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**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**IN THE MATTER OF:**

*THE CONSTITUTIONAL QUESTION ACT, R.S.B.C. 1986, c. 68*

**AND IN THE MATTER OF:**

*THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

**AND IN THE MATTER OF:**

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN  
ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE  
CONSTITUTIONALITY OF s. 293 OF THE *CRIMINAL CODE OF CANADA*,  
R.S.C. 1985, c. C-46

**EXPERT REPORT PREPARED FOR THE  
ATTORNEY GENERAL OF CANADA**

By

**John Witte, Jr.**  
Jonas Robitscher Professor of Law  
Alonzo L. McDonald Distinguished Professor  
Emory University School of Law  
1301 Clifton Road NE  
Atlanta, GA 30329  
404-727-6980; 678-644-6267  
jwitte@law.emory.edu

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## I. INTRODUCTION

1. I, John Witte, Jr., serve as Jonas Robitscher Professor of Law, Alonzo L. McDonald Distinguished Professor, and Director of the Center for the Study of Law and Religion Center at Emory University in Atlanta. I have been teaching law and directing the Law and Religion Center at Emory since 1987, and have been a chaired university professor of law since 1994. A specialist in legal history, marriage and family law, and religious liberty, I have published 180 articles, 11 law journal symposia, and 23 books. My curriculum vitae is attached as Appendix 1. I have drawn my opinion in part from the following titles that I have authored or edited:

- From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition (Louisville, KY: Westminster John Knox Press, 1997, 2d ed. forthcoming 2011)
- Religion and the American Constitutional Experiment, 3d ed. (Boulder/New York: Westview Press/Perseus Books Group, 2010 [2000, 2005]) (3d ed. with Joel A. Nichols)
- Law and Protestantism: The Legal Teachings of the Lutheran Reformation (Cambridge/New York: Cambridge University Press, 2002)
- Sex, Marriage and Family in John Calvin's Geneva I: Courtship, Engagement and Marriage (Grand Rapids: Wm. B. Eerdmans Publishing Co., 2005) (with Robert M. Kingdon)
- Co-Editor, Covenant Marriage in Comparative Perspective (Grand Rapids: Wm. B. Eerdmans Publishing Co., 2005) (with Eliza Ellison)
- Co-Editor, Family Transformed: Religion, Values, and Family Life in Interdisciplinary Perspective (Washington: Georgetown University Press, 2005) (with Steven M. Tipton)
- Co-Editor, Sex, Marriage, and Family in the World Religions (New York/London: Columbia University Press, 2006) (with Don S. Browning and M. Christian Green)
- God's Joust, God's Justice: Law and Religion in the Western Tradition (Grand Rapids: Wm. B. Eerdmans Publishing Co., 2006)
- Co-Editor, To Have and to Hold: Marrying and its Documentation in Western Christendom, 400-1600 (Cambridge/London: Cambridge University Press, 2007) (with Philip L. Reynolds)
- Co-Editor, The Equal Regard Family and its Friendly Critics (Grand Rapids: Wm. B. Eerdmans Publishing Co., 2007) (with M. Christian Green and Amy Wheeler)
- The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism (Cambridge/New York: Cambridge University Press, 2007)
- The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered (Cambridge/New York: Cambridge University Press, 2009)

2. My writings have appeared in ten languages, and I have lectured and convened conferences through North America, Europe, Japan, Israel, and South Africa. With major funding from the Pew, Ford, Lilly, Luce, and McDonald foundations, I have directed 12 major international projects on democracy, human rights, and religious liberty, and on marriage, family, and children that together have yielded some 250 public forums and 160 new books. I edit a book series with Don S. Browning of the

University of Chicago Divinity School, on "Religion, Marriage and Family," an imprint of the William B. Eerdmans Publishing Company.

3. I have previously provided expert evidence for use in Canadian court proceedings. An affidavit that I prepared at the request of the Attorney General of Canada tracing the religious and legal roots of marriage in the West was received into evidence in *Halpern v. Canada (Attorney General)* 60 O.R. (3d) 321; 95 C.R.R. (2d) 1; aff'd 65 O.R. (3d) (C.A.) 161 and also in *Reference re: Same-Sex Marriage* 2004 SCC 79.

## II. QUESTIONS

4. I have been asked to address the following four questions:

(1) What has been the historical development and evolution to the current day of the dyadic marriage structure in the Western tradition? What are the reasons for that development and evolution?

(2) What has been the historical development and evolution to the current day of the prohibition on polygamy, including the related impediment of precontract? What are the reasons for that development and evolution, including the stated actual or potential harms associated with polygamy?

(3) What are the past and current arguments against polygamy set out in various common law traditions?

(4) What are the issues, if any, related to allowing religious polygamy as an exception to the general prohibition on polygamy on grounds of religious freedom? What is the history of the treatment of religious freedom claims to practice polygamy in the United States?

### III. OVERVIEW OF ANSWERS

5. For more than 2500 years, the Western legal tradition has defined marriage as the union of one man and one woman who have the fitness, capacity, and freedom to marry each other. This has been the consistent normative teaching of Greeks and Romans, Jews and Christians, Catholics and Protestants, Enlightenment philosophers and Common Law jurists. While monogamous marriage is neither good for everyone nor always good, these writers 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.

6. For more than 1750 years, the Western legal tradition has declared polygamy to be a serious crime as grave as incest and rape; it was a capital crime from the ninth to the nineteenth century. While some Western writers and rulers have allowed polygamy in rare cases of urgent natural necessity, virtually all Western writers and legal systems have denounced polygamy and the occasional polygamous experiments of Jews, Anabaptists, and Mormons in Western history. Polygamy, they have argued, is unnatural and unjust to wives and children – a violation of their fundamental rights in modern parlance. It is the inevitable cause or consequence of sundry harms and crimes. And polygamy is a threat to good citizenship, social order, and political stability, even an impediment to the advancement of civilizations toward liberty, equality, and democratic government.

7. In what follows, I have traced these Western teachings through the major sources in the watershed periods of the history of the West – classical Greece and Rome, the biblical era and early Christian church, the high Middle Ages, the Protestant Reformation, the Enlightenment, and the modern common law. I give a short summary of each of their main teachings in this section. These sources offer a variety of competing arguments to commend monogamy – philosophical, theological, canonical, political, sociological, psychological, biological, and scientific. But the most common argument is that exclusive and enduring monogamous marriages are 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. Exclusive and enduring monogamous marriages, furthermore are the best way to ensure that men and women are treated with equal dignity and respect, and that husbands and wives, parents and children provide each other with mutual support, protection, and edification throughout their lifetimes, adjusted to each person's needs at different stages in the life cycle.

8. These sources also offer a variety of competing arguments to condemn polygamy. But the most common argument is that polygamy is inherently wrong and will inevitably cause wrongdoing, harm, and crime. These crimes can be seen in the earliest biblical stories of rape, murder, incest, and exploitation of women and children in the polygamous households of Abraham, Jacob, and David. They can be seen anew in the latest headlines documenting the crimes against women and children, the state and its taxpayers in isolated Fundamentalist Mormon communities in the west. For nearly two millennia, therefore, the West has declared polygamy to be a crime, and has had little patience with occasional theological or legal arguments raised in its defense.

## A. Greco-Roman Sources

9. **Monogamy.** The philosophical roots of monogamous marriage lie in ancient Greece and Rome. From the fifth century b.c.e. onward, classical philosophers treated marriage as natural and necessary institution designed to foster the mutual love, support, and friendship of husband and wife, to produce children who would carry on the family name and property. Foundational to the Western tradition was Aristotle's insights that monogamous marriage is a natural institution for most men and woman, that it is at once "useful," "pleasant," and "moral" for their lives, that it provides efficient pooling and division of specialized labor and resources within the household, and that it serves for the fulfillment, happiness, and lasting friendship of husband and wife, and their children. Also essential were Aristotle's insights that the marital household was the foundation of the polis, the first school of justice and education, the private font of public virtue. These views were echoed and elaborated by Greek and Roman Stoics who described marriage as a "sacred and enduring union" that entailed a complete sharing of the persons, properties, and pursuits of husband and wife in service of marital affection and friendship, mutual caring and protection, and mutual procreation and education of children.

10. These ideas of monogamous marriage entered Roman law already in the centuries before the common era, and became axiomatic for the Roman imperial law of the first six centuries of the common era. The Roman law defined "lawful marriage" as "the union of a man and a woman, a partnership for life" and restricted marriage to men and women who were of the age, fitness, and capacity to marry each other. No other sexual relationship had the status of marriage at Roman law, and no other institution could produce legitimate children.

11. **Polygamy.** The first explicit prohibitions and penalties against polygamy came into the Roman law in 258 c.e. and these measures were strengthened in succeeding centuries. The Roman emperors eventually grouped polygamy with incest and adultery as "abominable," "wicked," "unnatural," and "execrable" sexual offenses against the laws of God, nature, and the state. Convicted polygamists faced penalties and restrictions on their public and private rights; children born of such unions were illegitimate and subject to severe restrictions. By the ninth century, the Byzantine emperors made polygamy a capital crime, and it remained so in many Western lands until the nineteenth century.

## B. Biblical Sources

12. **Monogamy.** The Bible provided the Western legal tradition with a second, complementary source of monogamous marriage. According to the Hebrew Bible, God created the first monogamous marriage between Adam and Eve, calling them to become "two in one flesh" and "to be fruitful and multiply." And God exemplified marriage as a dyadic covenant modeled on the special covenant of faith between God and his chosen people of Israel. In the New Testament, both Jesus and Paul echoed the creation story, lifting up the union and equality of male and female in "one flesh" as the normative ideal for Christian marriages. They also offered a new metaphor of the church as the bride and Christ as the bridegroom brought into a mysterious union which

was echoed in each human marriage. The New Testament provided detailed instruction on sexual ethics, calling husbands and wives to love, honor, and be faithful to each other, and to respect the other's bodily and spiritual needs, including notably their need for sex.

13. **Polygamy.** While the Bible strongly commended monogamy and sexual purity, it did not prohibit polygamy outright. The Mosaic law left enough loopholes for polygamy, and the Hebrew Bible offered several examples of men in leadership positions who held multiple wives and concubines. While these polygamous households suffered bitter discord, violence, rape, and homicide among the competing wives and children, they were not prohibited outright. The New Testament did not list polygamy on its long rolls of sexual sins, though it branded as adultery any sexual encounter with anyone but one's spouse; even divorcees could not remarry, and widow(er)s were discouraged from remarriage. The Hebrew Bible stories inspired a few later Jewish noble families to practice polygamy. They also inspired occasional Christians to experiment with polygamy, despite the condemnations of polygamy by the church and criminalization of polygamy by Roman law beginning in the third century.

### C. Early Christian Teachings

14. **Monogamy.** From the start, Christian writers and church councils restricted marriage to monogamy. Even monogamous marriage had its own discord and distractions, which could make the single celibate life more attractive for those who were naturally continent. But, for early Christians in the first millennium, monogamous marriage was far better for individuals and societies than a life of polygamy, promiscuity, or loneliness. Augustine of Hippo offered the most elaborate theory of the goods of marriage. He repeated the many private and public goods of marriage recited by the Greeks and Romans and illustrated in the Bible. But he distilled all this into a famous theory that marriage has three goods: *fides*, the fidelity, trust, and support that husband and wife offered to each other; *proles*, children who provided the couple with joy, contentment, and succession, and who, in turn received essential nurture, care, and education; and *sacramentum*, a enduring covenant bond between the couple but also a stable institution for the church, state, and society.

15. **Polygamy.** Also from the start, Christian writers opposed polygamy as a form of adultery that violated the primeval command, oft repeated in the Bible, that "two," not three or four, join together in "one flesh." The church's theologians and philosophers did not offer an elaborate theory of the wrongs of polygamy. For them, polygamy was an obvious breach of the natural structure of marriage in which each spouse's love, friendship, and support of the other was equal and undivided. They were content to point to the biblical stories of the grim plight of the ancient patriarchs, like Abraham, Jacob, David, and Solomon, who dared to practice polygamy. Almost invariably in these stories, polygamy was associated with, if not the cause of, sundry other sins and crimes -- fraud, trickery, intrigue, lust, seduction, coercion, rape, incest, adultery, murder, exploitation and coercion of young women, jealousy and rivalry among wives and their children, dissipation of family wealth and inequality of treatment and support, banishment and disinheritance of disfavored children and more. These are the inevitable risks of polygamy, early Christian writers concluded; even the most pious and

upright biblical patriarchs incurred these costs when they experimented with this unnatural institution. These biblical stories were a grim warning that polygamy is simply too sinful and dangerous to be indulged. Church canons early on included polygamy as a sin to be avoided on pain of spiritual discipline.

#### D. Medieval Teachings

16. **Monogamy.** The medieval church, which had exclusive jurisdiction over marriage and polygamy from the twelfth to the sixteenth century, promoted a view of dyadic marriage as at once natural and sacramental, contractual and covenantal, legal and liturgical, rational and mysterious. The fullest theoretical formulation came from Thomas Aquinas who elaborated and integrated the Augustinian goods of children, fidelity, and sacrament that attend monogamous marriage. The fullest jurisprudential elaboration came in the church's canon law that treated marriage as a natural, contractual, and sacramental institution, and provided detailed rules on proper marriage formation, maintenance, and dissolution, parental rights, roles, and responsibilities, child care, education, and support, and marital property, dower, and inheritance.

17. At the foundation of this medieval Catholic theory and canon law of marriage was a naturalist argument about the human species and the need to create paternal certainty and investment in children because of their fragility and long-term dependency. Human children, unlike many other animals, are born weak, fragile, and utterly dependent on their parents for many years. It was thus critical to ensure that both parents would be certain of their offspring and invested in their care and support. Mothers generally have more parental certainty because they carry their children to term. They also generally have more parental inclination because of the deep organic bond that they form with their children through pregnancy and nursing. But mothers have a hard time caring fully for their children without help, especially if they have several children at once and live in a patriarchal society with independent forms and forums of support. A mother needs the help of others, of the children's father ideally. Fathers, however, are by nature more tangentially involved in the conception and birth of their children, and are often less certain of whether a new child is theirs. They are also by nature more prone to wander sexually, and less inclined to invest in their children. Men need to be assured of their paternity of that child, and induced to see in that child a continuation and extension of their own being or substance (or genes), of their name and property, of their talents and teachings. Nature has thus inclined human persons to develop enduring and exclusive monogamous marriages as the best way to meet all these goals. Such marriages ensure that both fathers and mothers are certain of their offspring. They ensure that husband and wife will together care for, nurture, and educate their children until they become mature and independent. The natural law thus inclines men and women toward marriage, and provides them with the natural rights and duties to care for each other and for their children.

18. Among medieval Christians, marriage was not just a natural and contractual relation. For baptized believers, who were properly married, marriage was also a sacrament, a vital and visible example and instantiation of the enduring and mysterious love of Christ and his Church. But the sacramental logic of monogamous marriage supplemented and stabilized the natural logic; it did not supplant or reject it. For

medievalists, monogamous marriage was first and foremost a natural institution that could be fully defended on a logic of the natural goods, needs, and interests of human beings, and a logic of natural law, natural justice, and natural order in human societies. As such, medieval Christian marital theories and laws readily embraced core philosophical insights and legal provisions into monogamous marriage already offered by Jews, Greeks, Romans, and others. And medieval Christian marital theories and law, in turn, readily provided a natural foundation and defense of monogamous marriage that would echo in the Western tradition for the rest of the second millennium.

19. **Polygamy.** This naturalist argument in favor of monogamy was also a strong argument against polygamy and other sexual crimes. It is naturally unjust, especially to women and children, to permit fornication, adultery, polygyny, polygamy, concubinage, prostitution, or other casual sexual encounters. Each of these sexual activities erodes paternal certainty and investment in child care. It dilutes family resources, energy, and time that must now be spent on care for extra-marital children. It produces illegitimate children who are stigmatized and discriminated against throughout their lives by their extramarital birth. It brings disease, strife, and harm into the family and into the marital bed. And it detracts from the mutual support and love that husbands and wives owe to each other throughout their lives, even after their children are mature.

20. To this naturalist argument, the medievalists added the early Christian argument that polygamy is simply a form of elaborate adultery by the man and enslavement by the woman that was both unjust and impractical. The grim plight of the biblical patriarchs, they said, was a sort of *res ipsa loquitur* proof of the inherent dangers of polygamy. The medieval canon law, enforced by the church courts, prohibited polygamy, and governed intricate questions of “constructive bigamy” and the impediments of “precontract” that could lead to annulment of purported second marriages.

### E. Protestantism

21. **Monogamy.** The Protestant Reformation brought sweeping changes to the Western law and theology of marriage. But Protestants embraced wholeheartedly the traditional classical and Christian ideas of monogamous marriage that had been created by God and modeled on the faithful and enduring covenant between God and his elect. Protestants regarded monogamous marriage as a natural and essential institution that served the private goods of marital love and fidelity, of mutual protection of adults from sexual sin, and of parental and communal participation in the nurture and education of children. It also served the common or public good: Protestants called the household a “little church,” a “little state,” a “little seminary,” a “little commonwealth” whose proper functioning were essential to the operation of many other institutions.

22. **Polygamy.** Polygamy was a serious crime in most Protestant lands in the sixteenth century and thereafter. It betrayed the natural and biblical ideal of marriage as a dyadic union, and deprived society and its members of the goods that monogamous marriage brought. But even worse, polygamy was a seat of patriarchy and abuse, of crime and exploitation, of unjust diffusion of wealth and property, of inequality and rivalry among wives and children, and the cause, consequence, and corollary of many other harms. Particularly John Calvin worked systematically through the biblical stories

of polygamy and the contemporary experiments with polygamy among a few Anabaptists in his day, to condemn the practice without condition.

23. Parties convicted of blatant and intentional polygamy were banished, sometimes after being whipped, imprisoned, and subjected to various shame penalties. Repeat offenders, or those who compounded their polygamy with other felonies like adultery, concubinage, child marriage, or rape, faced execution. Protestant lands also adopted the traditional canon law impediments of precontract, and state courts annulled marriages that featured a form of constructive bigamy. Constructive bigamists, even those who had inadvertently stumbled into concurrent engagements or marriages, faced involuntary annulment of their contracts, as well as fines and spiritual sanctions.

## F. The Enlightenment

24. **Monogamy.** The philosophers of the English, French, Scottish, and American Enlightenments developed rich accounts of monogamous marriage – using arguments from nature, reason, custom, fairness, prudence, utility, pragmatism, and common sense. They started with Aquinas’s argument that exclusive and enduring monogamous marriages are 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. Exclusive and enduring monogamous marriages, furthermore – and this went beyond Aquinas -- are the best way to ensure that men and women are treated with equal dignity and respect, and that husbands and wives, parents and children provide each other with mutual support, protection, and edification throughout their lifetimes, adjusted to each person’s needs at different stages in the life cycle.

25. This Enlightenment naturalist argument for stable monogamous marriages drew on complex ideas concerning human infant dependency, parental bonding, paternal certainty and investment, and the natural rights and duties of husband and wives, parents and children vis-à-vis each other and other members of society. But it also emphasized more heavily than the tradition the one feature of human nature that every legal system must deal with, namely that most human adults crave sex a good deal of the time. The Enlightenment philosophers thus stressed that husbands and wives must work hard to remain in open and active communication with each other, and maintain active and healthy sex lives even when – especially when -- procreation was not or no longer possible. Robust sexual communication within marriage was essential for couples to deepen their marital love constantly and to keep them in their own beds, rather than their neighbor’s. And marital sex sometimes was even more important when the home was (newly) empty, and husbands and wives depended so centrally on each other (not on their children) for their daily emotional fulfillment.

26. **Polygamy.** The Enlightenment natural law argument, furthermore, outlawed many other types of sexual activities and interactions, even those practiced in more primitive human societies. Polygamy was out because it fractured marital trust and troth, harmed wives and children, privileged patriarchy and sexual slavery, and fomented male lust and adultery. Polyandry was out because it created paternal uncertainty and catalyzed male rivalry to the ultimate detriment of the children. Incest

was out because it overrode the instincts of natural revulsion, weakened blood lines, and deterred the creation of new kinship networks. Prostitution and fornication were out because they exploited women, fostered libertinism, deterred marriage, and produced bastards. Adultery was out for some of the same reasons, but even more because it shattered marital fidelity and trust, diffused family resources and parental energy, and risked sexual disease and physical retaliation of the betrayed spouse. Easy divorce was out because it eroded marital fidelity and investment, jeopardized long-term spousal support and care, and squandered family property on which children eventually depended. By the twentieth century, similar natural law and natural rights arguments were used to stamp out the discrimination that the common law still retained against spinsters, wives, and illegitimate children.

27. The Enlightenment natural law argument for monogamy and against polygamy and other sexual offenses continued a critical line of argument about the natural foundations of sex and marriage that went back more than two millennia in the West, and was especially well developed by Aquinas and the medieval canonists. The Enlightenment philosophers echoed and elaborated the traditional arguments from natural law, natural justice, and natural human inclinations and needs. But they now presented them on grounds of fairness and utility rather than the Bible and theology. Earlier writers praised monogamous marriage for the many benefits it brought. And, they read the biblical accounts of polygamy as fair warning that this institution was not only inexpedient, immoral, unnatural, and unjust, but that it also inevitably fostered criminal wrongdoing. Polygamy usually caused or came with fraud, trickery, intrigue, lust, seduction, coercion, rape, incest, adultery, murder, exploitation and coercion of young women, jealousy and rivalry among wives and their children, dissipation of family wealth and inequality of treatment and support of household members, banishment and disinheritance of disfavored children and more. Not in every case, to be sure, but in so many cases that these had to be seen as the inherent and inevitable risks of polygamy, earlier writers concluded; even the most pious and upright biblical patriarchs incurred these costs when they experimented with this unnatural institution. The Enlightenment philosophers repeated this long list of harms and crimes attendant upon polygamy. But they now used comparative cultural examples rather than biblical examples to drive home their point.

### **G. Modern Common Law**

28. **Monogamy.** Since Anglo-Saxon times, the common law has consistently embraced monogamous marriage because of the many private and public goods that it offers. The common lawyers of the eighteenth to twentieth century found particularly attractive the Enlightenment rational and utilitarian arguments that pair bonding and domestic stability were the best way to protect the natural rights of men and women, parents and children. They also found attractive the Enlightenment argument that a stable monogamous household was a vital foundation of the democratic republic – at once a cradle of conscience, a matrix of citizenship, and the first school of love and justice, caring and sharing, public spiritedness and responsibility. All these were ancient insights of the Western tradition that Enlightenment philosophers and common lawyers recaptured in the common law idea of monogamous marriage as a special status in society.

29. **Polygamy.** Since Anglo-Saxon times, the common law has also consistently denounced polygamy because of the many harms and crimes that it occasions. From the twelfth to the sixteenth centuries, church courts and secular courts together punished polygamy as a crime, and annulled second marriages as forms of constructive bigamy. In 1604, Parliament declared polygamy a capital common law crime punishable by secular courts alone; in 1828, Parliament made it a serious but non-capital felony which it remains to this day in the United Kingdom. The American colonies and states followed similar patterns of criminalizing polygamy and annulling double marriages. The United States Congress since 1862 has criminalized polygamy, and since 1875 has barred entry to polygamist immigrants.

30. Most Anglo-American common law polygamy cases and statutes in the past 150 years have involved Mormons (since 1890, Fundamentalist Mormons). Their repeated efforts to gain free exercise exemptions from compliance with these anti-polygamy laws have uniformly failed. Both statutes and cases to date have been unyielding in their insistence that there is no religious right to violate criminal laws against polygamy. Not only does polygamy offend the fundamental values and goods of monogamy, these tribunals have argued, polygamy is the inevitable cause or consequence of numerous other crimes and harms, especially to women and children.

31. Some of the harms and crimes featured in Fundamentalist Mormon communities today, as documented in recent American prosecutions, however, are more particular to life in the modern democratic welfare state: arranged, coerced, and underage marriage particularly between young girls and 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 brides, rampant social welfare abuses, social isolation of polygamous communities, and conflation of religious and political authority within them in violation of the principle of separation of church and state. Again, not in every case, but in enough cases that the American courts have found that the firm maintenance and application of criminal laws against them is warranted.

## IV. DISCUSSION

### A. Classical Foundations of Monogamy

32. The philosophical roots of the dyadic structure of Western marriage lie in ancient Greece and Rome. This classical civilization was the font of many other cherished Western ideas of liberty and rights, democracy and equity, constitutional order and rule of law, republican government and separation of powers. Monogamous marriage was a central institution in this ancient world that brought many private goods to men, women, and children, and public goods rulers, citizens, and society.

33. Plato, Aristotle, Cicero, Musonius, Hierocles, Plutarch, and sundry other Greek and Roman philosophers from 500 b.c.e. to 300 c.e. defined and defended marriage as a monogamous union designed to foster mutual love, support, and friendship of husband and wife, to produce children to carry on the family name and property, and to school them in the vital norms and habits of citizenship. The legal formulation of marriage as a monogamous union between a man and a woman with fitness and capacity to marry each other was a basic assumption of Roman law already in the Roman republic, beginning with the Twelve Tables (ca. 450 b.c.e.). This legal view was strengthened during the Roman Empire, both before and after the Christianization of the Empire in the fourth century.

34. The first explicit prohibitions and penalties against polygamy came into the Roman law in 258 c.e. These measures were strengthened in succeeding centuries as Christian Roman emperors came to treat polygamy as a sexual crime as serious as adultery and incest. In the ninth century, some Byzantine emperors made polygamy a capital crime.

#### 1. Plato and Aristotle

35. The Western tradition inherited from classical Greece and Rome the idea that marriage is a dyadic union of a single man and single woman who unite for the purposes of mutual love and friendship and mutual procreation and nurture of children. This idea came into early Greek law already in the sixth century b.c.e.<sup>1</sup> By the later fifth century b.c.e, a number of Greek and Roman writers regarded monogamous marriage as a natural institution that served the good of the couple, the children, and the community at once. In a suggestive passage in *The Republic*, for example Plato (ca. 428 - ca. 347 b.c.e.) said it was obvious that a "just republic ... must arrange [for] marriages, sacramental so far as may be. And the most sacred marriages would be those that were most beneficial."<sup>2</sup> In his *Laws*, when advising young men on how to

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<sup>1</sup> See the laws of Solon described in Susan Lape, "Solon and the Institution of the 'Democratic' Family Form," *Classical Journal* 98 (2002/3): 117-39 and other early Greek legislation in Cynthia B. Patterson, *The Family in Greek History* (Cambridge, Mass.: Harvard University Press, 1998), 22-27; W. Scheidel, "A Peculiar Institution? Greco-Roman Monogamy in Global Context," *The History of the Family* 14 (2009): 280-91.

<sup>2</sup> Plato, *Republic*, in *The Collected Dialogues of Plato, Including the Letters*, ed. and trans. Edith Hamilton and Huntington Cairns (New York: Pantheon Books, 1961), 575, 698.

choose a wife, Plato wrote further: “A man should ‘court the tie’ that is for the city’s good, not that which most takes his own fancy.”<sup>3</sup> Once married, the man should restrict “procreative intercourse to its natural function ... and the result will be untold good. It is dictated, to begin with, by nature’s own voice, leads to the suppression of the mad frenzy of sex, as well as marriage breaches of all kinds, and all manner of excess in meats and drinks, and wins men to affection of their wedded wives. There are also numerous other blessings which will follow.”<sup>4</sup>

36. In his *Symposium*, Plato underscored the human need for dyadic love. “This then is the source of our desire to love each other. Love is born into every human being; 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.” “Why should this be so? It’s because ... we used to be complete wholes in our human nature, and now ‘Love’ is the name for our pursuit of wholeness, for our desire to be complete.”<sup>5</sup>

37. Plato’s student Aristotle (384-321 b.c.e.) viewed dyadic marriage as the foundation of the republic and the prototype of friendship. He envisioned humans as political animals who form states and other associations “for the purpose of attaining some good.”<sup>6</sup> “[E]very state is composed of households,” Aristotle wrote famously in his *Politics*.<sup>7</sup> Every household, in turn, is composed of “a union or pairing of those who cannot exist without one another. A male and female must unite for the reproduction of the species—not from deliberate intention, but from the natural impulse ... to leave behind them something of the same nature as themselves.”<sup>8</sup>

38. Aristotle extended this view in his *Ethics*, now emphasizing the natural inclinations and goods of dyadic marriage beyond its political and social expediency:

The love between husband and wife is evidently a natural feeling, for nature has made man even more of a pairing than a political animal in so far as the family is an older and more fundamental thing than the state, and the instinct to form communities is less widespread among animals than the habit of procreation. Among the generality of animals male and female come together for this sole purpose [of procreation]. But human beings cohabit not only to get children but to provide whatever is necessary to a fully lived life. From the outset the partners perform distinct duties, the man having one set, the woman another. So by pooling their individual contributions [into a common stock] they help each other out. Accordingly there is general agreement that conjugal affection combines the useful with the pleasant. But it may also embody a moral ideal, when husband and wife are virtuous persons. For man and woman have each their own special excellence, and this may be a

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<sup>3</sup> Plato, *Laws*, in *The Collected Dialogues*, 1225, 1350.

<sup>4</sup> *Ibid.*, 1404.

<sup>5</sup> Plato, *Symposium*, trans. Alexander Nehmans and Paul Woodruff (Indianapolis: Hackett Publishers, 1989), 25-31.

<sup>6</sup> Aristotle, *Politica*, 1.1.1, in *The Politics of Aristotle*, ed. and trans. Ernest Barker (New York: Oxford University Press, 1962).

<sup>7</sup> *Ibid.*, 1.3.1.

<sup>8</sup> *Ibid.*, 1.2.2.

source of pleasure to both. Children too, it is agreed, are a bond between the parents—which explains why childless unions are more likely to be dissolved. The children do not belong to one parent more than the other, and it is the joint ownership of something valuable that keeps people from separating.<sup>9</sup>

39. This remarkable passage by Aristotle would have a massive influence on the Western tradition. It declares that one of the main purposes of marriage, besides having and rearing children, is building a common community (“a common stock”) between a man and a woman that is both inherently useful and intrinsically pleasant. These communal and affectional qualities distinguish the marriages of humans from the unions of other animals. This passage says further that, whatever the differentiations of parental roles between a mother and father, children belong to both parents, they are objects of common parental investment, and their presence serves ultimately to strengthen the marital bond between mother and father. Indeed, to ensure that marital couples would remain bonded together for the sake of their children, Aristotle (echoing some of the provisions in Plato’s *Laws*) prescribed a whole series of rules about the ideal ages, qualities, and duties of husband and wife to each other and to their children.<sup>10</sup>

40. There were tensions between the views of Aristotle and Plato, especially some of Plato’s earlier views in *The Republic*. In that early masterwork of political philosophy, Plato experimented with the idea of having children raised by state nurses without knowledge by either parents or children as to who their blood relations really were. He believed that this social arrangement would overcome tribalism and nepotism – the chief cause, he contended, of civic strife and partisanship.<sup>11</sup> Plato himself had abandoned this thought experiment in parental anonymity by the time he wrote his *Laws*, and virtually all later major Western writers – Karl Marx and Friedrich Engels notably excepted<sup>12</sup> -- would denounce this idea as dangerous. Aristotle was among the first to critique it in favor of what evolutionary psychologists today call “kin altruism” – the tendency of parents to identify with and invest in their children because their offspring carry their bodily “substance” (as the ancients would say) or their “genes” (as modern evolutionary biologists would say). In his *Politics*, Aristotle developed a view that significantly shaped the naturalistic dimensions of dyadic marriage of later Western marriage theories and laws:

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<sup>9</sup> Aristotle, *The Nicomachean Ethics*, 8.12, in *The Ethics of Aristotle*, trans and ed. J.A.K. Thomson, repr. ed. (New York: Penguin Books, 1965). The interpolation “into a common stock” is an alternative translation that appears in several other translations of this passage.

<sup>10</sup> *Ibid.*, 8.10–12; see also Plato, *Laws*, 1349–51. See further sources and discussion in Patterson, *The Family in Greek History*; Sarah Pomeroy, *Families in Classical and Hellenistic Greece: Representations and Realities* (Oxford: Clarendon Press, 1997), and the discussions of comparable sentiments of Xenophon in Sarah Pomeroy, *Xenophon Oeconomicus: A Social and Political Commentary* (Oxford: Clarendon Press, 1994).

<sup>11</sup> Plato, *Republic*, 459d-461e.

<sup>12</sup> See Karl Marx, “Communist Manifesto,” in *id.*, *Selected Writings*, ed. Lawrence H. Simon (Indianapolis: Hackett Publishing Co., 1994), 172-174; Friedrich Engels, *The Origin of the Family, Private Property, and the State*, 5<sup>th</sup> impr. (Moscow: Foreign Languages Publishing House, 1895), preface, 99-136.

Whereas in a state having women and children in common, love will be watery, and the father will certainly not say “my son,” or the son “my father.” As a little sweet wine mingled with a great deal of water is imperceptible in the mixture, so, in this sort of community, the idea of relationship which is based upon these names will be lost; there is no reason why the so-called father should care about the son, or the son about the father, or brother about one another. Of the two qualities which chiefly inspire regards and affection – that a thing is your own and that it is your only one – neither can exist in such a state as this.<sup>13</sup>

41. Aristotle held that Plato’s utopian society, which ignored these natural family relationships, would in fact work out to be anything but utopian. Such a society would water down parental recognition and investment. It would also unleash violence, because of the absence of the inhibiting factor of consanguinity – of remaining loyal to one’s kin. Aristotle wrote: “Evils such as assaults, unlawful loves, homicides, will happen more ... for they will no longer call the members of the class they have left brothers, and children, and fathers, and mothers, and will not, therefore, be afraid of committing any crimes by reason of consanguinity.”<sup>14</sup>

## 2. The Roman Stoics

42. Three centuries after Plato and Aristotle, the Roman Stoics repeated and glossed these classical Greek views about dyadic marriage, even while many of them celebrated celibacy as the higher ideal for philosophers seeking quiet contemplation. For example, Cicero (106–34 b.c.e.), the leading jurist and moralist of his day, called marriage a “natural partnership” of the person and property of husband and wife that served for procreation, for companionship, and ultimately for the broader cultivation of “dutiful affection, kindness, liberality, good-will, courtesy, and other graces of the same kind.”<sup>15</sup>

43. Musonius Rufus (b. ca. 30 c.e.), an influential Stoic moralist, described monogamous marriage in robust companionate terms, anticipating by many centuries the familiar language of the Western marriage liturgy:

The husband and wife ... should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them, and nothing peculiar or private to one or the other, not even their own bodies. The birth of a human being which results from such a union is to be sure something marvelous, but it is not yet enough for the relation of husband and wife, inasmuch as quite apart from marriage it could result from any other sexual union, just as in the case of animals. But in marriage there must be above all perfect companionship and mutual love of husband and wife, both in health and in sickness and under all conditions, since it was

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<sup>13</sup> Aristotle, *Politics*, 2.4.

<sup>14</sup> Ibid.

<sup>15</sup> Cicero, *De finibus bonorum et malorum*, 3.23.65, ed. C. Moreschini (Munich: Saur, 2005); Cicero, *De Officiis*, 1.27.54, ed. M. Winterbottom (New York: Oxford University Press, 1994); Cicero, *De Republica*, 1.5; 5.5, trans. and ed. Clinton Keyes Walker (Cambridge, Mass.: Harvard University Press, 1943).

with desire for this as well as for having children that both entered upon marriage.<sup>16</sup>

44. Musonius further insisted that sexual intercourse was “justified only when it occurs in marriage and is indulged in for the purpose of begetting children.” He was almost unique among first-century writers in condemning the sexual double standards of the day that treated a wife’s extramarital sex with anyone as adultery, but allowed a husband to consort freely with prostitutes or slaves. Both husband and wife had to remain faithful to each other in body and soul, he insisted. Musonius was also distinctive in condemning the Roman toleration of leaving unwanted infants exposed to die. He praised those lawgivers who “considered the increase of the homes of the citizens [through procreation] the most fortunate thing for the cities and the decrease of them [through infanticide] the most shameful thing.” Indeed, he wrote, “whoever destroys human marriage destroys the home, the city, and the whole human race.” Here Musonius joined Plato and Aristotle in believing that maintaining healthy monogamous marriages and a stable home life for parents and children were central concerns of law and public policy.<sup>17</sup>

45. Musonius’s student, Hierocles (early second century c.e.), argued more strongly than his teacher that it was incumbent upon all men, even philosophers seeking quiet contemplation, to marry and to maintain a household. For “the married couple is the basis of the household, and the household is essential for civilization,” he wrote.<sup>18</sup> While procreation remained the ultimate ideal of marriage, in Hierocles’ view, the consistent companionship and mutual care of husband and wife was no less important, even in the absence of children:

[T]he beauty of a household consists in the yoking together of a husband and wife who are united to each other by fate, are consecrated to the gods who preside over weddings, births, and houses, agree with each other and have all things in common, including their bodies, or rather their souls, and who exercise appropriate rule over their household and servants, take care in rearing their children, and pay an attention to the necessities of life which is neither intense nor slack, but moderate and fitting.<sup>19</sup>

46. Here, in prototypical form, are some of the ideals of what would come to be called companionate marriage – the mutual celebration of a couple’s marriage in a public wedding and the consecration of the new family and household by the divine, the mutual sharing not only of bodies but also of souls, the mutual sharing of property and domestic responsibility, the mutual participation of the couple in the procreation and nurture of their children.

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<sup>16</sup> *Musonius Rufus: The Roman Socrates*, trans. and ed. Cora E. Lutz (New Haven, CT: Yale University Press, 1947), 89.

<sup>17</sup> *Ibid.*, 87, 93, 97. See further Roy B. Ward, “Musonius and Paul on Marriage,” *New Testament Studies* 36 (1990): 281-89.

<sup>18</sup> Judith Evans Grubbs, *Law and Family in Late Antiquity: The Emperor Constantine’s Marriage Legislation* (Oxford: Clarendon Press, 1995), 59.

<sup>19</sup> *Ibid.*, 59–60 (quoting Hierocles).

47. The prolific Roman historian and moralist, Plutarch (46-120 c.e.), waxed on similarly for several pages about the pleasures of love, intimacy, and friendship within a monogamous marital household. The ideal marriage, he wrote, is “a union for life between a man and a woman for the delights of love and the getting of children.” “In the case of lawful wives, physical union is the beginning of friendship, a sharing, as it were, in great mysteries. The pleasure [of sexual intercourse] is short; but the respect and kindness and mutual affection and loyalty that daily spring from it ... [renders] such a [marital] union a ‘friendship’.” And again: “[N]o greater pleasures derived from others, nor more continuous services conferred on others than those found in marriage, nor can the beauty of another friendship be so highly esteemed or so enviable as when a man and wife keep house in perfect harmony.”<sup>20</sup>

48. The ideal marital household, Plutarch continued in his *Advice to the Bride and Groom*, is a sharing of the person, property, and pursuits of its members under the gentle leadership of the *paterfamilias*:

When two notes are struck together, the melody belongs to the lower note. Similarly, every action performed in a good household is done by the agreement of the partners, but displays the leadership and decision of the husband....

Plato says that the happy and blessed city is one in which the words “mine” and “not mine” are least to be heard, because the citizens treat everything of importance, so far as possible, as their common property. Even more firmly should these words be banished from a marriage. Doctors tell us that an injury on the left side refers the sensation to the right. Similarly, it is good for a wife to share her husband’s feelings, and a husband his wife’s, so that, just as ropes gain strength from the twisting of the strands, so their communion may be the better preserved by their joint effort, through mutual exchanges of goodwill. Nature joins you together in your bodies, so that she may take a part of each, and mixing them together give you a child that belongs to you both, such that neither of you can say what is his or her own, and what the other’s. Community of resources also is particularly appropriate for the married; they should pour everything into one fund, mix it all together, and not think of one part as belonging to one and another to the other, but of the whole as their own, and none of it anyone else’s.<sup>21</sup>

49. Plutarch’s patriarchy is obvious here, but it is a soft patriarchy that promotes consensus, mutual agreement, and affection. The father here seems to function more like a chairman of the board than a king or benevolent dictator. The idea of the father as the *paterfamilias* was a Greco-Roman idea but one that early Christianity both wrestled with and amended with new biblical understandings of equality, as we shall see.

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<sup>20</sup> Plutarch, *Life of Solon*, 20.4, in *Plutarch’s Lives*, trans. Bernadotte Perrin (London: William Heinemann, 1928); Plutarch, *The Dialogue of Love*, §769-770, in *Plutarch’s Moralia*, trans. L. Pearson (London: W. Heinemann, 1960). See further Sarah B. Pomeroy, ed., *Plutarch’s Advice to the Bride and Groom and a Consolation to his Wife* (New York: Oxford University Press, 1999).

<sup>21</sup> Pomeroy, ed., *Plutarch’s Advice*, 6-10.

50. Plutarch also wrote at length, echoing Aristotle, about the natural affinity and affection of parents to their children -- what we now call their “kin altruism.” Among “the first mothers and fathers ... [t]here was no law ordering them to have families, no expectation of advantages or return to be got out of them.” “But the love of one’s offspring implanted by nature, moves and influences” parents even then to have and nurture children, much like it moves many other animals. “[T]here is no power or advantage to be got from children, but that the love of them, alike in mankind as among the animals, proceeds entirely from nature.” Nature also teaches that mothers should nurse and nurture their own infant children, and that both mother and father should cooperate in the upbringing, discipline, and education of their children.<sup>22</sup> Although Plutarch, like most of the ancient philosophers, advocated what he called “lawful marriage,” he did not believe that law creates marriage or parenthood. Marital relationships spring from the natural inclinations of attraction and attachment between a man and a woman which the law of the state then recognizes, sanctions, channels, and thereby promotes.

51. Not only law, but also liturgy served to sanction these natural inclinations and appetites for dyadic marriage in the ancient Greco-Roman world. For example, an early Greek handbook, attributed to Menander Rhetor, included some telling instructions on what should be included in the wedding hymn, sung by an official when the couple is formally joined. The rhetoric underscores the philosophical beliefs in the transcendent sources and ends of marriage:

After the proemia there should follow a sort of thematic passage on the god of marriage, including the general consideration of the proposition that marriage is a good thing. You should begin far back, telling how Marriage was created by Nature immediately after the dispersal of Chaos, and perhaps also how Love too was created then.... You should go on to say that the ordering of the universe ... took place because of Marriage.... [Marriage] also made ready to create man, and contrived to make him virtually immortal, furnishing successive generations to accompany the passage of time.... Marriage gives us immortality ... it is due to Marriage that the sea is sailed, the land is farmed, philosophy and knowledge of heavenly things exist, as well as laws and civil governments – in brief, all human things.<sup>23</sup>

52. Later Menander advised the rhetor to pray that the couple be able to fulfill the good of procreation:

[A]dd a prayer, asking the gods to grant them goodwill and harmony, happiness (?) in their union, a mingling of souls as of bodies, so that the children may be like both parents.... And you may add: “so that you can

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<sup>22</sup> *The Complete Works of Plutarch*, 6 vols. (New York: Kelmscott Society, 1909), 5:1–27.

<sup>23</sup> *Menander Rhetor*, trans. and ed. D.A. Russell and N.G. Wilson (Oxford: Oxford University Press, 1981), 136-39.

provide children for the city, who will flourish in letters, in generosity, in charitable benefactions.<sup>24</sup>

### 3. Roman Law and Dyadic Marriage

53. Some of these classical philosophical views about marriage also entered into classical Roman law. Marriage was a prominent public concern for the Roman state from the beginning, and monogamous marriage was considered “an honorable and desirable condition ... that ensured the continuation of the human race and provided a sort of communal immortality” for Rome herself and for the individual *familiae* that made it up.<sup>25</sup> A number of Roman jurists had “a sentimental ideal” of marriage “focused on a standard of companionate (but not necessarily equal) marriage and a delight in children as individuals and as symbols of home comforts” and perpetuators of the family name, property, and household.<sup>26</sup> They also had a strong belief in the primeval natural foundations and divine sanctions of marriage which was to be celebrated in ceremonies and liturgies in which the couples, their families, and the whole community ultimately participated.

54. Unlike the Greek and Roman philosophers who focused on the functions and ethics of marriage, the Roman jurists focused on the form of marriage and the formalities that attended its proper formation, maintenance, and dissolution. The first Roman Emperor, Caesar Augustus (27 b.c.e – 14 c.e.), put in place several strong new laws on marriage and family life, which systematized, reformed, and expanded the half millennium of laws inherited from the Roman Republic going back to the Twelve Tables (ca. 450 b.c.e.). Caesar Augustus’s laws, in turn, catalyzed a whole industry of juridical commentary and imperial edicts over the next five centuries, which were later compiled and systematized in Justinian’s *Corpus Iuris Civilis* (ca. 529-534). This massive text remained at the intellectual foundation of canon law, civil law, and common law in the second millennium of the common era. Many of the basic legal ideas and institutions of marriage that prevail at modern civil law and common law today were forged some two millennia earlier in classical Rome.

55. Well before the Christianization of the Empire in the fourth century c.e., classical Roman law defined a “lawful marriage” (*matrimonium iustum, iustae nuptiae*) as “the union of a man and a woman, a partnership for life involving divine as well as human law.”<sup>27</sup> This mid-third-century formulation of monogamous marriage, offered by the Stoic jurist Herennius Modestinus, was repeated by Western jurists until the twentieth century. Modestinus and his teacher Ulpian, also a Stoic and Aristotelian, offered other formulations that have also endured in the West. Marriage, they said, involved the obligation of a man and a woman “to live in inseparable communion,” in “a sacred and

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<sup>24</sup> Menander Rhetor, 150-52, with analysis in Grubbs, *Law and Family*, 63-64.

<sup>25</sup> Grubbs, *Law and the Family*, 64.

<sup>26</sup> Suzanne Dixon, “The Sentimental Ideal of the Roman Family,” in Beryl Rawson, ed., *Marriage, Divorce, and Children in Ancient Rome* (Oxford: Oxford University Press, 1991), 99-113; see also id., *The Roman Family* (Baltimore, MD: Johns Hopkins University Press, 1992).

<sup>27</sup> *The Digest of Justinian*, 23.2.1, ed. Theodor Mommsen and Paul Krueger, trans. Alan Watson, 4 vols. (Philadelphia: University of Pennsylvania Press, 1985) (hereafter “Dig.”).

enduring union” that was voluntarily contracted for the sake of “marital affection” and the propagation of offspring.<sup>28</sup>

56. Ulpian and Modestinus were typical of the early Roman jurists who regarded marriage as one of the mandates of natural law. Particularly important was the formulation that opened *Justinian’s Institutes*: “Natural law is the law instilled by nature in all creatures. It is not merely for mankind but for all creatures of the sky, earth, and sea. From it comes intercourse between male and female, which we call marriage, and also the bearing and bringing up of children.”<sup>29</sup> Such Roman law teachings complemented and amplified Greek philosophical teachings about marriage, and together influenced later Western law, including the law of monogamous marriage.

57. To form a “lawful” or “valid marriage,” classical Roman law required that the man and woman be of the age of puberty and have the fitness and capacity (*conubium*) to enter into marriage with each other. This latter requirement of *conubium* precluded marriage between parties of different ranks or classes, notably between Roman citizens and non-citizens and between non-citizen freemen and slaves (who were forbidden marriage altogether until the third century c.e.). It also precluded marriage between parties related by blood, marriage, or adoption – the impediments of consanguinity and affinity, as they came to be called, whose violation constituted the crime of incest. Both the man and the woman had to give their consent to the union and to receive the consent of their paterfamilias or guardian. Their families or guardians would often exchange marital property (*dos*), sometimes executing elaborate dotal contracts in so doing. But, it was “the mutual consent of a man and a woman” and their “reciprocal affection that constitutes marriage,” Justinian summarized, “without it being necessary to enter into a dotal contract” or hold a public ceremony.<sup>30</sup>

58. Classical Roman law made clear that one of the main purposes of contracting a valid marriage was to bear legitimate children who would serve as heirs to the family property, name, lineage, and household religion. Continuity of the family across the generations was of paramount importance – a local expression of Rome’s broader ideal of “communal immortality.” The children born to or adopted by a married couple were legitimate; those born outside of marriage (through fornication, adultery, incest, concubinage, or other forbidden unions) were illegitimate. Legitimate children came

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<sup>28</sup> Dig. 23.2.1; 24.1.32; 25.1; 35.1; *Justinian’s Institutes*, 1.9-10, ed. Paul Krüger, trans. Peter Birks and Grant McLeod (Ithaca, NY: Cornell University Press, 1987).

<sup>29</sup> *Justinian’s Institutes*, I.1.2. See also Gaius, *Institutiones*, I.1.1, ed. Paul Krüger and William Studemund (Berlin: Weidemann, 1877): “What natural reason establishes among all men and is observed by all people alike, is called the Law of Nations, as being the law which all nations employ”. See also *ibid.*, I.7.55-87, describing the various civil laws of marriage and family life in Rome and their consonance with this Law of Nations.

<sup>30</sup> *The Code of Justinian*, in Paul Krüger, ed., *Corpus Iuris Civilis*, 3 vols. (Berlin: Weidmann, 1928-1929), 5.4-9 [hereafter “JC”]; *The Novels of Justinian*, in S.P. Scott, *The Civil Law*, 17 vols., repr. ed. (New York: AMS Press, 1973), 22.1.3 [hereafter “Nov.”]. See further Judith Evans Grubb, “Marrying and its Documentation in Later Roman Law,” in *To Have and to Hold: Marrying and Its Documentation in Western Christendom, 400-1600*, ed. Philip L. Reynolds and John Witte, Jr. (Cambridge: Cambridge University Press, 2007), 43-94.

automatically within the authority of their father (*patria potestas*), who had near absolute power over their person, property, and activities until his death or their emancipation. He also had responsibilities for them: caring for and supporting them, facilitating their later marriages and their entry into a proper profession, and making presumptive provision for them in his last will and testament -- though he could disinherit any of his children by name. Legitimate children also automatically came to be members of the formal legal family or extended household, called the *familia*, which was headed by a *paterfamilias*. These legitimate children were related to the siblings, aunts, uncles, nieces, nephews, and other relatives by blood or adoption within this extended Roman *familia*. All these relatives had mutual rights and responsibilities to each other and could have claims to various parts of the others' estates, especially if one of their kin died intestate. These private domestic support systems were important considerations in a Roman society where the state provided virtually no public support for children, regardless of their status.

59. Children born outside of a lawful marriage were illegitimate at Roman law. Absent successful legitimation (a difficult and uncommon process), all such illegitimates were not a formal part of any legal household. They were beyond the authority and responsibility of any *paterfamilias* and without the support of any paternal relatives. They could not be included on the official birth registers. They could not be counted by the *paterfamilias* for purposes of taxation or of gaining rewards occasionally given to Roman citizens to have more children. Nor did they count in determining whether a *paterfamilias* with multiple children could be exempted from such public duties as guardianship or night watch. Roman law, until the reforms of the Christian emperors, allowed illegitimate children to be exposed or smothered upon birth or sold into servitude or slavery with virtual impunity -- a tempting course of conduct for parents who lacked the means to support the child.<sup>31</sup> Illegitimates had no claim to their father's property (if the father refused support), and they could not inherit from their father's estate (even if the father wanted to leave them a legacy). Illegitimates also had little legal recourse if they were abused, banished, or cut off from longstanding support, even from their guardians or tutors.<sup>32</sup>

#### 4. Roman Law and Polygamy

60. "Roman law assumed monogamy; so strong and basic was this assumption that classical Roman law simply ignored the possibility of bigamy" as a valid form of marriage and initially imposed no special penalties on it.<sup>33</sup> Extramarital sexual intercourse by a married woman was punished as adultery, by a married man as fornication.<sup>34</sup> "No fault" unilateral divorce could be pursued without formal notice,

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<sup>31</sup> See early sources in Jane E. Gardner, *Family and Familia in Roman Law and Life* (Oxford: Clarendon Press, 1998), 252-60.

<sup>32</sup> See detailed provisions in John Witte, Jr., *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered* (Cambridge: Cambridge University Press, 2009), 49-72.

<sup>33</sup> James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1987), 37-38.

<sup>34</sup> Jane Gardner, *Women in Roman Law and Society* (London: Croom Helm, 1986), 91-93.

procedure, or documentation, except in cases of adultery where civil and criminal sanctions could be imposed on the adulteress. Thus, if a man held out another woman as his new wife, it was assumed either that she was a prostitute or concubine, or that he had divorced the first wife and married the second. In the latter case, the public and private rights and duties of marriage attached to the second union and no longer to the first. Having two wives at the same time was impossible by the law of the Roman republic and the early empire. Any children born from the non-wife were illegitimate and suffered the same disabilities imposed on other non-marital children.

61. Beginning in the year 258 c.e., the Roman emperors became more explicit in prohibiting and punishing polygamy per se, eventually putting it alongside adultery and incest as “abominable,” “wicked,” “unnatural,” and “execrable” sexual offences that were against the law of God and the state.<sup>35</sup> A series of third- and fourth-century laws provided that parties who knowingly entered into an engagement or marriage agreement, while already engaged or married to another, would be charged with “fornication” (*stuprum*) and “fraud” and would incur “*infamia*” -- a legal “black mark” that precluded them from holding public office or other positions of trust or authority, from court appearances, and from exercising a number of private and public rights, even if they were citizens.<sup>36</sup> A father or guardian could also be brought up on charges of *infamia* if he knowingly ordered those under his authority to enter into a bigamous union.<sup>37</sup> No engagement or marriage could proceed without a legitimate breaking of the prior engagement or a successful divorce from the prior marriage. Until that time, a woman or her family could not keep or claim property from her purported fiancé, and the man, in turn, could reclaim any property from his purported fiancée and her family.<sup>38</sup> Both parties could be punished for their *infamia* in attempting or practicing bigamy, though an innocent single woman who had been coerced or tricked into joining a polygamous relationship would be spared.<sup>39</sup> An imperial rescript of 285 c.e. has typical language:

It is in general obvious that no one who is under the authority of the Roman name can have two wives, since also in the Praetor's Edict men of this sort were branded with legal infamy (*infamia*). The appropriate judge, when he learns of this matter, will not allow it to go unpunished.<sup>40</sup>

62. After the Christianization of the Empire in the fourth century, the Roman Emperors Constantine, Theodosius, Justinian, and others repeated and extended these provisions against polygamy. They also repeated and extended traditional prohibitions on sexual dalliances that could border on or encourage polygamy. First, marriage and concubinage were firmly separated: a man could have either a wife or a concubine, but

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<sup>35</sup> CJ, 6.57.5.1. See further *ibid.*, 5.27.2 and Paul Krüger, ed., *Codex Theodosianus* (Berlin: Weidmann, 1923-1926), 4.4.6

<sup>36</sup> Dig. 3.2.1; Dig. 3.2.13.1-4; CJ 9.9.18 and 5.3.5; Evans Grubbs, *Law and Family in Late Antiquity*, 167-69.

<sup>37</sup> Dig. 3.2.1 (Julian) and Dig. 3.2.13.1-4 (Ulpian).

<sup>38</sup> CJ 9.9.18; 5.3.5.

<sup>39</sup> *Ibid.*; Susan Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford: Clarendon Press, 1991), 279.

<sup>40</sup> CJ 5.5.2, 285.

not both at the same time.<sup>41</sup> Second, convicted adulterers, both men and women, were forbidden from ever marrying their former paramours, even after separation or divorce from, or death of the innocent spouse.<sup>42</sup> Third, a new widow was forbidden to remarry until after a suitable one-year period of mourning on pain of losing her legacy from her late husband and having any child born of another man during this mourning period declared illegitimate.<sup>43</sup>

63. Later Roman laws also took aim at various Jewish marriage practices, including polygamy.<sup>44</sup> While monogamy was the norm among the vast majority of Jews, polygamy “existed in a small number of noble families side by side with monogamy among the people at large. Josephus, for instance, tells his Roman readers of the long-standing Jewish custom to marry many wives, while various rules in the Mishnah, especially concerning levirate [marriage – the requirement of a brother to marry his late brother’s widow], point to the existence of polygynous families at that period.... The vast majority of Jews concurred with the trend towards monogamy, yet no general prohibition against polygamy was laid down” at Jewish law during the Roman period. Indeed Jewish law did not formally renounce polygamy altogether until the twelfth century c.e.<sup>45</sup>

64. The Roman emperors sought to ban the Jewish practice of polygamy. In 393, Emperor Theodosius and others announced: “None of the Jews shall ... enter into several marriages at the same time.”<sup>46</sup> In 535, Emperor Justinian repeated this prohibition, calling polygamy “contrary to nature” and “abominable,” declaring again that all children born of the second wife to be illegitimate, and ordering the seizure of one quarter of the property of practicing polygamists.<sup>47</sup> Two years later, however, Justinian granted a narrow exception for the Jews in living in the region of Tyre to continue to practice polygamy contrary to the general law.<sup>48</sup> Later emperors removed this exception, and by the ninth century, Byzantine Emperor Theophilus declared the practice of polygamy to be a capital crime.<sup>49</sup>

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41 CJ 5.26.1.

42 See earlier formulation by Modestinus, in Dig. 23.2.24.

43 CJ 5.9.1-3. See Judith Evans Grubbs, “Promoting Pietas in Roman Law” in Beryl Rawson, ed., *Blackwell Companion to Families in the Greek and Roman Worlds* (forthcoming).

44 Adiel Schremer, “How Much Polygyny in Roman Palestine?” *Proceedings of the American Academy for Jewish Research* 63 (1997-2001): 181-223.

45 Ze’ev W. Falk, *Jewish Matrimonial Law in the Middle Ages* (Oxford: Oxford University Press, 1966), 2-6 (internal citations omitted). See further Michael L. Satlow, *Jewish Marriage in Antiquity* (Princeton: Princeton University Press, 2001), 189-92; Louis M. Epstein, *Marriage Laws in the Bible and the Talmud* (Cambridge, Mass.: Harvard University Press, 1942), 12-33; and sample contracts in Mordechai Akiva Friedman, *Jewish Marriage in Palestine: A Cairo Geniza Study*, 2 vols. (Tel Aviv/New York: Jewish Theological Seminary of America, 1981).

46 CJ I.9.7.

47 Nov. 12; Nov. 89.5.12.

48 Nov. 139.

49 Percy Ellwood Corbett, *The Roman Law of Marriage* (Oxford: Clarendon Press, 1969 [1930]), 143 (citing a text from the ninth-century emperor, Theophilus). I have not been able to verify this source.

## 5. Section Summary

65. These classical Greek and Roman sources illustrate that the West has long held that dyadic marriage has natural goods and benefits for the couple, their children, and the broader community. Particularly perceptive were Aristotle's insights that monogamous marriage is a natural institution fundamental and foundational to any republic; that it is at once "useful," "pleasant," and "moral" in its own right; that it provides efficient pooling and division of specialized labor and resources within the household; and that it serves both for the fulfillment and happiness of spouses and for the procreation and nurture of children. Also influential was the Stoic and Roman natural law idea that marriage is a "sacred and enduring union" that entailed a complete sharing of the persons, properties, and pursuits of husband and wife in service of marital affection and friendship, mutual caring and protection, and mutual procreation and education of children. These classical sources provided the Western tradition, from the beginning, with an ample natural logic and language about the goods and goals of marriage.

66. These ideas of monogamous marriage entered Roman law already in the centuries before the common era and were given enduring form by the imperial legislation of Augustus, Constantine, Theodosius, and Justinian in the first six centuries of the common era. The Roman law defined "lawful marriage" as "the union of a man and a woman, a partnership for life" and restricted marriage to men and women who were of the age, fitness, and capacity to marry each other. The Roman law early on prohibited incest and adultery as "abominable," "wicked," "unnatural," and "execrable" sexual offenses. By the third century c.e., it added polygamy to this roll of "unnatural" sexual crimes. Parties convicted of any such sexual offenses faced penalties and restrictions on their public and private rights; children born of such unions were illegitimate and subject to severe restrictions. By the ninth century, the Byzantine heirs of the Roman Empire had made polygamy a capital crime.

### B. Biblical Foundations of Monogamy

67. The Bible provided the Western tradition with a second important foundation in support of dyadic marriage and in opposition to polygamy. One foundational text was Genesis 1 and 2, which recounted God's creation of the first man and the first woman and God's instruction that these "two shall become one flesh" and "be fruitful and multiply." A second foundational text was the Mosaic law, which provided detailed instruction on the proper norms and functions of sex, marriage, and family life. A third foundational text was the set of writings of the later Hebrew prophets who described marriage as a dyadic covenant modeled on the special covenant between God and his chosen people of Israel. This covenant marriage metaphor hearkened back to the image of marriage as "two in one flesh" and also underscored the expected procreative, sacrificial, and egalitarian ethic of a covenant marriage.

68. The New Testament repeated and embellished these teachings of the Hebrew Bible. Both Jesus and St. Paul returned repeatedly to the Genesis narrative, lifting up the union and equality of male and female in "one flesh" as the normative ideal. Both Jesus and Paul returned to the Mosaic law of marriage, enjoining their followers to live

by its natural core, its moral spirit. Both Jesus and Paul transformed the old metaphor of God's covenant marriage with his chosen people of Israel into a new metaphor of the church as the bride and Christ as the bridegroom brought into a mysterious union which was echoed in each human marriage. The New Testament also provided detailed instruction on sexual ethics, calling husbands and wives to honor and use their marital beds, and enjoining adultery, fornication, prostitution, incest, sodomy, seduction, immoderate dress and grooming, and other forms of sexual "immorality" and "perversion."

69. While the Bible strongly commended monogamy and sexual purity, it did not prohibit polygamy outright. The Hebrew Bible offered several examples of men in leadership positions, both before and after the giving of the Mosaic law, who held multiple wives and concubines. While these polygamous households suffered bitter discord, violence, rape, and homicide among the competing wives and children, they were not prohibited outright. The New Testament did not list polygamy on its long rolls of sexual sins, though it branded as adultery any sexual encounter with anyone but one's spouse; even divorcees could not remarry, and widow(er)s were discouraged from remarriage. The Hebrew Bible stories inspired a few later Jewish noble families to practice polygamy, as we saw. They also inspired occasional Christians to experiment with polygamy, despite the condemnations of polygamy by the early Church Fathers and church councils, and the prohibitions on the practice by Roman law beginning in the third century. After the third century, polygamy came to be universally condemned by both Western theologians and jurists – in part because of the inevitable harm, discord, and attendant crimes it visited on members of the polygamous household, in larger part because of the greater private and public goods that were available in monogamous marriages.

### 1. Creation Narratives

70. The story of the creation of the world in Genesis 1 and 2 was a critical source for the biblical teaching of dyadic marriage. Biblical scholars now believe that these two chapters, written several hundred years apart, first appeared together in the Second Temple period in the sixth century b.c.e. This was the time when a remnant of the Jews returned to Israel from Babylonian exile, rebuilt the temple in Jerusalem, and reissued the Torah (the Jewish law), now with these Genesis texts prominently placed at the head of the Torah.<sup>50</sup> These creation narratives were both a celebration of the divine origins of marriage and the starting point for a natural law governing men and women, husbands and wives.<sup>51</sup>

71. The older, Yahwistic account of the creation of man and woman, written in the tenth or ninth century b.c.e., appears in Genesis 2:18-24. The first verses of Genesis 2 recount how God created the heavens and the earth and placed the first man in a

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<sup>50</sup> See John J. Collins, "Marriage, Divorce, and Family in Second Temple Judaism," in Leo G. Perdue, et al., *Families in Ancient Israel* (Louisville, Ky.: Westminster John Knox Press, 1997), 104, 127-28.

<sup>51</sup> See David Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998).

paradise, called the Garden of Eden. But this Paradise was not complete without the creation of the first woman. The narrator in Genesis writes:

Then the Lord said, "It is not good that the man should be alone. I will make him a helper as his partner." So out of the ground the Lord formed every animal of the field and every bird of the air, and brought them to the man to see what he would call them; and whatever the man called every living creature, that was its name. The man gave names to all cattle, and to the birds of the air, and to every animal of the field; but for the man there was not found a helper as his partner. So the Lord God caused a deep sleep to fall upon him, and he slept; then he took one of his ribs and closed up the place with flesh. And the rib that the Lord God had taken from the man he made into a woman and brought her to the man. Then the man said, "This at last is bone of my bones and flesh of my flesh; this one shall be called Woman, for out of Man this one was taken." Therefore a man leaves his father and his mother and clings to his wife, and they become one flesh (Genesis 2:18-24 NRSV).

72. "One-flesh" union meant more than just the sexual coupling between a man and a woman, though that would become an important dimension of their relationship if done licitly. The Hebrew word for "flesh" (*kashar*) is better translated as "human substance" or "real human life."<sup>52</sup> To be joined in one flesh signifies "the personal community of man and woman in the broadest sense – bodily and spiritual community, mutual help and understanding, joy and contentment in each other."<sup>53</sup> Especially when read in the context of Adam's searching for a proper mate, the passage underscores that it was only in the woman, and not in any other creature, that the man found someone like him, someone with whom he could ultimately discover and discern his humanity. Before the creation of Eve, there was no creature to which Adam could compare or join himself. God was above humanity; the beasts of Paradise were below it. With the creation of Eve, Adam had a mirror in which to see himself, a creature with whom to compare and complete himself. To be fully human thereafter, Adam and Eve needed each other.<sup>54</sup> That is what was signified in the phrase, "one flesh union" between a man and a woman. That is what Adam was celebrating when he said of Eve, "This at last is bone of my bones and flesh of my flesh." And that is the fundamental human good that the institution of marriage serves to confirm, channel, and celebrate. The ancient Rabbis, in fact, and some early Church Fathers with them, taught that it is "only after marriage and the union of man and woman into one person that the image of God may be discerned in them. An unmarried man, in their eyes, is not a whole man."<sup>55</sup> The writer of Ecclesiastes (ca. 400 b.c.e.) also underscored this: "Two are better than one, because they have a good reward for their toil. For if they fall,

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<sup>52</sup> Michael G. Lawler, *Secular Marriage, Christian Sacrament* (New York: Twenty-Third Publications, 1985), 6-8.

<sup>53</sup> Claus Westermann, *Genesis 1-11: A Commentary*, trans. J.J. Scullion, S.J. (Minneapolis: Augsburg Publishing House, 1984), 232.

<sup>54</sup> John E. Coons and Patrick M. Brennan, *By Nature Equal: The Anatomy of a Western Insight* (Princeton: Princeton University Press, 1999), 55-62.

<sup>55</sup> Lawler, *Secular Marriage, Christian Sacrament*, 7-8.

one will lift up the other.... Again, if two lie together, they keep warm; but how can one keep warm alone?”<sup>56</sup>

73. The description in this passage of the woman as man’s “helper” (*ezer*) did not change the natural quality and equality of the primordial relationship of men and women. In the Bible, to be a “helper” is not necessarily to be in an inferior role -- as many later Christian teachings on “male headship” within the home, church, and society would assume.<sup>57</sup> The Hebrew word for helper (*ezer*) is the same word that the Hebrew Bible uses fifteen more times to describe God’s helping role in human life. The Psalmist, for example, describes God this way: “You are my helper (*ezer*) and my deliverer.”<sup>58</sup> Again, read in context, the emphasis of Genesis 2 is on the woman’s unique “suitability” (*k’negdo*) to be the man’s helper or partner – unlike any other creature in Paradise whom Adam had already separated and named. The Hebrew phrase *ezer k’negdo* is usually translated as “help meet” or even “help mate.” But properly it means that the woman is a helper who is like the man, who corresponds to him, who is suitable for and needed by him. The Hebrew Bible underscored this insight: “He who acquires a wife gets his best possession, a helper fit for him and a pillar of support. Where there is no fence, the property will be plundered, and where there is no wife, a man will become a fugitive and a wanderer.”<sup>59</sup> Moreover, it is symbolically significant that this story describes the woman as being created from man’s rib, from his mid-section. A later Quaker adage, echoing the Talmud, would underscore the equality of men and women implicit in this image: “God did not take Eve out of Adam’s head, that she might lord it over him, nor from his heel, that he might trample on her, but out of his rib, nearest his heart, that he might cherish her.”<sup>60</sup>

74. A later Priestly account of creation, written in the sixth century b.c.e. and recorded in Genesis 1, emphasizes anew the equality of the man and the woman as image bearers of God and co-creators and co-stewards with God of new life thereafter:

Then God said, “Let us make humankind in our image, according to our likeness; and let them have dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the wild animals of the earth, and over every creeping thing that creeps upon the earth.” So God created human kind in his image, in the image of God he created them, male and female he created them. God blessed them, and God

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<sup>56</sup> Ecclesiastes 4:9-11.

<sup>57</sup> See David Blankenhorn, Don Browning, and Mary Stewart van Leeuwen, eds., *Does Christianity Teach Male Headship?* (Grand Rapids, MI: Wm. B. Eerdmans, 2004).

<sup>58</sup> Psalm 70:5.

<sup>59</sup> Sirach 36:29-30. See further Sirach 25:1, 26:1-3, 14, 36:25; Proverbs 18:22, 30:18-19; Song of Songs 2:16, 6:3, and analysis in David R. Blumenthal, “The Images of Women in the Hebrew Bible,” in Michael J. Broyde and Michael Ausubel, eds., *Marriage, Sex, and Family in Judaism* (Lanham, MD: Rowman and Littlefield, 2005), 15-60.

<sup>60</sup> Quoted and discussed in Peter Coleman, *Christian Attitudes Toward Marriage From Ancient Times to the Third Millennium* (London: SCM Press, 2004), 28.

said to them, “Be fruitful and multiply, and fill the earth and subdue it.”...  
God saw everything that he had made, and indeed, it was very good.<sup>61</sup>

Genesis 5:1-2 repeats this account more cryptically: “When God created humankind, he made them in the likeness of God. Male and female he created them, and he blessed them and named them ‘humankind’ [*adam*] when they were created.”

75. Part of the point of creating men and women as image bearers of God, Genesis 1 makes clear, is that they, together, were to be co-creators with God in producing children and cultivating the earth. God’s command to “[b]e fruitful and multiply and fill the earth and subdue it” is a mandate not only for the first man and the first woman, the Christian tradition teaches. It is a mandate for all humanity. The union of male and female is not only for their personal completion and fulfillment. It is designed to allow humanity to continue God’s act of creation through their procreation of children -- “dressing and keeping” their children as a special procreative responsibility within the general mandate of “dressing and keeping” all of God’s creation as stewards and trustees.

76. These Genesis narratives, of course, are not about marriage per se, save the oblique reference to a man “clinging” to his “wife” rather than just any woman, and “multiplying” with her to form a new family. But the Jewish and later Christian traditions saw these creation narratives as a source and sanction of the institution of dyadic marriage, whose rules, procedures, and aspirations are laid out more fully in the rest of the Bible. Both traditions saw God’s ceremonial presentation of Eve to Adam as a celebration of the first wedding feast. The Book of Tobit, from the fourth or third century b.c.e., celebrates this in the wedding prayer that Tobias offers to his new wife Sarah:

Blessed are you, O God of our ancestors. And blessed is your name in all generations forever. Let the heavens and the whole creation bless you forever. You made Adam, and for him you made his wife Eve as a helper and support. From the two of them the human race has sprung. You said, “It is not good that the man should be alone; let us make a helper for him like himself.” I am now taking this kinswoman of mine, not because of lust, but with sincerity. Grant that she and I may find mercy and that we may grow old together.<sup>62</sup>

This passage eventually would find a prominent place in Christian wedding liturgies.<sup>63</sup> The Christian tradition also saw Christ’s performance of his first miracle at the wedding feast in Cana as a further divine confirmation of the goodness of marriage.<sup>64</sup> For Christians, these and other passages underscored that marriage was at root both a divinely-created and naturally-sanctioned institution in which both God and the couple participated.

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<sup>61</sup> Genesis 1:26-31 (NRSV).

<sup>62</sup> Tobit 8:5-7 (NRSV).

<sup>63</sup> Kenneth W. Stevenson, *Nuptial Blessing: A Study of Christian Marriage Rites* (Oxford: Oxford University Press, 1982).

<sup>64</sup> John 2:1-11.

## 2. Mosaic Law

77. Much more specific direction on sex, marriage, and family life came through the Mosaic law or Torah. Particularly the biblical books of Leviticus and Deuteronomy include a large number of rules, procedures, cases, and moral admonitions on point, some of which were echoed and elaborated in the writings of the prophets and sages gathered in the later books of the Hebrew Bible. Included in these many biblical passages were detailed teachings on marital formation, maintenance, and dissolution; on proper sexual behavior by men and women before, within, and after marriage; on the prohibition and punishment of sexual crimes like adultery, fornication, incest, rape, sodomy, interreligious marriage, and more; on the special roles and duties of boy and girl, man and woman, fiancé and fiancée, husband and wife, parent and child, master and servant, brother and sister-in-law, householder and patriarch; on the proper habits of sexual, bodily, and ritual cleanliness for men and women in different seasons; on the special marital and sexual restrictions and responsibilities imposed on priests and Levites; on dowries, marital property, child support, and family inheritance, including primogeniture (the testamentary privileging of the eldest male); on the special care owing to widows, orphans, strangers, slaves, and conquered persons within the household and community; on the complex social, economic, and ritual relationships within and among the marital household, the patriarchal family, the clan or tribe, and the evolving religious and political communities and their leaders. These many Mosaic laws and their prophetic echoes and elaborations provided the Western tradition with a perennial treasure trove of domestic norms and practices to mine in crafting their law, theology, and ethics.

78. Western jurists and theologians, however, understood that the Mosaic law was given by God to the elect people of ancient Israel, not to all humanity. Already the earliest Church Fathers argued that the Mosaic law had many distinctive ceremonial provisions concerning diet, dress, ritual life, and the like that were specific to the time and place of this ancient tribal people. These ceremonial laws, they argued, were fulfilled with the coming of Christ. But the early Church Fathers also understood that this Mosaic law was, in part, a reflection and elaboration of the natural or moral law that God has “written on the hearts” and consciences of all persons.<sup>65</sup> As such, the Mosaic law was a valuable prototype for a Christian law, theology, and ethics of sex, marriage, and family life. Particularly important was the Decalogue or Ten Commandments, which many Christian writers saw as a source and summary of both the moral law of the ancient Israelites and the natural law of all peoples. Four of the Ten Commandments deal with issues of sex, marriage, and family life. They reiterate the basic structure and obligation of the marital household and the demand for love and fidelity to God and neighbor, parent and spouse, child and servant.

Remember the sabbath day, and keep it holy. Six days you shall labor, and do all your work. But the seventh day is a sabbath to the Lord your God; you shall not do any work – you, your son or your daughter, your male or female slave, your livestock, or alien resident in your town....

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<sup>65</sup> Romans 2:14-15.

Honor your father and your mother, so that your days may be long in the land which the Lord your God is giving you....

You shall not commit adultery....

You shall not covet your neighbor's house; you shall not covet your neighbor's wife, or male or female slave, or ox, or donkey, or anything that is your neighbor's (Ex. 20:8-9, 12, 14, 17 NRSV).

79. Also important for the Western Christian tradition was the realization that a number of Mosaic laws of sex, marriage, and family life were comparable to the pre-Christian Roman law. Like the Roman law, the Mosaic law presumed marriage to be a monogamous union of a man and a woman designed for the procreation of children, and it likewise punished adultery and other sexual offenses that betrayed marriage and its fundamental purposes. Like Roman law, Jewish law prohibited incestuous unions of relatives and mixed marriages between parties from different classes and cultures (with Judaism adding interreligious marriage among the prohibited unions). Like Roman law, Jewish law envisioned a two-step marital process of an engagement and a wedding, featuring the exchange of marital gifts, dowry, and other property transactions negotiated by the families or guardians of the newly engaged man and woman. Like Roman law, Jewish law allowed for unilateral divorce at least for the man, and the right to remarriage for both parties thereafter, with the requirement that the father continue to care for and support the children of his first marriage during his lifetime and in devising his estate. Like Roman law, Jewish law obligated members of the extended Jewish family to care for their kin (though Judaism was unique in requiring "levirate marriage"). And like Roman law, Jewish law tended to privilege men in the laws of sexuality, courtship, marriage, divorce, and inheritance and in the adulation of the paterfamilias and the first-born son (though Jewish law was more tolerant of polygamy than Roman law). A number of Christian writers would later see these and other parallels between Jewish law and Roman law as evidence that these two legal traditions were drawing on a common natural law of sex, marriage, and family life whose basic norms were part of the foundation of Christian marriage.

### 3. Polygamy in the Hebrew Bible

80. As in early Roman law, so in Mosaic Jewish law, monogamous marriage was presupposed. The dyadic structure of marriage was underscored when the Torah was reissued in the Second Temple period with the creation stories of "two becoming one flesh" put at the head of Torah. Monogamy was further underscored in the vast Wisdom literature that was issued in the same period and repeatedly focused on the ethics of the husband and his one wife.<sup>66</sup>

81. But there is enough slippage in some of the Mosaic law texts to allow for alternative interpretations. As the authoritative *Anchor Bible Dictionary* reports:

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<sup>66</sup> See Proverbs 12:4; 18:22; 19:13; 21:9; Ecclesiastes 9:9; Job 31:1, 9-12; Sirach 26:1-4.

Exod. 20:17 and Deut. 5:21 list several things one ought not to covet, and all the objects the individual is warned against coveting are in the singular. If it is possible for a man to have more than one manservant, maidservant, ox, or ass, he could have more than one wife. Or again Lev. 18:8, 11, 14, 15, 16, 20 all refer to uncovering the nakedness of somebody's wife, always again in the singular as well. In fact, Lev. 18:9 warns against uncovering the nakedness of one's sister, who is further identified as "the daughter of your father or the daughter of your mother," indicating that a man could have multiple wives, providing sons and daughters from different mothers.... [And] there is one law in the Deuteronomic code (Deut. 21:15-17) which does allow for one man to married simultaneously to two wives.<sup>67</sup>

82. While both Jewish and Christian scholars have long disputed such interpretations, polygamy was practiced in Hebrew Bible times, both before and after the giving of the Torah.<sup>68</sup> The first polygamist recorded in the Bible was Lamech, a descendent of the first murderer, Cain.<sup>69</sup> The Bible recounts that several of Israel's leading patriarchs and kings -- Abraham, Jacob, Esau, Gideon, Elkanah, David, Solomon, Rehoboam, and others -- were polygamists, King Solomon the most ambitious of them with 700 wives and 300 concubines.<sup>70</sup> The Bible does report, sometimes at length, that each of these polygamists had deeply troubled households and that their polygamy often induced or came with other crimes like incest, rape, murder, and adultery. Each polygamist became distracted by multiple demands on his time and energy and multiple divisions of his affections. Each became voracious in his demand for other women -- even the wives of other men, as in the tragic case of King David who murdered Bathsheba's husband Uriah in order to add her to his harem.<sup>71</sup> The wives of the polygamist competed for his attention and approval and fought with each other. Their children vied for his property, power, and eventual inheritance, which inevitably dissipated among competing claimants. In King David's polygamous household, the sibling rivalry escalated to such an extent that the half-children of his multiple wives raped and murdered each other.<sup>72</sup> And King Solomon ultimately had to forfeit his empire under pressure of his competing half-sons and other kin.<sup>73</sup>

83. The vast majority of later Christian theologians, as we will see, would draw on these Old Testament stories to underscore their opposition to polygamy. Some interpreters treated the discord and violence of polygamous households as the inevitable fallout of breaking God's law of monogamy. Others saw these biblical stories

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<sup>67</sup> David Noel Freedman, et al, eds., *Anchor Bible Dictionary* (New York: Doubleday, 1992), 4:565. Deuteronomy 21:15-17 sets inheritance rules for children in cases where "a man has two wives" (though some scholars read this as "one wife" and one "ex-wife"). Deut. 17:17 instructs a king: "he shall not multiply wives for himself."

<sup>68</sup> See Epstein, *Marriage Law in the Bible and the Talmud*, 3-12.

<sup>69</sup> Genesis 4:9.

<sup>70</sup> Genesis 16; 25:1-2; 26:34; 28:9; 29:15-30; 36:2; Judges 8:12; 1 Samuel 1:2; 18:17-30; 25:38-43; 2 Samuel 3:2-5; 5:13; 1 Kings 3:1, 11:3; 2 Chronicles 11:2.

<sup>71</sup> 2 Samuel 11:1-27.

<sup>72</sup> 2 Samuel 13; 1 Kings 1-2.

<sup>73</sup> 1 Kings 11.

as a form of general deterrence against the practice, given the prominence of the polygamists in their own community and in history. Nonetheless, the small groups of Christian and non-Christian polygamists that occasionally emerged in the second millennium would call on these Hebrew Bible examples of polygamy to defend themselves.<sup>74</sup> I shall return to these examples in later sections.

#### 4. Marriage as a Dyadic Covenant in the Prophets

84. If the creation narratives and Mosaic laws were not clear enough in prescribing monogamy, the Hebrew Prophets underscored it by declaring marriage to be an exclusive dyadic covenant, modeled on God's exclusive covenant with his elect people of Israel. In a long series of writings from the mid-eighth to the mid-fifth centuries b.c.e., the Hebrew Prophets Hosea, Isaiah, Jeremiah, Ezekiel, and Malachi analogized this covenant relationship between God and his one chosen people of Israel to the marital relationship between a husband and his single chosen bride. Just as God chose to give up his divine freedom to bind himself to his one chosen people of Israel, the Prophets argued, so a man chooses to give up his natural freedom to bind himself to his wife, to become "one flesh" with her. Just as Israel chose Yahweh out of all the other gods of the ancient pantheon to be its God and to make sacrifices only to this God, so a woman chooses her husband from all the other men in the universe to be her only husband, and to sacrifice and dedicate herself to him alone. Just as God and Israel swore to bind themselves together by a special covenant, with each side promising to be faithful to the other, so a husband and wife swear to a special marital covenant, with each side promising to be faithful to the other in accordance with the terms of their agreement and with the laws of the Torah. Just as breach of the divine covenant between God and his chosen people will have devastating consequences upon later generations, so will breach or betrayal of a marital covenant between husband and wife often have devastating consequences for each of them and for the children and later descendants of that union.<sup>75</sup>

85. In these same passages, the Prophets impute rather graphic emotions to God, the metaphorical husband, as he moves through the stages of forming a covenant marriage with his chosen metaphorical bride, Israel. The Prophets repeatedly depict God wistfully recounting his new love for his chosen bride. Early on, he makes a promise to her father, Abraham, that he will take Israel as his chosen bride when she comes of age and if she will consent to the marriage and accept the terms of the covenant. He spends time getting to know her, lavishing her with special gifts and favors, prizing her virtues and values, protecting her and liberating her from her enemies during the protracted time of their courtship. After stating the terms of the

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<sup>74</sup> See John Cairncross, *After Polygamy was Made a Sin: The Social History of Christian Polygamy* (London: Routledge & Kegan Paul, 1974).

<sup>75</sup> See Hosea 2:2-23; 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 16:1-63; 23:1-49; Malachi 1-2. See discussion in Gordon P. Hugenberger, *Marriage as Covenant: A Study of Biblical Law and Ethics Governing Marriage Developed From the Perspective of Malachi* (Leiden, 1994); Michael G. Lawler, "Marriage as Covenant in the Catholic Tradition," in *Covenant Marriage in Comparative Perspective*, John Witte, Jr. and Eliza Ellison, eds. (Grand Rapids, MI: Wm. B. Eerdmans, 2005), 70-92.

marital covenant, and the blessings and curses that will befall them as they live for better or worse, God then seeks the consent of his chosen people, Israel. Finally, in a dramatic ceremony, presided over by Moses, God and Israel swear their covenant oaths to each other publicly and before a whole cloud of witnesses, announcing to the world their new agreement and recording it canonically for all to see and remember.

86. After describing such a lavish and promising start to this metaphorical covenant marriage between God and Israel, the Prophets then abruptly shift to a scene several years later, where they depict God as the aggrieved husband dealing with his wayward idolatrous wife. God is furious at the betrayal of his chosen people who have committed idolatrous adultery by worshipping other gods and abandoning the terms of the covenant. God laments the lost promise of covenant love with his chosen bride. He laments even more that Israel was sacrificing their children – literally, in consigning their first born to the altar as a gift to Baal, metaphorically in cutting off their descendents from the covenant by not teaching them to observe the law of the covenant and thereby jeopardizing the continuation of the marital covenant itself. God repeatedly threatens to file for divorce, as is his right under the law of the covenant. In Ezekiel’s account, God even files for divorce, uttering in metaphorical court a long roll of grievances against his adulterous bride to support his complaint. But then God repents of his anger, remembers his covenant with Israel, and promises anew his everlasting love, if for no other reason than for the sake of the children.

87. Malachi, the last of the Prophets to write about this metaphorical marital covenant between God and Israel, repeated this story of marital formation, betrayal, and reconciliation, but then used it to offer moral instructions about human marriages. He called each human marriage a special covenant relationship in its own right, indeed an echo and expression of God’s loving covenant with Israel. He called humans to be faithful to their covenant marriage with each other, just as God has been faithful in his covenant relationship with his chosen people. And he called breach of one’s own marital covenant with a spouse a breach of the broader covenant with God, which God will punish – in this case, by refusing their sacrifices, even if these sacrifices follow the ritual laws.

You cover the Lord’s altar with tears, with weeping and groaning because he no longer regards the offering and accepts it with favor at your hand. You ask, “Why does he not?” Because the Lord was witness to the covenant between you and the wife of your youth, to whom you have been faithless, though she is your companion and your wife by covenant. Has not the one God made and sustained for us the spirit of life? And what does he desire? Godly offspring. So take heed to yourselves, and let none be faithless to the wife of his youth. “For I hate divorce, says the Lord the God of Israel, and covering one’s garments with violence, says the Lord, the God of hosts. So take heed to yourselves and do not be faithless” (Mal. 2:13-16).

88. The Prophets’ main point in using this running metaphor of marriage as a covenant was to try to shake the Jews out of their idolatrous stupor by showing them, in raw emotional terms, what God must feel like in being so betrayed, and by warning them, in clear legal terms, what rights God has to punish them and their children under the covenant that prior generations had agreed to enter. But, this running covenant

metaphor also held major lessons for human marriage, integrating and elevating some of the other biblical teachings on marriage, including the biblical accounts of the natural law. They provide examples of the enduring qualities of a marriage covenant.

89. First, the covenant metaphor confirms the created form of marriage, as a dyadic or monogamous union between one man and one woman. Even God, who had the perfect right to pick as many brides as he wished, chose only one bride, his beloved Israel, with whom to produce Godly descendents. The Malachi 2 passage, just quoted, ties this norm directly to the primordial creation story of Genesis 1-2. At creation, God could have created two or more wives for Adam. But he chose to create one. God could have created three or four types of humans to be the image of God. But he created two types: “male and female he created them.”<sup>76</sup> In the law, God could have commanded his people to worship two or more gods, but he commanded them to worship one God. Marriage, as an order of creation and a symbol of God’s special relationship with his elect, involves two parties and two parties only.

90. Second, the covenant metaphor confirms that God participates in each marriage. The passage in Malachi again underscores this, echoing the Genesis story of creation. Just as God gave the first man Adam and the first woman Eve “the spirit of life” and brought them together, so God gives each man and each woman a spirit of love and witnesses and solemnizes their union. God is not only the creator of the institution of marriage. God is also the “witness” to each marriage, whose presence and testimony legitimates the formation of each new marital covenant that follows prescribed forms and norms. God is also the guarantor of the marriage, on whom the couple can call to ensure that the terms of the marital agreement are fulfilled. And God is the exemplar of a faithful covenant marriage as he shows in his metaphorical covenant marriage with the bride of Israel.

91. Third, the covenant metaphor confirms the created procreative function of marriage. Even God, who had the power to create as many faithful followers as he wished for as many generations as he wanted, chose instead to produce “Godly seed” through his chosen bride Israel operating under the normative terms of the covenant. This, too, echoes the creation story, where God delegates the power of creating the next generation of humans to Adam and Eve, calling them to be “fruitful and multiply” and fill the earth. Covenant marriage underscores this created procreative purpose of marriage. But it also makes clear, as Malachi highlights, that married couples are called to produce not just any children but “Godly offspring,” the next generation of God’s covenant faithful who love God and live by the laws of God’s covenant. God uses the institution of marriage to produce, nurture, and teach each new generation of faithful followers. The marital covenant makes procreation an extraordinary responsibility. It is a sharing with God in the creation and nurture of a new image bearer and a new covenant follower of God on earth, a responsibility that stays with parents for as long as they and their children live.

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<sup>76</sup> Genesis 1:27.

92. Fourth, the covenant metaphor confirms the divine laws governing marriage formation – as set out in both the Mosaic law and in the natural law revealed before Moses. Even God, who had the perfect right to take whatever bride by whatever means he wanted, obeys his own laws for proper courtship and marriage. He chooses his spouse carefully and takes his time in courting and getting to know her. He seeks her consent and that of her father, Abraham. He provides her with engagement and wedding gifts. He rehearses for her the terms of the marital covenant before their wedding day so that they both understand what they are getting into. And the couple then celebrates their covenant union in an elaborate public ceremony and public exchange of vows before the whole community with an authorized official, Moses, presiding. The metaphorical story of God’s covenant marriage with Israel, as told by the Prophets, cleverly underscores the very Mosaic laws of marriage that the covenanted people of Israel were required to follow in forming their own marriages. And these Mosaic laws of marital formation were in part an expression of a common natural law of marital formation, which other civilizations, before and after the time of Moses, notably the Greeks and Romans, translated into comparable positive laws.

93. Fifth, the covenant metaphor elevates these natural and Mosaic laws of marriage, both by adding new provisions and by exemplifying how to live by the spirit of the laws that already exist. God goes beyond the letter of the Mosaic law of marital formation in forming his relationship with Israel, thereby setting a moral example for his people. For example, Mosaic law, following the customs of ancient times, took very little account of the woman’s consent, allowing a man to sell his daughter to the highest dowry bidder, and providing that even a rapist could marry his victim so long as her father accepted the bride price for her.<sup>77</sup> God, by contrast, takes time to get to know Israel and to seek her consent to the marital covenant, while also seeking the consent of her metaphorical father, the ancient patriarch, Abraham. Mosaic law, again following ancient customs, treated marital gifts effectively as a “bride price” paid directly by the man to his fiancée’s father, not unlike transactions used to sell slaves or cattle.<sup>78</sup> God, by contrast, bestows his gifts directly upon his chosen fiancée and bride, making them a sign and token of his love for her. Mosaic law made little provision for the public celebration of a marriage or public recitation of reciprocal marital vows.<sup>79</sup> God, by contrast, connects the formation of marriage to the elaborate public ceremonies that attended the formation of other covenants; a covenant marriage is a public celebration in which the whole community must be involved.<sup>80</sup> Mosaic law gave the man the exclusive right to divorce a woman who was “unclean.”<sup>81</sup> God, by contrast, chooses to

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<sup>77</sup> Exodus 22:16-17, Deuteronomy 22:28-29.

<sup>78</sup> See the scattered passages within and beyond the Torah in Joseph Blenkinsopp, “The Family in Old Testament Israel,” in Leo G. Perdue, et al., *Families in Ancient Israel* (Louisville, KY: Westminster John Knox Press, 1996), 48, 60ff.

<sup>79</sup> See the detailed evidence and arguments for and against marital ceremonies and oaths in ancient Israel discussed in Hugenberger, *Marriage as Covenant*, 168-215.

<sup>80</sup> See Daniel J. Elazar, *Covenant & Commonwealth: From Christian Separation Through the Protestant Reformation* (New Brunswick, N.J.: Transaction Publishers, 1996) and his earlier writings cited and distilled therein.

<sup>81</sup> Deuteronomy 24:1-4.

forgive his “unclean” spouse, and to continue in loving covenant union with her notwithstanding her idolatrous adultery. God does get sad, hurt, and angry, and even files for divorce. But he ultimately waives his divorce rights under the covenant and reconciles with his wife despite her “uncleanness” and betrayal. Mosaic law required a man who was divorced and remarried to support the children of his first wife as much as those of his second.<sup>82</sup> God, by contrast, chooses to remain married to his first wife, if for no other reason than to be there to support their “children and children’s children” more effectively. All these enhancements to the Mosaic law and natural law commended by this divine covenant metaphor of marriage anticipate changes that were made both by the Talmudic Rabbis<sup>83</sup> and the early Church Fathers<sup>84</sup> as they interpreted the biblical texts. The covenant of marriage confirms and conforms to the natural and Mosaic laws for marriage, but it also integrates and elevates them, calling the faithful to live by the letter and spirit of these laws.

94. Sixth, the covenant metaphor makes clear that each individual marital covenant between husband and wife is part and product of a much larger covenantal relationship between God and humanity. Both the husband and the wife must be faithful to this covenant, Malachi made clear. This is a new egalitarian ethic. The earlier Prophets, echoing the Genesis account of humanity’s fall into sin through the failings of Eve, had always focused on Israel, the wayward wife, the adulteress, who had gone after other gods, and who had produced illegitimate children who could not be supported and who would “die out.”<sup>85</sup> That image of the fallen woman came through as late as Proverbs 2:17, a book produced a century before the Book of Malachi:

You will be saved from the loose woman, from the adventuress with her smooth words, who forsakes the companion of her youth, and forgets the covenant of her God (Prov. 2:16-17).

95. Malachi turned the tables and focused on the husband, too, calling him to be faithful to his wife, just as God was faithful to Israel. For a husband to wander after another woman – whether a lover, prostitute, concubine, or second wife -- is now not just an act of adultery, but an act of blasphemy, an insult to the divine example of covenant marriage that God, the metaphorical husband, offers to each husband living under God’s covenant. Husbands are now to follow God’s example of offering “covenant love” (*chesed*) to their wives, remaining faithful to them even in the face of “violence,” trouble, or betrayal. Husbands are also to follow God’s example in living both by the letter and the spirit of the traditional law of divorce. There is still a place for divorce in cases of deep rupture of the relationship. “God hates divorce,” Malachi says, but God does not prohibit it. Instead, God calls husbands not to divorce lightly on

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<sup>82</sup> Deuteronomy 21:15-17.

<sup>83</sup> See David Novak, *Covenantal Rights: A Study in Jewish Political Theology* (Princeton: Princeton University Press, 2000), 133-38; id., *The Jewish Social Contract: A Essay in Political Theology* (Princeton: Princeton University Press, 2005), 56-62.

<sup>84</sup> See Philip L. Reynolds, *Marriage in the Western Church: The Christianization of Marriage During the Patristic and Early Modern Periods* (Leiden: E.J. Brill, 1994).

<sup>85</sup> Hosea 2:4-5; Sirach 23:24-26; Wisdom 3:16-17, 4:16, with discussion in Witte, *The Sins of the Fathers*, 11-16.

grounds of mere “uncleanness” (as Deuteronomy 24 had allowed), nor to divorce harshly “covering their garments with violence” (as Malachi 2 put it). To breach one’s marital covenant lightly or violently, Malachi teaches, is tantamount to breaching one’s covenant with God. For those who do so, God “no longer regards or accepts” their offerings or worship – a sure sign of divine condemnation. In Malachi’s formulation, marriage has now become a part of one’s religious duty, a part of living in covenant community, a part of one’s expression of true love (*chesed*) of God, neighbor, and self.

## 5. New Testament Echoes and Elaborations

96. These same Hebrew Bible lessons about the covenant of marriage recur in the New Testament.<sup>86</sup> Both Jesus and Paul repeated and condoned the created structure of marriage as a “one flesh union” between a man and a woman, designed for the procreation of children and affection and mutual support.<sup>87</sup> Jesus himself participated in the wedding at Cana, performing his first miracle there, which incarnated and dramatized God’s own participation in the formation of a human marriage.<sup>88</sup> Jesus further used the image of a wedding feast repeatedly to illustrate the coming of the Kingdom of God and the union of God and his elect.<sup>89</sup> Both Jesus and Paul confirmed the procreative purpose of marriage, the natural and spiritual good of producing “Godly offspring” who exemplify the true faith and piety that become the Christian life. Both Jesus and Paul further underscored the importance of each parent’s and broader community’s responsibilities to protect, nurture, educate, and catechize the children -- the flipside to the obligation of children to “honor [their] father and mother.” In the New Testament, children are depicted as models of piety, fidelity, and purity, and Jesus reserved a special place in hell for those who harm or mislead them.<sup>90</sup> And both Jesus and later New Testament writers condoned the letter and spirit of a wholesome sexual ethic that believers must adopt to avoid fornication, adultery, concubinage, prostitution, incest, sodomy, and other forms of sexual uncleanness and debauchery.<sup>91</sup> “Shun immorality!” Paul admonished his followers. “Your body is a temple of the Holy Spirit.... Do you not know that he who joins himself to a prostitute become one flesh with her? For, as it is written, ‘The two shall become one flesh’.”<sup>92</sup>

97. While not explicit in condemning polygamy, the New Testament writers effectively treated all multiple marriages and extra-marital sex as forms of adultery. Rebuking the Mosaic law that gave the husband the right of unilateral divorce, Jesus

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<sup>86</sup> Matthew 22:1-14, 25:1-13; 2 Corinthians 11:2; see also Mark 2:19-20; John 3:29; Revelations 19:6-8, 21:9-10.

<sup>87</sup> Matthew 19:5; Mark 10:7-8, I Corinthians 6:16; Ephesians 5:31.

<sup>88</sup> John 2:1-12.

<sup>89</sup> Matthew 22:1-14, 25:1-13.

<sup>90</sup> See sundry verses and interpretations in Marcia Bunge, ed., *The Child in the Bible* (Grand Rapids, MI: Wm. B. Eerdmans, 2009; Patrick M. Brennan, ed., *The Vocation of the Child* (Grand Rapids, MI: Wm B. Eerdmans, 2008).

<sup>91</sup> Romans 1:24-27; 1 Corinthians 5:1; 6:9, 15-20; Ephesians 5:3-4; Colossians 3:5-6; 1 Timothy 2:9-10; 3:2; 1 Thessalonians 4:3-8.

<sup>92</sup> 1 Corinthians 6:15-20.

said: “For your hardness of heart Moses allowed you to divorce your wives, but from the beginning it was not so.” After quoting the creation mandate that the “two shall become one flesh,” Jesus declared: “Everyone who divorces his wife and marries another commits adultery, and he who marries a woman divorced from her husband commits adultery.”<sup>93</sup> Interpreting Christ’s teaching, Paul elaborated in Romans 7:2-3: “Thus a married woman is bound by law to her husband as long as he lives; but if her husband dies she is discharged from the law concerning the husband. Accordingly, she will be called an adulteress if she lives with another man while her husband is alive. But if her husband dies she is free from that law, and if she marries another man she is not an adulteress.” Even so, Paul encouraged widows to remain celibate and unmarried if they could.<sup>94</sup> He further required that each bishop, elder, or deacon refrain from remarriage after the death of his wife, but remain “the husband of one wife” and one who “manages his own household well.”<sup>95</sup> These texts, we will see, inspired some Church Fathers and later Catholic theologians to treat second marriages by the divorced or widowed as a form of “serial polygamy” or “digamy.”

98. The three most famous New Testament passages on marriage – Matthew 19, 1 Corinthians 7 and Ephesians 5 -- echo and amplify both the creation story and covenant ethic of monogamous and mutually sacrificial marriage. The first critical passage in Matthew 19 is Jesus’s response to a Pharisee’s question as to whether it was “lawful for a man to divorce his wife for any cause” as the Mosaic law had allowed.<sup>96</sup> Jesus’s answer:

Have you not read that the one who made them from the beginning made them male and female, and said “For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh?” So they are no longer two, but one flesh. What therefore God has joined together, let not man put asunder (Matt. 19:4-6).

99. This passage is not just about divorce (“putting asunder”), but also about marriage. It is a rebuke of the patriarchal assumption of both the Jewish and the Greco-Roman cultures of Christ’s day that a man can unilaterally divorce his wife for any cause, even if she cannot divorce him. It is also a restatement of the creation ideal of dyadic or monogamous marriage (“two shall become one flesh”) and the covenantal ideal of enduring and mutually sacrificial marriage. But not at all costs: Jesus went on

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<sup>93</sup> Matthew 19:8; Luke 16:18.

<sup>94</sup> 1 Timothy 5:9-16.

<sup>95</sup> 1 Timothy 3:2, 12; Titus 1:6. 1 Timothy 5:9 also applies this to widows who do pastoral work: “Let a widow be enrolled if she is not less than sixty years of age, having been the wife of one husband.” Some inventive interpreters have said that this might be a tacit warrant for polygamy, too. While a bishop, elder, deacon, or widow who serve in church ministry may have only one spouse, the argument goes, a lay person is not so restricted. Most scholarly interpreters, both historically and today, reject this reading. For them, the passage assumes monogamy for all, and then adds that bishops, elders, or deacons may not marry a second time after the death or divorce of their first wife, setting a moral example for other Christians.

<sup>96</sup> Matthew 19:3.

to allow divorce in cases of adultery, and Paul allowed divorce in cases of desertion as well.<sup>97</sup>

100. Paul repeated these themes of monogamous and enduring marriage in 1 Corinthians 7. Paul followed Jesus in saying that marriage is not for everyone, and that some may well be called to live a single, celibate life. He went further in counselling widows to forgo a second marriage if they could.<sup>98</sup> But Paul condoned monogamous marriage for all those who were tempted by sexual sin, saying it was “better to marry than to burn” with lust.<sup>99</sup> And within marriage, he commended that husband and wife alike have equal regard for the rights and needs of the other, including the other’s sexual needs.

[B]ecause of the temptation to immorality, each man should have his own wife, and each woman her own husband. The husband should give to the wife her conjugal rights, and likewise the wife to her husband. For the wife does not rule over her own body, but the husband does; likewise the husband does not rule over his own body, but the wife does. Do not refuse one another except perhaps by agreement for a season, that you may devote yourselves to prayer; but then come together again, lest Satan tempt you with lack of self-control. I say this by way of concession, not of command.<sup>100</sup>

101. This important passage echoed the Hebrew Bible in commending sex to marital couples. But St. Paul now stressed this as an egalitarian ethic. The Mosaic law, for example, had given new husbands an exemption from military service to “be free at home one year to be happy with the wife whom he has married.”<sup>101</sup> “[R]ejoice in the wife of your youth,” the ancient Proverb had said. “May her breasts satisfy you at all times; may you be intoxicated always with her love”<sup>102</sup> – a sensual admonition underscored by the many steamy passages on female anatomy in the Song of Songs. But all these passages in the Hebrew Bible were focused on the husband, and several of these passages were misogynist in their instrumentalist depictions of women. Malachi had already turned the tables on husbands, and pressed for a more egalitarian understanding of the marital covenant. Paul widened this egalitarian trajectory in 1 Corinthians 7. He underscored the mutual rights of both the wife and the husband to sexual bonding, the mutual sacrifice expected for the body of the other, and the mutual need for husband and wife to agree together to abstain from sex, and then only for a season, lest the unused marital bed tempt either of them to adultery.

102. This language of mutuality and equality within a monogamous marriage was even more pronounced in Ephesians 5:21-33. The full passage bears quotation:

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<sup>97</sup> Matthew 19:9; 1 Corinthians 7:15.

<sup>98</sup> 1 Cor. 7:8; 40.

<sup>99</sup> 1 Corinthians 7:9 (KJV).

<sup>100</sup> 1 Corinthians 7:2-7.

<sup>101</sup> Deuteronomy 24:5.

<sup>102</sup> Proverbs 5:18-19.

Be subject to one another out of reverence for Christ. Wives, be subject to your husbands as you are to the Lord. For the husband is the head of the wife just as Christ is the head of the church, the body of which he is the Saviour. Just as the church is subject to Christ, so also wives ought to be, in everything, to their husbands.

Husbands, love your wives, just as Christ loved the church and gave himself up for her, in order to make her holy by cleansing her with the washing of water by the word, so as to present the church to himself in splendor, without a spot or wrinkle or anything of the kind—yes, so that she may be holy and without blemish. In the same way, husbands should love their wives as they do their own bodies. He who loves his wife loves himself. For no one ever hates his own body, but he nourishes and tenderly cares for it, just as Christ does for the church, because we are members of his body. “For this reason a man will leave his father and mother and be joined to his wife, and the two will become one flesh.” This is a great mystery and I am applying it to Christ and the church. Each of you, however, should love his wife as himself, and a wife should respect her husband (NRSV).

103. Marriage, the author of Ephesians 5 emphasized, is a divinely sanctioned union in which God participates and which God exemplifies in his loving sacrificial union with his chosen people and church. Marriage is a monogamous one-flesh union between one man and one woman grounded in the creation order (and created in part, as Ephesians 6 says, for the procreation and nurture of children). Marriage is a union based on mutual consent and respect for the other but even more on a “tender” and “sacrificial love” for the other, modeled on Christ’s sacrificial love for the church. Marriage is fundamentally a communal relationship, being part of a broader body of Jesus on earth and an echo and reflection of God’s mysterious union with his church. And, Ephesians 6 and other passages go on to show how both husbands and wives are bound to live by the letter and spirit of the law of love, fidelity, purity, and sacrifice in their interactions with each other and their children. These are all familiar themes of the marital covenant that had been described more than a half millennium before by the Hebrew prophets.

## 6. Section Summary

104. The Bible provided the Western tradition with a set of core religious teachings about monogamous marriage that complemented the core rational teachings of the Greeks and Romans but also went beyond them. Both the classical and biblical traditions assumed that marriage was a dyadic or monogamous union. Both assumed that marriage was designed for the mutual love, support, and friendship of husband and wife, and the mutual procreation and nurture of children. Both embraced comparable understandings of engagement and marriage, husband and wife, sex and procreation, parent and child, household and community, property and legacy, legitimacy and illegitimacy, death and inheritance, divorce and remarriage. Both maintained comparable lists of sexual sins and crimes: incest, adultery, sodomy, rape, bestiality, mixed marriages, and others. Early Christians saw the substantial overlaps in these separate normative systems of sex, marriage, and family life as confirmation of a common natural law at work in both these ancient legal systems, a natural law written by God onto the hearts and minds of all persons, regardless of their faith. In the

Western tradition from the very start, the natural law was regarded as the foundation of the positive laws of various nations and peoples. It defined the core principles of justice, right order, and human relationships that were inherent in human nature and essential to human survival and flourishing in any social, political, and legal context.

105. Already the Hebrew Bible, however, went beyond these common natural law teachings with its unique images of marriage as a creation of God and as a covenant modeled on the loving bond between God and Israel. Particularly the creational idea of marriage as a “one flesh” union between a man and woman and the covenantal ideals of marriage as an enduring covenant love and forgiveness stressed that marriage was, by divine design, monogamous, procreative, publicly celebrated, mutually binding, and part and product of a much larger set of rights and duties of love toward God, neighbor, and self. These Hebrew Bible teachings provided the starting point for an emerging New Testament ethic that saw marriage as a reflection and expression of the mysterious and sacrificial love between Christ and his church. This New Testament ethic, which would deeply influence Western marriage for the next two millennia, confirmed the natural origins and orientation of marriage. But it rooted marriage in a more primordial order which God had created and which Christ had redeemed. This ethic confirmed the essential unity of the “one flesh union” of male and female in marriage. But it also insisted on the essential mutuality of marriage, the need for both husbands and wives to sacrifice themselves and their bodies for the other, to respect and meet the other’s physical, sexual, material, and moral needs. This ethic confirmed the procreative goods and goals of marriage so celebrated in Hebrew and Greco-Roman traditions. But it now treated children not only as the next generation in the family’s or community’s lineage, but also as the new co-creations of God and humanity, the new “Godly offspring” who were at the heart of the emerging family and kingdom of God. This ethic confirmed the traditional injunctions against impurity, adultery, and other illicit unions that corrupted the blood, commingled the property, and compromised the legacy of the family. But it also now called husbands and wives to flee all fornication and to purify their hearts and minds in loving service of each other, their children, and the community. This ethic allowed a couple to separate and divorce in the event of fundamental betrayal of the essence of marriage. But it also called both parties, especially husbands who had enjoyed the unilateral right to divorce, to reconcile with each other if at all possible in emulation of God’s covenant love for Israel and Christ’s eternal love for his church.

## **C. First Millennium Christian Prohibitions on Polygamy and Defenses of Monogamy**

### **1. Early Christian Prohibitions on Polygamy**

106. While mainstream Judaism took until the early second millennium of the common era to renounce polygamy, Christianity renounced it from the start. Indeed, it was the presence of occasional Jewish polygamists in their midst that first prompted early Christians to speak out against the practice. Jews “have four or five wives” and marry

“as many as they wish,” complained Justin Martyr early on.<sup>103</sup> Toleration of polygamy became one of the differences between Jews and Christians highlighted by the Church Fathers of the first four centuries as they sought to dissociate Christianity from Judaism, and negotiate their distinct identity and practice in the Greco-Roman world.<sup>104</sup>

107. Monogamy has been the norm since the time of creation, the early Church Fathers consistently argued, and polygamy is thus unnatural for humans, even if occasionally practiced. God created one wife for Adam, and God commanded the “two shall become one flesh.” The early third-century Church Father, Tertullian, author of an important early tract, *On Monogamy* (ca. 208 c.e.) put it thus:

The rule of monogamy is neither novel nor strange .... One female did God fashion for the male, culling one rib of his, out of a plurality [of ribs]. But, moreover, in the introductory speech which preceded the work itself, He said, “It is not good for man to be alone; let us make an help-meet for him.” For He would have said “helpers” if He had destined him to have more wives. He added, too, a law concerning the future: “And two shall be made into one flesh” – not three or four ... contaminated by double marriage.<sup>105</sup>

108. Polygamy is a crime that is “second place only to homicide,” Tertullian went on. He based this judgment on the biblical story of Lamech, the first recorded polygamist in the Bible, who was ancestor of the first recorded murderer, Cain. Lamech was himself both a polygamist and a murderer, and the two crimes were connected in Tertullian’s view. The Bible account reads: “Lamech said to his wives: ‘Adah and Zillah, hear my voice; you wives of Lamech, hearken to me when I say: I have slain a man for wounding me, a young man for striking me. If Cain is avenged sevenfold, truly Lamech seventy-seven fold’.”<sup>106</sup> For Tertullian and other early Church Fathers, this was the first clear indication in the Bible that polygamy was often the cause and consequence of many other serious crimes. Indeed, the Bible records that it was the murder, polygamy, and other sins of the earliest people that prompted God to destroy the world with the Flood and start again. With Noah, the earth was restored again “with monogamy as its mother,” said Tertullian. Noah had one wife, his sons had one wife each as well, following the natural order of “two in one flesh.” “Even in the very animals monogamy is recognized, for fear that even beasts should be born of adultery. ‘Out of all the beasts,’ said God, ‘out of all flesh, two shalt thou lead into the ark, that they live with thee, male and female’.... Even unclean birds were not allowed to enter with two females each.” While some animals did revert to polygamy after the Flood, a number of others like nesting birds did not, and humans certainly must not.<sup>107</sup>

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<sup>103</sup> See, e.g., Justin Martyr, *Dialogus cum tryphone Judaeo*, 134, 141, in J.-P. Migne, ed., *Patrologia Graeca*, 160 vols. (Paris: J.-P. Migne, 1857-1866), 6:785-86 [hereafter PG]; see further Brundage, *Law, Sex, and Christian Society*, 65-66; Epstein, *Marriage Laws in the Bible*, 17-19.

<sup>104</sup> See Luke Timothy Johnson, “Law in Early Christianity,” in John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Law: An Introduction* (Cambridge: Cambridge University Press, 2008), 53-70.

<sup>105</sup> Tertullian, *On Monogamy*, c. 4; id., *On Exhortation to Chastity*, c. 5, in J.-P. Migne, ed., *Patrologia Latina*, 221 vols. (Paris: Garniere Fratres, 1844-1864), 2:922, 930 [hereafter “PL”].

<sup>106</sup> Genesis 4:23-24.

<sup>107</sup> Tertullian, *On Monogamy*, c. 4.

109. By the fourth century c.e., this had become the standard patristic argument against polygamy. St. Jerome, the translator of the Bible into Latin, distilled the argument efficiently:

One rib was in the beginning formed into one wife. "They shall be two," He said, "in one flesh." Not three or four; for were there more, there would not be two. Lamech, a man of blood and a homicide, was the first to divide one flesh between two wives. For his fratricide and his polygamy, he paid one and the same penalty, the deluge.<sup>108</sup>

The fourth-century Greek Father, Basil of Caesarea, further described "polygamy as being beastly, and a thing unagreeable to human nature. To us, it appears a greater sin than fornication."<sup>109</sup>

110. These same early Church Fathers explained away the occasional practice of polygamy among the early Hebrew patriarchs and kings as God's temporary dispensations born of natural necessity. When the earth was nearly empty, God allowed some of the ancient patriarchs living under the natural law to practice polygamy in order for them to lawfully fulfill God's mandate to "be fruitful and multiply and fill the earth." These patriarchs were thus spared God's wrath, though they incurred ample domestic discord, distraction, and even violent crime among their wives and children as the inevitable fallout of this unnatural polygamous practice. But now, with the earth filled with people, roughly divided between male and female, God has cancelled this dispensation and repeated his earlier commandment that only "two shall become one flesh" in marriage. Malachi, Christ, and St. Paul said as much in their frequent recurrence to this creation story of "two in one flesh" as the source and sanction of monogamous marriage.<sup>110</sup>

111. These early patristic teachings became standard premises for later philosophical and legal arguments against polygamy in the Western Christian tradition. Monogamy was natural for humans, the standard argument went, polygamy was "unnatural," a "beastly" act. For Christian writers from the fifth to the twelfth centuries, polygamy inevitably brought with it jealousy, strife, hardship, coercion, violence, rape, murder, and sundry other harms to the household and the broader society. Indeed, for these writers, the chaos of the polygamous households of the biblical patriarchs, whose polygamy God temporarily excused, constituted a sort of *res ipsa loquitur* proof that polygamy was a grave sin and crime to be avoided.

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<sup>108</sup> Jerome, *Contra Jovinian*, 1. c. 14, PL 23:233, using translation in Joyce, *Christian Marriage*, 574.

<sup>109</sup> Canons of Basil of Caesarea, in *Early Church Fathers: Nicene and Post-Nicene Fathers, Second Series*, Philip Schaff and Henry Wace, trans. and ed., 14 vols. [1886-1889], repr. ed. (Peabody, Mass.: Hendrickson Publishers, 1994), 14:609 (hereafter "CF 2").

<sup>110</sup> Justin Martyr, *Dialogus*, 141.4, in PG 6:797-800; Tertullian, *On Exhortation to Chastity*, c. 5-7 and id., *On Monogamy*, c. 4-12, in ANF 4:50-72; Augustine, *Contra Faustum Manich.*, bk. 21.47, PL 42:428; id., *De Doctrina Christiana*, bk. 3, c. 12, n. 3, PL 34:72. See further J. Vergier-Boimond, "Bigamie," in R. Naz, ed., *Dictionnaire de droit canonique* (Paris: Librairie Letoutzey et Ané, 1937), 2:853-88; George Hayward Joyce, SJ, *Christian Marriage: An Historical and Doctrinal Study*, 2d enlarged ed. (London: Sheed and Ward, 1948), 570-74.

112. The biblical story of Abraham, a rich, powerful, and pious man was, for the Church Fathers, a good illustration of the harms and dangers of polygamy. Despite God's promise of many children, Abraham and his wife Sarah had produced no children to be heirs. Growing old and concerned that time was running out, Sarah urged Abraham to take her slave maid Hagar, and have children by her following the custom of the day for childless couples. Abraham obliged. Hagar conceived. Newly pregnant, Hagar "looked with contempt" upon Sarah, her barren mistress. Sarah was livid. She dealt harshly with Hagar who fled into the wilderness. An angel enjoined Hagar to return. The angel promised that her child would survive and indeed have many descendents. But the angel also warned that her son "shall be a wild ass of a man, his hand [will be] against every man and every man's hand against him." Ishmael was born and raised in Abraham's household. Abraham embraced him as his first-born son, and circumcised him to signify him as one of God's own. But then, fifteen years later, Abraham and Sarah were miraculously blessed with the birth of their own son Isaac. Sarah grew jealous of the adolescent Ishmael "playing with" – perhaps (sexually) abusing<sup>111</sup> -- her newly weaned son Isaac. She grew concerned about Isaac's claims to Abraham's vast wealth. She ordered Abraham to "cast out this slave woman with her son, for the son of this slave woman will not be heir with my son Isaac." Abraham obliged Sarah, contrary to his own affection for Ishmael, and sent Hagar and Ishmael away into the desert, meagerly supplied with food and water. Their provisions ran out, and only because God sent an angel to rescue them did they survive. Abraham later took other concubines and had children by them, and then as a very old widower took a young wife who produced six more sons. He gave gifts and legacies to all the sons he produced with Sarah, his second wife, and his concubines, but to Ishmael, his beloved first born, he gave nothing. Lust, adultery, concubinage, jealousy, rivalry among wives, favoritism, exploitation of young women, banishment from the home, and disinheritorship -- these are "the wages of polygamy," said the later Church Fathers.<sup>112</sup>

113. Jacob's many troubles with his two wives, Rachel and Leah, provided another sobering illustration of the evils and harms of polygamy. Jacob's uncle Laban had tricked him into marrying his elder daughter, Leah, instead of Rachel whom Jacob loved. Jacob had reluctantly married Leah. Later he married her sister Rachel as well, committing both incest and polygamy at once. After his second marriage, Jacob disliked Leah, but evidently not enough to stop sleeping with her, for she produced a dozen sons for him. Jacob loved and doted on Rachel to the point of fault, but she produced no children. Leah thus lorded her fertility over Rachel. Incensed, Rachel gave Jacob her servant Bilhah as a concubine in the hopes of having at least a surrogate child. Jacob obliged her and produced two sons by Bilhah. Leah countered by giving Jacob her servant Zilpah as a second concubine, with whom Jacob sired yet another son. All the while, Jacob continued to sleep with Rachel, who finally conceived and had a son Joseph. This only escalated the feud between Rachel and Leah and

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<sup>111</sup> "Tzad chet hoof," the Hebrew words for "playing," often have a sexual overtone in the Hebrew Bible. See, e.g., Genesis 17:17, 18:12-15, 19:14, 21:6-9, 26:8, 39:14-17. I am grateful to my colleague, Michael J. Broyde, for this insight.

<sup>112</sup> See Genesis 15-16, 21, 25 and sundry sources used in Witte, *Sins of the Fathers*, ch. 1.

their children and the children of their concubines. And this pathos continued in the next generation. Jacob and Leah's first son, Reuben, had sex with his mother-in-law. Another of their sons, Judah, had sex with his daughter in law whom he mistook as a prostitute. Both of them and their brothers sold their half-brother, Joseph, the son of Jacob and Rachel, into slavery.<sup>113</sup> Here was another illustration of the harms and sins associated with polygamy – fraud, trickery, jealousy, rivalry, intrigue, incest, concubinage, adultery, lust, and then even more polygamy, incest, prostitution, and rape.

114. Even the great and pious King David, so central in the history of the faith, brought grave sin, crime, and harm to his household and his whole kingdom through his polygamy. Though he already had an ample harem of wives and concubines, David lusted after another woman named Bathsheba, who was the wife of Uriah the Hittite. He first seduced and lay with her -- during her period no less. David then arranged to have her husband Uriah killed, and thereafter took Bathsheba as his wife. Other troubles soon followed. David's son by another wife, Amnon, lusted after his half-sister Tamar, the daughter of still a third wife. Tamar befriended and cared for Amnon. But when she refused his sexual advances, Amnon raped Tamar to her great shame and grief. Tamar's full brother Absalom was outraged and eventually had Amnon murdered. This set off a bitter feud within King David's household which eventually spilled into civil war and David's exile. Eventually this warfare led to the infamous death of Absalom as well, much to David's grief. When David, by then restored to his kingdom, later died, still more hardship followed as various of his sons and kin fought to the death for his throne and inheritance.<sup>114</sup> This story again illustrated that polygamy comes with fraud, trickery, jealousy, rivalry, intrigue, concubinage, lust, seduction, adultery, and other impurities, now compounded by rape, incest, murder, and civil war – and this is within the household of one of the greatest leaders in biblical history. For the later Church Fathers and early medieval theologians, these biblical stories of woe were proof enough that polygamy was inherently dangerous and must be avoided.

115. Even so, later Christian theologians argued, narrow equitable exceptions to the prohibition against polygamy must be considered in cases of extreme natural necessity. That was the point of God allowing the ancient patriarchs to practice polygamy to fill the empty earth with legitimate children through polygamy, despite his primeval command of monogamy to Adam and Eve. For later Christian writers, that precedent meant that extreme natural necessity might justify the practice of polygamy in narrow cases, or at least excuse individual parties from criminal and ecclesiastical punishment for practicing it. The most common example cited was when war or pestilence killed most of the men in the community and there was no other way to replenish the population easily. Another example, more hypothetical, was when the church was in danger of having no new generation of saints to fill the pews, and rapid procreation by remaining believers became essential for the preservation of the faith. A third example was when a king (think of Henry VIII of England) lacked a successor, and his kingdom faced massive warfare if there were an interregnum. A number of early and high medieval writers –

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<sup>113</sup> Genesis 27-31, 35:22; 38:12-30.

<sup>114</sup> 2 Samuel 11:1-12:31; 13:34-19:8; 1 Kings 1-2.

including such luminati as Alexander of Hales, Thomas Aquinas, Bonaventura, and John Duns Scotus in the high medieval period -- conceded that polygamy was permissible in such narrow circumstances. Pope Innocent III concurred in this view as well -- but only so long as any such equitable exception was made by papal dispensation, and only so long as each of these cases was isolated to its facts and did not become a precedent for relaxing general criminal laws against polygamy or softening moral denunciations of polygamy as unnatural. This remained the majority Catholic and (with modifications) Protestant position until modern times.<sup>115</sup> I shall return to this point below in discussions of Thomas Aquinas, Martin Luther, and John Calvin.

116. The Church Fathers denounced not only polygamy, but also other sexual relationships that might border on polygamy. They went further than the Roman law of their day in declaring as adulterous all extramarital and multiple sexual relationships. Roman law, for example, forced parties to choose either a concubine or a wife; they could not have both. The early Church Fathers denounced concubinage altogether. Roman law, at least until the time of Constantine, allowed aristocratic men to indulge with impunity in sex with prostitutes, slaves, and various women of the lower classes. The early Church Fathers denounced such fornication altogether. Roman law forced a man to divorce his wife properly before marrying another woman. The Church Fathers denounced the second marriages of divorcees. Roman law encouraged widows and widowers to remarry. The Church Fathers discouraged their remarriage, and some church councils prohibited it. For many Church Fathers, marriage was effectively a one-time relationship with a single spouse; everything else was fornication, adultery, and polygamy.

117. This attitude toward polygamy and other sexual dalliances was also reflected in early church laws that have survived in the time before the Christianization of the Roman Empire -- from the *Didache* (ca. 90-120) to the *Canons of Elvira* (ca. 300-309). In these early canons, faithful monogamous marriage was presupposed; extramarital and multiple sexual alliances and other forms of sexual impurity were to be avoided on pain of ecclesiastical discipline (admonition and censure, bans from the Eucharist, or excommunication). Both concubinage and polygamy (whether simultaneous or seriatim marriage to a second wife) eventually were listed among the many sexual sins to be avoided on pain of ecclesiastical discipline. Late first- and second-century church laws that have survived prohibited the sins of sodomy, adultery, and fornication, and commended chastity, modesty of dress, and separation of the sexes during bathing and education.<sup>116</sup> Local synods and councils in the later second and third centuries began to order bishops, priests, monks, and other leaders of the church to be chaste, heterosexual, and monogamous. By the early fourth century, some councils ordered

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<sup>115</sup> Vergier-Boimond, "Bigamie," 853-88; Joyce, *Christian Marriage*, 574-80.

<sup>116</sup> *The Teaching of the Twelve Apostles, Didache, or The Oldest Church Manual*, Philip Schaff trans. and ed., 3d rev. ed. (New York: Funk & Wagnalls, 1889), 161, 168, 172; *Didascalia Apostolorum*, R. Hugh Connolly, trans. (Oxford: Clarendon Press, 1929), chaps. 2, 3, 4, and 14; Hamilton Hess, *Sexuality and Power: The Emergence of Canon Law at the Synod of Elvira* (Philadelphia: University of Pennsylvania Press, 1972), with translation of the canons by Kenneth Pennington, posted at <http://faculty.cua.edu/pennington/Canon%20Law/ElviraCanons.htm> (visited June 28, 2010).

high clerics to be celibate, and all clerics to avoid prostitution, concubinage, and other sexual activities on pain of losing their clerical offices. These same early church laws enjoined lay Christians to live in peaceful, monogamous, and heterosexual lives and threatened to excommunicate those who betrayed Christian sexual and marital ideals. Lay Christians were prohibited from sexual immorality, with the New Testament's long lists of sexual sins repeated and sometimes supplemented with strong rules against incest, bestiality, polygamy, abortion, infanticide, child prostitution, pedophilia, pederasty, and abuse of wives, children, and servants. Lay Christians were further forbidden from marrying Jews, heretics, or heathens and from marrying parties with whom they had fornicating (save in cases of pregnancy where a single man and single woman could be forced to marry for the sake of their child). And, the church laws discouraged, and sometimes prohibited, remarriage after death or divorce, particularly for women beyond child-bearing years.<sup>117</sup>

118. The fullest church law that has survived from this early period is the collection of canons from the Council of Elvira (ca. 300-309). More than one third of its 81 canons deal with issues of sex, marriage, and family life; five of these deal with issues at the edge of polygamy or polygyny, though none treats it directly.

9. A baptized woman who leaves an adulterous husband who has been baptized, for another man, may not marry him. If she does, she may not receive communion until her former husband dies, unless she is seriously ill.

10. If an unbaptized woman marries another man after being deserted by her husband who was a catechumen, she may still be baptized. This is also true for female catechumens. If a Christian woman marries a man in the knowledge that he deserted his former wife without cause, she may receive communion only at the time of her death.

11. If a female catechumen marries a man in the knowledge that he deserted his former wife without cause, she may not be baptized for five years unless she becomes seriously ill.

38. A baptized Christian who has not rejected the faith nor committed bigamy may baptize a catechumen who is in danger of death, if they are on a sea voyage or if there is no church nearby. If the person survives, he or she shall go to the bishop for the laying on of hands.

61. A man who, after his wife's death, marries her baptized sister may not commune for five years unless illness requires that reconciliation be offered sooner.

119. After the Christianization of the Roman Empire in the early fourth century, the church tended to rely on the criminal prohibitions against polygamy set out in the

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<sup>117</sup> See illustrative provisions in *The Seven Ecumenical Councils*, CF 2, 14:11, 46-51, 70, 73, 79, 81-82, 92, 95, 98, 129, 149, 156, 157, 279, 280, 452, 460-62, 569-70, 604-13. See discussion in David Balch and Carolyn Osiek, *The Family in Early Christianity* (Louisville: Westminster/John Knox Press, 1997); David Balch and Carolyn Osiek, eds., *Early Christian Families in Context: An Interdisciplinary Dialogue* (Grand Rapids: Wm. B. Eerdmans, 2005).

Roman law and its Germanic successors, and simply imposed ecclesiastical discipline on those convicted of this crime. Various church councils and papal orders repeated the admonitions of Constantine and Justinian that “when anyone is married to a lawful wife, he cannot, during the existence of the marriage, contract any others.” When various Frankish and Germanic kings, including the great ninth-century Frankish king Charlemagne, began to experiment with polygamy and concubinage, both popes and church councils repeated the traditional admonitions that polygamy and concubinage are forms of adultery, citing Tertullian and the other early fathers as well as the early laws of both church and state.<sup>118</sup>

## **2. The Goods of Monogamous Marriage: The Example of St. Augustine**

120. While the Church Fathers were rather cryptic in their treatment of polygamy, they became increasingly expansive in their discussions of monogamous marriage. Indeed, the strongest arguments against the evils of polygamy were their arguments about the goods of monogamy. Hundreds of tracts on marriage have survived from the first millennium. The most articulate and enduring defence of monogamous marriage for the Western tradition came from St. Augustine (354-430 c.e.). Augustine peppered many of his tracts with discussion of marriage, but his most important writings on point were: *On the Good of Marriage* (ca. 401),<sup>119</sup> *On Marriage and Concupiscence* (ca. 419),<sup>120</sup> and *On Adulterous Marriages* (419).<sup>121</sup> Augustine’s defence of the natural and spiritual forms and functions of marriage and of the private and public goods and benefits that marriage offered was one of the most famous and elaborate Christian statements on marriage in the first millennium. Catholics, Protestants, and Enlightenment figures alike took his formulations as axiomatic, and his view saturated later discussions of canon law, civil law, and common law alike.

121. Summarizing both classical and Christian commonplaces of his day, Augustine regarded dyadic marriage as a God-given “natural society” created for the procreation of children and the protection of parties from sexual sin and governed by “a secret law of nature.” He called marriage the most “intimate and sincere” form of “human fellowship,” “an order of charity,” “a faithful friendship,” “a friendly and true union,” “a fellowship of faith,” a “bond of love” that fostered “domestic peace” and “household bliss” if properly

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<sup>118</sup> CJ 5.26; Nov. 89. 12.5. See the pronouncements against polygamy by various councils and popes from the fifth to the tenth centuries collected in Gratian’s *Decretum*, c. 28.2, 31.1, 32.1, 2, 7, 34.4, in Emil Friedberg, *Corpus Iuris Canonici* (Leipzig: Bernard Tauchnitz, 1879); Burchard of Worms, *Decretum*, 9:15-20, in PL 140: 574, 645, 965 and in modern edition, Karl Joseph von Hefele, *Histoire des conciles d’après les documents originaux* (Paris: Letouzey, 1907). vol. 2, and sample documents in Joyce, *Christian Marriage*, appendix, 609ff. See discussion in Vergier-Biomond, “Bigamie,” 860-71.

<sup>119</sup> “Augustine, *On the Good of Marriage*, in *Early Church Fathers: Nicene and Post-Nicene Fathers*, First Series, Philip Schaff, trans. and ed., 14 vols. [1886-1889], repr. ed. (Peabody, Mass.: Hendrickson Publishers, 1994) [hereafter “CF 1”], 3:397-413, and in *St. Augustine: Treatises on Marriage and Other Subjects*, trans. Charles T. Wilcox, ed. Roy J. Deferrari (Washington, DC: Catholic University of America Press, 1969), 9-54 [hereafter GM].

<sup>120</sup> Augustine, *On Marriage and Concupiscence*, in CF 1, 5:258-309 [hereafter MC].

<sup>121</sup> In *St. Augustine, Treatises on Marriage*, 61-134 [hereafter AM].

nurtured and maintained. He insisted that married couples continue to “remain permanently joined” in body, mind, and property, abstain from sexual intercourse only by mutual consent “for the sake of the Lord,” avoid unnecessary separation from bed and board for fear of temptation, and forgo the right to easy no-fault divorce available at Mosaic and Roman law. Like Aristotle, the Stoics, and the Roman jurists, Augustine called marriage “the first natural bond of human society,” “the first step in the organization of men,” the “first school” of justice, virtue, and order – a veritable “seedbed of the republic.” When marriage is properly formed by “a publicly attested contract,” Augustine wrote, it provides a disciplined and “orderly lifestyle” that anticipates and “ministers to the ordered agreement concerning command and agreement among citizens.”<sup>122</sup>

122. Marriage is a good institution, Augustine continued, even if celibacy might be better for those who have the gift of continence. Marriage is not just a lesser form of sin than fornication. That would be like calling health a lesser evil than sickness. Rather, “marriage and continence are two goods, whereof the second is better,” just as “health and immortality are two goods, whereof the second is better.” God created marriage, before the fall into sin, and enjoined men and women to join together “in one flesh” and to “be fruitful and multiply.” Those original goods and goals of marriage continued after the fall into sin. “When a woman is lawfully united to her husband, in accordance with the true constitution of marriage, and they remain faithful to what is due, and the flesh is kept free from the sin of adultery and children are lawfully conceived, it is actually the very same marriage which God instituted at the beginning.” As a creation and gift of God, marriage is and remains a “great and natural good.”<sup>123</sup>

123. Marriage, in fact, offers three interrelated goods (*bona*), Augustine wrote in an effort to distill and integrate earlier classical and patristic teachings. These goods are the procreation and nurture of children (*proles*), the faithfulness of spouses toward each other (*fides*), and the sacramental stability of the marital household within the City of God (*sacramentum*). The first two goods of children and fidelity are taught by the natural law and known to all persons. The third good of sacrament is known principally through Scripture, and is a distinct (though not necessarily exclusive) quality of a Christian marriage.<sup>124</sup> These three goods of marriage are mutually reinforcing, Augustine insisted, and together help create an integrated understanding of marriage.

#### **a. The Good of Children**

124. The first good of marriage is children (*proles*). The procreation of children is a perennial and natural duty of humankind, Augustine maintained. Marriage is the proper institution for discharging that duty. Each generation must produce children for the

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<sup>122</sup> Augustine, *The City of God Against the Pagans*, R.W. Dyson, trans. and ed. (Cambridge/New York: Cambridge University Press, 1998), XIV.10, 22, XV.16, XIX.14 [hereafter CG]; GM, 1-6, 9, 20; MC, I.5-9; *Sermon 1: On the Agreement of the Evangelists Matthew and Luke in the Generations of the Lord*, 20-29, in CF 1, VI: 252-56; AM, I.19

<sup>123</sup> GM, 8-12; MC, I.23-24, II.13, 54; AM I.25.

<sup>124</sup> GM, 32; MC, I.11, 19.

human race to survive, and for the City of God to grow. In the ancient world, when the earth was nearly empty, this duty of procreation bound everyone. Indeed, God even allowed some of the ancient patriarchs living under the natural law to practice polygamy in order for them to lawfully fulfill God's mandate to "be fruitful and multiply." But in this new dispensation after Christ, with the earth filled with people, roughly equally divided between male and female, polygamy is both "unnatural" and "unjust." Indeed, marriage and procreation have become optional for those who might be called the virginal life. Marriage and childrearing remain good vocations to pursue, even though it is better for those who are widowed or naturally continent to pursue higher spiritual goods without domestic distractions.<sup>125</sup>

125. Before the fall into sin, Augustine continued, humans could procreate innocently. But, since the fall into sin, human sexuality, like all of human nature, has been corrupted. Lust pervades every human act, and the libido has become unruly, "animalistic," and indiscriminate in the objects of its desire. God provides marriage to school fallen desire, to pardon sexual sinfulness, and to direct the natural but corrupted passions of a man and a woman to the good of procreation. Indeed, once they become parents, "the lust of their flesh is repressed, ... being tempered by parental affection. When they become a father and mother, husband and wife unite more closely." Their lust for others is blunted by the "glowing pleasure" of rearing their own children together. Children are thus a marital good in two complementary ways. They are the good fruit born of what could otherwise be the sexual sins of their parents. And the very presence of children in the household tempers the lust of their parents. Marriage channels the procreation of children. Children foster the preservation of marriage.<sup>126</sup>

126. Children are, in this sense, a "natural good of marriage," a "palpable blessing of nature," said Augustine, that complement the two other goods of fidelity and sacrament. This first good of marriage is evident even among some animals that are governed by the natural law. Sundry animals and birds "preserve a certain kind of federation of pairs, and a social combination of skill" in building their nests, protecting their infants, rearing their offspring, and driving away rival adults. Similarly, among human beings governed by the natural law, "males and females are united together as associates for procreation, and consequently do not defraud each other" but develop "a natural abhorrence for a fraudulent companion."<sup>127</sup> This argument about the mutual reinforcement of the bonds of husband and wife and parent and child both confirmed and elaborated the concept of kin altruism developed by Aristotle.

### **b. *The Good of Fidelity***

127. Marriage offers not only the good of children, but also the good of fidelity between husband and wife. While children help foster fidelity in marriage, fidelity is also

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<sup>125</sup> GM, 3, 9; CG, XXII.1, XIV.23; MC, I.5, 14; AM, II.12. On the non-marital life, see Augustine, *Of Continence; Of Holy Virginity, Of the Good of Widowhood; Of the Work of Monks*, in CF 1, III:379-93, 417-54, 503-24.

<sup>126</sup> GM, 3, 9 (my translation); CG, XXII.1, XIV.23; MC, I.5, II.14.

<sup>127</sup> MC, I.5.

a good of marriage in its own right, and a sufficient natural good if the couple is not blessed with children.

[Marriage] does not seem to me to be a good solely because of the procreation of children, but also because of the natural companionship between the two sexes. Otherwise, we could not speak of marriage in the case of old people, especially if they had either lost their children or had begotten none at all. But, in a good marriage, although one of many years, even if the ardor of youth has cooled between man and woman, the order of charity still flourishes between husband and wife.... [T]here is observed that promise of respect and of services due to each other by either sex, even though both members weaken in health and become almost corpse-like, the chastity of souls rightly joined together continues the purer, the more it has been proved, and the more secure, the more it has been calmed.<sup>128</sup>

128. In expounding this second good of fidelity, Augustine focused especially on the need for sexual fidelity between husband and wife. Glossing St. Paul's discussions of the "conjugal debt" in I Corinthians 7, he emphasized that marriage gives husband and wife an equal power over the other's body, an equal right to demand that the other spouse avoid adultery, and an equal claim to the "service, in a certain measure, of sustaining each other's weakness, for the avoidance of illicit intercourse." Marriage is "a contract of sexual fidelity," said Augustine, and couples could and should maintain active sexual lives for "the larger good of continence," even if procreation is not or is no longer possible. To be sure, it is best for couples to avoid sex altogether if they can no longer procreate. But it is better to remain sexually active than to court the temptations of lust and adultery. Sex within marriage is, at most, a venial sin; adultery in betrayal of marriage is a mortal sin. Marriage is furthermore a "hard knot" that should not be "unloosed", even if the couple prove barren or if one spouse strays into adultery or loses sexual or physical capacity. The marital good of "fidelity" calls for acceptance of barrenness, forgiveness of fault, and reconciliation to the inevitable fragility and erosion of age.<sup>129</sup>

### ***c. The Good of Sacramental Stability***

129. Among Christians, marriage offers not only the goods of procreation and fidelity, but also the good of a "sacrament." For Christians, marriage is not only a natural union of couples into "one flesh" for the good of "being fruitful and multiplying," as Genesis 1 and 2 provided. Nor is it only a "contract of sexual fidelity," that should not be "rent asunder," except in the case of adultery or desertion, as Matthew 19 and 1 Corinthians 7 taught. For Christians, marriage is also a reflection and expression of the enduring sacrificial love that Christ has for his church, described in Ephesians 5. "The apostle commands, 'Husbands, love your wives even as Christ also loved the Church,'" Augustine wrote, quoting Ephesians 5. "Of this bond, the essence of the sacrament

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<sup>128</sup> GM, 3 (Deferrari translation).

<sup>129</sup> Ibid., 6-11; MC, I.15-18; AM, I.2, II.12-17.

(*res sacramenti*) is undoubtedly that the man and the woman who are joined together in marriage, should remain inseparable as long as they live.”<sup>130</sup>

130. Going beyond the marital metaphors of Jesus and St. Paul, Augustine treated the mysterious union of Christ the bridegroom with the church his bride as the very paradigm of marriage, the marriage *par excellence*, which every human marriage should seek to imitate, particularly the marriage of Christians. He treated each marriage between Christian believers as a miniature version of this great divine marriage, a visible expression of this invisible mystery, this *sacramentum*. “It was said in Paradise before sin: ‘A man shall leave his father and mother and be joined to his wife and they will be two in one flesh,’ which the Apostle says is a ‘great sacrament in Christ and in the Church.’ Therefore what is great in Christ and in the Church is very small in individual husbands and wives, but is nevertheless a sacrament of an inseparable union.”<sup>131</sup>

131. As a sacrament, marriage confirms the marital goods that natural law provides, but also curbs the sexual sins that nature permits. The natural law permits any fit and able adults to join together for the good of procreation. The sacrament of marriage, however, as a symbol of Christ’s union with his faithful church, commands that only baptized, faithful Christians join together in marriage within the City of God, an injunction against interreligious marriage already anticipated in the covenantal laws of ancient Israel. Similarly, the natural law of Paradise taught that the “two shall become one flesh.” Yet many ancient patriarchs, operating under the natural law, practiced polygamy for the sake of producing many children and heirs. So do many higher animals still today who gather in large herds of one male with several females and their offspring. The sacrament of marriage, as a symbol of Christ’s union with his one true church, calls Christians to return to the primeval natural law of monogamy and to spurn polygamy, concubinage, and sexual unions with anyone other than one’s spouse. Even if polygamy might be justified for the sake of achieving the first good of children, and even if one’s wife might allow a second wife to enter the marital bed without taking it as a violation of the second good of fidelity (as Sarah did with Hagar), polygamy destroys the third good of sacramental stability. Finally, the natural law teaches parents to remain faithful to each other for the sake of their children who need them, but allows for separation when there are no children. The ancient patriarchs, operating under both the natural law and the Mosaic law, thus practiced divorce and remarriage, particularly when their wives proved barren. So do many animals today that drive out those mates who cannot produce offspring. The sacrament of marriage, in imitation of God’s eternal faithfulness to his elect, calls Christians to remain faithful to their spouses to the end, regardless of their procreative capacity. “For this is what is preserved ‘in Christ and in the Church’: that they should live together for eternity with no divorce. The observance of this sacrament is so great ... in the Church of Christ and in each and every married believer, for they are without doubt Christ’s members, that even when women marry or

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<sup>130</sup> MC, I.11-12 (my translation).

<sup>131</sup> Ibid., I.23, using translation in Reynolds, *Marriage in the Western Church*, 292. See also Augustine, *On the Gospel of St. John*, Tract 44, 9.2, in CF 1, 7:245.

men take wives ‘for the sake of procreating children’, a man is not allowed to put away a barren wife in order to take another, fruitful one.”<sup>132</sup>

132. As a sacrament, furthermore, Christian marriage confirms the good of fidelity in the marriage contract, but also goes beyond it. The deeper quality of a sacramental marriage, Augustine argued, lay in that it is also a “covenant” (*foedus*), a “bond” (*vinculum*), or a “bond of covenant” (*vinculum foederis*). Once contracted between Christians, he wrote, “marriage bears a kind of sacred bond,” like the eternal bond between Christ and his church. Even if the Christian couple does not produce children, even if they separate and divorce, even if one of them purports to marry another, “there remains between the partners as long as they live some conjugal thing [*quiddam coniugale*] that neither separation nor remarriage can remove.” “So enduring, in fact, are the rights of marriage between those [Christians] who have contracted them, that they remain husband and wife” even if they divorce and marry others. The sacrament of marriage ends only when one spouse dies.<sup>133</sup>

133. Procreation, fidelity, and sacrament: These were the three goods of marriage, in Augustine’s view. They were why the institution of marriage was good. They were why participation in marriage was good. They were the goods and goals that a person could hope and expect to realize upon marrying. Augustine usually listed the goods of marriage by giving first place to the good of procreation and childrearing in the Christian context. At least twice, he underscored this priority by writing that “the procreation of children is itself the primary, natural, legitimate purpose of marriage.”<sup>134</sup> But in sometimes calling procreation the primary good of marriage, he did not regard the others as secondary. He sometimes changed the order of marital goods to “fidelity, procreation, and sacrament”<sup>135</sup> -- passages that inspired later canonists and theologians to develop theories of “marital affection” as the primary marital good.<sup>136</sup> Even when he listed procreation as the first marital good, Augustine made clear that spousal fidelity and sacramental stability were essential for marriage and sufficient when married couples were childless or their children had left the household.<sup>137</sup> In doing so, he followed the classical Greek and Roman authors in highlighting some of the benefits of marriage to the couple themselves.

### 3. Section Summary

134. From the start, Christian writers and church councils opposed polygamy as a form of adultery that violated the primeval command, oft repeated in the Bible, that

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<sup>132</sup> GM, 17, 21; AM, I.21; *Sermon 1: On the Agreement of the Evangelists*, 23-26; MC, I.10-11; Augustine, *De Genesi ad Litteram*, IX.7, in PL 34:397.

<sup>133</sup> MC, I.11; GM, 6, 7, 15, 17, 32; AM, I.12, II.9-11.

<sup>134</sup> AM, II.12.

<sup>135</sup> Augustine, *De Genesi ad Litteram*, IX.7.

<sup>136</sup> Jean Leclercq, *Monks on Marriage: A Twelfth Century View* (New York: Seabury Press, 1982), 11–38, 71–81; John T. Noonan, Jr., “Marital Affection Among the Canonists,” *Studia Gratiana* 14 (1967): 480–499.

<sup>137</sup> GM, 12-13.

“two,” not three or four, join together in “one flesh.” The church’s theologians and philosophers did not offer an elaborate theory of the wrongs of polygamy. For them, polygamy was an obvious breach of the natural structure of marriage in which each spouse’s love, friendship, and support of the other was equal and undivided. They were content to point to the biblical stories of the grim plight of the ancient patriarchs who dared to practice polygamy. Almost invariably in these stories, polygamy was associated with, if not the cause of, sundry other sins and crimes -- fraud, trickery, intrigue, lust, seduction, coercion, rape, incest, adultery, murder, exploitation and coercion of young women, jealousy and rivalry among wives and their children, dissipation of family wealth and inequality of treatment and support, banishment and disinheritance of disfavored children and more. These are the inevitable risks of polygamy, early Christian writers concluded; even the most pious and upright biblical patriarchs incurred these costs when they experimented with this unnatural institution. While in rare cases of extreme necessity polygamy might be equitably allowed, polygamy is simply too sinful and dangerous to be indulged. Church canons early on included polygamy as a sin to be avoided on pain of spiritual discipline.

135. Monogamous marriage, by contrast, offers many goods to the couple and the community. Monogamy was not free from its own discord and distractions, which could make the single celibate life even more attractive for those who were naturally continent. But monogamous marriage was far better for individuals and societies than a life of polygamy or promiscuity. Augustine of Hippo offered the most elaborate theory of the goods of marriage. He portrayed marriage as having three complementary goods – children, fidelity, and sacramental stability. Each of these goods of marriage could be understood through rational or religious arguments. What ultimately made any marriage a Christian marriage, however, was the good of the sacrament. And this good could be sufficient to preserve a Christian marriage, even if the two other goods were lacking.

136. For the first four centuries of the common era, the church’s teachings on monogamy and against polygamy paralleled those of Greek philosophy and Roman law. But the Christian church and Roman state maintained separate and sometimes rival normative systems. After the Christianization of the Roman Empire in the fourth and fifth centuries c.e., these normative systems slowly converged and strengthened each other. Christian theology provided a more elaborate theory of monogamous marriage than prevailing Greco-Roman philosophy had offered. Roman law provided a more comprehensive law against polygamy than prevailing church canons had offered. By the fifth century, Western theology and law were united in prescribing monogamy and proscribing polygamy.

137. The church and its theologians continued to press beyond the Christianized Roman law in rejecting other sexual alliances that were tantamount to or could lead to polygamy. They were particularly hostile to married men maintaining concubines or visiting lovers or prostitutes, or single men fornicating with multiple women at once. The church sometimes also prohibited remarriage to divorcees, and discouraged remarriage of widows and widowers – though these prohibitions were much harder to enforce. Some writers called these sequential remarriages a form of “serial polygamy” or “digamy” a term that would become commonplace at medieval canon law.

## D. Medieval Theories and Laws of Monogamy and Prohibitions Against Polygamy

### 1. Thomas Aquinas

138. A major watershed in the development of Western marriage law and theology Catholic marital teachings came during the Papal Revolution of 1075-1300. This was the era when the clergy, led by Pope Gregory VII (1073-1085), threw off their royal and civil rulers and established the church as an autonomous legal and political corporation within Western Christendom. The church's revolutionary rise to power was part and product of an enormous transformation of Western society, politics, and culture. The West was further transformed through the rediscovery and study of the ancient texts of Plato, Aristotle, Stoic philosophy, Roman law, and Patristic theology. The first modern Western universities were established with their core faculties of law, theology, and medicine.<sup>138</sup>

139. It was in this revolutionary context that the Catholic Church developed a systematic law and theology of marriage – drawing in part on the Greek philosophers (especially Aristotle), the early Church Fathers (especially Augustine), and Roman law (especially after Constantine). From the twelfth century forward, the church's law, called the canon law, was systematized, first in Gratian's *Decretum* (ca. 1140),<sup>139</sup> then in Gregory's *Decretals* (1234)<sup>140</sup> and in a welter of later papal and conciliar laws later compiled in the *Corpus Iuris Canonici* (ca. 1586). In the medieval church, the canon law was no longer just a set of spiritual guidelines for church members, as it had been in the first millennium. The medieval canon law was a fully operating legal system of public, private, penal, and procedural laws, enforced by a complex hierarchy of church courts and officials throughout the West. On some subjects, the church courts shared jurisdiction with secular authorities; on other subjects, the church claimed exclusive jurisdiction. Marriage fell within the exclusive jurisdiction of the medieval church, and the canon law of marriage was the principal law governing Western sex, marriage, and family law from the twelfth to the sixteenth centuries -- in civil law and common law countries alike.

140. This is important for understanding the roots of monogamy and of the criminalization of polygamy in the common law tradition. While Anglo-Saxon and Norman laws did mandate monogamy and punish polygamy, as we will see in the last section, from the twelfth to the sixteenth century, the common law depended on and enforced the canon law of marriage and its criminal prohibitions on polygamy and other sexual crimes. It was only after the sixteenth-century Protestant Reformation that the English Crown and Parliament first acquired jurisdiction over marriage and sexuality,

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<sup>138</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983).

<sup>139</sup> Gratian, *Decretum*, causae 27-36, reprinted in Emil Friedberg, ed., *Corpus Iuris Canonici* (Leipzig: Bernard Tauchnitz, 1879), Part I [hereafter *Decretum*].

<sup>140</sup> *Decretales Gregorii*, bk. 5, tit. 1-19, in Friedberg, ed., *Corpus Iuris Canonici*, Part II [hereafter *Decretals*].

and passed their first statutes on point, including the first common law prohibition against polygamy issued by James I in 1604. Yet for the next 250 years, England retained its ecclesiastical courts to help judge cases of polygamy, and the English common lawyers maintained many medieval canon law teachings, including those on monogamy and polygamy. Not until the Matrimonial Causes Act of 1857, did the Parliament of England formally remove the canon law as an independent source of law in England and close the ecclesiastical courts in favor of exclusively secular courts. By then, the canon law lore on monogamous marriage and polygamous crimes had soaked deeply into the English common law – and its extension overseas to North America and elsewhere in the commonwealth.

141. Not only the church’s canon law, but also the church’s theology of marriage was systematized, notably by Peter Lombard (ca. 1100-1160)<sup>141</sup> and Thomas Aquinas (1225-1274),<sup>142</sup> then in the scores of thick glosses and commentaries on their massive texts published in subsequent centuries. Particularly the work of the Dominican friar, Thomas Aquinas, was of enduring importance for Catholic marriage theory, and for broader Western marriage theory as well. Particularly important, for our purposes, was Aquinas’s elaborate arguments from natural law and natural justice in support of monogamous marriage and against polygamy – arguments that became a mainstay in the Western tradition until the twentieth century. Aquinas anticipated insights about human infant dependency and reproductive strategies through pair bonding that the common lawyers, Enlightenment philosophers, and modern evolutionary scientists alike all took for granted.

142. In what follows, I first distill Thomas Aquinas’ expansion and revision of Augustine’s theory of the goods of monogamous marriage, and then his arguments from natural law and natural justice in favor of monogamous marriage and against polygamy and other sexual vices. I then show the legal application of these views of monogamy and polygamy in the medieval canon law, and the development of the impediment of “precontract” or “constructive bigamy.”

### **a. Aquinas on the Goods of Dyadic Marriage**

143. In reconstructing Augustine’s theory of marital goods, Aquinas began by meeting various objections that Augustine’s list of faith (*fides*), children (*proles*), and

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<sup>141</sup> *Sententiae in IV libris distinctae*, bk. 4, dist. 26-42 in PL 192.

<sup>142</sup> Thomas Aquinas, *Scriptum super Libros Sententiarum Petri Lombardiensis*, in id., *Opera Omnia sancti Thomae Aquinatis Doctoris Angelici*, 13 vols. (Rome: C. de Propagandae Fidei, 1882), vol. 7, pt. 2 [hereinafter Aquinas, *Scriptum*], partly translated in Thomas Aquinas, *On Love and Charity: Readings from the Commentary on the Sentences of Peter Lombard*, trans. Peter A. Kwasniewski, Thomas Bolin, and Joseph Bolin (Washington, DC: Catholic University Press of America, 2009). Aquinas’s commentary on Lombard’s discussion of marriage is reprinted almost verbatim in the *Supplement* to id., *Summa Theologica: Complete English Edition in Five Volumes*, trans. Fathers of the English Dominican Province, 5 vols. (New York: Benziger Bros., 1947-48), vol. 5 [hereafter S.T. Supp.]. See also Thomas Aquinas, *Summa Contra Gentiles*, trans. Vernon J. Bourke, 4 vols. (Notre Dame: University of Notre Dame Press, 1975) [hereafter Aquinas, SCG].

sacramentality (*sacramentum*)<sup>143</sup> might be "insufficiently enumerated." After all, critics of the day argued, Augustine had not taken into sufficient account Aristotle's insights that marriage is not only for procreation but also for spouses to enjoy a common life, a common stock, and companionship. Maybe love, charity, and sacrifice between spouses would be a better understanding of a "marital good" than *fides*. Maybe *proles* should be considered a derivative good, since children are not essential to marriage, and many married parties do not have them. Maybe *sacramentum* is not really a marital good at all, since Augustine is referring to the indissolubility of marriage, and indissolubility does not seem to be an essential feature of a sacrament. Maybe marriage should also have a good of justice, since it involves the discharge of marital rights and conjugal debts. Maybe the goods of marriage would be better if they were listed as those qualities of marriage that are "useful" rather than "virtuous."<sup>144</sup>

144. Aquinas defended Augustine's three goods as a sufficient and complete account: "The goods which justify marriage belong to the nature of marriage, which consequently needs them, not as extrinsic causes of its rectitude, but as causing in it that rectitude which belong to it by nature." "From the very fact that marriage is intended as an office or as a remedy [from sexual sin] it has the aspect of something useful and right; nevertheless both aspects belong to it from the fact that it has these goods by which it fulfills the office and affords a remedy to concupiscence."<sup>145</sup> "Matrimony is instituted both as an office of nature and as a sacrament of the church. As an office of nature it is directed by two things, like every other virtuous act. One of these is required on the part of the agent and is the intention of the due end, and thus the offspring (*proles*) is accounted a good of marriage; the other is required on the part of the act, which is good generically through being about a due matter; and thus we have faith (*fides*), where a man has intercourse with his wife and with no other woman. Besides this it has a certain goodness as a sacrament, and this is signified by the word sacrament (*sacramentum*)."<sup>146</sup>

145. Aquinas elaborated these three Augustinian goods of marriage, however, in a way that both integrated them more fully than Augustine had done and resolved more clearly the question of their priority. He argued effectively that marriage is a three-dimensional institution and that each of the marital goods anchors one of these three dimensions.

146. If marriage is viewed as a natural institution, Aquinas argued, procreation (*proles*) is the primary good. Building on both Augustine and Aristotle, Aquinas argued that men and women are naturally inclined to come together for the sake of having children, and that nature teaches the licit means for doing so is through a voluntary act of enduring marriage, rather than just a random act of sexual coupling. For procreation means more than just conceiving children. It also means rearing and educating them for

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<sup>143</sup> Following Peter Lombard, Thomas generally renders the list in this order. See Aquinas, *Scriptum*, IV.31, q. 1; Aquinas, ST Supp., q. 49, art. 2.

<sup>144</sup> Aquinas, *Scriptum*, IV.31.2, q. 1; Aquinas, ST Supp., q. 49, art. 2, obj. 1-7.

<sup>145</sup> Aquinas, ST Supp., q. 49, art. 1; Aquinas, *Scriptum*, IV.26.1, 2.

<sup>146</sup> Aquinas, ST Supp., q. 49, art. 2.

independent living. The good of procreation cannot be achieved in this fuller sense simply through the licit union of husband and wife in sexual intercourse. It also requires maintenance of a faithful, stable, and permanent union of husband and wife in a marital household. “[T]he natural order demands that father and mother in the human species remain together until the end of life” – in no small part because of their children who need their support for many years because of their natural fragility and dependence, and parents in turn will need their children’s help when they grow old, fragile, and senile. In this natural sense, the primary good of marriage is procreation; the secondary goods are faith and sacramental stability.<sup>147</sup>

147. If marriage is viewed as a contractual association, faith (*fides*) is the primary good. Marital faith is not a spiritual faith, but a faith of justice, Aquinas argued. It means keeping faith, being faithful, holding faithfully to one’s promises made in the contract of marriage. Marital faith requires, as Augustine had said, forgoing sexual contact with others and honoring the conjugal debt to one’s spouse. But marital faith also involves, as Aristotle and the Stoics had said, the commitment to be indissolubly united with one’s spouse in body and mind, to be the “greatest of friends,” to be willing to share fully and equally in the person, property, lineage, and reputation of one’s spouse – indeed, in the “whole life” of one’s spouse. To be faithful is to be and to bear with each other in youth and in old age, in sickness and in health, in prosperity and adversity. It is to be “solicitous” for one’s marital household and common possessions and to develop “solid affection” for one’s relatives and families. Marital faith, in this richer understanding, is a good in itself, Aquinas insisted. It certainly conduces to the natural good of procreation, since the father and mother who keep faith together also provide constant nourishment, protection, care, and education for their children; their children, in turn, provide support for them in their old age. But the good of fidelity is not necessarily tied to the good of children. And the physical expression of fidelity need not necessarily be directed toward or tied to the good of procreation. Indeed, married couples may and should enjoy sexual intercourse with each other as one form of marital affection and faithfulness even if procreation has become impossible because of their age or physical capacity. In this contractual sense, the primary good of marriage is faith (*fides*); the secondary goods are sacrament and procreation.<sup>148</sup>

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<sup>147</sup> Aquinas, Comm. Sent. IV.26.1, 33.1; S.T. III, q. 49, art. 3; Aquinas, SCG, III-II, 123-124.

<sup>148</sup> Aquinas, Comm. Sent. IV.26.2; 27.1; 31.1; 33.1; 41.1; Aquinas, ST Supp., qq. 41,49.5-6, 64; Aquinas, SCG, III-II, 123.3,4, 8; 124.4-5; 125.6; 126.1-6. See further John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 143-48. While Thomas spoke explicitly of ways in which *proles* and *sacramentum* could be viewed as primary and the other goods secondary, he never, so far as I have found, spoke explicitly of *fides* as the primary good. But this is a natural implication of his argument about the faith of the marriage contract, and the friendship of the marital institution. Thomas comes close to saying this in his argument that the marriage of Mary and Joseph was “perfect” even though not consummated. S.T. Supp., q. 29, art. 2: “Marriage or wedlock is said to be true by reason of its attaining its perfection. Now perfection of anything is two-fold. The perfection of a thing consists in its very form from which it receives its species; while the second perfection of a thing consists in its operation, by which in some way a thing attains its end. Now the form of matrimony consists in a certain inseparable union of souls, by which husband and wife are pledged by a bond of mutual affection that cannot be sundered. And the end of marriage is the begetting and upbringing of children, the first of which is attained by conjugal intercourse; the second by the other duties of husband and wife, by which they help one another in rearing their offspring. Thus we may say, as to

148. Finally, if marriage is viewed as a spiritual institution, *sacramentum* is the primary good, Aquinas argued. “[S]acrament is in every way the most important of the three marriage goods, since it belongs to marriage considered as a sacrament of grace; while the other two belong to it as an office of nature; and a perfection of grace is more excellent than a perfection of nature.”<sup>149</sup> Distilling the views of Peter Lombard and other earlier theologians, Aquinas regarded a marriage between two baptized Christians as a sacrament, on the order of baptism and the Eucharist. Marriage was an instrument of sanctification, a channel of grace, that caused God’s gracious gifts and blessings to be poured out upon those who put no obstacle in their way. Marriage sanctified the Christian couple by allowing them to comply with God’s law for marriage, and by providing them with an ideal model of marriage in Christ the bridegroom who took the church as his bride and accorded it his highest love, devotion, and sacrifice, even to the point of death. It sanctified their children by welcoming them as legitimate members of church, state, and society, and providing them with a chrysalis of nurture, support, and education that sustained them until they reached adulthood. And marriage sanctified the Christian community by enlarging the church and by educating the next generation of children as people of God and parishioners of the church. The natural procreative functions and fruits of marriage, and the faithful love and friendship forged between husband and wife were thus given spiritual significance when performed by Christians within the extended Christian church.

149. Once this channel of sacramental grace was properly opened, it could no longer be closed, said Aquinas. A marriage between baptized Christians, formed in compliance with natural, contractual, and spiritual laws, was an indissoluble union, a permanently open channel of grace. God would not close this channel of grace, given his faithfulness to his church. Neither spouse could close this channel, no matter how faithless to the other. Because Christ’s gracious love for his church is indissoluble, medieval writers argued, a Christian husband’s love for his wife must remain indissoluble as well. Because the church is a permanent embodiment of Christ on earth, a Christian wife must remain permanently joined to the body of her husband, part of one being, one flesh, with him. For as a sacrament, a Christian marriage not only reflected and symbolized Christ’s marriage with his church, it actually participated in this eternal mystery of the incarnation, taking on its essential qualities. The mysterious and enduring union of Christ and his church was thus duplicated in each Christian marriage. Its unique quality of indissolubility remained part of this sacramental association, regardless of what the husband and wife did or said.<sup>150</sup> As Aquinas wrote:

[B]ecause the sacraments effect that of which they are made signs, one must believe that in this sacrament a grace is conferred on those marrying, and that by this grace they are included in the union of Christ and the Church, which is most especially necessary to them, that in this

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the first perfection, that the marriage of the Virgin Mother of God and Joseph was absolutely true, because both consented to the nuptial bond but not to the bond of flesh.”

<sup>149</sup> Aquinas, *Scriptum*, IV.31; S.T. III, q. 49, art. 3.

<sup>150</sup> See texts in E. Schillebeeckx, O.P., *Marriage: Human Reality and Saving Mystery*, trans. N.D. Smith (New York: Sheed and Ward, 1965), 319-27.

way in fleshly and earthly things they may purpose to be disunited from Christ and the Church.

Since, then the union of husband and wife gives a sign of the union of Christ and the Church, that which makes the sign must correspond to that whose sign it is. Now, the union of Christ and the Church is a union of one to one to be held forever. For there is one Church.... Necessarily, then, matrimony as a sacrament of the Church is a union of one man to one woman to be held indivisibly, and this is included in the faithfulness by which the man and wife are bound to one another.<sup>151</sup>

150. This formulation of the goods marriage not only deepened the prevailing view of marriage as monogamous, faithful, and enduring; it also gave Aquinas another way of showing how polygamy was harmful and destructive even if naturally necessary in rare cases (like those of the ancient patriarchs). G.H. Joyce summarizes Aquinas's views crisply:

Marriage, he says, has three ends [or goods]. The primary end is the birth and training (*educatio*) of children: the secondary end is the mutual service rendered to each other by husband and wife, and all the charities of home life: while a third end, peculiar to Christians, is the symbolic representation of the union between Christ and the Church. With the first of these [ends or goods] polygamy does not necessarily interfere. But it is a grave impediment to the second: and it is wholly destructive of the sacramental symbolism which is the third end in marriage.

It follows that nature sets monogamy before us in the true form of marriage, but that in certain special circumstances polygamy may become permissible. A secondary end may sometimes be sacrificed if this be necessary to secure some good of a higher order. Now this was the case as regards the families of the patriarchs. At that time God's revelation to man was confined within the limits of a single family, and was preserved by being handed from father to son. The preservation of the true religion was a sufficient reason for permitting a plurality of wives. The secondary end of marriage might well be to some extent sacrificed in order to secure so great a good.<sup>152</sup>

### **b. Aquinas's Biological and Rational Arguments for Monogamy and Against Polygamy**

151. In his *Summa Contra Gentiles* -- his work of apologetics, written to present the truths of Christianity to Jews, Muslims, and other non-Christian "peoples" ("*Gentiles*") -- Aquinas worked hard to defend his theory of marriage as an indissoluble, heterosexual, monogamous union between two fit adults with fitness and capacity to marry each other. Seeking to convince serious readers who did not necessarily share his Christian faith, he resorted to various arguments about marriage from natural law and natural justice.

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<sup>151</sup> Aquinas, SCG, IV, 78.

<sup>152</sup> Joyce, *Christian Marriage*, 576-77.

152. Aquinas's naturalist argument for monogamous marriage built on Aristotle's belief that humans are "marital animals" as much as they are "political animals" -- inclined to marital bonding even before political association. He also built on Aristotle's belief that men and women have a natural attraction to each other and a natural inclination to produce copies of themselves and invest in the care of their offspring. This classic theory of "kin altruism" was at the heart of Aquinas's understanding of the purposes of marriage and familial care. But Aquinas added a great deal to Aristotle's insights when he described and elaborated how the long dependence of fragile human infants on their parents shaped human family formation.

[T]here are animals whose offspring are able to seek food immediately after birth, or are sufficiently fed by their mother; and in these there is no tie between male and female; whereas in those whose offspring needs the support of both parents, although for a short time, there is a certain tie, as may be seen in certain birds. In man, however, since the child needs the parent's care for a long time, there is a very great tie between male and female, to which ties even the generic nature inclines.<sup>153</sup>

153. Anticipating the insights of modern evolutionary scientists, Aquinas believed that humans form families, rooted in monogamy, because of the extraordinarily long period in which human infants and children remain dependent on their parents. Aquinas recognized that "among some animals where the female is able to take care of the upbringing of offspring, male and female do not remain together for any time after the act of generation." This is the case with dogs, cattle, and other herding animals, where newborns quickly become independent after a brief nursing period. "But in the case of animals of which the female is not able to provide for upbringing of children, the male and female do stay together after the act of generation as long as is necessary for the upbringing and instruction of the offspring." In these latter cases, this inclination to stay and help with the feeding, protection, and teaching of the offspring is "naturally implanted in the male," said Aquinas. One sees that in birds who will pair for the entire mating season until their fledglings take flight; sometimes these birds will remain paired for life and have other broods together in subsequent seasons.<sup>154</sup>

154. Aquinas drew lessons from these natural patterns of pair bonding and reproduction for the understanding of human family formation: "Now it is abundantly evident that the female in the human species is not at all able to take care of the upbringing of offspring by herself, since the needs of human life demand many things which cannot be provided by one person alone. Therefore it is appropriate to human nature to remain together with a woman after the generative act, and not leave her immediately to have such relations with another woman, as is the practice of fornicators." Human males and females are naturally inclined to remain together for the sake of their dependent human infant.<sup>155</sup>

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153 S.T. III, q. 41, art. 1.

154 Aquinas, SCG, III-II.122.6; 124.3.

155 Aquinas, SCG, III-II.122.6; 124.3.

155. Aquinas recognized that, under the right conditions, human males have natural inclinations to form families, assist the mother of their mutual offspring, and care for their children until their emancipation. But, under other conditions, human males have natural inclinations to unite with many different female partners and work out what evolutionary ecologists today call the R-strategy of inclusive fitness in contrast to the K-strategy. What is the difference? Most creatures, including other mammals and non-human primates, work out their survival not just as an individual but also by enhancing the birth and survival of as many offspring as possible that carry their “substance” – or what evolutionists today call their genes. This is the concept of inclusive fitness so powerful today in the evolutionary sciences. But there are two strategies for doing this, especially for males. One is what biologists call the R-strategy that entails producing as large a number of offspring as possible (think of tadpoles and rabbits) with little investment on the part of the male in assuring their survival. The other strategy, much more characteristic of the human species, is the so-called K-strategy. It entails having a much smaller number of offspring and investing great energy and care, even by the male, in assuring their survival and flourishing. Evolutionary ecologists hypothesize that at least two factors lead to male investment in offspring at the human level: (1) the long period of human infant dependency and vulnerability, and (2) the human cognitive capacity to surmise that the child of his consort is most probably his -- part of his “substance,” as the ancients put it, part of his genetic continuity with the future, as modern scientists now say.<sup>156</sup>

156. In his own pre-scientific way and without a modern theory of genes, Aquinas understood most of these natural conditions for human family formation through dyadic marriage. Male animals, he wrote, desire “to enjoy freely the pleasure of the sexual act, as he also does the pleasure of food.” For this reason, men will often fight with one another for access to females as much as for access to food. The infant’s long vulnerability plus the male’s cognitive estimate that the child is his (what evolutionists call “paternal recognition” and “paternal certainty”) activates the male inclination to invest in and care for the infant and to bond with the mother and to form a family for nurture and support. “Man naturally desires to know his offspring,” Aquinas wrote; “and this knowledge would be completely destroyed if there were several males for one female. Therefore that one female is for one male is a consequence of a natural instinct.”<sup>157</sup>

157. Aquinas added another biological argument about a man’s self-preservation through his children to underscore the need for both dyadic and enduring marital bonding. He wanted to find a way to overcome the tentative attachments of males to

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<sup>156</sup> See the classic treatment of William D. Hamilton, “The Genetical Evolution of Social Behavior, II,” *Journal of Theoretical Biology* 7 (1964): 17-52 and the skillful appropriation of evolutionary science in Christian ethics by modern Catholic theorist, Stephen J. Pope, *Human Evolution and Christian Ethics* (Cambridge: Cambridge University Press, 2007), 297-319. See also the masterful treatment of this topic by Don S. Browning et al., *From Culture Wars to Common Ground: Religion and the American Family Debate*, 2d ed. (Louisville, KY: Westminster John Knox Press, 2000), 113-24. I have drawn this section of the report from a forthcoming volume coauthored with the late Professor Browning, tentatively entitled, *From Private Order to Public Covenant: Christian Marriage and Modern Marriage Law*, chap. 6.

<sup>157</sup> Aquinas, SCG, III-II, 124.1; S.T. Supp. q. 41, art. 1.

their consorts and offspring. Unchecked, human males, like other male animals, tend to want to have sex, but not to invest in or bond with their offspring at the same rate as mothers who by nature expend great energy through long pregnancies and then nursing. To induce a father to care for his children, Aquinas appealed to a man's instinct for self-preservation. A father should remain with the mother and care for their children indefinitely as a way of extending and enriching those beings who are literally a part of his own self. As the father cherishes his own life, once he recognizes that the infant is from his very substance – indeed part and product of his own being – he will care for the infant as he is inclined to care for himself. Because children have so many years of physical and material dependence on their parents before they reach adulthood, and even thereafter retain emotional, moral, spiritual, and occasional economic dependency on their parents, that parental investment of care will need to go on for their parents' lifetimes. Marriage provides the context for this life-long investment in children. And marriage should be monogamous, exclusive, and faithful because that is the only way to ensure paternal certainty and remove rivalry – ensuring that a man is investing in his own children not those with whom he has no biological tie.<sup>158</sup>

158. But Aquinas's argument about marriage did not remain at this biological or natural level. He was not a strict naturalist, who drew easy moral prescriptions from nature without further arguments. For Aquinas, the appeal to nature and biology helped him to order what University of Chicago expert, Don Browning, calls the "pre-moral level" of his argument – the description of human natural inclinations, qualities, and needs, particularly the central needs created by the long period of human infantile dependency.<sup>159</sup> To this biological-natural argument, Aquinas added moral arguments, arguments from natural justice, in favor of monogamous and indissoluble marriage. His moral arguments were based on appeals to the freedom, dignity, and the inherent worth of persons.

159. These moral arguments emerged especially as he pressed for the superiority of monogamy over polyandry and polygyny in humans. Aquinas knew that some non-human animals maintained such multi-partner arrangements for procreation, undercutting an easy appeal to biology. His argument thus sounded in moral terms of justice, not just in biological terms of inclination. He rejected polyandry (one female with multiple males), a practice that Plato had briefly contemplated in his *Republic*, because it was unjust to children. If a woman has sex with several husbands, he argued, it removes the likelihood that the children born to that woman will clearly belong to any one husband. This will undermine paternal certainty and consequent paternal investment in their children's care. The children will suffer from neglect, and the wife will be overburdened trying to care for them and tend to her multiple husbands at once.<sup>160</sup>

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<sup>158</sup> Aquinas, SCG, III-II, 122-123.

<sup>159</sup> See Don Browning's elaboration of this theory in his *Christian Ethics and the Moral Psychologies* (Grand Rapids, MI: Wm. B. Eerdmans, 2006), 190-220.

<sup>160</sup> S.T. III, qq. 41, 65-66; Aquinas, SCG, III-II, 123.3, 124.3-8.

160. He rejected polygyny (one male with multiple females) because it was unjust to wives. It goes against the moral requirement of mutuality and equality that should exist between husband and wife, and it undercuts the undivided and undiluted love and friendship that become a proper marriage. Wives, instead are reduced to servants if not slaves of the household, and set in perennial competition with each other for resources and access to their shared husband. That's not marriage, but servitude, said Aquinas. True marital "friendship consists in an equality" that must undivided, he wrote. "So, if it is not lawful for the wife to have several husbands, since this is contrary to the certainty as to offspring, it would be not lawful, on the other hand, for a man to have several wives, for the friendship of husband and wife would not be free, but somewhat servile. And this argument is corroborated by experience, for among husbands having plural wives the wives have a status like that of servants." The morality of natural law and natural justice teach otherwise.<sup>161</sup>

161. Aquinas's moral argument also came through in his criticism of unilateral divorce with a right to remarry. Like all medievalists, Aquinas was against it. He thought a marriage, once properly formed, was indissoluble. Part of his argument was, of course, theological, as we saw. But his further argument against divorce was a moral argument that sounded in the same terms of natural justice. It would be unjust to wives to be left so vulnerable to their husband's right to divorce them, particularly when they became barren or lost their youthful beauty. In the patriarchal society of his day, Aquinas recognized, divorce was a male prerogative that would almost always work to the disadvantage of the wife. She would often be left in middle age, without support either from her husband, who would go on to other women, or from her father, who would likely be dead at that point. (The notion that a woman could have her own career to support herself, beyond that of the cloister or church guild, was simply not within the medieval imagination.) This made divorce just plain wrong, said Aquinas: "So if a man took a woman in the time of her youth, when beauty and fecundity were hers, and then sent her away after she had reached an advanced age, he would damage that woman, contrary to natural equity."<sup>162</sup>

162. This combination of biological and moral arguments for monogamous, exclusive, and presumptively permanent marriage, and against polygamy, adultery, and other extramarital unions, would become axiomatic in the Western tradition for the next seven centuries. Not only later Catholics, but also Protestant reformers, Enlightenment philosophers, and Anglo-American common lawyers until the twentieth century used this argument with endless variations. The core of the natural argument was focused on the natural needs and tendencies of men, women, and human infants and the premium placed on stable marriage as the proper site for sexual exchange, mutual adult dependency, procreation and nurture of long dependent children. The core of the natural justice argument was focused on the injustice and harm done to women and children by polygamy, polygyny, unilateral divorce, desertion, concubinage, promiscuity, and illegitimacy.

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<sup>161</sup> S.T. III, qq. 41, 65-66; Aquinas, SCG, III-II, 123.3, 124.3-8.

<sup>162</sup> S.T. III, q. 67; Aquinas, SCG, III-II, 123.

163. To these natural law and natural justice arguments Aquinas added his theological arguments about marriage as a sacrament. This strengthened his case for marriage of Christians, much like Augustine's arguments about the sacramental good of marriage strengthened his argument about the goods of children, fidelity, and stability. But even stripped of its theological overlay and left to stand alone, Aquinas' naturalist arguments for enduring monogamous marriages and against polygamy and other extramarital unions were powerful. Many later Western jurists and philosophers would build on these early arguments in defending monogamy and denouncing polygamy. And today, a number of anthropologists and evolutionary scientists have shown that reproduction through enduring pair-bonding is the most expedient means for humans to reproduce given the realities of long infant dependency. Indeed, human reproduction by enduring pair bonding is now described by anthropologist Claude Levi Strauss and primatologist Bernard Chapais as the "deep structure" of survival of the human species.<sup>163</sup>

## 2. The Medieval Canon Law on Monogamy

164. The medieval Catholic Church built upon this conceptual foundation a comprehensive canon law of sex, marriage, and family life that was enforced by a vast hierarchy of church courts and officials spread throughout Western Christendom. From the twelfth century to the sixteenth century Protestant Reformation, the Church's canon law of marriage was the preeminent marriage law of the West. A civil law or common law of marriage, where it existed, was usually supplemental and subordinate.

165. The canon law of marriage repeated many of the basic terms of the classical Roman law of marriage, but supplemented and reformed in light of the theology of marriage as an enduring sacramental bond between baptized Christians. At medieval canon law, marriage was a heterosexual monogamous union for life. It was formed by the mutual consent of an adult man and adult woman who had the fitness and capacity to marry and were not too closely related by blood, family, spiritual, or other ties. The couple first exchanged an engagement promise to be married in the future ("I *shall* take you"), with or without conditions, then a formal promise of marriage using words in the present tense ("I *now* take you"). The canon law encouraged the couple to seek their parents' consent, to secure the testimony of witnesses, to publish banns of their pending nuptials, to negotiate marital property contracts, and to get married in a church wedding. But none of this was required. At medieval canon law, a valid marriage was formed either by an engagement promise followed by consensual sex, or by an actual promise to marry even if not sexually consummated. Children born of a valid marriage were legitimate, supportable, and heritable. Children born out of wedlock were bastards with severely truncated rights and limited means of support and legitimation. Absolute divorce, with a subsequent right to remarry, was not permitted, even in cases of adultery, desertion, or cruelty. *Divortium* meant only separation from bed and board until the death of one's spouse. Full marital dissolution with a subsequent right to remarry was possible only on proof of a serious impediment to marriage, which could trigger an annulment, a declaration that the marriage was and had always been null and

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<sup>163</sup> Bernard Chapais, *Primeval Kinship: How Pair-Bonding Gave Birth to Human Society* (Cambridge, Mass.: Harvard University Press, 2008), 10.

void. The laws on impediments and annulments were, and still are, tremendously complex in theory. But, in medieval practice, annulment was not nearly so brisk a business in church courts as once was thought.<sup>164</sup>

166. Medieval canon lawyers drew on classical and medieval philosophy to present a three-dimensional picture of marriage, as: (1) a natural association; (2) a consensual contract, and (3) a sacrament of faith. All three of these dimensions of marriage were reflected in the canon law of marriage.

167. First, the canonists argued, marriage was a natural association, formed by the “one flesh” union of a man and a woman. Medieval writers repeated endlessly the traditional argument that God had created dyadic marriage in Paradise as a means of procreation, and God had later confirmed that marriage was a form of protection against sexual sinfulness. As a created, natural institution, they argued, marriage was subject to the law of nature. For the canonists, natural law was not only, as Justinian had put it, “the law that nature has taught all animals,” giving them “natural inclinations” to protect, preserve, and perpetuate themselves through natural procreative means.<sup>165</sup> Natural law was also what Gratian called the “natural instincts” or “intuitions” of humans and the “common customs” and “conventions” of humankind that were communicated in reason and conscience, and often confirmed and sometimes corrected in the Bible.<sup>166</sup> Natural law, in this fuller sense, defined the natural drive and determination that fit persons marry when they reach the age of puberty, that they conceive children and nurture and educate them until adulthood, and that they remain naturally bonded to their blood and kin who are naturally inclined to serve and support each other in times of need, frailty, and old age. Building on these natural law teachings, the medieval canon law prescribed monogamous, heterosexual, life-long unions between a couple, featuring mutual love, support, and faithfulness for each other and for their children. It proscribed bigamy, incest, bestiality, buggery, polygamy, sodomy, pederasty, masturbation, contraception, abortion, and other unnatural and non-procreative sexual activities and relations.<sup>167</sup>

168. Second, the canonists argued, marriage was a contractual relation subject to general rules of contract. Marriage depended in its essence on the mutual consent of the parties to be legitimate and binding. “What makes a marriage is not the consent to cohabitation nor the carnal copula,” argued Peter Lombard, stating what would become the medieval church’s canonical position; “it is the consent to conjugal society that does.” The form and function of this conjugal society, and the requirements for valid

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<sup>164</sup> See Charles Donahue, *Law, Marriage and Society in the Later Middle Ages* (Cambridge: Cambridge University Press, 2007); R.H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge: Cambridge University Press, 1974).

<sup>165</sup> Inst. I.1.2; Dig. I.1.3. See the Ordinary Gloss on Decretum, Dist. 1.6-7, in *Gratian: The Treatise on Laws with the Ordinary Gloss*, trans. James Gordley and Augustine Thompson, O.P. (Washington, DC: Catholic University of America Press, 1993), 6-7.

<sup>166</sup> Gratian, Dist. 1, c. 7.

<sup>167</sup> See sample texts in Rudolf Weigand, *Die Naturrechtslehre die Legisten und Dekretisten von Irenaeus bis Johannes Teutonicus* (Berlin: Hueber, 1967), 283-98.

entrance into it, were preset by the laws of nature, as amended and emended by the laws of the church. But the choice of whether to enter this conjugal society lay exclusively with the man and the woman.<sup>168</sup>

169. As a contract, marriage was subject to the general principles and rules of contract. One such principle was freedom of contract, and this applied equally to marriage contracts. Marriage contracts entered into by force, fear, or fraud, or through undue influence or inducement of parents, masters, or lords were thus not binding. A second general principle was that consensual agreements, entered into with or without formalities, were legally binding. Absent proof of mistake or frustration, or of some condition that would render the marital contract unjust, either party could petition a court to enforce its terms. This general principle also applied to marriage contracts. Both husband and wife had an equal right to sue in church court for enforcement even of a “naked promise” (*nudum pactum*) of marriage, for discharge of an essential and licit condition to marriage, and for vindication of their conjugal rights to sexual intercourse. Rights to spousal support and maintenance set in automatically after the couple was married, even if their marriage was not consummated. Conjugal rights to future sexual performance set in only after their first act of consensual sexual intercourse within marriage.<sup>169</sup>

170. Third, medieval canonists argued, marriage between two baptized Christians was also raised by Christ to the dignity of a sacrament and was modeled on Christ’s enduring love for his bride, the church. The canon law protected the sanctity and sanctifying purpose of marriage by declaring valid marital bonds to be indissoluble, and by annulling invalid unions between Christians and non-Christians or between parties related by various legal, spiritual, blood, or familial ties. And importantly, the medieval canon law prohibited polygamy and all other sexual unions that might constitute “constructive polygamy.”

#### **a. The Medieval Canon Law on Polygamy and Precontract Impediments**

171. Echoing earlier church canons and Roman laws, the medieval canon law included polygamy in the long list of forbidden sexual unions – adultery, fornication, prostitution, concubinage, rape, abduction, seduction, sexual battery, child and wife abuse, sodomy, masturbation, and other various other “unnatural activities.”<sup>170</sup> The medieval canonists, writes James Brundage in the leading book on point, “gave short shrift” to the crime of polygamy per se. “Ancient authorities had flatly forbidden

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<sup>168</sup> Lombard, *Sent.* bk. 4, dist. 27.2, 28.4.

<sup>169</sup> James A. Brundage, “Implied Consent to Intercourse,” in *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies*, ed. Angeliki E. Laiou (Washington, DC: Dumbarton Research Library and Collection, 1993), 245-56; Charles J. Reid, Jr., *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* (Grand Rapids, MI: Wm. B. Eerdmans, 2004), 25-68; Rudolf Weigand, *Die bedingte Eheschliessung im kanonischen Recht* (Munich: M. Hueber, 1963); John T. Noonan, *Canons and Canonists in Context* (Goldbach: Keip, 1997), 173-98.

<sup>170</sup> See detailed sources in Brundage, *Law, Sex, and Christian Society*, 203-214

polygamy – in the sense of simultaneous marriage to two or more wives,” and “the canonists simply repeated the ban.” Polygamy in this sense was a mortal sin and a serious crime, if done with knowledge and intent. Once convicted by a church court, such a polygamist faced a temporary ban from the Eucharist, excommunication in serious cases. The defendant would also be turned over to the secular authorities for criminal punishment, usually a heavy fine or occasional whipping. Unlike other sexual criminals, convicted polygamists could not appeal back to the church courts for relief from their secular punishment by pleading privilege of forum. This bar on appeal applied to the clerics, too, if they were found guilty of sexual or marital relations with two or more women (whether wives or concubines). It was bad enough that these clerics had breached their vows of celibacy; one-time offenders would be prosecuted and disciplined in the church courts. But clerical bigamists were defrocked and sent to the secular courts for final disposition of their cases, with no further resort to the church courts.<sup>171</sup> The medieval church adopted this as a rule of canon law in 1274. England passed a parallel statute in 1276, as did many other lands within a few years.<sup>172</sup> This pattern persisted in England until the Protestant Reformation.

172. The church courts in England, and throughout the West, also dealt with the more nuanced questions of bigamy that came up in annulment cases involving the impediment of precontract.<sup>173</sup> The core case of precontract was when an already married person sought to marry someone else before the death of the first spouse. The previous contract of marriage rendered the second marriage contract null and void. If and when discovered, the purported second marriage would be annulled, regardless of the parties’ wishes and even if it had been executed, consummated, and had yielded children. If one or both of these parties to the second marriage, or their parents, guardians, or matchmakers, knew about the first marriage, they would be charged with the crime of bigamy as well. Only if the parties could secure a rare papal dispensation on grounds of absolute necessity could the second marriage stand and/or the criminal punishment be waived.

173. These precontract cases were not so uncommon in medieval times -- given that secret marriages were valid, local marriage registration rolls were uneven and sometimes non-existent, parties were sometimes ignorant of the technical rules of marital dissolution and remarriage, and parties would often move into new regions where their past was unknown. The cases often came up when a first spouse rose up to object to a spouse’s purported second marriage, or when heirs to a first marriage challenged the claims of heirs to an improper second marriage. In an exhaustive study of late medieval church court records in England (notably York and Ely) and on the

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<sup>171</sup> See In 1274, at the Second Council of Lyons, the church agreed that “bigamists are deprived of any clerical privilege and are to be handed over to the control of the secular law, any contrary custom notwithstanding.” See <http://www.piar.hu/councils/ecum14.htm#16>.

<sup>172</sup> 14 Ed. 1 st. 3, ch. 5 (1276). See discussion in Richard Burn, *Ecclesiastical Law*, 6<sup>th</sup> ed., ed. Simon Fraser 4 vols. (London: A. Strahan, 1797), 1:192-93, citing Lindwood, *De Bigamis non ordinandis* p. 129.

<sup>173</sup> See detailed sources and discussions in Brundage, *Law, Sex, and Christian Society*, 207, 252-53, 318-319, 343, 405-08, 477-79. For basic canon law texts, see Gratian, *Decretum*, c. 28.2-3, 31.1, 32.1, 6-7, 33.2, 34.1-2, 35.9, 36.2; Gregory IX, *Decretales*, 4.2, 7, 21.

Continent, Harvard legal historian Charles Donahue has turned up quite a number of such cases of bigamy and precontract. His discoveries complement the earlier findings of University of Chicago legal historian R.H. Helmholz who found several cases in medieval English church courts as well. Both these exquisite studies also found a few cases where a party became engaged to a second party, while already being engaged or married to a first. These cases, too, led to easy annulment of the second engagement contract on ground of precontract. If a party became engaged to one person, but then married a second, the marriage contract was upheld, and the double contracted party was sanctioned for “constructive bigamy.”<sup>174</sup>

174. In the later Middle Ages, the canon law impediment of precontract was sometimes stretched to reach marriage or engagement contracts made by a divorcee, widow, widower, divorcee, prostitute, concubine, or adulterer. A good bit of the medieval canon law conversation about such relationships concerned whether such “irregularities” in a man’s prior life precluded him from clerical ordination. But these were live issues for the laity as well. What all these parties had in common was that they had already had sex with someone else. A few rigorous medieval canonists and moralists treated any new marital contract or contact by a non-virgin as a form of “constructive” or “interpretive bigamy” or “digamy” -- and called for annulment of the contract. Most canonists and canon law rules did not go so far. They simply maintained the biblical prohibition on the remarriage of divorcees (who converted to Christianity after their divorce). They also discouraged but allowed the remarriage of widow(er)s. All the other parties on this potential roll of constructive bigamists, most canonists concluded, might be guilty of sin that required penance, but their marriages were valid. The impediment of “public honesty” – rather than the impediment of “precontract” -- was occasionally used to annul marriages between former lovers, especially if they were discovered to have committed adultery while their prior spouse was living. “Public honesty” was also used on occasion to block the new marriage of an old widower to a young maiden, or an old widow to young man – particularly when there was evidence of coercion, graft, or exploitation of the elderly. While these cases came in for ample discussion among some of the canonists, medieval English court records don’t turn up many cases --- though James Brundage has shown that in some of these cases secular rulers stepped in to annul these latter marriages even if the church courts let them stand.<sup>175</sup>

### 3. Section Summary

175. Medieval Catholicism promoted a view of dyadic marriage as at once natural and sacramental, contractual and covenantal, legal and liturgical, rational and mysterious. The fullest theoretical formulation came from Thomas Aquinas who elaborated and integrated the Augustinian marital goods of children, fidelity, and sacrament, and who

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<sup>174</sup> See Charles Donahue, Jr., *Law, Marriage, and Society in the Later Middle Ages* (Cambridge: Cambridge University Press, 2007); R.H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge: Cambridge University Press, 1974).

<sup>175</sup> See also a good continental case study in Jean François Poudret, *Coutumes et coutumieres* (Bern: Staempfli Editions, 2002), 3:24ff.

defended monogamy and condemned polygamy on grounds of natural law and natural justice. Such views also pervaded the medieval canon law, which was the principal law governing issues of sex, marriage, and family life from the twelfth to the sixteenth centuries in England and throughout the West. The medieval canon law treated marriage as a natural, contractual, and sacramental institution. It provided detailed rules on proper marriage formation, maintenance, and dissolution, parental rights, roles, and responsibilities, child care, education, and support, and marital property, dower, and inheritance. The medieval canon law also prohibited various sexual crimes, including polygamy, and governed intricate questions of “constructive bigamy” and the impediments of “precontract” that could lead to annulment of purported second marriages.

176. At the foundation of this medieval Catholic theory and canon law of marriage was a naturalist argument about the human species and the need to create paternal certainty and investment in children because of their fragility and long-term dependency. Human children, unlike many other animals, are born weak, fragile, and utterly dependent on their parents for many years. It was thus critical to ensure that both parents would be certain of their offspring and invested in their care and support. Mothers generally have more parental certainty because they carry their children to term. They also generally have more parental inclination because of the deep organic bond that they form with their children through pregnancy and nursing. But mothers have a hard time caring fully for their children without help, especially if they have several children at once and live in a patriarchal society with independent forms and forums of support. A mother needs the help of others, of the children’s father ideally. Fathers, however, are by nature more tangentially involved in the conception and birth of their children, and are often less certain of whether a new child is theirs. They are also by nature more prone to wander sexually, and less inclined to invest in their children. Men need to be assured of their paternity of that child, and induced to see in that child a continuation and extension of their own being or substance (or genes), of their name and property, of their talents and teachings. Nature has thus inclined human persons to develop enduring and exclusive monogamous marriages as the best way to meet all these goals. Such marriages ensure that both fathers and mothers are certain of their offspring. They ensure that husband and wife will together care for, nurture, and educate their children until they become mature and independent. The natural law thus inclines men and women toward marriage, and provides them with the natural rights and duties to care for each other and for their children.

177. This naturalist argument was further enhanced by a moral argument designed to tilt this natural inclination more decisively in favor of monogamous and enduring marriages. It is simply unjust to women and children to permit fornication, adultery, polygyny, polygamy, concubinage, prostitution, or other casual sexual encounters. Each of these sexual activities erodes paternal certainty and investment in child care. It dilutes family resources, energy, and time that must now be spent on care for extra-marital children. It produces illegitimate children who are stigmatized and discriminated against throughout their lives by their extramarital birth. It brings disease, strife, and harm into the family and into the marital bed. And it detracts from the mutual support and love that husbands and wives owe to each other throughout their lives, even after their children are mature.

178. Among medieval Christians, marriage was not just a natural and contractual relation. For baptized believers, who were properly married, marriage was also a sacrament, a vital and visible example and instantiation of the enduring and mysterious love of Christ and his Church. The sacrament of marriage elevated the natural goods of procreation and marital fidelity into a divine act, modeled on the creative act of God the Father in Paradise, and the sacrificial act of God the Son who gave his life and body to the Church. The sacrament of marriage also elevated the natural law configuration of marriage. Marriage was no longer just a set of biological inclinations and moral instructions for men and women to form enduring and exclusive bonds for the sake of each other and their children. Sacramental marriage was now a channel of divine grace, like baptism, penance or the eucharist. Voluntary participation in it brought special divine blessings upon the couple, their children, and the broader communities of which they were a part. Sacramental marriage was also now a channel of divine work, the means God chose not only to perpetuate the human species, but also to preserve his church.

179. It is important to emphasize that, for medievalists, the sacramental logic of monogamous marriage supplemented and stabilized the natural logic; it did not supplant or reject it. For medievalists, monogamous marriage was first and foremost a natural institution that could be fully defended on a logic of the natural goods, needs, and interests of human beings, and a logic of natural law, natural justice, and natural order in human societies. As such, medieval Christian marital theories and laws readily embraced core philosophical insights and legal provisions into monogamous marriage already offered by Jews, Greeks, Romans, and others. And medieval Christian marital theories and law, in turn, readily provided a natural foundation and defense of monogamous marriage that would echo in the tradition for the rest of the second millennium.

## **E. Protestant Views of Monogamy and Polygamy**

### **1. Continental and English Patterns of Marital Reform**

180. Marriage was one of the hotly contested issues of the sixteenth-century Protestant Reformation and one of the first institutions to be reformed.<sup>176</sup> The leading sixteenth-century Protestant reformers – Martin Luther (1483-1546), Philip Melancthon (1497-1560), John Calvin (1509-1564), Martin Bucer (1491-1551), Thomas Cranmer (1489-1556), and Heinrich Bullinger (1504-1575) – all wrote at length on marriage. Scores of leading jurists took up legal questions of marriage in their writings, often

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<sup>176</sup> This section of the report is drawn in part from John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), 177–256; John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Louisville: Westminster John Knox Press, 1997), 42–193; John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2008), chaps. 3-4; and John Witte, Jr. and Robert M. Kingdon, *Sex, Marriage, and Family in John Calvin's Geneva I: Courtship, Engagement, Wedding* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2005), ch. 8; These chapters provide detailed citations to primary and secondary sources, which I am omitting herein.

working under the direct inspiration of Protestant theology and theologians. Virtually every Continental city and territory that converted to the Protestant cause in the first half of the sixteenth century had new marriage laws on the books within a decade after accepting the Reformation; the English reform of marriage took much longer, as we'll see in a moment.

181. The Protestant reformers' early preoccupation with marriage was partly driven by their theology. Many of the core issues of the Protestant Reformation were implicated by the prevailing sacramental theology and canon law of marriage. The Catholic Church's jurisdiction over marriage was, for the reformers, a particularly flagrant example of the church's usurpation of the magistrate's authority. The Catholic sacramental concept of marriage, on which the church predicated its jurisdiction, was for the reformers a self-serving theological fiction. The canonical prohibition on marriage of clergy and monastics stood sharply juxtaposed to Protestant doctrines of sexual sin and the Christian vocation. The canon law's long roll of impediments to betrothal and marriage, its prohibitions against complete divorce and remarriage, and its close regulations of sexuality, parenting, and education all stood in considerable tension with the reformers' understanding of the Bible. That a child could enter marriage without parental permission or church consecration betrayed, in the reformers' views, basic responsibilities of family, church, and state to children. Issues of marriage doctrine and law thus implicated and epitomized many of the cardinal theological issues of the Protestant Reformation.

182. The reformers' early preoccupation with marriage was partly driven also by their politics. A number of early leaders of the Reformation faced aggressive prosecution by the Catholic Church and its political allies for violation of the canon law of marriage and celibacy. Among the earliest Protestant leaders were ex-priests and ex-monastics who had forsaken their orders and vows, many of whom had married shortly thereafter. Also included were political leaders like King Henry VIII of England and Prince Philip of Hesse who sought to be free from the constraints of the canon law on their private marital lives. As Catholic Church courts began to prosecute these canon law offences, Protestant theologians and jurists rose to the defense of their co-religionists.

183. Protestant theologians treated marriage not as a sacramental institution of the heavenly kingdom but as a social estate or covenantal association of the earthly kingdom. Marriage, they taught, served the goods and goals of mutual love and support of husband and wife, mutual procreation and nurture of children, and mutual protection of both spouses from sexual sin. All adult persons, preachers and others alike, should pursue the calling of marriage, for all were in need of the comforts of marital love and of the protection from sexual sin. Marriage is a vital private and public institution that brings ample rewards and benefits to adults and children alike.

184. Though divinely created and spiritually edifying, Protestants insisted, marriage remained a natural estate of the earthly kingdom, not a sacramental estate of the heavenly kingdom. All parties could partake of this institution, regardless of their faith or standing in the church; interreligious marriages were perfectly legal even if imprudent. Though subject to divine and natural law, Protestants continued, marriage came within the jurisdiction of the state not the church. It was the task of the state to set the laws for

marriage formation, maintenance, and dissolution, appropriating and applying the basic norms of divine and natural law. The church could add complementary premarital and pastoral counseling, and its clergy could officiate at weddings, but all this was to be done on behalf of the state.

185. Political leaders rapidly translated this new Protestant gospel into the most sweeping legal reforms of marriage that the West had seen since the twelfth century, or would see again until the twentieth. Collectively, these new Protestant marriage laws: (1) shifted marital jurisdiction from the church to the state; (2) strongly encouraged the marriage of clergy; (3) rejected the sacramentality of marriage and the religious tests and impediments traditionally imposed on its participants; (4) banned secret marriages by requiring the participation of parents, peers, priests, and political officials in the process of marriage formation; (5) sharply curtailed the number of impediments to betrothals and marriages; and (6) introduced divorce, in the modern sense, on proof of adultery, malicious desertion, and other serious faults, with a subsequent right to remarriage at least for the innocent party. These changes eventually brought profound and permanent change to the life, lore, and law of Western marriage.

186. All these legal changes came quickly into the civil law of Continental Protestant lands. They took three centuries and more to soak into the English common law. The English common law of marriage, as we saw in the last section, was rooted in and dependent on medieval Catholic canon law (and its Greco-Roman sources). Legal reform of the English common law of marriage came in slower and longer waves of reform that receded before new reform waves later surged again. The Tudor Anglican marital reforms of the sixteenth century receded with the Elizabeth Settlement, the radical Anglo-Puritan reforms of the mid-seventeenth century receded with the Restoration of the monarchy, the Evangelical and Enlightenment reforms of the eighteenth century receded with the rise of Victorian Puritanism. But with each of these waves of reform new changes gradually soaked into the English marriage law system.

187. By the nineteenth century, the English common law of marriage was a complex amalgam of ideas and institutions drawn eclectically from classical Roman law and medieval canon law, from medieval Catholic and early modern Protestant theology, and from ancient Greco-Roman and new Enlightenment philosophy. All these sources were united, however, in their embrace of monogamy and in their rejection of polygamy. They confirmed that marriage is a monogamous union designed for the mutual love, support, and comfort of husband and wife, and for the mutual procreation, nurture, and education of children. And all these sources condemned polygamy, and annulled second marriages that featured constructive bigamy. The common law absorbed these traditional teachings without condition or change.

188. In what follows, I focus on two aspects of the Protestant reforms of marriage and its influence on Western law. First, I review the Protestant reformation of the classic theory of the goods of monogamous marriage, inherited from Augustine and Aquinas. Second, I review the polygamous experiments of the early Anabaptists, Luther's tentative speculations about polygamy, and then the firm Calvinist rejection of polygamy on the strength of biblical and natural teachings of marriage as a dyadic covenant. In

the concluding section, I show how these early Protestant teachings were transmitted across the Atlantic to colonial America.

## 2. The Reformation of the Goods of Marriage

189. Following the Christian tradition, the Protestant reformers viewed marriage as a one-flesh union between a man and woman that was rooted in the order of creation and governed by the law of nature. God had created Adam and Eve to be naturally inclined and attracted to each other. He had commanded them to be “fruitful and multiply” and to fill the earth with children. The commandment to marry became doubly imperative after the fall into sin, lest persons succumb to lust and other fleshly temptations. Marriage is both “natural and necessary,” wrote Luther.<sup>177</sup>

190. Also following the tradition, the reformers argued that marriage offers three goods to the couple, their children, and the community. Their preferred formula of the goods of marriage, however, was not the familiar Augustinian trilogy of children, faith, and sacrament. For Protestants the three goods of marriage were: (1) mutual love and support of husband and wife; (2) mutual procreation and nurture of children; and (3) mutual protection of both spouses from sexual sin.<sup>178</sup> This formula overlapped with the formula of faith, children and sacramentality offered by Augustine and Aquinas, but amended it in critical ways.

### a. Marital Love

191. The Protestant formulation of the first good of marital love embraced but went beyond the traditional good of marital fidelity (*fides*). Like Augustine and Aquinas, Protestants believed that spouses were required to be faithful to their marital promises, and loyal to their spouses, presumptively for life. Infidelity to the marriage contract -- whether sexual, physical, spiritual, or emotional -- was a sin against this good of fidelity.

192. Unlike Augustine, however, the reformers translated this good of fidelity into overt terms of marital love, intimacy, friendship, and companionship -- adducing selected passages from Aristotle, the Roman Stoics, and Aquinas to drive home their point. Luther was among the strongest such proponents of the good of marital love. “Over and above all [other loves] is marital love,” he wrote. “All other kinds of love seek something other than the loved one: this kind wants only to have the beloved’s own self completely. If Adam had not fallen, the love of bride and groom would have been the loveliest thing.” “There’s more to [marriage] than a union of the flesh,” Luther continued, although he considered sexual intimacy and warmth to be essential to the flourishing of marriage. “There must [also] be harmony with respect to patterns of life and ways of thinking.”

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<sup>177</sup> See Jaroslav Pelikan and Helmut T. Lehmann, eds., *Luther's Works*, 55 vols. (St. Louis: Concordia Publishing House 1955-1968), 45:18 [hereafter “LW”].

<sup>178</sup> This trilogy had already appeared more than a millennium before in Isidore of Seville’s (d. 636) *Etymologies* (though Isidore made procreation the first good). See Isidore, *Etymologiae*, 9.7.27.

The chief virtue of marriage [is] that spouses can rely upon each other and with confidence entrust everything they have on earth to each other, so that it is as safe with one's spouse as with oneself.... God's Word is actually inscribed on one's spouse. When a man looks at his wife as if she were the only woman on earth, and when a woman looks at her husband if he were the only man on earth; yes, if no king or queen, not even the sun itself sparkles any more brightly and lights up your eyes more than your own husband or wife, then right there you are face to face with God speaking. God promises to you your wife or husband, actually gives your spouse to you, saying: "The man shall be yours; the woman shall be yours. I am pleased beyond measure! Creatures earthly and heavenly are jumping for joy." For there is no jewelry more precious than God's Word; through it you come to regard your spouse as a gift of God and, as long as you do that, you will have no regrets.<sup>179</sup>

193. For Luther, love was a necessary and a sufficient good of marriage. He supported marriages between loving couples, even those between young men and older women beyond child-bearing years or between couples who knew full well that they could have no children. He stressed repeatedly that husband and wife were spiritual, intellectual, and emotional "partners," each to have equal regard and respect for the strengths of the other. He called his own wife Katherine respectfully "Mr. Kathy" and said more than once of her: "I am an inferior lord, she the superior; I am Aaron, she is my Moses." He repeatedly told husbands and wives alike to tend to each other's spiritual, emotional, and sexual needs and to share in all aspects of child-rearing -- from changing their children's diapers when they were babies to helping them settle into their vocations and establish their own new homes when they were grown up.<sup>180</sup>

194. Several other reformers wrote with equal flourish about the good of marital love and fidelity. The Zurich reformer, Heinrich Bullinger (1504-1575), for example, who was influential both on the Continent and in Tudor England, wrote that God planted in a married man and woman "the love, the heart, the inclination and natural affection that is right to have with the other.... Marital love ought to be (next unto God) above all loves," with couples rendering to each other "the most excellent and unstinting service, diligence and earnest labor, ... one doing for another, one loving, depending, helping, and forbearing another, always rejoicing and suffering one with another."<sup>181</sup> The Strasbourg reformer Martin Bucer, who was equally influential on both sides of the English Channel, wrote effusively about marital love, grounding his sentiments especially in St. Paul's admonition in Ephesians 5 that Christian couples practice a form of love and sacrifice for each other in imitation of Christ. Marital couples, Bucer wrote, must be

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<sup>179</sup> *D. Martin Luthers Werke: Kritische Gesamtausgabe*, repr. ed., 78 vols. (Weimar: H. Böhlau Verlag, 1883-1987) [hereafter "WA"]: WA 2:167; WA 13:11; WA 17/2:350ff.; WA TR 3, No. 3530, LW 54:223; WA TR 5, No. 5524, LW 54:444; WA 34:52.5-9, 12-21; LW 31:351ff.

<sup>180</sup> WA TR No. 4, No. 5212; LW 2:301ff; LW 45:39ff. See also quotes by Steven E. Ozment, *Ancestors: The Loving Family in Old Europe* (Cambridge, MA: Harvard University Press, 2001), 36-37.

<sup>181</sup> Heinrich Bullinger, *The Christen State of Marriage*, trans. Myles Coverdale (London?: n.p., 1541), folios iii.b-iii (spelling modernized).

united not only in body but in mind also, with such an affection as none may be dearer and more ardent among all the relations of mankind, nor of more efficacy to the mutual offices of love, and of loyalty. They must communicate and consent in all things both divine and human, which have any moment to well and happy living. The wife must honor and obey her husband, as the Church honors and obeys Christ her head. The husband must love and cherish his wife, as Christ his Church. Thus they must be to each other, if they will be true man and wife in the sight of God, whom certainly churches must follow in their judgment. Now the proper and ultimate end of marriage is not copulation, or children, for then there was no true matrimony between Joseph and Mary the mother of Christ, nor between many holy persons more, but the full and proper and main end of marriage is the communicating of all duties, both divine and humane, each to the other, with utmost benevolence and affection.<sup>182</sup>

### **b. Children**

195. Like Augustine and Aquinas, the Protestant reformers emphasized the good of children, if such a blessing were naturally possible and divinely granted. But the reformers amended Augustine's account with Aquinas's heavy gloss that the good of procreation included the Christian nurture and education of children, a responsibility that fell on husband and wife alike as well as on the broader communities of church and state. And they repeated Aquinas's argument that children were best born in faithful monogamous marriages that ensured paternal certainty and parental investment in the children.

196. The Reformers further amended Aquinas's teaching on procreation by insisting on the creation of public schools for the religious and civic education of all children, and by producing a welter of catechisms, textbooks, and household manuals to assist in the same. For the reformers, each child was called to a unique Christian vocation, and it was the responsibility of the parent, priest, and prince alike to ensure that each child was given the chance to discern his or her special gifts and prepare for the particular vocation that best suited those gifts. This teaching drove the creation of public schools in early modern Protestant lands – Lutheran, Calvinist, and Anglican alike. It added a crucial public dimension to the parents' private procreation and nurture of their children. Philip Melancthon, the so-called "teacher of Germany," called the public school a "civic seminary" designed to allow families, churches, and states alike to cooperate in imbuing both civic learning and spiritual piety in children.

### **c. Protection from Sexual Sin**

197. Unlike Augustine and Aquinas, the early Protestant reformers treated protection from sexual sin as a marital good in itself, not just a function and product of the good of marital fidelity. Since the fall into sin, they emphasized, lust has pervaded the body and mind of every person. Marriage has become not only an option but a necessity for

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<sup>182</sup> Martin Bucer, *De Regno Christi* (1550), partly translated in Wilhelm Pauck, ed., *Melancthon and Bucer* (Philadelphia: Westminster Press, 1969), bk. II, chap. 38.

sinful humanity. For without it, the person's distorted sexuality becomes a force capable of overthrowing the most devout conscience. A person is enticed by his or her own nature to prostitution, masturbation, voyeurism, and sundry other sexual crimes. "You can't be without a wife and remain without sin," Luther declared to the men who had gathered for one of his famous table talks. Anyone who chooses to "live alone undertakes an impossible task ... counter to God's word and the nature that God has given and preserves in him." The calling of marriage, Luther wrote, should be declined only by those who have received God's gift of continence. "Such persons are rare, not one in a thousand [later he said "a hundred thousand"], for they are a special miracle of God." The Apostle Paul has identified this group as the permanently impotent and the eunuchs; few others can claim such a unique gift.<sup>183</sup>

198. This understanding of the protective good of marriage undergirded the Protestant Reformers' bitter attacks on the traditional canon law rules of mandatory celibacy for clergy. To require celibacy of clerics, monks, and nuns, the reformers believed, was beyond the authority of the church and ultimately a source of great sin. Celibacy was for God to give, not for the church to require. It was for each individual, not for the church, to decide whether he or she had received this gift. The pastoral office should not be held out as an inducement to self-deception and self-denial about one's sexual needs; that only courts sexual deviance by priests and monks. In Lutheran, Calvinist, and Anglican lands alike, monasteries were accordingly dissolved and clerical marriage was encouraged.

#### **d. *Not a Sacrament but a Public Good***

199. Also unlike Augustine and Aquinas, Protestants gave no place to the marital good of *sacramentum* – either in the Augustinian sense of symbolic stability, or in the medieval Catholic sense of a permanent channel of sanctifying grace. For most early Protestants, marriage was neither a sacrament of the church on the order of baptism or the eucharist, nor a permanent union dissolvable only upon death of one of the parties. To be sure, Protestants like Catholics believed that marriages were covenants that were stable and presumptively indissoluble. But this presumption could be overcome if one of the other marital goods was frustrated, and the covenant needed to be dissolved, as covenants since biblical times had allowed. If there was a breach of marital love by one of the parties – by reason of adultery, desertion, or cruelty – the marriage was broken. The innocent spouse who could not forgive this breach could sue for divorce and remarry. If there was a failure of procreation – by reason of sterility, incapacity, or disease discovered shortly after the wedding – the marriage was also broken. Those spouses who could not reconcile themselves to this condition could seek an annulment and at least the healthy spouse could marry another. And if there was a failure of protection from sin – by reason of frigidity, separation, or cruelty – the marriage was again broken. If the parties could not be reconciled to regular cohabitation and consortium, they could divorce and seek another marriage.

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<sup>183</sup> WA TR 1, No. 233, LW 54:31; WA 18:276; LW 45:18-22; LW 28:9-12, 27-31.

200. Most early Protestants thus tended to view the goods of marriage in more teleological terms than their Catholic brethren. Marriage was a means to love, to protection from sin, and to the procreation of children. Where such goods failed, the marriage failed, and such goods should be sought in a second marriage. Martin Bucer, the Strasbourg reformer who influenced Lutherans, Calvinists, and Anglicans alike, put the matter more flatly than most Protestants: "A proper and useful" marriage, Bucer wrote, has "four necessary properties": "1. That the [couple] should live together.... 2. That they should love one another in the height of dearness.... 3. That the husband bear himself as the head and preserver of the wife instructing her to all godliness and integrity of life; that the wife also be to her husband a help, according to her place, especially furthering him in the true worship of God, and next in all the occasions of civil life. And 4. That they not defraud each other of conjugal benevolence." Marriages that exhibit these four properties must be maintained and celebrated. But even "where only one [property] be wanting in both or either party ... it cannot then be said that the covenant of matrimony holds good between such." To perpetuate the formal structure of marriage after a necessary property is lost, Bucer argued, is not only a destructive custom, but an unbiblical practice. "[T]he Lord did not only permit, but also expressly and earnestly commanded his people, by whom he would that all holiness and faith of the marriage covenant be observed, that he could not induce his mind to love his wife with a true conjugal love, might dismiss her that she might marry to another" who is more meet and good.<sup>184</sup>

201. This more teleological view of marriage is also reflected in the tendency of early Protestants to introduce alternative formulations of the goods of marriage than those inherited from the tradition. Aquinas and other medieval writers had considered, but then rejected, the notion that marriage might have additional or alternative goods beyond the Augustinian goods of faith, children, and sacrament. The Protestant reformers showed no such reticence. They held out all manner of personal, social, and political goods that marriage could offer – in part, on the basis of a fresh reading of biblical and classical sources, in part in support of their relentless arguments against celibacy and monasticism.

202. One common Protestant formulation was that marriage had civil and spiritual "uses" in this life. Both Luther and Calvin sometimes spoke in these terms. On the one hand, they argued, marriage has general *civil uses* for all persons, regardless of their faith. Marriage deters vice by furnishing preferred options to prostitution, promiscuity, pornography, and other forms of sexual pathos. Marriage cultivates virtue by offering love, care, and nurture to its members, and holding out a model of charity, education, and sacrifice to the broader community. Marriage enhances the life of a man and a woman by providing them with a community of caring and sharing, of stability and support, of nurture and welfare. Marriage enhances the life of the child, by providing it with a chrysalis of nurture and love, with a highly individualized form of socialization and education. On the other hand, marriage has specific *spiritual uses* for believers – ways of sustaining and strengthening them in the Christian faith. The love of wife and husband is among the strongest symbols Christians can experience of Yahweh's love

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<sup>184</sup> Bucer, *De Regno Christi*, 2.26, 38, 39.

for the elect, of Christ's love for the Church. The sacrifices one makes for spouse and child can be among the best expressions of Christian charity and agape. For Christian believers, Calvin wrote, marriage can thus be "a sacred bond," "a holy fellowship," a "divine partnership," "a heavenly calling," "the fountainhead of life," "the holiest kind of company in all the world," "the principal and most sacred ... of all the offices pertaining to human society." "God reigns in a little household, even one in dire poverty, when the husband and the wife dedicate themselves to their duties to each other. Here there is a holiness greater and nearer the kingdom of God than there is even in a cloister."<sup>185</sup>

203. Other Protestants emphasized not only the civil and spiritual uses of marriage, but also its social and political goods. Building especially on Aristotelian and Roman law antecedents, they treated marriage as the natural foundation of civil society and political authority. Philip Melancthon, Luther's co-worker in Wittenberg, opened a long discussion of political authority thus:

The earthly life has orders (*Stände*) and works (*Werke*) which serve to keep the human race, and are ordained by God with certain limits and means. By this order we should know that this human nature is not created without the distinct counsel of God, and that God in this way lets his goodness shine on us to sustain and provide for us.

Matrimony is first, for God does not want human nature simply to run its course as cattle do. Therefore God ordained marriage (Gen. 2; Matt. 19; I Cor. 7) as an eternal, inseparable fellowship of one husband and one wife.... [M]atrimony is a very lovely, beautiful fellowship and church of God, if two people in true faith and obedience toward God cheerfully live together, together invoke God, and rear children in the knowledge of God and virtue.<sup>186</sup>

204. Elsewhere, Melancthon, like Luther, emphasized that marriage was one of the three natural estates (*drei Stände*), alongside with the church and the state that together must govern and guide life in the earthly kingdom. The estate of marriage was to teach all persons, particularly children, essential values, morals, and mores that are needed for life in the church, state, and broader society. It was to exemplify for a sinful society a community of love and cooperation, meditation and discussion, song and prayer. It was to hold out for the church and the state an example of firm but benign parental discipline, rule, and authority. It was to take in and care for wayfarers, widows, and destitute persons – a responsibility previously assumed largely by monasteries and cloisters. Marriage was thus as indispensable an agent of social order and communal cohesion as the state. "All orders of human society," the Lutheran jurist Justin Göbler concurred, "derive from the first estate, matrimony, which was instituted by God himself. On this origin and foundation, stand all other estates, communities, and associations of men.... From the administration of the household, which we call *oeconomia*, comes the

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<sup>185</sup> Comm. Gen. 2:18, 21, 24, 6:2; Serm. Deut. 21:10-14; Comm. Mal. 2:14, 16; Comm. Harmony of the Gospels, Matt. 19:11; Comm. 1 Cor. 7:14, 9:11; Serm. 2 Tim. 5.

<sup>186</sup> Philip Melancthon, "Loci Communes (1555)," in Clyde Manschreck, trans., *Melancthon on Christian Doctrine* (New York: Oxford University Press, 1965), 323.

administration of a government, a state being nothing more than the proliferation of households."<sup>187</sup>

205. Johannes Althusius (1557-1638), a distinguished Calvinist jurist and political theorist, drew on sundry Christian and classical sources to construct a comprehensive covenantal theory of the state and society – again with marriage at its foundation. "Politics is the art of associating men for the purpose of establishing, cultivating, and conserving social life among them," Althusius wrote, citing Aristotle. "The goal of political man is a holy, just, comfortable, and happy symbiosis, a life lacking nothing either necessary or useful." All such political associations are formed by "individual men covenanting among themselves to communicate whatever is necessary and useful for organizing and living in private life." At the base of every such association is marriage, which is a "natural, necessary, economic, and domestic society that is contracted permanently.... Therefore it is rightly called the most intense society, friendship, relationship, and union, the seedbed of every other symbiotic association."<sup>188</sup>

206. Anglican and Anglo-Puritan writers in early modern England argued even more expansively than Continental Protestants that marriage at once served and symbolized the commonwealth (literally the "common good"), of the couple, the children, the church, and the state. Cambridge theologian, William Perkins (1558-1602), put it thus in 1590: "[M]arriage was made and appointed by God himself to be the foundation and seminary of all sorts and kinds of life in the commonwealth and the church.... [T]hose families wherein the service of God is performed are, as it were, little churches; yea, even a kind of paradise on earth."<sup>189</sup> English moral philosopher, Robert Cleaver (ca. 1561-1625) opened his famous 1598 tract, *A Godly Form of Householde Gouvernment* with an oft-repeated maxim: "A household is as it were a little commonwealth, by the good government whereof, God's glory may be advanced, the commonwealth which stands of several families, benefited, and all that live in that family, may receive much comfort and commodity."<sup>190</sup> William Gouge (1578-1653) premised his massive 800 page *Domestic Duties* (1622) on the same belief that "the family is a seminary of the Church and the Commonwealth," and is indeed in its own right, "a little church, and a little commonwealth, whereby a trial may be made of such as are fit for any place of authority, or subjection in Church or commonwealth."<sup>191</sup>

207. Faithful maintenance of domestic duties and offices, Anglican and Anglo-Puritan divines believed, was the best guarantee of individual flourishing and social order within the broader commonwealths of church and state. Robert Cleaver put it thus: "[I]f

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<sup>187</sup> Justin Göbler, *Der Rechten Spiegel* (Frankfurt am Main, 1550), translated in Gerald Strauss, *Luther's House of Learning* (Baltimore, MD: Johns Hopkins University Press, 1978), 118.

<sup>188</sup> Johannes Althusius, *Politica: Methodice digesta atque exemplis sacris et profanis illustrate* [1614], ed., Carl J. Friedrich (Cambridge, Mass.: Harvard University Press, 1932), I.1-3, 17, II.2, 27, II.14-15, 28

<sup>189</sup> William Perkins, *Christian Oeconomy or a Short Survey of the Right Manner of Erecting and Ordering a Family According to the Scriptures*, in *The Work of William Perkins*, ed. Ian Breward (Appleford: The Sutton Courtney Press, 1970), 418-419. I have modernized the spelling and punctuation in this and the next five quotations.

<sup>190</sup> Robert Cleaver, *A Godly Forme of Householde Gouvernment* (London: Thomas Creed, 1598), 1.

<sup>191</sup> William Gouge, *Of Domesticall Duties: Eight Treatises* (London: J. Haviland, 1622), 17-18.

masters of families do not practice catechizing and discipline in their houses and thereby join their helping hands to Magistrates, and Ministers, social order and stability will soon give way to chaos and anarchy."<sup>192</sup> "A conscionable performance of household duties ... may be accounted a public work," William Gouge echoed. For "good members of a family are likely to make good members of church and commonwealth."<sup>193</sup> Daniel Rogers (1573-1652) concurred, arguing that a stable marriage and household served as "the right hand of providence, supporter of laws, states, orders, offices, gifts, and services, the glory of peace, ... the foundation of Countries, Cities, Universities, ... Crowns and Kingdoms."<sup>194</sup>

### 3. Monogamy versus Polygamy

208. Marriage was so good for couples and children, churches and commonwealths, Protestants believed, it was incumbent upon church and state to remove as many obstacles in its way as possible. This understanding of the goods of marriage undergirded the reformers' repeated counsel that widows and widowers, as well as divorcees, could and sometimes should remarry, after a suitable period of grieving. Medieval writers, building on Paul and some of the Church Fathers as we saw, had frowned on all such remarriages, arguing that these were forms of "digamy" or "serial polygamy." The Protestant Reformers taught the opposite. A grieving and lonely widow(er) or divorcee often benefits from a new spouse, especially if he or she still has children to care for. A newly-single party who has known the pleasures and warmth of sexual intimacy will be doubly tempted to sexual sin in its sudden absence. Paul's instruction that "it is better to marry than to burn" becomes doubly imperative for them. "I'm astonished that the lawyers, and especially the canonists, are so deeply offended by digamy," Luther wrote. "Lawyers interpret digamy in an astonishing way if somebody marries a widow, etc.... To have one, two, three, or four wives in succession is [in every case] a marriage and isn't contrary to God, but what's to prevent fornication and adultery, which are against God's command?"<sup>195</sup>

#### a. Luther and Polygamy

209. Luther and his colleagues sometimes pressed this counsel to even more adventuresome, if not scandalous, ends of condoning private bigamy as a lesser sin than public adultery or concubinage in cases of natural necessity.<sup>196</sup> Luther hinted at this several times.<sup>197</sup> A 1532 case in his *Table Talk*, for example, reads thus:

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<sup>192</sup> Cleaver, *Householde Government*, A3.

<sup>193</sup> Gouge, *Domesticall Duties*, 17, 27.

<sup>194</sup> Daniel Rogers, *Matrimoniall Honour* (London: Philip Nevil, 1642), 17.

<sup>195</sup> WA TR 3, No. 3609B, LW 54:243-244; Bucer, *De Regno Christi*, bk. 2, chaps. 23, 24, 34, 41.

<sup>196</sup> See Luther on the concubinage of Lamech and Abraham in WA 29:144ff., 303ff. and his early speculations on polygamy being better than divorce in cases of impotence, in his *Estate of Marriage* (1522), in LW 45:11-18.

<sup>197</sup> See, e.g., WA TR 1, No. 611; WA TR 2, No. 1461; LW 50:33.

A certain man took a wife, and after bearing several children, she contracted syphilis and was unable to fulfill her marital obligation. Thereupon her husband, troubled by the flesh, denied himself beyond his ability to sustain the burden of chastity. It is asked, Ought he be allowed a second wife? I reply that one or another of two things must happen: either he commits adultery or he takes another wife. It is my advice that he take a second wife; however, he should not abandon his first wife but should provide for her sufficiently to enable her to support her life. There are many cases of this kind, from which it ought to be clearly seen and recognized that this is the law and that is the gospel."<sup>198</sup>

This might be read as a case of serial marriage rather than of bigamy. It might be understood that the "second wife" was to be taken after divorce from the first wife, who was still to be cared for despite the divorce. But Luther did not say this clearly.

210. Luther and his colleagues went further in their advice to Landgrave Philip of Hesse. Philip had been diplomatically married at the age of 19 to Christina, the daughter of Duke George of Albertine Saxony. He claimed that "he had never any love or desire for her on account of her form, fragrance, and manner," though this did not prevent him from siring seven children with her. Throughout his married life, and especially when his wife grew frigid in later life, Philip admitted to robust engagement with prostitutes and paramours of all sorts, and was rewarded with a rash of syphilis. He was now deeply ashamed of his conduct, confessed it fully, and sought to do better. He insisted that he still needed a sexual outlet, or he would again be driven to resort to fraternizing with his maids and prostitutes. He had taken a single concubine and wanted to marry her, thinking that contracting such a second marriage would be better than breaking the first. Philip asked Martin Bucer for his advice and blessing on this bigamous arrangement. Bucer instead counseled divorce from his first wife, with remarriage to his concubine. Divorce was licit if for no other reason than Philip's own repeated and fully confessed adultery. But Philip apparently did not want to risk public confession of such conduct. He preferred to keep and support his first wife, and to marry and support the second as well, in the tradition of David, Solomon, and the other patriarchs of Israel. A troubled Bucer took the case to Luther and Melanchthon for their counsel. Luther reports what happened thereafter:

Martin Bucer brought [us] a certified statement which set forth that the landgrave was unable to remain chaste on account of certain defects in his wife. Accordingly, he had lived so and so, which was not good, especially for an Evangelical, and indeed one of the most prominent Evangelical princes. He swore before God and on his conscience that he was unable to avoid such vice unless he was permitted to take another wife. The account of his life and purpose shocked us in view of the vicious scandal that would follow and we begged His Grace not to do it. We were then told he was unable to refrain and would carry out his intention in spite of us by appealing to the emperor or pope. To prevent this, we humbly requested him, if he insisted on doing it or (as he said) was unable to do otherwise before God and his conscience, at least to do it secretly because he was constrained by his need, for it could not be defended in public and under imperial law. We were promised that he

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<sup>198</sup> WA TR 1, No. 414 LW 54:65-66.

would do so. Afterward we made an effort to help as much as we could to justify it before God with examples of [the relative virtues of bigamy over concubinage evident in the story of] Abraham, etc. All this took place and was negotiated under seal of confession, and we cannot be charged with having done this willingly, gladly, or with pleasure. It was exceedingly difficult for us to do, but because we could not prevent it, we thought that we ought at least to ease his conscience as much as possible.<sup>199</sup>

211. Philip apparently shared the reformers' counsel with others, and then publicly celebrated his second wedding in open defiance of his own territorial laws and more general imperial laws against polygamy. This caused a great scandal in Germany. Both the emperor and the pope eventually weighed in to condemn Philip for his actions and Luther and his colleagues for their counsel. In defense of Luther and his colleagues, this was supposed to have been quiet private pastoral counsel reluctantly given to an obviously troubled soul, who could keep neither his continence nor his confidence. Luther saw this as one of those exceptional cases of "natural necessity," which the tradition had long countenanced. But it must also be said that this advice was of a (long) piece with the reformers' broader insistence that one of the fundamental goods and goals of marriage was to protect parties from sexual sin.

#### **b. Calvin and Beza's Denunciation and Criminalization of Polygamy**

212. What made Luther's counsel to Philip so controversial was that Germany had already been roiled by news of polygamous practices among certain Anabaptist and Spiritualist communities of the sixteenth century. Anabaptists were Protestants, but most of them wanted more radical reforms than Lutherans, Anglicans, and Calvinists. Anabaptist communities thus separated themselves from Catholics and Protestants alike into small, self-sufficient, intensely democratic communities, cordoned off from the world. These separated communities governed themselves by biblical principles of discipleship, simplicity, charity, and nonresistance. They set their own internal standards of worship, liturgy, diet, discipline, dress, and domestic education. They handled their own internal affairs of property, contracts, commerce, marriage, and inheritance, without appeal to the state or to secular law. Modern day Amish and Hutterite communities are heirs of this Anabaptist tradition.<sup>200</sup>

213. While most of these Anabaptist groups in the sixteenth century maintained the monogamous ideals of the Bible and the Christian tradition, a few of the more utopian communities, notably a group in Münster, began to experiment with polygamy. They defended themselves with interesting variations on traditional and novel Reformation arguments. First, they argued, following the Church Fathers, polygamy was a natural necessity, given that they the Anabaptists were the only true Christians left, and they

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<sup>199</sup> Letter to Elector John of Saxony (June 10, 1540), WA Br 9:131-135, using translation in Theodore G. Tappert, ed., *Luther: Letters of Spiritual Counsel* (Philadelphia: Westminster Press, 1955), 288-291. See further WA Br 8:631ff.; WA TR 4, No. 5038, 5046, 5096.

<sup>200</sup> Walter Klaassen, ed., *Anabaptism in Outline* (Scottsdale, PA: Herald Press, 1981), 101-114, 211-232.

would have to fill the earth with like-minded children before Christ could return. Second, polygamy had been practiced by the ancient patriarchs, and there was nothing wrong with the new leaders of the community to emulate them, especially since the Bible forewarned them about the dangers of polygamy to be avoided. Third, the Protestant Reformation was all about discarding obsolete and odious institutions that impeded the true worship of God. If other reformers could upend church and state alike in the process of reform, why couldn't the Anabaptist reformers now upend marriage, too, in order to bring greater and purer reform. Finally, and most decisively, the Anabaptists argued, marriage was God's recipe for human procreation and God's remedy for sexual sinfulness. Everyone should be allowed to be married, and every woman should have the maximum opportunity to have children properly through a marriage. Rather than letting individuals burn with passion or depriving men of the maximum chance to have children, why not allow for polygamy. These become familiar arguments in the sixteenth century, as other radical and anti-institutional writers stood up to defend this new experiment in polygamy.<sup>201</sup>

214. Both Protestants and Catholics in the day came down with a vengeance on these arguments, and local authorities prosecuted these polygamous communities with violence – executing several of the more defiant polygamists. The Genevan Reformer, John Calvin, who had married a (monogamous) Anabaptist widow, provided the most decisive and enduring Protestant rebuke of polygamy in the sixteenth century, and his views, together with those of his successor Theodore Beza, became the standard argument in Protestant civil law and common law lands thereafter.

215. Polygamy was a pressing concern for Calvin and Beza – not only because some Anabaptists were experimenting with it,<sup>202</sup> but also because the Old Testament was filled with examples of polygamists, including such leading patriarchs as Abraham, Jacob, David, and Solomon. How could Calvin and Beza insist that Bible-believing Christians follow these great Old Testament patriarchs in so much else, yet denounce their polygamy so vehemently and denounce anyone who sought to emulate the patriarchs in their polygamous practice?

216. Calvin denounced polygamy because he believed that God had prescribed monogamy as part of the “order of creation.” God created one man and one woman in Paradise, and brought them together in holy matrimony. This first marriage of Adam and Eve, he argued, set the norm and form for all future marriages, and it distinguished proper sexual relationships among humans from the random and multiple sexual associations of other animals. After recording the story of the creation and coupling of Adam and Eve, Moses wrote: “Therefore shall a man leave his father and his mother, and shall cleave onto his wife: and the two shall become one flesh.” Christ repeated and

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<sup>201</sup> See detailed sources and discussion in Cairncross, *After Polygamy was Made a Sin*, 1-54.

<sup>202</sup> *Ioannis Calvini opera quae supersunt omnia*, ed. G. Baum, et al., 59 vols. (Brunswick: C.A. Schwetschke et Filium, 1863-1900) [hereafter “CO”]: CO 11:174-180; CO 15:303-307; see Witte, *Law and Protestantism*, 224ff.; Hasting Eells, *The Attitude of Martin Bucer Toward the Bigamy of Philip of Hesse* (New Haven, CT: Yale University Press, 1924).

confirmed these words in his interpretation of the Mosaic law, as did St. Paul in his instructions on Christian marriage.<sup>203</sup>

217. Calvin read the phrase the “two *shall* become one flesh” as an imperative. In this phrase, God commanded monogamous marriage as the “most sacred” and “primal” institution. And, God also condemned polygamy as “contrary to the order and law of nature,” a teaching which Moses, Christ, and St. Paul all confirmed in their repeated references to this creation story. At creation, God could have created two or more wives for Adam, as he did for other animals. But he chose to create one. God could have created three or four types of humans to be the image of God. But he created two types: “male and female he created them.” In the Mosaic law, God could have commanded his chosen people to worship two or more gods as was common in the day, but he commanded them to worship one God and remain in exclusive covenant with him. In the Gospel, Christ could have founded two or more churches to represent him on earth, but he founded one Church, for which he made infinite loving sacrifices. Marriage, as an “order of creation” and a “symbol of God’s relationship with his elect,” involves two parties and two parties only. “[W]hoever surpasses this rule perverts everything, and it is as though he wished to nullify the very institution of God,” Calvin concluded.<sup>204</sup>

218. While monogamy had already been commanded at creation, polygamy had become commonplace already soon after Adam and Eve’s fall into sin. The first polygamist in the Bible was Lamech, a descendent of the first murderer, Cain. Calvin denounced Lamech, for he knowingly “perverted” the “sacred law of marriage” set by God that “two shall become one flesh.” Whether driven by lust or by a lust for power, Lamech upset the “order of nature” itself in marrying a second wife, said Calvin. Lamech’s sin of polygamy begat more sin. Many of Israel’s great patriarchs and kings after Abraham -- Jacob, Gideon, David, Solomon, Rehoboam, and others -- succumbed to the temptation of polygamy just like Abraham. The Bible’s account of the chronic discord of their polygamous households should be proof enough, Calvin argued, that their polygamy was against human nature and God’s covenantal ideal of monogamous marriage. Each polygamist became distracted by multiple demands on his time and energy and multiple divisions of his affections. His wives competed for his attention and approval. His parents became torn in their devotion to their daughters-in-law. His children vied for his property and power. In King David’s royal polygamous household, the sibling rivalry escalated to such an extent that the step- and half-children of his multiple wives raped and murdered each other. And that was after King David had already killed the husband of Bathsheba whom he lustfully coveted and wanted to add to his harem. Take one step on the slippery sinful slope of polygamy, Calvin concluded, and you slide all the way down into all manner of sinfulness.<sup>205</sup>

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<sup>203</sup> CO 10/2:255, 258, quoting Genesis 2:24, Matthew 19:5, I Corinthians 6:20, and Ephesians 5:32.

<sup>204</sup> CO 23:50-51; John Calvin, *Sermons sur la Genèse*, ed. Max Engammarre, 2 vols. (Neukirchen-Vluyn: Neukirchener Verlag, 2000), 1:139-49; Comm. Gen. 1:27; CO 7:214; Serm. Deut. 21:10-14, Comm. Harm. Law Ex. 20:3-6; Comm. Eph. 5:31; Serm. Eph. 5:31; Lect. Ezek. 16; Serm. Deut. 21:15-17.

<sup>205</sup> Comm. Gen. 4:19,16:1-6, 22:19, 26:34-35, 28:6-9, 29:27-30:34, 31:33-42; Lect. Mal. 2:15-16; Serm. 1 Sam. 1:6; Serm. 2 Sam. 13.

219. But it was not just kings with their hundreds of wives who suffered from the compounding sins of polygamy, Calvin went on. Jacob's travails with his two wives, Rachel and Leah, was a simple but sobering illustration of these evils of polygamy under any circumstance. The biblical story is detailed, and Calvin returned to it often. Jacob's uncle Laban had tricked him into marrying his elder daughter, Leah, instead of Rachel whom Jacob loved. Jacob, after working for seven years to get this privilege, had reluctantly married Leah. Later, after another long stint of work, he finally got permission to marry her sister Rachel as well. Both Laban and Jacob thereby "pervert[ed] all the laws of nature by casting two sisters into one marriage bed," and forced them to spend their "whole lives in mutual hostility." But it was not so much the incest as the polygamy that caused all the problems. After his second marriage, Jacob did not accord Leah "adequate respect and kindness"; indeed, he "hated" her. Yet the Lord "opened her womb" so that she produced many sons for him. Jacob loved Rachel, but she produced no children, placing her in hostile competition her sister Leah. Escalating the hostility, Rachel gave Jacob her servant Bilhah who produced two sons for Jacob. Leah countered by giving Jacob her servant Zilpah produced yet another son. All the while, Jacob continued to sleep with Rachel, who finally conceived and had a son Joseph. This only escalated the feud between Rachel and Leah and their children and the children of their concubines.<sup>206</sup>

220. For Calvin this entire scandalous affair proved that "there is no end of sinning, once the divine institution" and natural law of monogamous marriage are breached. Jacob's fateful first step of committing polygamy led him to commit all manner of subsequent sins – rampant incest, concubinage, adultery, lust, and then even more polygamy. Jacob's initial sin was perhaps excusable; he was after all tricked into marrying Leah and had worked and waited patiently seven years for a chance to be his wife and to consummate his love for her. His subsequent sins, however, were an utter desecration of God's law. Calvin blamed Rachel as well, rebuking her for her "petulance," her blasphemy and lack of faith, her abuse of her servant Bilhah, and her complicity in Jacob's concubinage, adultery, and polygamy.

221. Jacob could well have mitigated his sin by divorcing Leah, before marrying Rachel, Calvin further argued. For divorce was "a lighter crime" than polygamy in ancient Israel. After all, God through the Mosaic law did allow Jewish men to divorce their wives -- even if this was only a concession to their "hardness of heart" as Jesus had put it in Matthew 19. God's provision for divorce created a hierarchy of proper marital conduct. Marriage for life was best. Divorce and remarriage were tolerable. Polygamy, however, was never allowed, for it was a desecration of the primal form and norm of marriage.<sup>207</sup>

222. Calvin drove home this argument by appealing to the biblical idea of marriage as a covenant. Various Prophets, ending with Malachi defined marriage as an enduring covenant between a husband and wife, symbolizing the enduring covenant between

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<sup>206</sup> Comm. Gen. 29:27- 30:3.

<sup>207</sup> Lect. Mal. 2:14-16; Comm. Harm. Gospel Matt. 19:5-6.

God and His chosen people. Malachi 2:15-16 then provided, rather opaquely, as the King James Version captures it:

Because the Lord hath been a witness between thee and the wife of thy youth, against whom thou has dealt treacherously; yet she is thy companion, the wife of thy covenant. *And did not he make one? Yet he had the residue of the Spirit. And wherefore one? That he might seek a godly seed.*

Calvin read this passage as a confirmation of monogamy and as a condemnation of polygamy. The point of this passage, said Calvin, is that at creation God “breathed his spirit” of life into “one” woman, Eve. God had plenty of spirit left to breathe life into more women besides Eve. But God chose to give life to Eve only, who alone served to “complete” Adam, to be “his other half.” And it was this union only that could produce “godly seed,” that is, legitimate children.<sup>208</sup>

223. Both divorce and polygamy were deviations from this primal command of life-long monogamy, Calvin recognized. But when compared, “polygamy is the worse and more detestable crime” -- and this shows in how the children of each were to be treated according to God’s law. Divorce for cause was allowed by Moses, and even recognized by Christ and St. Paul. Polygamy enjoyed no such license. Children of divorce remained legitimate heirs. Indeed, the Mosaic law protected their inheritance against unscrupulous fathers who might be tempted to favor the children of their second wife. Children of polygamy, however, were illegitimate bastards who deserved nothing. Indeed, Mosaic law barred such bastards “from the assembly of the Lord ... until the tenth generation.” Later passages ordered that bastards be “cast out” of their homes -- just like Abraham had cast Ishmael out into the wilderness.<sup>209</sup>

224. Having made so much of this distinction between permissible divorce and prohibited polygamy, Calvin dismissed out of hand traditional Catholic arguments that the remarriage of divorcees was a form of serial polygamy, or “digamy.” “I do not consider polygamy to be what the foolish Papists have made it,” Calvin declared derisively. Polygamy is about marriage to two or more wives at once, as is practiced today among Muslims. It has nothing to do with remarriage to a second wife after the first marriage is dissolved by divorce or death. For Calvin, that was the end of the matter, and he left it to Theodore Beza to elaborate this argument against the concept of serial polygamy.<sup>210</sup>

225. To avoid polygamy was not only the right thing to do, Calvin went on; it was also the expedient thing to do. After all, the more wives a man had, the more he would lust after further wives thus distracting him from his main vocation. The more wives a king

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<sup>208</sup> Ibid.; Comm. 1 Tim. 3:2; Comm. Titus 1:6; Comm. Harm. Gosp. Matt. 19:3-9.

<sup>209</sup> See Comm. Harm. Law Deut. 21:15-17; Comm. Harm. Law Deut. 23:2; Serm. Deut. 23:1-3; Comm. Gen. 21:8-18; Comm. Gal. 4:21-31.

<sup>210</sup> See Theodore Beza, *Tractatio de Polygamia, et divortii: in qua et Ochini apostatae pro polygamia ... refutantur* (Geneva, 1568), reprinted in id., *Tractationum Theologicalarum*, 2d ed. (Geneva, 1582), 2:1-49, at 7, 11-26, 37-49.

had, the more taxes he would need to collect to keep his burgeoning household in “royal finery” and the more his mind would be “ensnared” and “stifled” of all “manly good sense.” He would be made “effeminate” and driven to “worship false gods” and to make bad judgments. Even the greatest kings of Israel, David and Solomon, fell prey to these temptations. They and their households and their people suffered miserably on account of this sin.<sup>211</sup> This combination of arguments from morality and utility, though sometimes blatantly misogynist, became standard fare in later Protestant briefs against polygamy. Polygamy was to be avoided not just because it was wrong but also because it did not work. Even the great patriarchs of salvation history could not bring their polygamous households in order. So who are we modern-day Christians to experiment with such a dangerous institution?

226. This was precisely the kind of argument that Theodore Beza pressed at length in his 1568 *Tract on Polygamy*. This tract was, in part, a refutation of the polygamous speculations of Bernard Ochino.<sup>212</sup> Ochino was a distinguished Italian scholar and preacher, and a former leader of the Franciscan order who converted to the Protestant cause. In a late-life title, *Thirty Dialogues* (1563), Ochino offered a series of Socratic musings about the cogency of various standard theological doctrines. Included was a dialogue “whether in some instances an individual man should make his own decision under the inspiration of Almighty God to marry a second wife.”<sup>213</sup> Ochino’s interlocutors went over many of the same biblical passages respecting polygamy that Calvin had analyzed. They left hanging the suggestion that since there was no clear biblical commandment against polygamy, leaving the decision about the propriety of polygamy to the judgment of each individual conscience.

227. This proved to be perilous speculation. When Ochino’s volume reached Geneva, Beza immediately wrote a blistering attack on his views; this brief formed part of his later *Tract on Polygamy*. Beza condemned Ochino as an “apostate” and “heretic,” terms that Beza had already put to grim effect in his defense of the 1553 execution of Michael Servetus for heresy.<sup>214</sup> Beza’s attack on Ochino’s views on polygamy was a key piece of evidence used by the Zurich authorities to prosecute Ochino later that year. The Zurich authorities found Ochino guilty of heresy and banished the frail 76 year old and his four children in midwinter. He wandered through Germany and Poland in search of refuge, and died the following year in Moravia. Ochino’s case stood as a sober but clear lesson that neither the practice nor the preaching of polygamy was welcome in the Protestant world.

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211 Though he refers here to the problems of Solomon’s polygamy, Calvin left no commentary on 1 Kings 11:3-8 where Solomon’s wives are reported have led him to worship other gods. Calvin also left no commentary on Judges 8:30 and 2 Chronicles 11:2 reporting on the polygamy of Gideon and Rehoboam.

212 See Henry Martin Baird, *Theodore Beza: The Counsellor of the French Reformation, 1519-1605* (New York, 1899), 275ff.; Tadataka Maruyama, *The Ecclesiology of Theodore Beza: The Reform of the True Church* (Geneva, 1978), 70ff.

213 *Bernardini Ochini Senensis Dialogi XXX* (Basel, 1563), 186ff. See Roland Bainton, *Bernardino Ochino* (Florence, 1941); Benedetto Nicolini, *Il pensiero di Bernardino Ochino* (Naples, 1939).

214 See Theodore Beza, *De haereticis a civili Magistratu puenindis* (Geneva, 1554).

### **c. The Prevailing Protestant Way**

228. Polygamy was a serious crime in most Protestant lands in the sixteenth century and thereafter. Parties convicted of blatant and intentional polygamy were banished, sometimes after being whipped, imprisoned, and subjected to various shame penalties. Repeat offenders, or those who compounded their polygamy with other felonies like adultery, concubinage, child marriage, or rape, faced execution.<sup>215</sup> Protestant lands also adopted the traditional canon law impediments of precontract, and state courts annulled marriages that featured a form of constructive bigamy. When someone engaged a second party while already being engaged to a first, the authorities generally upheld the first engagement and administered spiritual sanctions for entering the second. When someone engaged a second party, while already married to a first, or married a second party while already engaged to a first, the authorities generally upheld the marriage contract and administered both severe spiritual and also criminal sanctions of fines and various shame punishments. When someone was found in a double marriage, not only was the second marriage annulled, but the second couple could face severe criminal punishment -- flogging, banishment, and in serious cases of intentional polygamy, execution. All this became standard lore both at civil law and at common law.

### **d. Protestant Marital Traditions in Colonial America**

229. These European Christian models of marriage were transmitted across the Atlantic to America during the great waves of colonization and immigration in the sixteenth to nineteenth centuries. They provided much of the theological foundation for the American common law of marriage until well into the nineteenth century.

230. Catholic models of marriage, while not prominent in early America, came to direct application in parts of the colonial American south and southwest.<sup>216</sup> Before the United States acquired the territories of Louisiana (1803), the Floridas (1819), Texas (1836), New Mexico (1848), and California (1848), these colonies were under the formal authority of Spain, and under the formal jurisdiction of the Catholic Church. Most of the areas east of the Mississippi River came within the ecclesiastical provinces of San Domingo or Havana; most of those west came within the ecclesiastical province of Mexico. The Catholic clergy and missionaries taught the sacramental theology of marriage. The ecclesiastical hierarchy sought to enforce the canon laws of marriage, particularly the Decree *Tametsi* issued by the Council of Trent in 1563.<sup>217</sup>

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<sup>215</sup> William G. Naphy, *Sex Crimes From Renaissance to Enlightenment* (Stroud, Gloucestershire/Charleston, S.C., 2002), 48ff.; id., *Calvin and the Consolidation of the Genevan Reformation* (Louisville, 1994), 31ff., with examples from Geneva in Witte and Kingdon, *Sex, Marriage, and Family in John Calvin's Geneva*.

<sup>216</sup> Hans W. Baade, "The Form of Marriage in Spanish North America," *Cornell Law Review* 61 (1975): 1-89.

<sup>217</sup> This was not true of American Catholic communities, outside of Spanish territory, that came within the ecclesiastical provinces of Baltimore, Philadelphia, New York, and Boston, and, later, ecclesiastical provinces in the West. The original settlers in these non-Spanish communities were from Britain, Scotland, or other parts of northern Europe where the Decree *Tametsi* was not in effect. They thus

231. With the formal acquisition of these territories by the United States in the nineteenth century, jurisdiction over marriage shifted to the American Congress and, after statehood, to local state governments. These new civil governments at first rejected portions of the inherited Catholic tradition of marriage -- sometimes ruefully, thereby introducing a persistent streak of anti-Catholicism in American marriage law tracts for the next century and more.<sup>218</sup> Particularly the church's administration of marriage laws and the canonical prohibitions on religious intermarriage and on divorce and remarriage were written out of the new state laws almost immediately. But the Catholic clergy in these territories were generally left free to teach the doctrines and retain the canons of marriage for their own parishioners. Marriages contracted and consecrated before Catholic priests were eventually recognized in all former Spanish colonies in America. The Catholic hierarchy was generally free to pass and enforce new rules for sex, marriage, and family life to guide their own faithful and to advocate state adoption of these rules. Many basic Christian marital norms thereby found their way into American common law, particularly with the exponential growth of American Catholicism in the later nineteenth century.

232. Protestant models of marriage were much more influential in shaping early American marriage law. By the American Revolution of 1776, the Atlantic seaboard was a veritable checkerboard of Protestant pluralism. Lutheran settlements were scattered throughout Delaware, Maryland, Pennsylvania, and New York. Calvinist communities (Puritan, Presbyterian, Reformed, and Huguenot) were strong in New England, and in parts of New York, New Jersey, Pennsylvania, and the coastal Carolinas and Georgia. Evangelical and Free Church communities (Baptists, Methodists, and Quakers especially) found strongholds in Rhode Island and Pennsylvania and were scattered throughout the new states and far onto the frontier. Anglican communities (after 1780 called Episcopalian) were strongest in Virginia, Maryland, Georgia, and the Carolinas, but had ample representation throughout the original thirteen states and beyond.

233. These plural Protestant polities, though hardly uniform in their marital norms and habits, were largely united in their adherence to basic Protestant teachings on the goods of monogamous marriage. While adhering to many of the same basic Christian norms of sex, marriage, and domestic life taught by Catholics, they rejected Catholic sacramental views of marriage and ecclesiastical jurisdiction over marital formation, maintenance, and dissolution. They encouraged ministers to be married. They permitted religious intermarriage. They truncated the law of impediments. They allowed for divorce on proof of fault. They encouraged remarriage of those divorced or widowed.

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continued to recognize the pre-Tridentine Catholic canon law that a secret marriage formed by mutual consent was valid, even without priestly consecration. This disparity continued among some American Catholics until the Tridentine legislation was written into the 1918 Code of Canon Law. See Baade, "Marriage in Spanish North America," 19-24, 36-38.

<sup>218</sup> See, e.g., James Shouler, *A Treatise on the Law of Marriage, Divorce, Separation, and Domestic Relations*, 6th ed., 2 vols. (Albany, NY: Matthew Bender, 1921), 1:19; John Bouvier, *Institutes of American Law* (Philadelphia: Robert E. Peterson, 1851), 1:101.

234. One issue, however, divided these Protestant communities rather sharply -- jurisdictional conflicts over marriage and divorce. New England Calvinist communities, from the beginning of the colonial period, allowed eligible couples to choose to marry before a justice of the peace or a religious official. Anglican communities, following the *Book of Common Prayer*, insisted that such marriages be contracted "in the face of the church" and be consecrated by a properly licensed religious official. Calvinist communities in the north granted local civil courts jurisdiction over issues of divorce, annulment, child custody, and division of the marital estate. Anglican communities in the South insisted that only the legislature should hear and decide such cases.<sup>219</sup> These jurisdictional differences between north and south were eventually smoothed over in the nineteenth century -- with the mid-Atlantic and mid-Western states often providing examples of a middle way between them. The New England way ultimately prevailed.

235. Aside from these jurisdictional differences, most common law authorities accepted the basic law of marriage inherited from earlier Protestant models. With ample variations across state jurisdictions, a typical state statute in the eighteenth century defined marriage as a permanent monogamous union between a fit man and a fit woman of the age of consent, designed for mutual love and support and for mutual procreation and protection. The common law required that betrothals be formal, and, in some states, that formal banns be published for three weeks before the wedding. It required that marriages of minors be contracted with parental consent on both sides, and that all marriages be contracted in the company of two or more witnesses. It required marriage licenses and registration and solemnization before civil and/or religious authorities. It prohibited marriages between couples related by various blood or family ties identified in the Mosaic law. The common law discouraged -- and, in some states, annulled -- marriage where one party was impotent, sterile, or had a contagious disease that precluded procreation or gravely endangered the health of the other spouse. Couples who sought to divorce had to publicize their intentions, to petition a court, to show adequate cause or fault, to make permanent provision for the dependent spouse and children. Criminal laws outlawed fornication, adultery, sodomy, polygamy, incest, contraception, abortion, and other perceived sexual offenses against the natural goods and goals of sex and marriage. Tort laws held third parties subject to suit for seduction, enticement, loss of consortium, or alienation of the affections of one's spouse.<sup>220</sup>

#### 4. Section Summary

236. The Protestant Reformation brought sweeping changes to the Western law and theology of marriage. It shifted marital jurisdiction from the church to the state, rejected

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<sup>219</sup> See detailed study in George Elliott Howard, *A History of Matrimonial Institutions*, 3 vols. (Chicago: University of Chicago Press, 1904).

<sup>220</sup> See a comprehensive summary of laws in Chester Vernier, *American Family Laws: A Comparative Study of the Family Law of the Forty-Eight States*, 5 vols. (Stanford: Stanford University Press, 1931-1938).

the concept and laws of sacramental marriage, truncated the complex law of impediments, replaced secret marriages with public celebrations of marriage, and introduced divorce on grounds of fault with a subsequent right to remarry. This was the most sweeping change in marriage law that the West would see until the twentieth century, and it affected both the civil law of the Continent and eventually the common law of England and its colonies as well. These reforms were built on powerful new teachings on the private and public goods of marital love and fidelity, of mutual protection of adults from sexual sin, and of parental and communal participation in the nurture and education of children.

237. But for all the changes introduced by the Protestant Reformation, Protestant theologians and jurists remained resolute in their commendation of monogamy and condemnation of polygamy. Protestants accepted and extended classical and biblical, Catholic and humanist teachings that monogamy was the natural form and norm of marriage, and deviations from it brought untold hardship to the household and unchecked crimes to the community. After the first two decades of the Reformation, mainline Protestant reformers condemned all experimentation with and speculation about polygamy. Polygamy was against nature and Scripture, fairness and utility, and simply could not be countenanced in church, state, or society. Convicted polygamists faced severe criminal sanctions, execution in a number of cases. Constructive bigamists, even those who had inadvertently stumbled into concurrent engagements or marriages, faced involuntary annulment of their contracts, as well as fines and spiritual sanctions.

238. All these reforms in the theory and law of marriage came into the Anglo-American common law. It took longer for the English common law to accept these reforms, and some medieval canon law teachings and practices persisted till the nineteenth century. The common law colonies in America, however, particularly those outside of the Anglican south, adopted the Protestant norms and forms of marriage more readily, and these patterns eventually came to dominate the young American state. It was the Enlightenment theory of marriage, however, more than any particular Protestant theory that eventually came to dominate Anglo-American teachings on monogamy and against polygamy. To that I turn in the next section.

## **F. Enlightenment Natural Law Theory on Monogamy and Against Polygamy**

239. Protestants and Catholics, on both sides of the Atlantic, continued to expound covenantal and other rich theologies of marriage until the twentieth century. They continued to mine the Bible for further insights into the fundamentals of sex, marriage and family life. While these Christian theologies of marriage did change in accent and application over time and across denominational lines, the main Christian theological models of marriage did not change much before the twentieth century.<sup>221</sup>

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<sup>221</sup> See Brent Waters, *The Family in Social and Political Thought* (Oxford: Oxford University Press, 2007).

240. The more innovative changes in Western marriage theory came at the philosophical level. From the later sixteenth to the later nineteenth centuries, a whole series of writers, most of them associated with the Enlightenment, developed rich natural law accounts of monogamous marriage -- building on, but going beyond the natural law arguments of Catholics and Protestants. Most of these later writers accepted traditional norms and teachings on sex, marriage, and family life, including its teachings on monogamy and against polygamy. But, rather than simply adducing the Bible and Christian theology as their highest authorities, these Enlightenment writers sought to build a natural law account of these main features of monogamous marriage -- using rational and empirical arguments that would be cogent even to those with different religious convictions.

241. The Enlightenment marriage theorists used various methods to make their case for monogamy. Some drew increasingly sophisticated inferences from bonding patterns and reproductive strategies among animals, building on Aristotelian-Thomistic insights and anticipating the findings of modern evolutionary biologists. Some uncovered the common forms and norms of marriage that were shared by Jews, Christians, and Muslims, sometimes even by "pagans," "heathens," and "exotic" religions from Asia, Africa, and the Americas -- all of which they took as evidence of a common natural law at work in the hearts and consciences of all men. Some developed a practical, prudential, and even utilitarian logic of what worked best for husbands and wives, parents and children to exercise and enjoy their natural rights and duties in the household.

242. Part of this early modern natural law theory of marriage was its own alternative theological exercise -- to show the existence of a common natural theology of marriage that Christianity shared with the many other religions that were being discovered in the new age of world trade, mission, and colonization. Part of it was a philosophical exercise -- to prove the existence, if not the truth, of traditional marital forms and norms, much like others sought to prove the existence of God against the growing ranks of skeptics and atheists. Part of it was an historical exercise -- to retrieve and reconstruct some of the rational core of marriage and family life developed by classical writers, neo-classical movements being highly fashionable in many early modern Western universities and intellectual circles. And part of this was a jurisprudential exercise -- to create a common law of marriage that would form part of a universal law of nations that could transcend, if not pacify, the many European nations that had become locked in bloody religious warfare.

243. Hundreds of Western writers from the seventeenth through nineteenth centuries took up these challenges in developing a natural law of marriage, often as part of a broader theory of natural law (*ius naturale*) and the law of nations (*ius gentium*). Among English Protestants, the best and most original such natural law reflections on marriage came from the Puritan legal historian, John Selden, the Anglo-Puritan philosopher, John Locke, the Anglican philosopher and cleric, William Paley, and the Cambridge jurist,

Thomas Rutherforth.<sup>222</sup> Among Lutherans, the most prolific natural law writer on marriage was Samuel von Pufendorf (whose work together with that of Dutch Protestant jurist, Hugo Grotius, was popularized in Europe and America by the Genevan jurist, Jean Jacques Burlamaqui) as well as the German jurists, Johannes Wolfgang Textor and Christian Wolff.<sup>223</sup> Among Calvinists, the most interesting writings came from the many Presbyterians associated with the Scottish Enlightenment, most notably Gershom Carmichael, David Fordyce, Frances Hutcheson, and Henry Home.<sup>224</sup> Many of these writers took their departure from the thought of the Protestant jurist, Hugo Grotius, the Catholic philosopher, Francisco Vitoria, who built directly on the teachings of Thomas Aquinas. Let me just sample a few of these Enlightenment writings to show the power, creativity, and comprehensiveness of these natural law arguments in favor of monogamy and in rejection of polygamy and other sexual offenses.

### 1. John Locke and the Anglo-American Philosophers

244. In his *Two Treatises on Government* (ca. 1689), English philosopher, John Locke (1632-1704), pressed a natural law and natural rights argument for monogamous marriage that would become axiomatic for the Western tradition. Locke, in fact, designed his theory of marriage to refute the patriarchal theories of his fellow Englishman, Robert Filmer. In his *Patriarcha* of ca. 1638, Filmer argued that God had created the patriarchal domestic commonwealth, headed by the paterfamilias, as the source of the hierarchical political commonwealth headed by the king. God had created Adam and Eve as founders not only of the first marriage and family, but also of the first

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222 John Selden, *Uxor ebraica, seu de nuptiis et divortii ex jure civili, id est, divino & talmudico, veterum ebraeorum libri tres* (Frankfurt an Oder: Andr. Becmanus, 1673), reprinted in id., *Opera Omnia tam edita quam inedita in tribus voluminibus*, 3 vols. (London: Guil. Bowyer, 1726), 2:529-860; id., *De successionibus in bona defunctorum; & de successionibus in pontificatum Erbaeorum*, in id., *Opera Omnia*, 2:1-210; and commentary on the Decalogue prohibition on adultery in id., *Opera Omnia*, 1:498-604; Thomas Rutherforth, *Institutes of the Law, Being the Substance of a Course of Lectures on Grotius De jure belli ac pacis*, 2 vols. (Cambridge: Cambridge University Press, 1754), 1:159-69, 322-71. On Locke and Paley, see discussion below.

223 Johann Wolfgang Textor, *Synopsis of the Law of Nations*, trans. John Pawley Bate (Washington, DC: Carnegie Institution, 1916), 1.3.1-55; Samuel von Pufendorf, *De Jure Naturae et Gentium libri octo*, trans. C.H. and W.A. Oldfather (Oxford: Clarendon Press, 1934), 6.1.1-36; Samuel von Pufendorf, *Elementorum Jurisprudentiae Universalis libri duo*, trans. W.A. Oldfather, repr., ed. (New York: Oceana Publications, 1964), 37-39, 275-94; Samuel von Pufendorf, *The Whole Duty of Man According to the Law of Nature*, trans. Andrew Tooke, ed. Ian Hunter and David Saunders (Indianapolis: Liberty Fund, 2003), 174-84; Samuel Pufendorf, *The Divine Feudal Law: Or, Covenants with Mankind Represented*, trans. Theophilus Dorrington, ed. Simone Zurbuchen (Indianapolis: Liberty Fund, 2002), 47-51; Jean Jacques Burlamaqui, *The Principles of Natural and Politic Law* [1747], trans. Thomas Nugent (Indianapolis: Liberty Fund, 2006), 1.4.7. For later German (Lutheran) treatments, see Wolf, *Grosse Rechtsdenker*; Roderich von Stintzing and Ernst Landsberg, 3 vols., 2d repr. ed. (Aalen: Scientia Verlag, 1978).

224 See, among many others, Gershom Carmichael, *Natural Rights on the Threshold of the Enlightenment: The Writings of Gershom Carmichael*, trans. Michael Silverstone, ed. James Moore and Michael Silverstone (Indianapolis: Liberty Fund, 2002), 128-37; David Fordyce, *The Elements of Moral Philosophy in Three Books* [1754], ed. Thomas Kennedy (Indianapolis: Liberty Fund, 2003), bk. 2, chaps. 2-3; John Millar, *The Origin of the Distinction of Ranks*, ed. Aaron Garrett (Indianapolis: Liberty Fund, 2006), 1.2-3; 2.1-2; Adam Smith, *Lectures on Jurisprudence* [1762], ed. R.L. Meek, D.D. Raphael, and P.G. Stein (Indianapolis: Liberty Fund, 1982), Lectures Feb. 7-8, 10-11, 1763.

state and society. Adam was the first husband but also the first ruler. Eve was the first wife, but also the first subject. Together with their children, they comprised at once a domestic and a political commonwealth. All persons thereafter were, by birth, subject to the highest male head, descended from Adam.<sup>225</sup>

245. Locke responded to Filmer first by flatly denying any natural or necessary connection between the political and domestic commonwealths, between the authority of the paterfamilias and that of the magistrate. “[T]he power of a magistrate over a subject,” he wrote, “may be distinguished from that of a father over his children, a master over his servant, a husband over his wife, and a lord over his slave.” The “little commonwealth” of the family is “very far from” the great commonwealth in England “in its constitution, power and end.” “[T]he master of the family has a very distinct and differently limited power, both as to time and extent, over those several persons that are in it; ... he has no legislative power of life and death over any of them, and none too but what a mistress of a family may have as well as he.”<sup>226</sup>

246. Locke responded next by denying Filmer's patriarchal interpretation of the creation story in Genesis. God did not create Adam and Eve as ruler and subject, but as husband and wife, said Locke. Adam and Eve were created equal before God: “male and female he created them.” Each had natural rights to use the bounties of Paradise. Each had natural duties to each other and to God. After the fall into sin, God expelled Adam and Eve from Paradise. He increased man's labor in his use of creation. He increased woman's labor in the bearing of children. He said to Eve: “thy desire shall be to thy husband, and he shall rule over thee” (Gen. 3:16). These words, said Locke, which Filmer called “the original grant of government, were not spoken to Adam, neither indeed was there any grant in them made to Adam; they were a punishment laid upon Eve.” These words do not abrogate the natural equality, rights, and duties with which God created Adam and Eve, and all persons after them. They do not render all wives eternally subject to their husbands. And they certainly do not, as Filmer insisted, give “a father or a prince an absolute, arbitrary, unlimited and unlimitable power over the lives, liberties, and estates of his children and subjects.”<sup>227</sup>

247. Men and women were born free and equal in the state of nature, Locke argued. But “God having made man such a creature, that, in his own judgment, it was not good for him to be alone, put him under strong obligation of necessity, convenience, and inclination to drive him into society.” “The first society” to be formed after the state of nature “was between man and wife, which gave beginning to that of parents and children.” This “conjugal society,” like every other society, “is made by a voluntary compact between man and woman: and tho' it consists chiefly in such a communion and right in one another's bodies, as is necessary to its chief end, procreation; yet it draws with it mutual support and assistance and communion of interest too, as

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<sup>225</sup> Robert Filmer, *Patriarcha and other Political Works*, ed. Peter Laslett (Oxford: Oxford University Press, 1949).

<sup>226</sup> John Locke, *Two Treatises on Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), II.2, II.86.

<sup>227</sup> *Ibid.*, I.9, II.47, 86, 98.

necessary not only to unite their care, and affection, but also necessary to their common offspring, who have a right to be nourished and maintained by them, till they are able to provide for themselves.” Marriage has no necessary form or function beyond this “chief end” of procreation, Locke argued against traditional understandings. Couples were free to contract about the rest of the relationship as they deemed fit. “Conjugal society might be varied and regulated by that contract, which unites man and wife in that society, as far as may consist with procreation and the bringing up of children till they could shift for themselves; nothing being necessary to any society, that is not necessary to the ends for which it is made.”<sup>228</sup>

248. Locke thus grounded marriage and the family in a set of natural rights and duties. It was a natural right for a man and woman to enter into a marital contract. It was a natural duty for them to render procreation an essential condition of whatever marital contract they entered. It was a natural condition of children to be born helpless and thus a natural right for them to be nurtured, educated, and raised to maturity by the parents who conceived them. This triggered the natural duty of their parents to remain together in marriage in order to raise their children. Locke advanced an argument about the role of long-term infant dependency in marriage formation that was strikingly similar to one put forth by Thomas Aquinas:

For the end of conjunction between male and female, being not barely procreation, but the continuation of the species, this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones, who are to be sustained by those that got them, till they are able to shift and provide for themselves.... whereby the father, who is bound to take care for those he hath begot, is under an obligation to continue in conjugal society with the same woman longer than other creatures, whose young being able to subsist of themselves, before the time of procreation returns again, the conjugal bond dissolves of it self, and they are at liberty.<sup>229</sup>

249. The logical end of Locke's argument was that childless couples, or couples whose children were of age and on their own, should be free to divorce, unless they had found some other “communion of interest” to sustain their marriage. Locke dithered on the question of divorce. It was not essential to his argument to speak definitively on the subject, and he knew the dangers of loose literary speculation on it given the heated English politics of his day. In his private diary, he wrote quite brashly: “He that already is married may marry another woman with his left hand.... The ties, duration, and conditions of the left hand marriage shall be no other than what is expressed in the contract of marriage between the parties.” In his *Two Treatises* and other publications, however, he only flirted with the doctrine of divorce and remarriage, suggesting delicately that the matter be left to private contractual calculation.<sup>230</sup>

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<sup>228</sup> Ibid., II.77, 78, 83.

<sup>229</sup> Ibid., II.79-80.

<sup>230</sup> Diary Entry, quoted in editor's note to *ibid.*, II.81-82. The term “left-hand marriage” was a term of art in Locke's day to describe the so-called “morganatic relationship” between a nobleman and a common

250. The other logical end of Locke's argument was that church and state had little role to play within marriage and the family. The church was a voluntary assembly of like-minded believers who could enjoy only those powers that its members had collectively delegated to it. No man has power over another's marriage, and thus the church had no delegated power over marriage that it can ever exercise. The state likewise was a voluntary assembly, formed by a governmental contract among like-minded parties who agreed to become citizens. The state was formed after marriage and the family, and was ultimately subordinate to it in priority and right. The private marriage contract -- that preceded any public government or private church contract -- sets the basic terms of the agreement between husband and wife, parent and child, in accordance with the laws of nature. The church could intervene only at the invitation of the parties. The state could intervene only to enforce these contractual rights and duties, and only to vindicate the natural rights and duties of each party within the household. "For all the ends of marriage being to be obtained under politick government, as well as in the state of nature, the civil magistrate doth not abridge this right, or power of either naturally necessary to those ends, viz., procreation and mutual support and assistance whilst they are together; but only decides any controversy that may arise between man and wife about them."<sup>231</sup>

251. Locke's writings had a monumental impact on later natural law theorists. In France, Montesquieu, Rousseau, Voltaire, and others cited and quoted Locke's writings with reverence, including notably his discussions of marriage. Montesquieu, in particular, echoed and elaborated Locke's marital theories at length in his *Spirit of the Law* (1724), an anchor text for law, politics, and philosophy on both sides of the Atlantic for the next two centuries.<sup>232</sup> In America, John Adams, James Madison, Thomas Jefferson, and many others took Locke's marital and broader political theories as axiomatic, and wove them (and Montesquieu's elaboration of them) into their political writings and into the marriage laws of the young American republic.<sup>233</sup> A number of Scottish philosophers endorsed Locke, but also pushed beyond him in developing their natural law theories of sex, marriage, and family life. They accepted Locke's theories of egalitarian monogamy and of the natural rights and duties within the household between husband and wife, parent and child. But these Scottish writers worked hard to show the deeper natural foundations of exclusive and enduring monogamous marriages, and the injustices if not "barbarisms" of polygamy.

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woman, whose disparate social status precluded marriage. This was viewed as an exclusive and permanent union, sometimes blessed by the church. The women were supported during the relationship and gained truncated inheritance rights. Children born of these unions were considered legitimate, and received support during their father's lifetimes, but could not inherit from him. It's not clear whether Locke is referring to this kind of arrangement alongside a monogamous marriage.

<sup>231</sup> Ibid., II.83.

<sup>232</sup> Montesquieu, *Spirit of Laws*, 5.14-16, 23.1-10, 26.3, 8-14. On Montesquieu's and Locke's influence in early America, see Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge, LA: Louisiana State University Press, 1988), 140-141 who shows that Montesquieu was second only to the Bible in being the most frequently cited authority in all American legal and political writing from 1760-1805; Blackstone and Locke came in third and fourth respectively.

<sup>233</sup> Henry May, *The Enlightenment in America* (New York: Oxford University Press, 1976).

## 2. Henry Home and the Scottish Enlightenment

252. The writings of Henry Home, known as Lord Kames of Scotland (1696-1782), were particularly perceptive. A leading man of letters and a leading justice of the Scottish highest court, Home was a friend of Frances Hutcheson, David Hume, Thomas Reid, Adam Smith, and other such Scottish Enlightenment luminaries. He wrote extensively on law and politics, religion and morality, history and economy, art and industry. He was best known for his brilliant defense of natural law, principally on empirical and rational grounds. Home sought to prove the realities of virtue, duty, justice, liberty, freedom, and other natural moral principles, and the necessity for rational humans to create various offices, laws, and institutions to support and protect them. While his rationalist methodology and naturalist theology rankled the orthodox Christian theologians of his day, Home wanted to give his natural law argument a more universal and enduring cogency. A devout and life-long Protestant, he believed in the truth of Scripture and the will of God. But he wanted to win over even skeptics and atheists to his legal and moral arguments and to give enduring “authority to the promises and covenants” that helped create society and its institutions.<sup>234</sup>

253. Among many other institutions and “covenants,” Home defended monogamous marriage as a “necessity of nature,” and he denounced polygamy as “a vice against human nature.” Home recognized, of course, that polygamy was commonplace among some animals.<sup>235</sup> He also recognized that polygamy had been practiced in early Western history and was still known in some Islamic and Asiatic cultures in his day. But, Home insisted, polygamy exists only “where women are treated as inferior beings,” and where “men of wealth transgress every rule of temperance” by buying their wives like slaves and by adopting the “savage manners” of animals. Among horses, cattle, and other grazing animals, he argued, polygamy is natural. One superior male breeds with all females, and the mothers take care of their own young who grow quickly independent. For these animals, monogamous “pairing would be of no use: the female feeds herself and her young at the same instant; and nothing is left for the male to do.” But other animals, such as nesting birds, “whose young require the nursing care of both parents, are directed by nature to pair” and to remain paired till their young “are sufficiently vigorous to provide for themselves.”<sup>236</sup>

254. Humans are the latter sort of creature, said Home, for whom pairing and parenting are indispensable. Humans are thus inclined by nature toward enduring monogamous pairing of parents – indeed, more so than any other creature given the

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<sup>234</sup> See especially his *Essays on the Principles of Morality and Natural Religion* [1779], 3d ed., ed. Mary Catherine Moran (Indianapolis: Liberty Fund, 2005), esp. Part I, Essay 2, chaps. 6, 9 and the study of Ian Simpson Ross, *Lord Kames and the Scotland of his Day* (Oxford: Oxford University Press, 1972); William C. Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment: A Study in National Character and in the History of Ideas* (The Hague: Martinus Nijhoff, 1971).

<sup>235</sup> See Henry Home, *Sketches of the History of Man, Considerably Enlarged by the Latest Additions and Corrections of the Author*, ed. James A. Harris (Indianapolis: Liberty Fund, 2007), 3 vols., Book I, Sketch VI, Appendix: “Concerning Propagation of Animals and Care of Progeny.”

<sup>236</sup> *Ibid.*, Sketch V, 204, Sketch VI, 261, 263, 271, 278.

long fragility and helplessness of their offspring. Home expanded on the natural law configuration of marriage and the importance of human childhood dependency developed by Aquinas and his followers, as well as early Enlightenment philosophers like John Locke and Baron Montesquieu. He added new insights as well from the budding science of cultural development (anthropology as we now call it):

Man is an animal of long life, and is proportionally slow in growing to maturity: he is a helpless being before the age of fifteen or sixteen; and there may be in a family ten or twelve children of different births, before the eldest can shift for itself. Now in the original state of hunting and fishing, which are laborious occupations, and not always successful, a woman, suckling her infant, is not able to provide food even for herself, far less for ten or twelve voracious children.... [P]airing is so necessary to the human race, that it must be natural and instinctive.... Brute animals, which do not pair, have grass and other food in plenty, enabling the female to feed her young without needing any assistance from the male. But where the young require the nursing care of both parents, pairing is a law of nature.<sup>237</sup>

255. Not only is the pairing of male and female a law of nature, Home continued. “Matrimony is instituted by nature” to overcome humans’ greatest natural handicap to effective procreation and preservation as a species -- their perpetual desire for sex, especially among the young, at exactly the time when they are the most fertile. Unlike most animals, whose sexual appetites are confined to short rutting seasons, Home wrote, humans have a constant sexual appetite which, by nature, “demands gratification, after short intervals.” If men and women just had random sex with anyone -- “like the hart in rutting time” -- the human race would devolve into a “savage state of nature” and soon die out. Men would make perennial and “promiscuous use of women” and not commit themselves to the care of these women or their children. “Women would in effect be common prostitutes.” Few women would have the ability on their own “to provide food for a family of children,” and most would avoid having children or would abandon them if they did. Marriage is nature’s safeguard against such proclivities, said Home, and “frequent enjoyment” of marital sex and intimacy “endears a pair to each other,” making them want only each other all the more. “Sweet is the society of a pair fitted for each other, in whom are collected the affections of husband, wife, lover, friend, the tenderest affections of human nature.”

The God of nature has [thus] enforced conjugal society, not only by making it agreeable, but by the principle of chastity inherent in our nature. To animals that have no instinct for pairing, chastity is utterly unknown; and to them it would be useless. The mare, the cow, the ewe, the she-goat, receive the male without ceremony, and admit the first that comes in the way without distinction. Neither have tame fowl any notion of chastity: they pair not; and the female gets no food from the male, even during incubation. But chastity and mutual fidelity [are] essential to the human race; enforced by the principle of chastity, a branch of the moral sense. Chastity is essential even to the continuation of the human race. As the carnal appetite is always alive, the sexes would wallow in

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237 Ibid., Sketch VI, 263-64.

pleasure, and be soon rendered unfit for procreation, were it not for the restraint of chastity.<sup>238</sup>

256. Polygamy violates this natural design and strategy for successful procreation through enduring marital cohabitation, Home argued. First, monogamy is better suited to the roughly equal numbers of men and women in the world. “All men are by nature equal in rank; no man is privileged above another to have a wife; and therefore polygamy is contradictory” to the natural order and to the natural right of each fit adult to marry. Monogamous pairing is most “clearly the voice of nature.” It is echoed in “sacred Scripture” in its injunction that “two” – not three or four -- shall become “one flesh” in marriage. If God and nature had intended to condone polygamy, there would be many more females than males.<sup>239</sup>

257. Second, monogamy “is much better calculated for continuing the race, than the union of one man with many women.” One man cannot possibly provide food, care, and nurture to the many children born of his many wives. Their wives are not able to provide easily for their young when they are weakened from child labor and birth, needed for nursing, or distracted by the many needs of multiple children. Some of their children will be neglected, some will grow up impoverished, malnourished, or undereducated, some will inevitably die. “How much better chance for life have infants who are distributed more equally in different families.”<sup>240</sup>

258. Third, monogamy is better suited for women. Men and women are by nature equal, Homes argued at length, building on the egalitarian themes of Locke among others. Monogamous marriage is naturally designed to respect this natural gender equality, even while recognizing the different roles that a husband and wife play in the procreation and nurture of their children. Thus marriage works best when a husband and wife have “reciprocal and equal affection” as true “companions” in life, who enjoy each other and their children with “endearment” and “constancy.” Polygamy, by contrast, is simply a patriarchal fraud. Each wife is reduced to a servant, “a mere instrument of pleasure and propagation” for her husband. Each wife is reduced to competing for the attention and affection of her husband, particularly if she has small children and needs help in their care. One wife and her children will inevitably be singled out for special favor, denigrating the others further and exacerbating the tensions within the household which cause the children to suffer, too. Packs of wolves might thrive this way, but rational humans cannot. Combining natural instinct with rational reflection, humans have discovered that monogamy is the “foundation for a true matrimonial covenant” between two equal adults.<sup>241</sup>

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<sup>238</sup> Ibid., Sketch VI, 264, 267, 269-270. Later, Home condemned mandatory celibacy and abstinence within marriage as “ridiculous self-denial,” an “impudent disregard of moral principles,” and the “grossest of all deviations, not only from sound morality, but from pure religion” and natural law. Ibid., Book III, Sketch III, 888-90.

<sup>239</sup> Ibid., Book I, Sketch VI, 265-266.

<sup>240</sup> Ibid., Sketch VI, 266; Sketch VIII, 484.

<sup>241</sup> Ibid., Sketch VI, 261, 267-68, 287-311.

259. Fourth, monogamy is better designed to promote the fidelity and chastity humans need to procreate effectively as a species. It induces husband and wives to remain faithful to each other and to their children, come what may. Polygamy, by contrast, is simply a forum and a catalyst for adultery and lust. If a husband is allowed to satisfy his lust for a second woman whom he can add as a wife, his “one act of incontinence will lead to others without end.” Soon enough, he will lust after yet another wife and still another -- even the wife of another man, as the biblical story of King David’s lust for Bathsheba tragically illustrates. The husband’s bed-hopping, in turn, will “alienate the affections” of his first wife, who will embark on her own bed-hopping. Such “unlawful love” will only trigger more and more rivalries among husbands, wives, and lovers in which all will suffer. Moreover, by sharing another man’s bed, the wife might well require her husband “to maintain and educate children who are not his own.” This most men will not do unless they are uncommonly smitten or charitable. Polygamy simply “does not work,” Home wrote. “Matrimony between a single pair, for mutual comfort, and for procreating children implies the strictest mutual fidelity.”<sup>242</sup>

260. Even children understand that monogamous marriage is “an appointment of nature,” Home concluded. As infants they bond with both their mothers and fathers and when they grow older they work to keep the couple together. “If undisguised nature shows itself anywhere, it is in children,” Home wrote. “They often hear, it is true, people talking of matrimony; but they also hear of logical, metaphysical, and commercial matters, without understanding a syllable. Whence then their notion of marriage but from nature? Marriage is a compound idea, which no instruction could bring within the comprehension of a child, did not nature cooperate.” From the “mouths of babes” come profound truths about our most basic institution.<sup>243</sup> We hear in these words of Home the echoes of a children’s right point of view that Locke had introduced and later theorists would expand: the natural right of the child to be born in a society whose customs, institutions, and laws protect their inclination, need, and right to be raised by their parents of conception unless illness, accident, or death of a parent intervenes.

#### **a. *Frances Hutcheson***

261. Home’s argument for monogamy and against polygamy was typical of the arguments from nature, reason, and experience that the Scottish Enlightenment mustered in favor of monogamy and against polygamy and other sexual crimes. Some of these writers supplemented these with arguments from Scripture and Christian tradition, but most, like Home, sought to prove their case on rational and empirical grounds so much as possible. For example, the great Scottish philosopher of common sense, Frances Hutcheson (1694-1746) grounded his argument for the natural law of monogamy, fidelity, and exclusivity again on the natural needs of mothers and children:

Now as the mothers are quite insufficient alone for this necessary and laborious task, which nature also has plainly enjoined on both the parents by implanting in both that strong parental affection; both parents

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<sup>242</sup> Ibid., Sketch V, 204; Sketch VI, 270, 287-89.

<sup>243</sup> Ibid., Sketch VI, 265.

are bound to concur in it, with joint labor, and united cares for a great share of their lives: and this can never be tolerable to them unless they are previously united in love and stable friendship: as new children also must be coming into life, prolonging this joint charge. To engage mankind more cheerfully in this laborious service nature has implanted vehement affections between the sexes; excited not so much by views of brutal pleasure as by some appearances of virtues, displayed in their behavior, and even by their very form and countenances. These strong impulses plainly show it to be the intention of nature that human offspring should be propagated only by parents first united in stable friendship, and in a firm covenant about perpetual cohabitation and joint care of their common children. For all true friendship aims at perpetuity: there's no friendship in a bond only for a fixed term of years, or in one depending upon certain events which the utmost fidelity of the parties cannot ensure.<sup>244</sup>

262. "Nature has thus strongly recommended" that for humans all sex and procreation occur within a "proper covenant about a friendly society for life," Hutcheson continued. "The chief articles in this covenant" are mutual fidelity of husband and wife to each other. A wandering wife causes the "greatest injury" to her husband by bringing adulterine children into the home who dilute his property and distract him from "that tender affection which is naturally due to his own [children]." A wandering husband causes great injury to his wife and children by allowing his affections and fortunes to be squandered on prostitutes, mistresses, and lovers. (Hutcheson's commentators added the dangers of tracking in syphilis and other sexual diseases, too, through his illicit sex.) Other articles of the "natural marital covenant," Hutcheson wrote, include "a perpetual union of interests and pursuits" between husband and wife, a mutual commitment to "the right education of their common children," and a mutual agreement to forgo separation and divorce. It is against reason and human nature, Hutcheson wrote, "to divorce or separate from a faithful and affectionate consort for any causes which include no moral turpitude; such as barrenness, or infirmity of body; or any mournful accident which no mortal could prevent." Such "libertinism" is "not only unjust, but also unnatural." Divorce should be allowed only in cases of adultery, "obstinate desertion, capital enmity, or hatred and such gross outrages as take away all hopes of any friendly society for the future or a safe and agreeable life together."<sup>245</sup>

### **b. David Hume**

263. Similarly, the famous Scottish philosopher, David Hume (1711-1776), for all his skepticism about traditional morality, thought traditional legal and moral norms of sex, marriage, and family life to be both natural and useful. Hume summarized the natural law configuration of marriage crisply: "The long and helpless infancy requires the

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<sup>244</sup> Frances Hutcheson, *Philosophiae Moralis Institutio Compendiaria, With a Short Introduction to Moral Philosophy*, ed. Luigi Turco (Indianapolis: Liberty Fund, 2007), 218.

<sup>245</sup> *Ibid.*, 220-22. See also Frances Hutcheson, *Logic, Metaphysics, and the Natural Sociability of Mankind*, ed. James Moore and Michael Silverthorne (Indianapolis: Liberty Fund, 2006), 206-07.

combination of parents for the subsistence of their young; and that combination requires the virtue of chastity and fidelity to the marriage bed.”<sup>246</sup>

264. Hume used many of the same arguments that Home had mustered against polygamy. This “odious institution,” he called it, replaced the natural equality of the sexes with a form of slavery and tyranny. Polygamy fostered “the bad education of children.” It led to “jealousy and competition among wives.” Moreover, said Hume, polygamy forced a man, distracted by his other wives and children, to confine his other wives to the home – by physically threatening, binding, or even laming them, by isolating them from society, or by keeping them so sick, poor, and weak they could not leave, and be attractive enough for another man to steal. All this is a form of “barbarism,” with “frightful effects” that defy all nature and reason.<sup>247</sup> No rational woman would willingly accept such “tyranny” and “slavery,” said Hume. Nor would rational men accept such a role for their wives.

We are, by nature, their lovers, their friends, their patrons: Would we willingly exchange such endearing appellations, for the barbarous title of master and tyrant? In what capacity shall we gain by this inhuman proceeding? As lovers, or as husbands? The lover, is totally annihilated; and courtship, the most agreeable scene in life, can no longer have place, where women have not the free disposal of themselves, but are bought and sold like the meanest animal. The husband is as little a gainer, having found the admirable secret of extinguishing part of love, except its jealousy. No rose without its thorn; but he must be a foolish wretch indeed, that throws away the rose and preserves only the thorn....

The bad education of children, especially children of condition, is another unavoidable consequence of [polygamy]. Those who pass the early part of life among slaves [their mothers], are only qualified to be, themselves, slaves and tyrants; and in every future intercourse, either with their inferiors or superiors, are apt to forget the natural equality of mankind.... Barbarism appears, from reason as well as experience, to be the inseparable attendant of polygamy.<sup>248</sup>

265. Hume offered similar natural and utilitarian arguments against “voluntary divorce.” Many in Hume’s day argued for divorce as a natural expression of the freedom of contract and a natural compensation for having no recourse to polygamy despite a man’s natural drive to multiple partners. “The heart of man delights in liberty,” their argument went; “the very image of constraint is grievous to it.” Hume would have none of this. To be sure, he recognized that divorce was sometimes the better of two evils – especially where one party was guilty of adultery, severe cruelty, or malicious desertion, and especially when no children were involved. But, outside of such circumstances, he said, “nature has made divorce” without real cause the “doom of all

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<sup>246</sup> David Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals* [1777], 2d ed., ed. L.A. Selby-Bigge (Oxford: Clarendon Press, 1902, 2d impr., 1963), 206-07.

<sup>247</sup> David Hume, *Essays Moral, Political, and Literary*, rev. ed., ed. Eugene F. Miller (Indianapolis: Liberty Fund, 1987), Essay XIX “On Polygamy and Divorces”, pp. 182-87.

<sup>248</sup> *Ibid.*, XIX.9-13.

mortals.” First, with voluntary divorce, the children suffer and become “miserable.” Shuffled from home to home, consigned to the care of strangers and step-parents “instead of the fond attention and concern of a parent,” the inconveniences and encumbrances of their lives just multiply as the divorces of their parents and stepparents multiply. Second, when voluntary divorce is foreclosed, couples by nature become disinclined to wander, and instead form “a calm and sedate affection, conducted by reason and cemented by habit; springing from long acquaintance and mutual obligations, without jealousies or fears.” “We need not, therefore, be afraid of drawing the marriage-knot, which chiefly subsists by friendship, the closest possible.” Third, “nothing is more dangerous than to unite two persons so closely in all their interests and concerns, as man and wife, without rendering the union entire and total. The least possibility of a separate interest must be the source of endless quarrels and suspicions.” Nature, justice and prudence alike require their “continued consortium.”<sup>249</sup>

### 3. William Paley and the Utilitarians

266. The natural law writings of William Paley (1743-1805), a Cambridge philosopher and, later, an Anglican cleric, provide a good illustration of how these natural law arguments could be pressed into a more utilitarian and natural rights direction. Paley was known in his day as a “theological utilitarian.” He sought to define those natural principles and practices of social life that most conduce to human happiness – in this life and in the next. Those principles and practices, he said, could be variously sought in Scripture and tradition, divine law and natural law, morality and casuistry – all of which, for Paley, contributed and came to “the same thing; namely, that science which teaches men their duty and the reasons of it.”<sup>250</sup>

267. Marriage is among the natural duties and rights of men and women, Paley wrote, for it provides a variety of public and private goods. His list of marital goods was a nice distillation of traditional arguments:

1. The private comfort of individuals, especially of the female sex....
2. The production of the greatest number of healthy children, their better education, and the making of due provision for their settlement in life.
3. The peace of human society, in cutting off a principal source of contention, by assigning one or more women to one man, and protecting his exclusive right by sanctions of morality and law.
4. The better government of society, by distributing the community into separate families, and appointing over each the authority of a master of a family, which has more actual influence than all civil authority put together.

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<sup>249</sup> Ibid., 187-90.

<sup>250</sup> William Paley, *Principles of Moral and Political Philosophy* [1785], ed. D.L. LeMahieu (Indianapolis: Liberty Fund, 2002), 1-25. See further D.L. LeMahieu, *William Paley: A Philosopher and His Age* (Lincoln, NE: University of Nebraska Press, 1976).

5. The same end, in the additional security which the state receives for the good behaviour of its citizens, from the solicitude they feel for the welfare of their children, and from their being confined to permanent habitations.

6. The encouragement of industry ... and morality.<sup>251</sup>

268. Paley worked systematically through the respective “natural rights and duties” of husband and wife, parent and child. In marriage, a husband promises “to love, comfort, honor, and keep his wife” and a wife promises “to obey, serve, love, honor, and keep her husband” “in every variety of health, fortune, and condition.” Both parties further stipulate “to forsake all others, and to keep only unto one another, so long as they both shall live.” In a word, said Paley, each spouse promises to do all that is necessary to “consult and promote the other’s happiness.” These are not only Scriptural and traditional duties of marriage. They are natural duties, as can be seen in the marital contracts of all manner of cultures, which Paley adduced in ample number. These natural duties, in turn, give the other spouse “a natural right” to enforce them in cases of adultery, “desertion, neglect, prodigality, drunkenness, peevishness, penuriousness, jealousy, or any levity of conduct which administers occasion of jealousy.” What St. Paul called the “mutual conjugal rights” of husband and wife are simply one way of formulating the natural rights that husband and wives enjoy the world over.<sup>252</sup>

269. If the couple is blessed with children, the parents have a “natural right and duty” to provide for the child’s “maintenance, education, and a reasonable provision for the child’s happiness in respect of outward condition.” A parent’s rights to care for their children “result from their duties” to their children, said Paley.

If it be the duty of a parent to educate his children, to form them for a life of usefulness and virtue, to provide for them situations needful for their subsistence and suited to their circumstances, and to prepare them for those situations; he has a right to such authority, and in support of that authority to exercise such discipline as may be necessary for these purposes. The law of nature acknowledges no other foundation of a parent’s right over his children, besides his duty towards them. (I speak now of such rights as may be enforced by coercion.) This relation confers no property in their persons, or natural dominion over them, as is commonly supposed.

But a parent “has, in no case, a right to destroy his child’s happiness,” Paley went on, and those that do will suffer punishment, if not lose custody of their child. Moreover, while parents have a right to encourage and train their children to a given vocation and to give their consent to their children’s marriages, “parents have no right to urge their children upon marriages to which they are averse.” Children, in turn, have “a natural right to receive the support, education, and care” of their parents. They also have a

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<sup>251</sup> Paley, *Principles*, 167-68.

<sup>252</sup> *Ibid.*, 194-96.

“natural duty” to “love, honor, and obey” their parents even when they become adults, and to care for their parents when they become old, frail, and dependent.<sup>253</sup>

270. Paley built on this last point to work systematically through the various sexual sins that deviated from the private and public goods of marriage, and the natural rights and duties of the household – now marshalling natural, rational, and utilitarian arguments against them. He included briefs against fornication, prostitution, concubinage, incest, rape, adultery, no-fault divorce, and polygamy. While he marshaled strong arguments against each of these, he considered the last three offenses to be the most serious because they caused the most injury to the most parties, and thus had the least utility for the couple, their children, and society at large.

271. Adultery harms the innocent spouse as well as the couple’s children, said Paley. For the betrayed spouse, adultery is “a wound in his [or her] sensibility and affections, the most painful and incurable that human nature knows.” For the children it brings shame and unhappiness as the vice is inevitably detected and discussed. For the adulterer or adulteress, it is a form of “perjury” that violates their marital vow and covenant. For all parties in the household, adultery will often provokes retaliation and imitation – another slippery slope to erosion of marriage and the unleashing of sexual libertinism and seduction. Both nature and Scripture thus rain down their anathemas against it.<sup>254</sup>

272. Polygamy is adultery writ larger, Paley continued. It not only violates “the constitution of nature and the apparent design of the Deity” in creating men and women as equals and creating equal numbers of men and women. Its unnatural qualities are made even clearer in the many “bad effects” it occasions. Polygamy causes:

contests and jealousies amongst the wives of the same husband; distracted affections, or the loss of all affection, in the husband himself; a voluptuousness in the rich, which dissolves the vigor of their intellectual as well as active faculties, producing that indolence and imbecility both of mind and body, which have long characterized the nations of the East; the abasement of one half of the human species, who, in countries where polygamy obtains, are degraded into mere instruments of physical pleasure to the other half; neglect of children; and the manifold, and sometimes unnatural mischiefs, which arise from a scarcity of women. To compensate for these evils, polygamy does not offer a single advantage. In the article of population, which it has been thought to promote, the community gains nothing: for the question is not, whether one man will have more children by five or more wives than by one; but whether these five wives would not bear the same or a greater number of children to five separate husbands. And as to the care of the children, when produced, and the sending of them into the world in situations in which they may be likely to form and bring up families of their own, upon which the increase and succession of the human species in a great degree depend; this is less provided for, and less practicable, where twenty or thirty children are to be supported by the attention and fortunes of one

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<sup>253</sup> Ibid., 210.

<sup>254</sup> Ibid., 176-80.

father, than if they were divided into five or six families, to each of which were assigned the industry and inheritance of two parents.<sup>255</sup>

273. Paley opposed “frivolous” or “voluntary” divorce as well, using arguments from “natural law” and “general utility.” Like many other Protestants and Enlightenment philosophers, he thought that divorce and remarriage of the innocent spouse was both natural and necessary in cases of adultery, malicious desertion, habitual intemperance, cruelty, and crime. But Paley was against voluntary divorces or separations for “lighter causes” or by “mutual consent,” on grounds of nature and utility. Such “lighter” divorces were “obviously” against natural law if the couple had dependent children, Paley thought. “It is manifestly inconsistent with the [natural] duty which the parents owe to their children; which duty can never be so well fulfilled as by their cohabitation and united care. It is also incompatible with the right which the mother possesses, as well as the father, to the gratitude of her children and the comfort of their society; of both which she is almost necessarily deprived, by her dismissal from her husband’s family.”<sup>256</sup>

274. “Causeless,” “voluntary” and “lighter divorces,” unilaterally sought, are not so obviously against natural law for childless couples, Paley argued, but they are still “inexpedient” enough to prohibit. If such divorces are available, especially on a unilateral basis, one spouse will be unnaturally tempted to begin pursuing their own separate interests rather than a common marital interest. They will begin hoarding their own money, developing their own friendships, living more and more independently. “This would beget peculation on one side, mistrust on the other, evils which at present very little disturb the confidence of married life.” The availability of such divorces will further discourage spouses to reconcile their conflicts or “take pains to give up what offends, and practice what may gratify the other.” They will have less incentive to work hard “to make the best of their bargain” or “promote the pleasure of the other.” “These compliances, though at first extorted by necessity, become in time easy and mutual; and, though less endearing than assiduities which take their rise from affection, generally procure to the married couple a repose and satisfaction sufficient for their happiness.” And the availability of such divorces will heighten the natural temptation of each spouse, especially the husband, to succumb to “new objects of desire.” However much in love they were on their wedding day, and however hard they try, men are “naturally inclined” to wander after “the invitations of novelty” unless they are “permanently constrained” to remain faithful to their wives even as they lose their “youthful vigor and figure”. Thus “constituted as mankind are, and injured as the repudiated wife generally must be, it is necessary to add a stability to the condition of married women, more secure than the continuance of their husbands’ affection; and to supply to both sides, by a sense of duty and of obligation, what satiety has impaired of passion and of personal attachment. Upon the whole, the power of divorce is evidently and greatly to the disadvantage of the woman: and the only question appears to be, whether the real and permanent happiness of one half of the species should be surrendered to the caprice and voluptuousness of the other?”<sup>257</sup>

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<sup>255</sup> *Ibid.*, 182-83.

<sup>256</sup> *Ibid.*, 186, 190.

<sup>257</sup> *Ibid.*, 187-89.

275. Paley's natural law and theological utilitarian arguments for monogamy and against polygamy and related sexual offenses would find enduring provenance among many utilitarians into the nineteenth century. The most famous of these utilitarians, Jeremy Bentham (1748-1832), endorsed most of these same propositions that Paley had set forth, even though Bentham famously eschewed the natural law and natural rights language that had so inspired Paley's theory of marriage. Bentham thought that traditional commendations of monogamy and condemnations of polygamy and other sexual offenses could be rationalized on utilitarian principles alone.<sup>258</sup> He quoted with favor Montesquieu's rejection of polygamy as "useless":

With regard to polygamy in general, independently of the circumstances [of natural necessity] which may render it tolerable, it is not of the least service to mankind, nor to either of the two sexes, whether it be that which abuses or that which is abused. Neither is it of service to the children; for one of its greatest inconveniences is, that the father and mother cannot have the same affection for their offspring; a father cannot love the same twenty children as a mother can love two.... Besides, the possession of so many wives does not always prevent their entertaining desires for those of others; it is with lust, as with avarice, whose thirst increases by the acquisition of treasure.<sup>259</sup>

#### 4. Francis Lieber and New Cultural and Political Arguments for Monogamy

276. These English, Scottish, and Continental Enlightenment theorists also influenced Francis Lieber (1800-1872), a German-American jurist with both natural law and utilitarian tendencies. Lieber, whose views helped shape the United Supreme Court's law against polygamy in the later nineteenth century, emphasized the utility of monogamy not only for the couple and their children, but also for the democratic state and its citizens. "The family cannot exist without marriage, nor can it develop its highest importance, it would seem, without monogamy. Civilization in its highest state, requires it, as well as the natural organization and wants of man." The "Western world," said Lieber, from the earliest Greeks and Romans to the modern advanced nations of Europe and North America, "acknowledge with one voice, not only marriage, but monogamy, to be of the last importance for the cause of human advancement."<sup>260</sup>

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<sup>258</sup> *The Works of Jeremy Bentham*, ed. John Bowring, 11 vols. (Edinburgh; William Tait, 1843), 1:119-21, 348-57, 55, 2:499, 531-32; 3:73, 202-03; 6:63, 522; 7:579-81. See Mary Sokol, "Jeremy Bentham on Love and Marriage," *American Journal of Legal History* 30 (2009): 1.

<sup>259</sup> Montesquieu, *The Spirit of the Laws*, bk. 16, chp. 6.6.

<sup>260</sup> Francis Lieber, *Manual of Political Ethics, Designed Chiefly for the Use of Colleges and Students at Law*, 2d rev. ed., ed. Theodore D. Woolsey (Philadelphia: J.B. Lippincott, 1890), 103-04, 141-42. See also the interesting discussion of Lieber, and the Supreme Court's use of his writings in upholding the conviction of Mormon polygamists, in Maura Strassberg, "Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage," *North Carolina Law Review* 75 (1996-97): 1501, 1518-23. Strassberg goes on to defend a comparable theory of monogamous marriage that accents its goods in contrast to the harms of polygamy. See further her fine essay, "The Crime of Polygamy," *Temple Political and Civil Rights Law Review* 12 (2003): 353 where she shows that the maintenance of modern polygamous communities often create dangerous, isolated, and closed theocracies that improperly blend

277. Lieber distilled crisply the traditional Western argument, going back to Aristotle and Aquinas, that a stable monogamous family was essential to meeting the physical needs of fragile children who remained long dependent. But he went on to show how a stable monogamous family distinctly nurtures in its members healthy norms and habits of love and respect, rights and duties, loyalty and dependence, caring and sharing, authority and liberty, participation and public spiritedness that are essential to a thriving democratic state:

Of all animals, man is born not only in the most helpless state, but the infant requires the nurture of its mother long after it has ceased to derive its nourishment from her, which cause not only a physical but an intellectual education. Hence the fact that the attachment between human parents and their offspring is far more enduring than between other animals. The education lasts so long, the child requires the care, protection, and guidance of its parents for extensive a period, that they may have other children before the first is able to take care of itself. From this circumstance, and the continuity of conjugal attachment which is not, as with other animals, limited to certain seasons, originates the perpetuity of the conjugal union, as well as a mutual attachment among the children, while with other animals no connection, or a very limited one indeed, exists between the offspring of the various seasons. The protracted state of the child's dependency upon the parents produces habits of obedience, respect, and love, and, at a more advanced period, a consciousness of mutual dependence. The family, with its many mutual and lasting relations, increasing in intensity, is formed. The members of the family soon discover how much benefit they derive from reciprocal assistance, and from a division of occupation among them, since man is placed in the world without strong and irresistible instincts which are given to other animals for protection or support, and which seems to increase in specific intensity the lower the animal stands in the scale of animate creation, thus approach more and more the plant, which lives without any self-action—an absolute slave to season, clime, and soil. So little is man instinctive, that even his sociality, so indispensable to his whole existence, has first to be developed. He is led to it, indeed, by the natural relations between the progenitors and their offspring.... It is in the family, between parents and children, and sisters and brothers, that those strong sympathies and deep-rooted affections grow up which become the vital spark of so many good actions.... With them is mingled and a thousandfold entwined all that attachment which expands into patriotism – that warm devotion to our country which loves to dwell in every noble heart, and without which no free state can long exist. The love of our parents, of our children, of our brothers and sisters, makes patriotism, a thrilling reality.... The family is the focus of patriotism.

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religious and political authority, privilege patriarchy at the cost of the equality of women, exploit and coerce young women into unwanted marriages with older men, feature rape and statutory rape that is difficult to detect or prosecute, deprecate and ostracize boys who are viewed as competitors, curtail the education, democratic preparation, and social options for wives and children who are effectively trap them in these communities, and often time feature social welfare fraud and excessive entanglement between religious and political officials in local communities. Most of these harms associated with polygamy were well known in the tradition, and helpfully distilled by Lieber and earlier Enlightenment philosophers.

Public spirit, patriotism, devotion to our country, are nurtured by family ties, by the attachment to our community.<sup>261</sup>

278. Polygamy, by contrast, Lieber continued, obstructs human advancement by enslaving women, exploiting children, eroding education, foreclosing choice, and privileging rich men who are often inferior in habit, mind, virtue, and public spiritedness. Polygamy furthermore obstructs democracy by privileging patriarchy and hierarchy, denying liberty and equality, and creating powerful households and communities that become “laws unto themselves” rather than functioning as private associations within a broader democratic polity. With no small amount of cultural smugness and even racism, Lieber spent pages contrasting the “patriarchal,” “barbarian,” and “backward” “Asiatic” and “Moslem” peoples which countenanced polygamy with the more advanced, liberated, and egalitarian Western cultures which prescribed monogamy.<sup>262</sup> Lieber wrote:

Monogamy does not only go with the Western Caucasian race, the Europeans and their descendents, beyond Christianity, it goes beyond Common Law. It is one of the primordial elements out of which all laws proceeds, or which the law steps in to recognize and to protect.... Wedlock ... stands in this respect on a level with property.... Wedlock, or monogamic marriage, is one of the “categories” of our social thoughts and conceptions, therefore, of social existence. It is one of the elementary distinctions—historical and actual—between European and Asiatic humanity....<sup>263</sup>

279. This would become a standard argument in nineteenth-century and early twentieth-century theories of human, social, and political evolution: polygamy was at best a “middle step” in the development of civilization, and invariably associated with less developed cultures, economies, and polities. Lieber was writing in what distinguished Harvard historian Nancy Cott calls an “undercurrent of hysteria” in mid-nineteenth century America. The nation was roiling with debates over the criminalization of Mormon polygamy, the reservation of Native Americans, the abolition of slavery, the prosecution of free love radicals, and its first encounters with polygamous Chinese immigrants on the West coast and Muslim polygamists on the African mission fields. Lieber, like many others in his day, thus tinctured and tainted his rhetoric with cultural, racial, and religious prejudice.<sup>264</sup> A number of his later nineteenth century writers, many of whom were influential in legal circles, made many of these same arguments about the cultural, political, and economic advances associated with monogamy and pair-bonding but without the xenophobic rhetoric.<sup>265</sup>

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<sup>261</sup> Lieber, *Manual of Political Ethics*, 103-04, 141-42.

<sup>262</sup> Ibid., 139; Francis Lieber, *Essays on Property and Labor, as Connected with Natural Law and the Constitution of Society* (New York: Harper & Brothers, 1841), 18-19, 103-42, 387ff.

<sup>263</sup> Quoted by Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass.: Harvard University Press, 2000), 114-115 (I have not been able to read the original text which she quotes).

<sup>264</sup> Ibid., 115 and more generally, *ibid.*, 64-131.

<sup>265</sup> See a good summary of late nineteenth-century legal arguments about the development of pair-bonding in George Eliot Howard, *A History of Matrimonial Institutions*, 3 vols. (Chicago: University of Chicago Press, 1904), 1:89-151. For a late twentieth-century account of the various conditions and facts

## 5. Section Summary

280. Locke, Home, Hutcheson, Hume, Paley, Bentham, Montesquieu, Lieber, and others led scores of jurists and philosophers from the seventeenth to the nineteenth centuries who defended traditional Western norms of monogamous marriage using this surfeit of arguments from nature, reason, custom, fairness, prudence, utility, pragmatism, and common sense. Some of these writers were inspired, no doubt, by their personal Christian faith, others by a conservative desire to maintain the status quo. But most of these writers pressed their principal arguments for monogamy and against polygamy on non-biblical grounds. And they were sometimes sharply critical of the Bible – denouncing St. Paul’s preferences for celibacy, the Mosaic provisions on unilateral male divorce, and the tales of polygamy, concubinage, and prostitution among the ancient biblical patriarchs and kings. Moreover, most of these writers jettisoned many other features of the Western tradition that, in their judgment, defied reason, fairness, and utility – including, notably, the establishment of Christianity by law and the political privileging of the church over other associations. Their natural law theory of monogamy was not just a rationalist apologia for traditional Christian family values or a naturalist smokescreen for personal religious beliefs. They defended traditional family norms not out of confessional faith but out of rational proof, not just because they uncritically believed in them but because they worked.

281. The heart of their argument is that exclusive and enduring monogamous marriages are 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. Exclusive and enduring monogamous marriages, furthermore – and this went beyond Aquinas -- are the best way to ensure that men and women are treated with equal dignity and respect, and that husbands and wives, parents and children provide each other with mutual support, protection, and edification throughout their lifetimes, adjusted to each person’s needs at different stages in the life cycle.

282. This Enlightenment naturalist argument for stable monogamous marriages drew on complex ideas concerning human infant dependency, parental bonding, paternal certainty and investment, and the natural rights and duties of husband and wives, parents and children vis-à-vis each other and other members of society. But it also emphasized more heavily than the tradition a feature of human nature that every legal system must deal with, namely that most human adults crave sex a good deal of the time. The Enlightenment philosophers thus presupposed that husbands and wives must work hard to remain in open and active communication with each other, and maintain active and healthy sex lives even when – especially when -- procreation was not or no longer possible. Robust sexual communication within marriage was essential for couples to deepen their marital love constantly and to keep them in their own beds, rather than their neighbor’s. And marital sex sometimes was even more important when

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that lead to polygamy rather than monogamy, see Peter Bretschneider, *Polygyny: A Cross Cultural Study* (Uppsala: Gotab, 1995).

the home was (newly) empty, and husbands and wives depended so centrally on each other (not on their children) for their daily emotional fulfillment.

283. The Enlightenment natural law argument, furthermore, outlawed many other types of sexual activities and interactions, even those practiced in more primitive human societies. Polygamy was out because it fractured marital trust and truth, harmed wives and children, privileged patriarchy and sexual slavery, and fomented male lust and adultery. Polyandry was out because it created paternal uncertainty and catalyzed male rivalry to the ultimate detriment of the children. Incest was out because it overrode the instincts of natural revulsion, weakened blood lines, and deterred the creation of new kinship networks. Prostitution and fornication were out because they exploited women, fostered libertinism, deterred marriage, and produced bastards. Adultery was out for some of the same reasons, but even more because it shattered marital fidelity and trust, diffused family resources and parental energy, and risked sexual disease and physical retaliation of the betrayed spouse. Easy divorce was out because it eroded marital fidelity and investment, jeopardized long-term spousal support and care, and squandered family property on which children eventually depended. By the twentieth century, similar natural law and natural rights arguments were used to stamp out the discrimination that the common law still retained against spinsters, wives, and illegitimate children.

284. The Enlightenment natural law argument for monogamy and against polygamy and other sexual offenses continued a critical line of argument about the natural foundations of sex and marriage that went back more than two millennia in the West. The argument, we have seen, started with Aristotle and the later Plato, proceeded through the Stoics and various Church Fathers, got expanded by Aquinas and the medieval canonists, was furthered embroidered by various Protestant Reformers and their Catholic counterparts. With the Enlightenment in England, Scotland, and America, these arguments for monogamy and against polygamy were cast increasingly in non-biblical philosophical and rational terms. The Enlightenment philosophers echoed and elaborated the traditional arguments from natural law, natural justice, and natural human inclinations and needs, but presented them without the thicker theological arguments in which these arguments from nature were traditionally embedded and stabilized. This left some of these natural law arguments more wobbly and susceptible to political manipulation. But it also widened the appeal of these arguments in an increasingly pluralistic polity dedicated to the disestablishment of religion.

285. The Enlightenment philosophers furthermore highlighted the many public and private goods that monogamous marriage brought to husband and wife, parent and child, state and society, and the many harms that were associated with the practice of polygamy. This utilitarian argument, too, was continuous with the tradition, but the philosophers now abstracted it from biblical stories. Classical and Christian writers alike, we saw, praised monogamous marriage for the many benefits it brought. And, they read the biblical accounts of polygamy as fair warning that this institution was not only inexpedient, immoral, unnatural, and unjust, but that it also inevitably fostered criminal wrongdoing. Polygamy usually caused or came with fraud, trickery, intrigue, lust, seduction, coercion, rape, incest, adultery, murder, exploitation and coercion of young women, jealousy and rivalry among wives and their children, dissipation of family

wealth and inequality of treatment and support of household members, banishment and disinheritance of disfavored children and more. Not in every case, to be sure, but in so many cases that these had to be seen as the inherent and inevitable risks of polygamy, earlier writers concluded; even the most pious and upright biblical patriarchs incurred these costs when they experimented with this unnatural institution. The Enlightenment philosophers repeated this long list of harms caused by polygamy, and the long list of crimes that are associated with the practice of polygamy. But they now used comparative cultural examples rather than biblical examples to drive home their point. The Enlightenment philosophers presented these harms and crimes as *prima facie* evidence that polygamy was ultimately unnatural for humans, but they now made general appeals to human anthropology and evolutionary science to drive home their argument rather than adducing the creation story of “two in one flesh” or covenant metaphors based on God and his people.

286. Even the most robust natural law theorists of early modern and modern times, however, understood that the natural law of sex, marriage, and family could not do it all, because it was not self-executing. The natural law strongly inclines humans to behave in certain ways in their sex, marriage, and family lives, and many humans in fact follow these inclinations without prompting. But the reality is that a good number of folks stray on occasion from the naturally licit path, and some miscreants stray all the time. Natural law needs the positive laws of the state to teach these basic norms of sex, marriage, and family life to the community, to encourage and facilitate citizens to live in accordance with them, to deter and punish citizens when they deviate to the harm of others, and to rehabilitate and redirect them to healthier relationships consistent with the norms of natural and civil liberty. The common law notion of marriage as a good and desirable civil status captures this insight that natural law and positive law must work together to create fair and stable sex, marriage, and family lives for citizens.

287. Natural law not only needs the positive laws of the state to teach and enforce its norms. It also needs broader communities and narratives to stabilize, deepen, and improve these norms. Both the natural law and the positive law of the state ultimately depend on deeper models and exemplars of love and faithfulness, trust and sacrifice, commitment and community to give them content and coherence. They depend upon other stable institutions besides the state (churches, schools, charities, hospitals, and others) and other stable professionals besides lawyers (preachers, teachers, doctors, mentors, counselors, therapists, and others) to teach, encourage, and implement these natural law norms.

### **G. The Common Law Inheritance: Monogamy as Norm, Polygamy as Crime**

288. For more than 2500 years, the Western legal tradition has defined marriage as the union of one man and one woman who have the fitness, capacity, and freedom to marry each other. This has been the normative position of the West since the founding of ancient Greece and Rome and has been a consistent teaching of Western philosophers, theologians, and jurists ever since. While no serious writer has claimed that monogamous marriage is good for everyone or always good, in general and in most cases monogamous marriage is said to bring essential private goods to the married couple and their children, and vital public goods to society and the state.

289. For more than 1750 years, the Western legal tradition has declared polygamy to be a crime -- a capital crime since the ninth century, on the order of incest. This criminalization of polygamy has been defended with various natural, philosophical, theological, political, sociological, psychological, and scientific arguments. While some Western writers and rulers have allowed polygamy in rare cases of urgent natural necessity and a few anti-establishment radicals have experimented with the institution on paper at least and sometimes in practice, virtually all Western writers and legal systems have denounced polygamy. Polygamy, they have argued, is unnatural and unjust to wives and children. It is the inevitable cause or consequence of sundry harms and crimes. And it is a threat to good citizenship, social order, and political stability, and, in some more recent formulations, an impediment to the advancement of civilizations toward liberty, equality, and democratic government.

290. The Anglo-American<sup>266</sup> common law tradition has been part and product of these traditional Western assumptions about the goods of monogamy and the harms of polygamy. Anglo-Saxon laws from the seventh century forward defined marriage as a monogamous union of a man and woman, and the common laws of England and its North American colonies have maintained this definition of marriage ever since. Only in the last two decades have a few common law jurisdictions extended the legal definition of marriage to include same-sex couples, but here, too, monogamy remains the norm.

291. Anglo-Saxon law, furthermore, declared polygamy to be a serious crime, and this continued with the Normans. From the twelfth to the sixteenth centuries, church courts and secular courts together punished polygamy as a crime, and annulled second marriages as forms of constructive bigamy. In 1604, Parliament declared polygamy a capital common law crime punishable by secular courts alone; in 1828, Parliament made it a serious but non-capital felony which it remains to this day in the United Kingdom. The American colonies and states followed similar patterns of criminalizing polygamy and annulling double marriages. The United States Congress since 1862 has criminalized polygamy, and since 1875 has barred entry to polygamist immigrants.

292. Most Anglo-American common law polygamy cases and statutes in the past 150 years have involved Mormons (since 1890, Fundamentalist Mormons). Their repeated efforts to gain free exercise exemptions from compliance with these anti-polygamy laws have uniformly failed. Both statutes and cases to date have been unyielding in their insistence that there is no religious right to violate criminal laws against polygamy. And while a few constitutional scholars have argued that the recent legalization of same-sex marriage should lead to the legalization of polygamy and other forms of polyamory as well, most scholars have demurred. Polygamy, like incest, they argue, is too dangerous and harmful to the household and to the community, too often the cause or

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<sup>266</sup> For reasons of competence and space, I am focusing on Anglo-American common law formulations rather than the law of other common law or Commonwealth countries, including Canada, whose legal history on this topic is well beyond my ken. The eighteenth- to twentieth-century English materials discussed herein will be germane if not authoritative for Canada and other common law lands; the American materials, however, are presented for their comparative value.

consequence of other crimes, and too flagrant a violation of the fundamental international and domestic rights of women and children for the state to allow it.

293. In this final section of my opinion, I focus first on the common law defense of monogamy, particularly the adoption of the Enlightenment arguments for monogamy. I then review briefly the history of common law prohibitions against polygamy in England and America, and their application in selected cases against (fundamentalist) Mormons. I then touch briefly on a few of the enduring harms of polygamy, as understood by the tradition and distilled in these recent cases, statutes, and commentaries.

### 1. Common Law Uses of Enlightenment Arguments for Monogamy

294. The Enlightenment arguments in favor of monogamy and against polygamy and other sexual crimes were staples for the Anglo-American common lawyers of the eighteenth to twentieth centuries. It was precisely the rational, utilitarian, and even pragmatic formulation of these arguments that made them so appealing to the jurists as they sought to create a common law of marriage that no longer depended on ecclesiastical law, church courts, or theological arguments. Particularly in America, the disestablishment of religion mandated by the Constitution made direct appeals to the Bible and to Christian theology an insufficient ground by itself for cogent legal arguments. Even in England, which retained its Anglican establishment, many common lawyers were equally eager to cast their argument in the natural and utilitarian terms of the Enlightenment, rather than the biblical and theological terms of the tradition. It was one thing to say that “Christianity was part of the common law,” as Anglo-American lawyers had long said.<sup>267</sup> It was quite another thing to say that the common law was part of Christianity. That would simply not do. The Enlightenment distillation of the strongest classical and Christian traditional arguments for monogamy and against polygamy was thus attractive to the common lawyers.

295. William Blackstone, the leading English common lawyer of the eighteenth century, thus adverted regularly to these Enlightenment natural law writings on marriage in his influential *Commentaries on the Law of England* (1765). Citing Grotius, Locke, Pufendorf, Montesquieu, and other Enlightenment philosophers, Blackstone argued 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.

Montesquieu has a very just observation upon this head: that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children: for that ascertains and makes known the person who is bound to fulfill this obligation: whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way – shame, remorse, the constraint of her sex, and the rigor of laws – that stifle her inclinations to perform this duty: and besides, she generally wants ability.

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<sup>267</sup> See Stuart Banner, “When Christianity was Part of the Common Law,” *Law and History Review* 16 (1998): 27-62.

“The duty of parents to provide for the maintenance of their children is a principle of natural law,” Blackstone continued. It is “an obligation, says Pufendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world.” “The main end and design of marriage [is] to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong.”<sup>268</sup>

296. Much like his fellow Englishmen, William Paley and John Locke, Blackstone set out in detail the reciprocal rights and duties that the natural law imposes upon parents and children. God and nature have “implant[ed] in the breast of every parent” an “insuperable degree of affection” for their child once they are certain the child is theirs, Blackstone wrote. The common law confirms and channels this natural affection by requiring parents to maintain, protect, and educate their children, and by protecting their rights to discharge these parental duties against undue interference by others. These “natural duties” of parents are the correlatives of the “natural rights” of their children, Blackstone further argued. Once they become adults, children acquire reciprocal natural duties toward their parents:

The duties of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after; they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws.<sup>269</sup>

297. Blackstone was more liberal and tolerant than most common lawyers of his day in treating traditional sexual crimes, especially when children were not involved. But he was unequivocal in condemning polygamy, placing it among “offenses against the public health, and the public police or economy”:

The second marriage, while the former wife or husband is still living is simply void, and a mere nullity, by the ecclesiastical law of England: and yet the Legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state. For polygamy can never be endured under any rational civil nations, the fallaciousness of which has been fully urged by many sensible writers; but in northern countries the very nature of the climate seems to reclaim against it; it never having obtained in this part of the world even at the time of our German [Saxon] ancestors, who, as Tacitus informs us, “thought it to be singularly barbaric, and were content with a single wife instead.” It is punished therefore by the laws of ancient and

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<sup>268</sup> William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Oxford University Press, 1765), I.15.1, 1.16.1, 1.16.3. This quote is largely a paraphrase of Montesquieu, *Spirit of the Laws*, 23.2.

<sup>269</sup> Blackstone, *Commentaries*, 1.16.

modern Sweden with death. And with us in England ... it is a [capital] felony.<sup>270</sup>

298. While Blackstone's views had an enduring influence on the English common law of marriage, United States Supreme Court Justice Joseph Story's formulations were foundational for America law. Like Blackstone, Story was a student of European natural law theories of marriage, and he drew heavily on Scottish, English, and Continental writers in formulating his views. Story was also a deep student of comparative legal history and conflict of laws, and he studied his writings with all manner of ancient, medieval, and early modern sources on the origin, nature, and purpose of marriage.

Marriage is treated by all civilized nations as a peculiar and favored contract. It is in its origin a contract of natural law.... It is the parent and not the child of society, the source of the city, a sort of seminary of the republic. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under the sense of the force of sacred obligations, it has had the sanctions of religion superadded. It then becomes a religious, as well as a natural and civil contract; for it is a great mistake to suppose, that because it is the one, therefore it may likewise be the other.<sup>271</sup>

299. Marriage is thus a civil contract dependent in its essence on the mutual consent of a man and a woman with the freedom and capacity to marry each other. But marriage is "more than a mere contract," Story insisted, for it also has natural, religious, and social dimensions, all of which the positive law of the state must take into account. The state's positive law of marriage must reflect the natural law teaching that marriage is a monogamous union presumptively for life; that marriage channels the strong human sex drive toward marital sex which serves to deepen the mutual love between husband and wife; that marriage provides a stable and lifelong system of support, protection, and edification for husbands and wives, parents and children. The positive law of the state must also reflect the teachings of nature -- sometimes alone and sometimes "with religion superadded" -- that civilized societies outlaw the practices of polygamy, incest, fornication, adultery, and "light divorce" as well as desertion, abuse, neglect, and disinheritance because these offenses all violate the other spouse's and children's natural rights. "A heathen nation might justify polygamy, or incest, or contracts of moral turpitude, or exercises of despotic cruelty over persons, which would be repugnant to the first principles of Christian duty." While normally, a contract made in a foreign country would be honored and enforced in a common law land, on the traditional conflict of laws principle "if valid there, it is a valid everywhere," "the most prominent, if not the only known exceptions to this rule, are those respecting polygamy and incest" since they are "repugnant to the public policy of a civilized nation."<sup>272</sup>

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<sup>270</sup> Ibid., 4.13

<sup>271</sup> Joseph Story, *Commentaries on the Conflict of the Laws, Foreign and Domestic, In Regards to Contracts, Rights, and Remedies, and Especially in Regard to Marriages* (Boston: Hilliard Gray, 1834), sec. 108.

<sup>272</sup> Ibid., secs. 108-199, with quotes on *ibid.*, pp. 26, 87, 104.

300. It is just because marriage has all of these natural goods and qualities embedded within it that it is “more than mere contract,” Story went on. While all fit adults have the natural right and liberty to enter into a valid marriage contract, the form, function, and limits of this marriage contract are not subject to private bargain but preset by nature and society. In almost all civilizations and legal systems, marriage is “a unique contract, a contract *sui generis*” – indeed, a “unique form of covenant.” Story quoted at length from a Scottish case that distilled the views of Home, Hutcheson, Hume, and others:

The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is *juris gentium* [part of the common law of nations] and the foundation of it, like all other contracts, rests on the consent of the parties. But it differs from other contracts in this, that the rights, obligations or duties arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation over which the parties have no control by any declaration of their will. It confers the *status* of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges, thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot, in general, amongst civilized nations, be dissolved by mutual consent; and it subsists in full force, even although one of the parties should be forever rendered incapable, as in the case of incurable insanity, or the like, from performing his part of the mutual contract.<sup>273</sup>

No wonder that the rights, duties, and obligations arising from so important a contract, should not be left to the discretion or caprice of the contracting parties, but should be regulated, in many important particulars, by the laws of every civilized country.... [M]any of the rights, duties, and obligations arising from it are so important to the best interests of morality and good government, that the parties have no control over them; but they are regulated and enforced by the public law.<sup>274</sup>

Story quoted another Scottish case that drew on Henry Home and David Hume for the proposition: “Though the origin of marriage is contract, it is in a different situation from all others. It is a contract coeval with, and essential to, the existence of society; while the relations of husband and wife, parent and child, to which it gives rise, are the foundation of many rights acknowledged all the world over, and which, though differently modified in different countries, have everywhere a legal character altogether independent of the will of the parties....The rights arising from the relation of husband and wife, though taking their origin in contract, have yet in all countries, a legal character, determined by their particular laws and usages altogether independent of the terms of the contract or the will of the parties at the time of entering into it.”<sup>275</sup>

301. This was a common argument among Anglo-American common lawyers in the nineteenth and early twentieth centuries. Not only did they draw on the same Scottish,

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<sup>273</sup> *Ibid.*, secs. 109-110.

<sup>274</sup> *Ibid.*, secs. 110-112.

<sup>275</sup> *Ibid.*, secs. 111-112.

English, and Continental writers to defend the natural law configuration of marriage, and the natural law prohibition on various sexual crimes. They also, like Story, treated marriage as a multidimensional institution that discharged multiple goods for husbands and wives, parents and children, society and the state alike.

302. Chancellor James Kent of Virginia, for example, one of the great early systematizers of American law alongside Story, lifted up the civil, natural, and religious dimensions of marriage in his 1826 *Commentaries on American Law*:

The primary and most important of the domestic relations is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage a great share of the blessings which flow from the refinement of manners, the education of children, the sense of justice, and cultivation of the liberal arts.<sup>276</sup>

Citing Pufendorf, Paley, and various Scottish writers, Kent then worked systematically through their arguments for exclusive and enduring monogamous marriage and against incest, polygamy, extra-marital sex, and easy divorce. Polygamy, said Kent, is an “odious institution” that Blackstone properly placed among offenses against “public health, policy, and economy.” All polygamous marriages are “null and void,” and both England and America have properly punished them as serious crimes.<sup>277</sup>

303. A couple of generations later, Leonard Shelford, an English common law authority, combined the early modern natural law theories of marriage of his day with those of the classical Roman lawyers. Shelford started with the Stoic formulation of Modestinus, that marriage is “the union of a man and a woman, a partnership for life involving divine as well as human law.” The Romans were largely content to make such categorical statements about marriage, Shelford pointed out, without theoretically elaborating them. But the Western tradition has, since Roman times, come to understand that monogamous life-long marriages are naturally designed to foster the good of the couple and their children, the church and the state, the society and its morals at once. After quoting several English and Scottish authorities, Shelford wrote:

From various learned authors it may be inferred that marriage is, according to the primitive law of God and Nature, for the mutual help of husband and wife – the propagation of the human race – the educating and instructing of their children in the fear and love of God, and training them to be useful members of society. It is a solemn contract, whereby a man and a woman, for their mutual benefit, and the procreation of children, engage to live in a kind and affectionate manner.... Besides the procreation and education of children, marriage has for its object the mutual society, help, and comfort that the one ought to have of the other, both in prosperity and adversity. Marriage is the most solemn

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<sup>276</sup> James Kent, *Commentaries on American Law*, 4 vols. (New York: O. Halsted, 1826-1830), 2:72.

<sup>277</sup> *Ibid.*, 2:72-185.

engagement which one human being can contract with another. It is contract formed with a view not only to the benefit of parties themselves, but to the benefit of third parties; to the benefit of their common offspring, and to the moral order of civil society.<sup>278</sup>

All this is “confirmed and enforced by the Holy Scriptures,” Shelford added, citing the famous passages in Genesis 1 and 2, Matthew 19, and Ephesians 5. But the state is not heavily involved in the regulation of marriage because it wants to establish biblical truths, but rather to preserve the public and private goods of marriage. “Notwithstanding the origin and divine institution of marriage, human legislatures have properly assumed the power of regulating the exercise of the right of marriage, on account of its leading to relations, duties, and consequences, materially affecting the welfare and peace of society. It has been the policy of legislatures, proceeding on the ground that marriage is the origin of all relations, and consequently the first element of all social duties, to preserve the sacred nature of this contract.”<sup>279</sup>

304. The common law has not only embraced the ancient Western institution of monogamy, Shelford continued, it has also flatly prohibited the practice of polygamy. Shelford quoted the first Roman criminal law statute of 258 c.e.: “A man cannot have two wives at the same time” and then showed how this ancient rule of civil law “has been adopted by the codes of all civilized countries.” “Among modern civilized nations, polygamy has scarce ever been legalized, not even in Muscovy,” he wrote. English law, even from the days of the Anglo-Saxons, has prohibited polygamy, first by Germanic statute, then by ecclesiastical edict, and since 1604 by Parliamentary statute. Shelford then worked through a long series of cases and authorities to show the common law’s unwavering denunciation of blatant polygamy.<sup>280</sup>

305. A couple of generations later, distinguished American jurist, W.C. Rodgers opened his oft-reprinted treatise on the law of domestic relations with a veritable homily on marriage that made use of arguments based both on nature and what he called “the Divine plan.” Notice the ease with which he sets out the basic argument for the natural law configuration of monogamous marriage and family life.

In a sense, it is a consummation of the Divine to “multiply and replenish the earth.” It is the state of existence ordained by the Creator, who has

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<sup>278</sup> Leonard Shelford, *A Practical Treatise on the Law of Marriage and Divorce* (London: S. Sweet, 1841), 1-5. See the elaboration of this argument in Frederic A. Coudert, *Marriage and Divorce Laws in Europe: A Study in Comparative Legislation* (New York: Livingston Middleditch Co., 1893) who, also starting with Modestinus’ definition of marriage, shows the continuity of marital norms across classical Roman law, medieval civil law and canon law, and early modern civil law and common law. See further Charles Franklin Thwing, *The Family: An Historical and Social Study*, rev. enl. ed. (Boston: Lothrop, Lee & Shepard, 1913).

<sup>279</sup> *Ibid.*, 4. See similarly Frank H. Keezer, *A Treatise on the Law of Marriage and Divorce*, 2d ed. (Indianapolis: Bobbs-Merrill Co., 1923), 73-75: “Marriage is universal; it is founded on the law of nature.... Some claim that marriage is of divine origin, others that is the natural outgrowth of society. While the law does not explicitly recognize its religious character, it does recognize it as the most important of domestic relations, and in most countries it has had the sanction of religion superadded.” But marriage is “treated at law as a contract creating a status, and not in any controlling sense as a sacrament.”

<sup>280</sup> Shelford, *A Practical Treatise on the Law of Marriage and Divorce*, 223-231.

fashioned man and woman expressly for the society and enjoyment incident to mutual companionship. This Divine plan is supported and promoted by natural instinct, as it were, on the part of both for the society of each other. It is the highest state of existence in the most polished condition of man. All living creatures are made male and female; but it is for man only to live in a state of matrimony, and for him alone to guard and perpetuate marriage as practiced and sanctioned by all civilized peoples from the earliest times. The lower animals know nothing of this sort, and it only exists imperfectly in savage life. All writers ... proclaim it the only stable substructure of our social, civil and religious institutions. Religion, government, morals, progress, enlightened learning and domestic happiness must all fall into most certain and inevitable decay when the married state ceases to be recognized or respected. Accordingly, we have in this state of man and woman the most essential foundation of religion, social purity and domestic happiness.<sup>281</sup>

306. This thick multidimensional understanding of marriage informed many judicial opinions of the nineteenth century as well. Marriage law treatises at the turn of the twentieth century devoted many pages to citations to and quotations from state and lower federal cases that made the same point that marriage, while rooted in contract, was a multidimensional institution that served public and private goods at once. Such views occasionally reached the United States Supreme Court, too, which spoke repeatedly of marriage as “more than a mere contract”<sup>282</sup> and “a sacred obligation.”<sup>283</sup> In *Murphy v. Ramsey* (1885), Justice Matthews declared for the Supreme Court:

For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth ... than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guarantee of that reverent morality which is the source of all beneficent progress in social and political improvement.<sup>284</sup>

307. The Court argued similarly in *Maynard v. Hill* (1888), a case upholding a new state law on divorce, and holding that marriage is not a “contract” for purposes of interpreting the prohibition in Article I.10 of the United States Constitution: “No State shall ... pass any ... Law impairing the Obligation of Contracts.” After rehearsing at length various authorities of the day, Justice Field declared for the Court:

[W]hilst marriage is often termed ... a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or

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<sup>281</sup> W.C. Rodgers, *A Treatise on the Law of Domestic Relations* (Chicago: T.H. Flood, 1988), sec. 2.

<sup>282</sup> *Maynard v. Hill*, 125 U.S. 190, 210–11 (1888).

<sup>283</sup> *Reynolds v. United States*, 98 U.S. 145, 165 (1879); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885); *Davis v. Beason*, 133 U.S. 333, 341–42 (1890).

<sup>284</sup> 114 U.S. at 45.

entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and society, without which there would be neither civilization nor progress.<sup>285</sup>

### a. *The Status of Monogamy*

308. In the later nineteenth and early twentieth centuries, Anglo-American common lawyers came to use the term “*status*” to describe the natural form and norm of monogamous marriage. “*Status*” was a term that nineteenth-century English legal historian Sir Henry Sumner Maine had made famous in his provocative theory that the law of Victorian England altogether was moving “from *status* to *contract*”. Many American jurists accepted the concept of marriage as a “*status*,” without necessarily buying Maine’s broader argument that marriage law was moving from “*status* to *contract*.” Perhaps that movement could be seen in other areas of law where private contract was on the rise, American jurists argued, but the opposite was true in the law of marriage. Joel Bishop, a leading American family law jurist in the mid-nineteenth century, put it thus: “Marriage, as distinguished from the agreement to marry, and from act of becoming married, is the civil status of one man and one woman legally united for life, with the rights and duties, which, for the establishment of families, and the multiplication and education of the species, are ... assigned by the law of matrimony.” The state law of matrimony, Bishop continued, fixes the terms of the marriage contract in accordance with the dictates of nature, morality, and society. Parties are free to accept or reject these basic terms, but they cannot rescind, condition, or modify them if they wish to enter a valid marriage. And, once they marry, their status of being married is presumptively permanent and exclusive and carries with it built-in obligations of support and care for spouse, child, and other loved ones that continue even after death. Marital parties cannot dissolve this union on their own *ipse dixit*, nor simply walk away from their obligations with impunity. The voluntarily assumed legal status of being a husband, wife, father or mother is something that stays with them, even if they separate or divorce. The law still expects them to support and cooperate with each other in the care of their children, and sometimes to support each other through payment of alimony. And, even after death, the marital status of the decedent creates testamentary presumptions in favor of the surviving spouse, children, and natural kin.<sup>286</sup>

309. American jurist, James Schouler, put it succinctly in his authoritative 1921 treatise on domestic relations:

This [marital] contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with the principles of natural law, and are beyond and above the parties themselves. They may make settlements and regulate the property rights of each other; but they cannot modify the terms upon

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<sup>285</sup> 125 U.S. at 210-11.

<sup>286</sup> Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits* (Boston: Little, Brown and Company, 1852), sec. 11, 13.

which they are to live together, nor superadd to the relation a single condition. Being once bound, they are bound forever; mutual consent cannot part them.<sup>287</sup>

310. By the early twentieth century, this idea that monogamous marriage was a special civil status, defined by law, but entered into by voluntary contract, became the preferred common law formula.<sup>288</sup> Jurists and judges of the day used the term “marriage as status” as a short-hand formula to signify several features of marriage at once: (1) that marriage was a multidimensional institution, at once a contractual, natural, social, moral, economic, and religious in origin and orientation; (2) that marriage was both a private institution rooted in the consent of the parties, and a public institution directed to the goods of the couple, their children, and the broader communities of which they were a part; (3) that marriage was predetermined in its monogamous form, permanent in its spousal and paternal obligations, and preclusive of any other sexual or marital relation; and (4) that marriage defined a person’s status and standing in society, and vested them with the special rights and duties that attached to that status.

311. “The doctrine that marriage is a *status* is modern,” wrote the distinguished American jurist William Nelson in 1895. By calling marriage a “status,” the American common law had settled on a “half way step” between the traditional notion that “marriage was a sacrament to be solemnized by a religious ceremony of the church regardless of the faith of the parties” and the modern notion that marriage was merely a private “*civil* contract” in which the public has no interest. Marriage was a contract, but it was also more than a contract, Nelson insisted. Marriage was not a sacrament, but it did embrace some the same qualities of faithfulness, exclusivity, and permanence that typified sacramental and covenantal marriages since the time of Augustine.<sup>289</sup>

312. Religious communities could “superadd” requirements to the “civil status” of marriage, for their own voluntary faithful to abide, Nelson and others continued. They could, for example, prohibit interreligious marriages or divorce, as Catholics do. They could insist on various forms of premarital preparation and liturgical celebration as some Protestants do. They could even insist on detailed prenuptial contracts about property and inheritance as some Jews do. So long as parties are free to leave the religion altogether, and with it those “religious enhancements” to state law, this is permissible. But all these “enhancements” have to be consistent with the core forms and norms of marriage prescribed by state law and rooted in common human nature and natural law. Religious communities have no right, for example, to permit polygamy among their members, as Mormons and Muslims sometimes do. They have no business forcing couples to marry sight unseen as some Indian Hindus and Native American Indians do. Nor do they have the right to endanger the health and happiness of their children

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<sup>287</sup> James Schouler, *A Treatise on the Law of Marriage, Divorce, Separation, and Domestic Relations*, 6<sup>th</sup> ed. by Arthur W. Blakemore (Albany, NY: Matthew Bender, 1921), sec. 1073.

<sup>288</sup> See, e.g., E. Peck, *The Law of Persons or Domestic Relations* (Chicago: Callaghan and Co., 1913), 3-4; Rogers, *Domestic Relations*, 2-5; Walter C. Tiffany, *Handbook on the Law of Persons and Domestic Relations* (St. Paul, MN: West Publishing Co., 1896), 4-7.

<sup>289</sup> *Ibid.*, sec. 5; Joseph Long, *A Treatise on the Law of Domestic Relations* (St. Paul, MN: Keefe-Davidson Company, 1905), 1.3-7.

through hard labor, severe corporal discipline, faith healing, or comparable intrusions on the natural rights of the child. Religious communities can add to natural and positive laws governing the core civil status of marriage and family life. But they may not subtract or detract from them, even in the name of religious freedom.<sup>290</sup>

313. That was the issue that became central in the clash between Mormon polygamists and government authorities over polygamy. The Mormons claimed the constitutional right to practice polygamy in accordance with their religious faith. The government claimed the constitutional power to punish polygamy as a serious crime. The government won each time.

## **2. Common Law Prohibitions on Polygamy and the Mormon Challenge**

314. The Western legal tradition had declared polygamy to be a crime already in the third century; it was a capital crime after the ninth century, as grave and harmful as incest, adultery, and rape. These anti-polygamy laws came into England in the later seventh century, when the Anglo-Saxons declared polygamy to be a crime. Intentional polygamists lost their dower and other marital property, and were banished or executed in cases where they compounded their polygamy with other crimes.<sup>291</sup> William the Conqueror and his royal successors maintained these laws in the eleventh century, adding Frankish and Roman law precedents in further support. In the twelfth century, the Catholic Church in England assumed jurisdiction over the crime of polygamy as part of its canon law regulation of marriage and family life. English church courts now imposed spiritual discipline and annulled the putative marriages of polygamists. The church courts then sent the polygamists and their accomplices to secular courts for criminal punishment if there was evidence of mens rea.<sup>292</sup>

315. In 1604, Parliament reclaimed jurisdiction over polygamy, declaring it a capital crime to be prosecuted in English secular courts: "if any person or persons ... being married, do marry any person or persons, the former husband or wife being alive, that then every such offence shall be a felony, and the person or persons so offending shall suffer death."<sup>293</sup> The Old Bailey and other English courts heard hundreds of criminal cases of polygamy over the next three centuries, with occasional executions of the most flagrant and recalcitrant polygamists.<sup>294</sup> In 1828 and again in 1861, Parliament declared

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<sup>290</sup> William T. Nelson, *A Treatise on the Law of Divorce and Annulment of Marriage*, 2 vols. (Chicago: Callaghan & Co., 1895), I.9; Charles Caverno, *Treatise on Divorce* (Madison, WI: Midland Publishing Co., 1889), ch. 4; A.P. Richards, *Marriage and Divorce* (Chicago: Rand McNally & Company, 1889); Rogers, *Domestic Relations*, I.29-91; Lewis Stockton, *Marriage Considered from Legal and Ecclesiastical Viewpoints* (Buffalo: Huebner-Bleistein Patents Co., 1912).

<sup>291</sup> Matthew Bacon, *The Abridgement of the Law*, ed. John Bouvier (Philadelphia: T. & J.W. Johnson, 1852), 2:107-11, citing Coke's Institutes, 1:33 and more generally Berman, *Law and Revolution*, ch. 2.

<sup>292</sup> Howard, *History of Matrimonial Institutions*, 1:253-363.

<sup>293</sup> 1 Jac. 1, ch. 11.

<sup>294</sup> See Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge: Cambridge University Press, 2009), esp. 39ff. and 191ff. describing 168 bigamy cases prosecuted in the Old Bailey between 1715-1755. For earlier and overlapping lists of cases, see Chilton

polygamy to be a non-capital felony punishable by up to seven years of transportation or two years of prison. Polygamy cases continued to dribble into the English courts for the next century, including a few cases involving Mormon polygamists who consistently lost their claims.<sup>295</sup> With ample amendment and a softening of punishments, these provisions remain in place in England, although the crime of bigamy or polygamy is now rarely prosecuted as a separate criminal offense in England.<sup>296</sup> Instead, polygamy is usually dealt with as a civil offense yielding damages to the innocent spousal victim(s) and leading to annulment of the putative marriage(s).<sup>297</sup>

316. The American colonies and early states in the seventeenth and eighteenth centuries echoed the English capital laws against polygamy. Convicted polygamists in the American colonies were at least fined, sometimes whipped, pilloried, or banished, and occasionally executed, especially in cases of recidivism or where the polygamy was compounded by another crime like rape or incest.<sup>298</sup> Since the American Revolution of 1776 – and consistently to this day -- every state in the union has prohibited bigamy or polygamy as both a crime and a civil offense.<sup>299</sup> In the later eighteenth and early nineteenth centuries, the states gradually reduced polygamy to a non-capital felony, but prosecutors in several states pursued these crimes with alacrity until well into the twentieth century.<sup>300</sup> In the nineteenth century, duly convicted polygamists were still occasionally executed in cases of repeated polygamy or when the defendants compounded their polygamy with other sexual crimes.<sup>301</sup> In more recent cases, convicted polygamists generally have faced fines and short prison sentences – and automatic annulment of their second marriages, with damages paid to innocent spouses. Polygamous suspects also come under scrutiny of various state welfare and child welfare agencies, and have not infrequently lost their benefits or their children

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L. Powell, *English Domestic Relations, 1487-1653* (New York: Russell & Russell, 1972 [1917]); Matthew Bacon, *The Abridgement of the Law*, ed. John Bouvier (Philadelphia: T. & J.W. Johnson, 1852), 2:107-11; Blackstone, *Commentaries*, 4.13; Shelford, *A Practical Treatise*, 223-31.

<sup>295</sup> See, e.g., *Hyde v. Hyde and Woodmansee*, 1 P. & D. 130 (1866) other cases and relevant literature cited and discussed in Homer H. Clark, *The Law of Domestic Relations*, 2d ed. (St. Paul, MN: West Publishing Co., 1988), sec. 2.6.

<sup>296</sup> English conflict of laws rules evidently now recognize as valid a polygamous marriage contracted in a foreign land that recognized polygamy, so long as the man marries no additional wife while in England.

\_\_\_ Jaffey, "The Essential Validity of Marriage in the English Conflict of Laws," *Modern Law Review* 41 (1978): 38; \_ Morris, "The Recognition of Polygamous Marriages in English Law," *Harvard Law Review* 66 (1953): 961 (1953).

<sup>297</sup> Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford: Oxford University Press, 2005), 72-74.

<sup>298</sup> See, e.g., Edmund S. Morgan, *The Puritan Family: Religion and Domestic Relations in Seventeenth Century New England*, rev. enl. ed. (New York: Harper & Row, 1966), 31ff.; Howard, *A History of Matrimonial Institutions*, 2:169ff.,

<sup>299</sup> Kent, *Commentaries on American Law*, 2, 69;

<sup>300</sup> Nathan Dane, *General Abridgement and Digest of American Law*, 8 vols. (Boston: Cummins, Hilliard, & Co., 1824), vol. 6, chap. 198. See illustrative cases and provisions in Charles Vernier, *American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States, Alaska, the District of Columbia and Hawaii (as of Jan. 1, 1931)*, 5 vols. (Stanford: Stanford University Press, 1931), 214-23; Clark, *Domestic Relations*, sec. 2.6 and sources cited therein.

<sup>301</sup> See, e.g., *State v. Norman*, 13 N.C. 222 (June, 1829); *Ewell v. State*, 14 Tenn. 363 (1834).

even when they were not (successfully) prosecuted for the crime of polygamy.<sup>302</sup> Brazen polygamists who draw public attention to their crime or who aggravate their offense with coercion, child marriage, incest, or statutory rape will still serve hard time – as illustrated by the life sentence imposed by a Utah court on fundamentalist Mormon leader, Warren Jeffs in 2007.<sup>303</sup>

317. Not only the individual states, but also the United States federal government has been involved in the criminalization and regulation of polygamy. One area not involving Mormonism directly is immigration law. In 1875, Congress passed the Page Law, the first of a series of federal immigration laws designed, in part, to block the immigration of Chinese women who were (suspected to be) second wives to Chinese-American citizens or subjects. This law and its regulations operated for the next seventy years. Subsequent immigration laws and regulations have continued to block known polygamists from immigrating to the United States and have led on occasion to the deportation of polygamists who violate their visas.<sup>304</sup>

318. The more pertinent federal legislation, however, concerns the federal criminalization of polygamy that arose in direct response to the nineteenth-century Mormon Church, or Church of Jesus Christ of Latter-Day Saints. This was one of numerous new churches to emerge during the Second Great Awakening in the early nineteenth century. Its founder, Joseph Smith, had developed, under divine inspiration, a new Scripture to supplement the Christian Bible—the *Book of Mormon*, which he published in 1830. He had further developed a separate *Book of Commandments* in 1833, which described followers of the *Book of Mormon* as a new chosen people. The Mormon faith called for the formation of new communities centered on a temple, devoted to a common “Law of Consecration and Stewardship,” and especially committed to mission. This faith also featured a number of novel teachings, such as the efficacy of proxy baptism for the dead, the pre-existence of man, and a metaphysical materialism that stood in tension with the traditional biblical story of the creation *ex nihilo*. Such novel teachings and practices, and the ardent advocacy of them by missionaries, soon led to severe repression of the Mormon Church. The church was driven from New York to Ohio, and then to Missouri and Illinois. After severe rioting and the murder of Joseph Smith and his brother in 1844, the Mormon believers escaped and migrated to the American frontier under the new leadership of Brigham Young; they settled in what became in 1850 the United States Territory of Utah.

319. Many other new religious communities born of the Second Great Awakening were left to themselves. But the Mormon Church, even far away on the frontier,

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<sup>302</sup> See critical assessment of this in Martin Guggenheim, “Texas Polygamy and Child Welfare,” *Houston Law Review* 46 (2009): 759-816.

<sup>303</sup> See, e.g., the very recent bigamy convictions of fundamentalist Mormons in *State v. Holm*, 137 P. 3d 726 (2005) and *Utah v. Green*, 99 P. 3d 820 (2004), and earlier cases cited therein and in Clark, *Domestic Relations*, sec. 2.6.

<sup>304</sup> For detailed treatment, see Kerry Abrams, “Polygamy, Prostitution, and the Federalization of Immigration Law,” *Columbia Law Review* 105 (2005): 641-716; and Claire A. Smearman, “Second Wives’ Club: Mapping the Impact of Polygamy in U.S. Immigration Law,” *Berkeley Journal of International Law* 27 (2009): 382-447.

continued to attract national attention. The seminal cause was an 1852 manifesto from the church leadership that commended polygamy. For one man to have several wives, the church taught, was an appropriate and biblical form of communal living, illustrated by the Hebrew patriarchs. It also increased the opportunities for women to enjoy the spiritually salutary steps of marriage and motherhood. To set an example for the reticent, the church's leaders took several wives. They further reported that Joseph Smith and other church leaders had done the same in the 1830s and 1840s.

320. When word of this Mormon policy of polygamy reached Congress, it prompted instant denunciation and a political crusade against the Mormon Church. Not only was their polygamy considered to be a flagrant violation of long cherished norms of American and Western civilization. But word of this exotic new practice came just as nation was becoming deeply embroiled in bitter battles to abolish slavery and to secure women's rights. It was very easy to castigate polygamy as yet another species of slavery, patriarchy, abuse, and barbarism that needed to be vanquished. A staggering number of speeches, sermons, pamphlets, articles, and books poured forth after the 1850s denouncing polygamy – gradually adducing many of the same arguments about the harms of polygamy that we have sampled from the ancient Roman law and early Church Fathers to the latest Enlightenment philosophers. Polygamy and slavery were considered to be among the “twin relics of barbarism,” the main political argument went, and Congress has “the right and the duty to prohibit” this “odious institution.”<sup>305</sup>

321. Since Utah and some of the other western areas where the Mormons settled were still United States territories, Congress did have general authority to pass laws regulating issues of marriage, family, and sexuality. Congress exercised this authority with increasing sternness in an effort to stamp out Mormon polygamy. An 1862 law made polygamy a federal crime in all United States territories, including Utah. An 1882 law disqualified polygamists, as well as men cohabiting with more than one woman, from holding political office, voting in elections, and sitting on juries. Related statutes required parties to swear oaths denying practice or advocacy of polygamy, and subjected them to close scrutiny for even suspected belief in polygamy. An 1887 law called for the complete forfeiture of the Mormon Church's property if it persisted in its preaching and practice of polygamy.<sup>306</sup> The Mormons repeatedly challenged technical aspects of these laws, appealing more than a dozen times to the Supreme Court, but to little avail.

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<sup>305</sup> The literature on this familiar is voluminous. The story is well told and the literature well sifted in Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill, NC: University of North Carolina Press, 2002). See also good short summaries in Cott, *Public Vows*, 111-20; Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* (Chapel Hill, NC: University of North Carolina Press, 1985), 120-26. See also the interesting discussion in Kelly Elizabeth Phipps, “Marriage and Redemption: Mormon Polygamy in the Congressional Imagination,” *Virginia Law Review* 95 (2009): 438.

<sup>306</sup> 12 Stat. 501–502 (1862); 22 Stat. 30–32 (1882); 18 *Congressional Record* 585–593 (January 1887). Other laws are quoted and analyzed in *Murphy v. Ramsey*, 114 U.S. 15 (1885) and *Cannon v. United States*, 116 U.S. 55 (1885).

322. Three of these Supreme Court cases directly challenged these congressional laws as violations of the First Amendment free exercise of religion clause. In *Reynolds v. United States* (1879), a Mormon appealed a conviction under the criminal law against polygamy. In *Davis v. Beason* (1890), a Mormon appealed a conviction for false swearing of a mandatory oath renouncing polygamy.<sup>307</sup> In *Church of Jesus Christ of Latter Day Saints v. United States* (1890), the Mormon Church challenged the government's dissolution of its corporate charter and confiscation of its property.<sup>308</sup> In each case, the Mormon parties claimed that they had a free exercise right to participate in voluntary polygamy as their faith encouraged, and they thus sought exemptions from compliance with Congressional law.

323. The Supreme Court would have none of it, and held for Congress each time. Many of the Enlightenment arguments against polygamy that had been absorbed into common law jurisprudence over the past century and more came into these opinions, notably the arguments of Francis Lieber and James Kent who were amply quoted. In *Reynolds*, for example, Chief Justice Waite wrote for the Court:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estate of Deceased persons.

By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all

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<sup>307</sup> 133 U.S. 333, 341–342 (1890).

<sup>308</sup> 136 U.S. 1 (1890) and the companion case *Romney v. United States*, 136 U.S. 1 (1890). *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), upheld various laws disenfranchising known and suspected bigamists against challenges that the laws violated their more general "constitutional rights and liberties." In defense of the laws, Justice Matthews wrote: "For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guarantee of that reverent morality which is the source of all beneficent progress in social and political improvement."

men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or polygamy be punishable by the laws of this Commonwealth." 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com. 81, note (e). An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.<sup>309</sup>

324. The congressional power to pass general anti-polygamy laws in promotion of the health, safety, welfare, and morality of the community, the Court continued in *Davis* (1890), could not be compromised by judicial creations of a free exercise exemptions from these laws. To exempt Mormons polygamists, or their accessories, from compliance with general laws, particularly criminal prohibitions against polygamy, Justice Field thundered for the Court, would "shock the moral judgment of the community ... [and] offend the common sense of mankind." "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment."<sup>310</sup>

325. Justice Bradley drove home these sentiments in the Court's opinion in the 1890 *Latter Day Corporation* case: "The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world." It is a "sophistical plea" to claim free exercise protection for this "nefarious doctrine." For

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<sup>309</sup> *Reynolds*, 98 U.S. at 164-166.

<sup>310</sup> *Davis*, 133 U.S. at 336-337, 341-342.

the Court to grant free exercise protection in this case would invite all manner of specious evasions of the criminal law—even religious excuses for human sacrifice and suicide, the Court reasoned. “The state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced.”<sup>311</sup>

326. Confronted with these political and legal realities, Wilford Woodruff, the presiding officer of the Mormon Church, in 1890 issued a manifesto disavowing any further participation in polygamy and urging church members to follow. On October 6, 1890, a Mormon Church conference accepted the manifesto – although a small group of self-defined “Fundamentalist Mormons” broke off and have quietly maintained their polygamous practices to this day, each time losing their free exercise claims when prosecuted.<sup>312</sup> In response to the 1890 manifesto, Congress returned the Mormon church’s property in 1894. Utah became a state in 1896, and its new constitution prohibited polygamy and featured the only explicit clause on separation of church and state to appear among the state constitutions before 1947.<sup>313</sup>

327. In the twentieth century, the Mann Act and other federal statutes prohibited transportation of polygamous wives across state lines. A few fundamentalist Mormon polygamists were convicted under these statutes – and again had no success in pleading religious liberty exemptions.<sup>314</sup> Congress again issued long and firm statements and speeches denouncing (Mormon and Muslim) polygamy in debating and passing the Defense of Marriage Act (1996) and more recently in debating “A Bill to Establish a Federal Polygamy Task Force, to Authorize Assistance for Victims of Polygamy and Other Purposes.”<sup>315</sup> This latter bill was a product of the badly bungled raid by Texas state officials on the fundamentalist Mormon polygamist ranch in San Angelo, Texas, in 2008.<sup>316</sup>

328. While state law enforcement of its polygamy laws against Fundamentalist Mormons has sometimes been badly managed – as in the ill-fated Short Creek, Arizona Raid of 1953 and or the 2008 raid of the polygamist ranch in Texas – state courts have remained as resolute as the federal courts in denying free exercise exemptions from criminal laws against bigamy. A good recent example is *Utah v. Green* (2004). Tom Green was a fundamentalist Mormon charged with four counts of bigamy for maintaining multiple and overlapping relations with nine wives, with whom he produced 25 children who were now destitute and living largely on social welfare. He was also charged with first-degree felony rape, for marrying and impregnating one of his wives when she was thirteen years old and he thirty-seven. He was convicted on the four

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311 *Latter Day Corporation*, 136 U.S. at 48–50.

312 See Ken Driggs, “After the Manifesto: Modern Polygamy and Fundamentalist Mormons,” *Journal of Church and State* 32 (1990): 367-89.

313 Constitution of Utah (1896), Art. I, sec. 4; Art. III.

314 See, e.g., *Cleveland v. U.S.*, 329 U.S. 14 (1946);

315 110<sup>th</sup> Congress, 2d session S. 3313 (July 23, 2008).

316 See *In re Steed*, 2008 WL 2132014 (May 22, 2008) and discussion in Guggenheim, “Texas Polygamy and Child Welfare.”

counts of bigamy and the one count of rape. He appealed, arguing, *inter alia*, that the state's bigamy statute violated his free exercise rights.

329. The Utah Supreme Court made short work of his free exercise argument. The bigamy statute was neutral and generally applicable, the court concluded, and was properly applied in this case. "Any individual, who violates the statute, whether for religious or secular reasons, is subject to prosecution." The bigamy statute properly regulates and restricts the institution of marriage, and is designed to prevent "marital fraud" and the misuse of governmental benefits associated with marital status. "Most importantly," the Court continued, "Utah's bigamy statute serves the State's interest in protecting vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy, include incest, sexual assault, statutory battery, and failure to pay child support."<sup>317</sup>

330. The *Green* Court's final statement is a textbook example of an argument about polygamy that goes back for nearly two thousand years: polygamy is the cause and consequence of many other crimes and harms, especially to women and children. Classical Roman and early Christian writers alike, we saw, argued that polygamy usually caused or came with fraud, trickery, intrigue, lust, seduction, coercion, rape, incest, adultery, murder, exploitation and coercion of young women, jealousy and rivalry among wives and their children, dissipation of family wealth and inequality of treatment and support of household members, banishment and disinheritance of disfavored children and more. Not in every case, to be sure, but in so many cases that these had to be seen as the inherent and inevitable risks of polygamy. The Enlightenment philosophers and Anglo-American common lawyers repeated this long list of harms and crimes associated with polygamy.

331. As the *Green* case illustrates, some of the harms and crimes featured in Fundamentalist Mormon communities today, however, are more particular to life in the modern democratic welfare state: arranged, coerced, and underage marriage particularly between young girls and 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 brides, rampant social welfare abuses, social isolation of polygamous communities, and conflation of religious and political authority within them in violation of the principle of separation of church and state. Again, not in every case, as several defenders of Mormon polygamy insist, but in enough cases that the American courts have found that the firm maintenance and application of criminal laws is warranted.<sup>318</sup>

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<sup>317</sup> 99 P. 3d 820, 828-830 (2004).

<sup>318</sup> Maura Strassberg has catalogued and documented the harms and crimes of polygamy in two articles. She also points out the many violations of civil, constitutional, and international human rights occasioned by polygamy, particularly to women and children. See: Maura Strassberg, "The Crime of Polygamy," *Temple Political and Civil Rights Law Review* 12 (2003): 353-431; Maura Strassberg, "Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage," *North Carolina Law Review* 75 (1997): 1501-1624.

### 3. Section Summary

332. Since Anglo-Saxon times, the common law has consistently embraced monogamous marriage because of the many private and public goods that it offers. The common lawyers of the eighteenth to twentieth century found particularly attractive the Enlightenment rational and utilitarian arguments that pair bonding and domestic stability were the best way to protecting the natural rights of men and women, parents and children. They also found attractive the Enlightenment argument that a stable monogamous household was a vital foundation of the democratic republic – at once a cradle of conscience, a matrix of citizenship, and the first school of love and justice, caring and sharing, public spiritedness and responsibility. All these were ancient insights of the Western tradition that Enlightenment philosophers and common lawyers recaptured in the common law idea of monogamous marriage as a special status in society.

333. Recent social science scholarship on the goods of marriage has added a new chapter to this traditional story, and it is beginning to influence the law and other professions as well. The central thesis of this new social science literature is that, on the whole, it is healthier: (1) to be married or remarried than to remain single, widowed, or divorced; (2) to have two parents raising a child rather than one or none; and (3) to have marital cohabitation rather than non-marital cohabitation for couples who are planning to be together for the long term. On average, a number of recent studies show, married adults are less likely than non-married adults to abuse alcohol, drugs, and other addictive substances. Married parties take fewer mortal and moral risks, even fewer when they have children. They live longer by several years. They are less likely to attempt or to commit suicide. They enjoy more regular, safe, and satisfying sex. They amass and transmit greater per capita wealth. They receive better personal health care and hygiene. They provide and receive more effective co-insurance and sharing of labor. They are more efficient in discharging essential domestic tasks. They enjoy greater overall satisfaction with life measured in a variety of ways. Men, on average, enjoy more of these health benefits of marriage than women. The presence of children in the household decreases the short-term benefits but increases the long-term benefits of marriage for both spouses. Most children reared in two-parent households perform better in their socialization, education, and development than their peers reared in single- or no-parent homes.<sup>319</sup> These data on the health benefits of marriage are now emerging with increasing alacrity within a variety of modern professions, including very recently in public health recommendations. They have enormous implications for our

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<sup>319</sup> See Centers for Disease Control and Prevention per Charlotte A. Schoenborn, “Vital and Health Statistics Number 351” (December 15, 2004); Steven M. Tipton and John Witte, Jr., eds., *The Family Transformed: Religion, Values, and Society in American Life* (Washington, DC: Georgetown University Press, 2005); Don S. Browning, *Marriage and Modernization: How Globalization Threatens Modern Marriage and What to Do About It* (Grand Rapids, MI: Wm. B. Eerdmans, 2003); John Wall, Don Browning, William J. Doherty, and Stephen Post, eds., *Marriage, Health and the Professions* (Grand Rapids, MI: Wm. B. Eerdmans, 2002); Linda J. Waite and Maggie Gallagher, *The Case for Marriage* (New York: Doubleday, 2000).

professional responsibilities to couples and children, and to the institution of monogamous marriage itself.<sup>320</sup>

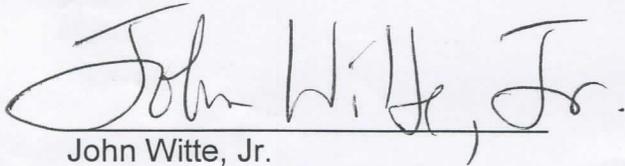
334. Since Anglo-Saxon times, the common law has also consistently denounced polygamy because of the many harms and crimes that it occasions. Convicted polygamists always faced fines and property forfeitures, the dissolution of any marriages besides their first, and often the payment of damages to the innocent spouse(s). For many centuries, convicted polygamists also faced whipping, imprisonment, time in the stocks, sometimes execution. Even today, brazen polygamists who flout their crime or compound it with other sexual offenses will serve hard time for a long time.

335. In the past 150 years, (Fundamentalist) Mormons have sought to practice polygamy on religious grounds and to be exempt from criminal liability on religious liberty grounds. American courts and legislatures have uniformly rejected these arguments. Not only does polygamy offend the fundamental values and goods of monogamy, these tribunals have argued, but polygamy is also the inevitable cause or consequence of numerous other crimes and harms, especially to women and children.

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<sup>320</sup> See John Wall, et al., eds., *Marriage, Health, and the Professions* (Grand Rapids, MI: Wm. B. Eerdmans, 2002).

I am aware I have a duty to assist the court and that I am not to be an advocate for any party. I have made this report in conformity with that duty and will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

A handwritten signature in cursive script that reads "John Witte, Jr." The signature is written in dark ink and is positioned above a horizontal line.

John Witte, Jr.

Jonas Robitscher Professor of Law  
Alonzo L. McDonald Distinguished Professor  
Director, Center for the Study of Law and Religion  
Emory Law School  
1301 Clifton Road NE  
Atlanta, GA 30322-2770

(April 13, 2010)

**John Witte, Jr.**

Jonas Robitscher Professor of Law  
Alonzo L. McDonald Family Distinguished Service Professor  
Director of Center for the Study of Law and Religion  
Emory Law School  
1301 Clifton Road  
Atlanta, Georgia 30322  
Phone: 404-727-6980/FAX: 404-712-8605  
jwitte@law.emory.edu

**Personal**

Born: August 14, 1959, St. Catharines, Ontario, Canada  
Married to Eliza Ellison; Two Daughters: Alison and Hope

**Education**

Harvard Law School (J.D., 1985)  
Calvin College (B.A., 1982)

**Books**

1. Editor, Herman Dooyeweerd, A Christian Theory of Social Institutions, Magnus Verbrugge, trans. (Toronto: Paideia Press, 1986)
2. Co-Editor, The Weightier Matters of the Law: Essays on Law and Religion (Atlanta, GA: American Academy of Religion Studies in Religion Series, 1988) (with Frank S. Alexander)
3. Editor, Christianity and Democracy in Global Context (Boulder, CO/San Francisco: Westview Press, 1993)
4. Co-Editor, Religious Human Rights in Global Perspective: Legal Perspectives (Dordrecht/London/Boston: Martinus Nijhoff Publishers, 1996) (with Johan D. van der Vyver) (Chinese translation forthcoming)
5. Co-Editor, Religious Human Rights in Global Perspective: Religious Perspectives (Dordrecht/London/Boston: Martinus Nijhoff Publishers, 1996) (with Johan D. van der Vyver) (Chinese translation forthcoming)
6. From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition (Louisville, KY: Westminster John Knox Press, 1997) (Korean translation by Kevin Jung, 2006; German translation by Dagmar Kelle, 2008; French and Chinese translations forthcoming)
7. Co-Editor, Human Rights in Judaism: Cultural, Religious and Political Perspectives (New York: Jason Aronson Publishers, 1998) (with Michael J. Broyde)

8. Co-Editor, Proselytism and Orthodoxy in Russia: The New War for Souls (Maryknoll: Orbis Books, 1999) (Russian and Ukrainian translations forthcoming) (with Michael Bourdeaux)
9. Co-Editor, Sharing the Book: Religious Perspectives on the Rights and Wrongs of Proselytism (Maryknoll: Orbis Books, 1999) (with Richard C. Martin)
10. Religion and the American Constitutional Experiment: Essential Rights and Liberties (Boulder/New York: Westview Press/Perseus Books Group, 2000)
- 10a. Religion and the American Constitutional Experiment, 2d ed. (Boulder/New York: Westview Press/Perseus Books Group, 2005) (Chinese translation forthcoming), 3d ed. (with Joel A. Nichols) (forthcoming, 2010)
- 10b. Religion and the American Constitutional Experiment, 3d ed. (Boulder/New York: Westview Press/Perseus Books Group, 2010) (with Joel A. Nichols)
11. Law and Protestantism: The Legal Teachings of the Lutheran Reformation (Cambridge/New York: Cambridge University Press, 2002) (Chinese and Korea translations forthcoming)
12. Sex, Marriage and Family in John Calvin's Geneva I: Courtship, Engagement and Marriage (Grand Rapids: Wm. B. Eerdmans Publishing Co., 2005) (with Robert M. Kingdon)
13. Co-Editor, Covenant Marriage in Comparative Perspective (Grand Rapids: Wm. B. Eerdmans Publishing Co., 2005) (with Eliza Ellison)
14. Co-Editor, Family Transformed: Religion, Values, and Family Life in Interdisciplinary Perspective (Washington: Georgetown University Press, 2005) (with Steven M. Tipton)
15. Co-Editor, Modern Christian Teachings on Law, Politics, and Human Nature (New York/London: Columbia University Press, 2005; 3 vol. pbk. ed. 2007) (with Frank S. Alexander)
16. Co-Editor, Modern Christian Teachings on Law, Politics, and Human Nature: Primary Sources (New York/London: Columbia University Press, 2005) (with Frank S. Alexander)
17. Co-Editor, Sex, Marriage, and Family in the World Religions (New York/London: Columbia University Press, 2006) (with Don S. Browning and M. Christian Green)
18. God's Joust, God's Justice: Law and Religion in the Western Tradition (Grand Rapids: Wm. B. Eerdmans Publishing Co., 2006) (Chinese translation forthcoming)
- 18a. Abridged as The Foundations of Faith, Freedom, and the Family, trans. H. Ohki and Y. Takasaki (Tokyo: Seigakuin University Press, 2008) (Japanese edition)

19. Co-Editor, To Have and to Hold: Marrying and its Documentation in Western Christendom, 400-1600 (Cambridge/London: Cambridge University Press, 2007) (with Philip L. Reynolds)

20. Co-Editor, The Equal Regard Family and its Friendly Critics (Grand Rapids: Wm. B. Eerdmans Publishing Co., 2007) (with M. Christian Green and Amy Wheeler)

21. The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism (Cambridge/New York: Cambridge University Press, 2007) (Chinese, Korean, Japanese, and German translations forthcoming)

22. Co-Editor, Law and Christianity: An Introduction (Cambridge/New York: Cambridge University Press, 2008) (with Frank S. Alexander) (Chinese and Japanese translations forthcoming)

23. The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered (Cambridge University Press, 2009)

24. Christianity and Human Rights: An Introduction (Cambridge University Press, 2011) (with Frank S. Alexander)

### **Books Under Contract and in Progress**

25. Sex, Marriage & Family in John Calvin's Geneva II: The Christian Household (Wm. B. Eerdmans) (with Robert M. Kingdon)

26. Christian Marriage and Modern Marriage Law (with Don S. Browning)

27. Religion and Human Rights: An Introduction (Oxford University Press) (with M. Christian Green)

28. Law & Protestantism II: The Legal Teachings of the Calvinist Tradition (under consideration at Cambridge University Press)

29. No Establishment of Religion: America's Contribution to Religious Liberty (under consideration at Oxford University Press) (with Jeremy T. Gunn)

### **Journal Symposia Edited**

1. "Religious Dimensions of American Constitutionalism," 39 Emory Law Journal 1-266 (1990)

2. "International Conference on Christianity and Democracy," 6 Emory International Law Review 19-70 (1992)

3. "A Conference on the Work of Harold J. Berman," 42 Emory Law Journal 419-589 (1993)

4. "The State of Religious Human Rights in the World Today," 10 Emory International Law Review 52-186 (1996), translated as "Les Droits de l'homme et la liberte religieuse dans le monde," 51 Conscience et liberte, 18-120 (Spring, 1996); "I Diritto dell'uomo e la liberta religiosa nel mondo," 27 Coscienza e Liberta 47-191 (Spring, 1996); "Religiose Menschenrechte heute," 46/47 Gewissen und Freiheit 24-176 (1996) (Chinese translation forthcoming)
5. "Soul Wars: The Problem of Proselytism in Russia," 12 Emory International Law Review 1-738 (1998)
6. "Pluralism, Proselytism, and Nationalism in Eastern Europe," 36 Journal of Ecumenical Studies 1-286 (1999)
7. "The Foundations of Law," 54 Emory Law Journal 1-375 (2005)
8. "What's Wrong with Rights for Children?" 20 Emory International Law Review 1-239 (2006)
9. "The Foundations and Frontiers of Religious Liberty: A 25<sup>th</sup> Anniversary Celebration of the 1981 Declaration on Religious Tolerance," 21 Emory International Law Review 1-276 (2007) (Chinese translation forthcoming)
10. "In Praise of a Legal Polymath: A Special Issue Dedicated to the Memory of Harold J. Berman (1918-2007)," 57 Emory Law Journal 1393-1643 (2007)
11. "The Future of Law, Religion, and the Family," 58 Emory Law Journal 1-102 (2009)

### **Articles and Book Chapters**

180 plus professional articles and book chapters in the fields of law and religion, European and American legal history, American and comparative religious liberty, marriage and family law, and legal philosophy, in such journals as *Calvin Theological Journal*, *Columbia Human Rights Law Review*, *Emory International Law Review*, *Emory Law Journal*, *Journal of Church & State*, *Journal of Law & Religion*, *Michigan Law Review*, *Notre Dame Law Review*, *Southern California Law Review*, *Zeitschrift der Savigny-Stiftung*, and other journals and anthologies in German, French, Italian, Hebrew, Spanish, Russian, Ukrainian, and Romanian translations. List of articles and book chapters available on request.

### **Lectures**

Sites of major public lectures include: Aarhus University; Arizona State University; University of Bonn; Boston College; University of California at Berkeley; Cambridge University; University of Cape Town; Catholic University of America; University of Chicago; Columbia University; University of Copenhagen; Dartmouth College; University of Edinburgh; Free University of Amsterdam; Georgetown University; Harvard University; University of Heidelberg; University of Iceland; Indiana University; University of Iowa; University of Las Vegas; McGill University; University of Minnesota; University of Notre Dame; University of Oslo; Oxford University; University of Pretoria; Princeton University; Queens University, Kingston; Seigakuin University, Tokyo; Tel Aviv

University; University of Minnesota; University of Texas at Austin; Trinity College, Dublin; University of Toronto; Trondheim University; University of Tübingen; University of Virginia; University of the Witwatersrand, Johannesburg; Windsor Castle, United Kingdom; Yale University; and numerous smaller colleges and institutes in North America, Western Europe, Israel, Japan, and South Africa. List of major lectures available on request.

### **Other Professional Appointments**

- Editor, Emory University Studies in Law and Religion, Wm. B. Eerdmans Publishing Co. (1989- )
- Co-Editor, Religion, Marriage and Family Series, Wm. B. Eerdmans Publishing Co. (2002- )
- Director, McDonald Foundation Project on The Foundations of Religious Liberty and Rule of Law (2007- )
- Co-Director, McDonald Foundation Project on Christian Jurisprudence in the 21<sup>st</sup> Century (2004- )
- Director, Lilly Endowment Project on Law, Religion, and the Protestant Tradition (1999- )
- Co-Editor, Religion and Human Rights Series, Orbis Books (1998-2005)
- Co-Director, Pew/Notre Dame Project on Law and Human Nature: The Teachings of Modern Christianity (2001-2004)
- Director, The Pew Charitable Trusts Project on The Problem of Proselytizing (1995-1999)
- Co-Director, Ford Foundation Project on Cultural Transformation in Africa: Legal, Religious and Human Rights Dimensions (1995-1998)
- Director, The Pew Charitable Trusts Project on Religious Human Rights, Law and Religion Program, Coordinator (1992-95)
- Director, The Pew Charitable Trusts Project on Christianity and Democracy, Law and Religion Program, Coordinator (1989-1992)

### **Awards**

- Most Outstanding Professor, 1992-93, 1993-94, 1997-98, 1998-99, 1999-2000, 2000-01, 2002-03, 2004-05, and 2006-2007, Student Bar Association, Emory Law School
- Emory University Scholar/Teacher Award, 1994
- Most Outstanding Educator Award for All Methodist Affiliated Schools, United Methodist Foundation for Christian Higher Education, Nashville, 1994
- Max Rheinstein Fellowship and Research Prize, Alexander von Humboldt-Stiftung, Bonn, 1995
- Professor of the Year Award for 1997-1998, Black Law Students Association, Emory Law School
- Abraham Kuyper Prize for Excellence in Theology and Public Life, Princeton Theological Seminary, 1999
- Distinguished Faculty Award and Lecture, Emory University, 2001
- Emory Williams Distinguished Teaching Award, Emory University, 2002

- Crystal Apple Award for Excellence in Professional School Teaching, 2007 and 2008
- National Religious Freedom Award, Council for America's First Freedom, 2008

### **Major Grants for Research Projects**

- The Pew Charitable Trusts: \$140,000 (1989); \$105,000 (1992); \$490,000 (1995); \$300,000 (1998); \$3.2 million (2000) with matching \$10 million endowment (2006); \$245,000 (2001)
- Ford Foundation (1995-1999): \$897,000
- Lilly Endowment, Inc.: \$549,000 (1999); \$50,000 (2004); \$400,000 (2007)
- The Alonzo L. McDonald Family Foundation: \$500,000 (2004); \$750,000 (2007); \$575,000 (2010)
- The John Templeton Foundation: \$192,000 (2005); \$750,000 (2006)
- The Henry Luce Foundation: \$480,000 (2006)
- The Social Science Research Network: \$100,000 (2010)