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## *MULIERIS DIGNITATEM* AND THE EXCLUSIVITY OF MARRIAGE UNDER LAW

*Howard Bromberg*<sup>†</sup>

Jesus Christ established monogamy, the marriage of one man to one woman, as the canonical norm of his church and the juridical norm for all nations.<sup>1</sup> This was a unique event in the history of the cultures and religions of the world. The Catholic Church has always defended its canonical norm of monogamy, often with great opposition.<sup>2</sup> Through its influence, monogamy has been established as law in the Western world and in almost all cultures influenced by Western law and norms.<sup>3</sup> The emerging jurisprudence of the United States, however, rejects any religious derivation as the basis of our laws. With that rejection, how can our laws affirming monogamy—our laws against polygamy—survive on a principled basis?

Jesus lifted marriage to its most sublime level. He declared it indissoluble and reserved it to the union of one man and one woman. As illustrated in the *Gospel of Matthew*:

[Jesus] answered, "Have you not read that he 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'? So they are no longer two but one. What therefore God has joined together, let no man put asunder."<sup>4</sup>

Building on the initial commandment in *Genesis 2:24*, this is a startling and unique command.<sup>5</sup> It is a misconception, held by many

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1. See *Matthew* 19:4–6; *Mark* 10:6–9.

2. See JOHN A. HARDON, S.J., *THE CATHOLIC CATECHISM* 363–64 (1975).

3. PAUL V. ADAMS ET AL., *EXPERIENCING WORLD HISTORY* 224 (2001); ALVIN J. SCHMIDT, *HOW CHRISTIANITY CHANGED THE WORLD* 115 (2004).

4. *Matthew* 19:4–6 (Revised Standard, Catholic Edition).

5. *Genesis 2:24* (Revised Standard, Catholic Edition) ("Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh.").

people, that societies and religions have long been monogamous and that a religion like Islam, which permits a man to take up to four wives, is an exception.<sup>6</sup> In fact, the reverse is true. It is difficult to find a strict juridical norm against polygamy anywhere in the history of the world other than in the Christian religion and nations it has influenced. Polygamy—marriage of a man to two or more women, often referred to under the specific term “polygyny”—was widespread in cultures in Africa, Asia, pre-Columbian America, Polynesia, and early Europe.<sup>7</sup> As recently as the twentieth century, to take the most prominent examples, kings in Africa, the King of Thailand, emperors of China and their chief officials, and other figures of great stature boasted numerous wives or consorts who enjoyed the status of lesser wives under the law.<sup>8</sup> It is true that Greek and Roman civilizations, the foundation of Western culture, did not favor polygamy, and as the power and sophistication of Rome grew, it found polygamy to be a relic of barbarism.<sup>9</sup> But neither Roman law nor Roman religion strictly forbade polygamy as a moral or juridical norm, and concubinage was widely accepted.<sup>10</sup> A quick review of the lives of such noble Romans as Julius Caesar and Mark Antony shows the Romans’ relaxed standards in regard to their

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6. DANIEL W. BROWN, *A NEW INTRODUCTION TO ISLAM* 85 (2d ed. 2009).

7. For a historical and anthropological study of polygamy in world society, see MIRIAM KOKTVEDGAARD ZEITZEN, *POLYGAMY: A CROSS-CULTURAL ANALYSIS* (2008), and STEPHANIE COONTZ, *MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE* (2006). For a survey of polygamy in world philosophy and practice, see *THE INT’L SOC’Y OF FAMILY LAW, THE INTERNATIONAL SURVEY OF FAMILY LAW* 346–54 (Andrew Bainham & Bart Rwezaura eds., 2004). For a case study of the interaction of English law with traditional Asian and African polygamy, see PRAKASH SHAH, *LEGAL PLURALISM IN CONFLICT: COPING WITH CULTURAL DIVERSITY IN LAW* 89–121 (2005). The classic but outdated sociological treatment of the history of marriage (and polygamy) in the world is the three-volume *History of Human Marriage* by Edward Westermarck. Westermarck was a leading sociologist who applied Darwinian principles to human history. A similarly wide-ranging history of marriage in the world is MARILYN YALOM, *A HISTORY OF THE WIFE* (2001).

8. See ADRIAN HASTINGS, *THE CHURCH IN AFRICA: 1450–1950*, at 312 (1994); TAMARA LOOS, *SUBJECT SIAM: FAMILY, LAW, AND COLONIAL MODERNITY IN THAILAND* 111–17 (2006); EVELYN S. RAWSKI, *THE LAST EMPERORS: A SOCIAL HISTORY OF QING IMPERIAL INSTITUTIONS* 128 (1998).

9. For modern studies of marriage and the role of women in the classical world, including some treatment of polygamy, see JUDITH EVANS GRUBBS, *WOMEN AND THE LAW IN THE ROMAN EMPIRE: A SOURCEBOOK ON MARRIAGE, DIVORCE AND WIDOWHOOD* 161–85 (2002); *MARRIAGE, DIVORCE AND CHILDREN IN ANCIENT ROME* 51 (Beryl Rawson ed., 1991); and DANIEL OGDEN, *POLYGAMY, PROSTITUTES AND DEATH: THE HELLENISTIC DYNASTY* (2000).

10. See MARY R. LEFKOWITZ & MAUREEN B. FANT, *WOMEN’S LIFE IN GREECE AND ROME: A SOURCEBOOK IN TRANSLATION* 107 (3d ed. 2005).

leaders taking more than one wife, if done for political reasons and with discretion.<sup>11</sup>

The history of religion tells a similar story. As noted, Islam not only permits polygamy, but according to some scholars it encourages it—up to a limit of four wives.<sup>12</sup> The Prophet Muhammad, who was granted the privilege of having an even greater number of wives, is taken as the exemplar of virtue by Muslims.<sup>13</sup> Hinduism and Confucianism have little negative to say about polygamy, and Buddhism is seemingly indifferent to it.<sup>14</sup> Polygamy was practiced in ancient Israel with biblical authority.<sup>15</sup> The Hebrew patriarchs had multiple wives, and Leah and Rachel, both wives of Jacob, are classified as matriarchs.<sup>16</sup> While the Jewish religion in Christian countries has not allowed polygamy, the rabbinical tradition cannot unequivocally condemn a marital practice that is permitted in the Torah. The fixed rule against polygamy in post-biblical Western

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11. The Roman Senate contemplated a bill permitting Julius Caesar to marry as many wives as he desired so that he could have many heirs. C. SUETONIUS TRANQUILLUS, *THE LIVES OF THE TWELVE CAESARS* 52 (Alexander Thomson trans., George Bell & Sons 1901). By naming Caesarion, the son of Julius Caesar and Cleopatra, the legitimate heir to Caesar in the Donations of Alexandria (34 BC), even though Caesar was married to Calpurnia Pisonis until his death, Mark Antony seemed to be exempting exalted Roman rulers from the norms of monogamy. See DIANA PRESTON, *CLEOPATRA AND ANTONY: POWER, LOVE, AND POLITICS IN THE ANCIENT WORLD* 226–27 (2009); ELEANOR GOLTZ HUZAR, *MARK ANTONY* 198 (1978); see also 1 ARTHUR BROWNE, *A COMPENDIOUS VIEW OF THE CIVIL LAW, AND OF THE LAW OF THE ADMIRALTY* 66 (New York, N.Y., Halsted & Voorhies 1840) (“At Rome frequent attempts were made to abolish the laws against polygamy, but without success. Julius Cæsar entertained such a design, but did not carry it into execution. Valentinian I, wishing himself to take a second wife, allowed the practice though it had ceased to be common.”).

12. For the history of polygamy in Islam and its practice in modern Islamic nations like Saudi Arabia, see MAHA A.Z. YAMANI, *POLYGAMY AND LAW IN CONTEMPORARY SAUDI ARABIA* (2008), and SEYYED HOSSEIN NASR, *ISLAM: RELIGION, HISTORY, AND CIVILIZATION* 68–69 (2003).

13. QUR’AN 33:50, *translated in AN INTERPRETATION OF THE QUR’AN: ENGLISH TRANSLATION OF THE MEANINGS* 425 (Majid Fakhry trans., 2002). To be sure, there have been critics of polygamy in the Muslim world as well, who point out that the Qur’an allows for polygamy only when the wives will be treated equally, a situation nearly impossible in the modern world. See *id.* 4:3; AMINA WADUD, *QUR’AN AND WOMEN: REREADING THE SACRED TEXT FROM A WOMAN’S PERSPECTIVE* 82–85 (1999).

14. For recent references to polygamy in Hinduism, see WERNER F. MENSKI, *HINDU LAW: BEYOND TRADITION AND MODERNITY* 374–426 (2003), and JOHN RENARD, *RESPONSES TO 101 QUESTIONS ON HINDUISM* 132–33 (1999). For a recent reference to polygamy in Confucianism, see JULIA CHING, *CHINESE RELIGIONS* 58 (1993). For recent references to polygamy in Buddhism, see BERNARD FAURE, *THE POWER OF DENIAL: BUDDHISM, PURITY, AND GENDER* 172, 198 (2003).

15. See Joseph Blenkinsopp, *The Family in First Temple Israel*, in LEO G. PERDUE ET AL., *FAMILIES IN ANCIENT ISRAEL* 48, 64 (1997).

16. See, e.g., 1 *Samuel* 25:43; 2 *Samuel* 5:13, 11:27; 1 *Kings* 11:3; *THE TORAH: A MODERN COMMENTARY* 186 (W. Gunther Plaut & David E.S. Stein eds., rev. ed. 2006).

Judaism is attributed as much to external Christian law as developing Jewish norms.<sup>17</sup> In Muslim countries that have permitted polygamy, it has always been practiced by some Jewish men without conflict with their religious strictures.<sup>18</sup>

Pope John Paul II's apostolic letter *Mulieris Dignitatem* shows what is to be made of this history of marriage.<sup>19</sup> In his apostolic letters and encyclicals, Pope John Paul II, following in the example of the Second Vatican Council, aimed to clear away the excrescences of history to attain the essence of the Gospel. As he describes in *Mulieris Dignitatem*, *Genesis* presents the "structural basis of biblical and Christian anthropology."<sup>20</sup> The story of our first parents—created, as Pope John Paul II writes, as a "unity of the two"—is of perennial value.<sup>21</sup> Correctly understood, this story outweighs the often "incomplete and temporary" laws of the Old Testament and the often obscured lessons of human history.<sup>22</sup> As the Pope writes, "[t]he whole of human history unfolds within the context of th[e] call" of the first man and woman to be an exclusive and mutual help and gift to each other.<sup>23</sup> At the beginning of human history, before the commencement of organized human society, man and woman were created as a communion of exclusive love.<sup>24</sup> "In the 'unity of the two,' man and woman are called from the beginning not only to exist 'side by side' or 'together,' but they are also called *to exist mutually 'one for the other.'*"<sup>25</sup>

Pope John Paul II's perspective in paragraph seven of *Mulieris Dignitatem* allows one to draw important conclusions about the

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17. For a discussion of the interplay between Christianity and Judaism on the issue of polygamy, see IRVING GREENBERG, FOR THE SAKE OF HEAVEN AND EARTH: THE NEW ENCOUNTER BETWEEN JUDAISM AND CHRISTIANITY 81 (2004). For an insightful, but more tendentious treatment, see DAVID C. GROSS & ESTHER R. GROSS, UNDER THE WEDDING CANOPY: LOVE & MARRIAGE IN JUDAISM 12, 66, 118, 139 (1996).

18. See, e.g., ELISHEVA BAUMGARTEN, MOTHERS AND CHILDREN: JEWISH FAMILY LIFE IN MEDIEVAL EUROPE 33, 202 n.65 (2004); HARVEY E. GOLDBERG, JEWISH LIFE IN MUSLIM LIBYA: RIVALS & RELATIVES 21 (1990).

19. Pope John Paul II, *Mulieris Dignitatem* [Apostolic Letter on the Dignity and Vocation of Women] (1988) [hereinafter *Mulieris Dignitatem*].

20. *Id.* ¶ 7.

21. *Id.* (internal quotation marks omitted).

22. Second Vatican Council, *Dei Verbum* [Dogmatic Constitution on Divine Revelation] ¶ 15 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 373, 384 (Nat'l Catholic Welfare Conference trans., 1967).

23. *Mulieris Dignitatem*, supra note 19, ¶ 7.

24. See *id.*

25. *Id.*

divine history of the exclusivity of marriage. By divine mandate, marriage in its original institution was required to be exclusive to one man and one woman, reflecting in mutual faithfulness a sincere gift of self and the self-revelation of the Triune God. Polygamy was permitted according to the contingencies of human history for the hardness of hearts, and God's plan even made use of it in divine history, but it was not part of God's original plan for marriage.<sup>26</sup> In this way polygamy can be compared to the institution of slavery and, to some extent, capital punishment. Slavery and capital punishment are both practiced in the Bible; both exist throughout salvation history.<sup>27</sup> But in modern times the Church has determined these practices to be inconsistent with human dignity. Pope John Paul II himself demonstrates this in his encyclical *Evangelium Vitae*, again returning to *Genesis* and in particular to the story of Cain and Abel, where Cain is not killed for his murder of Abel but banished, reaffirming the primacy of human life even over the requirement for strict retribution.<sup>28</sup>

Following its founder, the Church understood this great truth from its inception. Needless to say, the Christian church has opposed polygamy from apostolic times, as is clear from the New Testament, the writings of the first Christians, the records of the first church councils, and early canon law.<sup>29</sup> For example, St. Paul tells those who aspire to leadership in the Christian church that they must be the "husband of one wife."<sup>30</sup> Early Christian writers echoed the command that marriage be between one man and one woman.<sup>31</sup> Justin Martyr condemned Jews for permitting several wives.<sup>32</sup> Irenaeus likewise

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26. *Matthew* 19:8; CATECHISM OF THE CATHOLIC CHURCH ¶ 1610 (2d ed. 1997).

27. See, e.g., E. CHRISTIAN BRUGGER, CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION 60 (2003); JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING 17–18 (2005).

28. Pope John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] ¶ 9 (1995).

29. For a brief survey of Christian marriage in Scripture and history, see THOMAS M. MARTIN, THE CHALLENGE OF CHRISTIAN MARRIAGE: MARRIAGE IN SCRIPTURE, HISTORY, AND CONTEMPORARY LIFE (1991).

30. 1 *Timothy* 3:2 (Revised Standard, Catholic Edition); *Titus* 1:6 (Revised Standard, Catholic Edition); see also *Ephesians* 5:31; *Matthew* 19:4–10; *Mark* 10:2, 6–9; *Romans* 7:3.

31. OSCAR D. WATKINS, HOLY MATRIMONY: A TREATISE ON THE DIVINE LAWS OF MARRIAGE 595–633 (London, Rivington, Percival & Co. 1895) (surveying the early Christian treatment of polygamy).

32. JUSTIN MARTYR, DIALOGUE WITH TRYPHO, A JEW, Ch. 84, in 1 THE ANTE-NICENE FATHERS 194, 266–67 (Alexander Roberts & James Donaldson eds., 1956).

condemned the pagans for polygamous practices.<sup>33</sup> Tertullian writes that, for Christians, marriage is lawful but polygamy is not.<sup>34</sup> Methodius, Pseudo-Clementine, and Basil of Caesarea are equally emphatic in condemning polygamy.<sup>35</sup> The Council of Neocaesarea listed polygamy as a major sin.<sup>36</sup> The Church from its inception mandated monogamy for spouses with no true exception demonstrated in history. It has maintained this prohibition against polygamy to this day. There was tremendous pressure for the Church to relent from the newly converted tribes of early Europe, in the Protestant and English Reformation, and in the evangelization of the peoples of Africa and other areas where polygamy is woven into cultural norms.<sup>37</sup> In every century, new Christian groups have reinstated polygamy, in the American experience most notably with the Church of Jesus Christ of Latter Day Saints—the Mormons.<sup>38</sup> The Catholic Church has resisted and opposed each attempt without hesitation.<sup>39</sup> With the perseverance of Church teaching a principal

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33. IRENÆUS, AGAINST HERESIES, Ch. XXVIII, in 1 THE ANTI-NICENE FATHERS, *supra* note 32, at 309, 353.

34. TERTULLIAN, ON EXHORTATION TO CHASTITY, Ch. V (S. Thelwall trans.), in 4 THE ANTE-NICENE FATHERS, *supra* note 32, at 50, 53.

35. METHODIUS, THE BANQUET OF THE TEN VIRGINS, Ch. III, in 6 THE ANTE-NICENE FATHERS, *supra* note 32, at 309, 312 (1957); RECOGNITIONS OF CLEMENT, Bk. IX, Ch. 29 (Thomas Smith trans.), in 8 THE ANTE-NICENE FATHERS, *supra* note 32, at 75, 189 (1957); Letter from Basil, Bishop of Caesarea, to Amphilochius, Bishop of Iconium (375), in 8 NICENE AND POST-NICENE FATHERS: SECOND SERIES 255, 258 (Philip Schaff & Henry Wace eds., Hendrickson Publishers 1994).

36. CANONS OF THE COUNCIL OF NEOCAESAREA, cc.II–III, *reprinted in* 14 NICENE AND POST-NICENE FATHERS: SECOND SERIES, *supra* note 35, at 79, 79–80.

37. For modern attempts to find some reconciliation between Christianity and polygamy, see JOHN CAIRNCROSS, AFTER POLYGAMY WAS MADE A SIN: THE SOCIAL HISTORY OF CHRISTIAN POLYGAMY (Wilmer Brothers Ltd. 1974) (1974); EUGENE HILLMAN, C.S.SP., POLYGAMY RECONSIDERED: AFRICAN PLURAL MARRIAGE AND THE CHRISTIAN CHURCH (1975); and ADAM J. POWELL, POLYGAMY: A CHRISTIAN PRIMER (2009). None of these make a compelling case or demonstrate that the Catholic Church permitted the faithful to practice polygamy. See JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 245 n.105 (1997), for a reference to the willingness of the Protestant reformers Martin Luther and Martin Bucer to relax laws against bigamy and polygamy and a reference to the practice of polygamy among some early Anabaptists.

38. RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY ix (2d ed. 1989). The Mormon Church outlawed polygamy for its members in 1890. *Id.* at 139–40. For a history of polygamy in Mormonism, see generally WAGONER, *supra*, and JEFFREY NICHOLS, PROSTITUTION, POLYGAMY, AND POWER: SALT LAKE CITY, 1847–1918 (2002).

39. In modern times, the Catholic Church has repeated this prohibition often. “The unity of marriage, distinctly recognized by our Lord, is made clear in the equal personal dignity which must be accorded to man and wife in mutual and unreserved affection. *Polygamy* is contrary to conjugal love which is undivided and exclusive.” CATECHISM OF THE CATHOLIC CHURCH, *supra*

cause, laws against polygamy entered the jurisprudence of every Christian nation, of most every nation that was influenced by Christendom, and even of nations that came into passing contact with Christendom. Despite their religious heritage, many Muslim countries restrict and even outlaw polygamy.<sup>40</sup> Theologians have debated whether, in earlier centuries, polygamy was in direct opposition with natural law, but under the mandate of Jesus Christ and the influence of the Christian churches it has been disappearing from human society for two millennia.<sup>41</sup>

But if Christian norms underlie the jurisprudence of legal rules against polygamy, what happens when that influence wanes? American jurisprudence is rejecting the legitimacy of Christian traditions as a basis for its laws.<sup>42</sup> Absurdly, the courts are holding that supporting our laws with the religious values of three millennia is an unconstitutional “establishment of religion.” The most important legal case in American history involving polygamy was the

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note 26, ¶ 1645 (internal quotations omitted) (footnote omitted) (quoting Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 49 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II, *supra* note 22, at 513, 546 [hereinafter *Gaudium et Spes*]). The Church states further:

[P]olygamy is not in accord with the moral law. Conjugal communion is radically contradicted by polygamy; this, in fact, directly negates the plan of God which was revealed from the beginning, because it is contrary to the equal personal dignity of men and women who in matrimony give themselves with a love that is total and therefore unique and exclusive.

*Id.* ¶ 2387 (internal quotation marks omitted) (brackets omitted) (quoting Pope John Paul II, *Familias Consortio* [*Apostolic Exhortation on the Role of the Christian Family in the Modern World*] ¶ 19 (1981)). The Council of Trent in its twenty-fourth session on November 11, 1563, anathemized anyone who affirmed that “Christians may have more than one wife at once and that it is forbidden by no divine law.” Council of Trent, 24th Session, *Canons on the Sacrament of Marriage* ¶ 2 (1563), reprinted in 2 DECREEES OF THE ECUMENICAL COUNCILS 754, 754 (Norman P. Tamer, S.J. ed., Sheed & Ward & Georgetown Univ. Press 1990) (1972). The Second Vatican Council assailed polygamy in its document *Gaudium et Spes*, *supra*, ¶ 47.

40. See LEILA AHMED, *WOMEN AND GENDER IN ISLAM* 146, 168 (1992).

41. See, e.g., ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES*, Bk. 3, Ch. 124 (Vernon J. Bourke trans., Image Books 1956) (rejecting polygamy as violating the friendship of equality between man and wife); ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Supp., Q. 65, Art. 1 (Fathers of the English Dominican Province trans., Christian Classics 1981) [hereinafter *SUMMA THEOLOGICA*] (finding that polygamy violates the secondary, but not the primary, precepts of natural law, thus recognizing that the purpose of polygamy in the Bible was to beget children and polygamy was an impediment to attaining the good of the spouses); JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 478 (paperback ed. 1990) (acknowledging that St. Thomas Aquinas opposed polygamy, but recognized that under some Old Testament circumstances it was allowed).

42. See 2 JAMES HITCHCOCK, *THE SUPREME COURT AND RELIGION IN AMERICAN LIFE* 162–63 (2004).

1878 Supreme Court case of *Reynolds v. United States*.<sup>43</sup> In upholding criminal laws against polygamy in the face of Mormon religious practices, the U.S. Supreme Court found a basis for its decision in history, Christian traditions, and laws of the West.<sup>44</sup> The Court even described marriage to be “from its very nature a *sacred obligation*.”<sup>45</sup> Such a description is inconceivable in our modern Supreme Court. In fact, the Supreme Court has moved toward a jurisprudence demanding that all laws have a strictly secular basis.<sup>46</sup> This has led to startling results. In the *Planned Parenthood v. Casey* decision, reaffirming *Roe v. Wade*, the Court paid tribute not to the most basic function of law—protecting human life against violence—but to man’s autonomous search for meaning in the universe, “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>47</sup> In another departure from its historical jurisprudence, the Supreme Court in the 2003 case of *Lawrence v. Texas* seemed to find the state’s traditional role of regulating morality in ordinary life to be unconstitutional.<sup>48</sup>

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43. 98 U.S. 145 (1878).

44. *Id.* at 164–65. The Court declared:

Polygamy has always been odious among the northern and western nations of Europe . . . . After the establishment of 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 . . . .

*Id.* For a comprehensive treatment of this case in the context of American and Mormon marital norms and laws, see SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* 119–45 (2002); James L. Clayton, *The Supreme Court, Polygamy and the Enforcement of Morals in Nineteenth Century America: An Analysis of Reynolds v. United States*, 12 *DIALOGUE* 46 (1979); Henry Mark Holzer, *The True Reynolds v. United States*, *HARV. J.L. & PUB. POL’Y* 43 (1987); Jeremy M. Miller, *A Critique of the Reynolds Decision*, 11 *W. ST. U. L. REV.* 165 (1984); Carol Weisbrod & Pamela Sheingorn, *Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women*, 10 *CONN. L. REV.* 828 (1978).

45. *Reynolds*, 98 U.S. at 165 (emphasis added).

46. The literature on the Supreme Court and its religion jurisprudence is, of course, voluminous. For a thorough introduction, critical of an extreme separation of church and state in modern jurisprudence, see 1 *HITCHCOCK, supra* note 42, and 2 *HITCHCOCK, supra* note 42.

47. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

48. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The Court stated:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. . . . The Texas statute

These strands are brought together in the recent state supreme court cases that have invalidated laws holding that marriage is comprised of the union of a man and a woman. In several recent decisions in states such as California, Connecticut, Hawaii, Iowa, Massachusetts, New Jersey, and Vermont, courts have struck down their state's marriage laws, dictating the acceptance of same-sex marriage.<sup>49</sup> In one prominent case, *Goodridge v. Department of Public Health*, decided by the Supreme Judicial Court of Massachusetts, the court rejected the value of long-held religious beliefs enshrined in Massachusetts law understanding marriage as a union of a man and a woman.<sup>50</sup> The court rejected the traditional definition of marriage on the basis of a so-called fidelity to secular values.<sup>51</sup> The U.S. Supreme Court in *Reynolds v. United States* had invalidated polygamy to a large measure based on its understanding of marriage as both a civil and "sacred" institution.<sup>52</sup> In *Goodridge*, however, the Massachusetts Supreme Judicial Court was willing to define marriage as only a civil institution.<sup>53</sup> It defined marriage as "binary," or the "union of two persons as spouses, to the exclusion of all others," but it gave no reason why such a definition of "marriage" is inviolable.<sup>54</sup> The court stated its determination to uphold prohibitions on any form of polygamous relationship but was unable to state any principled reason for doing so.<sup>55</sup> It had already defined the purpose of marital laws only as obtaining "full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'"<sup>56</sup> Likewise, the court refused to use "historical, cultural, religious, or other reasons [to] permit the State to impose

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further no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

*Id.*

49. See *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999); *Baehr v. Miike*, 910 P.2d 112, 115-16 (Haw. 1996).

50. *Goodridge*, 798 N.E.2d at 953-58.

51. *Id.*

52. *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

53. *Goodridge*, 798 N.E.2d at 954 ("Simply put, the government creates civil marriage . . . [to be] a wholly secular institution.").

54. *Id.* at 965, 969.

55. *Id.* at 969 n.34.

56. *Id.* at 957 (quoting *Baker v. Vermont*, 744 A.2d 864, 889 (Vt. 1999)).

limits on personal beliefs concerning whom a person should marry.”<sup>57</sup> Consequently, if persons can freely commit to “intimate and lasting” relations with more than one person, the question must be posed whether the court under its stated reasoning can pose any objection to recognizing these relations in marriage.

If the religious basis of laws that define marriage as a union of a man and a woman cannot be enforced by our legal system, how can laws that define marriage as a union of *only* one man and one woman be sustained? All arguments that point to the social disadvantages of polygamy can be countered by arguments finding a countervailing benefit. Shorn of history and common belief, all such arguments will, in the end, seem subjective and personal. If the laws of marriage are intended only to protect the rights of people to intimate love, as *Goodridge* maintains, and if the realm of private consensual sex is off limits to the state, as *Lawrence* maintains, how can the state intrude on the intimate question of whether that love is expressed among two spouses or more? If we find something special in the “binary” nature of marriage, in the number “two,” it can only be that it reflects the number of sexes, the complementarity of persons, male and female, that make up the human race. In both the Old and the New Testaments, the joining of two persons into one union explicitly follows from humans having been made of two sexes, male and female.<sup>58</sup> If the religious and cultural expression of marriage as a union of the two sexes of humankind can be jettisoned, can the uniqueness of the number two truly be maintained? If “binary” marriage is not inextricably linked to a marriage of the two sexes, the “binary” requirement can soon lose its meaning. How then can we deny a marriage to three adults, perhaps prompted by a situation where all adults want to retain custody and relations with children or stepchildren, or perhaps the religious preferences of Muslim immigrants to the United States. Arguments based on the good of marital offspring, of children, and even of spouses can be made by all sides.<sup>59</sup> As we have seen, polygamy has a long and prevalent history

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57. *Id.* at 965 n.29.

58. *Genesis* 2:24; *Matthew* 19:4–6.

59. For example, we could examine the common situation where a married couple with a child has divorced and one of the spouses has gone on to contract a new marriage. It would be easy to imagine certain social benefits that could arise if the state allowed all three adults to form a marital union. Besides, in some situations, perhaps expressing a true bond of love or friendship, such a union might enhance joint custody of the child or the provision of health insurance and benefits to the custodial adults and, by extension, the child.

in human society. Even St. Thomas Aquinas concedes that polygamy, for all of its overriding faults, is consistent with certain ends of marriage, such as the natural procreation of children.<sup>60</sup> Unlike same-sex marriage, polygamous marriage extends far back into the historical record of culture and religion. Unlike same-sex marriage, a polygamist union can conceive children who are the biological offspring of both parents.<sup>61</sup>

As alluded to earlier, there can be no doubt that polygamy in the modern world offends the dignity of the spouses, endangers society, and can be declared against the natural law, as we have been led to a deeper understanding of natural law through faith and reason. It can be acknowledged that the basis of our laws is partly found in a shared understanding of natural law by people of good will, even of different religions. But where Christian revelation in the realm of marriage clarified natural law two thousand years ago, rejecting the insights of that tradition can only obscure the natural law, leading what can be perceived through a glass darkly to not being perceived at all.<sup>62</sup> If our society, our lawyers, and our judges cannot understand the natural law basis of marriage as a union of a man and woman, how can they explain and apply the natural law basis that limits marriage to *one* man and *one* woman?

This Article is not meant to be alarmist. Western societies are not about to strike down laws against polygamy. All manner of cultural reasons and current concerns militate against it, even though modern jurisprudence would seem to allow for no *principled* reason for maintenance of laws against polygamy. Calling attention to this fact also presents another reason to rethink our understanding of the First Amendment Establishment Clause, and our broader jurisprudence that rejects the religious and Christian contribution to American laws,

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60. SUMMA THEOLOGICA, *supra* note 41, Supp., Q. 65, Art. 1.

61. I wish to point out that this analysis only applies to what I believe to be the perennial basis of marriage between one man and one woman. The CATECHISM OF THE CATHOLIC CHURCH, *supra* note 26, ¶ 2358, emphasizes that people inclined to same-sex attraction “must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided.” In addition, the U.S. Bishops vehemently argue that access to health care be provided for all. See U.S. CATHOLIC CONFERENCE, A FRAMEWORK FOR COMPREHENSIVE HEALTHCARE REFORM: PROTECTING HUMAN LIFE, PROMOTING HUMAN DIGNITY, PURSUING THE COMMON GOOD 1 (1993). The debate over civil and domestic unions is necessarily complicated by the fact that one of the goals and results of these legal arrangements is the expanded provision of health-care insurance, a need urgently highlighted by the bishops. See *id.*

62. Cf. 1 *Corinthians* 13:12 (Douay-Rheims) (“We see now through a glass in a dark manner: but then face to face.”).

in defiance of reason and history. We need to recognize that, although we can certainly find support for monogamy in current social values and the natural law, it is Jesus Christ and the Christian church that made monogamy the juridical and moral norm in most of the world. It is religious faith that most illuminates, as Pope John Paul II writes in *Mulieris Dignitatem*, this “created” gift of “a unity of the two” that lives in a communion of love.<sup>63</sup> To reject the value of religious traditions in shaping our laws is to endanger our noblest and most dignified conception of marriage.

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63. *Mulieris Dignitatem*, *supra* note 19, ¶ 7 (internal quotation marks omitted).