POLITICS, RELIGION & IDEOLOGY, 2016
VOL. 17, NOS. 2–3, 303–318

Routledge
Taylor & Francis Group

REVIEW FORUM

John Witte, **The Western Case for Monogamy Over Polygamy**. Cambridge: Cambridge University Press, 2015, 550 pp., $49.99 (paperback), ISBN-10: 1107499178, ISBN-13: 978-1107499171

Polygamy's Emergence from a 'Shadow World': An Unintended Consequence of Thinning State Oversight of Marriage Post-Obergefell

Taking a page from the late Justice Antonin Scalia, John Witte's perfectly timed book, *The Western Case for Monogamy over Polygamy*, questions whether *Obergefell v. Hodges*[1] foreshadows a fight over polygamy.[2] Witte's rich historical account informs a number of broader policy questions on polygamy: whether 'sufficiently compelling reasons [exist] to relax Western laws against polygamy;' whether '1750-year-old criminal laws against polygamy' can be sustained given evolving constitutional norms; and whether we must extend 'valid marriage to include polygamy' and 'forums of marital governance to … countenance polygamy.'[3]

Witte sifts through a voluminous historical record to reveal the Judeo-Christian underpinnings of monogamy in marriage. Western nations, Witte shows, have always treated 'polygamy as a *malum in se* offense—something bad in itself.'[4] This is primarily because 'polygamous communities suffer from increased … abuse against women,' who are 'coerced into early marriages, … exploited periodically for sex and procreation, [and] forced to make do for themselves and their children with dwindling resources' after their husbands take additional wives.[5] Children suffer, too, because of 'perennial rivalry with other children and mothers' for attention and material support.[6] While these ills may not always follow, they follow 'in enough cases to make the practice of polygamy too risky to condone.'[7]

Although glorified by *Sister Wives* and *Big Love* as 'mainstream, even edgy,' polygamy today is largely concentrated in 'an African "polygyny belt"' and in Middle Eastern countries, where the now-'controversial' practice is 'shrinking, … particularly among younger, educated and urbanized Muslims.'[8] If Westerners intersect with polygamy, it will almost certainly be through fundamentalist Mormon sects or 'dispersed Muslim communities throughout the world.'[9]

Polygamy operates in a 'shadow world' in the US because it is currently illegal in every state[10]—but that may not continue. Relying on *Lawrence*, in 2013, federal district court Judge Clark Waddoups struck down Utah's ban on polygamous cohabitation, not polygamous

[1] 135 S. Ct. 2584 (2015).
[2] Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) ('State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity … [are] called into question by today's decision [striking Texas's anti-sodomy ban] … .').
[3] John Witte, Jr., *The Western Case for Monogamy over Polygamy* (Cambridge: Cambridge University Press, 2015), p. 2.
[4] Ibid., pp. 22–23.
[5] Ibid., pp. 22–23.
[6] Ibid., pp. 22–23.
[7] Ibid., pp. 22–23.
[8] Ibid., pp. 6, 18.
[9] Ibid., pp. 19, 4.
[10] Ibid., p. 19.

marriage, as violating free exercise and due process guarantees.[11] In 2006, the Utah Supreme Court sustained a man's conviction for polygamous cohabitation over Justice Christine Durham's strident dissent.[12] Durham challenged Utah's ability to criminalize something because it acts as a proxy for abuse, allowing 'the state to conduct a fishing expedition for evidence of other crimes.'[13] It is little wonder, then, that Utah's Governor and Attorney General will not enforce Utah's law.[14]

When insular polygamist communities come into contact with broadly understood norms around marriage, the State faces hard questions. Far more salient than enforcing 'dead letter[s] on the books' is the question that has racked Canada and the Continental countries: '[w]hat degree of accommodation' should our legal systems give to minority religious communities, who have 'strongly entrenched legal and moral codes'?[15] Polygamy becomes the crucible for debates 'on immigration in Europe' because so many 'state benefits … turn on marital status.'[16] Across the Continent, 'only the first marriage … is usually recognized as valid … in disputes about marital property and inheritance.'[17] The European Council bars 'family reunification of [any] additional spouse' after the first.[18] States have a substantial financial stake: equal recognition of multiple marriages permits families to swell their state benefits unilaterally.

The belief that accommodation allows polygamous families to become a 'law unto themselves' stokes a continuing 'firestorm.'[19] The real problem is that civil authorities lack the power to intervene in these marriages because women appearing before *Shari'a* courts in Great Britain never entered into civilly recognized marriages. These marriages are a legal nothing, so women have no recourse but to invoke religious law.

In those forums, departures between civil and religious law are stark—but not necessarily because a wife is one of multiple wives. Instead, it is because substantive rules in *Shari'a* courts depart sharply from British law, as Figure 1 shows. This is no small problem: over 1.5 million Muslims live in Great Britain, 96% of whom are Sunni, who predominantly follow the *Hanafi* school of law.[20]

True, the deep unfairness of these results may create pressure to open marriage to more spouses, accommodating them within civil structures. But it is far more likely to produce further efforts to suppress polygamy—for instance, by charging 'Muslim mediators … as accomplices to the crime of polygamy.'[21]

Ironically, in the US, there is a growing movement post-*Obergefell* to 'get the government out of the marriage business,' which may pave the way to legal status for polygamy.[22] Railing against *Obergefell*'s conception of marriage, legislators like Senator Rand Paul believe it is time

[11] *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1176 (D. Utah 2013).
[12] State v. Holm, 137 P.3d 726 (Utah 2006).
[13] Ibid., p. 775 (Durham, C.J., dissenting in part).
[14] Witte, p. 8.
[15] Ibid., p. 12.
[16] Ibid., p. 15.
[17] Ibid., p. 15.
[18] Ibid., p. 16.
[19] Ibid., p. 6. Writing for the Court in *Employment Division v. Smith*, which held that a 'neutral, generally applicable law' would not offend Free Exercise Clause guarantees even if that law tended to burden religion, Justice Scalia explained that heightened scrutiny for Free Exercise claims 'would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.' Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 872, 879 (1990).
[20] Robin Fretwell Wilson, 'Privatizing Family Law in the Name of Religion', *William & Mary Bill of Rights Journal*, 18 (2009), pp. 925, 928.
[21] Witte, p. 12.
[22] Robin Fretwell Wilson, '"Getting Government Out of Marriage" Post Obergefell: The Ill-Considered Consequences of Transforming the State's Relationship to Marriage', *University of Illinois Law Review*, 4 (2016), p. 1445. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742272.

The Costs to Women of Having No Civil Remedies		
	British Norm	*Hanafi* Norm
Custody of Minor Children	Awarded according to the Best Interest of the Child	Mother retains custody of boys until age 7 and girls until 9; father receives custody thereafter
Award of Alimony	May be awarded if a spouse is unable to provide for her own support	No Maintenance After Iddat period (roughly 3 months)
Property Division	Equitable division of assets	Property follows the Title-holder
Right to Divorce	Ability to seek divorce on no-fault grounds	In absence of man's fault, woman pays her way out of marriage by returning the mahr

Figure 1. The costs to women of having no civil remedies. Source: Adapted from Robin Fretwell Wilson, 'Privatizing Family Law in the Name of Religion', *William & Mary Bill of Rights Journal*, 18 (2009), pp. 925, 928 and Robin Fretwell Wilson, 'The Perils of Privatized Marriage' in Joel A. Nichols, (ed) *Marriage and Divorce in a Multi-Cultural Context: Reconsidering the Boundaries of Civil Law and Religion* (Cambridge University Press, 2011), p. 267. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2016231.

'to examine whether … governmental recognition of marriage is a good idea.'[23] Paul believes 'the government should not prevent people from making contracts,' but need not 'confer a special imprimatur upon a new definition of marriage.'[24] Proposed laws in Alabama and Indiana would eliminate marriage licenses in favor of 'signed contract[s] … to legally wed.'[25] Couples' ability to contract would be bounded by public policy constraints now governing prenuptial agreements (barring, for instance, agreements on custody), but couples would otherwise be free to set their relationship's terms—removing the government's ability to 'come into my church.'[26]

One need look no farther than the unconscionable consequences facing women in *Shari'a* courts to realize that many women will lack the bargaining power to protect themselves and their children through contract, especially in fundamentalist communities. The thinner the state's relationship to marriage, however, the greater the likelihood that polygamous families cloak their relationships in the respectability of contract—and the more difficult it will become for states to simply say to polygamists, as Witte closes the book, 'No thank you, we don't do that here.'[27]

Disclosure statement

No potential conflict of interest was reported by the author.

[23]'Rand Paul: Government Should Get Out of the Marriage Business Altogether', *Time*, 28 June 2015. http://time.com/3939374/rand-paul-gay-marriage-supreme-court/.
[24]Ibid.
[25]Stephanie Wang, 'Lawmaker Proposes and End to Indiana Marriage Licenses', *Indy Star*, 7 January 2016, 6:59 PM. http://www.indystar.com/story/news/politics/2016/01/07/lawmaker-get-government-out-marriage/78364598/.
[26]2016 Bill Text, Indiana H.B. 1041 § 15; Wang, *Lawmaker Proposes*.
[27]Witte, p. 465.

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http://dx.doi.org/10.1080/21567689.2016.1234748

Articulating the Christian principles of marriage

Marriage is today the focus of extensive debate in western societies—understandings of it and practices associated with it continue to develop and change, latterly at a rapid pace. As a result, civil governments respond with new legislation—and the courts with new case law—to experiences and demands stimulated by the desires of individuals to share their lives together. Religions have a direct interest—and some traditional religious postures on marriage are being challenged in consequence. So, States address how to accommodate these traditions as they attempt to balance social demands, moral imperatives, and religious claims. Similar strains are faced by some religions. In Christianity, for example, so many churches across the world have in turn been stimulated to re-visit their understandings of marriage, its nature and purpose. Developments in civil society as to divorce, remarriage, and, today, same-sex marriages, represent the most obvious stimuli for such Christian reflection in this regard. Moreover, for John Witte: 'With the cultural and constitutional battles over same-sex marriage now deeply joined in many parts of the West, the next battles about domestic life will certainly include polygamous marriage' (p. 444).

As it were in anticipation of these battles, this hugely important study by John Witte provides a masterful account of the dominant, but not exclusively uncontested, historical approaches in the west to monogamous marriage over polygamous marriage. As well as a scholarly masterpiece, the book has enormous practical value, as these battle lines may emerge, in helping to describe, explain, and evaluate the arguments likely to develop either side of those lines. With meticulous attention to detail, and rich documentation, particularly the juridical materials, John Witte carefully unpacks an extraordinary range of sources in one breath-taking historical sweep. Focussing on the various categories of polygamy (real, constructive, clerical, and successive), the book traces: the movement from polygamy to monogamy in Judaism; the case for monogamy over polygamy in the Church fathers; polygamy in the laws of church and state in the first millennium; the medieval case for monogamy over polygamy; polygamous experiments in early Protestantism; the Calvinist case against polygamy and its civil law influence; the case against polygamy in English theology, politics, and the early modern common law; the early modern liberal case for polygamy; the liberal enlightenment case against polygamy; and the American case against polygamy. In all this, John Witte expertly makes sense of the complexities. The case against same-sex marriages was (and still is for many) based predominantly on the Bible—and so the church not the state led the first campaigns against same-sex unions in the west. By way of contrast, the Bible contains no prohibition against real polygamy—so the church in its first millennium had little to say and do about polygamy. Instead, it was the state—not the church—that led