Pesky Polygamist Women: The Marginalization of Qualitative Data in British Columbia's Charter Reference on Polygamy

Nerida Bullock*

Abstract

This paper explores the thorny mingling of law with qualitative social science methodologies through the lens of the 2010–11 Supreme Court of British Columbia Charter Reference on polygamy, which was conducted to determine whether the criminalization of polygamy was consistent with the *Canadian Charter of Rights and Freedoms*. The Reference reveals how the marginalization of qualitative research(ers) effectively controlled whose voices were to be heard and whose were to be silenced in the broader project of sovereign intervention into family formation. With specific focus on Professor Angela Campbell, who provided expert opinion testimony in the Reference, this paper reflects on two important questions: when social science is invoked in legal settings, whose knowledge is legitimized, and who benefits from this legitimization? Drawing upon the longstanding feminist project of deconstructing assumptions of value-neutrality in all science, this paper considers how qualitative, feminist research(ers) may be inherently at odds with law's quest for (rational) "truth."

Keywords: Research methodology, qualitative research, feminist research methodology, sociology of knowledge, expert testimony

Résumé

Cet article s'attarde au Renvoi de la Cour suprême de la Colombie-Britannique sur la polygamie de 2010-2011 afin d'explorer le mélange complexe entre le droit et les méthodologies qualitatives des sciences sociales. Un renvoi qui avait, soulignons-le, été mené pour déterminer si la criminalisation de la polygamie était conforme à la Charte canadienne des droits et libertés. Le renvoi révèle comment la marginalisation des recherches qualitatives a permis de contrôler efficacement les voix qui devaient être entendues et celles qui devaient être réduites au silence dans le cadre

* This paper draws on research supported by the Social Sciences and Humanities Research Council of Canada. I am grateful to Travers for encouraging my intellectual curiosities and providing valuable insight. I am also indebted to Tiffany Muller Myrdahl for igniting my interest in methodology and generously providing feedback. I would also like to thank the anonymous reviewers for their helpful comments and Somayeh Bahrami for her listening ear and keen eye for detail.

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2021, Volume 36, no. 1, pp. 69–88. doi:10.1017/cls.2020.24

© The Author(s), 2021. Published by Cambridge University Press on behalf of the Canadian Law and Society Association.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

du projet plus large d'intervention autonome dans la formation de la famille. En mettant l'accent sur les propos de la professeure Angela Campbell, qui a fourni un témoignage d'expert dans le cadre du Renvoi, ce document réfléchit à deux questions importantes, soit quand les sciences sociales sont invoquées dans des contextes juridiques, 1) quelles sont les connaissances qui sont légitimées et 2) qui bénéficient de cette légitimation? S'appuyant sur le projet féministe, de longue date, qui cherche à déconstruire les hypothèses de neutralité des valeurs au sein de toute forme de science, cet article examine comment la recherche qualitative et féministe peut s'avérer en contradiction avec la quête de la « vérité » (rationnelle) dans le droit.

Mots clés: Polygamie, méthodologie de recherche, recherche qualitative, renvoi, Charte canadienne, méthodologie de recherche féministe, sociologie de la connaissance, témoignage d'expert

It all starts with those pesky polygamist women. Not the ones who appear in TV series documenting their escape from patriarchal fundamentalist polygamist cults, but the ones who have defiantly held their ground, asserting their right to choose heterosexual but non-normative family formations that defy both the expectations of good citizenry and normative femininity in Canada. *How dare they presume autonomy over their own life?* After all, good women *know* better. Good women *do* better.

But these aren't "good" women… well, at least not in the law-abiding, good consumer, "don't rock the boat" traditional sense. *Are they bad women? Are they victims in need of rescue?* Respectable women moderate their sexuality to adhere to the confines of serial monogamy, and the "good" woman (normatively White, economically privileged, and heterosexual) is the standard by which all women are judged.[1] The stubborn agency of (White) polygamous women—the ones who willingly choose non-normative family formations, provoke discomfort, perhaps even hysteria. Inherent within constructs of femininity are prescriptive mandates of sexual expression that control female sexuality. These mandates are revealed only through violations—in other words, "those who lack 'rightness' help define what is 'right.'"[2] In Bountiful, British Columbia, polygamist women's resistance to victim status through their active participation in and/or support of non-conforming family formations have frustrated moral crusaders.

Marriage has undergone significant change over the last twenty years in Canada, the most notable of which is the formal recognition of same-sex marriage in 2005. Public debate surrounding same-sex marriage largely focused on whether or not the state should extend the privileges and benefits of marriage to same-sex couples. However, many gay liberationists, radical feminists, and queer critics argue that energy would be better spent ensuring state social security and weakening the boundaries of inclusion/exclusion through the legal recognition of a

1 Angela Willey, "Constituting Compulsory Monogamy: Normative Femininity at the Limits of Imagination," *Journal of Gender Studies* 24, no. 6 (2015): 622.

2 Jill Reynolds and Margaret Wetherell, "The Discursive Climate of Singleness: The Consequences for Women's Negotiation of a Single Identity," *Feminism & Psychology* 13, no. 4 (2003): 489.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

variety of family and care formations, including unmarried partners (whether or not they are romantically or sexually attached) and polyamorous unions.[3] Such critics argue that when access to entitlements of citizenship hinge on one's participation in a conforming romantic dyad, liberal principles of a "just" government are violated, revealing marriage as a violent enforcement of colonial and White-normative citizenship.[4]

Canadian historian Sarah Carter has documented how, as an integral part of an assimilationist agenda, the imposition of monogamous Christian marriage upon Indigenous populations was a tool of colonization in the late nineteenth and early twentieth centuries.[5] By destabilizing traditional Indigenous family formations, including polygamous unions, community and cultural bonds were critically weakened to facilitate the national agenda of absorbing Indigenous populations into the dominant society, thereby detaching them from their land-based treaty rights. Motivated by concerns that newly established Mormon settlements in close proximity to nearby First Nations reserves in Southern Alberta would further encourage the practice of polygamy amongst Indigenous populations, polygamy (and all forms of multi-party conjugal unions) was first criminalized in Canada in 1890 through legislation that would eventually become *s.* 293 of the *Criminal Code of Canada.*[6]

Amidst the public's growing fascination with Mormon fundamentalists who, in accordance with their religious faith, were practicing polygamy in the community of Bountiful, the Attorney General of British Columbia asked the Supreme Court of British Columbia to consider the question of whether the criminalization of polygamy and all forms of multi-party conjugal unions was consistent with the *Canadian Charter of Rights and Freedoms*[7] through a *Charter Reference*[8] in 2010–2011.[9] At the center of the *Reference* was the question of harm, or more specifically, Parliament's reasoned apprehension of harm arising out of the practice of multi-party conjugal unions and whether or not these harms were severe enough to restrict religious freedom. At stake in the *Reference* was the state's authority to make moral claims justifying enforced monogamous marriage and the continued colonization of women's bodies. Social science experts who employed various methodologies were charged with the task of identifying, assessing, translating, and interpreting notions of harm. As Sean Matthew Ashley and Brittney Adams

---

[3] Jaye Cee Whitehead, *The Nuptial Deal: Same-Sex Marriage and Neo-Liberal Governance* (Chicago: University of Chicago Press, 2012); Mary Bernstein and Verta Taylor, *The Marrying Kind? Debating Same-Sex Marriage Within the Lesbian and Gay Movement* (Minneapolis: University of Minnesota Press, 2013).

[4] Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012); Amy Brandzel, *Against Citizenship: The Violence of the Normative* (Chicago: University of Illinois Press, 2016).

[5] Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008).

[6] Ibid., 86.; Criminal Code RSC, 1985, c C-46, s 293.

[7] *Canadian Charter of Rights and Freedoms*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter "*Charter*"].

[8] *Reference re: Section 293 of the Criminal Code of Canada 2011 BCSC 1558* [hereinafter "*Reference*"].

[9] By Order in Council, the Lieutenant Governor in Council referred the question to the Court pursuant to the Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 1.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

revealed, the *Reference* set up a methodological competition between qualitative and quantitative research in the legal quest to determine a single (rational) universal truth about the harms of polygamy.[10] The *Reference* exposes the inherent tension (perhaps incompatibility?) of the interface between post-structural/ feminist social science and legal inquiries that demand a single universal truth. Although both scientific reasoning and modern legal jurisprudence arose from the Enlightenment,[11] ongoing ontological and epistemological debates within the social sciences have challenged the lineage of enlightenment dichotomies such as subject/object, rational/irrational, and reason/emotion.[12] The social sciences have contested (with varying degrees of success) the hegemony of male modes of thought; yet Canadian law, as demonstrated in the *Reference*, remains firmly entrenched in a hegemonic patriarchal ordering of knowledge as fact.

Chief Justice Robert Bauman, the presiding judge, ultimately wrote the *Opinion* in 2011, which concludes that although *s.* 293 of the *Criminal Code* offends religious freedoms guaranteed by the *Charter*, its provision is justified in a free and democratic society due to the inherent harms polygamy poses to women, children, society and the institution of monogamous marriage.[13] The *Opinion* relied heavily on quantitative research provided by male "experts" from the academy who produced "evidence" to prove two truth claims: 1) the inferiority of non-Western societies where polygamy is not criminalized; 2) essentialist claims based in evolutionary psychology about the innate biological sex drives of men (and to a lesser extent women) that have presumably been kept in check through institutionalized monogamous marriage. Chief Justice Bauman dismissed as unreliable and biased qualitative research, specifically the ethnographic interviews of polygamous women from Bountiful, that offered a rare accounting of polygamy from the women who embody its practice. As Adams explains, through the marginalization of qualitative research, qualitative scholars of "gender and religious studies became the 'losers' in the competition for truth status" in the *Reference*, and the very women whom Chief Justice Bauman paternalistically sought to "save" from polygamy were excluded from his judicial considerations and thereby disempowered.[14]

The *Reference* on polygamy demonstrates how law's quest for *truth* and its reliance on certain iterations of science as a technology of governance is at odds with the longstanding feminist project of deconstructing assumptions of value-neutrality in all science, particularly positivistic science, and exposing androcentric bias and imperial legacies in the hierarchy of knowledge production. The purpose of this paper is to explore the thorny mingling of law with qualitative social science

---

10 Sean Matthew Ashley, "Sincere but Naive: Methodological Queries Concerning the British Columbia Polygamy Reference Trial," *Canadian Review of Sociology = Revue Canadienne de Sociologie* 51, no. 4 (2014): 325–42; Brittney Adams, "Untying the Knot: Feminist Expert Evidence in the 'Remarkable' Polygamy Reference Decision" (MA Diss., University of Lethbridge, 2016). https://opus.uleth.ca/bitstream/handle/10133/4794/ADAMS_BRITTNEY_MA_2016.pdf

11 Milan Zafirovski, *The Enlightenment and Its Effects on Modern Society* (New York, NY: Springer New York, 2011).

12 Susan Heckman, "The Feminization of Epistemology: Gender and the Social Sciences," *From Monism to Pluralism* 7, no. 3 (1987): 68.

13 *Reference*, para 1329-67.

14 Adams, "Untying the Knot," 87.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

methodologies that reject dichotomies of subject/object, rational/irrational, and reason/emotion. It is beyond the scope of this paper to pass judgement on whether polygamy is inherently "harmful" to women, children, and society—a question that is, in and of itself, deeply problematic. After all, all forms of marriage "are stained by gender-based violence,"[15] and assessments of harm cannot be disentangled from larger questions about whether "harm," irrespective of monogamous or non-monogamous family formation, is a product of the heteropatriarchal, capitalistic, colonial structure of society that is inherently gendered and oppressive. As Nan Hunter has noted, the "family" functions as a giant "cultural screen" for projections of "race, gender, sexuality and a range of other 'domestic' issues" recreating a discrete zone of social combat.[16] In a related and similar fashion, Rebecca Johnson argues that projected onto polygamy are our cultural fears about the dysfunctional dimensions of family, and "the criminalization of polygamy makes it easier to avoid talking about the challenges of familial life, challenges that are not generally the subject of criminal law, though they may well involve harm."[17]

At the heart of this inquiry are two questions: when social science is invoked in legal settings, whose knowledge is legitimized, and who benefits from this legitimization? The *Reference* reveals how the marginalization of qualitative research(ers) effectively controlled whose voices were to be heard and whose were to be silenced in the broader project of sovereign intervention into family formation and sexual control. A closer inspection of the tactical deployments used by the Attorneys General of Canada (AG Canada) and British Columbia (AGBC) charged with the task of proving the inherent harmfulness of polygamy opens a broader conversation about how "truth claims from different academic disciplines… [merge] with the truth claimed by law to construct a bounded narrative in which the law is able to pass judgement on the methodological practices of social science itself."[18] Qualitative research(ers) may be inherently at odds with what it means to be an "expert" witness—an interpreter of social knowledge, within the legal drama of judicial inquiry.

The Legal Actors

Arguing that the criminalization of polygamy is justified and constitutionally sound due to the inherent harm it poses to women, children, and society are the Attorney General of Canada (AG Canada) and the Attorney General of British Columbia (AGBC).

Arguing that the criminalization of polygamy is an unacceptable intrusion by the State into the most basic rights guaranteed by the *Charter* is the publicly funded Amicus Curiae (Amicus).

---

15 Carissima Mathen, "Reflecting Culture: Polygamy and the Charter," *Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 57, (2012): 362.

16 Nan Hunter, "Sexual Dissent and the Family," in *Sex Wars: Sexual Dissent and Political Culture*, 10th anniversary edition, ed. Lisa Duggan, Lisa Hunter, and Nan D. Hunter (New York: Routledge, 1991), 99.

17 Rebecca Johnson, "Reflecting on Polygamy: What's the Harm?" in *Polygamy's Rights and Wrongs: Harm, Family and Law*, ed. Gillian Calder and Lori G. Beaman (Vancouver, BC: UBC Press, 2014), 113.

18 Ashley, "Sincere but Naïve," 328.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

The AG Canada, AGBC, and Amicus are the three "formal" parties of the *Reference*. However, eleven other "interested persons" were granted status to participate in the evidentiary phase of the reference and make oral and written submissions. Seven of these parties aligned with the AG Canada and AGBC arguing *in support* of the criminalization of polygamy, and four parties aligned with the Amicus arguing that the criminalization of polygamy is an unjustifiable violation of *Charter* rights.[19]

Chief Justice Bauman presided over the *Reference*, having been appointed by Prime Minster Stephen Harper to the Supreme Court of British Columbia one year earlier, in 2009. At the time of the *Reference*, he had been married to his wife for over thirty-five years and together they had raised two sons. Prior to his appointment on the Supreme Court of British Columbia, he had served thirteen years on the trial and appellate courts of British Columbia, and practiced law in numerous firms within the province of British Columbia.[20]

As a qualitative researcher and "expert" witness for the Amicus, Professor Angela Campbell was asked "to give opinion evidence as a legal scholar and qualitative researcher addressing the interface between the practice of polygamy and the legal prohibition against polygamy with emphasis on the polygamist communities in Bountiful."[21] My acquaintance with Professor Campbell is entirely mediated through the court transcripts of the *Reference*. The two full days of her testimony and cross-examination in the *Reference* and the *Opinion* are my data set. In this paper, under these circumstances, her words are mediated through my consciousness, and my words are mediated through your consciousness, dear reader. The three of us form an intellectual ménage à trois of which the most polyamorous amongst us would be proud.[22]

---

[19] Joining the AG Canada and AGBC in favour of the criminalization of polygamy: Stop Polygamy in Canada, West Coast Legal Education and Action Fund, The Canadian Coalition for the Rights of Children jointly with David Asper Centre for Constitutional Rights, REAL Women of Canada, The British Columbia Teachers' Federation, and Beyond Borders. Joining the Amicus: The British Columbia Civil Liberties Association, The Canadian Association of Free Expression, The Polyamory Advocacy Association, The Fundamentalist Church of Jesus Christ of Latter-day Saints.

[20] Biographical information about Chief Justice Robert Bauman was found on the Peter A. Allard School of Law, University of British Columbia, website. https://historyproject.allard.ubc.ca/law-history-project/profile/honourable-chief-justice-robert-bauman

[21] Court Transcript, Day 6, November 30, 2010: 26.

[22] Dr. John Walsh provided expert opinion in the *Reference* that, within the mainstream Church of Jesus Christ of Latter-day Saints (LDS Church), there are two prevailing ideological camps regarding the practice of polygamy. Those in the first camp position polygamy as a practice firmly rooted in the historical "past," with little relevance to the different-sexed monogamous model of marriage that the church actively espouses today. The second camp regards polygamy (also known as celestial marriage) as an "eternal" principle, suspended due to political pressure, which will be practiced in the afterlife and possibly re-instated as an embodied earthly practice at a future date (Court Transcripts, Day 15 January 5, 2011). My father was a member of the second camp, and my earliest exposure to the concept of polygamy was listening to him pontificate about the inevitable return of celestial marriage. Arta Blanche Johnson tells the story of being a young (mainstream) Mormon bride and whispering in her husband's ear, "Promise me that you will never take another wife." I share similar recollections. Being married in the Cardston, Alberta, LDS Church temple meant my marriage was for "eternity," and if I died, my husband could remarry, sealing the three of us in a polygamist marriage for all time. Life is full of surprises, and few of us remain who we were at twenty-one (the age of my Mormon wedding). I am no exception. See Arta Blanche Johnson, "Are They Not Us? A Personal Reflection on Polygamy," in Calder and Beaman, *Polygamy's Rights and Wrongs*, 89–96.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

For all intents and purposes, Professor Campbell has been a very diligent scholar in the audit culture of academia. Graduating from McGill University Faculty of Law in 1999, Professor Campbell went on to earn her Master of Law from Harvard in 2000. She clerked for a Chief Justice of the Supreme Court of Canada and became an Assistant Professor at McGill University Faculty of Law in 2003. At the time of the *Reference*, she was the Director of the Institute of Comparative Law at McGill University, a member of Montreal Children's Hospital Research Ethics Board and a professor teaching graduate level research methodology. Her *curriculum vitae* highlights an impressive list of research projects, peer-reviewed publications, book chapters, conference papers, policy reports, and media articles.[23] Professor Campbell has followed the trajectory of a "coherent scholar" creating a body of work that identifies her as an expert and an accomplished producer of knowledge.[24]

Court proceedings are inherently adversarial, as participants are dichotomized into oppositional stances that battle for truth. Thus, the cross-examination of witnesses, including social scientists acting in the capacity of "experts," is not only expected, it's intrinsic to the judicial process.[25] However, in the case of the *Reference*, Professor Campbell was the *only* expert witness to conduct empirical research directly with polygamous women in Bountiful and she was the *only* witness whose qualifications to provide *expert* opinion were strenuously challenged, in spite of the fact that expert witnesses on both sides of the argument cited her work.[26] By contrast, the evolutionary psychologist who provided "expert" testimony on the origins of monogamy and the (supposed) superiority of Western "monogamous" societies had neither conducted nor published research on polygamy prior to being retained by the AGBC office.[27] Yet his qualification to provide *expert* opinion went unchallenged, and his evidence was heavily cited in Chief Justice Bauman's final *Opinion*.

Very little peer-reviewed research has been conducted with polygamous women in Canada. This may be due to the insular nature of polygamous communities—an entirely understandable response to potential state intervention in their families and lives. The Canadian and United States governments have a long and complicated history of surveillance of so-called "sexual deviants."[28] The small

23 Court Transcripts, Day 6, November 30, 2010: 4–6.

24 A "coherent scholar" within the neo-liberal, audit-oriented academy is one who successfully develops a recognizable area of focus through a clearly defined research trajectory culminating in the recognition of expertise, and a contributor to the economic survival of the university. See Collective, "I Am Nel: Becoming (In)Coherent Scholars in Neoliberal Times," in *Cultural Studies ↔ Critical Methodologies* 17, no. 3 (2017): 251.

25 In accordance with the *Mohan Rule*, as applied by *Abbey*, the criteria for admissibility of expert testimony: (1) Has the technique or theory been tested—i.e. subjected to the scientific concept of falsification? (2) Has the theory or technique been published or peer reviewed? (3) Does the scientific technique have a known or potential rate of error? (4) Is the theory or technique generally accepted in the relevant scientific community? For a deeper discussion, see Nayha Acharya, "Law's Treatment of Science: From Idealization to Understanding," in *Dalhousie Law Journal* 36, no. 1 (2013): 1–38; Kathryn Campbell, "Expert Evidence from 'Social' Scientists: The Importance of Context and the Impact on Miscarriages of Justice," in *Canadian Criminal Law Review* 16, no. 1 (2011): 13–35.

26 Court Transcripts, Day 6, November 30, 2010: 121–25.

27 Court Transcripts, Day 11, December 9, 2019: 78.

28 A case in point is the April 2008 raid on a Fundamental Latter-day Saint community in Texas, wherein over 300 children were forcibly removed from their homes, separated from their parents, and made wards of the Department of Family Protection Services. See Martha Bradley-Evans, "The

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

amount of peer-reviewed research that existed at the time of the *Reference* from the perspective of polygamous Canadian women in Bountiful had been conducted almost exclusively by Professor Campbell. Her prior work for the Status of Women Canada resulted in an unusual invitation from women in Bountiful to come to their community to conduct research.[29] After receiving funding from the Social Sciences and Humanities Research Council of Canada (SSHRC), Professor Campbell employed qualitative interviews to produce data aimed at better understanding how the criminalization of polygamy interfaced with the embodied experience of rural polygamist women. The AG Canada, AGBC, and Stop Polygamy objected to Professor Campbell's qualification as an expert witness, and a *Voir Dire*, a trial within the larger trial, was conducted to determine whether Professor Campbell could provide evidentiary "expert" opinion. Professor Campbell was cross-examined about her academic pedigree, her experience as a qualitative researcher, and her research methodology within the community of Bountiful. After an intensive day of cross-examination and submissions, Chief Justice Bauman qualified Professor Campbell as an expert witness; the following day, she provided "expert" testimony that was subject to a second round of intensive cross-examination.

In court, experts provide opinion evidence that must be limited to their area of expertise and adhere to the rules of evidence;[30] yet as Mariana Valverde explains, "for lawyers social science means positivistic knowledge… [and the very act of swearing] to tell the whole truth and nothing but the truth" is completely contrary to the epistemological principles to which many qualitative researchers subscribe.[31] In the case of the *Reference*, the role of expert was to provide guidance and offer conceptualizations of harm that provide the illusion of moving beyond moral reasonings to empirical/scientific reasonings for state intervention into the sexual and familial choices of Canadian citizens. The cross-examination of Professor Campbell in the *Reference* and the submissions by the AG Canada, the AGBC, and Stop Polygamy articulating their objections to Professor Campbell's expert status illuminates how "rational [legal] knowledge is a power-sensitive conversation."[32] Valverde explains that, "social science, purportedly courted because it can inject useful 'facts' into the legal process, is through the legal process

Raids at Short Creek and Yearning for Zion Ranch," in Calder and Beaman, *Polygamy's Rights and Wrongs*, 196–214. Seven weeks later a unanimous ruling by three judges of the Third Court of Appeals in Austin revoked the state's custody of the children for a lack of evidence that they were in immediate danger of sexual or physical abuse. See Ralph Blumenthal, "Court Says Texas Illegally Seized Sect's Children," *New York Times*, May 23, 2008. https://www.nytimes.com/2008/05/23/us/23raid.html?ref=us. Further investigation revealed that the entire incident was set off by a prank phone call to a shelter in San Angelo. See "Did Rozita Swinton's call set off the FLDS raid?" Newsweek, July 25, 2008. https://www.newsweek.com/did-rozita-swintons-call-set-flds-raid-93057. Family reunification efforts required parents and children to submit to DNA testing. See Dan Frosch and Kirk Johnson, "Parents of Sect's Children Begin Submitting DNA for Texas Officials," *New York Times*, April 23, 2008. https://www.nytimes.com/2008/04/23/us/23raid.html?th&emc=th.

29 Court Transcript, Day 6, November 30, 2010: 7–8.

30 Campbell, "Expert Evidence," 16.

31 Mariana Valverde, "Social Facticity and the Law: Social Expert's Eyewitness Account of Law," *Social & Legal Studies* 5, no. 2 (1996): 208.

32 Donna Haraway, "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective," *Feminist Studies* 14, no. 3 (1988): 590.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

reduced to the status of mirror for law's narcissistic deliberations."[33] The AG Canada, AGBC, and Stop Polygamy challenged the validity of Professor Campbell's qualitative research. In contrast, the presumed infallibility of the quantitative data remained uncontested in the *Opinion*. Evidently, to undermine an expert witness, particularly one whose evidence contests widely held views and assumptions about sexuality, one only needs to undermine qualitative research itself. Professor Campbell's interdisciplinary deployment of qualitative methodology in her research on polygamy in Bountiful was artfully weaponized to disqualify and devalue her expert opinion, rendering silent the voices of women who did not see themselves as victims or in need of saving.[34]

The methodology deployed in judicial reviews of legislation such as the *Reference*, "establishes space for certain actors to perform on the discursive stage, inhibits others from participating, and renders silent the voices of those whose perspectives do not fit."[35] As Sara Mills states, "exclusion is, in essence, paradoxically, one of the most important ways in which discourse is produced."[36] Undermining qualitative research to exclude unrepentant polygamist women renders those who challenge the public's imagination of what good women ought to be a mere curiosity. The following three examples of the way in which qualitative methodology was inherently at odds with the legal production of "truth" in the *Reference* articulate the inherent incompatibility between legal truths and qualitative research(ers).

Example One: Who Can Lay Claim to the Title "Qualitative Researcher"?

A central focus in the effort to disqualify and undermine Professor Campbell's expert opinion was an insistence that she was not qualified as an expert in qualitative research methodologies; furthermore, the fact that she lacked such qualifications, including the completion of formalized qualitative training,

33 Valverde, "Social Facticity and the Law," 202.

34 Professor Campbell was ordered by the court to produce the written interview transcripts (redacted to prevent interviewee identification) to the Attorneys General of British Columbia and Canada, and to all parties listed in footnote 18, with the exception of REAL Women of Canada, under the conditions that the transcripts not be made public and were to be destroyed at the conclusion of the *Reference* and any subsequent appeals. During the *Voir Dire*, arguments were made by the Attorneys General and Stop Polygamy Now that Professor Campbell should not be qualified as an expert witness, but should tender her interview transcripts with 22 Bountiful women as evidence. It was unclear whether the Attorneys General wanted the transcripts to be included in the *Brandeis Brief*, a collection of over 300 books, journal articles, news articles, etc., or whether the interview transcripts were to be tendered as either sealed or as public evidence. Both Attorneys General argued that tendering the interview transcripts as evidence would give the women of Bountiful a voice in the *Reference*. Their respective submissions did not reflect on the ethical consideration of tendering interview transcripts that were never intended by the participants for public and legal consumption. The court ultimately qualified Professor Campbell as an expert witness, and the interview transcripts were never tendered as evidence. Court Transcripts, Day 6, November 30, 2010: 90, 100, 104–8, 110.

35 Nancy A. Naples engaged discourse analysis in consideration of US Congressional Hearings on welfare reform that led to the passage of the *Family Reform Act 1988*. See Nancy A. Naples, *Feminism and Method: Ethnography, Discourse Analysis, and Activist Research* (New York: Routledge, 2003), 112.

36 Sara Mills, *Discourse* (New York: Routledge 1997), 60.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

disqualified her as an expert witness on the larger question—namely, the interface between the practice of polygamy and the legal prohibition against polygamy.

> Counsel for the AGBC: Now my submission, My Lord, is not simply that Professor Campbell's evidence is not helpful. My submission goes further than that and suggests there's a *danger* to adducing it because its admission would be premised on the possession by Professor Campbell of an expertise she doesn't have in the area of qualitative research [emphasis added].[37]

The AGBC's position raises the following interesting question: by what standard can a professor (or any other social scientist) lay claim to the title *qualitative researcher*? Under cross-examination, Professor Campbell admitted to having no formal training in qualitative research methodologies as an undergraduate in history and a student of law in the 1990s. However, in terms of practical experience, she had participated in several qualitative research projects as a research assistant in both her undergraduate and graduate studies. Recognizing her limitations and the interdisciplinary nature of her research, Professor Campbell's funding application included a request for funds to hire a graduate student in Sociology to assist in the design of the interview strategies, techniques, and structure. A fourth-year undergraduate student highly recommended by colleagues and with practical fieldwork experience was ultimately hired. This student, in consultation with a professor of Sociology at McMaster University, conducted a literature review and wrote several memos detailing how legal scholars should carry out empirical research with women in religious communities hostile to the outside world.[38] This research yielded a peer-reviewed publication in the *Canadian Journal of Law and Society* that drew upon the available scholarship to explore methods for conducting reflexive research from a feminist viewpoint.[39]

In addition to the careful consideration given to methodological concerns prior to the formal commencement of research in Bountiful, Professor Campbell had taught graduate level methodology at McGill University Faculty of Law and served on the Montreal Children's Hospital Research Ethics Board, a role that included reviewing qualitative research proposals.[40] This brings us full circle to the question, when does experience in qualitative research become expertise? And how does the legal tactic of conflating an ambiguous threshold of qualitative expertise with expertise in a particular subject area (in this case, the interface between the practice of polygamy and the legal prohibitions of polygamy) reinforce power regimes that insist on silencing "othered" subjects?

Donna Haraway has argued that "the contestability of science as practice and culture galls the guardians of the old orthodoxy" who are "dismayed by the insistence that science is a cultural practice because that account makes ample room for a motley crew of interlopers to take part in shaping and unshaping what

37 Court Transcripts, Day 6, November 30, 2010: 106. The words "dangerous" and "danger" were frequently used in submissions by the Attorneys General regarding Professor Campbell's expert testimony. One cannot help but wonder who/what is in danger and what this danger consists of.

38 Court Transcripts, Day 6, November 30, 2010: 17–19.

39 Angela Campbell, "Wives' Tales: Reflecting on Research in Bountiful," *Canadian Journal of Law and Society* 23, no. 1–2 (2008): 121–41.

40 Court Transcripts, Day 6, November 30, 2010: 4, 14.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

will count as scientific knowledge."[41] Alluding to a mythological threshold that qualitative researchers must pass in order to be considered experts in their respective disciplines resonates as an exclusionary tactic that demonstrates how certain discourses claim to speak truth, and are consequently afforded power. As Carol Smart observes, law is a discursive field which disqualifies supposedly inferior knowledges:[42]

> This is not a simple reductive statement akin to "all law is man-made," rather it is intended to draw upon an understanding of how the constitution of law and the constitution of masculinity may overlap and share mutual resonances. The notion of phallogocentric discourse makes this overlap clear. […] knowledge is not neutral but produced under conditions of patriarchy.[43]

From legal precedent, Chief Justice Bauman ruled that formal academic credentials are not required for expert status and that those objecting to Professor Campbell's ability to provide expert opinion had not pointed to any particular exclusionary rule that would serve to exclude her.[44] Yet the objections to Professor Campbell's evidence appear to have swayed the Chief Justice when it came to deciding how much weight to assign it.

Example Two: Findings That Cannot Be Generalized Are Not Really Findings

> Counsel for Stop Polygamy Q: And I think you would agree with me based on what you have written and what you have said this morning that no qualified researcher, no matter how experienced, would be able to properly generalize from the narratives and quotes of the women you interviewed about what is actually taking place in Bountiful or about the attitudes of women there?[45]

The ability (or lack thereof) of qualitative data to be generalized to a broader population has long been a point of reflection amongst qualitative researchers. The legitimacy of social science—an emerging field of study in the early twentieth century—was predicated on its adherence to positivistic methodology and the quest for universal laws that could explain, predict, and control.[46] However, conversations within the social sciences have taken a more nuanced approach to thinking about generalizations, discerning more precise and rational representations and the ability to think about what types of generalizations are appropriate for any number of research questions.[47] In the *Reference*, the AG Canada, AGBC, and

41 Donna Haraway, *Modest_Witness@Second_Millenium.FemaleMan©_Meets_OncoMouse: Feminism and Technoscience* (New York & London: Routledge, 1997), 67.
42 Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989): 26.
43 Ibid., 86.
44 *Reference*, para 85–88.
45 Court Transcripts, Day 6, November 30, 2010: 45.
46 Steinar Kvale, "Ten Standard Objections to Qualitative Research Interviews," *Journal of Phenomenological Psychology* 25, no. 2 (1994): 164.
47 Staffan Larsson, "A Pluralist View of Generalization in Qualitative Research," *International Journal of Research & Method in Education* 32, no. 1 (2009): 26.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

Stop Polygamy made submissions that Professor Campbell should be excluded as an "expert" witness because the qualitative interviews she conducted with twenty-two women from Bountiful could not, they argued, be generalized. As articulated by the counsel for the AGBC, "given that Ms. Campbell herself agrees that as a matter of qualitative method you can't draw any generalizations beyond the 22, it's not simply not helpful to have her do so, but it's *dangerous* to suggest that you can in the context of an expert affidavit [emphasis added]."[48]

The cross-examination of Professor Campbell and the submissions by counsel reveal a crude understanding of generalization that conflates many types of generalization—internal, external, lower order, higher order, with transferability, universality, and validity.[49] Questions during cross-examination drew upon positivistic logics of generalization to undermine qualitative findings:[50]

> Q: So would you agree you are making a generalization there in the first few words, "it's possible that the women in Bountiful." You're generalizing to the women in Bountiful?
> A: Well, I'm saying that it's possible for them, yes.
> Q: But that's not based upon the qualitative research study you did because you can't generalize past the 22 women you looked at?
> A: Well, it is based on those studies, yes.
> Q: Right. So it's limited to the 22 women that you interviewed?
> A: So my direct conclusion, what I can say I was told for sure, is limited to the 22, but in terms of possibilities beyond that, right, I'm not saying that necessarily it happens, but there's a possibility that what is set out here is occurring.

The usefulness of both qualitative and quantitative data to generalize is primarily indicative of the research question at hand, and certain research questions demand a level of generalization that others do not. Staffan Larsson has sketched out two lines of inquiry that remove the necessity of making generalizations: 1) the ideographic study that contributes to a broader picture by filling a "hole"; and 2) studies meant to undermine universal "truths."[51] Professor Campbell's research with women in Bountiful was specifically designed to pursue a broader understanding of the embodied experiences of polygamist women in Bountiful. Although her intention may not have been to undermine a universal truth on polygamy, its retrospective application by the Amicus in the *Reference* certainly attempted to do so.

Relying on Larsson's metaphor of a jigsaw puzzle with missing pieces,[52] the criminalization of polygamy in Canada was a puzzle missing a piece of important data—namely the actual experiences of polygamist women in Bountiful absent

48 Court Transcripts, Day 6, November 30, 2010: 107.

49 Joseph A. Maxwell and Margaret Chmiel, "Generalization in and from Qualitative Analysis," in The SAGE Handbook of Qualitative Data Analysis, ed. Uwe Flick (Thousands Oak, CA: SAGE Publications).

50 Court Transcripts, Day 6, November 30, 2010: 61–62.

51 Larsson, "A Pluralist View of Generalization," 28–30.

52 Ibid., 28.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

speculation and conjecture. The prohibition on polygamy has historically been justified in Canada by its supposed harms to women and children, yet there was a dearth of academic literature on the actual embodied experiences of polygamous women in Canada. Professor Campbell's research was an ideographic study designed to gain a broader understanding of polygamy (in relation to its criminal prohibitions) in Canada. Her research question did not articulate the need to develop an "essentialist" understanding of polygamy that could be generalized to Canada's polygamist population, whatever that might be. Her findings and conclusions did meet the threshold of *moderatum generalizations*, which "resemble the modest, pragmatic generalizations drawn from personal experience which, by bringing a semblance of order and consistency to social interaction, make everyday life possible."[53] It would seem that Professor Campbell herself was unaware of the various types of generalization and how her research is and is not generalizable:[54]

> Q: Now, you agreed with Mr. Samuels [Stop Polygamy] that your research was not intended to be representative of a broader sample? This is your research at Bountiful?
> A: Yes, not generalizable.
> Q: And so not generalizable generally and not even generalizable with respect to the Blackmore side of the community?
> A: Yes, I would be careful before making such generalizations even within that faction of the group.

It is difficult to conceive of a methodology capable of creating data on polygamist women that could harvest a universal understanding of their experience. The task is further problematized without qualitative research—how would we even know what to ask? A more productive consideration of Professor Campbell's research within the *Reference* would be to ask: in what ways can it contribute to a "dialectical" understanding about polygamy that destabilizes narratives of harm? Melissa Freeman explains that the core assumption of dialectical thinking is to consider the "human consciousness, personal identity, cultural norms and beliefs" in relation to the "historical, structural, and material conditions of which they are an integral part."[55] Professor Campbell's research objective was to understand how the criminalization of polygamy interfaced with the embodied practice of polygamy for women in Bountiful. In this sense, criminalization and embodied experiences were impossible to disentangle and the legal project of acquiring an inherent "truth" of polygamy, through generalization, is largely misplaced and counterproductive.

The second type of study that makes "generalization claims" inappropriate are studies that undermine universal truths. As Larsson explains, "cases that break the rule, which are not in accordance with the available discourses, will do the job of

[53] Geoff Payne and Malcolm Williams, "Generalization in Qualitative Research," *Sociology* 39, no. 2 (2005): 296.
[54] Court Transcripts, Day 6, November 30, 2010: 60.
[55] Melissa Freeman, *Modes of Thinking for Qualitative Data Analysis* (New York: Routledge, 2017), 47.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

troubling or destabilizing the taken-for-granted."[56] The purposive activity at the heart of the *Reference* was to answer the question of whether or not polygamy was inherently harmful, and the Attorneys General presented their case in the form of a universal truth—that polygamy was inherently exploitative of and harmful to women, children, and society. The Amicus's use of Professor Campbell as an expert witness was to undermined this universal truth. Qualitative interviews conducted by Professor Campbell with women in Bountiful showed that, notwithstanding certain complications, polygamy is a meaningful and rewarding life choice for some—undermining the universal narrative of victimhood and harm. It matters not that the findings can or cannot be generalized to a larger population because the deviation undermines the universalism. Although the purposive activity of the *Reference* was to pass judgement on whether the harms of polygamy justified criminal restrictions to religious practice and non-dyadic family formations, the purposive activity of Professor Campbell's qualitative research was to gain a broader understanding of the embodied practice of (criminalized) polygamy in Bountiful. The idealization of positivistic research in the *Reference*, exposed through the cross-examination of Professor Campbell and the reasoning in the *Opinion*, reveals the uncomfortable conflation of (ill-defined) generalizable quantitative findings with universal truths in judicial projects.

Example Three: If You Have an Opinion, Your Science Is Flawed!

Contrary to long-established feminist arguments that all knowledge is situated knowledge, the myth of science, within the legal context, as a neutral arbiter of facts stubbornly persists. Donna Haraway has explained that the "separation of expert knowledge from mere opinion as the legitimating knowledge for ways of life, without appeal to transcendent authority or to abstract certainty of any kind, is a founding gesture of what we call modernity."[57] Within the context of the *Reference*, the Attorneys General sought to disqualify Professor Campbell as an expert witness due to her public advocacy for the decriminalization of polygamy. As counsel for AG Canada argued in the *Voir Dire*:[58]

> Paragraphs 63 to 74 deal with Professor Campbell's actions as an advocate both for giving voice to the women of Bountiful who are pro-polygamy in particular and also as an advocate for the decriminalization of polygamy. I won't purport to take you through all of these, but everything and up to [sic] the *National Post* and *Globe and Mail* articles as they were entered into evidence, My Lord, calls for the decriminalization of polygamy or supports it—expresses a positive support for it. And her perspective or opinion went so far as to creep into the interviews […] Professor Campbell explicitly went into her position that the decriminalization of polygamy is preferred, or put otherwise, that the criminalization of polygamy is without foundation in the actual interviews with the women from Bountiful that she was talking to about polygamy.

56 Larsson, "A Pluralist View of Generalization," 30.
57 Haraway, *Modest_Witness*, 24.
58 Court Transcripts, Day 6, November 30, 2010: 103–04.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

> Now, I mean, I'll leave it for my friends to go into about how much of a breach this is of the qualitative research methodology that is accepted in the field, but from the perspective of the court I think it also just adds to the unnecessary nature of her opinion evidence.

The AG Canada's submission is premised on the assumption that social research has no place in judicial inquiry if researchers have opinions, are honest with their research subjects about these opinions, and/or participate in public advocacy on social justice issues. This legal line of reasoning sharply contrasts with the feminist project of troubling subject/object dichotomies, dispelling myths of value-neutrality in science, and asserting the responsibility of researchers to move beyond data extraction to advocacy. Research is always a political act, as conscious decisions about "what to include, exclude, emphasize, and strive for" must be made.[59] In other words, what has become the bedrock of ethical feminist research praxis in the social sciences is inherently at odds with legal projects that invoke the supposed value-neutrality of science. Sandra Harding has argued that, for institutions such as law, which appropriate "science and knowledge for their own purposes, it is extremely valuable to be able to support the idea that ignoring the constitution of science within political desires, values, and interests will somehow increase the reliability of accounts of nature and social life."[60] Science can never be disassociated from the social circumstances of its construction, and the discursive tactics used in the legal arena to propagate the mythology of neutrality reveal law's ability to pass judgement on what is/is not legitimate knowledge and legitimate ways of knowing. Feminist and queer researchers employing qualitative methodology trouble the assemblages of researcher/researched, cultivating intimacies that "tear…apart the machinery of normative ethical regimes that delimit a full range of possibilities."[61] Feminist researchers believe they have an obligation not only to "explain human behavior but also to appraise the world about them, to offer criticism when appropriate, and to share their ideals for the future."[62] In fact, even C. Wright Mills acknowledged that a lifetime of studying and publishing is a moral and political act.[63]

Taking this line of reasoning one step further, it is necessary to consider not only the positionality and biases of the social scientists but the positionality of the Chief Justice (and legal counsel) as well. I often wonder about Chief Justice Bauman—how his life course intersected with the lives of polygamist women, and how, at the crossroads of this inequitable intersection, his institutionalized power afforded him the judicial role of justifying criminalized restrictions to sexual

---

59 Freeman, *Modes of Thinking for Qualitative Data Analysis*, 4.

60 Sandra Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (Ithaca, NY: Cornell University Press, 1991), 148.

61 Mathias Detamore, "Queer(y)ing the Ethics of Research Methods: Toward a Politics of Intimacy in Researcher/Researched Relations," in *Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research*, ed. Kath Browne and Catherine Nash (New York: Routledge, 2010), 170.

62 Kenneth J. Gergen, Ruthellen Josselson, and Mark Freeman, "The Promises of Qualitative Inquiry," *American Psychologist* 70, no. (2015): 4–5.

63 C. Wright Mills, *The Sociological Imagination*, Fortieth Anniversary Edition (Oxford: Oxford University Press, 1959): 79.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

autonomy and family formation. Didi Herman has argued that judges are nation-builders who actively engage in strategies of estrangement that define the boundaries of belonging.[64] In Canada, the *Reference* was part of an ongoing public conversation about family formations and the boundaries of inclusion/exclusion to marriage entitlements. In my mind's eye, I see Chief Justice Bauman sitting in his office contemplating the *Reference* and imagining an alternative life in which he is at liberty to have multiple conjugal partners. Did he imagine the possibility of concurrently having the safety and security of his long-term marriage *and* the added erotic energy of a new, second spouse? Did he imagine the reactions of his wife, children, and friends should he decide that the criminalization of polygamy was an unjust violation of *Charter* rights? And what about his work colleagues? How might his ruling result in a rethinking of monogamous ethics? Would his character come under attack? Would he become the subject of speculation were he to rule that polygamy might not be so harmful? I don't suppose he even considered the possibility of his wife choosing to have a second spouse—after all, he was adamant in his *Opinion* that such a scenario was virtually non-existent.[65] His ability to consider multi-party unions from any frame of reference that subverts an androcentric Christian bias was non-existent. In the drama of the *Reference*, the State is, indeed, a man.[66] Patriarchy, presumed to be virtuous, gets performed in the character of legal authority, revealing how the "constitution of law and the constitution of masculinity overlap and share mutual resonances."[67] Zainab Batul Naqvi's deployment of a post-colonial feminist lens exposed the judicial discourse on polygamy in the United Kingdom as racist, imperialist, and Orientalist—hallmarks that feature prominently throughout the *Reference* and in Chief Justice Bauman's final *Opinion*.[68] Relations of power are exposed in the *Reference*, when the positionality of feminist research is problematized without a corresponding investigation into the positionality of the Chief Justice, who was imbued with the institutional power to write an *Opinion* in support of the curtailment of religious practice, free association, and sexual autonomy.

Benevolent Patriarchy

Artist Titus Kaphar's painting, entitled *Behind the Myth of Benevolence*, was inspired by a conversation he had with a history teacher who described Thomas Jefferson's ownership of slaves as benevolent slavery.[69] In the painting, behind a

64 Didi Herman, "'An Unfortunate Coincidence': Jews and Jewishness in English Judicial Discourse," *Journal of Law and Society* 33, no. 2 (2006): 282.

65 *Reference*, para 486.

66 Audra Simpson, "The State is a Man: Theresa Spence, Loretta Saunders and the Gender of Settler Sovereignty," *Theory & Event* 19, no. 4 (2016): para 6.

67 Smart, *Feminism and the Power of Law*, 86.

68 Zainab Batul Naqvi, "A Contextualised Historical Account of Changing Judicial Attitudes to Polygamous Marriage in the English Courts," *International Journal of Law in Context* 13, no. 3 (2017): 414; Joanna Sweet, "Equality, Democracy, Monogamy: Discourses of Canadian Nation Building in the 2010–2011 British Columbia Polygamy Reference," *Canadian Journal of Law and Society* 28, no. 4 (2013): 1–19.

69 Titus Kaphar, *Behind the Myth of Benevolence*, oil on canvas, 59 x 34 x 7, (2014), Collection of Guillermo Nicolas and Jim Foster. Digital image retrieved from: https://kapharstudio.com/behind-the-myth-of-benevolence/; Krista Tippet, "Annette Gordon-Reed and Titus Kaphar – Are We

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

peeled-back portrait of Jefferson is a second portrait—an intimate painting of a Black woman (presumably enslaved?) whose gaze locks with the observer, commanding a dismantling of the notion that the ownership of others can in any way be benevolent. *Behind the Myth of Benevolence* petitions a rethinking of historic narratives that obscure the indignities of oppression through the cloak of benevolence. Although Kaphar's body of work is largely a commentary on racial injustice in the United States (making the invisible visible), he provides a philosophical point of departure for considering other myths of benevolence. Within this framework, the *Reference* imposes one flavour of "benevolent" patriarchy—the institutions of law and Christian monogamous marriage—to counter a supposedly more harmful expression of patriarchy: polygamy. The *Reference* illustrates how social science methodology and the utilization of "expert" witnesses are inextricably entwined in the production of Western judicial "benevolent" patriarchy. The legal imperative to assess the *risk of harm* functions as a "versatile prop" within the theatrics of the legal drama. That is because, as Valverde notes, it introduces a "plurality of principles, values, and discourses in simultaneous deployment."[70] "Risk" allows "judicial discretion into the adjudication of harm. While actual harm requires empirical proof, virtually anything can be considered under the category of risk."[71] To negotiate this plurality, social scientists are invited into the legal arena as "expert" mediators of knowledge—"they use the leeway that exists between the production of knowledge and need for advice, between the uncertainty of scientific facts and need to take action."[72]

Judicial governance shares a common lineage with positivistic science. Both are products of modernity and, as such, are grounded in the faith of reason, rationality, and a process of discovery that culminates in a notion of ahistorical universal truth.[73] In the *Reference*, epistemic racism and sexism "buttress modern civilizational logics, which characterized non-Western people as closer to animality, as intellectually inferior, and as incapable of rationality,"[74] reaffirming "paternalistic regimes that endeavour to 'protect' women by limiting their freedom."[75] Although polygamy is a gender-neutral classification of all multi-party unions, limited only

Actually Citizens Here?" *On Being*, Podcast audio, July 4, 2019. https://onbeing.org/programs/annette-gordon-reed-and-titus-kaphar-are-we-actually-citizens-here/

70 Mariana Valverde, "The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law," *Social & Legal Studies* 8, no. 2 (1999): 184.

71 Ibid., 190.

72 Nico Stehr and Reiner Grundmann, *Experts: The Knowledge and Power of Expertise* (Abingdon, Oxon: Routledge, 2011): 118.

73 Enlightenment ideals, such as liberty, equality, rationalist systems of knowledge, consent of the governed, become foundational elements of modern political theory. For example, Baron de Montesquieu's *The Spirit of the Laws* (1748) employs a scientific approach to social, legal, and political system. See William Bristow, "Enlightenment," *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), ed. Edward N. Zalta, https://plato.stanford.edu/archives/fall2017/entries/enlightenment/, para 37; John Robertson, *The Enlightenment: A Very Short Introduction* (Oxford: Oxford University Press, 2015): 60–61.

74 Ramón Grosfoguel, as referenced in Jennifer A. Hamilton, Banu Subramaniam, and Angela Willey, "What Indians and Indians Can Teach Us about Colonization: Feminist Science and Technology Studies, Epistemological Imperialism, and the Politics of Difference," *Feminist Studies* 43, no. 3 (2017): 616.

75 Chris Bruckert, "Protection of Communities and Exploited Persons Act: Misogynistic Law Making in Action," *Canadian Journal of Law and Society* 30, no. 1 (2015): 3.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

by one's imagination, Chief Justice Bauman chose to conflate all polygamy with polygyny (one man with multiple wives), finding that the harms found in polygynous societies are not simply the product of individual misconduct but inevitably arise out of the practice itself.[76] In the paternalistic construction of harm, the justifications for sovereign control over sexuality and family formation, with specific focus on controls to legitimized female sexuality, was problematized by the voices of the very women whom the government sought to protect. Qualitative data on Bountiful's polygamist women, specifically the research of Professor Campbell, thwarted the simplistic narrative that polygamist women were victims who could be saved by swapping out one form of patriarchy in favour of a supposedly more benevolent kind. Chief Justice Bauman afforded this qualitative research little weight in his *Opinion*, demonstrating the court's naturalization of heteropaternalism and the "presumption that nuclear domestic arrangements should be the building blocks of the nation-state."[77] As he stated, "the Attorneys General have certainly demonstrated a reasoned apprehension of harm associated with polygyny. Indeed, they have cleared the higher bar; they have demonstrated 'concrete evidence' of harm."[78] It is somewhat perplexing how hypothetical harm could harden into "concrete evidence," based on speculation about the consequences of the decriminalization of multi-party conjugal unions in Canada. Chief Justice Bauman wrote in the *Opinion* that Professor Campbell's qualitative research was "sincere, but frankly somewhat naïve."[79] He was not willing to accept the claims of the women Professor Campbell interviewed "at face value,"[80] choosing to rely instead on commissioned quantitative research rooted in a functionalist framework to imagine potential harm to society.[81]

Lisa Duggan has argued that "sex panics, witch-hunts, and red scares are staples of Western history […] taken up by powerful groups in an effort to impose a rigid orthodoxy on the majority."[82] Sex is always political[83] and so is methodology, and these politics are magnified in the drama of law. By enabling and disabling particular types of inquiries and methodologies, policy, science, and legal discourse such as the *Reference* "imply a form of control and colonization of knowledge that sets in motion practices of methodological oversimplification, sacrificing complexity in the name of mechanicality."[84] As Gayle Rubin reminds us, the criminalization

---

[76] *Reference*, para 1045.

[77] Eve Tuck and Monique Guishard, "Uncollapsing Ethics: Racialized Sciencism, Settler Coloniality, and an Ethical Framework of Decolonial Participatory Action Research," in *Challenging Status Quo Retrenchment: New Directions in critical qualitative research*, ed. Trica M. Kress, Curry Malott, and Bradley J. Porfilio (Charlotte, NC: Information Age Publishing, 2013), 12.

[78] *Reference*, para 1044.

[79] Ibid., para 752.

[80] Ibid., para 757.

[81] Ashley, "Sincere but Naïve," 326–27; Mathen, "Reflecting Culture," 363–67.

[82] Lisa Duggan, "Sex Panics," in *Sex Wars: Sexual Dissent and Political Culture*, 10th anniversary edition, ed. Lisa Duggan, Lisa Hunter, and Nan D. Hunter (New York: Routledge, 1991): 72.

[83] Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in *Pleasure and Danger: Exploring Female Sexuality*, ed. Carole S. Vance (Boston: Routledge & Kegan Paul, 1984), 163.

[84] Mirka Koro-Ljungberg, *Reconceptualizing Qualitative Research: Methodologies Without Methodology* (Thousand Oaks, CA: Sage, 2016), 120.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

of multi-party conjugal unions, which share a common historic lineage with other innocuous behaviour, such as homosexuality, prostitution, and obscenity, has been rationalized by portraying them as menaces to "women, children, the national social fabric, the family, and civilization itself."[85] Like the equally troublesome Muslim woman who defies western gender norms, resists paternalistic veil-liberating efforts, and rebuffs demands to condemn and abandon her religion, the pesky polygamous (White) woman invokes considerable social anxiety and the deployment of the legal imperative of exclusion.[86]

Qualitative inquiry is "collaborative, multiple, tends to avoid closure, and already acknowledges her/histories, contexts and subjectivities… [and is] open to an always/already examination of changing relations of power."[87] Qualitative research, with its ongoing and evolving commitment to disrupting the ethos and ethics of positivistic research—through its itch to decolonize knowledge production, with its acceptance of messy, complicated, vexing, and joyous embodiment, with its irreverence of hierarchy, with its propensity to challenge our conceptions of what is and what is not research and how/if research should be communicated and shared—is not averse to challenging business as usual in the social sciences. However, within the power framework of legal institutions, "underlying law's incessant talk about adjudicating rights and wrongs lies a more fundamental silent process by which various philosophical claims, particularly epistemological ones, are adjudicated."[88]

The judicial field is the paradigmatic staging of the symbolic struggle where antagonistic world-views seek self-realization and the power to impose a universally recognized principle of social knowledge.[89] The *Reference* on polygamy maps the intersection of three colonial legacies—law as the mechanism of colonial conquest, science as its justification, and sexuality as a central domain of colonial imagination and intervention.[90] In the Canadian context, the criminalization of polygamy was most assuredly a colonizing gesture aimed at disrupting the marital traditions of Indigenous populations under policies of assimilation that kept Indigenous women under patriarchal control,[91] and the *Reference* was one moment within a larger judicial history revealing marriage to be a fluid technology of governance that is gendered, racialized, sexualized, and imbricated in settler

---

85 Rubin, "Thinking Sex," 163.

86 Lori Chambers and Jen Roth, "Prejudice Unveiled: The Niqab in Court," *Canadian Journal of Law and Society* 29, no. 3 (2014): 381–95; Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press, 2007): 237. Sherene H.Razack, "Imperiled Muslim Women, Dangerous Muslim Men, and Civilized Europeans: Legal and Social Responses to Forced Marriages," *Feminist Legal Studies* 12, no. 2 (2004).

87 Gaile S. Cannella, "Qualitative Research as Living Within/Transforming Complex Power Relations," *Qualitative Inquiry* 21, no. 7 (2015): 597.

88 Valverde, "Social Facticity and the Law," 206–07.

89 Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *The Hastings Law Journal* 38, no. 5 (1987): 837.

90 George Paul Meiu, "Colonialism and Sexuality," in *The International Encyclopedia of Human Sexuality (Vol. 1)*, ed. Patricia Whelehan and Anne Bolin (Oxford: John Wiley and Sons, Ltd, 2015): 239.

91 Carter, "*The Importance of Being Monogamous,*" 174–75.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press

colonialism.[92] Qualitative inquiry holds the possibility of understanding the lived experience of those who are "othered" in society and has the potential to disrupt larger conversations about what constitutes legitimate knowledge and who is a legitimate knower. Many qualitative inquiries are sensitive to ideals of "justice" contingent on an etymology of fairness, rules, and laws, and it seems a natural fit to seek remedial redress through legal apparatus. Yet the mingling of law and social science is troubling and should be approached with caution, as "law has its own method, its own testing ground, its own specialized language,"[93] exercising a power that easily disqualifies the experiences and knowledge of those who are "othered." The legal disempowerment of marginalized sexualities (and family formations) "enables the state to entrench its political power, and in doing so, sets up a vicious cycle of legal disenfranchisement."[94]

Unrepentant (White) polygamist women complicate the argument that rational women would never willingly consent to engage in polygamy; they complicate the racialization of polygamy; they complicate Western narratives of cultural progression that associate non-monogamy as a marker of the barbaric and uncivilized; and they complicate the notion that one type of patriarchy is more benevolent than other forms. Canadian law, as demonstrated in the *Reference*, remains firmly entrenched in a hegemonic patriarchal ordering of knowledge as fact—an ordering that exposes the inherent incompatibility of feminist knowledge production and the legal quest for universal truths.

Nerida Bullock, PhD Student
Department of Gender,
Sexuality and Women's Studies, Simon Fraser University
neridabullock@me.com

[92] Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000).

[93] Smart, *Feminism and the Power of Law*, 9.

[94] Kay Lalor, Arturo Sánchez García, and Elizabeth Mills, "How Useful is the Law for Attaining Sexual and Gender Justice?" in *Gender, Sexuality and Social Justice: What's Law Got to do With It?* ed. Kay Lalor, Elizabeth Mills, Arturo Sánchez García, and Polly Haste (Institute of Development Studies, 2016), 16.

https://doi.org/10.1017/cls.2020.24 Published online by Cambridge University Press