

# Reflecting Culture: Polygamy and the Charter

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## I. INTRODUCTION

Any society that seeks to be diverse yet bound by common values will face deep challenges. Inevitably, conflicts emerge over what it means to live a good life. In section 27, the *Canadian Charter of Rights and Freedoms*<sup>1</sup> states as a general interpretative principle that its rights and freedoms must be applied so as to preserve and maintain the multi-cultural heritage of Canadians. While it has been invoked infrequently,<sup>2</sup> section 27 stands with other broad ideals of our political community — such as pluralism, mutual respect and human dignity — which constitute important aspects of our legal culture.

Early “diversity” disputes revolved mainly around ethno-racial difference, spurred by dramatic demographic changes in post-war Canada. Cross-cultural interactions concentrated on particular manifestations of difference such as dress, food and celebration. These symbols might occasionally cause disquiet, but more probable reactions ranged from indifference to (enthusiastic) curiosity. In time, these disputes produced a variety of legal norms.

In recent years, the basis of such disputes has shifted from ethno-racial to religious difference (admittedly, these can be blurred together). This is to be expected, as religion has assumed a more prominent role in public discourse and in the framing of political controversies. Additionally,

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>2</sup> *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.); *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256 (S.C.C.).

the tone of the debate is sharper. “Difference” — especially religious difference — is now associated with an existential threat to society itself.<sup>3</sup>

In this paper, I will explore one of these supposed existential controversies: polygamy.<sup>4</sup> As a site of difference, polygamy is overwhelmingly associated with religion. It is thought to represent a not-so-thin wedge capable of overwhelming existing Canadian culture. I believe that such perceptions reflect a profound misunderstanding. In the brief confines of this paper, I suggest that the debate over polygamy only looks like an instance of cross-cultural clash. Its true significance is as a site of *intra-cultural* conflict and contestation — a glass through which our own legal system is reflected, darkly.<sup>5</sup>

## II. THE REFERENCE

Polygamy is an odd sort of crime. Though it has always been prohibited in Canada,<sup>6</sup> no one has been prosecuted in over 50 years.<sup>7</sup> Yet,

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<sup>3</sup> Sam Harris, *The End of Faith* (New York: Norton, 2005); Samuel Huntington, “The Clash of Civilizations” (1993) 72:3 *Foreign Affairs* 22; Mark Steyn, “The Future Belongs to Islam” *Macleans* (October 20, 2006), online: <<http://www.macleans.ca>>.

<sup>4</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 293:

- 293(1) Every one 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.

(2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

<sup>5</sup> Image borrowed from *The Bible*, 1 Corinthians 13:12.

<sup>6</sup> The offence appeared in the 1892 Code as s. 278 and is now found in s. 293. *Criminal Code*, R.S.C. 1985, c. C-46. The term is often misunderstood in common parlance. “Polygamy” refers to a relationship involving more than two people, regardless of the ratio between the sexes. “Polygyny” is a relationship between one man and more than one woman, and “polyandry” involves one woman and more than one man. In all cases, the relationship is one that is marital or marriage-like. In contrast, “polyamory” refers to intimate relationships involving more than two persons, but which are not necessarily marital or marriage-like. Popular discussion tends to focus on polygyny, but polygamy includes both polygamy and polyandry, and the fact that s. 293 extends to “conjugal unions” raises the issue of whether it also includes polyamory. The Court’s resolution of this issue is discussed below.

polygamy is now viewed as a pressing social problem. It is linked primarily to outsider communities such as the one in Bountiful, British Columbia whose residents practice a form of Mormon polygamy. The provincial government has been focused on this group for many years.<sup>8</sup> Another outsider group is made up of recent immigrants from jurisdictions which recognize polygamy and at least some of whom are thought to practise it here.<sup>9</sup>

It is interesting, but not determinative, that the issue of what to do about polygamy has resurfaced at the same time as other socio-legal developments reformulating the notion of “family”.<sup>10</sup> It is true that some have argued against expanding marriage on the basis that such changes would not end with same-sex equality, but lead inexorably to other definitional limits.<sup>11</sup> Despite a surface similarity, though, the debates over same-sex marriage and polygamy raise distinct issues: legal recognition on one hand, and criminal prohibition on the other. More likely, the resurgence of public attention to polygamy was created partly by greater awareness of the practice in certain communities in Canada, and partly by growing concern that the law prohibiting it violates the Charter.

In 2009, the Attorney General of British Columbia referred the following constitutional questions to the Supreme Court<sup>12</sup> of British Columbia:

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<sup>7</sup> Only two prosecutions have been recorded, both against Aboriginal men: *R. v. Bone*, [1899] 4 Terr. L.R. 173, 3 C.C.C. 329 (S.C.C.); *R. v. Harris* (1906), 11 C.C.C. 254 (Que. S.C.).

<sup>8</sup> An attempt to indict Winston Blackmore and James Oler was quashed in *Blackmore v. British Columbia (Attorney General)*, [2009] B.C.J. No. 1890, 247 C.C.C. (3d) 544 (B.C.S.C.). The Supreme Court of British Columbia held that the Attorney General had exceeded the authority provided in the *Crown Counsel Act*, R.S.B.C. 1996, c. 87 by appointing successive special prosecutors in the hopes of getting the go-ahead to proceed with a charge. Two special prosecutors had recommended, instead, that the government seek an advisory opinion.

<sup>9</sup> Nicholas Bala, “Polygamy in Canada: Justifiably Not Tolerated” *JURIST - Forum* (December 3, 2011), online: Jurist - Forum <<http://jurist.org/forum/2011/12/nicholas-bala-canada-polygamy.php>>.

<sup>10</sup> *Civil Marriage Act*, S.C. 2005, c. 33.

<sup>11</sup> For a dramatic example, see *Lawrence v. Texas*, 539 U.S. 558 (2003), *per* Scalia J. (dissenting). For a contrary view, see Robert Leckey, “Following Same-Sex Marriage: Redefining Marriage and the Impact for Polygamy” (2007) 2:1 *Les Ateliers De L’Ethique* 30.

<sup>12</sup> The British Columbia Supreme Court is a trial level court. Among Canadian jurisdictions, only British Columbia and Manitoba permit references at this level. This is the first reference of its kind in Canada, and the only one that I have been able to discover in similar common law jurisdictions where courts perform an advisory function. On March 26, 2012 the Minister of Justice for British Columbia declared that it had no intention of further appealing the ruling. It stated that the opinion enables “police and prosecutors to act with authority in investigating and prosecuting criminally polygamous relationships.” Ministry of Justice, News Release 2012JAG0023-000297, “No further reference in polygamy case” (March 26, 2012) online: <[http://www2.news.gov.bc.ca/news\\_releases\\_2009-2013/2012JAG0023-000297.htm](http://www2.news.gov.bc.ca/news_releases_2009-2013/2012JAG0023-000297.htm)>.

- 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 polygamy 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?<sup>13</sup>

The hearing began in late 2010 and took six months to complete. It involved a dozen intervenors, many more witnesses and a mountain of evidence. An *amicus curiae* was appointed to argue the case against the law's validity.

On November 23, 2011, Bauman C.J. issued a 265-page opinion. He accepted that insofar as the law criminalizes a religiously motivated choice to enter into a polygamous union, this constitutes a *prima facie* violation of section 2(a)<sup>14</sup> of the Charter. He also found that insofar as it applies to persons under the age of 18, the law violates section 7<sup>15</sup> of the Charter. He rejected arguments that section 293 violates section 2(b)<sup>16</sup> or section 2(d),<sup>17</sup> or that, when applied to adults, it violates the principles of fundamental justice. He concluded that the section 2(a) violation could be saved under section 1, but the section 7 violation for minors could not, and he therefore advised that the law was unconstitutional in that respect.<sup>18</sup>

Much of the opinion was taken up with reviewing the evidence introduced about polygamy, though the majority of that related to polygyny and the Chief Justice recognized a tendency for the two to be conflated.<sup>19</sup> Nonetheless, he accepted evidence about polygyny as relevant to the constitutional questions because polyandry is so rare. Ultimately, the Court found that Parliament has always had a "reasoned apprehension of harm arising out of the practice of polygamy".<sup>20</sup> That harm is both

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<sup>13</sup> *Reference re Section 293 of the Criminal Code of Canada*, [2011] B.C.J. No. 2211, 279 C.C.C. (3d) 1, at para. 16 (B.C.S.C.) [hereinafter "*Polygamy Reference*"].

<sup>14</sup> Section 2(a) protects the fundamental freedom of conscience and religion.

<sup>15</sup> Section 7 protects the right to life, liberty and security of the person against deprivations not in accordance with the principles of fundamental justice.

<sup>16</sup> Section 2(b) protects the fundamental freedom of expression and other modes of thought and communication.

<sup>17</sup> Section 2(d) protects the fundamental freedom of association.

<sup>18</sup> See *Polygamy Reference*, *supra*, note 13, at para. 1100.

<sup>19</sup> See *supra*, note 6.

<sup>20</sup> *Polygamy Reference*, *supra*, note 13, at para. 5.

interpersonal and societal. Below, I deal with these aspects in turn, and then consider how the social harm analysis affected two critical issues.

### III. HARM TO WOMEN, TO CHILDREN AND TO MEN

Chief Justice Bauman found that polygyny harms women in severe ways. It places women at “an elevated risk of physical and psychological harm”, including “higher rates of domestic violence and abuse”; it creates conditions of scarcity with respect to material and emotional well-being; it decreases autonomy and self-esteem, and increases marital dissatisfaction; and it leads women to have more children, in more dangerous ways, and to live shorter lives.<sup>21</sup>

Polygyny was described as extremely negative for children. It is linked to a host of harmful effects: higher infant mortality; emotional, behavioural and physical problems; an absent or indifferent father figure; lower educational achievement; and greater risk of abuse and neglect.<sup>22</sup>

In certain communities, polygyny creates negative consequences for men who are unable to secure the status required to take multiple wives. Frequently termed “Lost Boys”,<sup>23</sup> these males are ejected from some societies “with few skills and no social support” as their presence threatens the viability of a “sexually asymmetrical system”.<sup>24</sup>

I do not dispute polygyny’s association with harmful effects on its participants and other vulnerable persons such as children. (For ease of discussion I will focus on criminalizing “polygyny”, though section 293 is much broader.) The fact, though, that polygynous relationships may be harmful in some (or even most) instances cannot overcome a Charter legal rights challenge if the Crown is relieved from having to demonstrate that harm actually is present in a given relationship. To the extent that plural marriage functions as a proxy or substituted element for interpersonal harm, one must be able to show that such harm is so closely related to polygyny as to flow inexorably from it.<sup>25</sup> Plainly this is not the

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<sup>21</sup> *Id.*, at para. 8.

<sup>22</sup> *Id.*, at para. 9.

<sup>23</sup> Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada’s Polygamous Mormon Sect* (Toronto: Vintage Canada, 2008). *Polygamy Reference*, *id.*, at para. 382.

<sup>24</sup> *Polygamy Reference*, *id.*, at para. 586.

<sup>25</sup> *R. v. Whyte*, [1988] S.C.J. No. 63, [1988] 2 S.C.R. 3 (S.C.C.). I recognize that it might be possible to save such a substituted element under s. 1.

case. It is quite possible that a particular polygynous relationship could raise a reasonable doubt about harm.<sup>26</sup>

Even if section 293 was interpreted to require proof of harm in each case (perhaps by reading in an additional element), a separate issue arises from the fact that only plural relationships are so scrutinized — that polygyny performs a gatekeeper function for the kinds of relationships in which such harms warrant societal attention. As pointed out by the *amicus curiae*, all forms of marriage are stained by gender-based violence.<sup>27</sup> One could try to justify a crime targeted at polygyny while leaving monogamy unscrutinized on the basis that, while some of the same interpersonal harms may occur within both types of relationships, they are especially severe or routine in polygyny. On this view, Parliament is entitled to employ tunnel vision: to single out for punishment a very small number of relationships where harm occurs while leaving untouched an enormous number of relationships creating the same kind of harm (even if such harm exists to a lesser degree). I have argued that such a narrowly constituted offence reflects an arbitrary exercise of the criminal law power that cannot be upheld in a system committed to fundamental justice.<sup>28</sup>

Admittedly, the above-noted analysis has not enjoyed much favour in legal rights jurisprudence.<sup>29</sup> The Chief Justice was not persuaded either:

It seems to be obviously true, to an extent, that incidents of abuse arise in monogamous relationships. However, that does not really assist me here as I am considering the law that Parliament has directed against polygamy. I am concerned with the alleged harms arising out of this

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<sup>26</sup> The problem is exacerbated in the real world context where s. 293 is not limited to polygyny. It is impossible to sustain an argument that *all* polygamous marriages are harmful to their participants. For one thing, virtually all studies are focused exclusively on polygyny. Thus, s. 293 risks convicting persons who are not in harmful relationships. *Polygamy Reference*, *supra*, note 13, at para. 959. I expand on this point below.

<sup>27</sup> See Affidavit #1 of Todd Shackelford, cited in *Polygamy Reference*, *id.*, at para. 540 *et seq.* See also Canadian Centre for Justice Statistics, *Family Violence in Canada: A Statistical Profile 2005* (Ottawa: Statistics Canada, 2005), at 8 and 11, online: <<http://www.statcan.gc.ca/pub/85-224-x/85-224-x2005000-eng.pdf>>; Paula England, “Marriage, the Costs of Children, and Gender Equality” in Linda J. Waite, ed., *The Ties That Bind* (New York: Walter de Gruyter, 2000) 320; *Moge v. Moge*, [1992] S.C.J. No. 107, [1992] 3 S.C.R. 813 (S.C.C.).

<sup>28</sup> See Carissima Mathen, “Big Love and Small Reasons: Considering Polygamy”, Lecture delivered at the University of Alberta and the University of Calgary/Sheldon Chumir Foundation, January 27-28, 2011, online: <[www.chumirethicsfoundation.ca/main/page.php?page\\_id=334](http://www.chumirethicsfoundation.ca/main/page.php?page_id=334)>.

<sup>29</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.); *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.); but see *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) and the dissenting opinions of McLachlin J. and L’Heureux-Dubé J. in *Rodriguez*.

practice and whether a reasoned apprehension of harm has motivated Parliament to enact the provision. That harm may arise out of other human relationships, that is, monogamous ones, seems beside the point.<sup>30</sup>

Yet, such analysis is “beside the point” only if one adopts a particular approach to criminal law that rejects it as a site for the protection of fundamental justice.<sup>31</sup> The Court ignored the particular stigmatization inherent in the criminal sanction, as well as the law’s ability to shield prejudice and oppress minorities. In short, the above approach discards a richer understanding of criminal law which would reveal the relationship between cultural mores and legal tradition that largely have shielded from scrutiny the choice to target one kind of conduct but not another.

#### IV. HARM TO SOCIETY

Although I believe the focus on the interpersonal harms of polygyny is flawed, their acceptance by the British Columbia Supreme Court is not really a surprise. What is so striking about the *Polygamy Reference* is the time that the Court spends cataloguing a particular kind of social harm. Some of the social harms accepted by the Court are rooted in assumptions about human nature. Others spring merely from the fact that polygamy *is not* monogamy. Under this argument, the critique that I advanced in the preceding section is denuded of much of its force. The focus on societal harm — if supported — would shield section 293 against challenges of arbitrariness, overbreadth and gross disproportionality.<sup>32</sup>

In analyzing the social harms posed by polygyny, Bauman C.J. drew on both literature reviews<sup>33</sup> and on what he termed “powerful evidence”<sup>34</sup> provided by a commissioned statistical study. The study purported to

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<sup>30</sup> *Polygamy Reference*, *supra*, note 13, at para. 544.

<sup>31</sup> Additionally, this casual dismissal would make it difficult to justify any violation of religious freedom (though, because of its social harms analysis discussed *infra*, the Court had no difficulty doing so). I am grateful to an anonymous reviewer for pointing this out.

<sup>32</sup> The most recent discussion of these principles can be found in *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.); *Bedford v. Canada (Attorney General)*, [2012] O.J. No. 1296, 91 C.R. (6th) 257 (Ont. C.A.) [hereinafter “*Bedford*”].

<sup>33</sup> *Polygamy Reference*, *supra*, note 13, at paras. 577-608.

<sup>34</sup> *Id.*, at para. 624, describing the study introduced by Attorney General of Canada witness Dr. McDermott.

show the generalized negative results, across a variety of indicators,<sup>35</sup> in societies which accept polygyny.

The core of the analysis, though, drew on evolutionary psychology.<sup>36</sup> Citing expert testimony, Bauman C.J. found that human beings' "mating strategies"<sup>37</sup> propel both sexes to polygyny:

Through polygyny, both men and women can effectively follow their evolved mating strategies. Polygyny allows males to form multiple simultaneous pair-bonds, while it also allows more females access to high-status males, as they are not monopolized by a single male.<sup>38</sup>

The only forces capable of controlling such basic urges are "culturally-transmitted social norms that motivate and regulate social behaviour".<sup>39</sup> Chief among these norms is a marriage system which imposes rules about the numbers of and arrangements between partners. While social norms cannot entirely subvert mating psychology, "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*".<sup>40</sup>

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<sup>35</sup> The study examined the following indicators:

- a) discrepancy between law and practice with respect to women's equality — this variable relates to whether a state's laws accord with the United Nations Convention on the Elimination of Discrimination Against Women, and whether the country enforces these laws;
- b) birth rate;
- c) rates of primary and secondary education for male and female children;
- d) difference in HIV infection rates between men and women;
- e) age of marriage;
- f) maternal mortality, which refers to the number of women who die in childbirth;
- g) life expectancy;
- h) sex trafficking, including state compliance with relevant legislation;
- i) female genital mutilation;
- j) domestic violence, an omnibus measure incorporating domestic violence, rape, marital rape, and honour killings, as well as the extent and strength of the enforcement of the laws prohibiting these crimes in any given state;
- k) inequality of treatment of men and women before the law. At the low end are countries where the legal age of marriage is 18 or higher, women may choose their spouse, divorce is possible and both partners are treated equitably by law, abortion is permitted, and women may inherit property;
- l) defense expenditures; and
- m) political rights and civil liberties.

*Id.*, at para. 616.

<sup>36</sup> The Chief Justice described evolutionary psychology as "the study of the features of the mind with specific reference to our ancestral past as a way of trying to understanding how and why we behave in the present" (*Id.*, at para. 494).

<sup>37</sup> *Id.*, at para. 501.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*, at para. 502.

<sup>40</sup> *Id.*, at para. 502 (emphasis added).



The most important of these norms is “Socially Imposed Universal Monogamy” (SIUM).<sup>41</sup> SIUM’s distinctive feature is that it requires monogamy from everyone, regardless of wealth, status or other factors which might soften the heavy burden on men who take more than one wife. Earliest documented societies displayed evidence of polygyny, until SIUM began to emerge as a countervailing norm. While its exact cause remains unknown, SIUM is thought to have arisen as part of general human development toward civic institutions and “the development of ideas of normative egalitarianism”.<sup>42</sup> It emerged at the same time as “republicanism, citizenship rights, and high levels of collective action in the military and political spheres [which] can only be observed in ... Greece and Rome”.<sup>43</sup> It is impossible to determine the degree to which SIUM might have influenced these other developments, but the Court found that the co-existence of these events probably was not coincidental.<sup>44</sup>

SIUM is thus a norm that has regulated the conditions for entering marriage for approximately 1,750 years. In almost all Western nations, it is promoted by special legal recognition and benefits, and is enforced by criminal prohibitions against its opposite: polygamy. Yet, the fact that polygamy has been rejected throughout history is insufficient reason to continue to criminalize it. Many laws, once thought to embody essential moral truths, have in the fullness of time and social experience been rejected.<sup>45</sup> The focus must be on the arguments supporting the law’s retention, and the potential consequences of jettisoning it.

The Chief Justice thought that the risks of failing to maintain a social norm against polygamy are dire. First, a society which permits polygynous relationships creates a (greater) pool of unmarried men. This derives from the “mathematical reality” that “when some men are able to have multiple wives simultaneously, other men will be unable to find [any]”.<sup>46</sup> This pool could be as much as 40 per cent of all men who, in such a situation, are likely to “take substantial risks so that they [can] eventually participate in the mating and marriage market”.<sup>47</sup> In fact, men

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<sup>41</sup> *Id.*, at para. 150.

<sup>42</sup> *Id.*, at para. 154.

<sup>43</sup> *Id.*, at para. 156.

<sup>44</sup> The correlations between monogamy and polygamy, and different kinds of social outcomes, formed a large part of the Court’s analysis.

<sup>45</sup> H.L.A. Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1969).

<sup>46</sup> *Polygamy Reference*, *supra*, note 13, at para. 505.

<sup>47</sup> *Id.*, at para. 507.

unable to secure wives will tend to engage in criminal behaviour, including “murder, robbery and rape”.<sup>48</sup>

The harm of polygyny described in the *Polygamy Reference* is not solely captured by higher male crime. It includes more negative intra-family dynamics, specifically, that “high-status men could choose to invest their resources in acquiring more wives rather than investing in their children”.<sup>49</sup> Additionally, polygyny has been observed to lower the age of marriage for women and girls; increase the age gap between spouses; and worsen gender equality through, for example, depressing participation in the paid workforce.<sup>50</sup> The Court acknowledged that many of these effects were found in nations much less developed than Canada, but stated that controlling for such external factors overcame any barriers to comparison. Other, more speculative outcomes of SIUM include a preponderance of democratic institutions,<sup>51</sup> greater social equality<sup>52</sup> and even increased gross domestic product.<sup>53</sup>

Polygyny, in other words, is an “X” factor that opens the floodgates to a powerful male *id* that has just barely been subdued. In the absence of a sufficient legal sanction, it would quickly overwhelm the stable societal platform developed over two millennia. *Après* monogamy, it seems, *la déluge*.

The *amicus* argued vigorously that the Court should not rely on mere correlations. He characterized the regression analysis as a kind of “abracadabra” that linked every “evil on the planet” to “one man having more than one wife”.<sup>54</sup> In addition, monogamy itself has been undermined by significant demographic shifts completely unconnected from the restrictions (or lack thereof) on polygamy.<sup>55</sup> The Court found such arguments to simply reflect a misunderstanding of statistical analysis,

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<sup>48</sup> *Id.*, at para. 509.

<sup>49</sup> *Id.*, at para. 518.

<sup>50</sup> *Id.*, at paras. 522-533.

<sup>51</sup> *Id.*, at para. 536.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*, at para. 535, citing the Affidavit of Dr. Henrich:

[W]hen monogamy is imposed “the fertility rate goes down, the age gap goes down, saving rates go up, bride prices disappear, and GDP per capita goes way up”. [The] model was based on the assumptions that men and women care about both having children and “consuming”, that men are capable of reproducing during much more of their life than women, and that men tend to prefer younger women. In this model, when a ban on polygyny prevents men from investing in obtaining further wives, they instead save and invest in production and consumption.

<sup>54</sup> *Id.*, at 629.

<sup>55</sup> *Id.*, at paras. 468-481, citing the Affidavit of Dr. Zheng Wu.

which can only show *possible* relationships and is not meant to demonstrate factual causation.<sup>56</sup>

Chief Justice Bauman acknowledged that the catalogue of serious supposed harms are predicated upon a non-trivial increase in the practice of polygyny. For a number of reasons, he found that, in the absence of a criminal sanction, polygyny would spread in Canada. Evolutionary psychology posits that we are naturally inclined to such relationships. A complex matrix of social and legal norms — including the criminal sanction — has developed over 2,000 years to blunt that instinct. Were the prohibition on polygamy to be lifted, polygyny could take hold among the broader society fairly easily, especially if adopted by celebrities and other high-status individuals.<sup>57</sup> In addition, Canada would become a “beacon” for immigrants from around the world who no longer would be automatically inadmissible. The Court noted that immigrants from underdeveloped countries (where polygamy is widespread) tend to have more children — an additional factor that could lead to higher incidence of polygamy.<sup>58</sup>

In my view, the social harms analysis described above encompasses a number of disturbing assumptions and principles that are entirely contrary to Charter values. First, the *Polygamy Reference* relies on deeply heteronormative reasoning. It imbues (opposite-sex) monogamous marriage with miraculous powers — not only a primary mover in Western civilization, it encourages democracy, equality and better economic outcomes (though not a word is stated about the breakdown of such goods along gender lines).<sup>59</sup> Even accepting that some sort of criminal control on polygamy is worthwhile, many persons would find this account of monogamous marriage baffling.<sup>60</sup>

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<sup>56</sup> The Court recognized the “third variable” problem, quoting as described by a witness (*Id.*, at para. 637):

Yes, there’s what is known as the third variable problem. It actually goes by that particular label in statistics, and this is in correlational research you may find that there is a relationship between two variables but it is always possible that there is a third variable that you haven’t measured or that you’re not aware of that, in fact, is causing both of the variables that you happen to be assessing.

<sup>57</sup> *Id.*, at para. 555.

<sup>58</sup> *Id.*, at para. 560.

<sup>59</sup> Chief Justice Bauman did recognize that it is not possible to absolutely divine causation from correlation. But, because of the “reasoned apprehension of harm” standard that he applies to constitutional scrutiny of criminal law, the extent of the asserted correlations becomes an important element in the justification of any Charter infringements (to the extent that he finds any).

<sup>60</sup> Comments on the *Polygamy Reference* by Kasari Govender & Yvonne Zylan, *Law-Femme* 11:1 (February 2012), online: <<http://issuu.com/ubccfls/docs/lawfemme-february-2012>>.

Second, the *Polygamy Reference* employs aggressive legal moralism to justify a remarkably punitive<sup>61</sup> measure. The Court posits a bleak model of male personhood focused upon unbounded sexuality and violence, and a despairing picture of female victimization. The opinion also plays upon fears of the “Other” as exemplified in its imagery of Canada becoming a target for undesirable polygamists who will seek to transform our society (aided by their increased fecundity).

A particularly worrying aspect of the opinion is its incorporation of biological essentialism using evolutionary psychology. Biological essentialism is utterly at odds with the prevailing values of the Charter, such as individual respect, autonomy, choice and care. A society committed to equal regard and respect for others cannot justify the application of state coercion by recourse to notions that men are essentially violent creatures whom the law must civilize; or that women are wholly dependent upon male power and privilege for their personal security. The momentum of criminal law over the last century has been away from such deterministic concepts. The *Polygamy Reference*'s use of them is startling. Such techniques legitimize punishment based on the crudest of group generalizations. I hasten to add that the use of such generalizations is quite separate from progressive developments in criminal law, for example, the way that recognition of sexism spurred changes to the law of sexual assault.<sup>62</sup> In the latter case, a statistical over-representation of male-female victimization, combined with pre-existing societal stereotypes, requires the law to take special care not to further perpetuate sex inequality. The generalizations at play in the *Polygamy Reference* are different — they represent idealized notions of maleness and femaleness which cache out in an offence requiring no proof of harm, because the entire focus is on *preserving* those notions.

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<sup>61</sup> This is perfectly expressed in Bauman C.J.'s willingness to criminalize female participants in polygynous unions notwithstanding the presumptive harm they experience and notwithstanding that they may have entered such unions below the age of majority. In dismissing arguments about overbreadth, Bauman C.J. stated: “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”. (*Polygamy Reference, supra*, note 13, at para. 1197).

<sup>62</sup> *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.); *R. v. Darrach*, [2000] S.C.J. No. 46, [2000] 2 S.C.R. 443 (S.C.C.).

## V. HOW MONOGAMY SAVES A POLYGAMY OFFENCE — TWO POINTS

The Court's analysis also had important implications for two critical issues relating to the law's validity: the correct statutory interpretation of the provision, and the law's original purpose.

Some of the parties, anticipating at least *some* constitutional infirmity with section 293, had argued that it could be read down to capture only polygyny, or to require proof of an additional element. Recall that the great majority of Bauman C.J.'s decision examined the dangers and myriad harms of polygyny, and uncovered little evidence of such interpersonal harms in other plural relationships. Recall, as well, that the second constitutional question invited the Court to consider reading in additional elements such as "exploitation" or "undue influence". It would not have been surprising for Bauman C.J. to incorporate such arguments to safeguard the law against charges of overbreadth or gross disproportionality. Yet he did not.

The *amicus* had pressed for the broadest reading of section 293, arguing that the use of the term "conjugal union" extends to any relationship which bears indicia of a conjugal relationship as currently understood in law: essentially, any kind of committed, permanent relationship between three or more people.<sup>63</sup> The Attorney General of Canada opposed any reading down based on gender ratios of the participants. Canada argued that section 293 "prohibits practicing or entering into multiple simultaneous marriages, whether sanctioned by civil, religious or other means".<sup>64</sup> The intervener, West Coast LEAF, argued that section 293 could be read down to include only "exploitative" polygyny.<sup>65</sup> In contrast, the Attorney General of British Columbia stated that the presence of "duplicative" marriage functions as the core element of section 293.<sup>66</sup> It identified the chief concern with polygamy as "institutional" approval of plural relationships which is only given to

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<sup>63</sup> Some of these indicia include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. *Molodowich v. Penttinen*, [1980] O.J. No. 1904, 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), cited in *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3, at para. 59 (S.C.C.).

<sup>64</sup> *Polygamy Reference*, *supra*, note 13, at para. 931.

<sup>65</sup> The suggestion is almost identical to the technique ultimately employed by the Ontario Court of Appeal in *Bedford* with respect to s. 212(1)(j) (living on the avails of prostitution): *supra*, note 32, at para. 222.

<sup>66</sup> *Polygamy Reference*, *supra*, note 13, at para. 953.

“marriage”. It also challenged the idea that non-polygynous unions share the same marital characteristics as polygyny.<sup>67</sup>

The Court rejected the suggestion to read down polygamy to capture only polygyny. It noted that where Parliament means to enact a gender-based crime it has done so explicitly, for example, with earlier versions of bigamy. The focus of section 293 is on “multiple *marriages*, that is, pair-bonding relationships sanctioned by civil, religious or other means”.<sup>68</sup> The Court then distinguished marriage from common law relationships, stating that the inclusion of a separate prohibition of “conjugal unions” was enacted out of excessive caution rather than any intention to capture non-marital relationships:

The original polygamy prohibition was proposed in *An Act to Amend an Act Respecting Offences Relating to the Law of Marriage* — the law of marriage, not more casual, unformalized *relationships* ... A “conjugal union” coming within the prohibition may not need be recognized as a “binding form of marriage”, but the whole thrust of the section is that it must be a *purported* form of marriage.<sup>69</sup>

Given space constraints, I will refrain from detailed criticism of the Court’s statutory interpretation, except to note that it is difficult to square with: (a) section 293’s express exclusion of any requirement to prove “the method by which the alleged relationship was entered into”,<sup>70</sup> and (b) the section’s extension to any plural relationship “whether or not it is by law recognized as a form of marriage”.<sup>71</sup> More telling is the *reason* that section 293 is given such a peculiar interpretation (an interpretation that the Court itself admits is counterintuitive<sup>72</sup>):

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<sup>67</sup> *Id.*, at paras. 958-960:

The evidence indicates no significant religious, cultural or legal tradition, anywhere in the world, that includes among its tenets polyandrous or same-sex multi-partner unions. There are five affidavits from polyandrous polyamorists in Canada, but it may be doubted whether any of them is in a polygamous marriage or conjugal union within the *prima facie* scope of section 293 — *none of the relationships has been of long-standing (it appears the longest has endured three years), none involves a sanctioning authority or external influence, and the parties appear to consider themselves bound only as long as they choose.* (Emphasis added.)

<sup>68</sup> *Id.*, at para. 987 (emphasis in original).

<sup>69</sup> *Polygamy Reference, id.*, at paras. 1015-1017 (emphasis in original).

<sup>70</sup> *Supra*, note 4, s. 293(2).

<sup>71</sup> *Id.*, s. 293(1). The focus on some sort of “sanctioning event” also, in my view, presents a possible disproportionate impact (and discrimination claim) on the basis of religious freedom.

<sup>72</sup> *Polygamy Reference, supra*, note 13, at para. 1035:

It may fairly be said that in interpreting s. 293, I have had “a lot of explaining to do”; that its drafting has required the Court to tread a difficult route in an effort to clarify its meaning. But today’s provision is the product of 1890’s drafting which, as we have

[The offence reflects] the pre-eminent place that the institution of monogamous marriage takes in Western culture and, as we have seen, Western heritage over the millennia. When all is said, I suggest that the prohibition in s. 293 is directed in part at protecting the institution of monogamous marriage.<sup>73</sup>

This, of course, means that all participants in any plural marriage are caught by the provision and subject to punishment.

At this point, the Court briefly addressed an obvious concern with the male-female dynamic at the core of its analysis: how, then, to account for same-sex marriage? The answer is that “committed same-sex relationships celebrate all of the values we seek to preserve and advance in monogamous marriage”.<sup>74</sup> The slippery slope argument that there is an inexorable line from same-sex equality to polygamy was misconceived:

[T]he doctrinal underpinnings of monogamous same-sex marriage are indistinguishable from those of heterosexual marriage as revised to conform to modern norms of gender equality. This counters, as well ... the sentiment often expressed that the “State has no business in the bedrooms of the Nation”. *Here, I say it does when in defence of what it views is a critical institution — monogamous marriage — from attack by an institution — polygamy — which is said to be inevitably associated with serious harms.*<sup>75</sup>

While the above language sounds inclusive of LGBT equality, one should remember that arguments about the “essential” nature of marriage have been used to perpetuate inequality.<sup>76</sup> Much of the Court’s analysis is difficult to square with non-heterosexual family formation.

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seen, created an offence with a number of redundant layers. Those layers, in turn, were stripped away slowly and surely until ... we were left with the compressed kernel of the offence we see today. I must say that the metaphor of the committee designing the horse comes to mind, but s. 293 is what the Court is left to struggle with; to give effect to, if possible, in light of the rules which govern these matters.

<sup>73</sup> *Id.*, at para. 1041.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*, at para. 1042 (emphasis added).

<sup>76</sup> Sam Shulman, “Gay Marriage – and Marriage” (November 2003), online: OrthodoxyToday.org <<http://www.orthodoxytoday.org/articles2/SchulmanGayMarriage.php>>:

To me, what is at stake in this debate is not only the potential unhappiness of children, grave as that is; it is our ability to maintain the most basic components of our humanity. ... Some of our fellow citizens wish to impose a radically new understanding upon laws and institutions that are both very old and fundamental to our organization as individuals and as a society ... Let me try to be more precise. Marriage can only concern my connection to a woman (and not to a man) because, ... marriage is an institution that is built around female sexuality and female procreativity. (The very word “mar-

For me, a second telling moment in the opinion was its analysis of legislative purpose. Having found that the law violates both section 2(a)<sup>77</sup> and section 7<sup>78</sup> of the Charter, the Court turned to section 1. Here, it had to determine the original motivation behind the 1892 polygamy offence (at that time, section 278).<sup>79</sup> The *amicus* argued that the law stemmed from religious animus or, at least, a determination to protect a Christian view of marriage. Such a conclusion was bolstered by legislative history showing that parliamentarians were particularly concerned by a potential influx of fundamentalist Mormons from U.S. territories, where polygamy had been outlawed.<sup>80</sup> To the extent that the law was rooted in sectarian

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riage” comes from the Latin word for mother, *mater*.) It exists for the gathering-in of a woman’s sexuality under the protective net of the human or divine order, or both.

<sup>77</sup> The violation of religious freedom is made out because, for some individuals, the desire to enter into a polygamous union arises either out of a perceived religious obligation, or as a means of deepening their faith. *Polygamy Reference*, *supra*, note 13, at para. 1091.

<sup>78</sup> The Court accepted that criminalizing a person’s choice of family structure violates both her liberty and security of the person.

<sup>79</sup> The original offence read as follows in *Criminal Code, 1892* (U.K.), 55 & 56 Vict., c. 29, s. 278:

Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars, who –

- (a) practises, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into
  - (i) any form of polygamy;
  - (ii) any kind of conjugal union with more than one person at the same time;
  - (iii) what among the persons commonly called Mormons is known as spiritual or plural marriage;
  - (iv) who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union; or
- (b) celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (a) of this section; or
- (c) procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any such form, rule or custom which so purports; or
- (d) procures, enforces, enables, is a party to, or assists in the execution of, any such form of contract which so purports, or the giving of any such consent which so purports.

<sup>80</sup> Susan Drummond, “A marriage of fear and xenophobia. Our criminalization of polygamy is not about protecting women” *The Globe and Mail* (April 6, 2009), online: <<http://www.globeandmail.com>>; Bev Baines, “Polygamy ruling should trouble feminists” *The Toronto Star* (November 28, 2011), online: <<http://www.thestar.com>>.



sentiment, it would fail to demonstrate a pressing and substantial objective.<sup>81</sup>

To be sure, Parliament did amend section 278 in 1954 (creating the present section 293) to remove some of its more troubling components, such as the explicit reference to Mormon marriage.<sup>82</sup> So, one could argue that even if the original law was motivated by religious animus, the later amendment removed any such taint.<sup>83</sup> Strikingly, the Court did not make this claim. Instead, it found that the law in 1892 was not motivated by any animus whatsoever:

There is little question that the arrival of Mormons from Utah was a galvanizing influence on many of those who supported the introduction of s. 293. However, I do not agree ... that this reflected religious animus on the part of Parliament. ...The polygamy prohibition enacted in 1890 reflected a historical aversion to the practice that was many centuries old ... *[Section 293] has always been seen as addressing the risk of harm to women, children and society, although our understanding of the harms associated with polygamy has become more nuanced over time.*<sup>84</sup>

The above account is one of overriding concern for women. Yet it ignores much of women's oppression at the relevant time, including within the institution of marriage. Most of the harm perpetrated on women was condoned, if not actively encouraged, by the state. To take but one example, marital rape was not an offence until 1983. Surely this, as opposed to a polygamy offence, is more revealing of a society's true attitude toward marriage equality.

The Court describes a prevailing social ethos, rooted in ancient norms, that was *really* concerned with women's welfare. The claim rings hollow. It distorts the reality of gendered oppression within marriage to draw the necessary negative comparisons with the feared and hated practice of polygamy. In the service of monogamy, women's inequality is erased from juridical consciousness. A genuine concern with women's equality in family relationships would not be narrowly focused on the outlier practice of polygamy. It would consider whether criminal law and other legal tools are capable of addressing harm in all interpersonal

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<sup>81</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.); *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

<sup>82</sup> *Supra*, note 79, s. 278(a)(iii). The essence of the offence, though, did not change.

<sup>83</sup> I believe this argument lacks sufficient evidence of a true change in Parliamentary intention in 1954. But it raises a credible point of debate.

<sup>84</sup> *Polygamy Reference*, *supra*, note 13, at paras. 1088-1089 (emphasis added).

relationships. It would not pay singular attention to the cultural practices of tiny minorities, but would be open to recognizing the myriad ways in which all women are vulnerable to harm, exploitation and abuse in their intimate lives.

And so, what I find most illuminating about the *Polygamy Reference* is not its discussion of polygamy, but its discussion of law. The opinion does not function primarily to tease out a “clash” between Canadian and “foreign” culture. On the court’s own terms, the forces propelling us to polygyny are not foreign. They rest deep within us. The *Polygamy Reference* powerfully illustrates law’s propensity to shame, to exclude and to punish in the service of deep, even ancient norms — “the laws whose penalties I would not incur from the gods, through fear of any man’s temper”.<sup>85</sup> It is a stark reminder of the ever-present choice attending the Charter: what is this society that we wish to have, to create, to honour? The world that is reflected to us by the *Polygamy Reference* is not a world that I recognize, nor is it one that accords with the promise and essential regard for humanity in the constitutional project of the last 30 years.

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<sup>85</sup> Sophocles, *Antigone*, at lines 502-503.