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TESTING THE LIMITS OF RELIGIOUS FREEDOM

The Case of Polygamy's Criminalization in Canada

Melanie Heath

Polygyny was not prohibited because it was a religious belief, or, to turn the coin, because Parliament wanted to impose a Christian religious belief in monogamous marriage. I find that the original prohibition was prompted by largely secular concerns with perceived harms associated with the practice to women, children and society.

Reference re: Section 293 of the Criminal Code of Canada1

INTRODUCTION

What are the limits of sexual and familial intimacy in the context of religious belief and its practice? This question was at the heart of the Polygamy Reference trial, the British Columbia Supreme Court constitutional reference concerning the validity of Canada's antipolygamy law (Reference re Section 293). The central questions focused on whether a family that consists of multiple, conjugal partners is so inherently harmful to individuals and society that it must be criminalized. Does the harm it causes override the right to religious freedom, to liberty, and to freedom of association? Chief Justice Robert Bauman's words above reflect his reasoning that it is constitutional to criminalize polygyny[2] in Canada. The 2012 ruling found that section 293 of the Criminal Code of Canada violates the religious freedom of fundamentalist Mormons, and specifically members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints.[3] However, the justice determined that the harm polygyny brings to women, to children, to society and to the institution of monogamous marriage outweighs the basic right to religious freedom. Thus, he decided that the current law is justified in criminalizing the practice for anyone eighteen years of age or older, even while recognizing that it impinges on individual religious belief.

The Polygamy Reference put forward the question of how to balance competing rights—predominantly the right to freedom of religion with

DOI: 10.7330/9780874219975.c007

the equality rights of women, both guaranteed by the Canadian Charter of Rights and Freedoms, the bill of rights that forms the first part of the Constitution Act, 1982. Governments and policymakers seek to identify the complexities of competing human-rights claims and to elucidate the best way to balance these to ensure equality of treatment (Hall 2010). The shifting currents of rights clashes, or competing human-rights claims, are intensified in an increasingly globalized and multicultural context. Beverley McLachlin, the chief justice of the Canadian Supreme Court, outlines how competing rights involve the collision of coexisting diverse religious and ethnic practices: Whether we like it or not, religious, ethnic and cultural diversity is part of our modern world—and increasingly, part of our national and community reality. Human rights and the respect for every individual upon which they rest, offer the best hope for reconciling the conflicts this diversity is bound to generate" (qtd. in Hall 2010, 4).

Concerns over rights and belonging are central to the framework of multiculturalism, and courts must arbitrate how to balance cultural and religious practices that do not reflect a majority perspective in modern societies. Balancing competing rights is particularly challenging in the case of new religious movements (NRMs), often more pejoratively termed *cults* or *sects*. Such minority religions, whether new or old, push the boundaries of social control by promoting beliefs and practices at the margins of acceptable behavior in society (Richardson 2006a). Fundamentalist Mormons who practice polygyny in a remote area of British Columbia offer one such example. *Plural marriage*—the Mormon term for one man having more than one living wife at the same time—is better understood to constitute a practice of "religion as deviance," where a central tenet of religious belief requires participating in an outlawed family form (Hoffmann and Bahr 2006). The cultural and religious practice of polygyny among Muslims and others who live or migrate to Canada has also raised concern. In criminalizing minority religious and/or cultural practices like polygyny, the domain of law provides the state the power to enforce strong moral claims. These conditions put "the constitutional protection of religious conscience and the substantive criminal law . . . on a conceptual collision course" (Berger 2008, 515).

This chapter analyzes the BC Supreme Court decision that determined the criminalization of polygyny to be constitutional in Canada. It considers the consequences of a competing-rights approach to regulating religious and cultural practice. In the following, I examine how the decision, with its insistence on the universal harm of polygyny, actually

obscures consideration of important concerns over religious freedom and the right to familial and sexual intimacy. The decision thereby lacks substantive engagement with the rights at stake. First, I outline the sociological and legal literature on competing rights, paying particular attention to the role of religion and law in this balancing act. Next, after explaining the particular context for the criminalization of polygyny in Canada, I offer a content analysis of the decision to argue that its treatment of harm hinders a more robust examination of the importance of religious freedom, gender equality, and family and sexual intimacy in the criminalization of polygamy.

ANTAGONISMS BETWEEN RELIGION AND LAW

The interaction of religion and law raises significant points of contention in modern societies. While legal institutions and the law are important forces in the protection of the free expression of religious belief and practice, these same institutions play a key role in regulating religions and religious groups (Richardson 2009). When law acts as an independent variable with regard to religion, the relationship veers toward social control to regulate religion's boundaries. Majority religions tend to have the power to resist the influence of the state; the law gets involved only in the most conspicuous cases, such as the child sexual abuse scandals within the Catholic church. The case of minority religions, however, is often influenced by their lack of status and a general lack of familiarity that disadvantages newer and smaller religious groups in legal proceedings (Richardson 2006a). The popular imagination, and at times sociological theory (e.g., Hunter 1981), has treated NRMs as involving an antimodern impulse in which individuals seek to bring social order to the increasingly anomic conditions of modern life by turning to archaic rules and practices. An embrace of beliefs and ways of living outside the mainstream perpetuate the outsider status of many minority religions (1998).

While minority religious groups tend to have lower status and may be less tolerated in society, religious freedom—a value pervasive in the modern world—is by definition connected to religious pluralism. As James Richardson (2006b) queries, "If all agreed on religious matters, who would raise the question of rights of religious minorities, and why would it even be raised" (274)? Richardson theorizes that the degree and type of pluralism in a given society influence how openly and freely religious minorities are able to practice their religion. Even in societies where a strong state and an autonomous legal structure promote

religious tolerance, legal systems tend to advance normative understandings of religious and social practice. It is the normative function of the law that positions religious minorities as the losers in legal contests in which religious freedom is at stake. Legal sanctions against unpopular minority religions are often punitive and provide little opportunity for resolution. For example, government raids on minority faiths have increased in the past twenty years, often impacting the religious rights of targeted religious communities (Palmer 1999, 2011; Wright 1995, 2003; Wright and Richardson 2011).

One approach to studying minority religions has been to examine religion as deviance (Hoffmann and Bahr 2006). Historical and contemporary manifestations indicate two forms of deviant religious groups. The more common *sect* is a religious group within a mainstream religious tradition that imposes stricter beliefs and behavioral requirements. Public attitudes often view sects to be deviant due to their extreme religiosity. The second type of deviant religious group is the *cult* that stands outside mainstream religious traditions. The deviancy of the cult relates not to strict principles (though these may be relevant) but to its difference from mainstream society (Dawson 1998; Stark and Bainbridge 1997). One prominent example of behavior labeled as deviant is the practice of polygyny among Mormons in the nineteenth century and among fundamentalist Mormons in contemporary North American society. Sociologists of religion have problematized the term *cult* for its negative connotations among the general population and have advocated abandoning its use in academic circles (Barker 1986, 1989; Olson 2006; Richardson 1993). These scholars argue that the term provokes adverse, stereotypical images. James Lewis (2003) remarks, "Minority religions lose their chance at a fair hearing as soon as the label 'cult' is successfully applied to them" (206). Groups in the Anti-Cult Movement solidified stereotypes in the 1980s and early 1990s through labeling cult members as victims of brainwashing, totalism, and mind control (Robbins 2000).

In North America, religion cannot shield one from being charged for overt criminal acts. Still, the violation of a law assumes special meaning and requires more scrutiny when individuals claim that they act out of religious motivation. In most cases, special attention is given to such claims to ensure that individual religious rights are not violated. Growing religious pluralism in modern societies often leaves the secular state, with its purported neutrality to religion, as the main arbitrator of competing rights claims, such as clashes between freedom of speech and religion (An-Na'im 2013). Balancing competing rights claims is also

a challenge for international law, where customary law and international civil and political rights often collide (Perry 2011). The expansive and coercive powers of the state (and international governing powers) to decide whose rights count can lead to the oppression of ethnic, racial, and religious minorities. In response to potential abuse of power by the state, constitutionalists argue that government can/should be limited in its powers and that these limitations define its authority. Yet, scholars have pointed to the ways that the ideal of a neutral state or one able to protect the rights of minorities is often unrealized in a judiciary process that adjudicates issues outside the normative dimensions of substantive criminal law (Berger 2008). More generally, there is concern over inadequacies in the ability of judges to protect the rights of women, minority racial and religious groups, sexual minorities, the poor, and others whose interests stand outside mainstream ideologies. Feminists further critique the vestiges of male legal interventions in constitutions that structurally restrict women's full citizenship (MacKinnon 1989).

The recent Polygamy Reference offers an excellent example of the tension between the regulatory aspects of criminal law over family forms, considerations of gender equality, and the freedom connected to the constitutional protection of religion. Polygyny's criminal status facilitates the question of whether it is justifiable to criminalize practices motivated by religious belief. This question becomes particularly fraught by concerns over the apparent harms that polygyny inflicts on women and children. What are the strategies of courts for balancing the competing rights between freedom of religion and women's equality? How do these reflect mainstream ideologies? The polygyny case offers an example that shines light on the interactions between substantive criminal law and the constitutional protection of religion and women's rights.

A CRIME IN THE NAME OF RELIGION

In 2009, the provincial government of British Columbia laid charges against two leaders of Bountiful, a community of about one thousand people founded in the 1940s by families that broke away from the mainstream Mormon church after it renounced the practice of polygyny. After the charges were dropped for procedural reasons, British Columbia launched a reference case to ask for the courts' direction on the constitutionality of criminalizing polygyny. A reference case allows the government to seek an advisory opinion from the Supreme Court on a constitutional question. In British Columbia, legislation allows the province to initiate a reference case at the trial level to allow the

introduction of evidence and witnesses for a more evidentiary-based decision. The Polygamy Reference was unprecedented in the history of Canadian law, putting polygyny on trial and running for over four months. The attorney general of British Columbia referred the following constitutional questions to the BC Supreme Court:

> a) Is section 293 of the Criminal Code of Canada consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?
>
> b) What are the necessary elements of the offence in section 293 of the Criminal Code of Canada? Without limiting this question, does section 293 require that the polygyny or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence? (Reference re: Section 293, at para. 16)

The governments of Canada and British Columbia defended the law's constitutionality and a court-appointed *amicus curiae* challenged it. How did polygyny become an issue leading to an extensive trial-level reference? To answer this question, one must go back to the late nineteenth century.

Polygyny was originally practiced in Western Canada among aboriginal peoples and between white male settlers and aboriginal women (Carter 2008). In two early cases of white settlers who entered successive conjugal relationships with women, descendants fought for succession to large estates. Rather than treat the relationships as wrongfully initiated by the white men, the courts treated the issue of polygyny "as an aboriginal custom that might invalidate the original customary marriages" (Baines 2012, 454). The two cases regarded polygyny as a sideline, and there were no charges under the polygyny criminal law. A third case, however, ended in a conviction for committing the crime of polygyny under its prohibition enacted in 1890 and reenacted in 1892.[4] This case involved Bear's Shin Bone, a member of the Blood nation on the Kaini reserve who had married two women of the Blood nation in accordance with their customs. Sarah Carter (2008) explains that the government singled out this Blood Indian for prosecution due to the immigration of American Mormons who were escaping persecution under antipolygyny laws in Utah. Specifically, authorities did not want Mormon immigrants to think that polygyny was allowed in Canada. Legal scholar Beverly Baines (2012) speculates, "It is more than curious, however, that after criminalizing polygyny in a provision that included explicit reference to prohibiting 'what among the persons commonly called Mormons is known as spiritual or plural union,' Canada launched

the test case not against the Mormons in Cardston but rather against Bear's Shin Bone" (456).

Ultimately, the decision to prosecute Bear's Shin Bone discriminated on racial *and* religious grounds.

Eventually the aboriginal populations abandoned the practice of polygyny, and so did the first group of Mormon immigrants. In 1946, however, Harold Blackmore, whose embrace of polygyny was shunned by other local Albertan Mormons, moved his family to Lister, British Columbia, to establish the polygamist community that was renamed Bountiful in 1984. For two decades, the nephew of Harold Blackmore, Winston Blackmore, acted as bishop of the Bountiful group of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS church), connected to the FLDS in the United States. After Warren Jeffs, the church's prophet, excommunicated Winston Blackmore, the Mormon fundamentalists in Bountiful divided into two groups: about half are members of the FLDS church under the current bishop, James Oler. The other half follows Winston Blackmore.

For nearly fifty years, residents of Bountiful practiced polygyny in seclusion as a central tenet of their faith. Public attention only turned to Bountiful in the 1990s when allegations of polygyny prompted Royal Canadian Mounted Police investigations. No charges were laid, however, due to concerns regarding the constitutionality of the criminal provision. In 2004, Bountiful once again came under scrutiny after allegations of sexual exploitation, child abuse, and forced marriages emerged (Bramham 2008). Investigations culminated in the 2009 arrests of Blackmore and Oler and the subsequent Polygamy Reference in British Columbia in 2010. Eleven groups intervened to provide their opinions for or against criminalization at the trial, including Beyond Borders, the British Columbia Civil Liberties Association, the British Columbia Teachers' Federation, the Canadian Association for Free Expression, the Canadian Coalition for the Rights of Children, the Canadian Polyamory Advocacy Association, the Christian Legal Fellowship, James Marion Oler and the Fundamentalist Church of Jesus Christ of Latter-Day Saints, REAL Women of Canada, Stop Polygyny in Canada, and the West Coast Legal Education and Action Fund. Winston Blackmore did not participate in the case after being denied special status and funding, stating that he could not afford to participate. There were no groups in the list of interveners to represent women living in polygynous relationships, although the trial did include some of these women as witnesses. Likewise, no intervener group was involved to present the interests of some Muslims who

believe that the Qur'an permits a man to have up to four wives under certain conditions.

The methods for analyzing the Polygamy Reference involved coding the 265-page opinion issued by Chief Justice Bauman on November 23, 2011. The coding of this opinion is one step in a much larger comparative project of studying familial and sexual intimacy and competing rights claims in the regulation of polygamy. This chapter focuses specifically on the opinion of Chief Justice Bauman to analyze the construction of knowledge concerning competing rights in determining the criminal law's constitutionality. The coding involved the constant comparative method for systematic qualitative content analysis (Lincoln and Guba 1985). All data were coded using a qualitative software program, NVivo 10. Thematic codes were not predetermined but emerged from the data. The following sections examine the ways the treatment of harm in the decision constructs a "vulnerable monogamy" that must be protected as the best means to promote gender equality and the interests of society.

INHERENTLY HARMFUL: THERE IS NO "GOOD" POLYGAMY

In the Polygamy Reference, Chief Justice Bauman thoughtfully acknowledges that the law criminalizes a religiously motivated choice to establish polygynous unions, thereby violating section 2(a) of the charter, which protects the fundamental freedom of conscience and religion. He thus recognizes the case to be one of "competing fundamental rights" (Reference re: Section 293, at para. 1097). At the same time, Justice Bauman argues that the case is at heart about harm: "I have concluded that this case is essentially about harm; more specifically, Parliament's reasoned apprehension of harm arising out of the practice of polygyny. This includes harm to women, to children, to society and to the institution of monogamous marriage" (Reference re: Section 293, at para. 5).

The general content analysis finds that the longest section in the decision deals with the "alleged harms of polygyny." Table 7.1 offers a breakdown of the 717 paragraphs in the evidentiary portion of the opinion. Of the 717, Chief Justice Bauman devotes 13 to the changing family demographics in Canada, 57 to Canada's international obligations, 87 to the historical context, 102 to global polygyny, and 130 to polygyny in Canada. The section on the alleged harms of polygyny is 311 paragraphs, or 44 percent, of the total evidentiary document. A similar pattern holds true for the themes in the opinion. Table 7.1 presents the

Table 7.1 Paragraphs and Themes: Polygamy Reference

Paragraph Topics	*Frequency*	*Percentage/717 Total*
Terminology	11	2
Changing Family Demographics	13	2
Canada's International Obligations	57	8
Historical Context	87	12
Global Polygyny	102	14
Polygyny in Canada	130	18
Harms of Polygyny	311	44
*Themes: Rights and Harm**	*Frequency*	*Percentage/665 Total*
In/equality	64	10
Gender equality	15	2
Religion	216	32
Religious freedom	30	5
Harm	340	51

**There was a total of 35 themes and subthemes.*

frequency of themes that were coded for in/equality, gender equality, religion, religious freedom, and harm. By far, harm appears most frequently, at 51 percent. The theme of religion is the next frequent at 32 percent, but a very small portion—5 percent—deals with the issue of religious freedom. Likewise, only 10 percent of the themes deal with in/equality and a mere 2 percent with gender equality. (Please see Table 7.1. Paragraphs and themes: Polygamy Reference).

<L#>To be sure, this breakdown does not capture the way the important issues were treated in the decision. Specifically, there are good reasons for Bauman's in-depth treatment of harm. An analysis of this topic was not only required by the terms of the reference but also by charter jurisprudence. After the majority opinion in *R. v. Butler* dealing with pornography, the Canadian Supreme Court and the Courts of Appeal have more readily embraced a form of charter analysis linked to preventing harm through legislation as a way to justify infringements of charter rights (Levine 2004). The Supreme Court held that moral corruption and harm to society are inextricably linked. This move contrasts with earlier jurisprudence that more readily accepted moral values as a separate element to assess reasons for infringement. Thus, Bauman notes, "to justify criminalizing an activity, the government must demonstrate a reasoned apprehension of harm. . . . Once it has been established

that there is a reasoned apprehension of harm with respect to certain conduct, measures aimed at preventing that harm will almost always be rationally connected to the legislative objective (Reference re: Section 293, at paras. 772, 775). It was also necessary to weigh harm and competing rights in section 1 of the charter, known as the reasonable limits clause or limitations clause in legally permitting the government to limit an individual's charter rights.[5]

The evidence presented in the case also justifies an in-depth engagement with the harms of polygyny to women and children. Substantial testimony was presented throughout the trial as to the kinds of harms women and children, and even polygynous young men, experience. The goal of regulating the negative aspects of polygyny was a point on which all sides agreed. For example, evidence was presented of underage girls (below the age of sixteen years) being forced to marry much older men in both Canada and the United States, and young girls were transported from one country to the other to marry. Young men were also forced out of the tight-knit polygynous communities, ostensibly to reduce the competition for younger brides among older men.

Individuals who had fled polygyny testified in court about the substantial harms they experienced due to living in polygynous families. A few witnesses traveled from the United States to give testimony, and others also gave moving testimony in videos aired during the trial. Rowena Mackert grew up in a polygynous family in the United States. She recounted how her parents woke her up in the middle of the night to inform her that the prophet had a revelation and she was getting married the next day. Chief Justice Bauman quotes her words:

> I was 17. My father—my mother asked don't you want to know who you're supposed to marry, or who you're marrying, and I kind of looked in disbelief, you know, I really didn't want to know. Told me John, and John who, and I'm running down the list of all the Johns that I know and my father said Swaney and it was like a knife was stabbed through my heart. There was no love lost between the two of us. I was really headstrong and he was too. (Reference re: Section 293, at para. 667)

Her experience speaks to the issue of a lack of choice, in this case being forced to marry a boy of similar age. Former wives and children of polygamous families testified about the hardships they experienced within polygamy, including physical and verbal abuse.

However, the idea of universal harm to women and children was not uncontested. A number of witnesses shared their positive experiences of growing up and choosing to live in polygynous families. Chief Justice Bauman quoted several witnesses who countered the stereotype that

polygynous women are disempowered. Jennifer Zitting, who was raised in a monogamous family and married a man in a polygamist community, told the court:

> While living in a polygamist community, I met women who had the freedom to pursue high powered careers. Many women in the community held Masters Degrees in teaching and special education. Quite a few women had nursing degrees, the nurse practitioner who ran the clinic was a woman, and there was even a female lawyer. Even the women who stayed home accomplished feats that would amaze the average woman. I know one who raised 24 children, and did it well. I have noticed that these women have freedom that monogamous wives don't have because they are not 100% responsible for the care and feeding of their husbands. (Reference re: Section 293, at para. 691)

If there are, in fact, women and children who are not harmed or who may choose to live in polygynous families, and if these families are polygynous as a fundamental aspect of their religious faith, the rationale of criminalizing polygyny would violate these individual charter rights. Chief Justice Bauman readily admits this.

In his treatment of religious freedom, Justice Bauman recognizes a fundamental breach of religious liberty for fundamentalist Mormons, some Muslims, and Wiccans who sincerely hold plural marriage as a religious belief. It is interesting that he comes to this conclusion without much discussion of the meaning of religious freedom. He cites Chief Justice Dickson (and four colleagues) on freedom of religion in the decision of the Lord's Day Act:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> . . . Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. (Reference re: Section 293, at para. 1086)

In his reasons for why the criminal ban on polygamy offends religious freedom, Justice Bauman turned to the testimonies of individuals from religious faiths to underline the importance of sincerely held belief and the connection of polygamy to religious texts.

Thus, his decision maps out an important space for religious freedom concerning sincerely held religious belief. However, when he turns

to the section 1 analysis, which requires an assessment of whether limiting religious freedom is prescribed by law and justified in a free and democratic society, Justice Bauman justifies limiting religious freedom by accepting the claim that polygamy is inherently harmful. He argues:

> When one accepts that there is a reasoned apprehension that polygamy is inevitably associated with sundry harms, and that these harms are not simply isolated to criminal adherents like Warren Jeffs but *inhere in the institution itself*, the Amicus' complaint that there are less sweeping means of achieving the government's objective falls away. And it most certainly does when one considers the positive objective of the measure, the protection and preservation of monogamous marriage. For that, there can be no alternative to the outright prohibition of that which is fundamentally anathema to the institution. In the context of this objective, there is no such thing as so-called "good polygamy." (Reference re: Section 293, at para. 1343; my emphasis)

An in-depth analysis of the content of the decision reveals that Justice Bauman concentrates on evidence to juxtapose polygamy (and particularly polygyny) against monogamy to assert polygamy's inherently harmful nature.

The decision quotes from the voices of women and men in polygamous relationships, highlighting why some choose polygyny; however, it never considers polygyny as a form of familial and sexual intimacy. The freedom to practice it is understood only in terms of religious belief, a belief that is not seen as rational in the face of the substantial harms Justice Bauman views as intrinsic to polygyny. On the other hand, Justice Bauman does address the "postmodern" concept of polyamory, or consensual relationships with more than one partner, as offering a new lens on the idea of polygamy:

> Imaged as a form of commitment which is flexible and responsive to the needs and interests of the individuals involved, . . . This new polygamy reflects postmodern critiques of patriarchy, gender, heterosexuality and genetic parenthood. Such a "postmodern polygamy" might occasionally look like traditional patriarchal polygamy, but it differs in important ways. For example, it could as easily encompass one woman with several male partners as it could one man with multiple female partners. It also includes the expanded possibilities created by same-sex or bi-sexual relationships, neither of which is contemplated by traditional polygamy." (Reference re: Section 293, at para. 430)

The decision concludes that section 293 doesn't apply to multiparty, unmarried relationships or common law cohabitation unless these couples enter "into a 'marriage' with more than one person at the same time, whether sanctioned by civil, religious or other means, and whether

or not it is by law recognized as a binding form of marriage" (Reference re: Section 293, at para. 1036). However, regarding the religious forms of polygyny, it does not matter that there may be variation in the ways it is practiced (i.e., some women and men may benefit from it). For Justice Bauman, polygyny is a direct threat to monogamous marriage and therefore a threat to the social order. The next section considers the evidence presented that leads to this conclusion.

POLYGYNY, VULNERABLE MONOGAMY, AND THE NATION

Chief Justice Bauman argues that the prohibition of polygyny is essential to sustaining a democratic society. Early in the opinion, he specifies the specific harms that polygyny inflicts on society:

> Polygyny has negative impacts on society flowing from the high fertility rates, large family size and poverty associated with the practice. It generates a class of largely poor, unmarried men who are statistically predisposed to violence and other anti-social behaviour. Polygyny also institutionalizes gender inequality. . . .
>
> Polygyny's harm to society includes the critical fact that a great many of its individual harms are not specific to any particular religious, cultural or regional context. They can be generalized and expected to occur wherever polygyny exists." (Reference re: Section 293, at paras. 13–14)

To make this statement about the generalizability of the harms of polygyny, Chief Justice Bauman draws on evidence from a commissioned statistical study conducted by Rose McDermott, a professor of political science at Brown University. The study compares countries to demonstrate the generalized negative outcomes of polygyny across a number of indicators, including such diverse factors as sex trafficking, maternal mortality, female genital mutilation, political and civil rights, and even defense expenditures. Controlling for gross domestic product as a possible causal factor, McDermott's analysis found multiple negative outcomes for an increase in the incidence of polygyny: "As polygyny becomes more frequent, female genital mutilation increases; Women sustain greater domestic violence in polygynous societies; Differential legal treatment of women relative to men increases, to the detriment of women, in more polygynous societies" (Reference re: Section 293, at para. 621).

In outlining these negative impacts, Chief Justice Bauman turns to the testimony and research of Joseph Henrich, an associate professor in the psychology and economics departments at the University of British Columbia. Henrich argues that men and women are better able

to follow their evolved mating strategies by pursuing polygyny. Males form multiple simultaneous pair bonds, while females have access to high-status males. For Henrich, "Culturally-transmitted social norms that motivate and regulate social behaviour" are the only way to control these basic instincts (Reference re: Section 293, at para. 502). Especially important is the norm of monogamous marriage, which establishes rules about the numbers of and arrangements between partners. Justice Bauman expresses the view that "these marriage norms do not entirely replace or subvert mating psychology, but they can strongly influence behavioural patterns, both because compliance with these norms is intrinsically rewarding and because third parties are willing to punish norm violators" (Reference re: Section 293, at para. 502). With this focus on norms, Chief Justice Bauman does not shy away from embracing justifications for moral coercion in criminalizing polygyny (Berger 2008).

In fact, Chief Justice Bauman spends a substantial amount of space outlining the emergence of what one expert witness calls "socially imposed universal monogamy" (SIUM). He argues against the amicus's contention that the original purpose of the polygyny law was connected to Parliament's desire to impose a Christian religious belief on monogamous marriage. If this were the case, it would be harder to defend the law against a charge of religious animus. He relies on the expert testimony of John Witte, a professor and director of the Center for the Study of Law and Religion at Emory University, to detail how monogamy first appeared in ancient Greece and Rome. Witte is a well-known scholar in the United States who has defended the importance of promoting heterosexual marriage as key to a successful society. He was a signatory on the self-identified marriage movement's statement in 2000 that called for a broad movement to renew a marriage culture and detailed the need to promote marriage and impose restrictions on divorce (see Heath 2012). Witte argues:

> Prohibitions against polygyny are pre-Christian and post-Christian in their formulation in the West. Pre-Christian in that we have these formulations already in Greek philosophical texts and especially in pre-Christian Roman law, and post-Christian in that the architects of modern liberalism and the very formulation of what goes into a just liberal society are making clear that if we want to respect rights, if we want to respect dignity, if we want to respect the needs of all individuals in society and their inalienable and alienable rights, it is critical to maintain an institution of monogamy and prohibit and criminalize the institution of polygyny. (Reference re: Section 293, at para. 271)

Chief Justice Bauman agrees with the idea that SIUM is integral to "the development of ideas of normative egalitarianism" (Reference re: Section 293, at para. 154).

The historical characterization of SIUM offered in the trial fails to take into account feminist critiques of marriage as a primary vehicle for oppressing women (Millett 1969). There was no discussion of feminist critiques of monogamous, heterosexual marriage in the case. Expert testimony did bring evidence of harms that inhere in monogamous marriage, but in his decision, Chief Justice Bauman dismisses this evidence as outside the purpose of the trial, which must assess the criminalization of polygyny and not the question of oppression within monogamous marriage. Perhaps he would have also dismissed evidence in feminist critiques of marriage as outside the scope of the case. However, feminist historical accounts offer a different perspective on marriage in contrast to the focus on the benefits of monogamy. Justice Bauman states, "I speculate that the spread of monogamous marriage, which represents a kind of sexual egalitarianism, may have created the conditions for the emergence of democracy and political equality, including women's equality" (Reference re: Section 293, at para. 167). In contrast, feminist critiques of marriage ranging from liberal (e.g., Bergoffen 1999) to radical (e.g., Ettelbrick 1989) emphasize the patriarchal structure of marriage as problematic for women and its history of oppression that gave married women few independent legal and social rights. *Patriarchy* is a word that appears quite often in the decision but only in connection to polygamy.

The link between polygamy and patriarchy makes it possible to justify Parliament's suppression of it as an "evil" in order to safeguard "a threatened interest—the institution of monogamous marriage" (Reference re: Section 293, at para. 888). Justice Bauman states, "Polygamy leads to the patriarchal principle, and . . . when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy" (Reference re: Section 293, at para. 892). In contrast to monogamous marriage, which discharges "essential goods for the human species and essential goods for human society," polygamy has consistently been linked to "harm against women, against children, against men and against society" (Reference re: Section 293, at para. 229). Chief Justice Bauman links the despotic practice of polygamy to Islam. He notes that it is still legal and practiced in sub-Saharan Africa, the Middle East, and certain regions in Asia where "Islam provides a religious grounding" (Reference re: Section 293, at para. 235). He devotes a very brief discussion to the practice of

polygyny in Islam (fourteen paragraphs), detailing competing views on the Islamic legal basis in the Qur'an for permitting polygyny. The decision acknowledges that there was much less testimony concerning the issue of Muslim polygyny. Yet, the basis for his judgment relies on generalizable data largely drawn from the practice in Muslim or other African countries where polygyny is part of a cultural tradition.

Thus, the decision focuses attention on the normative practices of monogamy in Western societies and views polygyny as nonnormative without addressing the ways it might be normative in other cultures. Similar to the narrow interpretation of monogamy, the lack of attention to understanding polygyny as normative in some cultures allows Justice Bauman to focus predominantly on harm. Yet the picture is more complex when cultural context is taken into account. According to Mariam Koktvedgaard Zeitzen (2008), polygamy "has always been a statement of beliefs, in that practitioners were following cultural or religious norms that most people in their societies strived towards, but few were able to achieve" (182). Neither is polygamy monolithic: "Like all social institutions, it can be manipulated to fit the needs and purposes of its various practitioners" (182). In the global North, anxiety over its nonnormative aspects has fuelled the creation of laws and legislation to guard against "Oriental" religion, plural marriage, and a despotic type of governance (Carter 2008; Cott 2000; Ertman 2010; Talbot 2006).

Chief Justice Bauman acknowledges that many of the harms he outlines as serious social dangers would only pose a problem if Canada experienced a nontrivial increase in the practice of polygyny. Based on the expert testimony of Joseph Henrich, he finds that, without criminal sanction, polygyny would indeed spread in Canada. Turning to evolutionary psychology, he argues that individuals are naturally inclined toward polygyny, and that if it were decriminalized, there is a likelihood it would grow, especially if high-status individuals who are in the public's eye participate. Chief Justice Bauman also expresses concern that Canada would become a "beacon" for immigrants from around the world: "Polygyny is practiced in many countries from which Canada draws immigrants. This includes states in the Middle East and Africa. It also includes the United States, where as many as 50,000 fundamentalist Mormons reside" (Reference re: Section 293, at para. 558). He recognizes that Parliament could make polygyny a distinct ground of inadmissibility even if it were decriminalized. Nevertheless, he concludes, "I am not satisfied that this completely takes away from the possibility of an increase in immigration-based polygamy" (Reference re: Section 293, at para. 573). Immigrants from underdeveloped countries where polygyny

is practiced often have more children, also a concern for a higher incidence of polygyny.

According to historian Nancy Cott (2000), at the time of the founding of the United States, dominant, common-sense knowledge embraced the rightness of monogamous marriage in a model of liberal democracy set against the despotic and unruly practices of other cultures, and specifically of those that practiced polygyny: "Moral and political philosophy (the antecedent of social science) incorporated and purveyed monogamous morality no less than religion did" (9). This common-sense idea of monogamy was set against the "belief systems of Asia, Africa, and Australia, of the Moslems around the Mediterranean, and the natives of North and South America [that] all countenanced polygamy and other complex marriage practices" (10). She explains:

> From the perspective of the American republic, stock [*sic*] contrasts between monogamy and polygamy not only illustrated the superiority of Christian morality over the "heathen" Orient and reassured Christian monogamists in their minority position worldwide, but also staked a political claim. . . . The thematic equivalence between polygamy, despotism, and coercion on the one side and between monogamy, political liberty, and consent on the other resonated through the political culture of the United States all during the subsequent century (Cott 2000, 22).

Chief Justice Bauman quotes legal scholar Martha Ertman, who offers a similar analysis: "Accordingly, in establishing a separatist theocracy, Mormons were regarded as equivalent to 'backward African and Asian races.' This despotic government was primitive, as was their practice of polygamy, thus rendering Mormons unfit to participate in civilized society and politics" (Reference re: Section 293, at para. 299).

In the end, Justice Bauman dismisses this latter evidence in favor of another scholar who denies that the federal polygamy laws were motivated by any kind of animus against the Mormons. In fact, the opinion echoes the concerns of these early American founders over the threat of polygyny, in this case resulting from immigration and its practice among high-status individuals. Bauman embraces an ideal of the Canadian state as one that participates in an enlightened egalitarianism in comparison to the despotism enshrined in the practice of polygyny in other parts of the world. The comparison of the liberal state to the despotism of other places that countenance polygamy is reflected here in the view that polygyny is a threat to civilized society. Thus, Chief Justice Bauman concludes that the coercive powers of the criminal law are needed to curb the possible expansion of this worrying practice.

Finally, a brief section of the opinion deals with the issue of stereotyping religious minority groups (fourteen paragraphs). In this section, Chief Justice Bauman addresses the expert testimony of religious studies scholar Lori Beaman, who has written extensively on the legal rights of religious minorities, and of legal scholar Angela Campbell, the primary scholar to conduct ethnographic research in Bountiful. He states, "Both Professor Campbell and Dr. Beaman properly caution against the acceptance at face value of what may be stereotypical portrayals of life in polygamous communities. As they rightly point out, construing unfamiliar practices as harmful without careful examination can result in the perpetuation of stereotypes and an unjustified curtailing of fundamental freedoms" (Reference re: Section 293, at para. 747).

He follows this with reasons their testimony should be given less weight compared to other credible evidence: "I found the evidence of these two witnesses sincere, but frankly somewhat naive in the context of the great weight of the evidence" (Reference re: Section 293, at para. 752).

Neither does he give credence to the testimony of the anonymous witnesses from the Bountiful FLDS community. In fact, he questions whether they can even be considered victims as long as they continue to live the polygynous lifestyle:

> I question whether the capable consenting spouse is a "victim." To the contrary, she can be seen to be facilitating an arrangement which Parliament views as harmful to society generally.
>
> It is, in any event, constitutionally permissible for the state to attempt to deter vulnerable people from self-harm by criminalizing the harmful conduct. (Reference re: Section 293, at paras. 1197–98)

While women in polygynous relationships remain criminalized, in his opinion, Chief Justice Bauman does find that, insofar as the criminalization of polygyny applies to persons under the age of eighteen, it violates section 715 of the charter. Thus, by focusing on the inherent and social harms of polygyny, and especially the harms it would cause to the institution of monogamous marriage, Bauman offers an opinion that justifies criminalizing it for everyone in a polygynous union except for those below the age of eighteen.

CONCLUSION

Good justification exists to criminalize practices that are unlawful and harmful to women and children, such as underage and forced marriages and sexual abuse of all kinds, no matter their source. There is also very good reason to examine carefully the context in which polygyny occurs.

The Polygamy Reference uncovered substantial evidence of numerous social problems and harms associated with the practice. There is no doubt that the issue of polygyny in Western societies brings to the foreground essential questions of how best to assess the competing interests and the consequences of restrictions upon individual rights and freedoms. These challenges are difficult in the context of certain fundamentalist religions and sects that appear to limit women's equality rights.

I have analyzed Chief Justice Bauman's opinion to uncover his methodology for undertaking such a balancing act and find it lacking. The opinion examines the evidence concerning the psychological and social harms of polygyny, as well as the health consequences, to individuals and especially to children. Bauman's sweeping opinion, however, does little to shed light on the complex issues surrounding fundamentalism, the people who engage in the stigmatized family form of polygyny, or the cultural variability of its practice. Rather than fully addressing the ways competing interests might engage questions of coercion versus consent, rights versus freedoms, and so forth, Bauman focuses on the *possible* harms of polygyny to mainstream society and to monogamous marriage, as if these are themselves threatened and in need of protection. This conclusion concerning the state of monogamy is quite perplexing given the fact that most social-scientific research demonstrates a trend in the opposite direction. Polygyny is attenuating in Africa and the Middle East, where its practice has been most prevalent, due to globalizing and modernizing forces (Zeitzen 2008). On the other hand, it is unlikely that polygyny will disappear as a practice. There is little doubt that in North America, fundamentalist Mormons and other Christian groups will continue to embrace polygyny as a calling from a higher heavenly order.

In the context of societies that offer a smorgasbord of familial and sexual structures (common-law relationships, open relationships and marriages, same-sex marriage, covenant marriage, blended families, and so forth), can polygyny threaten the institution of monogamous marriage? Many opponents and scholars such as John Witte argue that decriminalizing polygyny would represent another assault on an already weakened institution, and an especially lethal one given the harms associated with its practice. On the other hand, "To more and more people in the Western world who are members of religions that allow (or used to allow) polygamy, becoming [a] member of a plural family represents an individual choice, a lifestyle choice" (Zeitzen 2008, 179). Thus, the issue of polygyny has become politicized as either an inherently harmful institution or one that can be freely chosen when the practice doesn't

hurt anyone else. This politicization is evident in the decision, in which Justice Bauman takes a strong stand that polygyny is ultimately a threat to the institution of marriage.

The opinion's 1,367 paragraphs focus predominantly on the *inherent* harms of polygamy and do very little to shed light on the interactions of criminal law and religion and how these relate to competing rights regarding family and sexual intimacy, gender equality, and religious freedom. This discussion is especially important given the growing diversity in Western societies and their hopeful commitment to democratic values. In the North American context, both the constitutional protection of religious freedom and substantive criminal law rely on the state to create and apply normative and moral standards, but they approach these from opposite directions. Legal scholar Benjamin Berger (2008) explains this tension:

> On the one hand, the constitutional protection of religious freedom and equality, a now-orthodox component of any modern constitutional democracy, is, at core, the quintessential reflection of the modern liberal demand that the state remain withdrawn from the domain of moral judgments and claims about the good life. . . . On the other hand, the substantive criminal law is precisely a domain of moral judgment. It is a field not only concerned with notions of individual moral blame, but one whose very conceptual foundation is that society can judge certain actions to be so morally repugnant as to warrant state actions with fearsome consequences for the individual. (514–15)

The tension between the normative and coercive aspects of law and the liberal ideal of nurturing diversity reflects profound contemporary uncertainty about imposing values through the legal system. The case of the Polygamy Reference demonstrates the fact that there is no simple solution to these difficult questions. The opinion offers perspective on the consequences of sidestepping the issues at stake to focus on anxieties concerning harm to the social order (via polygyny's threat to monogamous marriage). The moral language that supports arguments in favor of regulating and imposing monogamy is shielded from view but lurks in the background. Many would agree that there is a moral advantage to enforcing monogamy in society, but others would not. Chief Justice Bauman missed an important opportunity to articulate the values being pursued in criminal law, and to engage broader social debate that might facilitate a broader vision of social justice concerning familial and sexual intimacy, gender equality, and religious freedom.

Notes

1. *Reference re Section 293 of the Criminal Code of Canada*, BCSC 1588 (2011), at para. 1088.
2. *Polygamy* is a general term referring to relationships involving more than two people, regardless of the ratio between genders. *Polygyny* is a relationship between one man and more than one woman, and *polyandry* involves one woman and more than one man. *Polyamory* is a postmodern type of family that is generally attached to a particular religion where people seek more than one intimate relationship at a time with the knowledge and consent of everyone involved. In this article, *polygamy* is used to denote *polygyny* (and not *polyandry* or *polyamory*).
3. "Canada Criminal Code, R.S.C. 1985, c-46, s. 293 provides: (1) Everyone who
   (a) practises or enters into or in any manner agrees or consents to practise or enter into
   (i) any form of polygyny, 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 offense and liable to imprisonment for a term not exceeding five years.
4. There have been only two convictions entered in Canada for the offence of polygamy, both at the turn of the twentieth century and both resulting from the prosecutions of aboriginal men (*Queen v. Bear Shin's Bone*, *R v. Harris*) (Campbell 2014).
5. Section 1 of the Canadian Charter of Rights and Freedoms acknowledges the principle that individual rights and freedoms are not absolute and that some circumstances may require limitations on rights by the state in order to protect the interests of the community. Section 1 provides that rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In its 1986 decision in *R. v. Oakes*, 1 SCR 103 (1986), the Supreme Court of Canada established a framework to decide whether a law found to violate a charter right can still be justified under section 1. This balancing rights test became known as the *Oakes Test*. Chief Justice Bauman found that the law violates the religious freedom of fundamentalist Mormons, but the harm against women and children outweighs that concern. This is called *passing the Oakes test*.

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