

CASE COMMENTARY

THE PRUDE IN THE LAW: WHY THE POLYGAMY REFERENCE IS ALL ABOUT SEX

Dana Phillips*

CITED: (2014) 19 Appeal 151–158

INTRODUCTION

On October 22, 2009, as renewed public controversy over Canada's longstanding criminal prohibition of polygamy culminated in a constitutional reference to the Supreme Court of British Columbia (BCSC), Mormons and self-identified sluts¹ found themselves in bed together. Although united in their desire for a common result—the striking down of the prohibition codified in section 293 of the *Criminal Code*²—they differed radically in their underlying perspectives and interests. Mormons affiliated with the Fundamental Church of Jesus Christ of Latter Day Saints (FLDS) sought to defend patriarchal polygynous practices as part of their right to freedom of religion under section 2(a) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).³ Allegations of sexual abuse and exploitation within the polygynous FLDS community of Bountiful, British Columbia had triggered the reference and stood directly in the judicial spotlight.⁴ The sluts, many of whom identified with a movement known as ‘polyamory,’ also sought to defend a non-normative approach to conjugal relationships; one that rested not on the religious entrenchment of patriarchal values but rather on principles of personal autonomy, equality, and sex-positivity. Their practices of ethical non-monogamy⁵ were rooted, not in religious conviction but in a principled rejection of socially imposed monogamy and its associated culture of dishonesty, secrecy, and sexual shame. Far from the spotlight of the constitutional reference, this group found themselves in danger of becoming its collateral damage.⁶

* Dana Phillips is an articulated student at the National Judicial Institute in Ottawa. She received her Juris Doctor from the University of Victoria Faculty of Law in the spring of 2013. This article was originally submitted in fulfillment of the course requirements for Professor Gillian Calder's Family Law course at the University of Victoria. Dana would like to thank Professor Calder for her detailed and thoughtful feedback on the article, and her encouragement to publish it. She would also like to thank Cody Reedman for his invaluable editorial assistance.

1 While not all ethical non-monogamists would call themselves sluts, I use the term here in reference to Dossie Easton & Janet W Hardy's *The Ethical Slut: A Practical Guide to Polyamory, Open Relationships & Other Adventures* 2d ed (Berkeley: Celestial Arts, 2009) [*Ethical Slut*].

2 *Criminal Code*, RSC 1985, c C-46, s 293 [*Criminal Code*].

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(a) [*Charter*].

4 For a detailed account of the events leading up to the reference, see Sheila M Tucker, *Process and the Polygamy Reference: The Trip to Bountiful* (2011) 69:4 *Advocate* 515.

5 In *Ethical Slut*, *supra* note 1 at 274, Easton & Hardy note that they prefer the term ‘polyamory’ to ‘non-monogamy,’ since the latter implicitly centers monogamy as the social norm. However, I have chosen to use this term in order to include individuals who may identify as ‘non-monogamous’ but not ‘polyamorous.’

6 Both the FLDS and the Canadian Polyamory Advocacy Association participated in the reference as interested persons.

On November 23, 2011, Chief Justice Bauman sealed the fate of these strange bedfellows with his decision in *Reference Re: Section 293 of the Criminal Code of Canada* (“*Polygamy Reference*”).⁷ The lengthy judgment reduces to a simple analysis. Yes, the prohibition of polygamy violates section 2(a) of the *Charter*, but that violation is justified under section 1 because the prohibition is all about protecting society from harms: “harms to women, to children, to society, and, importantly, to the institution of monogamous marriage.”⁸

It is the harm to the institution of monogamous marriage that casts the ethical non-monogamists in with the polygynous Mormons. In this paper, I draw from the practice of ethical non-monogamy to explore Chief Justice Bauman’s reasons for articulating this harm, and to consider its consequences. In Part I, I critique Chief Justice Bauman’s reliance on the harms widely associated with polygynous communities as justification for the absolute prohibition of polygamy. To show that the harms and benefits arising from relationships are not inextricably tied to their outward form, in Part II I discuss ethical non-monogamy as an equality-oriented alternative to more traditional polygamous practices.⁹ In Part III, I consider why Chief Justice Bauman identifies “harm to the institution of monogamous marriage” as a consequence of polygamy rather than simply affirming the benefits of monogamous marriage. I argue that this articulation legitimizes the objective of preserving the institution of monogamous marriage, which, as I explain in Part IV, ultimately serves to reign in sexual difference.

Most ethical non-monogamists would not be directly caught within the scope of section 293 as delineated by Chief Justice Bauman.¹⁰ However, I contend that his decision amounts to a reprimand of their sexual preferences with the full force of the law behind it. To justify upholding the prohibition of polygamy, Chief Justice Bauman focuses on the outward form of conjugal relationships rather than the harms and benefits that arise in particular circumstances. In doing so, he enables the government to continue indirectly controlling sexual behavior that cannot be directly regulated in the modern political context. Underlying his concern with preserving monogamous marriage as a social institution is a deep-seated view of sexuality as sinful, shameful, and dangerous to the public order.

I. THE HARMS OF POLYGAMY: INHERENT OR CONTINGENT?

‘Polygamy’ is an umbrella term used to denote multi-spouse relationships. It includes, among its various forms, two distinct conjugal arrangements: polygyny, where a male has multiple female spouses, and polyandry, where a female has multiple male spouses. Chief Justice Bauman’s justification for upholding section 293 is grounded in two conclusions which he draws from the extensive evidence brought before him: first, the most prevalent form of polygamy is and has always been polygyny;¹¹ and second, polygyny is inherently harmful.¹² The harms of polygyny drawn from the evidence at trial include poverty,

7 *Reference Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, [2011] BCJ No 2211 (QL) [*Polygamy Reference*].

8 *Ibid* at para 881.

9 My discussion of the outward form of relationships refers to structural features such as the number of people involved and the identities, roles, and commitments of those individuals within the relationship—in other words, the characteristics by which relationships are socially and legally categorized.

10 Chief Justice Bauman interprets section 293 as applying strictly to multiple marriages, excluding more informal non-monogamous conjugal relationships (*Polygamy Reference, supra* note 7 at para 987).

11 *Ibid* at para 136.

12 *Ibid* at para 1045.

crime, increased mortality, physical and mental health problems (especially for women and children), domestic violence, sexual abuse and exploitation, sex trafficking, gender inequality, and the oppression of women.¹³

A preliminary problem with Chief Justice Bauman's analysis is his uncritical acceptance of evidence that looks to speculative theories of evolutionary psychology to draw conclusions about the dangers of polygyny and the contrasting benefits of monogamy.¹⁴ While a full discussion of the issue lies beyond the scope of my paper, it is important to flag the empirical weakness of this evidence, which relies on dubious assumptions about human mating behaviour to hypothesize the causes and effects of polygyny.¹⁵ To the extent that Chief Justice Bauman relies upon such theoretical projections without the expertise to properly weigh them, his factual findings with respect to the harms of polygyny and the benefits of monogamy rest on shaky ground.

Evidentiary issues aside, there are two major flaws in Chief Justice Bauman's reasoning. First, while polygyny may well be the most prevalent form of polygamy, it is certainly not the only form. Interestingly, after asserting the inherent harms of polygyny, Chief Justice Bauman adds that "many of these harms could arise in polyandrous or same sex polygamous relationships."¹⁶ He avoids claiming that such relationships are inherently harmful, but he suggests that they may cause harm to children, to the psychological health of spouses, and to the institution of monogamous marriage.¹⁷

The second flaw is that the harms at issue are not inherent to the structure of the relationship itself. As argued by legal scholar Elizabeth Emens, polygyny's oppression of women is contingent: "the validity of the charge depends on the individual relationship, just as in monogamous marriage."¹⁸ Emens' point indicates a third problem, also noted by legal scholar Carissima Mathen: many of the harms associated with polygyny are already directly prohibited through other provisions of the *Criminal Code*.¹⁹ For example, the *Criminal Code* sets out indictable offences for all of the following acts: sexual interference with a person under 16 (sections 150.1 – 155); sexual exploitation (section 153); assault, including sexual assault (section 265 – 268); unlawfully causing bodily harm (section 269); human trafficking (section 279.01); and trafficking of persons under 18 (section 279.011).²⁰ While the harms associated with polygyny are separately criminalized, the prohibition of polygamy itself does not require proof of any harm whatsoever; it applies to all multi-spouse relationships, regardless of the actual dynamics of the relationship.²¹ The result, as Mathen argues, is a criminal provision that arbitrarily targets a specific category of relationship.²²

13 See *ibid* at paras 779-793 for a more detailed description.

14 See, for example, Chief Justice Bauman's discussion of Dr Heinrich's evidence at paras 493-506 (*ibid*).

15 For a comprehensive critique of human mating theories derived from evolutionary psychology, see Christopher Ryan & Cacilda Jethá, *Sex at Dawn: The Prehistoric Origins of Modern Sexuality* (New York: HarperCollins, 2010).

16 *Polygamy Reference*, *supra* note 7 at para 1045.

17 *Ibid*.

18 Elizabeth Emens, "Just Monogamy?" in Joshua Cohen & Deborah Chasman, eds, *Just Marriage* (New York: Oxford University Press, 2004) 75 at 77 [Emens, "Just Monogamy"].

19 *Ibid* at 76; Carissima Mathen, "Big Love and Small Reasons: Considering Polygamy" (lecture delivered at the University of Alberta, 28 January 2011), online: YouTube <<http://www.youtube.com/watch?v=FqPbY5yggcc>>.

20 *Criminal Code*, *supra* note 2.

21 *Ibid*.

22 *Ibid*.

II. ETHICAL NON-MONOGRAMY

The practices of ethical non-monogamists illustrate the contingent connection between relationship forms and values, both by refuting the inherent harmfulness of polygamy and by offering a form-independent relationship philosophy. Far from supporting patriarchy or enabling sexual exploitation, ethical non-monogamists offer an approach to intimate relationships that promotes honesty, consent, equality, and autonomy in a far more radical way than a social institution such as marriage ever could.²³ Practitioners often refer to this philosophy as ‘polyamory’ — a sort of reclaiming of polygamy within a context of real equality. The Canadian Polyamory Advocacy Association defines polyamory as “the practice, desire, or acceptance of having more than one intimate relationship at a time with the knowledge and consent of everyone involved.”²⁴ The precise form of polyamorous relationships may vary greatly: from plural marriage to more informal intimate networks to couples in open relationships.²⁵ What matters is not so much the outward form of the relationship but adherence to certain key principles, which Emens describes as self knowledge, radical honesty, consent, self-possession, and the privileging of love and sex as key life priorities.²⁶ The Canadian Polyamory Advocacy Association’s opening statement in the *Polygamy Reference* emphasizes that polyamorists believe in the equality of all genders and sexual orientations.²⁷

Despite its flexibility, the term ‘polyamory’ often connotes a fringe lifestyle that attracts significant social stigma. Individuals who espouse the principles of polyamory within more conventional relationship forms (e.g., married couples in open relationships) may thus be wary of identifying themselves in this way. In 2011, popular Seattle sex columnist Dan Savage coined a new term for such people: “monogamish.”²⁸ Savage believes that many couples who are perceived as strictly monogamous have successfully experimented with consensual non-monogamy in private but choose not to share these stories with their friends and loved ones for fear of social stigma.²⁹ These couples have arranged their lives to coincide with monogamous social norms; however, they share with their polyamorous counterparts the understanding that non-monogamous needs and desires (whether emotional, sexual, or both) may be pursued with joy, respect and honesty—and that this pursuit may actually strengthen the viability of their most prized intimate relationships. The experiences of polyamorists provide an answer to feminist legal scholar Mary Lyndon Shanley when she asks “whether polygamy can be reformed on egalitarian lines.”³⁰ The stories of the monogamish demonstrate the potential pervasiveness of this alternative philosophy within mainstream culture.

23 The Canadian Polyamory Advocacy Association website states: “We don’t just choose freely; we define the choices. If we have an ‘institution’, it’s an anti-institution.” (“The Poly Majority”, online: Canadian Polyamory Advocacy Association <<http://polyadvocacy.ca/>>).

24 “About Polyamory”, online: Canadian Polyamory Advocacy Association <polyadvocacy.ca>.

25 Elizabeth Emens, “Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence” (2004-2005) 29 NYU Rev L & Soc Change 277 at 303 [Emens, “Monogamy’s Law”].

26 *Ibid.*, at 320-330. See also “Our Beliefs” in *Ethical Slut*, supra note 1 at 20-26.

27 *Reference Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, [2011] BCJ No 2211 (Opening Statement on Breach, Canadian Polyamory Advocacy Association at para 13).

28 Dan Savage, “Monogamish”, Savage Love, *The Stranger* (20 July 2011), online: *The Stranger* <<http://www.thestranger.com/>>.

29 Indeed, his “Meet the Monogamish” column attests to this (Dan Savage, “Meet the Monogamish”, Savage Love, *The Stranger* (4 January 2012) online: *The Stranger* <<http://www.thestranger.com/>>).

30 Mary Lyndon Shanley, “Just Marriage” in Joshua Cohen & Deborah Chasman, eds, *Just Marriage* (New York: Oxford University Press, 2004) 1 at 18.

III. HARM TO THE INSTITUTION OF MONOGAMOUS MARRIAGE (SAY WHAT?)

The story of ethical non-monogamy suggests that the values promoted by intimate relationships are not tied to outward form or institution. From this perspective, the criminal law should focus not on polygamy but on the particular harms that sometimes arise in polygamous relationships.³¹ Chief Justice Bauman, however, rejects this approach. To uphold the law's focus on form, he advances a further, peculiar line of argument built on two premises. First, he asserts that plural marriage poses a direct threat to the institution of monogamous marriage. Second, he argues that this institution has historically established benefits to society.³² Chief Justice Bauman points to "the prevailing view through the millennia in the West"³³ as the authority for these benefits, which he summarizes as paternal certainty and joint parental investment in children, gender equality, and a strong, mutually supportive family unit.³⁴ His reasoning is arguably also informed by earlier articulations of the benefits of monogamous marriage, which he describes at length. The historical evidence presented on this point includes the association of monogamous marriage with democratic freedom, justice, and egalitarianism in society at large. It also includes the notion, persistent throughout Western history, that monogamous marriage protects against sexual temptation (often described in terms of sin) while promoting chastity and fidelity.³⁵

Chief Justice Bauman takes great pains to explain and emphasize this argument, perhaps belying his understanding that it is a strange one. Harms and benefits are already naturally opposed, and can be directly weighed against each other. It is redundant to say that a loss of benefits is a harm. However, in the context of the *Reference*, this twist of logic may serve a useful purpose. Without disrupting the harm-based justification for the prohibition of polygamy, Chief Justice Bauman avoids the problem of arbitrarily targeting a particular category of relationship by inserting the preservation of a long-standing social institution as an additional objective. Polygamy may not be inherently harmful, but it is inherently non-monogamous. On the other side of the equation, preserving the status quo of marriage gains new credibility as a legislative objective when couched in the language of harm. Neither the contingent harms of polygamy nor the preservation of monogamous marriage alone provide a compelling objective to justify the violation of constitutional rights. However, when taken together, they cancel out each other's deficiencies, allowing the law to focus on categories of relationships rather than on the specific harms and benefits that arise out of those relationships in different situations.

IV. THE PRUDE IN THE LAW

Why does Chief Justice Bauman place so much emphasis throughout his judgment on the importance of preserving the institution of monogamous marriage rather than simply promoting its benefits? After all, ethical non-monogamy offers the very benefits that Chief Justice Bauman associates with monogamous marriage, often in a more meaningful way. Shanley rightly observes that notions of spousal unity in monogamous marriage have often worked against women's autonomy and equality in the past. This is

31 This perspective also questions whether relationships should be institutionalized at all. However, this topic is outside the scope of my paper. For discussion of the institutionalization of relationships, see Joshua Cohen & Deborah Chasman, eds, *Just Marriage* (New York: Oxford University Press, 2004).

32 *Polygamy Reference* *supra* note 7 at para 883.

33 *Ibid* at para 884.

34 *Ibid*.

35 *Ibid* at paras 170-227.

most clearly exemplified by the doctrine of coverture, present in the English common law until the late 19th century, wherein a married woman's legal status was subsumed under that of her husband.³⁶ While women have since gained considerable rights, the persistence of economic power imbalances in heterosexual marriage and the ongoing problem of domestic violence refute any notion that the present day institution has solved the problems of gender equality.

By contrast, ethical non-monogamy is premised upon the autonomy and equal treatment of all partners, regardless of gender or sexual orientation.³⁷ By encouraging open and honest discussions between partners in intimate relationships, and creating space within those relationships for the conscious fulfillment of non-monogamous desires, the practice arguably strengthens family bonds. Relying on the evolutionary psychology viewpoint, Chief Justice Bauman concludes that plural relationships of all types decrease parental investment in children.³⁸ However, as noted by Easton and Hardy, wider intimate networks can actually provide more resources for kids, who “take to these relationships quite readily, perhaps more so than to the traditional nuclear family: children have grown up in villages and tribes for most of human history.”³⁹ Emens offers the example of Elizabeth Joseph, a polygynous female attorney who credits the domestic support provided by her co-wives for her ability to pursue a career and raise a family without stretching herself too thin.⁴⁰

There is only one historically lauded characteristic of monogamous marriage that ethical non-monogamy cannot offer: the sexual restraint of monogamy itself. As legal scholar Gillian Calder argues, “the current condemnation of polygamy may be tied to many sources [...] but at the heart of all of these issues is the issue of monogamy.”⁴¹ Throughout Western history, monogamous marriage has been seen as a protection against both paternal uncertainty and sexual immorality.⁴² But ethical non-monogamists eschew the notion that sex and pleasure are immoral in themselves.⁴³ In their view, sex is only wrong when it is deceitful or non-consensual.⁴⁴ Here, I argue, lies the reason why Chief Justice Bauman feels compelled to uphold the institution of monogamous marriage itself rather than its associated benefits. The *Criminal Code* independently addresses many of the harms associated with polygamy, but it does not criminalize promiscuity.⁴⁵ Such a provision is unlikely to garner the support of a majority of Canadians, who stood with Pierre Trudeau over 50 years ago when he famously declared that “the State has no business in the bedrooms of the Nation.”⁴⁶

Chief Justice Bauman clearly recognizes that it would be out of step with current social mores to criminalize non-monogamous sexual practices. In delineating the scope of section 293, he is careful to exclude adultery, cohabitation, and other non-monogamous

36 Shanley, *supra* note 30 at 26.

37 *Supra* note 27.

38 *Polygamy Reference*, *supra* note 7 at 1045.

39 *Ethical Slut*, *supra* note 1 at 100.

40 Emens, “Just Monogamy”, *supra* note 18 at 77.

41 Gillian Calder, “Penguins and Polyamory: Using Law and Film to Explore the Essence of Marriage in Canadian Family Law” (2009) 21 CJWL 55 at 80.

42 *Polygamy Reference*, *supra* note 7 at paras 884; 170-227.

43 See *Ethical Slut*, *supra* note 1 at 11-13.

44 Emens, “Monogamy’s Law” at 320-330, *supra* note 25; *Ethical Slut*, *supra* note 1 at 20-26.

45 Some US states still have provisions that make adultery a criminal offence, but they are rarely enforced (Emens, “Monogamy’s Law”, *supra* note 25 at 364).

46 *Omnibus Bill: “There’s no place for the state in the bedrooms of the nation,”* Toronto, CBC Digital Archives (1967-12-21, archived from the original on 2012-08-12), online: <<http://www.webcitation.org/69rtGGDLm>>.

relationships short of marriage, and even suggests that sexual behaviour is not the target of the law.⁴⁷ To emphasize the point, he quotes from B. Carmon Hardy's *Mormon Polygamy in Mexico and Canada*⁴⁸: "it was not the sexual derelictions of individuals with which the law was concerned so much as with preserving the form of the monogamous home."⁴⁹ Still, the question remains: what purpose does that form serve? It serves to encourage sexual monogamy, without directly mandating it. I suggest that this is the only meaningful answer. As I have already illustrated, all the other supposed benefits of monogamy are not form-dependent. By framing the purpose of section 293 in terms of the preservation of monogamous marriage, Chief Justice Bauman indirectly influences what he cannot directly regulate.

According to Mathen, the purpose of section 293 has always been "a religiously compelled moral ideal"⁵⁰ rather than a harm-based provision. As she argues, it makes little sense for a criminal provision to have an objective (i.e., preventing harm) that is not relevant in every case where the provision applies, is not reflected in the elements of the offence, and is itself addressed through independent criminal offences.⁵¹ Drawing from the work of American philosopher Martha Nussbaum, Mathen suggests that the true purpose of the prohibition lies in the same "primal emotions of disgust and shame" raised by other sexually deviant acts such as necrophilia, incest, and, until recently, sodomy.⁵²

The sexual squeamishness underlying Chief Justice Bauman's reasoning reflects deep-seated cultural values. Nowhere is this more apparent than in the current cultural discourses surrounding adultery and same-sex marriage. In her survey of popular culture, law and sexuality scholar Brenda Cossman notes a persistent effort to prevent and treat what has become known as an "epidemic of adultery", often through a quasi-religious process of sexual shaming.⁵³ In one example, she describes an Oprah episode entitled "Cheating Husbands Confess,"⁵⁴ wherein the cheaters tell their stories to the audience's shock and dismay—a "public shaming, where the cheaters stand in public, marked as bad citizens."⁵⁵ Cossman connects this ritual to the religious confession, long used as a method of redemption for sexual sin.⁵⁶ She also observes the pervasive cultural message that married people must take responsibility for their desires, such that "the sexually monogamous marriage becomes the new front line in the war on this epidemic."⁵⁷ Even in the twenty-first century, sexual desire remains a scourge to be kept at bay by the virtues of monogamy.

The political battle for gay rights provides another example of societal revulsion towards promiscuity. Cossman discusses the case of *M v H*,⁵⁸ in which the Supreme Court of Canada found that the exclusion of same-sex couples from the statutory definition of common-law spouse in Ontario violated the right to equality under section 15(1) of

47 *Polygamy Reference*, *supra* note 7 at para 1037.

48 B. Carmon Hardy, "Mormon Polygamy in Mexico and Canada: A Legal and Historiographical Review" in Brigham Y Card et al, eds, *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990).

49 *Ibid* at 196, cited in *Reference*, *supra* note 7 at para 889.

50 Mathen, *supra* note 19.

51 *Ibid*.

52 *Ibid*.

53 Brenda Cossman, "The New Politics of Adultery" (2006) 15 Colum J Gender & L 274 at 286-288 [Cossman, "New Politics"].

54 Oprah, "Cheating Husbands Confess" (ABC television broadcast, 1 November 2004).

55 Cossman, "New Politics", *supra* note 53 at 288.

56 *Ibid* at 288-289.

57 *Ibid* at 286.

58 *M v H*, [1999] 2 SCR 3, [1999] SCJ No 23.

the *Charter*.⁵⁹ She warns that while the decision validated gays and lesbians as legal subjects, it did so only in the context of the monogamous, nuclear family: “[t]he new legal subject was not a sexual subject, but a desexualized subject. It was not, absolutely not, the erotically charged subject of the gay bars and bathhouses, who remain sexual outlaws.”⁶⁰ This warning was illustrated by the many police raids on men’s and women’s bathhouses that occurred in the months following the judgment.⁶¹ The point is also manifest in the *Reference*:

And let me recognize here that we have come, in this century and in this country, to accept same-sex marriage as part of that institution. That is so, in part, because committed same-sex relationships celebrate all of the values we seek to preserve and advance in monogamous marriage.⁶²

In other words, the legal recognition of same-sex relationships is conditional upon their conformity with monogamous heterosexual norms.

CONCLUSION

The lines of the law in the *Reference* are carefully drawn. On the one hand, Chief Justice Bauman avoids the direct regulation of sexual behaviour, and scopes section 293 narrowly enough to avoid criminalizing most forms of non-monogamy. On the other hand, by focusing on upholding monogamous marriage as a central institution, and by framing this goal in terms of harm-prevention, he allows the prohibition of polygamy to retain public legitimacy, and re-affirms the social normativity of sexual monogamy. The result is a law that criminalizes patriarchal polygyny, but also marginalizes ethical non-monogamy. The effect belies the intention. A law that punishes both patriarchal polygyny and ethical non-monogamy with the same crack of the whip is not a law against crime, exploitation, or the oppression of women. It is a law against sexual difference. Still, legal scholars Ratna Kapur and Tayyab Mahmud assert that alongside “the law’s hegemonic role in the creation of meaning”⁶³ lies its capacity “to produce resistant practices that move beyond the focus of disciplinary surveillance.”⁶⁴ Such is the achievement of the monogamish. By practising ethical non-monogamy within the guise of the monogamous form, they give lip service to the prude in the law, but free themselves from its handcuffs.

59 Brenda Cossman, “Canadian Same Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories” (2000) 48 Clev St L Rev 49.

60 *Ibid* at 54.

61 *Ibid* at 54-55. See also Calder, *supra* note 41 at 75-76.

62 *Polygamy Reference*, *supra* note 7 at para 1041.

63 Calder, *supra* note 41 at 60.

64 Ratna Kapur & Tayyab Mahmud, “Forward: Re-orienting Law and Sexuality” (2000) 48 Clev St L Rev 1 at 5.