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Church, State and the Legal Interpretation of Polygamy in Canada

Lori G. Beaman

ABSTRACT: Using the Church of Jesus Christ of Latter-day Saints in Canada as an example, I argue that religious minorities who are deemed to be harmful to society are controlled through law, either directly by legislation, through judicial application of legislation, or, more insidiously, through the discursive practices of government agents such as immigration officials. Both the legal controls imposed and the types of resistance or compliance offered by religious minorities shift and change over time. Definitions of religious freedom also shift and change over time. While the primary focus of this article is a case study of the Latter-day Saints and polygamy, it is prescient of other contemporary issues of social control of religious minorities. In these post-September 11 times, there has been a shift in rhetoric from nation-building to nation-preservation. Polygamy still plays a role in the construction of citizenship in Canada through the filtering of immigrants, but current social, political and economic circumstances differ from those the Latter-day Saints faced in the 1800s.

As the host of the 2002 Winter Olympics, Salt Lake City received a great deal of media attention. On 23 February 2002, the *National Post*, a Canadian newspaper, ran a half-page reproduction of an advertisement for "Polygamy Porter," whose slogan was "why have just one?" The *Post's* headline was, "Source of mirth for some, pain for others, polygamy persists in the Beehive State."[1] In some measure, the piece captured the present-day tension between mainstream and polygamist Latter-day Saints, and between Saints and the society in which they live. To this, add the story of Bountiful, a beautiful community

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set in the foothills of the Canadian Rockies in the province of British Columbia, home to a tight-knit community of some 700 people. It is a community in which polygamous relationships are commonplace, and for which, thus far, there have been no criminal sanctions imposed for behavior that is in clear violation of the Criminal Code of Canada. Winston Kaye Blackmore, head of the Canadian branch of the Fundamentalist Church of Latter-day Saints, has reportedly noted that the group has constitutional protection, stating, "We've got a great piece of legislation in this land of ours, and it's the Charter of Rights and Freedoms."[2] Indeed, section 2(a) of that document guarantees freedom of religion.

The existence of polygamous communities such as Bountiful raises important questions. Why, despite the clearly worded provisions of the Criminal Code, has no one in Bountiful been charged with criminal conduct? This article will conclude with some speculative answers to that question. More important, though, is the exploration of the links between religious practices in Bountiful to those of other groups, especially an examination of how, why, and when religious minorities are socially controlled through criminal and other legal sanctions. Underlying this discussion is the question of how limits on religious freedom are constructed.[3] Intertwined in this discussion are religious and legal discourses, which set the context in which boundaries around religious freedom are constructed.

Drawing from case law, parliamentary debates, and legislation, I will detail the shifting terrain and multiplicity of voices that have emerged in relation to Latter-day Saints and polygamy. I begin the article with a brief overview of the history of polygamy in the Saints' belief system and its social control through law. I then situate the legal treatment of Latter-day Saints in Canada in the broader context of the legal boundaries around religious minorities generally. Because the legal objections to polygamy focus on "harm" as the central principle, I explore the parameters of that concept as a limiting tool in the context of the intersection of religious and legal discourses.

I argue that religious minorities deemed harmful to society are controlled through law, either directly by legislation, through judicial application of legislation, or, more insidiously, through the discursive practices of government agents such as immigration officials. Both the imposition of legal controls, such as Criminal Code provisions and policy practices, and the types of resistance or compliance offered by religious minorities shift and change over time. The nineteenth-century Church of Jesus Christ of Latter-day Saints (LDS Church) suffered a fracture over the issue of polygamy, with the main body of the church reaching a compromise position with the state, while polygamist Saints continued to resist state demands to change their practices. Throughout this process, definitions of religious freedom also changed,

in part because of perceptions of what constitutes harmful behavior, a calculation based on shifting boundaries of the social construction of harm. While the primary focus of this article is a case study of the Latter-day Saints and polygamy, it is prescient of a contemporary example of social control of religious minorities. In these post-September 11 times there has been a shift in rhetoric from nation-building to nation-preserving. Polygamy still plays a role in the construction of citizenship through the filtering of immigrants, but in social, political, and economic circumstances that differ from those the Latter-day Saints faced in the 1800s.

POLYGAMY, LATTER-DAY SAINTS, AND LEGAL HISTORY

It is important to acknowledge fully the difficulties inherent in discussing Mormon polygamy. First, some members of the mainstream church would oppose calling polygamists Latter-day Saints at all. Second, as an outsider, my use of the term Mormon is tenuous at best. It has become a re-appropriated term in the construction of religious identity that is perhaps best not used by those outside the LDS community. Finally, I wish to stress that I have attempted to be respectful of both those in the mainstream LDS tradition and polygamous Latter-day Saints. I refer to polygamous LDS as Latter-day Saints and as Mormons, qualified by the word "fundamentalist." The terms LDS, Saints, and Mormons are also used interchangeably by members of these groups. To use one term over the other would misrepresent the diversity of this group, because these multiple terms reflect how *they* self-identify. However, I recognize that polygamy is a point of schism and disagreement between what we might describe as mainstream Mormons and polygamists, despite their shared religious history. Generalizations about theological differences are difficult to make, as there are at least a dozen polygamous denominations, each with varying interpretations of the "fundamentals" of Mormon faith.[4] These theological intricacies are beyond the scope of this article.[5] Canadian fundamentalists are simply one of the schismatic groups who live in Canada through historical circumstances I will discuss later in the article.

The Saints have a long history of tensions and ambiguities around polygamy.[6] Joseph Smith's reporting of his revelation of "Celestial Marriage" and the sanctity of plural marriage was met with a negative reaction both within and outside the Mormon community.[7] However, "Latter-day Saints accepted it as a commandment of God and non-Mormons fought it by passing legislation."[8] But the percentage of LDS who actually lived in polygamous situations was extremely varied.[9] While Mormons were not the only group to experiment with sexual boundaries in the name of religion, they were the largest and most powerful group to do so.[10]

The tension continues today. For example, Quinn describes instances of mainstream adherents reporting their fundamentalist sisters, daughters, and others practicing polygamy.[11] Both the state and LDS Church ban polygamy, yet there is an awareness of the fundamentalist adherence to the practice. Popular ignorance among the non-Mormon population has contributed to a defensiveness about polygamy among mainstream LDS, who see church teachings as encouraging, and indeed dictating, that the faithful obey the laws of the land, including anti-polygamy laws. For fundamentalists, as Quinn reports, adherence or conversion to fundamentalism is not about polygamy, but rather a quest "for a greater doctrinal and spiritual emphasis than they have known in the LDS church."[12] Fundamentalists see themselves as the "true" Mormon church because they have adhered to what they interpret as original church teachings.

In 1862, the United States Congress banned polygamy through the *Morrill Act,*[13] but Mormons did not experience the enforcement of legal sanctions for more than a decade after the law's passage[14] (in this, their situation was similar to that of modern-day Bountiful). The polygamy issue came to a legal head in 1870 through the test case of *Reynolds v. United States,* in which the United States Supreme Court found that freedom of religion could be limited by law, and that banning polygamy was a justifiable limit on freedom of religion.[15] Thus ended the open practice of polygamy, at least for a time. Polygamists fled to Mexico and to Canada, and in the following years, United States courts and legislative bodies continued to deny the legitimacy of polygamy. The 1882 Edmunds Act amended the Morrill Act to impose harsher sanctions, including prison for practicing polygamists and the unseating of polygamous elected officials. A series of United States Supreme Court decisions upheld these limits on the freedom of Latter-day Saints to engage in polygamy. Eventually, "[t]he cost of maintaining the practice of plural marriage and with it increasing government persecution proved to be too great."[16] By 1890, the church officially ended polygamy, planting the seeds of the fundamentalist movement in which present-day adherents see themselves as following the true teachings of the church. Intense state opposition to polygamy is now more accurately viewed as an exercise in nation-building. While polygamy was the lightning rod that attracted attention to the LDS, it was the possibility that members of a new religious movement would place their allegiance to the leaders ahead of their commitment to the state that posed the real threat. Eliminating polygamy was linked to the preservation of the welfare of the country and the protection of liberty.[17]

While Canada proved to be a temporary sanctuary for polygamous Mormons, it took legal measures to reinforce its stand on the criminal nature of polygamy; thus, any respite from persecution the LDS enjoyed in Canada quickly ended. Following British legal tradition, Canada had

laws prohibiting polygamy prior to Mormon immigration. "By the time of Mormon arrival, not only had the 'British North America Act' lodged the regulation of marriage throughout the dominion with the central government but also the 'Consolidation Act' of 1869 reaffirmed the most recent English statute prohibiting polygamy."[18] Mormon men were advised that they would only be allowed to live with one wife in Canada, and the Canadian government took action to increase the penalty for polygamy from two to five years' imprisonment.[19]

The 1890 parliamentary debates, as reported in *Hansard*, about the Criminal Code amendment are telling. The intention of the legislature clearly was to address the "Mormon problem" of polygamy. As it became apparent that Mormons were seeking asylum in Canada, the need to prevent the establishment of polygamous colonies became more pressing, evidenced by a comment during debates:

> Section 9 deals with the practice of polygamy, which I am not aware yet exists in Canada, but which we are threatened with; and I think it will be much more prudent that legislation should be adopted at once in anticipation of the offence, if there is any probability of its introduction, rather than we should wait until it has become established in Canada.[20]

The ensuing discussion around this section of the Criminal Code revealed ignorance about religious practices and ambivalence about Mormons as immigrants, who were recognized to be industrious and frugal, but whose sexual practices mitigated against enthusiasm about their immigration. As one member of Parliament said, "we are here trying to prevent what may become a serious moral and national ulcer."[21] Another member stated: "I think it is not the class of population which we desire, and the history of the United States proves that it forms an element which the American people would be glad to be rid of."[22] While they were recognized to be "first rate" settlers, there was concern that, despite assurances of Ora Card (the "leader" of the immigrant group) that they would comply with the law of the land, they would succumb to their "Mormon inclinations."[23]

Section 310 of the Criminal Code of Canada, 1906 was clearly drafted with the Saints in mind:

> Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars—
>
> (a) who practises, or, by the rites, ceremonies, forms, rules, or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into
>
> i) any form of polygamy,

ii) any kind of conjugal union with more than one person at the same time
iii) what among the persons commonly called Mormons is known as spiritual or plural marriage. . . .

During the time of early LDS settlement in Canada, and in particular southern Alberta, there was considerable tension around the immigration of Mormons from the United States. Popular myths and stereotypes were countered by government support for the LDS presence, and in fact "British Canadian Protestants were torn between the pressing need to populate the prairies and their reservations about securing immigrants who were culturally different."[24] Today, the Criminal Code provision (293) reads:

(1) Every one who:
(a) practices or enters into or in any manner agrees or consent to practice 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 a 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.

The present day Criminal Code has eliminated the specific mention of "the persons commonly called Mormons,"[25] which, as will be discussed later in the paper, has the effect of expanding the possible scope of application, and eliminating from scrutiny polygamous, but non-threatening LDS. In essence, during one period of history religious freedom was interpreted so as to exclude polygamous family structures, and in another, was tacitly accepted, at least when practiced by Latter-day Saints.

The Legal Context of Religious Minorities in Canada

Historically, Canada has had a Protestant/Roman Catholic quasi-establishment that has served to set the boundaries around that which constitutes "normal" religion.[26] The law is a mechanism by which religion on the margins is socially controlled. Bountiful is a singular example of the complex web of church-state-community relations that underlies religious freedom in Canada (and arguably North America). Scientologists, Jehovah's Witnesses, Wiccans, and Native Americans, to name but a few groups on the religious margins, have all experienced social control through the criminal sanctioning of their religious

activities. Scientologists have been charged with fraud for practices that would be seen as "normal" for mainstream religious groups, such as paying church leaders out of church profits.[27] Jehovah's Witnesses have been restricted by municipal bylaws from proselytizing[28] and more recently from making medical decisions in relation to their children.[29] Wiccans are forbidden from talking about their religion with their children.[30] Native Americans are criminally charged for hunting out of season, for possessing prohibited animal parts when they attempt to perform religious rituals, and for use of a prohibited substance (peyote) as part of a sacred ceremony.[31] In the case of fundamentalist LDS, polygamy is the focal point for persecution and, historically, prosecution. For Scientologists, it is their socially and sometimes legally constructed "cult" status and the absence of God in their cosmology. For Native Americans, it is their way of thinking that threatens the Eurocentric ordering of ownership. Each of the minority groups is a case study in itself, as the parameters of exclusion take a different shape and the boundaries of "normal" are contested terrain that shifts over time and space. Indeed, exclusion from the norm may be partial—one of the conditions of acceptance of Mormons as normal was that they abandon polygamy as a religious practice.[32] However, acceptance may be partial and conditional, depending upon the shape of the dominant religious voice(s). Paradoxically, those dominant voices often act silently to define "real" religion, and thus shape the ways in which freedom of religion is articulated.

Communities like Bountiful pose an interesting exception to the patterns of criminal sanction experienced by Latter-day Saints and other polygamous groups. Everyone agrees that polygamy is a violation of the Criminal Code. Indeed, a Royal Canadian Mounted Police investigation resulted in a recommendation that two Bountiful residents, one being Winston Kaye Blackmore (the leader cited at the beginning of this article), be charged under the Code. But the Crown Prosecutor's office reportedly refused to proceed, arguing that section 2(a) of the Charter of Rights and Freedoms would strike down the Criminal Code section in this instance.[33] In essence, the Crown Prosecutor's office refused to proceed based on what it anticipated *might* happen. Yet, in other circumstances the state has not hesitated to impose "external" standards of justice on closed religious communities in the past, as in *Lakeside Colony of Hutterian Brethren v. Hofer* (1992).[34]

The somewhat odd and uneven approach to religious freedom is not simply a Canadian anomaly—we can find many other examples of the uneven terrain of religious freedom in other countries as well. James T. Richardson has examined the contours of this problem internationally.[35] James Beckford has focused on the ways in which religious freedom is legally constructed in France.[36] In the United States, the 1988 *State of Oregon v. Smith* case is representative of the type of reasoning used

to restrict religious liberty, and is probably the case of most recent and sweeping significance.[37] There the Supreme Court privileged the so-called war on drugs over a religious ritual involving peyote, a prohibited substance but a central element in a Native American ritual. As Richardson notes, there has been a serious erosion of religious freedom in the United States.[38] In cases involving religious freedom there is a majority religious discourse that acts as a barometer of what constitutes "real" religion, even when the state is explicitly committed to secularism.

The legal mechanisms for limiting religious freedom vary from country to country. In Canada, the Supreme Court has held that it will give a broad interpretation to the meaning of religion in "freedom of religion," stating that it will not impose "internal limits."[39] Nonetheless, the Court has restricted the religious liberty of minority groups. One mechanism for limiting religious freedom is Section 1 of the Charter of Rights and Freedoms, which limits the rights and freedoms contained in the Charter by stating they are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[40] Legally, religious minorities are limited by the boundaries of "the normal," however that might be constituted. The parameters of those boundaries are negotiated terrain, but highly influenced by the hegemonic impact of mainstream Christianity in Western countries.

While the Supreme Court of Canada has used Section 1 to limit religious freedom, there is no clear reasoning or framework established for doing so. Certainly there is a body of case law that introduces mechanisms for determining Section 1 limits, but these are sufficiently vacuous to allow for the incorporation of a silent standard of "real" religion. The most articulate and well-reasoned decision of the Supreme Court in conducting a balancing and limiting of religious freedom is found in the *Ross* case, in which the Court weighed the religious freedom claimed by an anti-Semitic teacher against the "poisoned atmosphere of the educational environment."[41] The Court defined religious freedom as the "right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."[42] In its decision, the Court was clear that religious freedom is not boundless and must be tempered by the interests of society. Here the Court introduced the notion of "harm" and decided that there was a causal relationship between the teacher's conduct and the identified harm. The Court did not, however, articulate a clear framework with which such analyses could be conducted. The legal concept of harm is not new, but it is a novel approach in the limitation of religious freedom. It is also a concept that is employed, explicitly or implicitly, by the various voices that contribute to the debate over polygamy—that it harms women, the state, or men's control of women, and so on. The calculation of harm as a method for delineating legal

boundaries has become increasingly important, and it is therefore worth exploring in some detail.

"HARM" AS A LIMITING CONCEPT

Martha Nussbaum develops the concept of harm in relation to the limiting of religious freedom in her essay, "Religion and Women's Equality." Her balancing formula for religious freedom and other human rights involves a consideration of the preservation and support of human "central capabilities" with religious freedom. The intervening principle, and the aspect of Nussbaum's argument that is most interesting for the purposes of this article, is that of "harm." Nussbaum's central proposition is that "we should refuse to give deference to religion when its practices harm people in areas covered by the major capabilities."[43] She argues that religion should be protected because it is an important mechanism for some people for searching for ultimate good, and that religion is an important facilitator of morality.[44] However, her list of "major capabilities" is problematic. For example, 10b is "Material—being able to hold property," a central capability that reflects a particular liberal conceptualization of human fulfillment that runs contrary to the teachings of some religious groups, but that would not, in my view, constitute a "harm" that would justify limiting religious freedom.[45] For example, a number of religious groups hold property communally (see the discussion of the *Lakeside* case in note 34). Embedded in Nussbaum's central capabilities are judgments about what is good, desirable, and important for human happiness that may not be shared by all people and cannot necessarily be linked with the essence of what it is to be a healthy, happy human being. The "harms" conceptualized by Nussbaum are open to debate. Her underlying premises evidence, first, a limited understanding about religion—she insists that "cults" not be protected if they do not contain a "conduct improving element" and refers to Scientology as a "money making scheme."[46] Second, her underlying premises are based on an over-reliance on liberalism and conservative notions of virtue that would preserve the religious freedom of mainstream religions while leaving many religious minorities on the margins. The use of "harm" as a limiting concept may have potential, and it is a beginning point from which we may want to build a more clearly articulated framework for limiting religious freedom. However, it is important to recognize, as illustrated by Nussbaum's carefully laid out schema, that asking questions about harm necessarily imports moral frameworks about what is good and desirable. This is unavoidable. The point is that those frameworks must be identified as such, rather than masked under the guise of neutrality and objectivity. This is especially important in law, which holds itself as a neutral arbiter, and which presents legal formulae as objective problem solvers.

Mariana Valverde identifies the multi-faceted potential of the "harm" test in her discussion of obscenity law in Canada. Her analysis references us back to the problems with Nussbaum's proposed categories for the determination of the existence of harm by identifying the multiple possibilities of the harm test and the underlying values or standpoints from which the risk of harm argument is deployed. In short, Valverde argues that risk of harm acts "as a veritable joker card that can serve completely different purposes depending on the context."[47] In the example of polygamy, risk of harm also can be cited by the state in its bid to preserve the single-ownership model of women. Harm can be used by feminists who seek to argue that polygamy is a harmful vestige of patriarchy, and by women in polygamous relationships who may argue that their agency is compromised through the criminalization of polygamy. Valverde's arguments in relation to obscenity law bear repeating in the context of polygamy and its criminalization:

> The *Butler* decision's test of "risk of harm" has met with a warm reception both from other judges and from the public, but in this general happiness that a new basis for the criminalization of "immorality" has been found, it has been largely forgotten that the fashionable term "harm" can mean many things and that harm-based governance can have very different rationales and produce extremely varied results.[48]

Harm, or risk of harm, is a fluid concept subject to perspective and (ab)use by any interested party. Does this render it useless as a means to consider the limits we might want to place on religious freedom? Not necessarily, but a primary caveat of its use must be the revelation of moral assumptions about what is "good" or "right" or "desirable."

How can the concept of harm be used as a legal limit on religious freedom against those who claim they are entitled to practice polygamy as an expression of their religious beliefs? A central obstacle to its use is not a legal one, but rather an ongoing dilemma related to human agency and freedom of choice that again illustrates the differences among the various voices wishing to define religious freedom. Further, the fluidity of harm, as pointed out by Valverde, is intertwined with the confluence of many streams, including nation-building, nation-preserving, and the targeting of particular groups as "threatening" or "risky." Where, then, are we left on the question of polygamy, its criminalization, and its use as a filter in the boundaries of citizenship and nation? The determination of harm is no easy task, and must always be assessed (if harm analysis is the chosen route) asking the question: harm from whose perspective?

In the preceding pages, I have outlined the persecution of polygamous Latter-day Saints as a religious "other" whose threat to nation-building was articulated around the issue of polygamy. Over time, the

Saints have proven themselves to be good citizens, and are no longer seen as a threat to the nation. The main LDS Church has officially banned polygamy and clearly separates itself from polygamous groups. Fundamentalist groups, like those in Bountiful, are not perceived as a threat by the Canadian state. In short, the harm and risk of harm caused by polygamy has been assessed as non-existent, or at least not as a threat to the state. I wish to conclude this discussion with an example of the potential reconfiguration of harm in the post-September 11 climate.

PRESERVING THE NATION, DEFINING THE BOUNDARIES

In her carefully crafted discussion of "The Mormon Question," Sarah Barr Gordon locates the polygamy issue in its historical context. Gordon argues that polygamy became a symbolic beacon around power struggles of a broader nature, including religious freedom and nation-building. Central to anti-polygamy arguments were the notions that Christian monogamy and the welfare of the country were intertwined; that liberty and mainstream Protestantism were linked; and that polygamy could only be supported by theocracy, eliminating the distinction between church and state.[49] Of course, the links between mainstream Protestantism and the well-being of the nation and its citizens were not seen to violate the church-state wall. Anti-polygamists framed their arguments in relation to the antislavery movement, appealing to "the emotional suffering created by a system of oppression."[50] This connection also "provided a blueprint for constitutional rights consciousness."[51] In short, polygamy was constructed as being fraught with harm and risk of harm at multiple levels, not least of which was jeopardizing an entire nation and the values the majority of its citizens held dear (or so went the rhetoric).

Let us fast-forward to 2004, a post-September 11 era in which nation preservation, through the creation of fortress North America and the mounting of the war on terrorism, has become a pervasive discourse. In his pre-2001 discussion of treatment of immigrants in American culture, John K. Roth worried about the marginalization of "surplus" people, a discussion he linked to the "Final Solution" of the Nazi regime. He cited Richard Rubenstein: "[I]n a crisis, a secularized equivalent of the division of mankind into the elect and the reprobate could easily become a controlling image." Roth also noted that, "Western monotheism's emphasis on a God of history has typically included the idea that some groups or persons are specially called. They are linked together with God in covenantal relations."[52] While the post-September 11 God-rhetoric has been much more pervasive in the United States than in Canada, there is a renewed sense that an anti-immigrant sentiment, particularly against non-Christians, has certainly accelerated since Roth wrote these words.

In an interesting parallel, we see once again what has become articulated as a shared problem between the United States and Canada involving the flow of immigrants seen as posing a risk of harm, and who therefore must be monitored, controlled, and in some cases excluded as potential citizens. In the late 1800s, Mormons were constructed as presenting a threat to nationhood similar to that posed by present-day immigrants, particularly those from Muslim countries. Religion again plays a role in distinguishing "us" from "them," and the issue of polygamy emerges, albeit less centrally, as a sorting mechanism for excluding those constructed as presenting a threat to the nation/continent.

I pose this thesis not as a given, but as a call for further research and investigation. A significant limitation to such an inquiry is the availability of data, particularly through case law. Much of the sorting of immigration cases occurs behind closed doors, in the context of creating files embedded in a power-knowledge matrix that eludes external examination.[53] Further, immigrants are excluded from access to justice to a much greater extent than are citizens. Fear, lack of knowledge of the legal and bureaucratic systems, language barriers, and limited financial resources contribute to the parameters of power relations in this context. Finally, while the passage of time occludes many details of the story of Latter-day Saints and polygamy, it has also opened possibilities for discussion and allowed identification of narrative strands that make possible arguments such as that presented by Gordon. This same historical advantage is unavailable to us, as we are in the midst of the intersection of polygamy with broader social, political, and legal currents.

Reported cases of polygamy are somewhat scarce, and case law represents a very small portion of those matters that enter the legal forum; it is difficult to generalize from them, and there is much within legal discourse that remains hidden from view. Polygamy cases frequently turn on matters of conflict of laws, such as which country's laws apply, and are often focused on the availability of "matrimonial relief" to polygamous wives who immigrate to Canada.[54] In *R. v. Moustafa* (1991), the judge noted: "If I recall the Old Testament correctly, polygamy was a prevailing type of marriage arrangement in biblical days and is still in some countries permitted, although it certainly seems to be a type of marriage that is on the wane." The data the judge drew on for this conclusion was not mentioned. The defense council responded: "It's too expensive, your Honor." While the court noted that polygamy "surfaced" in earlier times in North America in the LDS Church, it went on to state that "it is not a kind of marriage that has been practised in Canada. The defendant is from Egypt, and of the Moslem religion. The defendant is sentenced to time served, and to probation. In addition, he is ordered to report to immigration authorities."[55] In 2002, in *Gure v. Canada (Minister of Immigration),* the applicant, who married a Somalian woman and later

a Saudi Arabian woman, was denied permission for permanent resident status based on his previous polygamous status. He had divorced one of the women, but the court noted his separate applications for permanent residence with each woman, and the fact that he was married to two women at the time of his application, as reason to exclude him from the legislative parameters of "member of the family class" for the purposes of sponsorship.[56] In a 1998 decision *Ali v. The Minister of Citizenship and Immigration*, the Federal Court upheld the decision of an immigration officer refusing Ali's application for permanent residence in Canada because the officer "was of the opinion that there were reasonable grounds to believe the applicant would practice polygamy in Canada."[57] Not mentioned here were polygamous marriages in Canada that remained outside the purview of prosecutorial energies.

A thematic link between Mormon fundamentalists and present-day immigrants is their minority religion status. The fact that both groups have been limited in their religious expression is no mere coincidence. For both Mormons and immigrants, the law controls the religious practices of minority groups and, by implication, imposes a particular, idealized notion of family life/intimate relations. Cultural assimilation is thus facilitated on two fronts—religion and family structure—and the polygamy issue remains a mechanism for monitoring citizenship.[58]

CONCLUSION

The existence of polygamous groups such as that found in Bountiful serves as a point from which to explore some important issues, including the ways in which the definition of religious freedom shifts and changes over time. Historically, polygamy served as a focal point for attention to what was then a new religious movement. The LDS Church fractured over this issue, and it remains divided. In the contest between citizenship and nascent religious doctrine/practice, the former was the strategic choice for mainstream Mormonism. This ongoing internal conflict begs the question of why external sanctions, in the form of criminal prosecution, have not been pursued in Bountiful. Does failure to prosecute mean legal condoning of polygamy? There are several possible explanations for Bountiful's seeming immunity.

First, it might be argued that the failure to prosecute is in fact an attempt to respect women's autonomy/agency. State reluctance frequently manifests in this form, in which women's agency is used as the symbolic touchstone for non-intervention. Similar reasoning is used in relation to various forms of violence against women, including "domestic" violence and sexual assault. But this reasoning is often offered uncritically, leaving women without legal resources, or without a legal system that is responsive to women's oppression. There is, in this approach, no real reflexive interpretation of what we mean by women's

agency and how that might be best supported. It may take different shapes for different women. The reality is that polygamy is sometimes raised as problematic by women who leave polygamous colonies or families. Their allegations and insights offer another perspective on polygamous family life. Polygamous families are like other families—they can support a "private" place in which violence against women occurs and in which children are abused. While social scientists have identified issues around perspective in reporting (usually around "brainwashing") from those who leave religious colonies, nonetheless it is the voices of women who emerge to call into question conditions for women in polygamous colonies. Their voices must be taken seriously by the legal system. The state claim to be respecting women's agency through non-intervention lacks both credibility and reflexivity.

A second explanation for non-intervention may be the state's desire to avoid bad appearances. Scenes of crying women and babies as "offenders" are led away come to mind, such as the highly publicized case at Short Creek, Arizona, in 1953. In that case, the families were eventually reunited and remained committed to their religious beliefs, including the sacredness of polygamy.[59] The political management of a scene in which the state is seen as destroying families becomes extremely difficult, particularly in a neo-liberal climate that brings with it support for "traditional family values." In the abstract, polygamous families fall outside that framework, but the reality resembles the "ideal" family of conservative rhetoric much more than does the single-parent family. This raises an associated problem—what to do with the disassembled polygamous family? As the state has moved to privatize responsibility for families, and to displace state responsibility with individual responsibility, the creation of state-sanctioned "broken" families is problematic. Some family, it would seem, is better than no family at all, especially if it resembles a patriarchal model that avoids the dreaded female-headed family. A patriarch gives the state some assurance that the family is in safe hands.

In the social and legal construction of religious freedom and its limits, polygamy has served as a touchstone from which to control marginalized groups. The need to prosecute LDS polygamists has disappeared—they are no longer seen as a threat to the nation or the social order. Polygamy laws served a purpose in relation to social control of Mormons. They contributed to nation-building by transforming potentially rebellious outliers into model citizens. However, state-building was taking place at both levels. In the process of trading away polygamy, Mormons gained nationhood in terms of a safe territory that was granted statehood. In part, then, Joseph Smith's vision of a separate, earthly, kingdom[60] was realized.[61] Mormons have proved themselves model citizens, and thus a more radical group of polygamist LDS can be tolerated by the state with a live-and-let-live attitude.

However, the polygamy threat can be transposed to other groups who are perceived as threatening the nation, such as those who emigrate from countries in which polygamy is practiced legally, and whose religious beliefs support polygamy. In Canada, the Criminal Code provisions serve as a filtering device for immigrants with undesirable national/religious backgrounds. In an interesting historical continuity, parliamentary debates around the 1890 Criminal Code's enactment of polygamy sections reveal the targeting and control of immigration and immigrants (at that time Mormons) as a key goal:

> Notwithstanding the anxiety the hon. members from the North-West have shown during the last few days to promote immigration, I fancy they will not be very anxious to promote immigration of this character, and I do not suppose that any of us feel, under the circumstances, that such immigration is of a useful or wholesome or profitable character. I am not suggesting at this moment that we cannot do more than, by the most careful and comprehensive legislation, provide machinery for the discontinuance or the prevention of these abominable practices which we know these people engage in under pretence of religion.[62]

Although the social and political context was much different—Canada was a relatively new nation for which settlement was an important and somewhat pressing issue—the use of the Criminal Code as a filtering mechanism remains today.

The polygamy provisions are especially useful in the negotiation of power relations between state and religious minorities. The Criminal Code provisions prohibiting polygamy have been in existence for years, rendering them relatively unobtrusive and less likely to attract civil rights groups' attention. In theory, the provisions reflect the values of a society in which mainstream Christianity provides a silent measure of what counts as religion and what is worthy of protection under constitutional guarantees of freedom of religion. The calculation of risk of harm remains the wild card, as described by Valverde. In the meantime, polygamy and the limitation of its practice will no doubt continue to be a topic on which multiple discursive voices will be heard. The shifting terrain of polygamy laws allows the legal and social construction of LDS polygamists as harmless citizens and polygamist immigrants as potential dangers.

ENDNOTES

[1] This paper was presented at the annual meeting of the Society for the Scientific Study of Religion, Columbus, Ohio, 17–19 October 2001. The author wishes to thank the Social Sciences and Humanities Research Council of Canada for its financial support. Also, thanks to Chris Canning, Caroline Williams, Becky Little, and Peter Wigand for their

research assistance. Jon Berquist, Rebecca Johnson, and Marilyn Nefsky offered valuable suggestions. I thank the anonymous reviewers for their guidance.

[2] Estanislao Oziewicz, "Bountiful's Troubling Tradition," *Toronto Globe and Mail*, 9 December 2000.

[3] Polygamy, or more accurately polygyny (husband with multiple wives), is practiced worldwide by a wide range of religions, including Jews and Muslims.

[4] Richard N. Ostling and Joan K. Ostling, *The Power and the Promise: Mormon America* (San Francisco: HarperSanFrancisco, 1999), 74.

[5] See D. Michael Quinn, "Plural Marriage and Mormon Fundamentalism," in *Fundamentalisms and Society: Reclaiming the Sciences, the Family, and Education*, ed. Martin E. Marty and R. Scott Appleby (Chicago: University of Chicago Press, 1993) 240–93. Quinn offers an excellent discussion of Mormon fundamentalism and its theology.

[6] See Quinn, "Plural Marriage and Mormon Fundamentalism," 253–55, for a discussion of the tensions between fundamentalist and mainstream LDS.

[7] For some of the LDS rationales for polygamy, beyond the claim that it was a revelation to Joseph Smith, see Stanley S. Ivins, "Notes on Mormon Polygamy," in *The New Mormon History: Revisionist Essays on the Past,* ed. D. Michael Quinn (Salt Lake City: Signature Books, 1991), 175.

[8] Jessie L. Embry, *Mormon Polygamous Families: Life in the Principle* (Salt Lake City: University of Utah Press, 1987), 16.

[9] Richard S. van Wagoner, *Mormon Polygamy: A History* (Salt Lake City: Signature Books, 1989). Also, see Quinn, "Plural Marriage and Mormon Fundamentalism."

[10] Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2002). In any event, "today Mormons are widely regarded as quintessentially, even hyper, American." Grant Underwood, "Millennialism, Persecution, and Violence: The Mormons," in *Millennialism, Persecution, and Violence: Historical Cases,* ed. Catherine Wessinger (Syracuse: Syracuse University Press, 2000), 60.

[11] Quinn, "Plural Marriage and Mormon Fundamentalism," 253–55.

[12] Quinn, "Plural Marriage and Mormon Fundamentalism," 252.

[13] This is a simplification of a more complex legal history. For an excellent and detailed overview, see Mary K. Campbell, "Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854–1887," *Yale Journal of Law and Feminism* 13 (2001): 29–70.

[14] Eric Mazur, *The Americanization of Religious Minorities: Confronting the Constitutional Order* (Baltimore: Johns Hopkins University Press, 1999), 74–80.

[15] *Reynolds v. United States*, 98 US 145 1878.

[16] Mazur, *Americanization of Religious Minorities*, 83.

[17] Gordon, *Mormon Question*, 30. Gordon also notes the tendency in popular culture to compare polygamy to slavery, and the criticism of law in its seeming ineffectiveness to control both during the mid 1800s (48–49).

[18] Carmon B. Hardy, "Mormon Polygamy in Mexico and Canada: A Legal and Historiographical Review," in *The Mormon Presence in Canada*, ed. Brigham Y. Card, Herbert C. Northcott, John E. Foster, Howard Palmer, and George Jarvis (Edmonton: University of Alberta Press, 1990), 195.

[19] Embry, *Mormon Polygamous Families*, 24.

[20] *Hansard,* 3177.

[21] *Hansard*, 3177.

[22] *Hansard*, 3178.

[23] *Hansard*, 3179.

[24] Howard Palmer, "Polygamy and Progress: The Reaction to Mormons in Canada, 1887–1923," in Card, Northcott, Foster, Palmer, and Jarvis, *Mormon Presence in Canada*, 110.

[25] Section 310, Criminal Code of Canada, 1906.

[26] "Few Canadians find the 'separation of church and state' an acceptable description either of their situation or of their ideal of it." John Webster Grant quoted in Seymour Martin Lipset, *North American Cultures: Values and Institutions in Canada and the United States* (Orono, Me.: Borderlands Project, 1990), 10.

[27] *R. v. Church of Scientology* No. 6, 99 OAC 321, 1997.

[28] *Saumar v. City of Quebec and Attorney General of Quebec* [1953] 2 SCR 229.

[29] *Sheena B* [1995] 176 N.R. SCC.

[30] *Gay v. Kingston* [1992] AJ 1171.

[31] *R. v. Jack* [1982] 5 WWW 193. See *Employment Division, Department of Human Resources of the State of Oregon v. Smith*, 485 U.S. 660 (1988).

[32] See Underwood, "Millennialism, Persecution, and Violence," for a discussion of millennialism, violence and links to polygamy in the 1890s, especially on 51.

[33] Oziewicz, "Bountiful's Troubling Tradition."

[34] That case involved the expulsion of a member of an Alberta Hutterite colony who had invented and patented a hog feeder against the wishes of the community. Such colonies are in some senses models of Durkheim's mechanical solidarity: values and norms are shared, and punishments for transgressions are harsh, thus maintaining, at least in theory, social solidarity. Shaming, in this instance, becomes a central mechanism for social control. In this way Hutterite communities minimize conflict and try to deal with decisions using a community consensus model. In part they achieve this by separating themselves from the world. In *Hofer*, the expelled member argued that the principles of natural justice had not been followed because he was not given proper notice of the meeting at which the decision to expel him was reached. The Supreme Court of Canada imposed external standards of natural justice, which it assumed were universal standards and if they were not followed, should be. In applying external legal standards, the Court ignored the internal order of the colony that the expelled member clearly violated. Only Justice McLachlin (now Chief Justice of the Supreme Court of Canada) in dissent acknowledged that the social context should be carefully considered. She stated, "The church is predicated on voluntary submission to the rulings of the elders in authority, so as to maintain the ideal of peaceful and harmonious living. A member is at all times free to remove himself from the colony." See *Lakeside Colony of Hutterian Brethren v. Hofer* [1992] 3 S.C.R. 165, at 228. Rather than respecting the colony's dispute resolution mechanisms as well as its need to maintain social solidarity in such a tight-knit community, the court privileged legal discourse over religious discourse. Surely if the court was willing to interfere over a hog feeder, risking the balance of the community, it should have no trouble enforcing the public law as stated in the Criminal Code in relation to polygamy, or at least chancing a favorable decision at what would inevitably be the Supreme Court of Canada level.

[35] James T. Richardson, "Minority Religions ('Cults') and the Law: Comparisons of the United States, Europe and Australia," *University of Queensland Law Journal* 18, no. 2 (1995): 183–207.

[36] James A. Beckford, "'Dystopia' and the Reaction to New Religious Movements in France," paper presented at the annual meeting of the Society for the Scientific Study of Religion, 2001.

[37] *Employment Division, Department of Human Resources of the State of Oregon v. Smith*, 485 U.S. 660 (1988).

[38] In all these examples, the minority religious groups seek to define the boundaries of religious freedom based on internal understandings of their religious beliefs and practices. These groups frequently engage the legal measures and formulae for religious freedom in attempts to transcend boundaries that might otherwise exclude them.

[39] *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825 paragraph 73.

[40] Canadian Charter of Rights and Freedoms, Constitution Act 1982.

[41] See *Attis v. New Brunswick District No.15 Board of Education* [1996] 195 N.R.81 (S.C.C.) 251, known as the "Ross" case.

[42] *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825 paragraph 72.

[43] Martha Nussbaum, "Religion and Women's Equality: The Case of India," in *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies*, ed. Nancy Rosenblum (Princeton: Princeton University Press, 2002), 349.

[44] Nussbaum, "Religion and Women's Equality," 348.

[45] In her list, Nussbaum includes reproductive health and "opportunities for sexual satisfaction," raising the possibility that she might eliminate celibacy from the range of protected choices made in accordance with religious beliefs.

[46] Nussbaum, "Religion and Women's Equality," 349.

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

[48] Valverde, "The Harms of Sex," 187.

[49] Gordon, *Mormon Question,* 30, 33, 34–35.

[50] Gordon, *Mormon Question*, 49.

[51] Gordon, *Mormon Question*, 51.

[52] John K. Roth, *Private Needs, Public Selves* (Chicago: University of Illinois Press, 1997), 187.

[53] Michel Foucault, *Discipline and Punish* (New York: Vintage Books, 1977). See also Lori G. Beaman, "Legal Ethnography: Exploring the Gendered Nature of Legal Method," *Critical Criminology: An International Journal* 7, no. 1 (1996): 53–74.

[54] *Sara v. Sara* [1962] 31 DLR 2nd 566; *Re Hassan and Hassan* [1976] 12 OR 2nd 432. See M. L. Marasinghe, "Polygamous Marriages and the Principle of Mutation inn the Conflict of Laws," *McGill Law Journal* 24 (1978): 395–421, for an extensive discussion of conflict of laws issues.

[55] *R. v. Moustafa*, [1991], O.J. No. 835 (Ont. Prov. Div.) (QL).

[56] *Gure v. Canada (Minister of Immigration)* [2002], 25 Imm.L.R. (3d) (Imm. & Ref. Bd. [App. Div.]).

[57] *Ali v. Canada (Minister of Citizenship and Immigration)* [1999], 154 F.T.R.

[58] Notes in the Criminal Code make it clear that adultery does not constitute polygamy. The law does not otherwise sanction adultery, and thus multiple relationships in North America in one form receive tacit approval or at the very least are not socially controlled through law.

[59] Quinn, "Plural Marriage and Mormon Fundamentalism," 145; and Ostling and Ostling, *The Power and the Promise*, 74. See also Ken Driggs, "'This Will Someday Be the Head and Not the Tail of the Church': A History of the Mormon Fundamentalists at Short Creek," *Journal of Church and State* 43, no. 1 (2001): 49–80.

[60] Gordon, *Mormon Question,* 22.

[61] In the United States, there is an extra piece to the puzzle of polygamy. The United States Constitution differs from the Canadian constitutional approach to religion (which, especially in the Constitution Act of 1867, arguably could be interpreted as endorsing state/religion entanglement) in that the former explicitly prohibits the "establishment"

of religion. It might be argued that Utah in fact has an established religion in that its state government is dominated by LDS, and it is clear that LDS religious beliefs are reflected in state laws. It is arguable that, with the elimination of polygamy as a tenet of mainstream Mormonism, the church brought itself within the boundaries of mainstream Protestantism, which forms the hegemonic religious discourse in the United States. Thus "establishment" became acceptable as long as the established church fell within the parameters of mainstream Protestantism.

[62] *Hansard*, 3175.