Protestants from 1200–1700, long before liberal Enlightenment philosophers and jurists set out to work. Indeed, by 1650, Christians of various types had already defined, defended, and died for every right that would appear a century and a half later in the United States Bill of Rights or in the French Declaration of the Rights of Man and Citizen.<sup>353</sup> And a good case has been made that modern human rights norms still need religious and moral sources and sanctions in order to be fully cogent and effective even in our post-establishment and post-modern secular polities.<sup>354</sup>

The dialectic of morality versus liberty is also too blunt because proponents of modern liberty have their own morality, grounding their arguments in deep moral beliefs, values, ideals, and metaphors—not least the foundational moral concept of human dignity on which the modern human rights revolution has been built since 1948.<sup>355</sup> The notion that modern liberals press only neutral, objective, and value-free arguments in favor of liberty and equality while Christians and other faith traditions trade only in prejudicial, subjective, and judgmental moral values now faces very strong epistemological headwinds.<sup>356</sup> Every serious school of legal, political, and social thought today rests ultimately on a foundation of fundamental beliefs and values.

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<sup>352</sup> See, e.g., Margaret Denike, *The Racialization of White Man's Polygamy*, 25 *HYPATIA* 852 (2010); Martha Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 *COLUM. J. GENDER & L.* 287 (2010).

<sup>353</sup> See, e.g., CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION, *supra* note 179; BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW, 1150–1625 (Wm. B Eerdmans Publ'g 2001) (1997); WITTE, *supra* note 268.

<sup>354</sup> See sources and discussion in W. COLE DURHAM, JR. & BRETT G. SCHARFFS, *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* (2010); and sources cited in *supra* note 298.

<sup>355</sup> See, e.g., LOUIS HENKIN ET AL., *HUMAN RIGHTS* 80 (2d ed. 2009); MICHAEL J. PERRY, *THE POLITICAL MORALITY OF LIBERAL DEMOCRACY* (2010).

<sup>356</sup> See CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* (2002); JOHN PERRY, *THE PRETENSES OF LOYALTY: LOCKE, LIBERAL THEORY, AND AMERICAN POLITICAL THEOLOGY* (2011) (summarizing recent criticisms from various quarters); MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991).

Modern reproduction technologies have changed how humans understand procreation and parenthood. Seismic cultural shifts have changed how we think about and adjudicate issues surrounding human sexuality and sexual bonding. Yet, apart from a few exceptional cases that are often glorified in the media, there is little evidence to suggest that polygamy is an effective way to promote social equality, familial stability, or the overall wellbeing of spouses and children. To the contrary, in its typical expressions polygamy coincides with extreme forms of patriarchy and correlates with substantial harms to women, children, and the broader communities in which it is practiced. In the still-ripe flush of the sexual revolution, courts may be tempted to classify laws criminalizing polygamy with now-defunct laws that once criminalized traditional sexual taboos, like “sodomy” and “buggery.” Courts may also be tempted to cast laws limiting marriage to monogamous couples into the heap of now-defunct laws limiting marriage to heterosexual partners. Doing so, however, would neglect important historical distinctions between the moral and legal justifications for these laws. In their haste to do away with discriminatory and repressive regulations in the spheres of marriage, sex, and family, courts should not give legal sanction to a form of marriage that is not uniformly, but inevitably, harmful and repressive to the most vulnerable parties.

## APPENDIX: THE SHIFTING TERMINOLOGY OF PLURAL MARRIAGES

The topic of polygamy or plural marriage involves a shifting and slippery terminology that is worth spelling out a bit. The term “polygamy” usually brings to mind either the oft-prurient thought of sharing a bed with two or more spouses or the troubling thought of subjugated women forced to endure life in the harem of a wealthy, powerful, and older man. Some might also think of the traveling cad who keeps secret wives in multiple cities or the malicious deserter who abandons his wife and children and marries another woman down the road without bothering to end the prior marriage.<sup>357</sup> Movie and literature lovers might also think of the tragic stories of a long deserted spouse who finally gives up hope and gets married to another, only to have the first spouse reappear after heroic struggle on the high seas or the battlefield, or after overcoming dire illness or long captivity. Think of Lord Tennyson’s *Enoch Arden*, Tom Hanks’s *Cast Away*, or *The Return of Martin Guerre*.<sup>358</sup> All these are core cases of polygamy in the Western legal tradition.

But historically the term “polygamy” covered a number of other forms of plural union as well, and the term was combined with a number of other shifting and confusing terms. Below, Table 1 sets out the forms and names of plural marriage that were discussed in the Western legal tradition since biblical and classical times and which were subject to restrictions and sanctions by the state, and sometimes the church, too. All of them were considered to be forms of the generic category of “polygamy,” and the rationales for their respective punishment were often intertwined.

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<sup>357</sup> Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637, 641–42 (1991).

<sup>358</sup> ALFRED TENNYSON, *ENOCH ARDEN* (Boston, Ticknor & Fields 1865); *CAST AWAY* (Twentieth Century Fox et al. 2000); *THE RETURN OF MARTIN GUERRE* (Dussault et al. 1982).

**TABLE 1: THE HISTORICAL FIELD OF POLYGAMY**

| <b>Name of Offense</b>   | <b>Relationships Covered by the Offense</b>  |
|--|--|
| <i>Real Polygamy/Bigamy</i><br>(also called Polygyny and Polyandry)                            | <ul style="list-style-type: none"> <li>• a husband with two or more wives</li> <li>• a wife with two or more husbands</li> </ul>   |
| <i>Constructive Polygamy</i> (also called Interpretive Polygamy or Quasi-Polygamy)             | <ul style="list-style-type: none"> <li>• a man or woman with two or more fiancé(e)s</li> <li>• a man or woman with one or more fiancé(e)s and one or more spouses</li> <li>• a husband with a wife and one or more concubines</li> <li>• a man with two or more concubines</li> <li>• a husband who married or had sex with two or more sisters in a row</li> <li>• a man or woman who took both spiritual and marital vows</li> </ul>   |
| <i>Successive Polygamy</i><br>(also called Bigamy, Digamy, Sequential or Serial Polygamy)      | <ul style="list-style-type: none"> <li>• a divorcee who married before the death of the former spouse</li> <li>• a widow(er) who remarried too soon or too often</li> </ul>  |
| <i>Clerical Polygamy or Clerical Bigamy</i><br>(also called Digamy; later called Irregularity) | <ul style="list-style-type: none"> <li>• a deaconess/avowed nun who had married two or more husbands, before taking vows</li> <li>• an ordained priest or avowed monk who had, before taking vows <ul style="list-style-type: none"> <li>○ married two or more wives in a row</li> <li>○ married a woman who had already taken a spiritual vow</li> <li>○ married a non-virginal wife who was <ul style="list-style-type: none"> <li>▪ widowed</li> <li>▪ a former concubine</li> <li>▪ a former prostitute</li> <li>▪ a former fornicator</li> <li>▪ a former actress</li> <li>▪ an earlier victim of rape or abduction by another</li> </ul> </li> </ul> </li> </ul> |

**Real Polygamy/Bigamy.** As Table 1 shows, the core and clearest case of polygamy in the Western tradition involves a man or woman with two or more spouses at the same time. Historically, the term “bigamy” was sometimes used if a person had only two spouses at the same time; “trigamy” for three spouses,

“quadragamy,” for four spouses and so on.<sup>359</sup> But “polygamy” was the more common generic word describing the act of having two or more spouses at the same time. Technically, the term “polygyny” (from the Greek “*poly*” for many and “*gyne*” for wife or woman) describes a man having two or more wives. “Polyandry” (combining “*poly*” with the Greek term “*anēr*” for man) describes the quite rare instance of a woman having two or more husbands. And the term “polyamory” is the generic term often used to describe all manner of plural spousal and sexual arrangements. These technical terms were occasionally used in historical texts and are used more frequently in the social science literature today. But again “polygamy” was and is the more common generic word for having two or more spouses at the same time.

Writing in the thirteenth century, the leading canon law jurist of his day, Hostiensis (c. 1200–c. 1271), called this core case of having two or more spouses at the same time to be “real” or “proper” bigamy or polygamy (*polygamia vera, bigamia propria*) as opposed to various forms of what he called “constructive polygamy” or “successive polygamy” that we will describe in a moment.<sup>360</sup> Three centuries later, the great English jurist, Sir Edward Coke (1552–1634), echoed this view, calling his fellow common lawyers to use the term “polygamy” to describe only the crime of having two or more spouses at the same time.<sup>361</sup> William Blackstone (1723–1780) again echoed this view in eighteenth-century England,<sup>362</sup> as did James Kent (1763–1847) in nineteenth-century America.<sup>363</sup> But other jurists, judges, and

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<sup>359</sup> *The First Canonical Epistle of Our Holy Father Basil, Archbishop of Caesarea in Cappadocia to Amphilochius, Bishop of Iconium* (c. 370 C.E.) [hereinafter *Basil Canons*], translated in 14 A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH app. 604, 607 (Canon 50) (Philip Schaff & Henry Wace eds., 2d prt. 1995) [hereinafter NPNF2]; Letter 188 from Saint Basil to Amphilochius (c. 374 C.E.), translated in 8 NPNF2, *supra*, at 223, 225–26; see also SAMUEL PURCHAS, THE FIRST PART OF PURCHAS HIS PILGRIMAGE 243–44, 248 (London, William Stransby 1614) (discussing Mohammed taking four, and possibly eleven, wives).

<sup>360</sup> HOSTIENSIS, SUMMA AUREA, lib. 1, *De Bigamis Non Ordinandis [Of Nonordinary Bigamy]* 243 (Venice, 1574), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1032&context=david\\_freidenreich](http://works.bepress.com/cgi/viewcontent.cgi?article=1032&context=david_freidenreich). This “real v. constructive” formulation is repeated in LUDOVICO ENGEL, COLLEGIUM UNIVERSI JURIS CANONICI [COLLECTION OF UNIVERSAL CANNONS] 192–93 (Salzburg, Joan Jof. Mayr 1770).

<sup>361</sup> EDW. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND § 107, at 80 (London, Adam Islip 1628). Continental writers were pressing the same argument. See, e.g., 7 LUCIUS FERRARIUS, PROMPTA BIBLIOTHECA: CANONICA, JURIDICA, MORALIS, THEOLOGICA [A CONVENIENT LIBRARY OF CANONICAL, JURIDICAL, MORAL, AND THEOLOGICAL TEXTS] (Venice, Gasparem Storti 1782).

<sup>362</sup> 4 BLACKSTONE, *supra* note 283, at \*163 (“[W]hat our law corruptly calls *bigamy*; which properly signifies being twice married, but with us is used as synonymous to *polygamy*, or having a plurality of wives at once.”).

<sup>363</sup> 2 KENT, *supra* note 289, at 70; see also LEONARD SHELFORD, A PRACTICAL TREATISE ON THE LAW OF MARRIAGE AND DIVORCE 186 (Philadelphia, John S. Littell 1841).

legislators, throughout Western history, still sometimes used the terms “bigamy,” “polygyny,” “polyandry,” and “polyamory,” as well as “digamy” (double marriage) to describe a case of “real polygamy,” even though these terms sometimes had other meanings, too.<sup>364</sup>

Writing alongside Hostiensis and Coke, other medieval and early modern jurists began to call for a greater differentiation of types or degrees of “real polygamy”—a hierarchy of offenses from more serious to less serious.<sup>365</sup> Various soft taxonomies of “real polygamy” slowly began to emerge in early modern times with different punishments attached to each level of offense. Some distinctions were based on the defendant’s state of mind: intentionally or knowingly having two spouses was considered more serious than innocently or negligently taking a second spouse (thinking, wrongly, that the first spouse was dead or that the first marriage had properly ended). Some distinctions were based on the defendant’s actions and the harm he or she caused: keeping two or more spouses in the same house or bed was considered more serious than secretly having two or more spouses in different locales, each unknown to the other. Some distinctions were based on the number of victims drawn into the polygamy: having three spouses at the same time was worse than having two; having four was worse than having three. Forcing, inducing, or inviting one or more of the spouses to accept the polygamy was worse because it made them accomplices in the defendant’s crime, if not criminals themselves. Drawing parents, priests, peers, and others knowingly into blessing or supporting an illegal second or third marriage was also more serious than keeping it secret.

By the seventeenth century, various jurists used these many forms of real polygamy to set out more refined taxonomies of types or degrees of real polygamy, and these slowly began to penetrate the law books and statutes of

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<sup>364</sup> See, e.g., MILLER, *supra* note 313, at 240 n.51 (discussing variations of the term “polyandry”); I HOWARD, *supra* note 344, at 80–84 (discussing how matrimonial institutions progress from polyandry to polygyny); Anne McLaren, *Monogamy, Polygamy, and the True State: James I’s Rhetoric of Empire*, 25 HIST. POL. THOUGHT 446, 473–74 (2004) (contrasting polygyny and polyandry).

<sup>365</sup> See 3 DIDACO GARCIA DE TRASMIERA, DE POLYGAMIA ET POLYVIRIA [ON POLYGAMY AND MULTIPLE SPOUSES] (Panhormi, Apud Decium Cyrillum 1638) and MONTAIGNE, *supra* note 100, at 122–32 for the most extensive arguments for the *ius commune* on the Continent. On common law differentiation, see G.W. Bartholomew, *Polygamous Marriages and English Criminal Law*, 17 MOD. L. REV. 344, 359 (1954) (“A valid potentially polygamous marriage will be a sufficient first marriage for the purposes of bigamy . . . [but] [a]ny second marriage celebrated in [England] will be bigamous . . .”); J.H.C. Morris, *The Recognition of Polygamous Marriages in English Law*, 66 HARV. L. REV. 961, 1010–11 (1953) (discussing the legitimacy of English polygamous marriages depending on whether it is in accordance with the parties’ personal law and agreed upon by contract).

Western lands.<sup>366</sup> The real payoff for these distinctions came during the sentencing of convicted polygamists. While polygamy was a capital offense in the West from the ninth to the nineteenth centuries, execution orders were reserved only for intentional and unrepentant polygamists, especially those who openly kept multiple spouses at the same time or systematically married several women and then abandoned them and their minor children leaving them destitute. Most polygamists were convicted of lower grades of polygamy and faced lighter punishments—shame punishments, public confessions, fines, prison, whipping, indentured servitude, enslavement, banishment, or a term of rowing in the galleys.<sup>367</sup>

From the time of the early Roman Empire until today, it has always been the state that has punished “real polygamy” as a crime, and a rather serious crime at that. Only in the later Middle Ages did “real polygamy” also become a serious spiritual offense, eventually punished simultaneously by the church courts and the Inquisition—and with no sympathy for claims of double jeopardy.<sup>368</sup> By the seventeenth century, however, both Catholic and Protestant churches dropped their involvement in the criminal prosecution of polygamy. But they continued to impose spiritual discipline on real polygamists among their faithful, barring them from the church or at least from church offices.

**Constructive Polygamy.** Once various degrees of real polygamy came to be classified, it became easier to talk about what Hostiensis called “constructive polygamy” or “quasi-polygamy” (*polygamia interpretativa*).<sup>369</sup> This was a form of plural union that approximated, emulated, or was a step on the way toward committing real polygamy. The classic form of constructive polygamy was being doubly engaged, or being married to one spouse and then getting engaged to a second, or vice versa.<sup>370</sup> Another was having a wife as well as a regular live-in concubine (which pre-Christian Roman law had already prohibited).<sup>371</sup> Another was having made religious vows to be a cleric or a monastic (and thus becoming “married” to Christ and the church) but then

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<sup>366</sup> WITTE, *supra* note 3, at 241–74, 298–320.

<sup>367</sup> *Id.* at 154. See case studies described in *id.* at 263–71, 305–20, 407–16.

<sup>368</sup> Medieval church courts prosecuted cases of real polygamy with growing alacrity after the thirteenth century, Sara McDougall and others have shown, with the volume of church court cases against polygamy reaching their apex in the fifteenth century. See analysis and detailed primary and secondary sources cited in MCDUGALL, *supra* note 222.

<sup>369</sup> HOSTIENSIS, *supra* note 360.

<sup>370</sup> See detailed analysis and literature in WITTE, *supra* note 3, at 110–14, 130–32, 263–69.

<sup>371</sup> *Id.* at 58–64 & nn.23–43.

getting engaged or married to a person.<sup>372</sup> Several other more attenuated forms of quasi-polygamy were recognized as well.

For much of Western legal history, these forms of “constructive polygamy” or “quasi-polygamy” were viewed as spiritual offenses punishable by the church more than as criminal offenses punishable by the state.<sup>373</sup> But occasionally, these offenses were viewed as both sins and crimes, and subject to the spiritual sanctions of the church and the criminal penalties of the state. For example, in both Germanic law and early modern Protestant law, when engagement contracts were taken more seriously and not so easily broken, double engagements or being engaged to one and married to another were punished by both church and state.<sup>374</sup> Similarly, in Catholic lands, monastics or clerics who abandoned their religious vows and got married to another person were not only disciplined by the church but, having lost their privilege of benefit of clergy, were subject to state criminal punishment as well.<sup>375</sup> In these and other instances, the boundary between “real” and “constructive” polygamy was much blurrier. And again, in these cases, claims by some parties of double jeopardy were routinely rebuffed.

**Successive Polygamy.** A distinct Christian contribution to the Western case for monogamy over polygamy was the concept of “successive polygamy”—improperly being married to two or more spouses in a row rather than at the same time. In several passages, the New Testament strongly discouraged, if not outright prohibited, the divorced and the widowed from getting remarried.<sup>376</sup> Neither Roman law nor Jewish law recognized these as forms of polygamy before the advent of Christianity, and state laws eventually dropped this category of polygamy after the sixteenth century. But “successive polygamy” of remarried divorcees and widow(er)s was a major part of the Western legal tradition’s concerns about polygamy from the fourth to the sixteenth centuries.<sup>377</sup> It dominated a good deal of the theoretical discussion of monogamy versus polygamy in the West and was sometimes conflated with the discussion of “real polygamy.” Some of the arguments that eventually came to justify the prohibitions against successive polygamy also had a bearing

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<sup>372</sup> *Id.* at 72–73, 122–23, 137–40, 186–90.

<sup>373</sup> *Id.* at 126–32, 151–55, 290–94.

<sup>374</sup> *Id.* at 130–32, 263–69.

<sup>375</sup> *Id.*

<sup>376</sup> *Romans* 7:2–3; 1 *Corinthians* 7:1, 25–35, 39–40; 1 *Timothy* 3:2, 12, 5:9–16; *Titus* 1:6 (Revised Standard).

<sup>377</sup> See detailed analysis and literature in WITTE, *supra* note 3, at 70–72, 93–97, 120–22, 132–40, 182–86.

on the criminalization of “real polygamy.” Some were simple *a fortiori* arguments: if marriage to two wives in a row is prohibited, then marriage to two at the same time is even more obviously wrong.<sup>378</sup> But more serious were the arguments that focused on the powerful symbolism and social goods of a single monogamous marriage, which called both real and successive polygamy into question.<sup>379</sup>

The introduction of this new, distinctly Christian form of “polygamy” complicated the Western case for monogamy over polygamy and also complicated the terminology. Later advocates for and against polygamy liked to quote selected passages from some of these earlier sources that seemed to be endorsements or condemnations of “real polygamy,” not realizing that many of the passages concerned “successive polygamy,” not “real polygamy.”

**Clerical Polygamy or Clerical Bigamy.** A final distinct form of plural marriage, also largely introduced by Christianity, was the concept of “clerical bigamy” or “clerical polygamy.”<sup>380</sup> This was not a religious official who practiced “real polygamy,” as some later commentators mistakenly assumed. It was rather the special offense of a candidate for clerical ordination who had been married to two or more wives in a row (the first marriage ending by death, divorce, or annulment) or a candidate who had married only once, but his wife was not a virgin at the time of their marriage. Both the Hebrew Bible and early Roman laws governing the pontiffs and temple officials had laws concerned with priestly purity, virginity, and monogamy.<sup>381</sup> But it was again Christianity that made concerns for “clerical bigamy” prominent in the fourth to sixteenth centuries. The basis for these rules was the repeated New Testament statements that a bishop or deacon had to be “the husband of one wife” and a deaconess the “wife of one husband.”<sup>382</sup> The emerging rationale for these rules, rooted in the symbolic power of a single monogamous marriage, provided further indirect support for the Western legal tradition’s case for monogamy over polygamy.<sup>383</sup>

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<sup>378</sup> See *Matthew* 5:31–32; 19:9 (Revised Standard); see also X 4.19.8 (1201 pronouncement); *supra* note 221 (discussing same).

<sup>379</sup> See analysis and detailed primary and secondary sources cited in MCDUGALL, *supra* note 222 and D’AVRAY, *supra* note 222.

<sup>380</sup> WITTE, *supra* note 3, at 72–73, 122, 137–40, 186–90.

<sup>381</sup> *Id.* at 72–73, 93–97.

<sup>382</sup> 1 *Timothy* 3:2, 12; 5:9 (Revised Standard).

<sup>383</sup> See WITTE, *supra* note 3, at 186–90; see also D’AVRAY, *supra* note 222, at 131–67 (discussing bigamy’s effect on priesthood); S. Kuttner, *Pope Lucius III and the Bigamous Archbishop of Palermo*, in *MEDIEVAL STUDIES* 409, 410 (J.A. Watt, J.B. Morrall & F.X. Martin eds., 1961).

Those clergy who wittingly or unwittingly had taken two or more wives or a single non-virginal wife before their ordination were charged with clerical bigamy or clerical polygamy. They were removed from clerical office and severely sanctioned if they had been intentionally fraudulent in hiding prior multiple marriages or the non-virginity of their one wife. Particularly in the High Middle Ages, church and state officials worked together to root out clerical bigamists, and this prohibition became an important part of the state's criminal law as well as an impediment to a number of civil and political benefits and offices.<sup>384</sup> After the sixteenth century, the category of "clerical bigamy" largely faded from state law, though it remained an important part of Catholic canon law<sup>385</sup> and, for a time, Anglican ecclesiastical law as well.<sup>386</sup>

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<sup>384</sup> WITTE, *supra* note 3, at 190, 304–05.

<sup>385</sup> THE CODE OF CANON LAW (1983).

<sup>386</sup> 1 RICHARD BURN, ECCLESIASTICAL LAW 192–93 (London, A. Strahan 8th ed. 1824).