

ARTICLE

BEYOND BOUNTIFUL: TOWARD AN INTERSECTIONAL AND POSTCOLONIAL FEMINIST INTERVENTION IN THE BRITISH COLUMBIA POLYGAMY REFERENCE

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I. INTRODUCTION

In recent years, the issue of polygamy¹ has garnered much public attention. Among the reasons for this² are the polygamous practices of members of the Fundamentalist Church of Jesus Christ of the Latter Day Saints community of Bountiful, British Columbia and more specifically, the polygamy charges laid against two of the community's leaders in January 2009 following several years of investigation.³ Section 293 of the *Criminal Code*, which

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1. While polygamy is a general term that includes both polyandry, the practice of one woman having more than one husband, as well as polygyny, the practice of one man having more than one wife, there is no evidence of polyandrous polygamy in Canada and indeed, the concern around polygamy in Canada is focused on polygamy in its polygynous form. For a more in-depth history of polygamy in Canada, see Amy J. Kaufman, "Polygamous Marriages in Canada" (2004-2005) 21 Can J Fam L 315.
2. See also the events in the US Fundamentalist Church of Jesus Christ of the Latter Day Saints (FLDS) community in Utah where FLDS leader and prophet Warren Jeffs was convicted in 2007 as an accomplice to rape for his part in arranging the 'celestial marriage' of a 14-year old FLDS member to her cousin. John Dougherty & Kirk Johnson, "Sect Leader is Convicted as an Accomplice to Rape" *The New York Times* (26 September, 2007) online: <<http://www.nytimes.com/2007/09/26/us/26jeffs.html>>. The recent debates on same-sex marriage in Canada have also sparked discussion about polygamy as 'slippery slope' arguments emerged. Some groups were concerned that allowing same-sex marriage would lead to, among other things, polygamy, the legalization of incest and other 'intolerable behaviour.' Claire F.L. Young & Susan B. Boyd, "Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada" (2006) 14(2) *Fem Legal Stud* 213 at 234-235.
3. Daphne Bramham, "Bountiful leaders charged with polygamy" *The Vancouver Sun* (7 January 2009), online: <http://www.vancouver.sun.com/news/Bountiful+community+leaders+charged+with+polygamy/1151579/story.html>.

prohibits polygamy (the “Polygamy Provision”)⁴, has rarely been used since its enactment in 1892,⁵ but the charges against Winston Blackmore and James Oler have served to bring it back to the forefront of Canadian law and society. While the charges were eventually dropped in September of the same year for reasons unconnected to the merits of the polygamy case against Blackmore and Oler,⁶ British Columbia’s Attorney General has decided to proceed by seeking the courts’ direction on the constitutionality of the Polygamy Provision through a reference to the British Columbia Supreme Court (the “Polygamy Reference”).⁷ The Attorney General’s office, with the support of mainstream women’s organizations, argues that the law prohibiting polygamy exists in order to protect women’s equality rights and to prevent the exploitation of women and children from the vulnerability and harm that may arise in polygamous communities.⁸ However, there are concerns about whether s. 293 is compliant with the *Canadian Charter of Rights and Freedoms*, specifically the right to freedom of religion protected under s. 2(a) of the *Charter*. Indeed, the first two special prosecutors appointed by the then Attorney General, Wally Oppal, recommended against proceeding with charges due to concerns that the Polygamy Provision may not be constitutionally valid.⁹ The British Columbia Supreme Court is scheduled to hear the Polygamy Reference between November 15, 2010 and January 31, 2011 and the case will likely be heard by the Supreme Court of Canada in the following years.

In light of this legal history and the impending court proceedings, this is an especially important moment to engage with the issue of polygamy and to consider the perspectives to which the courts will need to attend in order to decide the Polygamy Reference. In particular, given that the issue of polygamy is connected to broader concerns such as gender equality and that the public discourse in support of the criminal provision has centered on the harm to women that is often said to flow from the practice of polygamy, it is crucial that the courts take feminist perspectives into account when making its decision. Moreover, while the government’s concern with polygamy has coalesced around a white, non-immigrant, religious group in British Columbia, the Polygamy Provision has a troubling history of use as a tool to preserve racial boundaries and promote white supremacy even when it is marshaled against those who are perceived to be white and thus members of the dominant racial group. Further, the Polygamy Reference decision will affect other marginalized groups in Canada as well, such as the Muslim community, some of whom may practice polygamy in accordance with their faith. That members of all of these communities include women who have diverse understandings of the relationship between polygamy on the one hand and gender equality and harm on the other should give pause to any simplistic

4. *Criminal Code*, RSC 1985, c C-46 s 290 Section 293(1) states,

Every one who

(a) practises or enters into or in any manner agrees or consents to practise or enter into

(i) any form of polygamy;

(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,

...

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

5. These polygamy charges are the first in Canada since the 1800s. See Bramham, *supra* note 3.

6. The charges against Blackmore and Oler were dropped after the British Columbia Supreme Court ruled that the decision of the first special prosecutor, Richard Peck, not to proceed with a prosecution was final and binding on the Attorney General and that the AG did not have the authority to appoint two subsequent special prosecutors in attempt to secure a different prosecutorial recommendation. See *Blackmore v. British Columbia*, 2009 BCSC 1299 [*Blackmore*].

7. British Columbia Ministry of Attorney General, Media Release, 2009AG0012-000518, “Province to Seek Supreme Court Opinion on Polygamy” (22 October 2009) (The “Polygamy Reference”).

8. Bramham, *supra* note 3.

9. British Columbia Ministry of Attorney General, *supra* note 7.

analysis. Indeed, it is important for the courts to take a specifically intersectional and post-colonial approach to feminist readings of this legal issue.

As an intervener in the Polygamy Reference who aims to represent the interests of all women, the West Coast Women's Legal Education and Action Fund (LEAF) seems poised to bring a unique feminist perspective to the courts. According to its Application for Intervention, LEAF intends to argue that the Polygamy Provision can be interpreted to be constitutionally valid and should be upheld in order to protect the equality rights of women.¹⁰ However, I argue that while the position advanced by LEAF is attentive to some of the issues engaged by the Polygamy Reference, ultimately, LEAF's position is problematic when assessed through an intersectional and postcolonial feminist perspective. In particular, LEAF's position in support of the criminal prohibition continues to single out and stigmatize a practice associated with religious and cultural minorities.¹¹ In doing this, LEAF privileges and constructs as normal a certain cultural and racialized distribution of power despite their concern for a nuanced response to polygamy. Ultimately, in supporting the Polygamy Provision, LEAF participates in dynamics of 'Othering;' it positions those who engage in polygamous relationships as a cultural 'Other,' reinforcing the dichotomy between a civilized, Western 'us' and a barbaric, non-Western 'Them.' In the process, the concerns of women in polygamous relationships, who may see their relationship with gender equality differently, are further marginalized.

In order to determine the Polygamy Reference in a manner that is responsive to the concerns of marginalized women, I argue that the courts should take a feminist approach that is intersectional,¹² in being attentive to diversely located identities and in moving beyond the "reductive analyses of power based on a single axis of social division,"¹³ and postcolonial,¹⁴ in being alive to the way in which the legacies of colonialism continue to affect our understanding of the choices and concerns of women, especially those from minority communities. Specifically, this feminist, intersectional and postcolonial approach would result in the courts striking down the Polygamy Provision. Part II of this article outlines the background to, and provides context for, the Polygamy Reference with special attention to the historical roots of the criminal prohibition of polygamy as a tool of religious oppression. Part III explains the position of West Coast LEAF, a prominent Canadian women's rights organization, on the Polygamy Provision. Part IV takes a critical, intersectional and post-colonial feminist lens to LEAF's position. In this part, I aim to problematize LEAF's ap-

10. West Coast LEAF, Intervener Affidavit of Alison Brewin, No. S-097767, Vancouver Registry (25 January 2010).

11. While I recognize that there are important differences between cultures and religions, I group these together for the purposes of this paper because they can both serve as sources of marginalization in the creation of the cultural 'Other' in the context of polygamy. Further, while I am aware of the contentiousness surrounding the term "minority" and "minority culture," I use it for ease of reference to refer to a range of marginalized social groups. For a more in depth discussion of this issue, see, Philip Gleason, "Minorities (Almost) All: The Minority Concept in American Social Thought" (1991) 43(3) *American Quarterly*.

12. The concept of intersectionality is grounded in an understanding that different axes of identity such as race, class, gender, ability, etc. interact to create complex experiences of marginalization that cannot be understood through a single lens. See, for example, Kimberlé Crenshaw's groundbreaking articulation of intersectional identities in Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 *Stan L Rev* 1241 at 1252.

13. Sirma Bilge, "Beyond Subordination vs. Resistance: An Intersectional Approach to the Agency of Veiled Muslim Women" (2010) 31(1) *Journal of Intercultural Studies* 9 at 10.

14. Postcolonialism considers the way in which Western narratives construct non-Western subjects as monolithic, unchanging and without agency in order to create the Western identity based on ideas about progress and modernity. See, for example, Edward Said's groundbreaking work on postcolonialism in Edward Said, *Orientalism* (New York: Vintage Books, 2003). See also Chandra Talpade Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" (1988) 30 *Feminist Review*, in which Mohanty critiques the project of Western feminism in creating the static category of the Third World Woman.

proach to s. 293 with an eye to delineating a more inclusive legal approach to polygamy. Finally, Part V offers thoughts on how an intersectional and postcolonial feminist approach to polygamy can be articulated through the law.

II. BACKGROUND AND CONTEXT OF THE POLYGAMY REFERENCE

The Polygamy Reference stems from charges against two leaders of the Bountiful Community,¹⁵ a community of about 1,000 people founded in the 1940s by families that broke away from the mainstream Mormon Church after the latter renounced the practice of polygamy.¹⁶ Known as the Fundamentalist Church of Jesus Christ of the Latter Day Saints (FLDS), residents of Bountiful continue to openly practice polygamy as a central tenet of their faith and, until relatively recently, drew little public attention. This began to change in the 1990s amidst allegations of polygamy, which prompted RCMP investigations into the community and increasing public interest. No charges were laid, however, due to concerns regarding the constitutionality of the Polygamy Provision.¹⁷ In 2004, Bountiful once again became the subject of intense investigations after reports of sexual exploitation, child abuse and forced marriages emerged.¹⁸ These investigations culminated in the 2009 arrests of Blackmore and Oler on polygamy charges and the subsequent Polygamy Reference to the British Columbia courts in 2010.

The mainstream discourse that has emerged around polygamy and its practice in Bountiful indicates that the contemporary rationale for its prohibition is grounded in ideas about protecting women from the inherent inequalities and harm that are said to flow from being one of many wives.¹⁹ Former Attorney General Oppal, for example, has commented: “the reason the polygamy law exists is to prevent the exploitation of women”²⁰ while LEAF executive director Alison Brewin responded to the charges against Blackmore and Oler by noting that they would “allow the courts, the government, the women of Bountiful and all Canadians to determine the boundaries of religious freedom when women’s equality is at stake.”²¹ Internationally, in its General Recommendation on Equality in Marriage and Family Relations, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), of which Canada is a party, notes that “Polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.”²² Indeed, current justifications for the prohibition of polygamy are clearly centered on ideas about the protection of women.

However, the criminal provision also has historical roots in a legacy of colonialism, racism and sexism. According to Susan Drummond, the Polygamy Provision “from its inception through its bizarre history of virtual non-use, has always been shrouded in an aura of xenophobia and racism.”²³ The law prohibiting polygamy was originally enacted in 1892 under

15. *Blackmore*, *supra* note 6.

16. Mike D’Amour, “Polygamists defend lifestyle” *The Calgary Sun* (2 August 2004).

17. British Columbia Ministry of Attorney General, *supra* note 7.

18. D’Amour, *supra* note 16.

19. Angela Campbell, “Bountiful Voices” (2009) 47 Osgoode Hall LJ 190 [Campbell, “Bountiful Voices”].

20. Bramham, *supra* note 3.

21. *Ibid.*

22. CEDAW at General Recommendation No. 21 (13th session, 1994), online:

<<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>>.

23. Susan Drummond, “A marriage of fear and xenophobia” *The Globe and Mail* (6 April 2009), A13 [Drummond, “Xenophobia”].

pressure from the United States government, who was attempting to eliminate the practice of polygamy by members of the Mormon Church.²⁴ The US government was not concerned about gender equality but rather was attempting to control what they viewed as “treacherous Mormon claims to political, economic, and social control of Utah in the late nineteenth century.”²⁵ Equally, scholars have demonstrated that the US government was concerned about the ‘race treason’ engaged in by this group of white polygamists.²⁶ Indeed, citing Martha Ertman, Drummond highlights that in the leading anti-polygamy case of the era, *Reynolds v. United States*, the US Supreme Court notes that polygamy was “odious among the northern and Western nations of Europe... almost exclusively a feature of the life of Asiatic and of African people.”²⁷ Under US influence, then, Canada also enacted laws against polygamy and in fact, the original Polygamy Provision had a clause explicitly targeting Mormon polygamy that was not removed until 1954.²⁸

The origins of the Polygamy Provision as a mechanism for religious persecution and as a tool for policing racial boundaries and reinforcing white supremacy are not the only troubling aspects. Since its enactment, there has been a single conviction under the law, notably, against an Aboriginal man²⁹ and the contemporary desire to prosecute using the Polygamy Provision has mostly been directed at religious minorities such as Muslims.³⁰ As Drummond points out, this disconcerting history “supports the idea that the polygamy provision was crafted as a means of disciplining and colonizing socially and politically marginal groups.”³¹ In light of this context, and the fact that the Polygamy Reference will affect many other minority communities in Canada beyond Bountiful, a closer analysis of the current rationale for the criminal prohibition and its effect on marginalized communities and members of those communities is necessary.

III. A FEMINIST PERSPECTIVE ON POLYGAMY: WEST COAST LEAF

Many arguments have been advanced both in support of and in opposition to the prohibition on polygamy on the basis of a range of rationales. For example, some have opposed the law on the ground that it is unconstitutionally vague and targets no discernable criminal mischief³² while others have supported the law on the basis that it is the source from which other alleged harms flow and thus needs to be addressed directly.³³ While these arguments make important contributions to the different ways of thinking about the Polygamy Provision, as stated above, it is also crucial for the courts to consider an intersectional, post-colonial feminist perspective in light of the nature of the issues engaged by the Polygamy Reference and the current justification for the criminal prohibition based on the protection

24. *Ibid.*

25. Susan Drummond, “Polygamy’s Inscrutable Criminal Mischief” (2009) 47 Osgoode Hall LJ 317 at 331 [Drummond, “Mischief”].

26. *Ibid.*

27. *Ibid.*

28. *Ibid.* See *Criminal Code*, SC 1953-54, c 51, s 243.

29. The only reported conviction under the Polygamy Provision, *Bear’s Shin Bone*, involved a First Nations man who was living in a customary polygamous relationship. See Harsha Walia, “West Coast LEAF Women’s Equality and Religious Freedom Project: Report Based on Advisory Committee Discussions” *West Coast LEAF Report* (November 2006) 30.

30. Drummond, “Mischief”, *supra* note 25 at 329.

31. *Ibid.* at 359.

32. See, for example, Drummond, “Mischief”, *supra* note 25 at 368 where she notes: “given the range of behaviours and arrangements that the law views as consistent with monogamy, it has become increasingly difficult to decipher the specific harm that the polygamy provision is intended to thwart.”

33. Bramham, *supra* note 3.

of women. As a women's organization with extensive experience in the area of women's rights and promoting women's substantive equality through public legal education, law reform and equality rights litigation, LEAF seems perfectly situated to assist the courts in gaining a feminist understanding of polygamy. Indeed, LEAF's stated vision "[is] a society in which women are full participants in the social, economic and political activities of the nation, a society in which it is a *right to have one's differences respected and supported* both by the law, and through social and institutional policies and practice".³⁴ Additionally, on the issue of polygamy in particular, LEAF has considerable interest and expertise.³⁵

Having been granted leave to intervene, LEAF will argue that, "read down to include as a necessary element of the offence one or more of: involvement of a minor, exploitation, coercion, abuse of authority, a gross imbalance of power or undue influence, the Polygamy Provision is consistent with the *Charter*."³⁶ Thus, LEAF supports the criminal provisions where the offence meets certain other criteria. LEAF expects the evidence at the hearing to show that the practice of polygamy in communities like Bountiful is directly connected with the abuse and exploitation of women and children, in violation of their rights to equality and autonomy and will argue that "there is a sufficient historical connection between the practice of polygamy and these harms to justify the legislative prohibition of polygamy."³⁷ In general, LEAF's position is that the practice of polygamy can limit women's choices and create serious vulnerability for young women and girls to sexual and other exploitation and that s. 293 can be interpreted to prohibit this harmful conduct. In the alternative, LEAF argues that the law can be justified under s. 1 of the *Charter*: "The Polygamy Provision prevents the practice of polygamy where such practice is exploitative or abusive of the women and children involved. The Polygamy Provision is justifiable to the extent that it prohibits unacceptably harmful conduct."³⁸ Ultimately, LEAF's position is that s. 293 can be interpreted to be constitutionally valid and should be upheld in order to protect the constitutional rights of women with respect to equality and autonomy.

This position is attentive to some of the nuances engaged by the Polygamy Reference and succeeds, to some extent, in recognizing the overly broad sweep of the Polygamy Provision as well as the way it may affect differently situated individuals. In particular, in recognizing that the law must be 'read down' to be constitutionally valid, LEAF attempts to ensure that only those polygamous relationships that involve certain other harmful characteristics will be subject to the criminal provision; men or women who are in polygamous relationships that do not involve "a minor, exploitation, coercion, abuse of authority, a gross imbalance of power or undue influence"³⁹ would not be captured by the prohibition. By insisting on such a reading down, LEAF's position aims to prevent harm to women that may flow from a polygamous relationship but recognizes that not all polygamous relationships are problematic *per se*.

However, while LEAF's position addresses one problematic aspect of the provision, it neglects others. LEAF's position in support of the Polygamy Provision focuses on the idea that polygamous relationships are potential sites of gender inequality and that harm to women may result. But, as Lori Beaman has noted, "women have been protected from themselves

34. LEAF website online: <http://www.westcoastleaf.org/> [emphasis added].

35. For example, according to their Intervenor Affidavit, their views on the practice of polygamy in Bountiful have been cited in various media outlines 11 times since August 2007. Intervenor Affidavit, *supra* note 10 at 6.

36. Intervenor Affidavit, *supra* note 10 at 7.

37. *Ibid* at 7.

38. *Ibid* at 8.

39. Intervenor Affidavit, *supra* note 10 at 7.

by state institutions from time immemorial, and very often not protected when they have asked for it.”⁴⁰ Beaman suggests that the use of such rhetoric should cause suspicion and proposes that we ask: “Whose interests are being served by this? What relations of power are being supported by the use of women and children as a shield?”⁴¹ In the next section, I intend to take up Beaman’s suggestion in analyzing LEAF’s approach. In particular, I hope to engage with LEAF’s position to unravel some of the assumptions, norms and values that may underlie this position in an attempt to gain a sense of how it falls short of an intersectional and postcolonial feminist approach.

IV. PROBLEMATIZING WEST COAST LEAF’S POSITION: APPROACHING AN INTERSECTIONAL AND POSTCOLONIAL FEMINIST PERSPECTIVE ON POLYGAMY

LEAF’s position fails to take the intersectional and postcolonial feminist approach necessary to be responsive to difference and the needs of differently situated women. More specifically, LEAF’s recognition that not all polygamous relationships result in harm to women through advocating for a ‘read down’ interpretation of the prohibition does not go far enough. As this Part explains, LEAF’s position still does not question the special targeting and condemnation of polygamous relationships by the criminal provision, but rather, supports this singling out. In light of the Polygamy Provision’s history and the way in which it has been used, this approach ultimately serves to police the boundaries between a civilized, Western ‘us’ from a barbaric, non-Western ‘them’ and further ignores the intersectional identities of some marginalized women. Thus, while recognizing the important work that LEAF has done in promoting gender equality as well as the fact that the allegations of some of the practices in Bountiful are troubling, I propose to examine LEAF’s position more closely. This will be productive not only for gaining a sense of the weaknesses in LEAF’s position but, more importantly, for understanding what a more inclusive feminist position, one that embraces difference and is mindful of colonial projects, may look like and to suggest that this is the perspective that the courts should consider.

A. The Assumed ‘Inherent’ Harm of Polygamy

LEAF’s position in support of the Polygamy Provision begins to be problematic when it accepts, without question, a discourse that assumes polygamous relationships are inherently more exploitative than monogamous relationships, a discourse that perhaps conflates the institution of polygamy with the way that polygamy can sometimes be practiced. Even while advocating for a ‘read down’ interpretation of the criminal prohibition that would seem to recognize that polygamous relationships are not inherently problematic, LEAF fails to question whether there is, in fact, anything inherently more exploitative about polygamous relationships than monogamous ones such that criminal sanctions are justified *at all*. Indeed, the fact that LEAF supports criminal prohibitions for polygamy alongside the non-prohibition of monogamy, when both have the potential to be sources of gender inequality and harm, reveals the acceptance of a discourse that presumes the unique and inherent harm of polygamy. As Gillian Calder notes, “issues of lack of consent, and abuse of women and children, are properly subjects of the criminal law, but none of these

40. Lori Beaman, “What’s Wrong with Polygamy or For the Sake of Women and Children” (Talk at the Faculty of Law, University of Victoria, 1 October 2009) [unpublished] used with permission.

41. *Ibid* at 3.

are inherent to the practice of loving more than one person at the same time.”⁴² Indeed, polygamy does not appear to be inherently more exploitative than monogamy.

While some have argued that polygynous polygamy is, by nature, unequal by virtue of the fact that wives are forced to share the emotional, sexual, and financial attention of their husband with other wives,⁴³ such an interpretation is only one way of understanding the many possible manifestations and dimensions of polygamous relationships. For example, some scholars have pointed out that “relationships and alliances forged between and among women could prove to be sites for developing agency and implicit power, bolstering women’s autonomy and influence in their families and community.”⁴⁴ Further, in her interviews with twenty women from Bountiful, Angela Campbell reports that, “participants cast Bountiful as a heterogeneous and dynamic social and political space, where at least some women are able to wield considerable authority in their marriages, families, and community.”⁴⁵ For example, one participant commented: “I feel sorry for the guys. They’re very outnumbered even if they’re with two wives. They’re very outnumbered.”⁴⁶ Moreover, this understanding of polygamy as inherently more exploitative assumes that, but for the existence of other wives, a wife would otherwise not have to ‘share’ her husband’s time and resources with other competing interests and that a wife would have more control over her husband’s resources simply because he does not have other wives. While this may certainly be true in some circumstances, it must be noted that monogamous relationships are not specially structured to ensure that any of a husband’s time and resources are used to the benefit of his wife.

Perhaps even more compellingly, Elizabeth Joseph, a lawyer and outspoken polygamist wife in Utah has described her life as representing “the ultimate feminist lifestyle” with regards to tasks such as childcare. At a National Organization for Women (NOW) conference, she explained: “If I’m dog-tired and stressed out, I can be alone and guilt free... It’s a rare day when all eight of my husband’s wives are tired and stressed at the same time.” According to Joseph, polygamy “offers an independent woman a real chance to have it all.”⁴⁷ While Joseph’s framing of how polygamy provides her with the ‘ultimate feminist lifestyle’ is not without problems,⁴⁸ it is nonetheless significant that there are other ways of understanding the power dynamics at play within a polygamous relationship and that it need not result in inequality.

In failing to make explicit this distinction between whether there is something inherently exploitative about polygamy and whether troubling aspects emerge in the way polygamy

42. Gillian Calder, “Penguins and Polyamory: Using Law and Film to Explore the Essence of Marriage in Canadian Family Law” (2009) 21(1) CJWL 55 at 80.

43. Susan Deller Ross cited in Lisa M. Kelly, “Bringing International Human Rights Law home: An Evaluation of Canada’s Family Law Treatment of Polygamy” (2007) 65 UT Fac L Rev 1 at 14.

44. Angela Campbell, “Wives’ Tales: Reflecting on Research in Bountiful” (2008) 23 CJS 121 at 126 [Campbell, “Wives’ Tales”].

45. Campbell, “Bountiful Voices”, *supra* note 19 at 188.

46. *Ibid* at 214.

47. John Tierney, Op-Ed, *The New York Times* (11 March 2006) online: The New York Times: <<http://select.ny-times.com/2006/03/11/opinion/11tierney.html>>.

48. For example, according to Joseph, one of the ways in which polygamy facilitates the ‘ultimate feminist lifestyle’ is by providing “round-the-clock day care that enabled her to keep an unpredictable schedule at work and to relax when she came home.” *Ibid*. While such an arrangement, involving shared childcare among ‘sister-wives,’ may certainly assist some women in achieving their career or other goals, it does not address the fact that childcare is still predominantly undertaken by women. Nor does it consider the needs of other sister-wives, some of who may want to pursue goals requiring an “unpredictable schedule” too, and, that in this way, polygamy is not so different from many monogamous nuclear family relationships where some, usually women, must sacrifice other activities in order to undertake care-giving responsibilities.

is sometimes practiced, LEAF's position falls short of ensuring that their position is inclusive and attentive to difference. However, LEAF's position, rather than focusing on this analysis, centres on the way in which polygamy is sometimes practiced. Indeed, LEAF's argument focuses on the connection between the practice of polygamy and harms to women in order to justify the criminal provision. Is this, then, sufficient to justify the provision? In other words, even if there is nothing inherently exploitative about polygamy, is the fact that the practice of polygamy is directly connected with the abuse and exploitation of women and children in communities like Bountiful sufficient to justify the Polygamy Provision? In the next section, I argue that it is not.

B. Creating the Cultural 'Other' and the Project of Empire

LEAF's position is problematic when considered from an intersectional and postcolonial feminist perspective because it supports a law that singles out a practice associated with religious and cultural minorities for special condemnation while leaving the mainstream practice of monogamy criminally un-interrogated. LEAF's position implicitly yet effectively harnesses and reinforces a civilizational discourse that works to racialize and culturalize minority practices as uniquely oppressive to women, and thus indicative of that culture's 'backwardness,' while rendering dominant Western practices invisible as the 'norm.' In doing this, LEAF's position contributes to creating the cultural 'Other' and permits feminist concerns about gender equality to be co-opted by neo-colonial forces.

While the practice of polygamy is certainly not without problems, neither is the practice of monogamy. For example, in highlighting that women are not automatically better off in monogamous, as compared to polygamous, relationships despite the fact that abuse and exploitation are frequently cited factors in support of the Polygamy Provision, Christina Murray points out that "violence is endemic in Western nuclear families. Nuclear families isolate women and disadvantage them economically and when monogamous unions disintegrate, women are usually left to join the poorest class in society, that of single mothers."⁴⁹ Indeed, focusing exclusively on polygamy as a problematic family form can obscure the problems within monogamous relationships. As Campbell explains, "flatly casting plural marriage as a misogynist practice serves as a foil to monogamy in a way that clouds the experience of monogamous wives."⁵⁰ Monogamy does not afford women unique protection from inequality and harm, and feminists have long critiqued the institution of (heterosexual and monogamous) marriage and the norm of the nuclear family as harmful to women. As Jyl Josephson puts it "the flaws of the institution are deeply embedded in its reinforcing of inequality, gender roles, gender hierarchy, and male power."⁵¹ However, despite the fact that the practice of monogamy sometimes involves the same troubling aspects as the practice of polygamy, only polygamy is subject to special critique. To selectively use the criminal law as a way to address concerns about gender inequality and the exploitation of women within *some* polygamous relationships harnesses racist and culturalist ideas about the sources of

49. Christina Murray, "Is Polygamy Wrong?" (1994) 22 *Agenda: Empowering Women for Gender Equality* 37 at 39.

50. Campbell, "Bountiful Voices", *supra* note 19 at 190-191.

51. Jyl Josephson, "Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage" (2005) 3(2) *Perspectives on Politics* 269 at 270. See also Ruthann Robson, "Resisting the Family, Repositioning Lesbians in Legal Theory" (1994) 19(4) *Signs* 975.

gender inequality and serves to position racialized and minority communities as a cultural 'Other' with a distinctly subordinate position on the civilizational hierarchy.⁵²

In her influential work analyzing issues at the intersection of race, gender and culture, Sherene Razack has examined the culturalizing trend in recent decades as the way in which Western liberal societies have addressed issues of patriarchal violence.⁵³ More specifically, these societies have increasingly focused on violence experienced by racialized and minority women and pointed to the cultures of these communities as the exclusive source of patriarchal violence. This culturalizing move uses the status of women, and particularly gender equality, as a marker of progressive Western civilization.⁵⁴ And, as Sirma Bilge points out, "it is particularly with regards to Muslims... that the gender-equality-and-sexual-freedoms frame has become the normative interpretative schema."⁵⁵ However, rather than examining the gender oppressive practices of both Western and non-Western societies, the culturalist narrative highlights the oppressive practices of non-Western societies, attributing these practices to their cultures while rendering invisible the oppressive practices of Western societies. As Leti Volpp explains,

[p]art of the reason many believe the cultures of the Third World or immigrant communities are so much more sexist than Western ones is that incidents of sexual violence in the West are frequently thought to reflect the behavior of a few deviants – rather than as part of our culture. In contrast, incidents of violence in the Third World or immigrant communities are thought to characterize the cultures of entire nations.⁵⁶

In this vein, Razack explains that "dominant groups are thought to have *values* while subordinate groups have *culture*"⁵⁷ and while the minority "culture" is expected to "clean up its gender act,"⁵⁸ one that is framed as unchanging, backwards and barbaric, the unmarked gender practices of dominant groups remains invisible and un-interrogated as the norm.⁵⁹

In explaining the violence that such a narrative does to marginalized communities, Volpp states:

[t]hose with power appear to have no culture; those without power are culturally endowed. Western subjects are defined by their abilities to make choices, in contrast to Third World subjects, who are defined by their group-based determinism. Because of the Western definition of what makes one human depends on the notion of agency and the ability

52. Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 96-97. [Razack, "Looking White People in the Eye"]. Sirma Bilge makes a similar observation noting "the problematic persistence of a gender-first approach to discrimination... which pushes feminist agendas within states, human rights establishments and supranational organizations, without critically engaging with specific overt and covert exclusions they may enforce, or social hierarchies they may consolidate." Bilge, *supra* note 13 at 11.

53. See especially Sherene Razack, "Imperiled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages" (2004) 12 *Fem Legal Stud* 129 [Razack, "Imperiled Muslim Women"]. Razack uses the term 'culturalization' to describe an exclusive focus on culture, understood as frozen in time and separate from systems of domination. *Ibid* at 131, n. 3.

54. *Ibid* at 131-132.

55. Bilge, *supra* note 13 at 10.

56. Leti Volpp, "Feminism Versus Multiculturalism" (2001) 101 *Colum L Rev* 1181 at 1187.

57. Sherene Razack, *Casting Out: The Eviction of Muslims From Western Law & Politics* (Toronto: University of Toronto Press, 2008) at 169. [Razack, "Casting Out"] [emphasis added].

58. *Ibid* at 169.

59. *Ibid*.

to make rational choices, to thrust some communities into a world where their actions are determined only by culture is deeply dehumanizing.⁶⁰

To further highlight and problematize Western societies' attention to the violence experienced by minority women to the exclusion of an analysis of patriarchal violence in the West, Uma Narayan notes that: "burning a woman to death in India is no more exotic than shooting a woman to death in the United States; at the same time, shooting a woman to death would be considered exotic in India, where firearms are not freely available and the prevalence of guns is viewed as an American phenomenon."⁶¹ Such a culturalist framing "prevents the serious exploration of the roots and nature of human suffering"⁶² and further, ignores the way in which interlocking systems of oppression function. As Razack cautions: "we should remember that patriarchies themselves are not only cultural practices but systems interlocked with capitalism and white supremacy."⁶³ Further, such a framing enables feminist concerns about gender equality to be appropriated to serve the colonial projects of the West.⁶⁴ As a result, this culturalist gender narrative is deeply problematic. In discussing this turn to culture in the federal government's new guide to citizenship entitled 'Discover Canada: The Rights and Responsibilities of Citizenship,' Radha Jhappan puts it this way:

[J]ust as Canadians would be horrified if 'Canadian culture' were to be advertised as home to many barbaric practices, including rape, sexual assault, spousal abuse, sex discrimination, and pay inequity, neither should our government substitute 'culturism' as the new screen for good old-fashioned racism.⁶⁵

In its support for the Polygamy Provision, LEAF relies on and buttresses these ideas about the 'backwardness' of the cultural 'Other.' Although the Polygamy Reference emerged from charges against a white religious minority group in British Columbia, the current understanding of polygamy, as presenting a unique and intolerable threat to women's equality, stems from a fear of the cultural, and often Muslim, 'Other.' Indeed, Beaman points out that in the briefing notes of the Federal Minister of Justice who was speaking about polygamy in Bountiful, there is specific mention of Muslims and polygamy. She explains,

[i]n fact, in the brief there is a rapid transition to Muslims, polygamy in Muslim Communities and reference to section 117(9)(c) of the *Immigration and Refugee Protection Act* which prohibits sponsorship by a spouse who is also the spouse of another person. Why, if the Minister was being asked about polygamy, specifically in relation to the BC government's decisions around Bountiful, was there a need to talk about polygamy among Muslims?⁶⁶

60. Volpp, *supra* note 56 at 1192.

61. Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* (New York: Routledge, 1997) at 102.

62. Lila Abu-Lughod, "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others" (2002) 104(3) *American Anthropologist* 783 at 784.

63. Razack, "Casting Out", *supra* note 57 at 165.

64. *Ibid.*

65. Radha Jhappan, "The new Canadian citizenship test: No 'barbarians' need apply" *FEDCAN Blog* (23 February 2010), online: <<http://blog.fedcan.ca/2010/02/23/the-new-canadian-citizenship-test-no-barbarians-need-apply/>>.

66. Beaman, *supra* note 40 at 9.

As Natasha Bakht further points out, “the government’s concern with polygamy though currently directed at the Mormons of the FLDS in Bountiful, British Columbia will likely open the door to more vociferous investigations of the already besieged and racialized Muslim community in Canada.”⁶⁷ While the practice of polygamy can certainly be critiqued, the selective condemnation of polygamy as uniquely problematic positions a practice associated with religious and cultural minorities as distinctively oppressive to women and further obscures the fact that polygamy exists within a global context of systemic discrimination. Further, the inequality of women in non-Western cultures is held up in contrast to the supposed equality that women have in Western societies as a way of constructing the superiority of the West and justifying a racialized distribution of power.

The difference in the nature of the mainstream discourse between the practice of polygamy and polyamory is illustrative of this racializing and culturalizing process whereby practices that are imagined and represented as racialized are treated differently than practices associated with white mainstream society. As Harsha Walia explains, “while polyamory is used to define a relationship based on mutual negotiation between ‘independent people,’ polygamy refers to a ‘cultural practice.’ Such a dichotomy reinforces assumptions that women in racialized cultures are being more exploited and less independent than ‘autonomous women’ from dominant white cultures.”⁶⁸ These assumptions, in turn, justify the different scrutiny applied to polygamy and polyamory. Thus, polyamory, while still a marginal practice, does not come under the same scrutiny as polygamy; it is shielded by its white identity. Tellingly, LEAF has not sought to include polyamory within the purview of polygamy.

Until the state is prepared to criminalize monogamous relationships in and of themselves, as opposed to acts of violence or abuse against women that may occur in these relationships, criminalizing polygamous relationships creates a cultural ‘Other’ and brings the power of the State to bear on those who are different. The singling out of polygamy for special condemnation will only serve to reinforce a certain cultural and racialized distribution of power and to reify the boundaries between a civilized and Western ‘us’ as opposed to a barbaric and non-Western ‘Other.’

C. The Problem of Agency and the Rhetoric of Salvation

LEAF’s position is objectionable in yet another way. It does not consider the intersectional identities of some marginalized women who practice polygamy and who may understand the connection between polygamy and gender equality differently than those who practice monogamy. As a result, LEAF’s approach leaves no room for these women and risks stripping them of agency through discourses of salvation. Feminist support for the Polygamy Provision thus further marginalizes women who want to live in polygamous relationships in accordance with their faith, relegating them to the space just outside of criminal sanctions. In supporting the criminal prohibition on polygamy, even a ‘read down’ interpretation of the prohibition, LEAF’s position risks casting women in polygamous relationships as perpetual victims, without agency within patriarchy.⁶⁹ Indeed, promoting a law that is

67. Natasha Bakht, “Reinvigorating Section 27: An Intersectional Approach” (2009) 6(2) *JL & Equality* 135 at 156-157.

68. Interview of Harsha Walia by Anna Carastathis (28 December 2007) in “Gender, Race, and Religious Freedom: The Bouchard-Taylor Commission’s Hijacking of ‘Gender Equality’” *The Dominion* (28 December 2007), online: <<http://www.dominionpaper.ca/articles/1595>>.

69. Volpp, *supra* note 56 at 1211.

justified on culturalist terms on the basis of protecting women from the inequality and harm of a racialized practice reinforces the idea that these marginalized women need to be ‘saved’ from their cultures.

In discussing the politics of the veil in the aftermath of 9/11, but which I argue applies equally to thinking critically about polygamy and the agency of women in polygamous relationships, Lila Abu-Lughod notes first, that “veiling itself must not be confused with, or made to stand for, lack of agency... [when it is sometimes a] voluntary act by women who are deeply committed to being moral and have a sense of honor tied to family,”⁷⁰ and second, asks us to think about “what freedom means if we accept the fundamental premise that humans are social beings, always raised in certain social and historical contexts and belonging to particular communities that shape their desires and understandings of the world?”⁷¹ Indeed, it is important to remember that “women are agents with multilayered identities.”⁷² In insisting that we be careful in using the rhetoric of salvation, Abu-Lughod points out,

when you save someone, you imply that you are saving her from something. You are also saving her to something. What violences are entailed in this transformation, and what presumptions are being made about the superiority of that to which you are saving her? Projects of saving other women depend on and reinforce a sense of superiority by Westerners, a form of arrogance that deserves to be challenged.⁷³

Thus, in approaching the issue of polygamy, it is vitally important to consider the context, agency, and motivations of women engaged in polygamous relationships as well as any Western biases at work in our reading of the issue.

In her article, in which she attempts to understand the agency of veiled Muslim women, Sirma Bilge offers similarly valuable insight applicable to thinking about the agency of women in polygamous relationships. Recognizing the prevailing dichotomy where the veil acts either “as a *symbol of submission* of women to men, [or] as a *symbol of resistance* against Western hegemony,”⁷⁴ Bilge attempts to move beyond this framework because “both fail to address the reasons most frequently given by veiled women [for veiling]; questions of piety, morality, modesty, virtue and divinity.”⁷⁵ She notes that in both perspectives, veiling as submission and veiling as resistance, religious reasons for veiling are translated into something else and thus fail to address religious motivations. Bilge suggests that part of taking religious motivations seriously “requires asking how people conceive their own actions, whether they attribute responsibility for events to individuals, to fate, to deities, or to other animate or inanimate forces.”⁷⁶

In light of this, how can we be mindful of the fact that the wholesale condemnation of polygamy may not be helpful in addressing issues of gender inequality and harm within polygamous communities? Furthermore, how can we approach the Polygamy Provision in a manner that embraces difference? Abu-Lughod has advocated that we undertake

70. Abu-Lughod, *supra* note 62 at 786.

71. *Ibid.*

72. Razack, “Casting Out”, *supra* note 57 at 153.

73. Abu-Lughod, *supra* note 62 at 789 [emphasis in the original].

74. Bilge, *supra* note 13 at 14.

75. *Ibid.*

76. *Ibid* at 22.

the hard work involved in recognizing and respecting differences — precisely as products of different histories, as expressions of different circumstances, and as manifestations of differently structured desires. We may want justice for women, but can we accept that there might be different ideas about justice and that different women might want, or choose, different futures from what we envision as best? We must consider that they might be called to personhood, so to speak, in a different language.⁷⁷

As suggested by this analysis, the courts will need to “pay attention to specific contexts, to listen to those women whose rights we purport to stand for, and to understand that we occupy different relationships of power and privilege.”⁷⁸

V. TOWARD AN INTERSECTIONAL AND POSTCOLONIAL FEMINIST PERSPECTIVE TO POLYGAMY IN THE LAW

In order to realize an intersectional and postcolonial feminist approach to polygamy, the courts must begin by striking down the Polygamy Provision. In the event that this happens, legislators must necessarily critically evaluate what, if any, legislation will take its place. However, even if the courts do not strike down the criminal prohibition on polygamy, legislators should still consider a different approach to polygamy. Rather than isolating a practice associated with religious and cultural minorities for special condemnation, legislators could take the following steps in addressing polygamy.

A. Approach Polygamy Through a ‘World-Travelling’ Methodology

In mapping out how legislators might theorize and implement a more inclusive approach to polygamy, the concept of ‘world-travelling,’ as popularized by Isabelle Gunning,⁷⁹ may provide some guidance. Maneesha Deckha has explained the term as “signifying a certain critical yet respectful stance of listening to ‘Others’ from cultural contexts not our own.”⁸⁰ In her work on why feminists should not dismiss the potential of the practice of sexual sadomasochism to be part of a feminist project, Deckha advocates using the world-travelling approach because it

readily affirms the situatedness and embodiedness of all knowledge-making. Steeped as it is in the nuances and subtleties of the scattered nature of power, it denies the possibility of a pure or innocent “equal” exchange between relatively privileged and marginalized locations, despite the best intentions we may hold as privileged subjects of undoing hegemonies that mediate our interactions with Others.⁸¹

Indeed, this seems especially important in the context of the Polygamy Reference where the dominant discourse marshaled in support of the Polygamy Provision, by both the British Columbia Attorney General’s Office as well as mainstream women’s rights organizations

77. Abu-Lughod, *supra* note 62 at 788.

78. Carastathis, *supra* note 68.

79. Isabelle Gunning, “Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries” (1991-1992) 23 Colum HRL Rev 189 at 194.

80. Maneesha Deckha, “Pain as Culture: A Postcolonial Feminist Approach to S/M and Women’s Agency” (2010) at 9 [unpublished, on file with author].

81. *Ibid* at 9-10.

such as LEAF, centres on the criminal prohibition's supposed ability to promote gender equality and protect women from harm. While these groups may have the best intentions in supporting the law against polygamy, taking a world-travelling approach would enable the courts to assess the practice of polygamy informed by the perspectives of those who reside in different 'worlds.' Indeed, using a world-travelling methodology does not mean that 'outsiders' to a particular practice should not evaluate that practice, rather, "it is a structured reminder... that the buffer to prevent slippages into an unwitting imperial standpoint is to educate one's affect with these different perspectives before settling on a position."⁸² In her work on female genital 'cutting,' Isabelle Gunning further articulates the process for undertaking a world-travelling approach noting that it involves three steps: 1) understand one's own historical context; 2) see oneself as the 'Other' woman might see you; and 3) see the other woman, her world and sense of self through her eyes.⁸³ She explains that this three-part methodology "is a process to use in perceiving and understanding [unfamiliar] practices within their cultural context and relies upon a multicultural dialogue as a way to encourage the evolution of more shared values."⁸⁴

B. Engage With and Listen to Women Who Reside in Different 'Worlds'

As part of employing a world-travelling approach, legislators should engage with and listen to women who are in polygamous relationships to understand where there may be gaps in the laws that aim to protect their interests. Rather than presuming to know the source of problems in polygamous relationships, legislators should make an effort to connect directly with those whom the law purports to protect before advocating for particular provisions and legislation. As Campbell puts it, "the question of what — if anything — to do about polygamy in Canada is one that embodies the perils of relying exclusively on 'the situated knowledge of the golden few' whom we typically imagine as wielding moral prominence and authority."⁸⁵ Good intentions cannot replace empirical research, such as that done by Campbell, and direct engagement with polygamous wives if we are to understand how the law can best be used to promote and protect equality rights; "the perspectives of the women affected by these hardships are necessary to understanding whether these women perceive polygamy, or some other force, as the root source of such adversity."⁸⁶ While direct engagement with wives in polygamous relationships may be challenging, not the least because polygamy remains a culturally and legally sensitive issue, it is nevertheless a critical task.

C. Address Concerns with Polygamy Through Existing Legislation.

As some have already pointed out, "the specific harms associated with sexual integrity that are now voiced in the concerns about a minimum age for, and consent to, valid marriages are already captured in the prohibitions on sexual exploitation and sexual interference, as well as the post-1983 removal from the *Criminal Code* of marriage as a defence to sexual assault."⁸⁷ While the elements of the offence of polygamy may be easier to prove than, for example, sexual exploitation in tightly knit and closed communities such as Bountiful, this

82. *Ibid* at 10.

83. Gunning, *supra* note 79 at 194.

84. *Ibid* at 193.

85. Campbell, "Bountiful Voices", *supra* note 19 at 226.

86. Campbell, "Wives' Tales", *supra* note 44 at 139.

87. Drummond, "Mischief", *supra* note 25 at 366.

should not be a reason for upholding a law that is otherwise deeply problematic. Indeed, “the moral perils inherent in the criminalization of polygamy need to be deeply weighted and re-considered.”⁸⁸

VI. CONCLUSION

As a prominent women’s organization focused on promoting the equality rights of women, LEAF seems ideally situated to bring a nuanced feminist perspective on polygamy to the courts. However, I have argued that LEAF’s position is problematic from an intersectional and postcolonial feminist perspective. In supporting even a ‘read down’ interpretation of the Polygamy Provision, LEAF accepts a discourse about polygamy that too easily and uncritically creates boundaries between mainstream and marginal practices, labeling the former as acceptable and the latter as criminal, without interrogating the reasons underpinning this understanding of a minority practice. First, LEAF’s position is based on the assumption that polygamy is inherently more harmful to women such that it warrants criminal sanctions. This is problematic because it leaves unexamined what exactly is so troubling about a different practice, one that is imagined and represented as racialized, and whether and how our own assumptions and values are at work in understanding polygamy in this way. Second, LEAF’s position isolates a practice associated with religious and cultural minorities for special critique while leaving the mainstream practice of monogamy unexamined. As Drummond has highlighted, “the singling out of minority groups for practices that are functionally no different from what the majority population has tolerated and accommodated over the last century leaves the polygamy provision poised to trigger concerns about xenophobia and racism.”⁸⁹ Finally, LEAF’s position fails to consider the concerns of women who participate in polygamous relationships and who do not view their relationships as unequal and oppressive in the way that mainstream society has understood polygamy, thus furthering their marginalization.

In light of this and the Polygamy Provision’s troubling history as a tool of oppression and an aid to white supremacy, the courts must be careful in determining the Polygamy Reference to ensure that they take an intersectional and postcolonial feminist approach. While currently focused on the practices of a white, non-immigrant minority religious group, this decision has the potential to affect future decisions involving racialized minorities with similarly ‘foreign’ practices. As such, the courts must be mindful of their role in creating cultural ‘Others’ and strike down the Polygamy Provision. In order to create a more inclusive legal approach, legislators should then take a world-travelling approach to polygamy to ensure that those unfamiliar with, and uninformed about, particular practices and ‘worlds’ do not slide into inaccurate and culturally biased understandings. As part of this world-travelling approach, decision-makers will need to engage with women who are involved in polygamous relationships and learn about their perspectives on their relationships. Finally, actualizing an intersectional and postcolonial feminist perspective to polygamy in the law also includes addressing problems that emerge in polygamous relationships with existing legislation that targets particular harms.

88. *Ibid.*

89. Drummond, “Mischief”, *supra* note 25 at 368.