Equality, Democracy, Monogamy: Discourses of Canadian Nation Building in the 2010–2011 British Columbia Polygamy Reference

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Abstract

This article examines how the *2010-2011 Reference re s 293*, which considered the constitutionality of the polygamy prohibition, contributed to nation building discourses in Canada. A critical discourse analysis demonstrates that traditional views of monogamous marriage remain an important tenet of nation building in Canada. Discourses in the reference portrayed monogamous marriage as a central national institution and as a means of safeguarding women's equality rights. These discourses, in turn, had racialized consequences for defining Canadian national identity.

Keywords: polygamy, marriage, gender, race, culture, Canada, nation building

Résumé

Cet article examine comment la décision de la Cour suprême, citée dans le *2010-2011 Reference re : s 293*, qui déclarait constitutionnelles les dispositions du Code criminel interdisant la polygamie, a contribué aux discours canadiens relatifs à l'édification de la nation. Une analyse critique du discours démontre comment les points de vue traditionnels du mariage monogame demeurent un volet important de l'édification de la nation au Canada. Les discours dans le document de référence a présenté le mariage monogame comme une institution nationale centrale qui garantie les droits des femmes à l'égalité. Ces discours, à leur tour, ont eu des conséquences raciales envers l'élaboration de l'identité canadienne nationale.

Mots clés : polygamie, mariage, genre, race, culture, Canada, édification de la nation

In Canada, polygamy[1] has long been associated with the fundamentalist Mormons in Bountiful, British Columbia. The group's leaders, James Oler and Winston Blackmore, are openly polygamist. Winston Blackmore is rumoured to have over 25 wives and over 100 children. The group at Bountiful has been associated with

[1] "Polygamy" can be subdivided into "polygyny," the practice where one man takes several wives, and "polyandry," where one woman takes multiple husbands. Historically and cross-culturally, polygamy manifests itself almost exclusively as polygyny. This article uses the term "polygamy" to refer to both polygyny and polyandry.

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the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS),[2] which is based in the United States. The FLDS has received extensive media coverage in recent years with the 2008 raid on the Yearning for Zion Ranch in Eldorado, Texas, and the successful prosecution of the FLDS Prophet Warren Jeffs, who in August 2011 was convicted of two counts of felony child sexual assault and sentenced to life in prison. The FLDS is not the only group practicing polygamy; as seen on television shows such as *Big Love* and *Sister Wives*, there are also independent fundamentalist Mormon polygamist families living within the mainstream population. Polygamy is also practiced in some African and Middle Eastern cultures and is permitted according to some interpretations of Islam.

Polygamy is prohibited by section 293 of the *Canadian Criminal Code*, which states:

> *Polygamy*
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> 293. (1) Everyone who
>
> (a) practises or enters into or in any manner agrees or consents to practise or enter into
>
> (i) any form of polygamy, or
>
> (ii) any kind of conjugal union with more than one person at the same time,
>
> Whether or not it is by law recognized as a binding form of marriage, or
>
> (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
>
> *Evidence in case of polygamy*
>
> (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.

Between November 2010 and April 2011, the British Columbia Supreme Court (BCSC) heard a reference on the constitutionality of s 293. The reference stemmed from the decision of the Attorney General of British Columbia (AGBC)

[2] Fundamentalist Mormonism is not to be confused with the mainstream Mormon Church of Jesus Christ of Latter Day Saints (LDS), which rejects polygamy. Fundamentalist Mormons continue to believe that plural marriage is essential to enter into the highest level of glory in the afterlife. The FLDS is one sect of Fundamentalist Mormonism. In Canada, Winston Blackmore was the Bishop of Bountiful until he was excommunicated by FLDS leader Warren Jeffs and replaced by James Oler. Upon his excommunication, the Bountiful community split, with some members remaining loyal to Blackmore and others following Oler. The Blackmore faction at Bountiful is Fundamentalist but not presently FLDS.

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to not prosecute polygamy in Bountiful. The reference raised questions of whether the prohibition unjustifiably infringes on constitutional rights including the freedom of religion at s 2(a); the freedom of expression at s 2(b); the freedom of association at s 2(d); the right to life, liberty and security of the person at s 7; and the equality rights at s 15(1).

The arguments raised in the course of considering these legal questions demonstrate that there continues to be a significant relationship between marriage and nation building in Canada. The reference is part of a broader history where policies affecting who could marry, how they marry, and what legal rights flow from the marriage were used as a means of building and protecting Canada's "national character," and as such, had consequences for defining what it meant to be "Canadian." Although the nature of marriage has changed in Canada—for instance, through its redefinition to include same-sex marriage and an increasing proportion of common law relationships—marriage continues to have consequences for defining Canadian national identity. The way marriage affects relationships between men and women, and between married couples and the broader society, was central to the reference. The impact of marriage on "gender equality" and democracy were particularly salient issues, and these arguments had consequences for racialization and Canadian national belonging. This is demonstrated through a discourse analysis of the arguments presented in the reference by both those who challenged the provision and those who defended it.

Background to the Polygamy Reference

The reference comes in response to the ongoing question of how to best deal with "the problem of polygamy" in Bountiful. In 1990 and 1991, Bountiful was the subject of a 13-month RCMP investigation, which concluded with recommendations to charge prominent community members Dalmon Oler and Winston Blackmore. The Ministry of the Attorney General did not prosecute, however, as advice from lawyers within the Ministry suggested that the provision would likely be found unconstitutional. A second RCMP investigation took place in 2005. Following that investigation, Attorney General Wally Oppal ordered the appointment of a special prosecutor to determine whether charges should be laid. Richard Peck was appointed, and Peck recommended that s 293 be referred to the courts to determine its constitutionality. Oppal disagreed with this recommendation and appointed a second special prosecutor, Leonard Doust, who also recommended a reference. In 2009, Oppal appointed a third special prosecutor, Terrence Robertson, to examine whether charges should be laid in Bountiful.[3] Robertson recommended laying charges against James Oler and Winston Blackmore, and in January 2009, the men were each charged with one count of practicing polygamy contrary to s 293. These charges were ultimately quashed, however, when Madam Justice Sunni Stromberg-Stein denied Robertson's appointment as special

[3] "Third Prosecutor Named to Investigate Polygamy in Bountiful, BC," *CBC News,* Monday, June 2, 2008, http://www.cbc.ca/news/canada/british-columbia/story/2008/06/02/bc-080602-bountiful-prosecutor-roberts.html.

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prosecutor in September of that year. She found that Oppal did not have authority to appoint a new special prosecutor when Doust returned a recommendation with which Oppal disagreed. She stated that the AGBC had improperly gone "special prosecutor shopping" for someone who was willing to prosecute polygamy. Oppal was obliged to take Doust's recommendations, and the BC government proceeded with the reference.

In October 2009, the AGBC announced that the Ministry of the Attorney General had asked the BCSC for an opinion on two questions regarding s 293:

> 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?

Chief Justice Robert J. Bauman of the BCSC appointed George MacIntosh, a litigator with the law firm Farris, Vaughn, Wills and Murphy in Vancouver, to act as Amicus to the court. An Amicus is a "friend of the court," and in this case, an uninterested party appointed to challenge the provision in the strongest possible terms. If this had been a prosecution, the persons charged with practicing polygamy contrary to s 293 would have challenged the constitutionality of the provision. Since it was a reference, this task fell to the Amicus. He argued that the provision violated sections 2(a), 2(d), 7, and 15(1) of the *Canadian Charter of Rights and Freedoms*.[4] The AGBC and the Attorney General of Canada (AGC) defended the provision. Additionally, several groups were granted interested person status, which allowed them to call evidence and make submissions to the court. Seven interested persons joined the Attorneys General in defending the provision,[5] and four joined the Amicus, including the FLDS and James Oler. [6]

In the case, polygamy in Canada was portrayed almost exclusively with reference to fundamentalist Mormonism and focused primarily on the FLDS living in Bountiful, BC. Fundamentalist Mormon polygamy is the best-documented and most well-known form in the North American context, and was thus at the centre of the reference. The focus on the FLDS reflects the historical context of the

[4] The CPAA and FLDS additionally argued that the provision violated s 2(b) of the *Charter*.

[5] Seven groups with interested person status joined the AGBC and AGC in defending the provision: Beyond Borders, the British Columbia's Teachers' Federation (BCTF), the Canadian Coalition for the Rights of Children & the David Asper Centre for Constitutional Rights (CCRC/DACCR), the Christian Legal Fellowship (CLF), REAL Women of Canada, Stop Polygamy in Canada (SPC), and the West Coast Women's Legal Education and Action Fund (West Coast LEAF) ("the defenders").

[6] The Amicus Curiae was joined by four groups with interested person status: the Fundamentalist Church of Jesus Christ of Latter Day Saints and James Oler, the Canadian Association for Free Expression (CAFE), the Canadian Polyamory Advocacy Association (CPAA), and the British Columbia Civil Liberties Association (BCCLA) ("the challengers"). Winston Blackmore's faction did not participate in the reference.

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polygamy provision. Polygamy came to the attention of Canadian legislators after the immigration of Mormons from the United States, and Canada's response reflected the American experience. The polygamy prohibitions in the United States resulted from continuous political struggles between the growing LDS Church and the American government. There had been violent conflicts between the LDS and their non-Mormon neighbours in Missouri (1838), Illinois (1844–1845), and Utah (1857–1858), and Mormons were perceived as threatening because of their increasing numbers and ability to vote "en bloc."[7]

Polygamy was made public by Brigham Young in 1852, and the American government subsequently passed three separate acts prohibiting the practice: the *Morrill Anti-Bigamy Act* in 1862, the *Edmunds Act* in 1882, and the *Edmunds-Tucker Act* in 1887. Those convicted of polygamy generally faced incarceration and a loss of political rights. The *Edmunds-Tucker Act* also targeted the LDS Church itself by un-incorporating the Church and seizing its property and assets over $50,000. The American government demanded that the practice of polygamy cease as a condition for granting statehood status to Utah, and in 1890, LDS Church President Wilford Woodruff issued a manifesto prohibiting plural marriage. The political pressure on the LDS at the time that the manifesto was issued led followers of fundamentalist Mormonism to conclude that the manifestowas not a true revelation but signified the submission of the LDS to the United States government.

The prosecution of Mormon polygamists in the mid- and late-1800s prompted Mormon immigration to Mexico and Canada. Charles Ora Card founded the first Mormon settlement in Canada, in Cardston, Alberta, in 1887. Card faced prosecution in the United States for polygamy. He considered immigrating to Mexico but was urged by Church President John Taylor to lead an expedition to Canada instead. Card came to Canada accompanied by one of his wives and a few other people.[8] A year later, a delegation of Mormon leaders met with Prime Minister John A. Macdonald and Justice Minister John Thompson and asked whether they could bring their polygamous families to Canada. The Canadian government welcomed them, recognizing that Mormons wanted to come to Canada in part to escape the prejudice that existed in the United States. However, the government refused to allow the practice of polygamy within Canada's borders, and the Mormons were told that they were welcome insofar as they agreed to abide by Canadian law.[9]

Canada did not have a criminal provision prohibiting polygamy at this time. The first legislative provision addressing polygamy was introduced in an 1890 Senate bill, *An Act to amend 'An Act respecting Offences relating to the Law of Marriage.'* This bill proposed criminalizing polygamy with a sanction of two years in prison, a fine of five hundred dollars, or both. The act limited the political rights

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7 Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill, NC: University of North Carolina Press, 2002), 24–25.

8 John C. Lehr, "Polygamy, Patrimony and Prophecy: The Mormon Colonization of Cardston" *Dialogue: A Journal of Mormon Thought* 21 (1988): 114–21.

9 House of Commons Debates (April 10, 1890) at 5180.

of those convicted of polygamy by preventing them from being a candidate or voting in an election in the House of Commons or in the Legislative Assembly of the North West Territories; serving as a juror in the North West Territories; holding any public or municipal office in the North West Territories. Macdonald referred to this bill as part of a strategy to prevent Mormon settlement, and therefore polygamy, in Canada:

> If there are Mormons in the North-West Territories, wherever they settle they will practise the tenets and customs of their sect. It is, therefore, necessary and wise that we should at once prevent the spread of this canker in our country."[10]

The bill was ultimately withdrawn in February 1890, upon the introduction of a criminal law amendment bill that also created a polygamy offence. In this new bill, the crime of polygamy was punishable by imprisonment for a five-year term and a fine of five hundred dollars, but the provisions which took away the political rights of those convicted of the crime were removed. The provision was incorporated into the *Criminal Code, 1892*, s 278 as follows:

> 278. Everyone is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars, who—
> (a) practices, 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 another 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; [or]
> (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.

The 1892 provision was moved within the *Code,* but its wording largely remained constant until 1954, when the *Criminal Code* was revised. The provision was then amended and the reference to "Mormon spiritual marriage" was removed. The amendment was meant to simplify the provision, not to change the elements of the offence.

There have been very few polygamy prosecutions under the *Criminal Code*. Of the few cases considering the polygamy provision in the late 1800s and early 1900s, most dealt with situations of adultery, where either a married person was openly cohabiting with someone other than his or her spouse, or where two people were openly cohabiting together outside of marriage. In these cases, the courts generally found that mere cohabitation, in the absence of some form of contract between the parties binding on them, was outside the scope of the provision

[10] Debates of the Senate (February 20, 1890) at 112.

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(*R v Labrie*[11]; see also *Dionne v Pepin*[12] and *R v Tolhurst and Wright*[13]). There were only two reported successful polygamy prosecutions: *The King v John Harris* (1906),[14] where Harris held the woman with whom he was living out as his wife within his community, and *The Queen v Bear's Shin Bone* (1899),[15] where an indigenous man was convicted of polygamy for being married to two women simultaneously.

For all the fear of Mormon polygamy, neither of these polygamy convictions involved Mormons. This is at least partly because, by and large, polygamy was not known to be practiced among fundamentalist Mormons in Canada until 1946, when Harold Blackmore bought land in Lister, BC and established the community that is today known as Bountiful. Blackmore was a devout Mormon who converted to fundamentalism and later married polygamously. The Blackmores, along with a few other fundamentalist Mormon families in Lister, aligned themselves with the FLDS in the United States. The focus on the FLDS in Bountiful ultimately led to the 2010–2011 reference.

Marriage, Canadian National Belonging, and Racialization

National belonging in Canada is defined, in part, through deliberations around national values and their limits. In this case, the value of religious freedom was often juxtaposed with the value of gender equality. Part of this debate focused specifically on gender equality within the context of marriage and the harms of polygamous marriage to women. It also engaged harms to broader society through arguments that monogamous marriage was important in stemming criminal tendencies in men and that it also correlated to democratic government.

Part of the Amicus's argument that the provision should be found unconstitutional was that it was influenced by American prohibitions that were enacted in the 1800s to in part punish Mormons for "race treason." Polygamy was seen as "race treason" because it was viewed as unnatural for "white people" and was perceived as threatening to the racial order of the American nation. As in the United States, national belonging in Canada has had racialized dimensions, evidenced, for instance, in the subjugation of indigenous peoples and immigration policies that have explicitly favoured British and Western European immigrants. This racialized nation building is also illustrated by statements such as those of Sir John A. Macdonald, who argued that immigration should be restricted to "whites":

> If you look around the world, you will see that the Aryan races will not wholesomely amalgamate with the Africans or the Asiatics. It is not desired that they should come; that we should have a mongrel race; that the Aryan character of the future of British America should be destroyed by a cross or crosses of that kind.[16]

The suggestion that the reference engaged the concept of "race" may seem counterintuitive, given that the FLDS would generally be recognized as "white." Its

11 *R v Labrie* (1891), 7 MLRQB 211 (Que CA).
12 *Dionne v Pepin* (1934), 72 CS 393 (Que SC).
13 *R v Tolhurst and Wright* (1937), 38 CCC 319 (Ont CA).
14 *The King v John Harris* (1906), 11 CCC 254 (Que).
15 *The Queen v Bear's Shin Bone* (1899), 4 Terr LR 173 (NWTSC).
16 House of Commons Debates (May 4, 1885) at 1589.

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members are generally of British and Western European descent, and the religion has American roots. Historically, ideology within the Church itself has emphasized the group's "whiteness." For example, at the time of the original prohibitions against polygamy, Mormon theology taught that indigenous peoples of North America were once white but were "cursed" with dark skin because of disobedience.[17] They could be turned back into a "fair and delightsome people" by receiving the Mormon gospel. More specifically, they were to become "white" through marriage.[18] From the perspective of "colour-racism," which focuses on skin colour, and from their own teachings, the FLDS are "white." Yet critical studies of whiteness explains that skin colour is only one component of racism. Sara Ahmed's understanding of "whiteness" as "an ongoing and unfinished history, which orientates bodies in specific directions, affecting how they 'take up' space"[19] explains whiteness as process. As such, it cannot be taken for granted. Whiteness is not intrinsically connected to a particular group of people, nor does it simply refer to a skin tone; rather, it is a process that affects an individual's potential, mobility, and belonging. This opens up ways to question how different groups might experience "whiteness" differently. Ahmed's understanding can take into account historical cases demonstrating that skin colour and "race" are not always linked. The experience of the Irish, Italian, and Jewish people, whose "race" shifted from being "non-white" upon their arrival in the United States to being generally considered "white" today illustrates the procedural and arbitrary nature of whiteness. The "white" skin of members of the FLDS does not automatically preclude processes of racialization.

Martha Ertman, Christine Talbot, and Margarete Denike have demonstrated that Mormons experienced racialization in the nineteenth century during debates over polygamy in the United States. The racialization of Mormon polygamy was accomplished, in part, by likening Mormons and polygamy to peoples and practices from the "barbaric" East.[20] Talbot warns that applying the concept of Orientalism to the Mormon experience in the United States must be done with caution, because it transplants the concept from its origins in the colonization of the East. Mormons are not a colonized people, but the concept was used to liken Mormons to the East in part to help explain away their unequivocally white, American roots.[21] Denike observes:

> From the moment that the exclusively white members of the Church came to the defense of polygamy, it was incessantly analogized to "Mohamedism" (as a form of false prophecy that has led entire races astray) as it was to the sexual excesses of Middle Eastern "harems."[22]

For example, Benjamin Farris, a US territorial official, asserted that polygamy "belongs now to the indolent and opium-eating Turks and Asiatic, the miserable

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17 Book of Mormon, 2 Nephi 21.
18 Lawrence Foster, *Religion and Sexuality: The Shakers, the Mormons, and the Oneida Community* (New York: Oxford University Press, 1984), 135.
19 Sara Ahmed, "A Phenomenology of Whiteness," *Feminist Theory* 8:2 (2007): 149, 150.
20 Christine Talbot, "Turkey in our Midst," *Journal of Law and Family Studies* 8 (2006): 363.
21 Ibid., 370–72.
22 Margaret Denike, "The Racialization of White Man's Polygamy," *Hypatia* 25(4) (2010): 852 at 863–64.

Africans, the North American savages, and the latter-day saints."[23] Such comparisons also occurred in the country's highest court. In *Reynolds v United States,* the Supreme Court of the United States stated:

> Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."[24]

Polygamy also engaged discourses of "race treason" and was associated with "miscegenation." Ertman shows the widespread racialization of Mormons through a perceived link between polygamy and racial degeneracy. She demonstrates that political cartoons, for instance, framed Mormons as black and Oriental.[25] The "backwards" "Asiatic and African people" who practiced polygamy were described as "despotic," while the Europeans were "civilized" and "democratic." Polygamy was linked to despotism, and monogamy with civilization and democracy. Polygamy was one of the "twin relics of barbarism" that politicians pledged to exterminate from the country. The other was slavery.[26] At this time, both polygamy and slavery were seen to be "natural" to "savage races" but "unnatural" for "civilized" people.[27] Polygamy was seen as both a mark of "less civilized" cultures and a proof of European superiority. The very presence of Mormon polygamy, it was said, took "the whole race . . . in its downward direction."[28] The Canadian response to Mormon immigration in the late 1800s was influenced by the American experience. The polygamy provision reflects this history.

The desire to build a white, Christian nation was also reflected in policies affecting families. Sarah Carter has demonstrated that the traditional model of the patriarchal, white, heterosexual, monogamous family was crucial to nation building and was reinforced in the policies governing the settlement of Western Canada. These policies included prohibiting polygamy, not only among Mormon immigrants, but also among indigenous groups.[29]

The importance of the traditional model of patriarchal, heterosexual, monogamous marriage and the attendant "benefits" for women and society at large implicated gender in the nation building project. Popular culture linked polygamy to slavery and oppression of women. Monogamous marriage, on the other hand, was portrayed as protecting women's equality. Carter observes that monogamous marriage at the end of the nineteenth century was presented as "the key to the liberty, happiness and power that Christian, European and North American white women allegedly enjoyed."[30]

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23 Martha Ertman, "Race Treason: The Untold Story of America's Ban on Polygamy," *The Columbia Journal of Gender and Law* 19:2 (2010): 287, 314.
24 *Reynolds v United States*, 98 US 145 (1878), 164.
25 Ertman, 318–19.
26 Ibid.
27 Denike, 856.
28 Francis Lieber, "The Mormons: Shall Utah be admitted into the union?" *Putman's Monthly* 5 (27) (1855), 10fn, quoted in Denike, 862.
29 Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008), 206.
30 Carter, 27.

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The notion of gender equality and harms to women were also central to the 2010–2011 reference. Canada prides itself on a commitment not only to gender equality but also to multiculturalism and religious freedom. The way in which a cultural or religious tradition is seen to interact with "gender equality" can be crucial to its acceptance or rejection. It can demarcate those practices that are recognized as "validly Canadian" and those that fall outside "Canadian values." It can also have a racializing effect when stereotypes of "East" and "West" act as a "colour line" dividing religious women who are portrayed as backwards and oppressed from their modern, liberal, educated, "white" counterparts.[31] Sherene Razack and Natasha Bakht[32] have observed these processes at work in faith-based arbitration debates in Ontario that focus primarily on Muslim family law arbitration. Similar processes were at work in the 2010–2011 reference when discourse implicitly engaged with or relied upon Orientalized assumptions. While "race" was not central to the reference, echoes of the racialized rhetoric around the prohibition of Mormon polygamy were heard in discourse that engaged stereotypes of the "civilized" West and the "backwards," "barbaric" East. This discourse was evident in some of the argumentation concerning the harms to women caused by polygamy and the need to preserve democracy through monogamous marriage.

Establishing the harms of polygamous marriage was a central task of all parties to the reference. The follow subsections focus on two of the harms that were identified: harms to women and harms to democracy.

Harms to Women

Both the challengers and the defenders were concerned with the potential harms to women in polygamous relationships. The evidence of harm came almost exclusively from fundamentalist Mormonism and primarily from the FLDS context. The Attorneys General attempted to use this evidence to illustrate the harms of polygamy generally. AGBC counsel Craig Jones argued, "The harms documented at Bountiful are the perfectly predictable—indeed the inevitable—consequences of a polygamous society . . . *Bountiful did not create polygamy. Polygamy created Bountiful.*"[33] Yet the almost singular focus on fundamentalist Mormonism made it difficult to ascertain whether the harms identified by the challengers stemmed from polygamy itself or whether they stemmed from the practices and ideology of this particular religious group. It also had the effect of singling out fundamentalist Mormon cultural practices.

For example, while some cross-examination focused on the harms to women that were thought to arise from polygamy, such as the age at which the witness was married or the question of who initiated the marriage, some lines of questioning focused on FLDS culture. For instance, counsel for

[31] Sherene Razack, "The Sharia Law Debate in Ontario: The Modernity/Pre-Modernity Distinction In Legal Effort to Protect Women From Culture" *Feminist Legal Studies* 15:3 (2007): 5–6.

[32] Natasha Bakht, "Religious Arbitration in Canada: Protecting Women by Protecting Them From Religion" *Canadian Journal of Women and the Law* 19:1 (2007): 119.

[33] Draft Transcripts (November 22, 2010), 50 line 25, and 51 line 1. Emphasis Mine.

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the AGBC asked FLDS Anonymous Witness No. 2 about the FLDS style of dress:

> Q.: The people in your community believe it's important to cover your body; is that correct?
>
> A.: Yes.
>
> Q.: And you wear clothes that are different from the people outside of your community?
>
> A: Yes.
>
> Q. You are required to wear long underwear?
>
> A. It is [*sic*] been a suggestion to us, not everyone does.
>
> Q. And the men wear shirts and pants that cover their body?
>
> A. Yes.
>
> Q. And the women don't wear pants is that right?
>
> A. For the most part, no.
>
> Q. They wear long dresses with long sleeves?
>
> A. Yes.
>
> Q. And have you ever been swimming in the creek?
>
> A. Yes. Yes, I have.
>
> Q. And some of your brothers and sisters swam in the creek as well?
>
> A. Yes.
>
> Q. And when you swam in the creek were you required to swim with all of your clothes on?
>
> A. We do swim with our clothes on, yes.[34]

The FLDS choice of clothing is not relevant to polygamy unless one accepts that polygamy created FLDS culture. This may have been the intention; after all, AGBC counsel Jones asserted, "Polygamy created Bountiful." But there are many polygamous cultures in the world with different customs. The AGBC would likely argue that polygamous cultures are all oppressive to women, but very little evidence was presented in the reference as to the experiences of women in other polygamous contexts. There were only two affidavits submitted on Muslim polygamy; otherwise, Muslim polygamy was not explored in any great detail. The affidavit of Alia Hogben explained that Islam allows polygyny in some circumstances, that there are at some Muslim polygynous marriages in Canada, and that some of these women report that the marriages were not consensual. The affidavit of Dena Hassouneh described her study, which documented some of the harms of polygamous marriage to Muslim women in the United States. There was some Brandeis Brief evidence as to harms to women in Bedouin and African contexts, but this was also left largely unexplored in affidavit and oral testimony.

[34] Draft Transcripts (January 25, 2011), 33.

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The testimony presented by former FLDS women shows that certainly some women have suffered emotional, physical, and sexual abuse, and have been forced into unwanted marriages. The AGBC presented testimony from former FLDS members who described the abuses they suffered in their polygamous marriages, and affiants testified to being sexually abused and forced into marriage. Women explained that they were expected to be obedient to their husband and to the religious leadership, and were urged to have as many children as possible, despite health concerns.[35] Former FLDS member Jorjina Broadbent described women being taught to "keep sweet," which, she explained meant "to be submissive and obedient and give ourselves to our husband. And we have no opinion we're not supposed to have a choice in anything just do as our husband [says]."[36] The AGBC also demonstrated harms to women and children through statistics showing that girls in Bountiful were more likely to become pregnant at younger ages than in British Columbia overall. He presented evidence of at least eight cross-border marriages involving girls, all under the age of eighteen and one as young as twelve.[37] These marriages involved girls from Bountiful being taken to the United States to be married. Other forms of child abuse were described; for instance, Carolyn Jessop testified to the practice of "obedience training," which involves submerging crying babies in water and suffocating them until they are so exhausted that they become quiet.[38] The defenders located harm in the creation of the relationships by calling into question a woman's choice to enter a polygamous marriage and the quality of her consent. The FLDS practice a form of arranged marriage called "placement marriage," and the extent to which women are able to decline placement marriages is widely questioned.

The challengers acknowledged that some polygamous relationships are abusive, but they rejected the proposition that polygamy was the source of those harms. Some women from the FLDS and fundamentalist Mormon communities testified to having consented to their marriages and to being happy with their lives. Marianne Watson, a fundamentalist Mormon, testified to her "rich, warm childhood" in a polygamous family. She testified to choosing polygamous marriage when she "noticed big differences" between the polygamous women in her family and the monogamous mothers and grandmothers of friends in the LDS Church. She desired to live a life like these women, whom she admired.[39] Similarly, FLDS Witness No. 1, who married her husband at age sixteen, submitted:

> My husband was a wonderful man, and his wife was my best friend and greatest support in our life together. We had a great time together, and always went everywhere possible together. (All of us and our three children). I loved her and she loved me and both of us loved our husband, who certainly loved us in return.[40]

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35 See, for instance, the testimony of Carolyn Jessop, Draft Transcript (January 12, 2011), 26–27.
36 Testimony of Jorjina Broadbent, Draft Transcript (January 7, 2011), 48 line 39 to 49 line 2.
37 Affidavit No. 3 of Leah Greathead (February 23, 2011), 2.
38 Testimony of Carolyn Jessop, Draft Transcript (January 12, 2011), 48.
39 Affidavit No. 1 of Marianne T. Watson (October 15, 2010), 5–6.
40 Affidavit No. 1 of Witness No. 1 (October 15, 2010) at para 7.

The evidence that some fundamentalist Mormon women choose polygamy was supported by one of the Amicus's expert witnesses, Angela Campbell, Professor of Law at McGill University. Campbell interviewed women from Winston Blackmore's faction in Bountiful. Some women asserted that they had chosen their polygamous marriages. The AGC raised the idea that, although Campbell did not go through male leadership in the community in order to set up the interviews, male leaders may have been told about the impending project, and that certain women may have been urged to speak with Campbell, which would have influenced the types of responses given in the interviews.[41]

Questioning the veracity of testimony on the grounds that it gave a positive account of polygamy perpetuated the assumption that all women were being coerced into giving these accounts. Any assertion to the contrary was viewed with suspicion. FLDS women were sensitive to being characterized as oppressed by the men in their community and unable to make real choices about their own lives. FLDS Witness No. 13 submitted, "I am not sheltered and I have access to information and people outside of the FLDS community. I am happy with my life and I wish to be left alone to live in accordance with my beliefs."[42]

While it is possible that the women were coerced into saying that they chose polygamy freely, whether they were in fact coerced is impossible to determine. It is reasonable to assume that some women in the fundamentalist Mormon community are forced to enter into polygamy; others may agree to unwanted polygamous marriages because they are faced with the difficult choice of marrying or leaving their community, families, and perhaps abandoning their religious beliefs; and some women will truly choose to marry polygamously. While enculturation undoubtedly plays a role in many polygamous marriages, it is problematic to suggest that enculturation vitiates true consent. From a legal perspective, whether individual women actually chose to enter a polygamous marriage may be irrelevant. One can allow for the possibility that some fundamentalist Mormon women choose polygamous marriage and nonetheless decide that polygamy cannot be legally recognized. It is possible to treat certain activities as crimes even if the identified harms associated with the activity do not occur to all participants in every instance. This was established by the Supreme Court in *R v Malmo-Levine*,[43] which considered the criminal prohibition of marijuana use. From a constitutional standpoint, "harm" is not determinative of the constitutionality of a criminal law. Justices Gonthier and Binnie stated that "there is no consensus that tangible harm to others is a necessary precondition to the creation of a criminal law offence."[44] A reasonable harm was sufficient. This was also the case in *R v CFJ*,[45] which involved a consensual incestuous relationship between adults. Although the participants claimed that no harm came to them in this case, the Nova Scotia Court of Appeal found that the restrictions imposed by the provision furthered

41 Draft Transcript (December 01, 2010), 56–60.
42 Affidavit No. 1 of Witness No. 13 (October 15, 2010) at para 15.
43 *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571 ("*Malmo-Levine*").
44 *Malmo-Levine* at para 126.
45 *R v CJF* (1996), 149 NSR (2d) 91, 105 CCC (3d) 435 (NS CA).

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the societal objective of "preserving the integrity of the family, prevention of genetic defects and the protection of vulnerable family members."[46]

Parliament can criminalize behaviour that is "deeply offensive" to society. The court cites the crimes of bestiality and cruelty to animals as "examples of crimes that rest on their offensiveness to deeply held social values."[47] In *Malmo-Levine*, the court found that criminal law can prohibit conduct that results in "society's collective disapproval" of the activity in question. From a discursive perspective, characterizing fundamentalist Mormon women who believe in polygamy as brainwashed problematically creates a situation where the action of agreeing to polygamy comes to be viewed, in and of itself, as evidence of oppression and coercion. It creates a binary characterization of fundamentalist Mormon women; either they must reject polygamy or they are oppressed. This is a recurring theme in debates that focus on gender and culture, and which juxtapose the "uneducated," "oppressed" woman (whether by function of her religion or culture) with the "liberal," "educated," "free" Western woman. In such discourses, it is rarely questioned whether women from the majority population are "brainwashed" by their culture. For example, there was no question in the reference as to whether "mainstream" Canadian women are brainwashed into thinking that monogamous, heterosexual marriages are the best choices or that they lead to gender equality. Rather, their "civilized" lifestyles are taken as the template that will help to "save" the "oppressed" and "uneducated" women from their culture and religion.

The concern of harms to women in polygamous relationships did not extend to women in multi-partner relationships characterized as polyamorous. The Canadian Polyamory Advocacy Association (CPAA) was the only other group that presented evidence from individuals in multi-partner relationships. Polyamorous relationships involve three or more individuals. The CPAA describes polyamory as "a post-modern, non-patriarchal relationship structure based on gender equality"[48] and core values including self-determination, free choice for all involved, mutual trust, and equal respect among partners.[49] Polyamory is very fluid, and polyamorous relationships come in a variety of forms. For instance, the relationship might take a "V" formation where one individual has two partners, but those two partners do not have a relationship with each other; a "triangle" where all three individuals are in a relationship with one another; a "quad" relationship involving four individuals; and so on. Section 293 is particularly worrisome to polyamorous families where all members live together in a committed relationship, even if not all members are sexually involved with one another.

The CPAA submitted four affidavits from individuals in polyamorous relationships. From a cultural perspective, the CPAA affiants are readily distinguished from the FLDS affiants. Two affiants were women in relationships with two men, one was a man in a relationship with a woman and a man, and one

46 Ibid. at para 25.
47 *Malmo-Levine* at para 117.
48 *Reference re Criminal Code, s 293*, 2010 BCSC 1308.
49 Canadian Polyamory Advocacy Association, FAQ, http://polyadvocacy.ca/category/faq.

affiant was a woman in a quad relationship. The gender configurations of these relationships differ markedly from those of the FLDS, as the only form of polygamy practiced by fundamentalist Mormons is polygyny. The "race" or ethnicity of the affiants was not mentioned, except insofar as they were all born in either Canada or the United States. Outside their unconventional family structures, the CPAA affiants were part of mainstream Canadian culture. The affiants were raised in mainstream society; many held university degrees, many had professions, and some were successfully raising children within the context of polyamorous relationships. Their multi-partner relationships were not motivated by culture or religion.

It was unclear whether polyamory would be considered polygamy for the purposes of s 293. The views of challengers and defenders differed on this point; the AGC interpreted the provision to apply only in cases of marriage,[50] but the Amicus argued that this interpretation is unclear on the wording of s 293,[51] while REAL Women of Canada suggested that it should apply in all cases, including those of polyamory.[52] Interpreting the definition of "polygamy" in the provision was central to each argument, and each party's position generally reflected its argument regarding the harms of polygamy. The AGBC asserted that the court could limit the definition of "polygamy" to polygyny and exclude polyandry.[53] The AGC argued that polygamy occurred when multi-party relationships were formalized such that they created a "conjugal union." Either definition proposed by the Attorneys General would be sure to capture FLDS polygamy and would likely exclude polyamory, although the AGBC's definition could potentially capture a polyamorous relationship between one man and several women, and the AGC's definition might capture polyamorous relationships that go through some form of ceremony to make the commitment "official."[54]

The BCSC may determine there is sufficient evidence to find that the provision is constitutional and that all polygamy is illegal in Canada, regardless of whether direct harm is suffered by any participants in the relationship. Regardless of the outcome, the focus on fundamentalist Mormonism to the exclusion of other forms of cultural or religious polygamy had the effect of constructing fundamentalist Mormons in relation both to mainstream Canadian families and to polyamory, and of reinforcing Canadian identity as espousing gender equality even within the mainstream practice of monogamous marriage.

Democracy

The discourse linking polygamy with "despotism" and monogamy with "civilization" also resurfaced in the reference. The AGBC presented expert evidence from Dr. Joseph Henrich of the University of British Columbia to show that polygamy gives rise to undemocratic structures. This was also considered by the Amicus's

50 *Closing Submissions of the Attorney General of Canada* at para 204.
51 *Closing Submission of the Amicus Curiae* at paras 108–110.
52 *Closing Submissions of REAL Women of Canada* at para 1.2.
53 *Closing Submissions of the Attorney General of British Columbia* at para 122.
54 This desire was expressed in the Affidavit of Karen Ann Detillieux (May 27, 2010) at para 38.

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expert, Dr. Walter Scheidel of Stanford University. Heinrich testified to a possible link between socially imposed monogamy[55] and democracy:

> [I]t is worth speculating that the spread of normative or imposed monogamy, which represents sexual egalitarianism (Macdonald 1990), may have helped create the conditions for the emergence of democracy and political equality at all levels of government. Monogamy may impact the emergence of democratic governance at all levels by (1) dissipating the pool of unmarried males that were previously harnessed by despots in wars of aggression, and (2) focusing males, especially high status males, on investing in their offspring and their current wife (in lieu of pursuing additional wives). Historically, we know that universal monogamous marriage preceded the emergence of democratic institutions in Europe and the rise of notions of equality between the sexes.[56]

He further explained that ancient Greece had elements of both democracy and monogamous marriage, although it remains unclear whether democracy or monogamy came first.[57] While monogamy and democracy were found to be correlated, there is no evidence that monogamy leads to democracy or, conversely, that polygamy necessarily leads to despotism. Scheidel agreed with Henrich that, while likely un-provable, socially-imposed monogamy had been a contributing factor in the relative pace of Western development, but that the strength of its contribution remains in question. It is not possible to determine based on the existing empirical evidence whether socially imposed universal monogamy had been instrumental in modernization and social success.[58] Henrich further suggested that since polygamy is almost always expressed as polygyny, legalizing all forms of polygamy would lead to problems associated specifically with an excess of unmarried men. For instance, he argued that the more narrowly-distributed the opportunities to reproduce, the more men would engage in risk-taking and violent behaviour.[59] This relied on the idea that monogamous marriage civilizes men who would otherwise be more likely to engage in criminal behaviour.

In contrast to the discourse drawing on social science evidence that considers the link between monogamy and democracy, and between polygamy and despotism, some discourse engaged in rhetoric that reproduced the racialized assumptions of the mid- and late-1800s. For example, in opening statements, REAL Women of Canada stated that "[m]y friend from the federal government referred to it

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55 The term "socially imposed monogamy" (or "socially imposed universal monogamy") refers to the normative prohibition on polygamy. It is contrasted with "ecologically imposed monogamy," which refers to situations in which polygamy would be admissible but is restrained by lack of ecological resources (Affidavit of Walter Scheidel, *Report on Monogamy and Polygamy* (July 7, 2010), 2).

56 Affidavit of Joseph Henrich, *Polygyny in Cross-Cultural Perspective: Theory and Implications* (July 15, 2010), 41.

57 Ibid.

58 Affidavit of Walter Scheidel, 16. He states, "I conclude that the question of whether SIUM has been instrumental in modernization and societal success, and more specifically in the creation of the modern democratic and economically highly developed state, cannot be meaningfully answered on the basis of the evidence that has been marshalled and analyzed to date."

59 *Closing Submissions of the Attorney General of British Columbia* at paras 235–237.

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[polygamy] as being antidemocratic. It would be no exaggeration to say that it produces—what it produces is an *antidemocratic abomination*."[60] Similarly, Stop Polygamy in Canada echoed the link between polygamy, despotism, and slavery when they argued that "[p]olygamy is a form of autocratic society and historically such societies have resulted in a loss of civil liberties, abuse and enslavement."[61] They noted that "the criminal prohibition in Canada is consistent with the countries that we typically compare ourselves with."[62]

In addition, some argumentation appealed to the nineteenth century discourse as evidence in itself. For instance, in discussing the objective of s 293, the AGC relied on the contentious passage from *Reynolds* that explicitly links monogamy with civilization and polygamy with despotism:

> The basis of the disapprobation of the practice of polygamy was clearly articulated in early American law. In particular, polygamy was stated to be subversive to the institution of marriage, abusive of women and not conducive to a free and democratic way of life (see, for example, *Reynolds v. U.S.*, 98 U.S. (Otto) 145, 12 L.Ed. 244 (1878) and *Davis v. Beason*, 133 U.S. 333 (1890)). Concluding that the offence of polygamy in Utah was not contrary to the guarantee of the free exercise of religion in the U.S. Constitution, the Supreme Court stated, at p. 250:
>
> > …Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations, a civil contract, regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is required necessarily to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the Government of the People, to a greater or lesser extent, rests. Professor Lieber says: polygamy tends to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.[63]

The assertion that monogamy does not tend toward the "patriarchal principle" in this passage is curious, given the traditional patriarchal model of monogamous marriage which has historically served to oppress women through principles like coverture, where a woman's legal identity was subsumed under that of her husband when she married. The passage also relies on the work of Francis Lieber, a prominent nineteenth century political scientist who was known for his views on the superiority of the "Anglican race."[64]

The racialized dimensions of the nineteenth century polygamy debates were diminished by the AGBC, who questioned whether references comparing Mormon polygamy to cultural practices of racialized peoples were intended to have a racialized effect. The AGBC argued that the passage in *Reynolds* calling

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60 Draft Transcripts (November 23, 2010), 65 lines 3–6. Emphasis mine.
61 Draft Transcripts (November 24, 2010), 43 lines 9–11.
62 Draft Transcripts (November 24, 2010), 43 lines 28–30.
63 *Opening Statement of the Attorney General of Canada* at para 26.
64 *Closing Submission of the Amicus Curiae* at para 72.

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polygamy "a feature of the life of Asiatic and of African people" should not be taken as evidence of racism; rather, the court was simply explaining why it was not an issue in the West until Mormon polygamy emerged in the North American context.[65] The AGBC's argument attempts to minimize the racialized dimensions of the provision, but regardless of court's intent in making this statement, it has the effect of comparing Mormons with "Asiatic and African peoples." The AGC made a similar argument in its closing submissions:

> Prior to the enactment of Canada's polygamy provision, the harms of polygamous marriage were recognized and articulated in American jurisprudence. For example, in *Reynolds*, the Supreme Court of the United States provided a comprehensive overview of the harms of polygamy. The Court viewed polygamy as incompatible with democratic government. The Court describes polygamy as "odious" because it undermines the principles upon which democracy rests and "fetters the people in stationary despotism."[66]

When put into the broader context of the time, where this comparative technique was used to disparage Mormons and portray them as a threat to the racial order of the United States, the statement reflects this racialization.

Conclusions

Monogamous marriage remains a salient marker of Canadian national identity. The reference portrayed monogamous marriage as important to maintaining gender equality and democracy in Canada. The importance of monogamous marriage to a free and equal Canada was reaffirmed through discourse which juxtaposed the liberal, modern, "free," monogamously-married mainstream Canadian woman with the uneducated, backwards, enslaved polygamously-married woman. This comparison stemmed almost exclusively from the context of FLDS polygamy, a rigidly hierarchical, patriarchal culture, which undoubtedly has caused harm to both its female and its male members. It was not evident, however, that the act of being married to multiple people at once, outside such a structure, would create similar harms, as was demonstrated by testimony from the polyamorous affiants. While most polyamorous relationships do not involve marriage, some affiants expressed interest in formalizing their relationship in a ceremony, and the social science evidence presented in the reference did not suggest that these arrangements would cause harm to women or children; rather, it appears that patriarchy (as evidenced in the extreme form of polygyny) is harmful. It did not delve into the extent to which patriarchal monogamous marriage creates gender inequality.

This discourse had racialized effects. The discourse analysis suggests that the racialized dimensions of the polygamy provision are not entirely a thing of the past, and may appear in discussions considering harms to women and the link between monogamy and democracy, on the one hand, and polygamy and despotism, on the other. While "race" was not a central point in the Polygamy Reference, some argumentation echoed the racialized discourse of the late nineteenth

[65] *Closing Submissions of the Attorney General of British Columbia* at para 36.
[66] *Closing Submissions of the Attorney General of Canada* at para 197. 1

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century surrounding the introduction of the polygamy provision. While expert evidence properly focused much of the discussion on social science findings, not stereotypes, "race" was engaged in characterizations drawing on assumptions between East and West that implicitly reinforced Canada's identity as a liberal, tolerant, civilized nation that protects women's rights. These findings reinforce the idea that processes of racialization can operate independently of skin tone. In this case, orientalized discourse establishes boundaries between mainstream Canadian society and a religious group with a racialized history. This is not to say that fundamentalist Mormons experience racialization in the same way as peoples of colour, rather that racialization is a process which extends beyond physical differences and implicates culture as well.

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