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Why No Polygamy

John Witte, Jr.*

Abstract

This chapter, distilled from a long book on the topic, analyzes the 1,850 year tradition of Western laws against polygamy and the growing constitutional and cultural pressures to reform these laws today. I show how the traditional Western cases against polygamy and same-sex unions used strikingly different arguments drawn from the Bible, nature, rights, harm, and symbolism. I conclude that, because these arguments are so different, Western nations can responsibly hold the line against polygamy, even if they choose to accept same-sex marriage and its accompanying norms of sexual liberty, domestic autonomy, equality, and nondiscrimination.

Keywords: Monogamy; polygamy; same-sex marriage; Mormonism; Muslims; Bible; Judaism; Roman law; Emperor Justinian; natural law; natural rights; Cajetan; Luther; Thomas Aquinas; Theodore Beza; John Locke; Mary Wollstonecraft; sexual liberty; religious freedom; teaching function of law; multiculturalism; immigration; *Big Love*; *Sister Wives*

Introduction

A century and a half ago, Mormons made international headlines by claiming a First Amendment right to practice polygamy,¹ despite criminal laws against it. In four cases from 1879 to 1890, the United States Supreme Court firmly rejected their claims.² Part of the Court's argument was historical: the common law has always defined marriage as monogamous, and to change those rules "would be a return to barbarism."³ Part of the argument was prudential:

*This Chapter is distilled from my book, JOHN WITTE, JR., *THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY* (2015) and used herein with the publisher's permission.

¹ I am using the term "polygamy" colloquially to include both polygyny (one man with two or more wives) and polyamory (one woman with two or more husbands). Classically, the term "polygamy" covered all manner of other forms of plural union, too, some of which had their own distinct names. For an overview of the shifting and confusing terminology, see the Appendix in *ibid.*, 27-33.

² *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 66 (1890); *Davis v. Beason*, 133 U.S. 333, 374 (1890); *Murphy v. Ramsey*, 114 U.S. 15, 35 (1885); *Reynolds v. United States*, 98 U.S. 145, 162 (1879).

³ *Late Corp.*, 136 U.S. at 49 (1890).

religious liberty can never become a license to violate general criminal laws lest chaos ensue. And part of the argument was sociological: monogamous marriage “is the cornerstone of civilization,” and it cannot be touched without upending our whole culture.⁴ These millennium-old prohibitions on polygamy are still the law of the land today – not only in America, but also in 121 of the world’s 198 nations, including all of Europe and Latin America, as well as Russia, China, Japan, and much of India.⁵

The question of polygamy is back in the headlines today in America and other Western lands. Fundamentalist Mormons and various Muslim, Hmong, and other emigres from Asia, Africa, and the Middle East are pressing new arguments to practice polygamy on grounds of religious freedom and the right to cultural self-determination. Various liberal scholars have now joined their cause, pressing arguments of sexual liberty, equality, and autonomy.⁶ Traditional criminal prohibitions against adultery, abortion, contraception, and sodomy, they argue, have all been struck down. Criminal prohibitions against polygamy must be repealed, too. Same-sex marriage is now constitutionally protected in 23 Western nations and counting. Polygamous marriages must now be allowed, too.

The first cases challenging the constitutionality of anti-polygamy laws have been filed in North America and Europe. The first rounds of public debate about the legality of polygamy have appeared in Western newspapers, journals, and social media, with many writers favoring polygamy. The first wave of popular media portrayals of good polygamous families has now broken with shows like “Big Love” and “Sister Wives,” stoking the cultural imagination and sympathy much like “Ozzie and Harriet” and “Little House on the Prairie” did for prior generations. Just as same-sex marriage advocates moved first to decriminalize sodomy and then pressed for the recognition of same-sex marriage, so pro-polygamy advocates aim first to repeal traditional criminal laws against polygamy and then to include polygamy among the marriage options recognized by the state.⁷

The traditional Western arguments against polygamy and same-sex unions, however, are strikingly different. Same-sex relations were regarded as unnatural and immoral sexual taboos that violated biblical norms.⁸ Polygamy was regarded as a harm crime that victimizes wives and children, correlates with other crimes and abuses, and threatens good citizenship and political stability. Same-sex opposition was largely Christian in inspiration, opposition that has now faded with the church’s waning political influence in the West.⁹ Anti-polygamy laws had pre-Christian

⁴ Cf. *Davis v. Beason*, 133 U.S. at 345 (discussing 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”).

⁵ Witte, *supra* note *, at 8-21.

⁶ See Strassberg, this volume, for a detailed account of claims.

⁷ See RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE (2015).; MARK A. GOLDFEDER, LEGALIZING PLURAL MARRIAGE: THE NEXT FRONTIER IN FAMILY LAW (2017).

⁸ See Part I *infra*.

⁹ See “Nones” on the Rise, PEW RESEARCH CENTER (Oct. 9, 2012), <http://www.pewforum.org/2012/10/09/nones-on-the-rise/> (explaining that one in five Americans now “do not identify with any religion,” a category shorthanded as “nones,” while one in three adults under 30 self-identify as “nones”).

origins and post-Christian logics that now serve to enhance rather than erode fundamental liberties.

Because these legal arguments are so different, I submit that Western nations can responsibly hold the line against polygamy, even if they choose to accept same-sex marriage and its accompanying norms of sexual liberty, domestic autonomy, and nondiscrimination. I reject ideological arguments, pro and con, that anti-polygamy laws are a form of traditional Christian morality. I reject slippery slope arguments, from the right and the left, that acceptance of same-sex marriage must inevitably lead to acceptance of polygamous marriage. And I reject arguments from domestic and international sources that religious freedom norms command the accommodation, if not validation, of religious polygamists. The West may and should politely say “No” to polygamy.

I. Biblical and Legal Arguments

The Western case against same-sex relations was (and for some still is) based on the Bible. The Mosaic law commanded firmly: “You shall not lie with a male as with a woman; it is an abomination.” “If a man lies with a male as with a woman, both of them have committed an abomination; they shall both be put to death.”¹⁰ The Apostle Paul declared ominously that “the wrath of God is revealed from heaven against all ungodliness and wickedness,” including specifically the acts of “sodomites,” “sexual perverts,” and others who succumbed to “dishonorable passions”: “women [who] exchanged natural relations for unnatural, and the men [who] likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men.”¹¹ While some modern scholars see ambiguity in these passages,¹² the Christian tradition until recently treated these texts as a clear condemnation of same-sex activities and unions, let alone marriages.¹³

It was thus the church, not the state, that led the first campaigns against same-sex activities and unions in the Western tradition. The early canons of the church prohibited sodomy, buggery, transvestism, and other stated forms of “fornication” and “perversion,” spiritually punishing such sins and excommunicating recalcitrant sexual sinners. These prohibitions became more detailed and severe in the Germanic penitential literature that followed, and even more so in high medieval canon laws and scholastic texts.¹⁴ Sex between men was singled out as a particularly vile form of “unnatural” sin, even more so if it involved a cleric.¹⁵ While a few

¹⁰ *Leviticus* 18:22; 20:13 (using Revised Standard unless otherwise indicated).

¹¹ *Romans* 1:18–19, 24–27; 1 *Corinthians* 6:9–10; 1 *Timothy* 1:10.

¹² See, e.g., AUTHORIZING MARRIAGE: CANON, TRADITION, AND CRITIQUE IN THE BLESSING OF SAME-SEX UNIONS (MARK D. JORDAN, et al., eds., 2006); WILLIAM STACY JOHNSON, A TIME TO EMBRACE: SAME-GENDER RELATIONSHIPS IN RELIGION, LAW, AND POLITICS (2nd ed., 2012).

¹³ JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 57, 73–74, 147–49 (1987).

¹⁴ *Id.* at 103–75, 300–324.

¹⁵ *Id.* at 212–14, 313–14, 398–400, 534–35.

church leaders may have winked at occasional same-sex relationships and even quietly blessed a few of them in special liturgies,¹⁶ one cannot rewrite this history by anecdote. The overwhelming teaching and practice of the historical Christian church was to condemn same-sex relations.

Roman law, for its first 1,000 years, allowed same-sex acts and relationships—though only heterosexual couples of the proper class could contract valid marriages and produce heritable children.¹⁷ It was only after the 4th-century Christian conversion of Emperor Constantine that these biblically-based norms against homosexual activities slowly soaked into Roman law. By the 6th century, the Christian Roman Emperor Justinian called sex between men an “abominable,” “abhor[rent],” “diabolical,” and “reprehensible vice” that is so “contrary to nature” that the practice is “not committed [even] by beasts.”¹⁸ Since the biblical days of Sodom, Justinian declared, such “impious and criminal acts” and “filthy practices” have brought “the wrath of God” unto any community that countenanced them. “[S]evere measures” were thus needed to stamp out these acts for good. This classic Christian condemnation of sodomy and same-sex activities was echoed and elaborated in the civil law, canon law, and common law traditions thereafter. By the twelfth and thirteenth centuries, church and state courts worked together to mete out severe punishment against convicted “sodomists,” including death by burning, beheading, or hanging (by their testicles and penises, no less!) for egregious offenders.¹⁹

By marked contrast to same-sex relations, not a single command against polygamy appears in the Bible. The Mosaic law, in fact, contemplated polygamy in cases of seduction, enslavement, poverty, famine, or premature death of one’s married brother, and it made special provision for the maintenance and inheritance of multiple wives and their children in those cases.²⁰ More than two dozen polygamists appear in the Hebrew Bible.²¹ Almost all of them were good and faithful kings, judges, or aristocrats, and not one of them was punished for practicing polygamy *per se*. While the New Testament condemned a wide range of sexual practices of the Jewish, Greek, and Roman cultures of the day, it, too, was silent on polygamy, save for its special rules that a bishop or deacon had to be “the husband of one wife” and a deaconess “the wife of one husband.”²² The laity were commanded to “flee fornication,”²³ but in all the long New Testament lists of sexual sins illustrating what “fornication” means, not a word appears about polygamy..

¹⁶ See, e.g., JOHN BOSWELL, *SAME SEX UNIONS IN PREMODERN EUROPE* (1994); MARK D. JORDAN, *BLESSING SAME-SEX UNIONS: THE PERILS OF QUEER ROMANCE AND THE CONFUSIONS OF CHRISTIAN MARRIAGE* (2005).

¹⁷ Remnants of this structure exist today in countries like Israel, which commit marriage to the exclusive authority of religious communities, but will recognize same-sex marriages entered into outside Israel. See Barzilay and Yefet, this volume.

¹⁸ JUSTINIAN’S INSTITUTES 1.10, 4. 18.4 (Paul Krüger ed., Peter Birks and Grant McLeod trans., 1987); JUSTINIAN’S NOVELS 12.1; 77.1; 89.12.5; 141.1 (Fred H. Blume trans., **unpub.** ca. 1952).

¹⁹ Brundage, *supra* note 7, at 397–401, 472–74.

²⁰ *Exodus* 21:1-2, 22:16–17; *Leviticus* 20:10, 20–22; *Deuteronomy* 17:17, 21:7–16; 22:22–29; 1 *Kings* 11:4; *Isaiah* 4:1, 13:12; *Ruth* 4:5–6, 13–21 .

²¹ Witte, *supra* note *, at 36, 44.

²² 1 *Timothy* 3:2–5; 5:9.

²³ 1 *Corinthians* 6:18 (King James Version).

Accordingly, the Christian Church, for its first 1,000 years, said and did rather little about polygamy, though the practice persisted among some first millennium Jews, seventh through 10th century Muslims, and various Indigenous groups in the Middle East, Africa, and Asia. A few early Church Fathers called polygamy a dangerous betrayal of the natural ideals of marriage as a creation of “two in one flesh.”²⁴ Others criticized the spousal rivalries and family unrest of biblical and contemporary polygamists.²⁵ But in the 5th century, the preeminent Western Church Father, St. Augustine, called polygamy a perfectly natural form of sexual interaction and an efficient means of procreation, too.²⁶ The Old Testament polygamists, said Augustine, committed no offense “against nature, custom, or law.”²⁷ By the same token, the early canon law of the church said virtually nothing against polygamy. Only a few cryptic canons on point have survived from the first millennium, and they called for polygamists in the church to be punished as petty thieves would be.²⁸

It was the state, not the church, that always led the Western campaign against polygamy. Indeed, half a millennium before the advent of Christianity, both Greek and Roman laws treated polygamy as a form of “barbar[ism]” and domestic “tyranny” that violated the natural human need for pair-bonding.²⁹ “Love is born into every human being,” Plato wrote famously; “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.”³⁰ In extension of these monogamous ideas, early Roman laws also banned a man from having a wife and a concubine at the same time, even if they lived in separate households or cities.³¹ By the 3rd century A.D., the pre-Christian Roman emperors declared polygamy to be a crime of infamy whose punishment gradually escalated under their imperial successors. Polygamy was declared a capital crime in the 9th century, and so it remained in much of the West until the 19th century. With the exception of medieval England, it was the state courts of the West that, for nearly two millennia, took the lead on punishing polygamy.

It was only in the twelfth and thirteenth centuries, after the medieval church developed a robust sacramental theology and canon law of monogamous marriage, that it came to condemn polygamy clearly as a heretical violation of the exclusive and enduring marital sacrament.³² It was only then that the church courts—and for a time the Inquisition, too—joined the state courts in punishing polygamists. And it was only then that polygamy was made a formidable “boundary

²⁴ *Genesis* 2:24; *Matthew* 19:5; *1 Corinthians* 6:16; *Ephesians* 5:31.

²⁵ Witte, *supra* note *, at 98–99, 107–08, 125–27.

²⁶ *Id.* at 88–93.

²⁷ AUGUSTINE, *CONTRA FAUSTUM*, 21.47, (Philip Schaff, ed. Nicene and Post-Nicene Fathers, repr. ed.1989), 4:289–90; ST. AUGUSTINE: *TREATISES ON MARRIAGE AND OTHER SUBJECTS*, 33–34, 49–51 (Roy J. Deferrari, ed., Charles T. Wilcox et al. trans.,1955),

²⁸ Witte, *supra* note *, at 114–21.

²⁹ See Walter Scheidel, *Monogamy and Polygyny*, in *A COMPANION TO FAMILIES IN THE GREEK AND ROMAN WORLDS* 108, 111 (Beryl Rawson, ed., 2011).

³⁰ PLATO: *SYMPOSIUM*, 25–31 (Alexander Nehamas & Paul Woodruff trans., 1989).

³¹ Krüger, *supra* note 11 at 5.26.1.

³² Witte, *supra* note *, at 144–95.

marker” between true Christians of the West and various Jews, Muslims, Asians, Africans, heretics, and free thinkers who preached or practiced polygamy.

But even then the Christian tradition wavered in its opposition to polygamy. Late medieval Catholic luminaries like Cardinal Cajetan, reaching back to Augustine, said that polygamy was a “perfectly natural” option in cases of personal or political necessity.³³ Sixteenth-century Protestants like Martin Luther went back to the Bible and ultimately considered consensual polygamy to be a better biblical option than brazen adultery or no-fault divorce to resolve hard cases of friction inside marriage.³⁴ The biblical texts on polygamy also led a few early modern Christian communities like the Anabaptists in Münster to experiment with biblical polygamy anew.³⁵ It also led a few free thinkers such as Bernard Ochino, John Milton, and Martin Madan to suggest further that allowing polygamy might be a better way to end prostitution, rape, fornication, prostitution, concubinage, adultery, and bastardy than insisting on monogamy alone.³⁶

It was only when the Council of Trent in 1563 issued its final confirmation of the sacramentality of monogamous marriage and its forceful anathema on the heresy of polygamy that this internal speculation about polygamy finally ended in Catholic circles.³⁷ In turn, it was only when Protestants came to treat marriage systematically as a divine covenant modeled on God’s exclusive relationship with his elect—or as a “little commonwealth” at the foundation of the commonwealths of church and state—that Protestants had the theological machinery needed to declare anew that monogamy was the only valid form of marriage. Marriage, early modern Catholics and Protestants together now clearly said, was created as an enduring and exclusive “two in one flesh” union, rooted in the natural order of creation and modeled on the mysterious relationship of God and his elect, Christ and his church. Early modern Western states responded by reconfirming their traditional capital laws against polygamy and strengthening their prosecution and punishment of polygamists.

“So what!” a modern skeptic might well say to all this history. So what if, two plus millennia ago, sodomy happened to be born a biblical sin and polygamy a Roman crime? So what if the first millennium church took the lead in punishing sodomy, and the first millennium state took the lead in punishing polygamy? So what if it took until the High Middle Ages or even the Reformation era for church and state to align forces coherently in condemning and punishing both sodomy and polygamy? The reality is that for at least half a millennium the Christian Church and the Christian state together branded sodomy and polygamy as unnatural sins and crimes, and together they condemned and punished as sexually deviant anyone who felt naturally drawn to same-sex or plural unions. Under the hot, bright lights of modern constitutional liberty,

³³ DENNIS DOHERTY, *THE SEXUAL DOCTRINE OF CARDINAL CAJETAN* 233–34 (1966).

³⁴ Witte, *supra* note *, at 205–18.

³⁵ See JOHN CAIRNCROSS, *AFTER POLYGAMY WAS MADE A SIN* 1–33 (1974).

³⁶ BERNARDINO OCHINO, *A DIALOG ON POLYGAMY: ORIGINALLY WRITTEN IN ITALIAN BY BERNARDINO OCHINO* (Don Milton ed., 2009); LEO MILLER, *JOHN MILTON AMONG THE POLYGAMOPHILES* 20–21, 45–46, 205–08 (1974); MARTIN MADAN, *THELYPHTHORA; OR, A TREATISE ON FEMALE RUIN, IN ITS CAUSES, EFFECTS, CONSEQUENCES, PREVENTION, AND REMEDY* (Don Milton ed., 1781).

³⁷ Witte, *supra* note *, at 218–20, 285–90.

these centuries-old sex “crimes” look equally problematic to the modern skeptic. . Since consensual sodomy and same-sex marriages are now constitutionally protected, consensual polygamy and other forms of polyamorous union should be protected, too. Clever reconstruction of the variant ancient pedigrees of these purported crimes avails us little today. Dusty historical arguments about what is natural and unnatural just are not good enough anymore, the modern skeptic concludes.

II. Arguments from Nature

There are striking differences, however, between the traditional natural arguments against same-sex unions and those against polygamous unions. The heart of the traditional natural argument against same-sex relations was that they are by nature “non-generative.” However consensual and loving, same-sex intimacy simply cannot produce a child, which is the ultimate end and good of sexual intercourse, the tradition has long taught. And having a child is essential for the preservation of the human race and for the perpetuation of one’s own family name, business, identity, memory, and more. Like every other animal, Aristotle put it three centuries before Christ, a “male and female must unite for the reproduction of the species,” and humans are thus born with “the natural impulse . . . to leave behind them something of the same nature as themselves.”³⁸ Same-sex partners simply cannot procreate together, rendering their sexual intimacy unnatural.

Moreover, the traditional natural argument added, “even the beasts” do not engage in same-sex activities, despite their lack of reason and conscience.³⁹ Many animals do kill and eat each other, take each other’s homes, food, mates, and offspring, and ignore other creatures in peril, even those of their own species. All of this violates basic natural laws of homicide, theft, adultery, family, and charity that humans have discovered and learned to implement through the use of their reason and conscience. But even the beasts, following natural instincts alone, know that same-sex activities are unnatural, even repulsive. If even the beasts instinctually know better, the traditional argument went, even the most irrational and irresponsible humans should also know that same-sex desires, relations, and activities are unnatural.

Finally, the human sexual body itself reflects what is natural, the tradition taught. A penis can slide into a vagina easily and comfortably during love-making, while anal penetration requires artificial lubrication and often causes pain. Vaginal intercourse can bring intense orgasmic pleasure to both parties in a way that oral sex cannot, absent simultaneous masturbation and spilling of seed by the other party. Face-to-face missionary vaginal sex brings the couple’s whole bodies more closely together in intimacy than any other sexual positions. We might blush or roll at our eyes at these distinctions today, using our imaginations or the Internet to find exceptions and counterexamples. But, historically, those differences between male–female and

³⁸ THE POLITICS OF ARISTOTLE, 1.2.2. (Ernest Baker, ed. & trans. 1972).

³⁹ Nov. 141.1 (559 A.D.). A modern debate swirls around whether animals “can be gay.” John Mooallem, *Can Animals Be Gay?*, THE NEW YORK TIMES MAGAZINE (March 31, 2010), <http://www.nytimes.com/2010/04/04/magazine/04animals-t.html>.

same-sex intimacy were taken as important evidence that the natural end or telos of the human sexual body was for straight sex, not gay or lesbian sex.

All of these traditional natural arguments against same-sex relations are seriously disputed today, and their erosion has helped topple traditional Western laws against same-sex partners. But none of these traditional natural arguments applies to polygamy, in particular polygyny. Procreation is not only possible but is enhanced by having multiple wives rather than one. Polygyny is not only known in nature but is the predominant form of reproduction in most animals, including more than 95% of all higher primates.⁴⁰ Pairing birds, voles, and a few other animals are the monogamous exception. The human body is not only capable of having multiple sex partners but allows a man to impregnate several women in a night, though a woman can have only one pregnancy at a time no matter how many men she takes into her bed. That's why Augustine and many later Western sages thought that only polygyny (one husband, multiple wives), not polyandry (one wife, multiple husbands), was a "natural" form of procreation. And that's why the current erosion of the traditional natural argument against same-sex relations has little bearing on the Western case against polygamy.

The traditional natural argument against polygamy was of a different order. Nearly eight centuries ago, the great Dominican scholar, Thomas Aquinas, summed up what was, and what would continue to be, a commonplace of Western thought and law. Human beings, Aquinas argued, are distinct among animals in having perennial sex drives rather than annual mating seasons. They produce vulnerable babies who need the support of both their mother and father for a long time in order to survive and thrive. Women bond naturally with children; men do so only if they are certain of their paternity. Exclusive and enduring monogamous unions are the only way that humans can at once have regular sex, paternal certainty, and mutual caretaking for their young children. Humans have thus learned by natural inclination and hard experience to the contrary to develop enduring pair-bonding strategies as the most effective means of reproduction, child-rearing, and community formation.⁴¹

By contrast, polyandry is naturally unjust to children, Aquinas continued. If a woman has sex with several husbands, it removes the likelihood that any child born to that woman will clearly belong to any one husband. That will undermine paternal certainty and, consequently, paternal investment in their children's care.⁴² The children are thus more likely to suffer from chronic neglect and deprivation, and the wife will be overburdened trying to care for them and trying to tend to her multiple husbands and their disproportionate sexual needs at once. Polygyny is similarly unjust to wives and children. It does not necessarily erode paternal certainty. So long as his multiple wives are faithful to him alone, a man can be assured of being

⁴⁰ MELVIN KONNER, *THE EVOLUTION OF CHILDHOOD: RELATIONS, EMOTION, MIND* 452–62 (2010).

⁴¹ ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES*, III-II, ch. 123 (Vernon J. Bourke trans., 1975) [hereafter SCG]; THOMAS AQUINAS, *SUMMA THEOLOGICA*, (Fathers of the English Dominican Province, trans. 1948), Supp. q. 41, art. 1; q. 65, arts. 1-5; q. 67, art. 1.

⁴² For a review of empirical studies around certainty of paternity, see Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42(3) *SAN DIEGO LAW REVIEW* 847 (2005); Jeffrey Rosenberg & W. Bradford Wilcox, *The Importance of Fathers in the Healthy Development of Children*, U.S. Department of Health and Human Services (2006), <https://www.childwelfare.gov/pubPDFs/fatherhood.pdf>.

the father of any children born in his household. But this requires a man to pen up his wives like livestock, isolating them from other males even as his own energies are dissipated over the several women gathered in the household. It places half-siblings in competition for every scrap of food, shelter, and paternal attention, and sets their mothers against each other and especially against rival stepchildren in the household.⁴³ This is not “an association of equals, but, instead, a sort of slavery on the part of the wife,” said Aquinas.⁴⁴ It betrays the fundamental requirements of fidelity and mutuality of husband and wife, of the undivided and undiluted love and friendship that become a proper marriage. Polygamy is thus unnatural, unjust, and unfair, Aquinas concluded. It violates the natural law.

Later Catholic and Protestant writers argued that polygamy violates not only natural law but also natural rights. Calvinist jurist Theodore Beza put this argument clearly nearly five centuries ago. Beza took the Ten Commandments of the Bible to be the best summary of the natural law, but he saw parallel commands in many other formulations of the natural law. He argued that polygamy violates the commandments against adultery, theft, false testimony, and coveting all at once. Polygamy is a form of adultery that breaches a man’s duty to be faithful to his first wife alone. It is a form of theft that breaches his duty to provide sufficient material support for his wife and their children even after his death. It is a form of false witness that breaches his duty to honor his promise of marital fidelity. And it is a form of coveting that breaches a man’s duty not to lust after his female neighbor.⁴⁵

Each of these natural duties about fidelity, property, honesty, and respect for others rooted in the Decalogue has correlative natural rights that polygamy also breaches, Beza continued.⁴⁶ Polygamy breaches the first wife’s natural rights to marital fidelity and trust, to ongoing marital property and material security, and to contractual expectations and reliance on her husband’s fidelity to the marriage contract. It breaches the children’s natural rights to proper support and inheritance and to the undiluted care, nurture, and education of their father and mother together. And it breaches a neighbor’s rights to have an equal opportunity to marry without having most of the eligible women hoarded in one harem or having the neighbor’s own wife or daughters subject to the covetous privations of a powerful polygamous neighbor. Polygamy was thus doubly unnatural, Beza concluded—a violation of natural law and natural rights alike.

Liberal philosophers and common law jurists from the 17th century onward drew directly on these traditional natural law and natural rights arguments against polygamy, even while they supported the legal disestablishment of Christianity. Most liberals posited natural rights as “inherent” in human nature or the state of nature rather than commanded in the Bible or the order of creation. But they came to the same conclusion as earlier Christians that polygamy violated the natural rights and liberties especially of women and children. 17th-century English philosopher John Locke, for example, regarded polygamy as a violation of the natural-born

⁴³ For a review of empirical evidence about polygamy’s harms, *see* Strassberg, this volume.

⁴⁴ SCG, *supra* note 36, at III-II, ch. 123.4.

⁴⁵ THEODORE BEZA, TRACTATIO DE POLYGAMIA 12–40 (1587),.

⁴⁶ *Id.*; JOHN WITTE, JR., THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM 81–142 (2007).

equality of men and women, as well as the natural rights of children to be properly nurtured and fully supported by both their mother and father until they were fully emancipated.⁴⁷ For Locke, the natural laws favoring monogamy trumped religious arguments for polygamy, and he would allow no religious liberty exemptions from criminal prohibitions on polygamy. A century later, leading common law jurist William Blackstone condemned polygamy as a “singularly barbaric” violation of the reciprocal natural rights and duties of husbands and wives and parents and children, which no modern civilization could countenance.⁴⁸ To Blackstone, polygamy was a grave offense against public health and public order.

18th-century women’s rights advocate Mary Wollstonecraft castigated polygamy for privileging men and degrading women, forcing them to compete with other women, especially the more nubile and fertile young women whom their husbands would inevitably drag home to replace them when they grew barren or lost their good looks. A woman is not just a temporary object of beauty or a dispensable channel of procreation, Wollstonecraft insisted. A woman is a full citizen who must be given the right, education, and opportunity to choose her own public and private vocations and to enjoy her natural-born liberty and equality within her own monogamous home if she chooses to marry.⁴⁹ Marriage must be structured as a “dyadic friendship.”⁵⁰ Scottish philosophers Henry Home, David Hume, and Adam Smith argued that polygamy would breed tyrannical patriarchy or servile submissiveness in children, depending on their and their mother’s place in the polygamous home. Children of polygamy simply cannot learn the healthy balances of authority and liberty, equality and respect, and property and responsibility that they need to survive, let alone thrive. For these Scottish sages and the many 19th-century American writers who echoed them, this was no way to treat the natural rights of the child.⁵¹

“So what!”—a modern skeptic again might say to all this talk about natural law, natural justice, or natural rights. Traditional “natural” arguments against polygamy are no more convincing than traditional “biblical” arguments. After all, modern philosophers and linguists have made clear that “nature” talk is just a thin and movable cover for the imposition of underlying religious and cultural preferences and prejudices. They have proved that “irrefutable” principles of reason or “objective” facts of nature are always conditioned by a community’s levels of socialization and scientific knowledge. They have shown that “self-evident” truths are only temporary normative stopping points in endlessly evolving cultures.⁵²

Take the “naturalist” argument for exclusive and enduring heterosexual marriages that Thomas Aquinas introduced and nearly eight centuries of Western jurists and philosophers thereafter repeated. Today, genetic testing has made paternity much easier to establish.

⁴⁷ JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 165–66, 287–41, 318-19, 341, 350–51 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); JOHN LOCKE: A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 69, 84, 105–11 (Mark Goldie ed., 2010).

⁴⁸ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1.15.1 – I.16.3; 4.13 (1765).

⁴⁹ MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN 63, 100, 103, 106 133, 141 (Janet Todd ed., 2nd ed., 2008).

⁵⁰ EILEEN HUNT BOTTING, WOLLSTONECRAFT, MILL AND WOMEN’S HUMAN RIGHTS 57 (2016).

⁵¹ Witte, *supra* note *, at 372-80, 416-41.

⁵² For a critical review, see Don S. Browning, *A Natural Law Theory of Marriage*, 46 ZYGON 733, 733-760 (2011).

Contraceptives have made extramarital sex much safer to pursue. Artificial reproductive technology, adoption, and surrogacy (and maybe cloning soon, too) have made reproduction readily available to men and women, straights and gays, single and married, couples or communes. And the welfare state is there to help all these parents if they or their children have need.⁵³ What Aquinas took as objective “natural” conditions about human sexuality and heterosexual pair-bonding strategies of reproduction were, in fact, conditioned by the level of science, economy, and politics of his day. As the conditions changed, domestic arrangements have changed, too. LGBT advocates have used this evolutionary insight to open the door to same-sex equality and marriage.⁵⁴ Polygamy advocates can and must do the same, the argument goes.

Shifting the discourse from “natural law” to “natural rights” arguments against polygamy only compounds the problem, this skeptical argument continues. Plainly, natural rights—or “universal human rights,” as we now call them—are also cultural constructs. They are rooted in and reflective of the values and beliefs of the Western cultures that first named and used them. Theodore Beza and other early modern Christians were at least honest in rooting these natural rights firmly in the Bible and the order of creation. But post-Christian liberals have rooted these rights in the shifting sands of human nature and the state of nature. Jeremy Bentham was perhaps a bit too harsh in calling all this “nonsense upon stilts.”⁵⁵ But the reality is that human rights are just normative totems of a community’s ideals, procedural means to enforce a favored set of social and institutional relationships. Calling these rights “natural” or “human” does not change the reality that most purportedly “universal” human rights in vogue today are principally Western (Christian) constructions of value and belief. They have little salience or cogency in polygamous communities around the world that have chosen to reject rights talk, or at least Western formulations of human rights.

III. Harm Arguments

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

⁵³ Often the state finds it easier to pursue polygamists for child support or other crimes than for polygamy itself. (of ten prosecutions in a decade, six “involved defendants who were also prosecuted for crimes other than bigamy, such as criminal non-support, unlawful sexual conduct with a minor, forcible sex abuse, marriage license fraud, and insurance fraud.” *Brown v. Buhman*, 822 F.3d 1151, 1158 (10th Cir. 2016).

⁵⁴ For commentary on state legislative responses around same-sex marriage and non-discrimination protections for LGBT persons, *see* Adams, this volume.

⁵⁵ NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 2:46, 53 (Jeremy Waldron, ed., 1987).

Some 1,800 years ago, ancient Jewish Rabbis and early Church Fathers alike warned that polygamy was “trouble,”⁵⁶ even when practiced by the most noble and God-fearing men and women. Think of Abraham with Sarah and Hagar, Jacob with Rachel and Leah, Elkanah with Hannah and Peninnah.⁵⁷ All of these biblical households suffered bitter rivalry between the wives, bitter disputes among their children over inheritance and political succession, deadly competition among half-siblings that ultimately escalated to incest, adultery, kidnapping, enslavement, banishment, and more. Think of the great King David who lustfully murdered Bathsheba’s husband to add Bathsheba to his already ample harem.⁵⁸ Or think of King Solomon with his thousand wives and concubines who led him into idolatry, and whose children ended up raping, abducting, and killing each other, precipitating civil war in ancient Israel.⁵⁹

Some 800 years ago, William of Auvergne and other observers of Middle Eastern Muslim polygamy argued that the “bent love” of polygamy was inevitably harmful. Women are harmed because they are reduced to rival slaves within the household, exploited for sex with an increasingly sterile and distracted husband, sometimes deprived of the children they do produce, and forced to make do for themselves and their children with too few resources as other women and children are added to the household against their wishes. Children are harmed because their chances of birth and survival are diminished by their calculating fathers who might contracept, abort, smother, or sell them, and by their mothers who sometimes lack the resources, support, and protection to bring them to term, let alone to adulthood. Men are harmed because they do not have the time, energy, or resources to support their polygamous households and because their minds and hearts cannot rest if they are always on the lookout for another woman to add to their harems or for another dangerous man who will abduct his women. And societies are harmed because polygamy results in too many unattached men who become menaces to public order and morality. Finally, polygamy creates too many ad hoc seats of domestic power which are based on sheer numbers rather than on legitimate political succession or election.⁶⁰

Some 500 years ago, European critics of the Anabaptist town of Münster documented the harms done when religious leaders gained power over an isolated polygamous community.⁶¹ There, a group of young men, giddy with lust and theocratic pretensions, combined charisma, brutality, and biblical platitudes to force a gullible Christian community to adopt their utopian vision of polygamy. Old couples were forced to end their marriages and start again. Young girls and women were coerced into premature and unwanted marriages; even little prepubescent girls were fair game and were literally raped to death. Husbands collected wives like spiritual trophies, measuring their faith by the size of their harems and nurseries. Wives were used and then spurned when they were pregnant or nursing or when the next wife was added to the harem.

⁵⁶The Hebrew word for a co-wife (*tzarah*) literally means “trouble.”; See Michael J. Broyde, *Jewish Law and the Abandonment of Marriage*, in MARRIAGE, SEX, AND FAMILY IN JUDAISM 88-89 (Michael J. Broyde & Michael Ausubel, eds., 2005).

⁵⁷*Genesis* 16:1–6; 29:15-30; 1 *Samuel* 1:1–8.

⁵⁸ 2 *Samuel* 11:27.

⁵⁹ 1 *Kings* 11:1–6.

⁶⁰GUILIELMI ALVERNI OPERA OMNIA, 1:512-528 (repr. ed., Frankfurt am Main: G.m.b.H., 1963); PETER BILLER, THE MEASURE OF MULTITUDE: POPULATION IN MEDIEVAL THOUGHT 60–88 (2000).

⁶¹Cairncross, *supra* note 28, at 1–33.

Polygamous households were filled with bickering wives and children, who were then cowed into silence with threats of the sword. Wives who still objected, or who rejected their husband's sexual advances to protest the unwanted polygamy, were summarily executed. Community dissenters and critics of these utopian excesses faced the sword as well.

Some 150 years ago, American critics of Mormon polygamy found much the same thing on the Western frontier.⁶² First, they charged, polygamy harmed young girls who were too often tricked, coerced, or commanded to enter spiritual marriages with older men and had too little education and too few means of escape when they were inevitably neglected or replaced by another favorite wife. Their plight was exacerbated by the practice of unilateral male divorce that allowed men to banish wives who failed to fall in line or who no longer offered children, labor, support, or sex. Second, polygamy licensed and encouraged male lust for sex and power. It induced inevitable restlessness on the part of some males to add more women to their harems. It invited inevitable repression and ostracism of rival males eager to find a wife or lover among the scant supply of women who were left to them. It favored marriage by the richest and most powerful, not necessarily the fittest and most virtuous males of the community. Third, polygamy created religious power structures that rivaled the legitimate power of the state. Church leaders slowly gained control of the property, economy, and work force. They compelled their congregants, workers, and family members to support their polygamous policies and to vote for new officials who would do the same. The new officials colluded to create laws and policies favoring polygamy and to suborn the perjury and contempt of those polygamists who were sought by the authorities. And when government officials sought to restore legal and moral order in the territory, these communities confronted them with boycotts, guns, riots, and violence. This simply could not be countenanced in a democratic land dedicated to the separation of church and state.⁶³

Today, observers of polygamous communities scattered about the West point to similar problems of higher than average incidences of arranged, coerced, and underage marriages of young girls to older men; rape and statutory rape; wife and child abuse; social and educational deprivation of women and children in polygamous households; abuse and ostracism of young boys and poorer men who compete for fewer brides; rampant social welfare abuses by oversized polygamous families; social isolation of polygamous communities; and dangerous conflation of religious and political authority.⁶⁴ Outside of the West, most polygamous cultures are rural, poor, and uneducated. They exist in low technology and labor-intensive economies that require many children to do the work and that feature low survival rates among these children. Or they are part of powerful political and religious families in traditional tribal settings, Muslim settings, or both. But regardless of “whether it is practiced in a Western democracy or sub-Saharan Africa, polygamy produces harmful effects that ripple throughout a society,” Brown University political scientist Rose McDermott concludes after a thorough cross-cultural study of polygamy in over

⁶² Witte, *supra* note *, at 429-39.

⁶³ For a pair of views on the modern boundaries of free exercise in the United States, *see* Helfand, this volume; Sepper, this volume.

⁶⁴ Strassberg, this volume; Julia Chamberlin & Amos N. Guiora, *Polygamy: Not “Big Love” But Significant Harm*, 35 WOMEN'S RIGHTS L. REP. 144, 171-85 (2014).

170 countries.⁶⁵ All these polygamous communities suffer from increased levels of physical and sexual abuse against women, increased rates of maternal mortality, shortened female life expectancy, lower levels of education for girls and boys, lower levels of equality for women, higher levels of discrimination against women, increased rates of female genital mutilation, increased rates of trafficking in women, and decreased levels of civil and political liberties for all citizens.

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

Furthermore, allowing religious polygamy as an exception to the rules is even more dangerous, the Western tradition has concluded, because it will make some churches, mosques, tribes, and temples a law unto themselves.⁶⁶ It is notable that no religious community in the West today regards polygamy as an absolute religious requirement.⁶⁷ For the faithful, it is a custom not a command, an option not an obligation. It is also notable that some Western communities that once preached and practiced polygamy, namely, Jews and Mormons, have now renounced the practice. It is even more notable that polygamy is shrinking in the Muslim world, even though 53 of the 55 Muslim-majority nations today still allow the practice. More conservative schools of Islamic jurisprudence, particularly the Wahhabi and Hanafi schools, do allow for a limited right to practice polygamy for men of ample means. This has persisted in some Islamic communities to this day, both in Muslim-majority lands and in dispersed Muslim communities throughout the world, including in the West. In Muslim lands and communities that follow the more liberal teachings of the Malaki and Shaf’i schools of jurisprudence, however, polygamy is typically an unpopular and shrinking domestic practice, particularly for families in urban settings and more developed cultures. A number of Muslim jurists within these schools have been openly critical of the practice because of concern for the treatment of women and children.

But even if polygamy were religiously favored or obligatory, modern Western constitutional laws still empower states to prohibit behavior that the states consider harmful or

⁶⁵ Rose McDermott & Jonathan Cowden, *Polygyny and Violence Against Women*, 64 EMORY L.J. 1767 (2015).

⁶⁶ *Reynolds*, 98 U.S. at 167.

⁶⁷ See Azizah Y. Al-Hibri, and Raja’ M. El Habti, *Islam, in SEX, MARRIAGE, AND FAMILY IN WORLD RELIGIONS*, 150-225 (Don S. Browning, M. Christian Green, and John Witte, Jr. eds., 2006).

dangerous.⁶⁸ Again, some religious communities and their members might well thrive with the freedom to practice polygamy. But, inevitably, closed repressive and isolated regimes, like Anabaptist Münster in the 16th century or the Fundamentalist Mormon communities in thinly populated regions of western Mexico, America, and Canada today⁶⁹ will also emerge—with underage girls duped or coerced into sex and marriages with older men, with women and children trapped in sectarian communities with no realistic access to help or protection from the state, and no real legal recourse against a religious community that is following its own rules. The West prizes liberty, equality, and consent too highly to court such a risk.

“So what!”, a skeptic might argue for the final time. Monogamous households are filled with many ugly harms, too: wife and child abuse, deprivation and abandonment of children, wastrel habits, welfare abuses, and, sadly, so much more.⁷⁰ That has not led to the abolition of monogamy but only to the closer policing and punishment of each harm as it occurs. Why not do the same here? If polygamy really does cause or correlate with various harms, why not just punish those harms when they occur?⁷¹ If polygamous wives or children really do suffer from increased levels of abuse, neglect, or deprivation, why not give them model contracts with strong, built-in protections for the vulnerable that are scrupulously enforced, a possibility Box explores elsewhere in this volume? If religious leaders really do subvert due process, why not let polygamous parties just litigate their claims in state courts? If religious communities really do isolate their members at the risk of abuse, why not make polygamy more mainstream, transparent, and accountable? If *Big Love* and *Sister Wives* can make the polygamous family work, why can’t everyone else be given a fair chance?

IV. Symbolic and Educational Arguments

“Bad cases make bad law,” a familiar legal dictum holds, and that is the case here. The compelling case for the lawfulness of polygamy is when three or more well-educated parties—similar in wealth, ability, and opportunity, with eyes and doors wide open—choose to enter into a polygamous union. They can calculate and negotiate the costs and benefits and the advantages and disadvantages of their pending plural union. They can protect themselves through prenuptial and postnuptial contracts and through their own independent means.⁷² They can hire lawyers, accountants, private investigators, and security guards to help them if their partners betray or endanger them or their children. And they can hit the airwaves and social media to elicit

⁶⁸ Adams, this volume; Helfand, this volume.

⁶⁹ MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL, AND LEGAL ISSUES xvi, 163-84 (Cardell K. Jacobson and Lara Burton, eds., 2011), (giving map of Fundamentalist Latter-Day Saints communities) ; MARTHA BAILEY AND AMY J. KAUFMAN, POLYGAMY IN THE MONOGAMOUS WORLD: MULTICULTURAL CHALLENGES FOR WESTERN LAW AND POLICY 69-132 (2010).

⁷⁰ See generally Rachel Kidman, *Child Marriage and Intimate Partner Violence: A Comparative Study of 34 Countries*, INT. J. EPIDEMIOLOGY (Oct. 12, 2016), <https://academic.oup.com/ije/article-abstract/doi/10.1093/ije/dyw225/2417355/Child-marriage-and-intimate-partner-violence-a?redirectedFrom=fulltext>.

⁷¹ See similar argument in *State v. Holm*, 137 P.3d 726, 758 (Utah 2006) (Durham, J., concurring and dissenting).

⁷² See Bix, this volume, for a discussion of the extent to which parties can contract on questions related to child welfare. For a recent decision granting custody to three adults using existing law of custody, based on the parties’ decision to “create this unique relationship” between a legally married couple and a downstairs neighbor, see *Dawn M. v. Michael M.*, 2017 NY Slip Op 27073 (N.Y. Sup. Ct, Suffolk Cty., 2017).

sympathy and action if the state authorities do not respond quickly or fully enough. For these exceptional parties, a state's criminal prohibition against polygamy hardly seems necessary.

But general criminal prohibitions against polygamy are designed not for the exceptional case, but for the typical case. And throughout Western history and still today, a typical case of polygamy too often involves vulnerable parties who do not have the knowledge, resources, or connections to engage in the kind of self-protection and self-help available to the families depicted on *Big Love* or *Sister Wife*.⁷³ Every Western state has general laws on the books against wife and child abuse; coerced marriage and statutory rape of young girls; deprivation of food, shelter, and education of children; welfare abuse; and more. The reality, however, is that, in action, these laws have provided far too little support and protection for these vulnerable populations, especially as state administrative agencies face shrinking budgets, dwindling personnel, and political disincentives to prosecute.

But these traditional criminal laws against polygamy are more than just prudential prophylactics against harm. They also play an important symbolic and teaching function that the state and its family laws still play in our lives. Historically, in the West, the laws against polygamy were part of a broader set of family laws designed to support the classical Western ideal that the monogamous family was the most primal and essential institution of Western society and culture. Aristotle and the Roman Stoics called the union of husband and wife, and parent and child, the “foundation of the polis” and “the private font of public virtue.”⁷⁴ The Church Fathers and medieval Catholics called the monogamous household the “seedbed” of the city, “the sacramental force that welds Christian society together.” Early modern Protestants and Anglo-American common lawyers called the stable household a “little church,” a “little commonwealth,” the first school of love and justice, nurture and education, charity and citizenship. John Locke and the Enlightenment philosophers called monogamous marriage “the first society” to be formed as men and women moved from the state of nature to an organized society dedicated to the rule of law and the protection of natural rights. All these traditional metaphors taught a certain vision of the good life and the good society, with monogamous marriage at its core.

For all of our new cultural emphasis on liberty and autonomy, and for all our current wariness about totalitarian power, Western society still looks to the law to promote private and public “health, safety, and welfare” and to discourage activities and relationships that harm them. The state has shrunk the traditional ideals of sex, marriage, and family life that it teaches, and modern family law systems have moved away from many of the absolute “thou shalt” and “thou shalt not” commands of the past, as well as the harsh measures used to enforce them. But still, in the “soft law” between these two clear commands, the modern state still does its teaching work, “nudging” its citizens in one direction or another. The state does not require its citizens to get

⁷³ See *State v. Holm*, *supra* note XX, as one example (describing religious marriage of 16-year-old girl to 32-year-old man legally married to the girl's sister, which led to the girl giving birth to one child before 18 and another three months after she turned 18, for which the man was tried and convicted of two counts of unlawful sexual conduct with a sixteen- or seventeen-year-old and one count of bigamy, all third degree felonies).

⁷⁴ See JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION*, (2d ed., 2012).

married, but it does “nudge” in that direction: It provides state marital licenses, tax and social security benefits, spousal evidentiary and health care privileges, and hundreds of additional federal and state benefits and incentives.⁷⁵ In turn, while the state rarely prosecutes polygamy *per se*, it still nudges strongly against polygamy by providing it with no funding, facilitation, licenses, or support, and threatening prosecution when polygamy is combined with other harms and crimes.

V. Conclusion

All Western nations to date have held the line against polygamy, even if they have accepted sexual liberty and same-sex marriage. They should continue to do so. Polygamy causes or correlates with too many harms to women, children, men, and society. It defies the natural family form that the Western classical, Christian, and liberal tradition has defended for 2500 years. It ignores the conclusions of modern evolutionists that pair-bonding is part of the “deep structure”⁷⁶ of human reproduction that humans have developed as their best strategy for long-term survival and success.

But let’s face it: the argument for polygamy is and always has been primarily about a small group of men seeking the social, moral, and legal imprimatur to have and to hold sundry females at once. However, there is plenty of empirical evidence to show that historically and today, most men and almost all women are instinctively attracted to single partner intimacy for the long term, especially when children are involved, and instinctively repulsed and angered if forced to share their bed with a third party. Despite our wide cultural acceptance of sexual liberty in the West, sexual infidelity still breaks marriage and intimate relationships more than any other single cause.⁷⁷

For the West to maintain its traditional stance against polygamy does not mean that it needs to trade in the ugly rhetoric that has historically attended this stance. We do not have to posit narratives of moral progress that brand polygamists as “barbarians” and “savages” and polygamy as “odious among the northern and western nations.”⁷⁸ We do not have to say that the West is more “advanced” than the rest because of its monogamy. We do not have to repeat the haughty and xenophobic arguments used by Graeco-Roman writers against their imperial subjects, by early Christians against Jews and Muslims, by early modern Europeans against New World natives, or by 19th-century Americans against emancipated slaves, Native Americans, Asian workers, or traditional Mormons, all of whom practiced polygamy. The West can now

⁷⁵ See Wilson, this volume (canvassing legal incidents of marriage); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (listing benefits associated with marriage); *United States v. Windsor*, 133 S.Ct. 2675 (2013) (same).

⁷⁶ BERNARD CHAPAI, *PRIMEVAL KINSHIP: HOW PAIR-BONDING GAVE BIRTH TO HUMAN SOCIETY* 10 (2008).

⁷⁷ *Divorce in America: Who Wants Out and Why ?*, AUSTIN INSTITUTE (April 9, 2014), <http://www.austin-institute.org/research/divorce-in-america/> (listing “infidelity by either partner” as the “most-cited reason[] for wanting a divorce”).

⁷⁸ *Reynolds*, 98 U.S. at 164.

simply and politely say to the polygamist who bangs on its door seeking admission or permission to practice polygamy: “No thank you; we don’t do that here,” and close the door firmly.