

# **Religious Identity and Discrimination in the Public Realm: *The Case of Polygamy in Western Canada***

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Polygamy has been criminally prohibited in Canada since 1890,<sup>1</sup> but many people, including some communities, openly engage in the practice either as a matter of lifestyle choice,<sup>2</sup> because the practice is culturally familiar and accepted,<sup>3</sup> or because it is religiously mandated, as it is in the Fundamentalist Church of Jesus Christ of the Latter Day Saints (FLDS), who are also known as ‘fundamentalist Mormons’. Rarely have polygamists in North America been charged with the offence and those who have been convicted tend to receive light penalties. However, starting in 2002, this situation changed. At that time, the FLDS community in North America gained national and international attention due to a conflict within the community between rival leaders, one of whom, Warren Jeffs, was convicted in Utah as an accomplice for his role in arranging a marriage between a 14 year old girl and her 19 year old cousin.<sup>4</sup> In the context of the conflict, Jeffs tried to excommunicate his rival in Canada, Winston Blackmore, which led to a split in the

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1 Today, section 293 of Canada’s Criminal Code contains similar wording to the 1890 statute. Section 293 states:

(1) Everyone who

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

(i) any form of polygamy, or

(ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or

(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),

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

(2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

R.S., c. C-34, s. 257.

2 The Polyamory Advocacy Association of Canada views section 293 of Canada’s Criminal Code, which prohibits polygamy, as unfairly targeting people who are in loving and non-exploitative relationships with multiple sexual partners. See “FAQ: The Litigation, the Law, and the Charter” (16 June 2010) online: The Polyamory Advocacy Association of Canada <<http://polyadvocacy.ca>>.

3 The practice of polygamy is accepted in many countries which are governed partly by Shari’a law (e.g. Jordan, Egypt, Morocco, Syria, India, Pakistan, Algeria) and is practiced by some (there is no estimate of how many) Muslims living in Canada. Some believe that the practice is allowed by the Koran, though not religiously mandated. The criminal prohibition on polygamy is not considered a denial of freedom of religion for Muslims. See e.g., Rehman 2007: 115.

4 On July 27, 2010 a judge in Utah overturned Jeffs’ conviction and ordered a new trial in the case on the basis that the jury was incorrectly instructed about the nature of Jeffs’ liability as an accomplice in the rape. See Frosh, 2010.

FLDS community of Bountiful, British Columbia. Of the 1200 members in Canada today,<sup>5</sup> 700 follow Blackmore and 500 follow Jeffs's replacement, James Oler. Then, in 2008, two years after Jeffs' conviction, Texas officials raided an FLDS community in Eldorado Texas, apprehending 416 children, after receiving a call from a 16 year old girl who claimed that she had been physically and sexually abused.<sup>6</sup> In 2009, 60 years since anyone was charged with the crime in Canada, Winston Blackmore was charged with polygamy. His case was initially dismissed after the judge ruled that the state had proceeded in a biased manner. Instead of appealing the case directly, the Government decided to ask the British Columbia Supreme Court to rule on the constitutional validity of the s.293 of Canada's Criminal Code which prohibits polygamy.<sup>7</sup> By all accounts the law is out-dated and weakly crafted.<sup>8</sup> Nonetheless, there remains a public appetite to prosecute polygamists in Canada while, at the same time, a growing number of scholars and public interest groups question whether the prohibition on polygamy is justified.

In countries like Canada, which are committed to the principles and values of multiculturalism and the accommodation of religious pluralism, one might expect to find some support amongst members of the public and the political elite for tolerating polygamy. After all, as the FLDS community has argued, prohibiting polygamy denies to members of a religious community the right to live according to practices which are central to their way of life and to tenets of their religious faith which are constitutionally protected by the guarantees to religious freedom found in Canada's Charter of Rights and Freedoms.<sup>9</sup> The prosecution of polygamists, they argue, is a

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5 It is estimated that there are between 30,000 to 100,000 FLDS members in North America. See Berkowitz 2007: 617.

6 The girl was never identified, leading some to speculate that no such call was ever received. No evidence of abuse was found amongst the 416 children even after extensive (and in some accounts, questionable) investigative tests administered to them by Texas officials. See Kovach, 2008.

7 The federal and provincial Attorney Generals in Canada may refer cases to the courts to determine their constitutional validity. The cases are known as 'reference cases'.

8 Canada's anti-polygamy law is so weakly crafted that it can be credibly interpreted as criminalizing adultery. The law was first passed in 1890 and revised in 1953. It pre-dates the entrenchment of the Canadian Charter of Rights and Freedoms (1982) which guarantees, amongst other things, freedom of religion as a constitutional right. The BC government hopes to convince the court that s.293 can be 'read down' in the sense that it is meant only to criminalize 'patriarchal polygyny that is intergenerationally-normalized and enforced through more or less coercive rules and norms of non-state social institutions'. See Attorney General British Columbia, Statement of Position on the Constitutional Questions Referred and Preliminary Summary of Facts Asserted, Feb 24, 2010 available at <http://stoppolygamyincanada.files.wordpress.com/2010/11/statement-of-agbc1.pdf>.

9 Section 2(a) of Canada's Charter of Rights and Freedoms states:

"2. Everyone has the following fundamental freedoms:

(a) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;"

form of religious persecution. Several scholarly accounts back up this claim. For instance, some scholars suggest that the enthusiasm to prosecute polygamists in Canada historically arose to discourage Mormon immigration,<sup>10</sup> to protect a Christian definition of marriage (Baines 2009), and that it arises today, to appease public anxieties about Muslim immigrants some of whom practice polygamy (also see Campbell 2009, Drummond 2009, Song 2007). Many people wonder whether criminalizing polygamy is discriminatory because it singles out one particular practice that is no more or less harmful than many other practices which are legally allowed. Any abuses that may occur in the community, they argue, should be dealt with using laws that target underage and arranged marriage, or child and wife abuse. They suggest that the practice of polygamy per se is not the culprit in these harms. Nor, in light of the legislative history of restricting the practice, is it clear that criminally prohibiting the practice has been principally motivated by the need to prevent harm to those within the community. If anything, the law has made the practice more secretive and the communities that practice it more insular which may, in fact, further jeopardize vulnerable members.

That being so, there is no denying that the practice of polygamy reinforces sexism and was historically motivated by sexist values which relegated women to reproductive and service roles while helping men to enjoy control over their families and communities. The initial North American legal cases against the practice in the late 19<sup>th</sup> Century<sup>11</sup> argued that the practice placed women under the control of men and thereby ‘reinforced patriarchy’. The evidence continues to show that polygamy gives considerable power to men who use the threat that they will take on a new wife in order to discipline their current wife or wives (see Cook and Kelly 2006). This power imbalance defines polygamous relationships and is thought to lead to

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According to Canadian jurisprudence, the sincerity with which a person believes that a practice is integral to their religious faith is one of the standards used by the courts to determine whether a practice can be protected under freedom of religion. For a discussion and application of the sincerity of belief test in Canada see *Syndicat Northcrest v Amselem* (2004) 2 SCR 551. For an American case see *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989).

<sup>10</sup> Mormon immigration to Canada occurred as a result of the persecution of the Mormons in the United States. In 1882, the US Congress passed the Edmunds Act (1882) which disenfranchised all people who practiced polygamy and, through subsequent legislation, imposed heavy fines and imprisonment on those convicted of polygamy. Nearly 1,300 Mormons were jailed, their children were declared illegitimate, and their Church was driven into bankruptcy. As a result of this, the Mormon Church announced in 1887 that it renounced the practice of polygamy. Some Mormons continued the practice secretly in Utah, where the community was based, while others emigrated to different regions of North America, including Western Canada, where a community settled in southern Alberta in 1887.

<sup>11</sup> *Reynolds v United States* 98 US 145(1878).

additional abuses, including coercion and underage marriage.<sup>12</sup> The practice is also associated with poverty and welfare fraud in North America and in Western Europe which are caused partly by the financial strain placed on families, many of which live in overcrowded conditions with little personal space. Such conditions lend themselves to resentment and even violence amongst wives and towards each other's children.<sup>13</sup> For these reasons prohibiting the practice of polygamy seems to be justified.

Against this background of opposing opinions, the question addressed here is what criteria ought to be used today to assess whether polygamy should be prohibited or not. My focus here is not on the criminal or constitutional law but rather on the normative criteria used by public decision makers and in public discourse to assess controversial practices. The practice of polygamy is especially interesting to a normative analysis in so far as it plays a central role in the identity of the FLDS community. In the last 30 years, and therefore well after the law prohibiting polygamy in Canada was passed, the protection of the identities of individuals and communities has come to be considered an important part of how human rights are conceptualized and fairly implemented.<sup>14</sup> With the advent of multiculturalism, minorities have made an increasing number of claims in the public realm for protection of their practices by arguing that these practices are important to their identities. These claims and the political

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12 The connection between polygamy and marriages between older men and younger women is also said to occur because the need for more wives amongst older men requires that they draw from a pool of ever younger women.

13 See Campbell 2009: 207. Because of these risks, international organizations, such as the committee which oversees the United Nations Convention on the Elimination on all forms of Discrimination (CEDAW) conclude 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" (General Recommendation 21, Equality in Marriage and Family Relations, UN CEDAWOR, 13th Sess., UN Doc. A/47/38, (1994), at para. 14. Also see United Nations Human Rights Committee, General Comment No 28: Equality of rights between men and women . CCPR/C/21/Rev.1/Add.10, 03/29/2000. at paras 5 and 24 <http://www.unhchr.ch/tbs/doc.nsf/0/13b02776122d4838802568b900360e80>). The Committee recognizes that, in practice, the connection between sexism and polygamy can be traced to the psychological and emotional power imbalances between men and women in these relationships and is strong enough to justify condemning the practice. From this perspective, even if the prosecution of polygamists has the effect of diverting attention away from the sexist practices of majority groups, or appeasing public anxieties about Muslim immigration or the demise of Christian family values, the practice nonetheless contributes to gender inequality and to increasing the vulnerability of women and children.

14 In the last 30 years, numerous states and international bodies have amended their constitutions and adopted legal mandates in order to recognize a right to cultural or to protect aspects of group identity, especially in relation to indigenous, linguistic, regional and minority nationalist groups. Explicit mention of 'identity' or 'cultural rights' can be found in the constitutions of Argentina, Belize, Brazil, Bulgaria, Canada, Croatia, Ecuador, Guatemala, Kosovo, Mexico, Nicaragua, Italy, Spain (Catalunya) and Germany (Lander). For an account of the trend amongst international institutions to recognize cultural and other identity-based entitlements see Kymlicka 2007.

struggles that surround them have come to be known as ‘identity politics’. Western states are more willing today to acknowledge that group-based claims to cultural and religious protection can be legitimate entitlements and that threats to group identity constitute a denial of rights.

At the same time, how public decision makers assess identity claims continues to be under-analyzed. How do public decision makers determine whether to recognize claims made by minorities to engage in practices thought to be socially deviant and harmful by the broader public but which are central to the group’s identity? Multicultural discourse suggests that protecting important features of people’s identities is a means to protecting them from discrimination and injustice. Can courts be sensitive to the religious identity claims of polygamists in a way that protects them from discrimination while providing a reasonably justified and unbiased assessment of whether polygamy is indeed harmful or imposed coercively? How should Canadian courts assess polygamy?

#### Which identity claims matter?

If we accept that sometimes practices important to the identities of groups generate entitlements, e.g. language rights, rights to religious accommodation, or rights to cultural protections, the question remains how should decision makers distinguish legitimate claims from illegitimate ones. It is one thing to argue, as multiculturalists do, that democratic citizenship sometimes requires the recognition of the right to culture or the protection of religious practices, and quite another thing to describe what these rights demand in specific cases, such as when a group wants to practice plural marriage, or slaughter animals in public places, or require that women and girls wear a niqab. In multicultural states, courts and legislatures are often charged with the task of translating the right to culture or freedom of religion into policy suited to specific cases. But how exactly they translate vague principles and broad legal mandates to protect ‘diversity’ into actual public policy is not well understood despite the crucial role that such translation plays in formulating human rights policies and establishing good relations with minority groups who seek to be treated fairly, i.e. in an even-handed manner, compared to other groups.

In part, the problem is that few if any western democracies have established a set of transparent criteria which can be used by public institutions to guide their assessments for group

accommodation. This might seem surprising in light of the fact that one of the most common concerns about public decision making in this area is that it lacks objectivity in the sense that judges and legislators are often suspected of using their own personal biases or misinformation about minority groups to guide their decisions.<sup>15</sup> Evidence of bias tends to be especially stark in cases that involve unpopular minorities or groups whose practices are considered socially deviant (such as polygamists). For example, research in the United States shows that judges often accept highly dubious evidence where the disputed practices of new religious groups directly challenge mainstream values, such as when young adults drop out of school to join the Moonies, or people leave all their money to the Church of Scientology.<sup>16</sup> The research of feminist and critical race scholars shows similar trends. According to Leti Volpp (2000), judges tend to believe that women from racialized cultures are more likely to be motivated by their cultures when they engage in cultural practices (such as polygamy, female genital cutting, or wearing a burka), while women from non-racialized cultures, or those who do not fit the stereotype of women in their culture, appear to act out of choice (also see Phillips 2007, 27, 93-99). According to this research, women from cultural and religious minorities are not only more likely to be the victims of harmful practices within their communities, but are also more likely to be denied equal treatment by mainstream courts which tend to see them as either dupes to their culture or in need of being rescued from it.

Countries which have weak or no multicultural policies seem to do worse in this respect because, in the absence of transparent guidelines, agents of the state, at all levels, have considerable discretion to use their personal biases to influence decisions. When conflicts arise in states with weak multicultural policies, the courts and legislatures of these states are less likely to have institutional memory about how minority practices were assessed in the past and less likely to have publicized best practices or documented experiences to draw on. Consider, in this respect, the widely different experiences of France and Britain in managing religious diversity in prisons. In France, where *laïcité* is the governing norm, inmate requests for religious accommodation

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<sup>15</sup> Rentlen 2004 offers many examples of how cultural and personal biases influence cases which involve cultural defences.

<sup>16</sup> Judicial bias is especially strong where minorities are widely viewed as ‘cults’. Judges and juries willingly accept highly contentious and unfalsifiable psychological theories about ‘brainwashing’ or ‘repressed memory syndrome’ in such cases, which they use to justify extraordinary investigative techniques that often further bias the case against the accused, or measures, which are otherwise difficult to legally justify, to intervene in what appears to be voluntary activity (Richardson 1998 and 2000).

have been denied or met inconsistently at the prison director's discretion. Whereas French law recognizes that prisoners have the right to practice their religion (subject to reservations about security) it has no criteria for deciding what counts as religion, nor when accommodation is justified. These matters are left to the director. By contrast in Britain, which has a long history of chaplains operating in the prison system, the regulation of religion in prisons has a legacy of established practices and decision making rules. Prisoners in the British prison system have access to religious services by chaplains, rabbis and imams and their religious dietary restrictions are accommodated. In French prisons, accommodation occurs, but it is inconsistent both across different religious groups and between different prisons (see Beckford et al. 2005, pp. 117-8). According to Beckford, Joly and Khosrokhavar (2005), one contrasting result of these two different systems is that French prisons experience greater religious radicalism amongst Muslims prisoners today. This is hardly surprising given the inconsistency of treatment which is likely to breed resentment. Moreover, in the absence of reliable access to regularized prayer sessions and imams, French prisoners practice their religions secretly, conduct services secretly, and choose religious leaders amongst themselves in the prison rather than using the services of an imam from the outside, as British prisoners do. Due to *laïcité*, which discourages religious accommodation in the public sphere, there are no publicized, even-handed criteria in French prison regulations to guide directors in deciding what counts as a religious belief and how to assess requests for accommodation from inmates who are believers.

In the absence of transparent criteria, the religious liberty of citizens, although legally guaranteed to them by the laws and constitutions of western states, is likely to be left to the discretion of judges and legislators much in the same way as the religious liberty of French prisoners is guaranteed at the discretion of prison directors. The abstract principle of religious freedom will be translated by decision makers into a patchwork of policies because no criteria exist to guide decision makers in how they ought to assess requests for the accommodation of religious belief and practice in a consistent and even-handed manner. Under these circumstances, the promise of multiculturalism and principles of religious liberty are disconnected from the policies meant to translate principle into practice. For those who are supposed to enjoy the entitlements, the state's abstract guarantee of freedom of religion means little in practice.

The promise of multiculturalism requires that states go beyond the purely symbolic act of entrenching identity-based rights in their constitutions. Minimally, it also requires that decision makers have some guidance for what counts as a fair and even-handed way of translating identity-based principles into policy and practice. Whereas guidelines of this sort will not work if they eliminate all discretion, including the ability of judges to assess evidence on a case-by-case basis, the complete absence of any guidelines may license too much discretion. The aim is to encourage sensitivity to religious and cultural differences, not to impose a set of rigid and formulaic guidelines by which all minority rights cases can be resolved. Decision makers need general criteria which encourage institutional reflexivity and illuminate the outlines of a justified and fair assessment of a cultural or religious practice, like polygamy, which may be viewed as socially deviant (sexist, homophobic, or harmful) by the majority.

#### How is the Practice of Polygamy Publicly Assessed?

We can now turn to the debates in Canada today to examine the criteria being used to assess the practice of polygamy. Here I have drawn from the submissions to the courts from interested parties, the scholarly debates about polygamy, and the broader public debate (from both critics and supporters of polygamy) as reflected in the media, journalistic accounts, and case briefs submitted by interested parties to the upcoming legal challenge.<sup>17</sup> On the basis of the arguments from these sources, three broad issues emerge as dominating the discussion and guiding the assessment of the practice. The first issue is whether polygamy is a central tenet of a religious faith in the sense that a central aspect of the group's identity will be jeopardized if the practice is prohibited. The second issue is whether people within the community are coerced into engaging in the practice. And the third issue is whether the practice is harmful to those who practice it or others in the community. On the basis of these three issues, I propose below three conditions which together can be used to build a transparent and reasonable approach to assessing controversial religious and cultural practices.<sup>18</sup>

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17 As of February 2011, the case was still being heard in the British Columbia Supreme Court. When a decision is reached, it will be cited as Canada. Reference re: Criminal Code, s. 293 BCSC 2011.

18 The three main issues that are identified here are not unique to the polygamy case but are generally considered important in many cases about controversial minority practices. For a broader discussion of these issues and the conditions that respond to them, see Eisenberg 2009.



### *The jeopardy condition*

The first condition is the jeopardy condition which requires decision makers to assess what is central and integral to the community's identity. In relation to the broader human rights agenda, the jeopardy condition addresses the concern that the failure to accommodate practices which are especially important to community identity can jeopardize communities and, in turn, cause individuals to suffer real harm if their communities lose the ability to function in a manner that is sustainable because one of their key practices has been prohibited. The jeopardy condition responds to one of the key worries arising from identity politics, namely that circumstances which weaken community identity can expose individuals to injustice – e.g. discrimination, disrespect and disesteem – and prevent them from acting upon an important part of their identity in a meaningful way. To establish the strength of the jeopardy condition requires that decision makers look for evidence that a disputed practice is central to the community's identity in the sense that the community's identity would significantly change if the practice was not accommodated or that the way of life that informs the community's identity would become unsustainable in the future. The jeopardy condition is at play whenever courts assess whether or not an object of faith or a religious practice is a central element of a community's identity. The condition is strong where objects or practices are found to be central and integral and weak where the absence of the practice won't affect the well-being, integrity, or sustainability of the community's identity.

In the debate about polygamy in Canada, defenders and critics of polygamy have each advanced arguments which focus on what I call the jeopardy condition. According to defenders of the practice, the criminal restrictions jeopardize the FLDS because polygamy and plural marriage is a central article of their faith. They argue that polygamists in Bountiful are not merely people who 'feel like' marrying multiple sexual partners but individuals who are bound by a sacred vow to their faith (see "Bountiful" 2009).<sup>19</sup> The community's evidence to establish the integral nature of the practice shows that polygamy is religiously mandated, systematic, binding in a manner akin to the institution of marriage, intergenerationally transmitted and therefore viewed by

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<sup>19</sup> Also see Opening Statement by the Amicus Addressing Breach, Reference re: s293 BCSC, Vancouver Registry S097767, Nov 1, 2010. Available at <http://stoppolygamyincanada.files.wordpress.com/2010/11/opening-statement-by-the-amicus-addressing-breach.pdf>.

members as constituting a way of life worthy of continuing into the next generation, related to a distinctive view of family, and integral to the community's struggles for citizenship. This evidence distinguishes the practice in FLDS communities from the practice amongst some Muslims – where it is broadly acknowledged that the practice is not religiously mandated – and amongst 'polyamourists' who merely want to consensually marry more than one person. Defenders argue that when courts assess the practice of polygamy, they should gauge the strength of the FLDS claim by examining the history and role of polygamy amongst the FLDS along these dimensions. The result will establish a strong jeopardy condition.

The critics of polygamy have tried to undermine the FLDS claims in part by arguing that nothing of real importance to the FLDS identity or religious practice is jeopardized by prohibiting the practice. They make this argument in two ways. First, they point out that polygamy is a voluntary practice amongst the FLDS. Some women living in the Bountiful community are not in polygamous relationships and some have claimed that women may choose not to enter a polygamous marriage. In addition, some community members claim that, as a matter of principle (which they call the 'principle of Sarah') current wives must consent before additional wives are added to the family. The need for consent and the presence of choice indicates both that the practice is not coercively imposed (which is a separate condition discussed below), and that the practice is not an essential part of community life. The message is that, if polygamy is a choice rather than a mandate, the FLDS community can live without it.

Second, the critics of polygamy also try to weaken the jeopardy condition by showing that polygamy lacks authenticity as a religious practice, that Bountiful and the FLDS are just an excuse for polygamy and that nothing of value to the group's religious identity is jeopardized by prohibiting the community from engaging in the practice. Critics of the FLDS suggest that polygamy in Bountiful is mandated by men who desire multiple and ever younger women, who want 'harems' of women to serve them sexually, emotionally, domestically and economically. The chances that this argument will succeed are likely to be good if the court is convinced that the community's adherence to the practice is recent (which is unlikely in this case), that nothing in the religious dogma of the group mandates the practice (which is untrue in this case since polygamy is demonstrably a central tenet of FLDS faith), or that groups with similar religious

dogmas (e.g. mainstream Mormons) reject the practice (which is also a difficult argument to make since the FLDS community exists because mainstream Mormons abandoned the practice of the polygamy in the 1880s). In addition, if the court can be convinced that power and exploitation, rather than identity-based beliefs, are the real motivation for the practice, then the authenticity of the religious practice will be successfully drawn into question. The jeopardy condition is weakened by evidence which convincingly shows that the practice is inauthentic in these senses.

### *The validation condition*

The second condition, the validation condition, addresses the concern that individuals are sometimes coerced and indoctrinated by their communities to engage in practices they would not otherwise choose. The validation condition rests on the requirement that identity practices must be validated by those who practice them. This condition takes its direction from scholarly arguments which emphasize the importance of individual choice within contexts of choice (Kymlicka 1995). According to this view, meaningful choices are made when individuals have ‘critical distance’ from their commitments and can assess them from perspectives furnished by other and different contexts. Meaningful choice occurs as long as individuals have the means to critically assess their commitments from different vantages.

Like the jeopardy condition, something like the validation condition is already at play in most cases about controversial practices. The public debate about polygamy in Canada focuses heavily on criteria relevant to the issue of validation.<sup>20</sup> Evidence shows that FLDS children are poorly educated and pressured to marry before completing high school (Campbell 2009: 23)<sup>21</sup> and FLDS communities are theocratically governed and highly insular, making them perfect settings for indoctrinating young people into the belief that polygamy is a religious commandment rather than a free choice. Young girls are said to be removed from their homes, shipped across the border between Canada and the United States far away from their immediate

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20 Individual autonomy and consent are central to the arguments made in legal briefs submitted to the British Columbia Supreme Court in defence of polygamy by the British Columbia Civil Liberties Association and the Canadian Association for Freedom of Expression.

21 The ongoing resistance of Bountiful community educators to use the provincially mandated curriculum in their lessons (which is required by law in Canada) is one reason why the British Columbia Teachers Federation has been granted intervener status in the upcoming constitutional reference case. See BC Teacher’s Federation Opening Statement in Reference re: s. 293 BCSC, Vancouver Registry S097767, Nov 8, 2010.

family, where they are married to older men (see Bramham 2008 and Krakauer 2003). Much of the research conducted on the Bountiful community, including testimonies of those who have left the community, show that adult community members choose to practice polygamy out of fear that they will be ostracized if they reject the practice. To a considerable degree, the public criticisms of the practice rests on the strength of this evidence.

Conversely, several scholarly accounts suggest that FLDS polygamy has been unfairly framed by the mainstream community to ‘exoticize’ or ‘other’ the practice. On the basis of numerous interviews conducted with women in the Bountiful community, Angela Campbell concludes that polygamous wives are “thoughtful, articulate, and alive to the distinctions and parallels between their lives and those of outsiders” (Campbell 2009: 227). Campbell suggests that the polygamous experience needs to be reframed so that residents ‘start to resemble ‘us’ in some important ways. When this happens, the criminalization of the practice becomes more difficult to justify because mainstream objections constructed around the presumption that children are indoctrinated or coerced to engage in the practice will be exposed as ideological attempts to ‘other’ polygamous communities in order to justify majority preferences for monogamous, heterosexual marriage, or to disguise mainstream racism and intolerance for difference (Campbell 2009: 190, also see Carter 2008, Drummond 2009 and Song 2007 chp 6). Campbell’s account, which plays an important role in the case currently being heard in British Columbia, suggests that majority assessments of polygamy are biased against the practice in ways that exaggerate the differences between polygamist and monogamist wives and thereby justify the need to criminalize the practice.

Yet even if the practice of polygamy is being characterized in a way that exoticizes FLDS polygamists, the issue remains whether individuals within that community can exercise meaningful choice. The presence or absence of meaningful choice cannot entirely depend on how circumstances are framed because then any gesture of willingness would potentially count as meaningful validation. People exercise choice even under the most restrictive and oppressive circumstances. The fact that women in Bountiful have claimed in interviews, or in oral testimony<sup>22</sup> that they are making autonomous choices counts for something in assessing the

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22 Several women were allowed to testify anonymously in the BC reference case currently being heard.

strength of their validation. But it does not count for everything. The validation condition also requires evidence that communities have in place social and political institutions or processes in which individuals develop and exercise their critical capacities. Meaningful choice also depends on the character and quality of education that children receive, whether children finish high school (the evidence is mixed on this point in the FLDS community), when they get married and have children (the evidence shows that many girls are married and have their first child before they are 18 years old), how political leaders are chosen (FLDS leaders are not democratically elected and women are not allowed to take leadership roles), whether women and men choose who they marry (marriages are arranged; girls/women can refuse an arrangement), how many children they have (girls/women are mandated to have many children and have been likened to breeding animals by the critics of the community), or to what degree members are financially independent (property is owned by the church and controlled by the male elite; women control the household expenses and many work outside the home).

A second similar concern sometimes expressed about the validation criterion is that it embodies a liberal individualist view of autonomy and thereby conflicts with the values of religion which operate on the basis of faith and discipline rather than critical assessment. Many religious and cultural practices are neither critically endorsed nor rejected by their adherents, but instead are matters of habit and tradition or edicts imposed by elites. The aim of the validation condition is not to ignore these features of religion but instead to take seriously that individuals are not merely or irrevocably members of one community. The fact that a tradition is inculcated as a matter of habit does not mean that it should be prohibited but, instead, that it will not score highly in terms of validation and that whether it is prohibited or not will depend on how it fares in relation to the other criteria. That being said, it is likely that democratic and egalitarian validation processes will generate stronger validation conditions. The condition asks that decision makers distinguish open, informed and consultative processes from processes which are coercive, lack consultation, and rely on active attempts to withhold information from community members in order to bias their choices in favour of the status quo in their communities. Such distinctions may end up privileging democratic processes and some liberal values. But they do so only because liberal democratic processes and values share these aims. The more direct justification is that the validation condition is strengthened in light of evidence that communities

engage in practices which ensure that individuals exercise meaningful choice about their most personal and deep commitments. If practices other than democratic ones can be convincingly shown to be a good way to ensure meaningful choice, then these practices should also be recognized as strengthening the validation condition.

### *The safeguard condition*

The final criterion, the safeguard condition, assesses the costs of mitigating the harms or risks of harm that result from a disputed religious practice. The safeguard condition does not impose an absolute restriction on harmful practices and, for this reason, it is not the same as a ‘harm’ condition. Its aim is to address harm without unfairly imposing culturally unfamiliar and biased understandings of harm on all groups. By emphasizing ‘safeguards’ rather than harms as the focus of public assessments, the condition encourages decision makers to focus not merely on determining the presence or absence of harm, but instead to identify safeguards which can diminish harms that may arise. The implicit suggestion of this condition is that both majority and minority practices can be harmful and that decision makers ought to take a broad view of all the different harms and risks that follow from various practices. But the condition goes further to ask what can be done to diminish these harms, given the social circumstances in which harms arise? Whereas public decision makers need to be aware of all risks and harms that may follow from majority or minority practices, their assessments of controversial practices should rest on determining what safeguards, if any, can effectively reduce the risks of harm and what costs are associated with these safeguards.

The harmfulness of polygamy is the central issue for the Attorney General of British Columbia and for most public interest groups critical of the practice in Canada. But evidence to substantiate that polygamy, in fact, causes greater harms than monogamous relationships is inconclusive. Despite some glaring allegations of abuse within FLDS communities, there is little direct evidence of women or children being harmed in a manner that can be directly attributed to polygamy. Evidence that girls are married and impregnated below the age of consent has not been substantiated to a degree that distinguishes polygamists from monogamists. In the absence of better evidence of direct harm, critics of the practice argue instead that polygamy creates a

context in which harm toward girls and women is difficult to control.<sup>23</sup> In part this is because the community is insular and resists attempts by the state (through child welfare) to intervene. In part, the problem is exacerbated by the socialization of girls to be obedient and submissive, to marry at a young age and to bear as many children as possible. And in part, the problem exists because the community advocates sexual discrimination in every aspect of communal life. From governance structures to education curriculum, from family planning to economic decision making, girls and women are denied equality of opportunity, resources, and voice. The critics argue that inequalities of these sorts are typically found in polygamous communities and either constitute harm in themselves or leave girls and women open to harms which are difficult to control.

Defenders of the Bountiful community argue that there is nothing inherently harmful about the practice of polygamy. The risks of polygamy are a product of conditions – in particular, insularity - that have been forced upon the community as they attempt to escape religious persecution. The risks related to polygamous marriage are greater than those related to monogamy only because public policies and social services have developed safeguards over the years to deal with the risks of monogamy, but have not responded to the risks of polygamy. In short, they claim that the harms associated with polygamy in Bountiful are not inherent features of the practice nor any different from harms shared by all forms of marriage, but rather are harms that can be mitigated through public policies. If the advocates can establish their case, then they will refocus the debate on the ways in which potential harms might be mitigated and the costs associated with mitigating the harms. The safeguard condition thereby helps decision makers to avoid imposing double standards on minorities or using harm to demonize these groups.

In sum, three conditions dominate the debates about whether polygamy ought to be prohibited and how it should be assessed. The first condition is concerned with the need to accommodate practices important to the identities of communities in order to protect individuals from suffering injustices which result from their communities lose the ability to function. The jeopardy condition addresses this concern by seeking out evidence regarding whether the disputed practice

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23 This position is central to the argument of the Attorney General of British Columbia and to the West Coast Legal Education and Action Fund, a feminist organization that was granted intervener status in the case.

is central and integral to the community's identity and whether it is authentic. Evidence that the practice is mainly designed to exploit some members for the benefit of others or to empower a particular set of elites weakens the jeopardy condition whereas evidence that the practice is integral to the community's identity strengthens the jeopardy condition. Second, because individuals can be coerced and indoctrinated by their communities and appear to consent to community practices that further disadvantage them, the validation condition requires evidence which establishes that individuals exercise critical agency over the practices they follow. It is not enough to show that people say they are autonomous. The second condition requires evidence that members have meaningful choices, and that the critical capacities to make these choices are credibly developed by the values, practices, and institutions of community governance, education, domestic affairs, and so forth. The third condition, the safeguard condition, holds that disputed practices must either not harm those who practice them or others affected by them or that the risks of harm associated with various practices must be mitigated at costs that the minority community or broader society are willing to bear. The concern here is that definitions of harm and risk of harm differ significantly from one cultural and religious community to the next. The challenge of this third condition is to display sensitivity to these differences while exercising vigilance to protect people from physical and psychological harms.

Together, these three conditions are meant to recover a deeper understanding of what it means to treat people equally and thereby to strengthen the connection between protecting human rights and the recognition of identity. The intention here is to outline what counts as good reasons for prohibiting or accommodating disputed practices, not to provide a rigid or formulaic guideline for the assessment of identity claims. Partly because of this lack of rigidity, and because all the evidence has yet to be heard by the court in British Columbia, this analysis cannot draw a definitive conclusion about whether or not polygamy should be prohibited in Canada. The point here is not to draw such a conclusion but instead to argue that the outcome depends on whether public decision makers can be convinced that polygamy is an authentic and centrally important religious practice, that, according to several clear indicators, is critically validated by community members including by those who directly participate in it, and that any risks or harms associated with the practice are either not attributable to the practice or can be mitigated at costs that someone is willing to bear. In British Columbia, if the state shows that the FLDS community



cannot meet these conditions, then the approach advocated here suggests that polygamy ought to be prohibited.

### Conclusion:

Some scholars have argued that states which have been unjust to groups in the past lack the legitimacy to make decisions in the present about the rights of these groups. They argue that such decisions, instead, must be left up to communities to make for themselves hopefully using democratic decision making processes (Spinner-Halev 2001). But in many communities which engage in controversial practices, this solution will not work. This is partly because in some communities, decision making is far from democratic, and to insist that it be democratic (and egalitarian) would involve significant inference in the community, and partly because undemocratic communities tend to deal with dissent by marginalizing and expelling dissenting members. Bountiful is exemplary of this tendency.<sup>24</sup>

The analysis here holds that decision making in multicultural societies requires transparent and justified criteria to guide decision makers in assessing the claims that groups make about what is important to their religious identities. This argument acknowledges that groups, such as the FLDS, may have been persecuted in the past and struggled for access to the benefits of citizenship while adhering to a practice of their religious faith which is prohibited. It may also be true that the persecution of the FLDS community was reinforced by public anxieties about the demise of Christian conceptions of marriage and about Mormon and then Muslim immigration. All of these factors raise concerns that decisions today about the disputed practice of polygamy will be biased and lack legitimacy, at least in the eyes of those who defend the practice. These are precisely the circumstances in which a transparent approach to assessing controversial minority claims is most needed. A guided procedure of the sort suggested here will provide decision makers with a set of transparent criteria by which to assess controversial minority claims and an opportunity to reflect on a complex set of factors related to jeopardy, validation and safeguards, that should inform fair decision making. These criteria will narrow the personal

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<sup>24</sup> This pattern is unambiguous in Bountiful, where the criticisms of polygamy are especially forcefully made by community members who have left and where the community allegedly expels 'excess' boys as a means to ensure a higher ratio of girls to boys and to extinguish dissent proactively. See Bramham 2008 and Palmer and Perrin, 2004.

discretion that decision makers use, establish a consistent repertoire of best practices, and institutional memory which can be used to by decision makers to reflect on how previous decisions have been made about minority claims and how they may be improved in the future.

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