Introduction

FIGURE 1. "Marriage Certificate," from the American School (nineteenth century). Used by permission of Library Company of Philadelphia, PA, USA / Bridgeman Images.

FIGURE 2. "Polygamy," by Amy Spencer.
Used by permission of the artist.

What is the Western tradition's case for monogamy over polygamy, and is that case still convincing in a post-modern and globalizing world? Are there sufficiently compelling reasons to relax Western laws against polygamy, and is this a desirable policy given the global trends away from polygamy and given the social, economic, and psychological conditions that often attend its practice? Or, are there sufficiently compelling reasons, reconstructed in part from the tradition, to maintain and even strengthen these anti-polygamy measures, in part as an effort to hasten the global demise of this practice? This book lays out the historical sources that should help inform the debates about these hard questions.

Questions about polygamy are likely to dominate Western family law in the next generation. Two generations ago, contraception, abortion, and women's rights were the hot topics of Western family law and the culture wars. This past generation, it has been children's rights and same-sex rights that have dominated public deliberation and litigation. On the frontier of modern Western family law are hard questions about extending the forms of valid marriage to include polygamy, and extending the forums of marital governance to include religious and cultural legal systems that countenance polygamy. This book aims to put those looming questions in larger and longer context.

THE AMERICAN CONTEXT

A century and a half ago, Mormons made international headlines by claiming the religious right to practice polygamy, despite federal criminal laws against it.[1] In four main cases from 1879 to 1890, the United States Supreme Court firmly rejected their claims, and threatened to dissolve the Mormon Church if they persisted. 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." Part of the argument was prudential: 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 moved without upending our whole Western culture.[2] Contemporaneous European courts and legislatures were equally dismissive of Mormon and other polygamists' claims.[3] These old cases remain the law of the West. Most Mormons renounced polygamy in 1890, and in 1906, Mormon Church leaders made polygamy a ground for excommunication from their church.[4]

The question of religious polygamy is back in the headlines, now involving a Fundamentalist Mormon group that has retained the church's traditional polygamist practices. The Fundamentalist Latter Day Saints (FLDS) are a Mormon splinter group, created in 1890, and operating continuously in various subgroups since then. Their early founders rejected the mainline Mormon Church's departure from its traditional polygamous teachings and practices. The FLDS regarded polygamy as a central religious practice, critical to their own salvation. Seeking to escape social stigma and criminal prosecution, the church members withdrew into small, isolated, and often religiously controlled communities scattered throughout the thinly populated American west, as well as in western Canada and Mexico. The largest

[1] On early Mormon polygamy, see George D. Smith, *Nauvoo Polygamy* (Salt Lake City, UT: Signature Books, 2011); Brian G. Hales, *Joseph Smith's Polygamy*, 3 vols. (Salt Lake City, UT: Greg Kofford Books, 2013).

[2] *Reynolds v. United States*, 98 U.S. 145 (1879); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885); *Davis v. Beason*, 133 U.S. 333 (1890); *Church of Jesus Christ of Latter Day Saints v. United States* together with *Romney v. United States*, 136 U.S. 1 (1890). For context and case analysis, see Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002).

[3] For England, see, e.g., *Hyde v. Hyde* (1866) L.R. 1 P & D. 130; In re Bethel (1887), 38 Ch.D. 220. For Scotland, see F.P. Walton, *Scot Marriages: Regular and Irregular* (Edinburgh: W. Green & Sons, 1893); *Polygamous Marriages: Capacity to Contract a Polygamous Marriage and the Concept of the Potentially Polygamous Marriage* (London: Her Majesty's Statonery Office, 1982). For Ireland, see 10 Geo. 4, c. 31, s. 26. For the Continent, see discussions later in this chapter.

[4] See R.S. van Wagoner, *Mormon Polygamy: A History*, 2nd ed. (Salt Lake City, UT: Signature Books, 1989), 168; Irwin Altman and Joseph Ginat, *Polygamous Families in Contemporary Society* (Cambridge: Cambridge University Press, 1996), 37–38.

such community today, under the leadership of Warren Jeffs, has 8,000 to 10,000 members. Total FLDS membership in America today is roughly 60,000, although exact numbers are elusive.[5] These FLDS communities are now coming into the public eye. *The New York Times Magazine* had a major exposé on them in 1999.[6] *National Geographic* carried a cover story and national television feature on them in 2010.[7] Popular television shows like *Sister Wives* and *Big Love*, popular magazines like *People* and *Time*, and a spate of tell-all biographies and television appearances are making the polygamous lifestyle look mainstream, even edgy and glamorous.[8]

But for all this new experimentation, the legal reality is that polygamy is still a crime in every state in the United States, and those who practice it risk criminal punishment.[9] This is precisely what happened on April 3, 2008, when state authorities raided an FLDS community in Eldorado, Texas, called the Yearning for Zion Ranch. The authorities were acting on preliminary evidence that under-aged girls were being forced into sex and spiritual marriages with men two or three times their age. They eventually removed some 129 mothers and 439 children from the ranch, and put them into state protective custody. They found twelve girls, aged 12 to 15, who had been forced into marriages, seven of them already with child. They found 262 other children – in 91 of the 146 families on the Ranch – who were themselves victims of child abuse, statutory rape, or neglect, or had witnessed or been exposed to the sexual abuse, assault, or rape of another child within their

[5] See Cardell K. Jacobson and Lara Burton, eds., *Modern Polygamy in the United States: Historical, Cultural, and Legal Issues* (Oxford/New York: Oxford University Press, 2011), esp. xvi (map of FLDS communities), 163–184. See also *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2005); Martha Bailey and Amy J. Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara, CA: Praeger, 2010), esp. 69–132; Janet Bennion, *Polygamy in Primetime: Media, Gender, and Politics in Modern Fundamentalism* (Waltham, MA: Brandeis University Press, 2012).

[6] Timothy Egan, "The Persistence of Polygamy," *New York Times Magazine* (February 28, 1999): 51.

[7] "The Polygamists," *National Geographic Magazine* (February, 2010), with a show on the National Geographic Channel (February 10, 2010).

[8] Alex Tresniowski, "This is Home," *People Magazine* (March 23, 2009); Belinda Luscombe, "I Do, I Do, I Do, I Do: Polygamy Raises Its Profile in America", TIME: HEALTH & FAMILY July 26, 2012, http://healthland.time.com/2012/07/26/i-do-i-do-i-do-i-do-polygamy-raises-its-profile-in-america. See, additionally, Bennion, *Polygamy in Primetime*; Bailey and Kaufman, *Polygamy*, 69–70.

[9] See, e.g., *State v. Green*, 99 P.3d 820 (UT S. Ct., 2004); *Utah v. Holm*, 137 P. 2d. 726 (UT S. Ct., 2006); *Arizona v. Fischer*, 199 P.3d. 663 (AZ Ct. App., 2008). But see *Brown v. Herbert*, 2012 *Bloomberg Law* 27041 (D. Utah, February 3, 2012), where the federal district court held that Kody Brown and his sister wives faced a credible threat of prosecution for bigamy from Utah authorities, and thus had standing to press a federal constitutional case against the county attorney for chilling their First Amendment free speech rights in airing their show, and advocating their polygamous lifestyle. See also *Brown v. Buhman* (D.C. Utah, December 13, 2013) (granting summary judgment for the Browns that Utah's prohibition on polygamy is unconstitutional).

household.[10] Eleven men were eventually charged with polygamy, sexual assault, and child abuse. All eleven have been convicted – with punishments ranging from seven to seventy-five years. Warren Jeffs, the prophet of this FLDS community, was also convicted and sentenced to life imprisonment plus twenty years for forcing two under-aged girls into spiritual marriages with others, and for forcing a 15-year-old girl to join his harem and bear his child.[11] He faces additional accomplice bigamy charges both in Utah and Texas for presiding over other spiritual marriages of minors in other FLDS communities.[12]

Many of the legal questions raised by the Texas ranch case are easy. Coerced marriages, statutory rape, sexual assault, and other abuses of children are all serious crimes. The adults on the ranch who committed these crimes, or were complicit in them, are criminals. They have no claim of religious freedom that will excuse them, and no claim of privacy that will protect them from prosecution. Dealing with the children, ensuring proper procedures, and sorting out the evidence are all practically messy and emotionally trying questions, but they are not legally difficult. The order of the Texas courts to return most of the children who had been seized from their homes during the raid underscores an additional elementary legal principle – that decisions about child custody and about criminal liability must be done on an individual basis as much as possible.[13]

The harder legal question is whether criminalizing polygamy is still constitutional. Texas criminal law makes marriage to two or more persons at once a felony – a first degree felony if one of the parties is younger than 16 years of age.[14] Every other American state has comparable criminal prohibitions on the books against

[10] See *Eldorado Investigation: A Report from the Texas Department of the Family and Protection Services* (December 22, 2008), at http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22_Eldorado.pdf (June 29, 2012). For an earlier study of marriage demographics in FLDS communities, see Altman and Ginat, *Polygamous Families*, 460–478.

[11] *Jeffs v. State*, 2012 WL 1068797 (Texas App, March 29, 2012) No. 03–11–00568–CR, at *1.

[12] Linda F. Smith, "Child Protection Law and the FLDS Raid in Texas," in Jacobsen and Burton, eds., *Modern Polygamy*, 301–330; Bailey and Kaufman, *Polygamy*, 116–120. In a separate case in Utah, Jeffs was convicted as an accessory to two counts of statutory rape for presiding over a compelled spiritual marriage of a 14-year-old girl to her cousin in another FLDS community. The case was reversed, however, and remanded for a new trial because of erroneous jury instructions. See *State v. Jeffs*, 243 P. 3d 1250 (Utah, 2010). See also Stephen Singular, *When Men Became Gods: Mormon Polygamist Warren Jeffs, His Cult of Fear, and the Women Who Fought Back* (New York: St. Martin's Press, 2013).

[13] In re Steed, 2008 WL 2132014 (Tex. Court of Appeals, 2008), affirmed in In re Texas Department of Family and Protective Services, 255 S.W. 3d 613 (Sup. Ct. Texas 2008).

[14] Texas Penal Code 25.01 (Bigamy). Texas – and other states like Utah and Colorado with FLDS polygamists – extends the definition of bigamy to include parties who cohabit with, purport to marry, or maintain the appearance of being married to a second spouse, while still married to a first. Ibid. This provision was designed to preclude bigamists like Tom Green, who divorced each of his wives before marrying the next one, yet kept all of them in his harem. Utah sent him to prison. See *State v. Green*, 99 P.3d 820 (UT S. Ct., 2004) and discussion in Joanna Grossman and Lawrence M.

polygamy or bigamy.[15] These criminal prohibitions have been in place in America since its earliest colonial days and have been part of Western criminal law since the third century; polygamy was, in fact, a capital crime in the West from the ninth to the nineteenth centuries. Can these 1,750-year-old criminal laws against polygamy withstand a challenge that they violate an individual's constitutional rights to privacy and sexual liberty, to marriage and domestic autonomy, and to equal protection and non-discrimination – in addition to the rights to religious liberty?[16]

In the nineteenth century, when the first Mormon cases reached the federal courts on religious liberty grounds alone, none of these additional constitutional rights claims was yet available to pro-polygamy litigants. Now they are, and the Supreme Court has used them to uphold every adult citizen's rights to consensual sex, cohabitation, marriage, divorce, contraception, abortion, sodomy, and same-sex relations, if not marriage.[17] Do Texas and other states have strong enough reasons to uphold their traditional criminal prohibitions of polygamy against such constitutional claims, especially if made by a party with deep religious convictions? May a religious polygamist at least get a religious liberty exemption from compliance with these laws? That would make polygamy a tolerated practice for these religious parties – a "de facto" form of marriage, as lawyers call it. The state would not prosecute them for polygamy. But the state would also not enforce their polygamous marriage contracts, provide them with family services or protections, or accord the spouses any of the thousands of rights and privileges available to state-recognized families. No state burdens, no state benefits: polygamous families and their religious communities under this arrangement would become "a law unto themselves."

That raises a still harder legal question – whether a state legislature could or should go further, by not only decriminalizing polygamy, but legalizing it as a valid marriage option for its citizens. In one sense, this move from toleration to recognition, from "de facto" to "de jure" polygamy, seems like a small step. After all, American states today, viewed together, already offer several models of state-sanctioned domestic life for their citizens: straight and same-sex marriage, contract and covenant marriage, civil union and domestic partnership.[18] Each of these off-the-rack models of domestic life has built-in rights and duties that the parties have to each other and to their children

Friedman, *Inside the Castle:Law and the Family in 20th Century America* (Princeton, NJ: Princeton University Press, 2011), 28–32.

[15] See discussion on terminology later in this chapter, pp. 27–33.

[16] A qualified "no" is the answer of a federal district court in *Brown v. Buhman* (D.C. Utah, December 13, 2013).

[17] See esp. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roemer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *U.S. v. Windsor*, 570 U.S. __ (2013); *Hollingsworth v. Perry*, 570 U.S. _ (2013).

[18] See Joel A. Nichols, ed., *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (Cambridge/New York: Cambridge University Press, 2012).

and other dependents. And the parties can further tailor these built-in rights and duties through private prenuptial contracts.[19] With so much marital pluralism and private ordering already available, why not add a further option – that of polygamous marriage? Why not give to polygamous families the same rights and duties, privileges and protections that are afforded to other domestic unions recognized by state law? Would that not be better than consigning polygamists to a shadow marriage world controlled by religious authorities, who have none of the due process constraints that the constitution imposes on governmental authorities?

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

These questions are not unique to the FLDS Church. In the United States, various Muslim, Vietnamese Hmong, and Native Americans, as well as various émigrés from Africa, Asia, and the Middle East have been quietly practicing polygamy under the supervision of religious and cultural leaders, and in defiance of state criminal laws.[20] Various "poly communities" have also emerged in America – from sundry free love polyamorists and "pantagamists" on the left[21] to conservative Muslims in the inner cities who see polygamous households as the only way to deal with the massive numbers of single mothers and non-marital children in their communities who need male support.[22] It is only a matter of time before these groups press for state recognition of their plural marriages, especially if they are targeted for

[19] See Brian Bix, "Private Ordering and Family Law," *Journal of the American Academy of Matrimonial Lawyers* 23 (2010): 249–285.

[20] See, e.g., Nina Bernstein, "In Secret: Polygamy Follows Africans to New York," *New York Times* (March 23, 2007); Ann Lacquer Estin, "Unofficial Family Law," in Nichols, ed., *Marriage and Divorce*, 92–119; Katharine Charlsley and Anika Liversage, "Transforming Polygamy: Migration, Transnationalism and Multiple Marriages Among Muslim Minorities," *Global Networks* 13 (2013): 60–78; Miriam Koktvedgaard Zeiten, *Polygamy: A Cross-Cultural Analysis* (Oxford/New York: Berg, 2008), 165–184.

[21] See examples of their literature at http://groups.yahoo.com/neo/groups/PolyResearchers/info. See also Philip L. Kilbrie and Douglas R. Page, *Plural Marriage for Our Times: A Reinvented Option?* 2nd ed. (Santa Barbara, CA: Praeger, 2012), esp. 77–88; Mark Goldfeder, "Chains of Love in Law: Revisiting Plural Marriage" (SJD Thesis, Emory, 2013), Pt. I, ch. 3; Maureen I. Strassberg, "The Challenges of Post-Modern Polygamy: Considering Polyamory," *Capital Law Review* 31 (2003): 439.

[22] See, e.g., Barbara Bradley Hagerty, "Philly's Black Muslims Increasingly Turn to Polygamy, NPR (March 28, 2008), http://www.npr.org/templates/story/story.php?storyId=90886407; Patricia Dixon-Spears, *We*

prosecution – and there are plenty of academics who are now pushing their case in the literature.[23] It is also only a matter of time before litigants press for reform of America's immigration ban on polygamists in place since 1875 that bars polygamists from naturalization, and even entry into the country.[24]

Even if these anti-polygamy laws are not openly challenged on federal or state constitutional grounds, they may well slowly become dead letters on the books. The status of being in a polygamous marriage itself, while formally prohibited by criminal law in every state, now rarely moves law enforcement authorities to action. Most state prosecutors today will move on polygamous individuals or groups only if they engage in other criminal activities, like coerced marriages or sex involving children, or if they seek to engage in social welfare, social security, or tax fraud to support their multiple wives and children. Indeed, the state attorney general in Utah recently issued a formal declaration, condoned by the governor, that his office would not prosecute even brazen public polygamy per se.[25] This declaration comes despite the fact that Utah has one of the few American state constitutions to prohibit polygamy, a vestige of its early experiments with Mormon polygamy.[26] Utah today, like other American states, treats polygamy mostly as an aggravant to other crimes. It is a point of leverage for prosecutors to pursue attendant sexual or social welfare crimes, and it gives judges power to impose heavier punishments on the duly convicted.

THE BROADER WESTERN AND GLOBAL CONTEXT

Most of America's common law cousins[27] have comparable criminal prohibitions against polygamy and face comparable pressure to remove these prohibitions or at

Want for Our Sisters What We Want for Ourselves: African-American Women Who Practice Polygyny by Consent (Baltimore, MD: Imprint Editions, 2009).

[23] See Concluding Reflections, pp. 442–447.

[24] See Kerry Abrams, "Polygamy, Prostitution, and the Federalization of Immigration Law," *Columbia Law Review* 105 (2005): 641–716; Claire A. Smearman, "Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law," *Berkeley Journal of International Law* 27 (2009): 382–447.

[25] See Jennifer Weissman, "Killing Anti-Bigamy Laws Softly: Not to Prosecute Polygamy Must be Abandoned" (forthcoming). This policy was already being discussed in 1998. See James Brooke, "Utah Struggles with a Revival of Polgamy," *New York Times* (August 23, 1998): sec. 1, at 12.

[26] Utah Const. Art. III, sec. 1; see also Ariz. Const. Art. XX, par. 2; Idaho Const. Art. I, sec. 44; N.M. Const. Art XXI, sec. 1; Okla. Const. Art I., sec. 2.

[27] South Africa, which blends common law with Roman-Dutch law, recognizes "customary African polygamy" but not Muslim polygamy. See Recognition of Customary Marriages Act 120 (1998), and discussion of the act and case law in Johan D. Van der Vyver, "Multi-Tiered Marriages in South Africa," in Nichols, ed., *Marriage and Divorce*, 200–219, at 203–207; Tracy E. Higgins, Jeanmarie Fenrich, and Ziona Tanzer, "Gender Equality and Customary Marriage: Bargaining in the Shadows of Post-Apartheid Legal Pluralism," *Fordham International Law Review* (2007): 1653–1708, 1684ff. Likewise, India, which draws in part on the common law, recognizes Muslim polygamous marriages.

least grant exemptions from them for religious and cultural minorities.[28] In Canada, for example, an FLDS group in Bountiful, British Columbia, supported by a wide spectrum of pro-polygamy supporters, pressed for the repeal of Canada's traditional criminal law against polygamy on grounds of liberty, privacy, autonomy, equality, nondiscrimination, self-determination, freedom of religion, freedom of association, and other rights set out in Canada's Charter of Rights and Freedoms, and in various international human rights instruments to which Canada is a signatory. In a closely watched 2012 case, the British Columbia Supreme Court came down resolutely in support of Canada's traditional criminal law against polygamy.[29] Drawing on empirical, historical, and comparative arguments and data, the court held that legalizing polygamy would visit inevitable and disproportionate harms on women, children, and society and that granting religious exemptions to practice polygamy privately would give untoward power to religious authorities who are not bound by due process or other rule of law constraints in the treatment of their members.[30] The constitutionality of polygamy will likely come before the Supreme Court of Canada in due course. The outcome before this high court, famous for its avant-garde opinions, is by no means clear.[31]

See detailed discussions in Tahir Mahmood, *Statute-Law Relating to Muslims in India* (New Delhi: Institute of Objective Studies, 1995); Werner Menski, *Modern Indian Family Law* (Richmond, Surrey: Curzon Press, 2001).

[28] Bailey and Kaufman, *Polygamy*, 69–132.

[29] *Criminal Code*, R.S.C. 1985, c. C-46 s. 293: "Everyone who (a) practises or enters into or in any manner agrees or consents to practise or enter into (i) any form of polygamy, or (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years." This law builds on *An Act Respecting Offences Relating to the Law of Marriage*, R.S.C. 1886, c. 161, as amended by *An Act further to amend the Criminal Law*, S.C. 1890, c. 37, s. 11, as well as *Criminal Code*, S.C. 1953–54, c. 51, s. 243. See analysis of the statutory history and context in Martha Bailey, "Polygamy and Unmarried Cohabitation," in Bill Atkin, ed., *The International Survey of Family Law, 2011 Edition* (Bristol: Jordan Publishing, 2011), 123–146.

[30] Reference re: Section 293 of the *Criminal Code of Canada*, 2011 BCSC 1588. See careful case analysis in Thomas H.W. Buck, "From Big Love to the Big House: Justifying Anti-Polygamy Laws in an Age of Expanding Rights," *Emory International Law Review* 26 (2012): 939–996; and more critical readings in Lori G. Beaman and Gillian Calder, eds., *Polygamy's Rights and Wrongs; Perspectives on Harm, Family, and Law* (Vancouver: University of British Columbia Press, 2013); Angela Campbell, "Bountiful Voices," *Osgoode Hall Law Journal* 47 (2009): 183–234; id., "Bountiful's Plural Marriages," *International Journal of Law in Context* 6 (2010): 343–361.

[31] For contrary arguments, see, e.g., Nicholas Bala, "Why Canada's Prohibition of Polygamy is Constitutionally Valid and Sound Policy," *Canadian Journal of Family Law* 25 (2009): 165–221; Angela Campell, *Sister Wives, Surrogates, and Sex Workers: Outlaws by Choice?* (Farnham, Surrey: Ashgate, 2013). For additional historical context, see Sara Carter, *The Importance of Being Monogamous; Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008).

A decade before the British Columbia case, the Canadian provinces of Ontario and Quebec faced a strong push by Muslims and other groups to establish Shari'a arbitration tribunals for governance of Muslim marriages, as a part and product of Canada's firm commitment to multiculturalism. That proposal was thoroughly debated, but ultimately defeated.[32] But the stated concern was not so much about the legalization of polygamy as about giving religious authorities and religious laws a role in the governance of the family lives of Canadian citizens. Since then, Canadian multicultural theorists have pushed hard to develop nonreligious arguments in favor of a "multi-conjugal" society that would include state-recognized polygamy and other forms of polyamory subject to private ordering norms.[33]

Australia and New Zealand likewise face challenges from various Aboriginal groups as well as Asian, African, and Middle Eastern immigrants who have been pressing for the right to practice polygamy under the governance of their own religious customs and courts.[34] Both countries have had firm criminal prohibitions against polygamy since colonial days, and these laws have been confirmed in recent criminal law and family law statutes and cases.[35] Neither country recognizes Aboriginal polygamous unions as valid marriages,[36] nor do they accept second marriages that were contracted abroad, although they grant some social welfare benefits to known polygamists. In Australia, the human rights case for polygamy is harder to press because the country lacks a national bill of rights,[37] and the international human rights norms to which Australia is a signatory have not been interpreted to support a right to practice polygamy.

[32] Marion Boyd, Office of Canadian Attorney General, *Dispute Resolution in Family Law, Protecting Choice, Promoting Inclusion* (2004), http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/body/fullreport.pdf. See different perspectives in Jean-François Gaudreault-Desbiens, "Religious Courts, Personal Federalism, and Legal Transplants," in Rex Ahdar and Nicholas Aroney, eds., *Sharia in the West* (Oxford: Oxford University Press, 2010), 59–70, and Ayelet Schachar, "Faith in Law? Diffusing Tensions Between Diversity and Equality," in Nichols, ed., *Marriage and Divorce*, 357–378.

[33] See various perspectives in Daniel Cere, "Canada's Conjugal Mosaic: From Multiculturalism to Multi-Conjugalism?" in Nichols, ed., *Marriage and Divorce*, 284–308; Mohammed H. Fadel, "Political Liberalism, Islamic Family Law, and Family Law Pluralism," in ibid., 164–199; see also earlier analysis in Lisa M. Kelly, "Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy," *University of Toronto Faculty of Law Review* 65 (2007): 1–38.

[34] See, e.g., Law Reform Commission (Australia), *Multiculturalism and the Law*, Report No. 57, 1.15–18 (2002); id., *The Recognition of Aboriginal Customary Laws*, Report No. 31, 95–124 (1986); Abdullah Saaed, "Reflections on the Establishment of Shari'a Courts in Australia," in Rex Ahdar and Nicholas Aroney, eds., *Sharia in the West* (Oxford: Oxford University Press, 2010), 223–239; Ann Black, "In the Shadow of our Legal System," in ibid., 239–254.

[35] See New Zealand Crimes Act 1961, sec. 205–206 with discussion in *R v. Clinton*, CA177/99 (June 29, 1999); Australia Marriage Act 1961, sec. 94 with discussion in *Dohm v. Acton FamCA* 482 (2008); *Wold v. Kleppir FamCA* 178 (2009).

[36] For New Zealand, see *Rangai Kerehoma v. Public Trustee* [1918], CLR 483 (SC).

[37] See Paul Babie and Neville Rochow, eds., *Freedom of Religion Under Bills of Rights* (Adelaide: University of Adelaide Press, 2012).