

The Bedrooms of the Nation: A Critical Examination of the Laws of Private Sexual Ordering and Their Sources in the Legal Regimes of the 21st Century

Jordan Bronte Palmer

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University of Ottawa

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Abstract

Law regulates the sexual citizen in myriad ways, from overt sexual behaviour, to conjugal and familial formation and dissolution, to issues which engage questions of sex and societal behaviour. This work uses Queer Theory, Legal Feminism, and Legal Historicism to explore the law regulating “private sexual ordering” through an analysis of three subject areas: polygamy, prostitution/sex work, and law’s regulation of female sexuality. The analysis is undertaken of both national and international legal regimes. The author’s informational methodology consists of textual analysis, comparative law, and investigating historical and social science literature which bears on, and is applied to, a legal analysis.

The philosophical, religious, and moral motives of laws regulating sexual and sexualized behaviour are analyzed, as is the restriction of forms of private sexual ordering on dissenting minorities, some of whom invoke freedom of religion and conscience to justify their choices. The work concludes that contemporary law restricting forms of private sexual ordering is imbued with religio-moral content which inhibits law applying principles of human autonomy and freedom of choice. The work thus recommends reform of the laws prohibiting or restricting private sexual ordering in the areas of polygamy and prostitution, while remaining optimistic that both national and international law can be used to safeguard the agentic and physical integrity of women faced with restrictions on their private sexual ordering and reproductive behaviours.

Acknowledgments and Dedication

To paraphrase Isaac Newton, to the extent that this work sees far, it rests upon the shoulders of many giants, both directly involved in this work and who have provided the scholarly basis on which this work rests.

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All errors, omissions, and points in need of clarification are completely attributable to the author.

I would like to dedicate this work to those in the legal profession and legal academia who continue to strive towards a just society which treats all minorities with dignity and respect.

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In the matter of reforming things, as distinct from deforming them, there is one plain and simple principle; a principle which will probably be called a paradox. There exists in such a case a certain institution or law; let us say, for the sake of simplicity, a fence or gate erected across a road. The more modern type of reformer goes gaily up to it and says, 'I don't see the use of this; let us clear it away.' To which the more intelligent type of reformer will do well to answer: 'If you don't understand the use of it, I certainly won't let you clear it away. Go away and think. Then, when you can come back and tell me that you *do* see the use of it, I may allow you to destroy it.'

G.K. Chesterton, *The Thing*

You have only to be sufficiently determined to realize heaven on earth to be sure of raising hell.

H.D.P. Lee, Introduction to Plato's *Republic*

Savages we call them, because their manners differ from ours, which we think the perfection of civility; they think the same of theirs.

Perhaps, if we could examine the manners of different nations with impartiality, we should find no people so rude, as to be without any rules of politeness; nor any so polite, as not to have some remains of rudeness.

Benjamin Franklin, *Remarks Concerning the Savages of North America*

CHAPTER I

The Need for an Analysis of Private Sexual Ordering

During oral argument at the Supreme Court of the United States on *Muhammad v. Hobbs*, a case concerning a regulation impinging on the Plaintiff's religiously-inspired desire to grow a beard, Justice Antonin Scalia asked the following:

[T]he problem I have...with your client's claim of...religious requirement is the religious requirement is to grow a full beard, isn't it? Now let's assume in the religion that requires polygamy...could I say to the prison, well, you know, okay, I won't have three wives; just let me have two wives. I mean, you're still violating your religion, it seems to me, if he allows his beard to be clipped to...one inch, isn't he?¹

This seeming non-sequitur is actually very illustrative. The issue of religious accommodation is tied to instances involving sexuality, for the normally strict laws involved, the allure of the subject matter, and finally for the prominent role conjugality plays in the life of the average person. Framed against this context, the seemingly random mention of polygamy describes a key reference-point for a study of religious content in the law, and the impact of law on religion. Highlighting important fault lines for religious and minority interaction with law,² the law of polygamy---and by extension law regulating sexual behaviour---can provide a solution to larger discussions. It is thus an important area of study.

Many instances of the legal regulation of the sexual citizen, or what I will term "private sexual ordering," have been extensively studied, including (non-exhaustively) the law's disempowering attitude towards women,³ sexual minorities such as the lesbian, gay, bisexual,

¹ Oral argument at the Supreme Court of the United States in *Holt, aka Muhammad v Hobbs*, per Scalia J. Online: Supreme Court of the United States, <http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-6827_8758.pdf> at p 5.

² In an earlier decision, Scalia had opined that requiring government to prove a "compelling interest" to interfere with religious freedom was "courting anarchy...that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them," *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872 (1990) at 888. Needless to say, anarchy has not yet been a noted outcome of religious sensitivity.

³ Amongst a vast and varied scholarship, see, eg, Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Women's Press for the Osgoode Society, 1991), Zillah R Eisenstein, *The Female Body and the Law* (Los Angeles, CA: University of California, 1988).

transgendered and intersex [LGBTI] communities,⁴ and groups philosophically opposed to the societal *status quo*⁵ (ranging from members of dissenting religions, to freethinkers, and to social deviants such as the modern polyamorous community and sex workers⁶). Despite this completed scholarship, an inclusive genealogy of the law of private sexual ordering, combined with both an up-to-date analysis of current laws (both locally and internationally), and an examination of the impacts such legal regulation has on sexual communities, is still required.

This dissertation requires study of the underpinnings of the law, what has been variously termed as “sedimentation” or “incrustation,”⁷ what Popper somewhat mysteriously describes as “prejudices which are taken for granted, so that we have not become aware of them.”⁸ An analysis of these unspoken foundations of legal reasoning allows for an interrogation of existing norms with the dual aims of articulation and reform: “[s]edimentation acknowledges patterns of power relations without reifying their existence. In other words, the idea of sedimentation leaves open the possibility of changes in such patterns.”⁹ After probing the religious, moral, and philosophical underpinnings of the current legal landscape on private sexual ordering, I will closely examine three particularly illuminating and topical areas where law regulates the sexual citizen: a study of polygamy, prostitution (also known as sex work), and the regulation of female

⁴ Again *inter alia*, see Kathleen Lahey, *Are We ‘Persons’ Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999), David L Chambers, “Polygamy and Same Sex Marriage” (1997) 26 Hofstra L Rev 53, and Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford, CA: Stanford University Press, 2007).

⁵ Again only a small part of the literature, see Michel Foucault, *The History of Sexuality*, volumes 1-3 (New York: Vintage Books, 1990) [translated by Robert Hurley], Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard UP, 2002), Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002) and Gillian Calder and Lori G Beaman, eds, *Polygamy’s Rights and Wrongs: Perspectives on Harm, Family and the Law* (Toronto: UBC Press, 2013).

⁶ Amongst many other works, see Peter de Marneffe, *Liberalism and Prostitution* (New York: Oxford University Press, 2010) and Teela Sanders, Maggie O’Neill and Jane Pitcher, *Prostitution: Sex Work, Policy & Politics* (London: Sage, 2009).

⁷ Karl Popper, *The Open Society and Its Enemies*, New One Volume ed (Princeton, NJ: Princeton University Press, 2013) at 427.

⁸ *Ibid.*

⁹ Lori G Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Toronto: UBC Press, 2008) at 4.

sexuality. Legal analyses are frequently restricted to a given geographical area. However, as a basic component of the “human condition,” private sexual ordering and its socio-legal regulation transcend geographical boundaries, and no discussion of particular areas would provide a full picture of the myriad varieties of ordering. This dissertation will compare and contrast legal and social practices from around the globe.

This introductory chapter will outline the main themes and issues of the work, providing a guideline for further discussion. First, I will define and contextualize the concept of “private sexual ordering,” describing its usefulness as a framework of study and subsequently discussing its contemporary statuses around the world. I will then introduce the legal issues to be further explored. The dissertation will study the legal regimes associated with the regulation of private sexual ordering as instantiated by the specific issues of polygamy, prostitution, and female sexuality (including, but not limited to, reproductive rights), a project which is global in scope. Throughout the specific discussions, an attempt will be made to trace both the religious influences of the laws themselves, and their impact on the religious freedoms of minority religions and cultures. In this introduction, I introduce the philosophical underpinnings of the specific legal areas to be discussed, the issues generated by the legal regime, my chosen methodological and theoretical frameworks, and a brief contextual discussion of how these three areas of study relate to the greater issue of private sexual ordering and the law.

The Context of the Law of Private Sexual Ordering

As part of the context of the term “private sexual ordering,” a brief definitional note on the phrase “private sexual ordering” is warranted. The term “private ordering” can be traced to an elucidation in 1958, when Henry Hart and Sacks described the concept that:

Every society necessarily assigns many kinds of questions to private decision, and then backs up the private decision, if it has been duly made... Thus, private persons are empowered, by observance of a prescribed procedure, to oblige themselves to carry out certain contractual undertakings, and, if a dispute arises, to settle their differences for themselves. So may a host of

other matters be settled which are immediately of private, but potentially of public, concern. In a genuine sense, these procedures of private decision, too, become institutionalized. An understanding of how they work is vital to the understanding of the institutional system as a whole.¹⁰

In that work, as in Mnookin and Kornhauser's seminal "Bargaining in the Shadow of the Law,"¹¹ the emphasis is on an individual making a private contract or arrangement that society will (by default) enforce. The term could be accused of becoming ubiquitous, while shifting uncomfortably to concerns regarding contracts, rational actor theory, and *homo economicus*. In contrast, the term "private sexual ordering" draws on the tradition of individual autonomy and action, but goes beyond questions of contract or agency to encompass all decision-making power an individual can wield with respect to her sexual life. It includes, *inter alia*, an individual's decisions regarding sexual activity, living arrangements which are predicated upon a sexual relationship (such as marriage, cohabitation, and divorce), and ancillary issues to those relationships (such as decisions about reproduction, family structure, and the raising of children). The term is defined broadly so as to capture the entire sexual experience of the individual or group.

A person's ontological construction is composed of many roles, values and categories. One of the most central is an individual's construction of conjugal identity: as lover, family-member, relation or parent. Sexual behaviour and identity undeniably plays a key role in the human experience, so much so that Plato, speaking in *The Laws*, has Socrates state that the correct policy for every state will probably be to pass marriage laws first.¹² Conjugal relationships still bring society together, for as Friedman notes, "[t]he key to social life is still commitment. Perhaps it is a looser commitment, and perhaps more and more people choose *not* to commit; but

¹⁰ Henry M Hart, Jr & Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, tentative ed (Cambridge, MA: Harvard University, 1958) at 7.

¹¹ Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88:5 Yale LJ 950.

¹² Plato, *The Laws*, translated by Trevor J Saunders (New York: Penguin Books, 1975) at 182.

commitment is still the glue that holds society together.”¹³ How the law allows people to realize their sexual behaviours and identities, who, in short, the law allows people to be, is a deeply influential and important inquiry to make.

Modern conceptions of law acknowledge that law regulates, by commission and omission (explicitly and implicitly), all aspects of an individual’s participation in society. This includes, with tangible social goods, the regulation of the private sphere insofar as basic public norms need enforcement, such as criminal laws prohibiting domestic violence, unsafe uses of property, and basic intrusions of the State for record-keeping or finance-collecting purposes. A major source of tension, however, is to what extent law should have the power to coercively regulate the private actions of individuals which do not directly concern the public sphere. To some philosophical positions, imposition of majority norms is acceptable and such positions therefore welcome a legal society where “[m]oral matrices bind people together and blind them to the coherence, or even existence, of other matrices,” a society which consciously “makes it very difficult for people to consider the possibility that there might be more than one form of moral truth, or more than one valid framework for judging people or running a society.”¹⁴ This can be instantiated in Blackstone’s dictum that specifically links a religio-moral vision to legal regulation of marital form when he writes of “polygamy being condemned by the law of the new testament, and the policy of all prudent states, especially in these northern climates.”¹⁵ Such a view dates as far back as Plato’s *Republic*, in which censorship and elite rule are elevated to a legal status, as is seen in Plato’s zealous censorship of literature he describes as “in error in matters of the greatest

¹³ Lawrence M Friedman, *Private Lives: Families, Individuals, and the Law* (Cambridge, MA: Harvard University Press, 2004) at 187.

¹⁴ Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012) at 110.

¹⁵ William Blackstone, *Commentaries on the laws of England: to which is added an analysis by Barron Field*, vol 1 (New York: E Duceykinck, 1827) at 337 [Accessed through Gale Cengage, *The Making of Modern Law* database].

human importance.”¹⁶ The reasoning behind such statements persists in contemporary law on private sexual ordering. A counter-vision of legal philosophy sees an atomistic society where laws do not restrain individual action when it does not adversely affect others: “the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others.”¹⁷ Legal history is replete with persecution of minorities or others falling outside an accepted “naturalistic” norm, from the de-personification of women, to the horrors, still experienced today, of anti-Semitism and other bigotries. While overt examples of such persecution have been removed from current legal realities in most areas with a functioning legal order, the inertia of legislation and jurisprudence often privileges patriarchal, coercive and majority-affirming narratives of why and how the law should re/create the sexual citizen.

Nowhere is this conflict between public regulation and private ordering more apparent than in the regulation of a citizen’s private sexual activity. Traditionally, such regulation, arising in Western law from supposedly Judaeo-Christian norms of behaviour (again instantiated by Blackstone, who described homosexual sodomy as “the infamous *crime against nature*...the very mention of which is a disgrace to human nature...a crime not fit to be named...the voice of nature and reason, and the express law of God, determined to be capital”¹⁸) simply enforced conformity with religious and existing societal structures: patriarchy, heteronormativity, and the “norm” of sexual activity solely within religiously-sanctioned relationships. As an early Canadian decision, affirmed by the Supreme Court of Canada, stated, “[i]n Christian countries...marriage...is the union for life of one man with one woman, to the exclusion of all others; any intercourse without these distinctive qualities cannot amount to a Christian

¹⁶ Plato, *The Republic*, translated by Desmond Lee (Toronto: Penguin Classics, 2007) at 85.

¹⁷ John Stuart Mill, *On Liberty*, Elizabeth Rapaport, ed (Indianapolis, IN: Hackett Publishing, 1978) at 9.

¹⁸ Blackstone, *supra* note 15 at Vol 2, 159-160.

marriage”¹⁹ and was thus illegal. Accordingly, although sometimes more honoured in the regulation’s breach than observance, “deviant” sexual activity such as homosexuality and prostitution were sharply proscribed. To argue against this illegality was thought to be arguing against nature itself, and to fight against the lack of protection to persons ordering their private lives in this manner, illegitimate. This historical fact does not mean that contemporary (or even historical) religion speaks with one voice: as Jakobsen and Pellegrini point out, “there are ongoing debates about homosexuality within Christian denominations and within branches of Judaism.”²⁰ Sidestepping the interesting theological aspect to the debate, it is clear that a discriminatory conception of Judaism and Christianity (the Christian-dominated “Judaeo-Christian” model²¹) informed legal discrimination.

Moreover, as will be discussed thoroughly in this dissertation’s chapters on polygamy and prostitution, issues of sexual identity and private sexual ordering became caught up in race. Sexual behaviour outside of subjective norms was ascribed to other races and suppressed. Examples range from the Supreme Court of the United States equating polygamy with having “always been odious among the northern and western nations of Europe [and until the Mormon church] almost exclusively a feature of the life of Asiatic and of African people,”²² to the nineteenth-century Canadian phenomenon, described by Nelson, of a

social imperative [to avoid the potential of biological and social deterioration] to curb female Aboriginal sexuality [which] meshed well with the Victorian values that had ‘inexorably asserted themselves’ into Canadian society by the 1870s. As settlement advanced, marriage occupied a central role in the Euro-Canadian moral code...Proper Victorian marriage was equated with civilization.²³

¹⁹ *Jones v Fraser* (1886), 12 QLR 327 (QB), aff’d (1886), 13 SCR 342.

²⁰ Janet R Jakobsen & Ann Pellegrini, *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance* (Boston, MA: Beacon Press, 2004) at 100.

²¹ See *ibid* at 31-32.

²² *Reynolds v United States*, 98 US 145 (1879) at 164.

²³ Jay Nelson, “‘A Strange Revolution in the Manners of the Country’: Aboriginal-Settler Inter-marriage in Nineteenth-Century British Columbia” in John McLaren, Robert Menzies, & Dorothy E Chunn, eds, *Regulating Lives: Historical Essays on the State, Society, The Individual, and the Law* (Toronto: UBC Press, 2002) 22 at 42.

In the historical American context, “only white women could be victims, because only women of color would choose to prostitute themselves.”²⁴ The sexual citizen who does not conform is “Othered,” dissected, analyzed. Said’s general comments about “orientalism” are applicable here: “[t]he Orient is *watched*, since its almost (but never quite) offensive behavior issues out of a reservoir of infinite peculiarity...The Orient becomes a living tableau of queerness.”²⁵ The “Orient” was not the only constructed locale, but its “fecundity[,] sexual promise (and threat), untiring sensuality, unlimited desire [and] deep generative energies”²⁶ can be analogized to other constructed realities which Western law also tried to control.

But, as the Reverend Martin Luther King Junior eloquently noted, “[o]ppressed people cannot remain oppressed forever.”²⁷ Sexual minorities were able to resist their systematic oppression, resulting in a hotly-contested modern legal landscape. The liberalization of the law of sexual ordering has been a comparatively recent development, following famous American precedents such as *Roe v Wade*²⁸ and *Eisenstadt v Baird*,²⁹ and more recently, *Lawrence v Texas*,³⁰ and in Canada, Pierre Elliott Trudeau’s famous dictum that the “there’s no place for the State in the bedrooms of the Nation-what’s done in private between consenting adults doesn’t concern the *Criminal Code*,”³¹ coupled with the relaxing of restrictions on divorce, adultery, homosexuality, and abortion. Where they occurred, these reforms were enacted piecemeal in a climate of political compromise, leaving sexualized groups such as sex workers, polyamorists,

²⁴ Heather Monasky, “On Comprehensive Prostitution Reform: Criminalizing the Trafficker and the Trick, But Not the Victim-Sweden’s Sexköpslagen in America” (2011) 37:4 Wm Mitchell L Rev 1989 at 2020.

²⁵ Edward W Said, *Orientalism* (New York: Vintage Books, 2003) at 103.

²⁶ *Ibid* at 188.

²⁷ Martin Luther King Junior, “Letter from a Birmingham Jail,” (16 April 1963) African Studies Center, University of Pennsylvania, online: <http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html>.

²⁸ 410 US 113 (1973).

²⁹ 405 US 438 (1972).

³⁰ 539 US 558 (2003).

³¹ Pierre Trudeau, “Omnibus Bill: ‘There’s no place for the state in the bedrooms of the nation’” *CBC Television News* (broadcast 21 December 1967) in CBC Digital Archives, online: <<http://www.cbc.ca/archives/categories/politics/rights-freedoms/trudeaus-omnibus-bill-challenging-canadian-taboos/theres-no-place-for-the-state-in-the-bedrooms-of-the-nation.html>>.

and even the LGBTI community (who were still not granted equal conjugal rights) out of the reforms and providing no comprehensive framework for the continued reformation of the law of private sexual ordering. This thaw was contemporaneous with the growing recognition that minority groups, for reasons of culture or religion, would require legal recognition, and sometimes legal protection, to participate in society legally. Together with the *Canadian Charter of Rights and Freedoms*³² and section 9 of the *European Convention on Human Rights*,³³ which both guarantee freedom of religion and (to a certain extent) religious practice, legal pluralism has seen victories for those who are disproportionately affected by their religious beliefs. A study of the law of private sexual ordering thus comes full circle: from an examination of the religious roots and underpinnings of the law, it ends at a study of the legal impacts upon cultural and religious practices. Similar to the debate on LGBTI sexual minorities, the subject matter of this dissertation represents a struggle against ingrained social, religious, and moral sensibilities enshrined in law.

Laws across the world provide interesting examples of interaction with sexual behaviour. Globally, the law of both private sexual ordering and religious “accommodation” (or, as better phrased by Bruce Ryder, the concept of “equal religious citizenship,” recognizing that “[w]ithout the ability to demand that neutral rules and policies be adjusted to meet their religious needs, persons of faith cannot participate equally in social and economic life”³⁴) are both in flux. Specific examples include the Supreme Court of Canada striking down laws that indirectly endangered and criminalized prostitution in December 2013³⁵ and subsequent governmental re-

³² Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, 1982, c 11 (UK) (*Charter*).

³³ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14*, 4 November 1950, ETS 5.

³⁴ Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Toronto: UBC Press, 2008) 87 at 90.

³⁵ *Canada (AG) v Bedford*, 2013 SCC 72.

entrenchment to make prostitution illegal,³⁶ to a recent Utah decision overturning the criminalization of plural cohabitation (and with it, over 100 years of American jurisprudence on the limits of freedom of religion),³⁷ which is still under appeal. Practitioners of polygyny are currently on trial in British Columbia.³⁸ These legal battles take place in the context of the ongoing ontological struggle for control over the female body and reproductive rights, and finally to the (hopefully sustained) legal gains made in the cause of same-sex marriage (and unfortunately, as seen in countries as diverse as Russia, Nigeria, Uganda and India,³⁹ the resistance to homosexuality). The legal discourse is currently being created in jurisprudence, legislation, and academic and popular commentary.

It is clear from the vigorous nature of the discussions that sexual identity is a social key, illustrated through those who oppose sexual freedom often adopting 19th century political scientist Francis Lieber's belief that sexual structure determines societal success: "monogamic marriage...is one of the pre-existing conditions of our existence as civilized white men...Strike it out, and you destroy our very being."⁴⁰ Lieber owned slaves⁴¹ and wrote on a related social issue, gender equality, that "[i]f woman were to be admitted into active participation in politics she

³⁶ The *Protection of Communities and Exploited Persons Act*, SC 2014 c25, legislation whose biases are revealed in its title, amended Canada's *Criminal Code* to criminalize the purchase of sex, and while decriminalizing public solicitation and brothels, criminalized the sale of sex near areas normally occupied by minors, such as schools.

³⁷ *Brown v Buhman*, 947 F Supp 2d 1170 (D Utah Dec 13, 2013).

³⁸ See CBC News, "Bountiful: Winston Blackmore, James Oler polygamy hearing begins in Creston, B.C." (9 October 2014), online: CBC < <http://www.cbc.ca/news/canada/british-columbia/bountiful-winston-blackmore-james-oler-polygamy-hearing-begins-in-creston-b-c-1.2793046>>.

³⁹ On December 11, 2013, India's Supreme Court upheld the criminalization of homosexual behaviour as constitutional. See *Koushal v Naz Foundation* (December 11, 2013), online: Supreme Court of India (Civil Appellate Jurisdiction) Civil Appeal No 10972 of 2013 <<http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>>.

⁴⁰ Francis Lieber, "The Mormons: Shall Utah be Admitted into the Union?" (1855) 5:27 Putnam's Monthly 225 at 233-234, as quoted in Martha Ertman, "Race Treason: The Untold Story of America's Ban on Polygamy" (2010) 19:2 Colum J Gender & L 287 at 333.

⁴¹ Ertman, *ibid* at 332.

must do it at the price of her whole peculiar nature, her grace and her attraction:”⁴² an *ad hominem* attack, perhaps, but one that raises the question of what “our very being” meant to him.

Today, as laws imposing mainstream religious principles gradually lose momentum and legal control, under pressure both internally and through international rights critiques, an important question at the heart of the modern State is on what basis to regulate the private sexual ordering of individuals, a regulation which engages majority practices as well as sexualized minorities. The legal nexus between the State’s responsibility to regulate conduct for its citizens must be carefully counterbalanced against the rights of those citizens to structure their conjugality as they desire. In a sense, two conflicting imperatives compete for legislative and judicial dominance: the right to private ordering, and the paternalistic duty of the State to ensure order for its citizens. Although there are plausible arguments to be made on both sides of the debate, the preponderance of careful judicial consideration, at least in the North American context, has recently been in favour of an expansive permissiveness for private sexual ordering.⁴³ Nonetheless, further rights-based discourse is needed to render the law of private sexual ordering fully self-coherent. Justifications for regulating private sexual ordering must be evaluated against societal and legal principles---as with any area of the law, if the regulations cannot be justified other than as relics of a “traditional” past, they must be altered or abandoned. This evaluation in turn raises a larger question: what is the proper justification (if any) for legal regulation of the

⁴² Quoted in Carol Weisbrod & Pamela Sheingorn, “Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women” (1978) 10:4 Conn L Rev 828 at 830.

⁴³ See, e.g., *R v Labaye*, 2005 SCC 80 (striking down an indecency conviction for group sexual activities, *Canada (AG) v Bedford*, *supra* note 29 (striking down the criminalization of activities associated with prostitution in Canada, albeit suspending a declaration of invalidity for one year to allow for legislative action). The decision in *Reference Re s 293 of the Criminal Code*, also known as the *Polygamy Reference*, 2011 BCSC 1588, was not appealed and thus provides little guidance for future jurisprudence on the constitutionality of criminalizing polygamy. A better-known and clearer victory for a progressive law on private sexual ordering was the landmark victory in *Reference Re Same-Sex Marriage*, 2004 SCC 79, which upheld the government’s acceptance of same-sex marriage in the *Civil Marriage Act*, SC 2005, c 33, although the Court explicitly (at para 71) did not decide whether a system which did not allow for same-sex marriage was unconstitutional. Finally, of course, any achievement can be legislatively overridden by invoking s 33 of the *Charter*, *supra* note 32.

consensual private life of the individual? Is paternalism compatible with a liberal democracy, or must a legal regime allow its citizens the “liberty of self-degradation?”⁴⁴ Should religion (including of course humanistic ethics and morality) have a place in the State’s regulation of an individual? If so, whose morality will inform the law and how will it deal with dissent?

The struggle for independent human rights relating to self-determination and autonomy vis-à-vis sexual rights has not been as promising in legal systems which do not attempt or cannot achieve gender equality and equality of conscience, where punishment for sexual activity outside of prescribed norms is regulated, state-induced or tolerated, and severe. While not the subject of this dissertation, one group is a good illustration of the importance of sexual behaviour to ontology and the ability of law to interfere. High-profile examples of the strong legal actions against homosexuals,⁴⁵ taken by several developing nations, illustrate the need for further legal groundwork, to affirmatively protect the rights of individuals to engage in private sexual ordering. As the problem of resistance to granting even basic recognition to the rights of women and the LGBTI community appears to be a commonly-occurring legal situation, a multilateral legal response is required. Almost all possible actions to remake a non-discriminatory law on private sexual ordering (concomitantly gaining or preserving rights for vulnerable sexualized groups) must survive the critique and charge of being neo-colonialist: however, asserting that these states must be free to develop while denying basic human rights is an unsatisfactory

⁴⁴ Kate Field, quoted in Sarah Barringer Gordon, “‘The Liberty of Self-Degradation’: Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America” (1996) 83:3 *J American History* 815 at 815.

⁴⁵ South Sudan has followed in the footsteps of Uganda and Liberia, where Nobel Peace Prize Laureate Ellen Sirleaf Johnson has defended laws against homosexuality as upholding “traditional values” (Tamasin Ford and Bonnie Allen, “Nobel peace prize winner defends law criminalising homosexuality in Liberia”, *The Guardian*, March 19, 2012, online: <<http://www.guardian.co.uk/world/2012/mar/19/nobel-peace-prize-law-homosexuality>>). According to the article, in total, 37 African countries criminalize homosexuality, to say nothing of President Mahmoud Ahmadinejad of Iran, who asserted in a speech at Columbia University, New York City, that there are no homosexuals in Iran (see Daily Mail, “‘We Don’t Have Any Gays in Iran,’ President tells Ivy League Audience” *Daily Mail*, September 25, 2007. Online: <<http://www.dailymail.co.uk/news/article-483746/We-dont-gays-Iran-Iranian-president-tells-Ivy-League-audience.html>>).

solution. Responses can be either multilateral and inclusive or heavy-handed, but in either case, further legal protection of private sexual ordering is needed. In a sense, the two concerns of the law form a coherent singular whole on required action: the relaxation of state involvement in private sexual ordering and (where needed) a reaffirmation of basic human rights of association and self-determination. The controversial difference is where the coercive law (which Hart compares to “a gunman saying to his victim, ‘Give me your money or your life’ ... in the case of the legal system the gunman says it to a large number of people who are accustomed to the racket and habitually surrender to it”⁴⁶) is drafted to compel those other than the majority to obey majority norms.

Overview of the Project

As Posner reasons, if “fear and distaste that activate discrimination” are not based in an objectively-justifiable rationale for differing treatment, “the discrimination itself [is] therefore irredeemably vicious.”⁴⁷ In this work I will argue that, apart from inherent safety concerns which properly engage the law regardless of an individual’s conjugal status, State regulation of private sexual ordering in both national and international legal settings is often infused with subjective moral judgments, is in need of reform, and potentially demonstrates such irredeemable viciousness which violates basic legal rights such as self-determination, autonomy, and freedom of association. Attempted retrenchments to conservative values can allege harm if these values are disregarded, but a “harm” analysis, whereby other (gendered and certainly not race-neutral) sociological factors are inherently identified with private sexual ordering, is neither innovative nor always a legitimate critique. As Professor Susan Drummond writes, regarding one round of the attempted prosecutions for polygamy in Bountiful, British Columbia:

⁴⁶ HLA Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harvard L Rev 593 at 603.

⁴⁷ Richard A Posner, *Sex and Reason* (Cambridge, MA: Harvard University Press, 1998) at 293.

The Criminal Code clearly prohibits sexual activity between adults and children under the age of 16. If there is a shred of credible evidence that this criminal activity has been going on in Bountiful, B.C., then it is woefully lamentable that charges were not laid under these provisions. If wives are vulnerable to abuse in Bountiful, domestic abuse is a criminal offence under our assault provisions in the Criminal Code. Yet, the only charges coming out of Bountiful are under the anachronistic polygamy section.⁴⁸

Persuasive arguments for the proposition that the State has no place in the consenting bedrooms of the Nation are numerous. From a theoretical-philosophical perspective, law will expend resources for no universally-acknowledged social good by arbitrarily privileging one type of private sexual ordering over another. The cost will be particularly high if the discrimination creates an under-privileged or even criminalized sub-class of citizens out of those who would otherwise be law-abiding individuals. While the utilitarian ideal that legislation should exist only to protect non-consenting individuals from harm has been rejected in Canada,⁴⁹ a law based on subjective religious principles is contrary to the premise that a liberal democracy should grant its citizens freedom of thought, religion, and freedom from arbitrary interference in their actions, interfering with private decisions only when required to achieve a “legitimate” societal aim. This is not an absolute principle, nor is the definition of when the State may legitimately interfere clear-cut, but the freedom of individual choice, conscience and action is clearly manifested in principles such as the freedom of association and worship, both of which are implicated in private sexual ordering.

There are also major flaws in the criminalization of certain private sexual ordering from a legal perspective. First, as sometimes controversially invoked, the freedom of religion bears strongly on the issue of how religious minorities choose to order their societal and familial structure. Religious freedom should not trump all other considerations, but in the absence of an articulable harm over and above supposed voluntary “exploitation,” State intervention arguably

⁴⁸ Susan Drummond, “A Marriage of Fear and Xenophobia” *The Globe and Mail* (6 April 2009) at A13.

⁴⁹ *R v Malmo-Levine*, 2003 SCC 74; cf European Human Rights Legislation, which accords significant deference to the criminal law legislation of its member states.

does greater harm than good. As one example of how State control can stunt an individual's growth, intervention denies a dissenting individual a place in social discourse, inhibiting "a political conception that religious and non-religious citizens can endorse as respectful of their differing commitments."⁵⁰

While the modern State cannot legitimate or accept religious conceptions which would invalidate basic guarantees designed to protect individuals (such as freedom of association and freedom from religious discrimination), to enforce its subjective conceptions of equality on consenting dissenters is also problematic. Freedom of religion can also be conceived of as a negative right: insofar as conjugality is legally regulated according to any subjective conception of the "good life," freedom from the religio-moral tenets of the State is violated. This is a larger principle than simple technical or formal neutrality, which "expresses not only a guideline or a constant related to the legislation that regulates the fundamental freedoms (including religious freedom), but also...expresses a directive and mandate consistent with the requirements of state action in managing legal contexts in which the religious factor is present."⁵¹

Secondly, I will also explore the freedom of association and equality rights which are guaranteed by domestic and international instruments. These are powerful tools against attempts to regulate private sexual ordering following either an archaic script, the demands of a tyrannical majority, or capriciously. Finally, I will examine the pragmatic effects of keeping some segments of the modern State as "outlaws," bereft of the protection afforded to the more "righteous" and socially-approved sexual ordering. It is no coincidence that society's strongest punitive and denunciatory measure--criminal sanction--continues to be applied to the nuanced situations of polygamy and prostitution, where the law is demonstrably not acting as a deterrent to those

⁵⁰ Martha C Nussbaum, "A Plea for Difficulty" in in Joshua Cohen, Matthew Howard, & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 105 at 114.

⁵¹ Rafael Palomino, "Religion and Neutrality: Myth, Principle, and Meaning" (2011) 2011:3 *BYU L Rev* 657 at 689.

wishing to order their private sexual lives in a manner not consistent with the majority's morality. Resistance to the law is of course always possible, as Beaman notes: "we might be better served by a writing of governance as governance/resistance."⁵² However, extra-legal resistance to the law by groups such as sex workers, sexual minorities or religious groups is fraught with danger. Law provides an unique outlet for resistance within the challenged structure. While neither the only nor the determinative manner of resolving issues or giving voice to resistance, resistance through legal form has the potential to be a potent tool to advance a non-moralistic law of private sexual ordering.

Methodologies and Theoretical Frameworks

The subject matter of this work is broad, and the important critiques range from philosophical and religious texts, to social science texts, to "legal" texts such as jurisprudence, legislation and academic commentary. While the topic is sometimes widely-encompassing, it studies discourses capable of unification, and an analysis unifying these issues promises to provide insights not only for each separate issue but also for the "big picture" of the issues combined. To that end, I will write from the perspective of several theoretical frameworks, and utilize (and blend) multiple methodologies in examining the topic of law and private sexual ordering. A brief methodological and framework outline follows: these methods will be further discussed in the dissertation's chapter on methodology and theory. The dissertation will use four main methodologies oriented within three larger critical/methodological traditions. In terms of research methodology, I will use legal comparative, social science, textual and legal historical analyses to explore the issue of private sexual ordering and to formulate potential legal and societal responses to problems identified.

I will be employing the methodological traditions of legal feminism, queer theory and legal

⁵² Beaman, *Defining Harm*, *supra* note 9 at 29.

historicism to formulate the issues, questions and responses. All three critical theoretical frameworks are useful in part because of their history of resistance to mainstream or “common sense” views, which have historically involved oppression. In exploring the three areas of private sexual ordering through these methodologies, it becomes clear that legal regulation of these instances of private sexual ordering is as much an exercise of “power” over sex as any legitimate regulatory instinct. Moreover, with the methodologies’ twin strengths of being rooted in rationality and falsifiable fact, and the impulse to destabilize traditional narratives of coercion and control, these viewpoints will assist in getting at the root of how our society regulates examples of sexual conduct, and why.

Similarly, all theoretical frameworks have the potential to re-evaluate received wisdom and thus engage with the goal (originally ascribed to queer theory) of “the contestation of boundaries and categories, not only of sexual identity, but more widely to include the boundaries of normalcy itself...[to] constantly seek to reflect upon the contingency and ambiguity of all sexual categories.”⁵³ In using these methodologies within these overarching frameworks, I acknowledge the constant development and tension that exists within these traditions, as instantiated by Wing’s discussion of feminist legal theory. Wing emphasizes both commonalities and different approaches, “various prominent threads in feminism such as formal equality, dominance/inequality, socialism, hedonic feminism, pragmatic feminism, radical feminism, and liberal feminism,”⁵⁴ where an underlying theme is “feminism’s emphasis on gender oppression within a system of patriarchy.”⁵⁵ In viewing the methodological findings through the fundamental theoretical frameworks of legal feminist theory, queer theory, and legal history, I

⁵³Erin Fowler, “A Queer Critique on the Polygamy Debate in Canada: Law, Culture, and Diversity” (2012) 21 Dal J Leg Stud 93 at 111.

⁵⁴ Adrien Katherine Wing, “Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century” (2001) 11:2 J Contemp Legal Issues 811 at 822.

⁵⁵ *Ibid.*

will apply the critical, egalitarian and (especially regarding queer theory) destabilizing viewpoints while analyzing historical contexts and texts, using insights and lessons from related social sciences fields, analyzing legal documents, jurisprudence and legislation, and finally by comparing/contrasting legal material.

I will rely on primary sources and critiques of the normative aspects of the modern law (both domestic and international) of sexual regulation, such as legislation, jurisprudence, and stated motivations of the legislature and the judiciary with regard to their respective actions. This critique will also focus on the theoretical and legal justifications underpinning the current regulation of a citizen's private activity, as well as the normative sources and arguments for a greater liberalization of sexual association laws in modern developed societies. Finally, no discussion of the current state of the law, and what the future state of the law ought to be, would be complete without both statistical and qualitative data from decision-makers to support the argument that in absolute theoretical and practical terms, a relaxation of the current law of private sexual ordering is required.

This work seeks to articulate the underpinnings of the current state of law in both national and international jurisdictions. This exploration will incorporate a legal historical approach, empirical data, and a review of the justificatory exercise that these jurisdictions embark upon to create law. A legal positivist divide between law "that is" and law "that ought to be"⁵⁶ will be maintained. At this stage, religious foundations of the current law, and the question of how this should interact with a modern secular society, will also be discussed. Next, to explore the differing types of legal regulation of private sexual ordering, I will first divide the investigated aspects into two groups, one comprising countries which have broadly adopted prevailing

⁵⁶ A fundamental tenet of legal positivism. See, eg, Brian Tamanaha, "The Contemporary Relevance of Legal Positivism" (2007) 32 Australian J Leg Philosophy 1 and HLA Hart, *supra* note 46.

international norms for legal structure, the other for those whose justice systems, for varying reasons, do not. In the second group, I envision not only nations whose norms differ from the formal equality espoused by the international system (whether it be from reasons of practicality or religio-moral objection), but where debates need not (or are not) framed in egalitarian terms. I am aware of the dangers this dichotomy may cause, such as a tendency to privilege one system over another, or assume that disparate “categorized” systems mirror each other without hard evidence to support that contention. Nevertheless, the distinction is necessary due to the wide difference in legal situation and action needed. I will explore the impacts of the regulation of private sexual ordering in illuminating examples of national law, and in international systems. I will structure the inquiry so as to look at the three discrete areas (polygamy, prostitution, and the regulation of female sexuality) in turn.

The study of these spheres and private choices necessarily entails the study of national private law (and the impact of consensual sexual ordering on issues such as estates, (private) family law, and property law), public law, such as immigration, criminal and constitutional law concerns (these areas of the law are ideal for a discussion of concepts such as “fundamental justice” and dignity of the citizen) and finally the discipline of “conflict of laws.” Private international law is especially important to the law regarding polygamy, as many Islamic countries allow and/or practice polygamy, creating a legal conundrum on how to recognize the “nullity” relationship in the regulating State. I will study each of these areas in turn, arguing that where competing imperatives exist, the Anglo-American common law tradition must be shifted to allow for private personal autonomy and distanced from moral *apologia*.

The classification and comparative issues raised by this study are fascinating, but I feel that this dissertation can achieve more than simple description. After examining the issues, I argue

that the legal regulation of private sexual ordering requires a approach consistently consonant with a respect for the human dignity of individuals and groups making informed choices about their sexual ordering. This necessarily requires legal guidelines for articulation of the law, acknowledging stakeholders with respect to societal norms, respect for citizens and their autonomy, and clear mechanisms on how to continue societal discourse, hopefully in some cases towards greater social change. In the last section of this work, I will present what I believe is a coherent framework for the regulation of the private sphere of an individual's sexual life. This critique will describe essential components of any workable system (as outlined above), with special emphasis on the particular legal mechanisms (such as international law, constitutional law, and a human-rights based approach) which may be able to create such a workable system. While inherent in legal and political systems is the ability for the decision-maker to choose from a variety of options and legitimate the choice by reference to existing principles, some systems may generate greater consonance with those principles, such as respect for human rights or for human autonomy. Just as change is not required solely for change's sake, it is not a defensible position either to simply accept the *status quo*.

Theoretical/Philosophical Justifications for Regulating Private Sexual Ordering

Anticipating Chapter 3, I will here discuss two theoretical arguments advanced to justify coercive rules on minority private sexual ordering. These justifications presuppose the legitimacy of State intervention in the "private" sphere, whereby even if "citizens are subjected to laws with which they disagree or which they find oppressive...[c]onsent to constitutional democracy and the rule of law...may not eliminate coercion, but it would legitimate it."⁵⁷ The two major justifications for State intrusion on consensual acts are first, an appeal to subjective majority

⁵⁷ Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy" (2001) 74:5 S Cal L Rev 1307 at 1312.

values, whereby the majority rejects the validity of minority ordering. The second, and more legitimate, objection focusses on harm arising out of the practice, either to individuals outside the practice (such as children or other members of society), society itself, or the participants themselves..

The first justification, used in the setting up of laws regulating private sexual ordering, is an appeal to “natural law,” or more precisely Judaeo-Christian religious principles. It may be considered odd that this tradition, which originally tolerated both patriarchal imposition of prostitution⁵⁸ and very emphatically polygamy,⁵⁹ should have by the time of Western legal codification evolved to mandate monogamy. However, Judaeo-Christian law has always supported the regulation of private sexual ordering as part of a comprehensive code of life: homosexuals are condemned to death by the Tanakh⁶⁰ and denounced by the Christian New Testament,⁶¹ and this condemnation was extended to the early law.⁶² The claim that any religion or subjective moral code should claim domain over a State’s law is anathema to the (admittedly subjective) principles of religious freedom and cultural plurality, which guarantees “freedom of conscience and religion,”⁶³ and for the most part, freedom of private action. Rightly or wrongly,

⁵⁸ See, for example, the story of Tamar and Judah in Genesis, Chapter 38. Although what a religion “tolerates” is a thorny issue, textually, this episode appears to sanction prostitution. While myriad interpretations of biblical text are joined to issues of translation (from Hebrew, Greek, or Aramaic), this dissertation will use, unless otherwise mentioned, the text of the New International Version *NIV Student Bible* (Grand Rapids, MI: Zondervan, 2011). References will cite the traditional biblical identification (book, chapter, and verse) rather than pagination.

⁵⁹ For example, the polygyny of biblical patriarchs Abraham and Jacob. There is no doubt the polygyny described is patriarchal in nature.

⁶⁰ Leviticus 18:22 and 20:13, for example.

⁶¹ One example, 1 Timothy 1:8-11, groups homosexual people with those who commit certain flagrantly unacceptable conduct such as murderers, and equates this religious conception with legal propriety: “[w]e know that the law is good if one uses it properly. We also know that the law is made not for the righteous but for lawbreakers and rebels, the ungodly and sinful, the unholy and irreligious, for those who kill their fathers or mothers, for murderers, for the sexually immoral, for those practicing homosexuality, for slave traders and liars and perjurers—and for whatever else is contrary to the sound doctrine that conforms to the gospel concerning the glory of the blessed God.”

⁶² For a complete summary of early Roman and Christian Visigothic law, see Lahey, *supra* note 4 at Chapter 5.

⁶³ See for example United Nations *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71, Article 18, guaranteeing “freedom of thought, conscience and religion”; The wording above is taken from the *Canadian Charter of Rights and Freedoms*, *supra* note 32 at s 2(a).

and undoubtedly essential to the smooth functioning of a modern multicultural and free society, the State does not and believes it should not impose one religion on another. To quote from a decision of the Canadian Supreme Court:

The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the Charter, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.⁶⁴

To currently base a law or legal regulation of an individual's private sexual ordering on religious principles is thus legally indefensible. To the extent that basing laws on religion override the individual's personal choices, especially the dictates of an opposing religion, they cannot be justified. The same insight holds true to protect the minority from even an overwhelming majority: the "community standards" of the situation should not be allowed to govern.

However, there is a second, more powerful, explanation for the legal regulation of consensual private sexual ordering in a modern developed legal code. This is, as articulated by Chief Justice Bauman in British Columbia's *Polygamy Reference*,⁶⁵ the idea that private sexual ordering is within the purview of the State to regulate based on its potential to harm. Bauman accepted evidence that polygyny increases the number of "unmarried low-status men" in a society and that "a 0.01 increase in sex ratio was associated with a 3% increase in property and violent crimes."⁶⁶ The problematic nature of that reasoning is discussed in this dissertation's chapters on polygamy.

⁶⁴ *R v Morgentaler*, [1988] 1 SCR 30 per Wilson J at 166.

⁶⁵ *Reference Re s 293*, *supra* note 43.

⁶⁶ *Ibid* at paras 507 and 515.

But it is easy to see in some situations that a harm argument is tenable: the State has a legitimate interest in protecting against coerced sexual mutilation or violence, especially insofar as it affects related parties, such as children. It is this harm that was upheld by Bauman against polygamy, just as it had been unsuccessfully argued to attack swinger clubs in *Labaye*, where the objective harm was alleged to be heightened risk of sexually transmitted infection. It seems clear that the State has a justification, indeed a duty, to intrude into the sphere of private sexual ordering in order to maintain respect for personal autonomy and safety, while preventing true harm. However, harm or perceived harm can serve as the justification for arguments which are in reality morality-based. Mariana Valverde's characterization of harm as a "veritable joker card"⁶⁷ which can be played in any scenario, for any reason, is apt. Playing that card, as Blake does in identifying "sex acts the state has an interest in controlling because of the harm created, arguably polygamy, bestiality, and prostitution"⁶⁸ not only requires strict delineation of participant agency, but also analysis of whether the "harm" is situational (and therefore not systemic to the sexual practice), and an answer to whether cultural or religious bias has been allowed to enter the deliberation.

Three further points of interest in the harm analysis must also be discussed. The first is that, to be defensible, the State's interference must be "minimally impairing" on the right to personal autonomy and religious freedom. Blanket criminalization of any activity, while psychologically satisfying to a conservative portion of society, is unlikely either to minimally impair the rights of individuals regulated but will also likely catch other non-harmful activities. Criminalization is, further, a blunt instrument which provides little recourse to "rescue" an individual engaged in a criminal act. Secondly, and perhaps more importantly, a clear definition

⁶⁷ As quoted in Beaman, *Defining Harm*, *supra* note 9 at 86.

⁶⁸ Catherine Blake, "I Pronounce You Husband and Wife and Wife and Wife: The Utah Supreme Court's Re-Affirmation of Anti-Polygamy Laws in *State v. Green*" (2005) 7:2 JL & Fam Stud 405 at 416.

of the term harm is needed for legitimate government legislation: this was the clear criticism of the Court's voluminous judgment in the *Polygamy Reference*, where, as Professor Carol Rogerson points out, the "harms" articulated, relating to children of polygamous marriages, all represent analogues to "harms" children suffer from the indisputably legal step of divorce.⁶⁹ A clear definition of "harm" may be impossible, but contingent or subjective definitions should not drive law which intends to be value-neutral.

Moreover, unless there is clear evidence to the contrary, adult individuals should be presumed to consent to their chosen form of sexual ordering. It is a reality that insular communities socialize youths, especially women, to believe certain "truths" which conflict with the prevailing moral sentiments, established facts, or both. However, to embark upon this inquiry will lead to the deprivation of personal autonomy of various groups (not simply sexualized minorities) on a more-or-less subjective standard. Disagreement with the State and the raising of children in the same mindset should be interfered with in only the clearest of cases.

Finally, ambiguous laws do not pass muster automatically because some meaning can be construed to them. Laws which, like Blackstone's conception, permit the "good" interpretations and exclude the "bad" will run afoul of principles forbidding vague laws. As former Supreme Court of Canada Justice Louise Arbour stated, "[a]t some point, in an effort to give sufficient precision to provide notice and constrain discretion in enforcement, mere interpretation ends and an entirely new provision is drafted."⁷⁰ Archaic provisions cannot be theoretically justified because they *can* be interpreted: to do so is judicial legislating of an outdated and overbroad piece of religiously-based regulation which also impinges on freedom of religion or conscience.

⁶⁹ Carol Rogerson, Oral Presentation, "Concepts of Harm in Section One of the Charter: the Polygamy Reference," Laskin-Beetz Conference on Constitutional Law, Université de Montréal, September 14, 2012.

⁷⁰ *Canadian Foundation for Children, Youth and the Law v AG Canada*, 2004 SCC 4 at para 190 per Arbour J, dissenting.

In brief conclusion, law is sometimes justified in regulating private sexual ordering: but the justifications must be rigorous and must prevent actual harm, not just sooth the outrage of a segment of society. This need for intelligent articulation is seen in the laws specifically engaging with polygamy, prostitution, and female sexuality. I will now provide an introduction to each of these in turn.

Polygamy in Countries Consonant with Articulated International Legal Norms

Polygamy is currently criminalized in all of North America, South America, and most of Europe. The Law Reform Commission of Canada, in a 1985 working paper entitled *Bigamy*, recommended the abolition of all crimes, including polygamy, that solely engage private sexual ordering, although its reasoning was somewhat problematic: “[b]y not giving polygamy any legal recognition, matrimonial law ensures that this phenomenon is not viable in Canada.”⁷¹ It is highly doubtful that law ignoring polygamy would in any way curtail the practice. However, decriminalizing polygamy and instead focusing on non-controversial crimes sometimes associated with polygamy (as recommended by the British Columbia Civil Liberties Association when it wrote that “all of the other alleged abusive and exploitative acts (child and spousal abuse) [allegedly associated with polygyny] are clearly prohibited by existing, ordinary criminal provisions”⁷²) would appear to more properly reflect the balance between individual security and freedom.

For the purposes of this dissertation, I will use the term “polygamy” to refer to both polygyny (the practice of one man marrying multiple female partners), polyandry (a rarer variant of polygamy whereby one woman marries multiple male partners), and same-sex marriage

⁷¹ Law Reform Commission of Canada, Working Paper 42: *Bigamy* (Queen’s Printer, 1985) at 22-23. This did not extend to bigamy although the work noted that a civil sanction may be more appropriate.

⁷² British Columbia Civil Liberties Association, “Annual General Meeting Newsletter, 2001,” quoted in Martha Bailey & Amy J Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara, CA: Praeger, 2010) at 156.

unions involving more than two individuals. This is a departure somewhat from the standard conception of polygamy as meaning only polygyny, but it is the only way for a coherent society which has accepted gender equality and homosexual equality to make a coherent discussion of the law. Moreover, it is both consistent with the traditional definitions wherein “there is a definite meaning and a need for each of the three terms”⁷³ and recognizes the transformative potential of polygamy on issues such as polyamory and plural same-sex relationships. Polygyny is the most common representation of polygamy in Canada owing to its religious affiliation with Islam and some “sects” of the Church of Jesus Christ of Latter-day Saints (“Mormonism”), and is likely the most prevalent internationally.

A basic principle, included for completeness, is the difference between “actual polygamy” and “potential polygamy.” Potentially polygamous marriages are those made in a jurisdiction which would allow a polygamous marriage, even if the marriage in question is between only one woman and one man. Thus, even a monogamous marriage between individuals allowed to marry in a jurisdiction such as Saudi Arabia would be “potentially polygamous,” even if the individuals were residents of a country which forbids polygamy. Actual polygamous marriages involve the formation of a marital bond with more than two individuals. Obviously, legal action against potentially polygamous marriages misses the actual intent of the parties, and as such is less defensible than as against actual polygamous marriages.

Legal scholarship on polygamy in Canada has experienced a surge⁷⁴ thanks to the community of Bountiful, British Columbia, where polygynous members of the Fundamentalist

⁷³ David E Davis, “The Use of the Terms Polygamy, Polygyny and Polyandry” (1940) 92:2387 *Science*, New Series 287 at 287.

⁷⁴ No brief canvass here can do justice to the scholarship, but as a cursory introduction, scholars discussing polygamy in Canada include Rebecca Cook, University of Toronto; Susan Drummond, Osgoode Hall Law School; Bita Amani and Martha Bailey, Queen’s University Faculty of Law, Angela Campbell, McGill University, and (from an Islamic legal perspective) professors Mohammad Fadel and Anver Emon, University of Toronto Faculty of Law.

Church of Jesus Christ of Latter-day Saints (the FLDS) live more-or-less openly. While circumstances regarding the law of private sexual ordering differ from location to location, analyses of specific legal and societal situations are to some extent applicable to all modern developed states, as the issue of multiculturalism and plurality of belief is germane to debates in other developed legal systems around the world.

Put simply, the criminalization of polygamy in Canada is a reaction to the introduction of the state of Utah to the United States of America. With American statehood came American disapprobation of the Mormon practice of polygamy, and lest it be seen as a sympathetic jurisdiction of relocation, Canada enacted broad legislation to discourage polygamy.⁷⁵ Susan Drummond articulates the inherent problem with such an old statute which was immediately put to offensive uses:

The racialized and politicized roots of the polygamy doctrine in both the United States and Canada give pause to assertions that it can be invoked without xenophobic taint. However, there are other socio-legal dimensions of the polygamy law in Canada that suggest that it has been used as an instrument of colonization (*i.e.*, through the forceful restructuring of Aboriginal family structures). Since 1892, there have only been a handful of such prosecutions under the code's polygamy sections. One of the more salient of these was *R. v. Bear's Shin Bone* [(1899), 4 Terr. L.R. 173], the 1899 case of a Blood Indian from the North West Territories, Bear's Shin Bone, who was convicted under the polygamy section for entering into simultaneous conjugal unions with two women. The marriages were formed "Indian fashion," meaning that "he promised to keep her all her life, and she promised to stay with him, and that that was the way Indians got married."⁷⁶

It is not immediately apparent, (ignoring the racialized imposition of cultural norms and the dismissive ignorance of the multiplicity of aboriginal culture,⁷⁷) what harm the accused (who was convicted) was inflicting upon anyone. Such a case today, assuming informed consent by the accused's female spouses, would be highly troubling. Modern applications of laws such as this one, with a history of stifling personal, religious and cultural freedom, should

⁷⁵ Nicholas Bala et al, "An International Review of Polygamy: Legal and Policy Implications for Canada" in *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2005), online: http://epe.lac-bac.gc.ca/100/200/301/swccfc/polygamye/pdf/200511_0662420683_e.pdf at 28.

⁷⁶ Susan Drummond, "Polygamy's Inscrutable Criminal Mischief" (2009) 47 Osgoode Hall LJ 317 at 331-332.

⁷⁷ *Ibid* at 332.

not be retained in present legal frameworks. Where conflicting sociological evidence, and more importantly, conflicting interpretations of that evidence exist, the law should generally, and specifically in the case of polygamy, suspend punishment and sanction until further research can be done. It is instructive that the evidence of one expert witness in the *Polygamy Reference* was accepted to brand polygamy as “harmful,” when the same expert had previously testified that same-sex marriage was harmful and his evidence had been rejected.⁷⁸

The criminalization of polygamy represents an anachronism in the modern State and its legal code. While there are sociological suggestions that polygamy is harmful *per se* (as opposed to the paper tigers set up against some practitioners of polygamy), there is no conclusive basis on which to use the full might of the criminal law against what are alleged to be vulnerable communities. Moreover, these claims of harm often lack nuance, exemplified by the statement that “[e]ven in polygamous situations where all parties involved claim to be consenting adults...pressures put on multiple wives...are tantamount to coercion and result in the subordination of women in polygamous marriages, negating any true possibility of consent.”⁷⁹ No nuance or situational variability is admitted, or even supposedly possible.

Prostitution in Allegedly Egalitarian States

There is some divergence on how prostitution is legally regulated in modern States. These regulations range from aggressive prosecution, notably in most jurisdictions of the United States of America, to toleration (either through decriminalization or regulation) such as in the “Nordic

⁷⁸ Rogerson, Laskin-Beetz Conference, *supra* note 54. John Witte claimed that “marriage, as it is understood in the West, developed from, and is a reflection of the understanding of marriage that is developed in the major Western Christian religions,” quoted at para 6 (of Blair RSJ’s reasons) of *Halpern v Toronto (City)* (2002), 60 OR (3d) 321 (Div Ct). This evidence was at best deemed irrelevant, as both the Divisional Court and the Court of Appeal deemed exclusion of same-sex marriage unjustifiable discrimination. Yet in the *Polygamy Reference*, *supra* note 43, Witte’s evidence was used to discover the “emergence of socially imposed universal monogamy in Western cultures” (para 482), leading to the conclusion that “Western” marriage, historically viewed as monogamous, should remain so. Witte’s historical analysis thus properly bore no fruit in *Halpern*, but reified the status quo in the *Polygamy Reference*.

⁷⁹ Cassiah M Ward, “I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America” (2004) 11 Wm & Mary J Women & L 131 at 150.

model” which criminalizes the purchase but not the sale of sex, to full legal protection of prostitution as a regular occupation (such as in The Netherlands and Germany). Any discussion of prostitution must be cognizant of the potential for advocacy to cloud the facts of the debate:

[S]ome [oppression paradigm] proponents also make specific empirical claims that, taken together, present an image of *concentrated, manifold victimization* [including] that *most* prostitutes enter the trade when they are 13-14 years old, were physical or sexually abused as children, were tricked or forced into the trade by pimps or traffickers, are subjected to routine violence while working, use or are addicted to drugs, suffer severe psychological problems, and desperately want to exit the sex trade...these claims...are largely drawn from nonrandom, unrepresentative, and small samples of the street-based population...we cannot even say that these generalizations apply to street prostitution, let alone the various types of indoor prostitution.⁸⁰

The issue of prostitution will be considered as distinct from the issues of sexual slavery and human trafficking, despite links between the two practices in some (but only some) cases. The dissertation will accept that these other topics are demonstrably pernicious and will not analyze them in depth.

Regardless of any individual moral viewpoint on prostitution, a defensible law in a modern, multicultural democracy will affirm the basic human dignity of sex workers. The law need not take a normative stance on sex work to base rules on sociological and empirical evidence. In this instance, therefore, the harms of unregulated prostitution (danger to sex workers, dangers of sexually transmitted diseases, and the very real potential for sexual violence, slavery and forced addiction to compel participation in the trade) are a sufficient rational basis for the State to regulate private sexual ordering as it relates to economic sexual activity. The major question is, how should the State regulate the activity? Sometimes called the “world’s oldest profession,” the sex trade defies any attempt to stamp it out by criminalization, and therefore the law must recognize that turning sex workers into outlaws, outside the law’s

⁸⁰ John R Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York: New York University Press, 2012) at 13-14.

protection (or, just as bad, outside the law's notice in a stalemate of enforcement) is untenable. Indeed, in Canada some forms of criminalizing prostitution have been ruled unconstitutional.⁸¹

So far, this discussion of the legal regulation of private sexual ordering as it relates to economic uses of private sexual ordering has been general. But only the simplistic arguments (blanket prohibition or blanket permission) have been addressed. The critique of the sex trade in developed nations, of which Canadian jurisprudence is again in the lead thanks to an inflexible government and flexible constitution,⁸² must rest upon the factors that will lead to a coherent governmental regulation of the sex trade. Does this trade have as its goals deterrence, with provisions made for the human dignity of those who remain in the industry? Or is the morality of the subject irrelevant, and the provision of prostitution, like the provision of alcohol, a lucrative business to be engaged in despite social cost?

In this work, I use both an empirical and feminist/sexualized critique of the law of private sexual ordering as it relates to prostitution. I will first argue for the positivist removal of value judgments from the area of law, which is admittedly controversial. Then, in the context of the potential harm of the sex trade upon sex workers, I elucidate principles which will ensure that individuals participating in the sex trade will be treated in a manner which accords with principles of human dignity. The inexorable law of supply and demand means that neither the seller nor the buyer can be singled out for differing treatment: a law which criminalizes "johns" while empowering prostitutes still effectively renders prostitution illegal and thus keeps the activities of prostitutes outside of legal oversight and protection. Finally, while this is outside a strict legal purview of the issue of prostitution, I will argue for the need for greater resources to

⁸¹ The case of *Canada (AG) v Bedford* struck down laws indirectly criminalizing prostitution at both the Trial level and two appellate levels, including the Supreme Court of Canada.

⁸² The "living tree capable of growth and expansion within its natural limits" of *Edwards v AG Canada*, [1930] AC (PC) 124 at 136.

be dedicated to social programs providing the individual with conscious choice as to whether to engage in economic sexual activity, as well as to ensure that individuals are not motivated by overwhelming economic necessity or the need to engage in sex work due to their status as economic migrants (for example, in the Netherlands, less than half of the celebrated “red light district” prostitutes in the Netherlands comprise Dutch citizens⁸³). The goal is to make prostitution reflective of basic human dignities while understanding the harms that the sex trade can cause, even while regulated.

Regulation of Private Sexual Ordering as it Relates to Personal Integrity

This dissertation will advocate for personal autonomy related to sexual decisions, arguing that such autonomy is intrinsic to an individual’s identity. Polygamy and prostitution illustrate major interactions between the law and private sexual ordering. The legal regulation of private sexual ordering has a direct implication on the personal integrity of the individual. This is seen in several issues, such as homosexual rights (the right, for example, of free speech condemning homosexuality as opposed to the right to be free from speech demeaning human dignity, seen in *Saskatchewan (Human Rights Commission) v Whatcott*,⁸⁴ in which the Supreme Court of Canada determined that while hate speech against homosexuals, instantiated by pamphlets condemning “sodomites,” is prohibited, “it would only be unusual circumstances and context that could transform a simple reading or publication of a religion’s holy text into what could objectively be viewed as hate speech”⁸⁵).

The question of abortion remains in the forefront of North American legal jurisdictions, with complete lack of regulation in Canada thanks to no recent attempts to directly regulate the

⁸³ TAMPEP (European Network for HIV/STI Prevention and Health Promotion Among Migrant Sex Workers), *Sex Work in Europe: A Mapping of the Prostitution Scene in 25 European Countries* (Amsterdam: TAMPEP, 2009) online: <<http://tampep.eu/documents/TAMPEP%202009%20European%20Mapping%20Report.pdf> at 28, indicating that 60% of Dutch prostitutes (as of 2008) are migrants. This is down from 70% in 2006>.

⁸⁴2013 SCC 11.

⁸⁵ *Ibid* at para 199.

practice. Laws regarding abortion are particularly controversial not only because of the religious aspect of the law (for those who oppose the legality of all or most abortions), but also because the State's regulatory power must undeniably be asserted over abortion in some capacity (for example, standards for this medical procedure intended to ensure that the health of the woman is protected and that the procedure is competently carried out). Thus, the issue of abortion represents a nexus of individual autonomy and governmental interaction, with the contestations in the discourse revolving around the proper role of government. Informed for many by religious and conscientious regimes, and always able to be thrust back into the spotlight,⁸⁶ the legal debate over abortion--a crucial instantiation of the law of private sexual ordering--is both a fruitful and seemingly infinitely-ongoing area for legal study. At the bare minimum, law must prevent "abortions...carried out in medically unsafe environments, thereby endangering the lives of users."⁸⁷ The law must respect personal autonomy while simultaneously protecting safety.

In taking a broader view rather than focusing on only one particular issue, I will argue in this section that the law of private sexual ordering in a modern legal society is directly related to the respect for human dignity. In essence, I argue that the myriad of laws concerning private sexual ordering, from abortion to the rights of matrimony and cohabitation, represent key cornerstones of individual rights which must be respected and remain autonomous. As the Law Commission of Canada wrote in a legal treatment of status and cohabitation, entitled *Beyond Conjugality*:

Sexuality is one of the most intimate aspects of many personal relationships. The presence or absence of a consensual adult sexual relationship, or the nature of the adults' consensual acts, are matters that are not relevant to the promotion of legitimate state objectives. Sexual relationships may give rise to consequences, such as deepening emotional and economic bonds or the procreation of children that are relevant to the formation of state policies. But it is these

⁸⁶ In Canada, for example, s 33 of the *Charter*, *supra* note 32, allows for temporary legislative override of constitutional protections granted by the *Charter*, such as those used to invalidate past abortion laws.

⁸⁷ Victor Nnamdi Opara, "Re-Characterizing Abortion in Nigeria: An Appraisal of the Necessity Test"(2004) 11 *ILSA J Int'l & Comp L* 143 at 171.

consequences, not sexual activity itself, which ought to be taken into account when formulating state policies.⁸⁸

Although broadly stated, this quotation illustrates the central tenet that as an “intimate” act regarding physical integrity, the law of private sexual ordering transcends other laws to arrive at the core of the citizen’s integrity and dignity.

Women’s Rights Regarding Private Ordering in Legal Regimes Not Consonant with International Norms

Western and International legal systems assume formal equal rights between genders, even as this reality fails to substantively materialize. Multiple legal instruments and institutions aim to investigate claims of gender discrimination, and while claims are made that these institutions and instruments are not completely or even significantly effective, their presence can reinforce the incorporation of equality as a norm. Gender equality reverses an established trend for most historical human societies: well into the 20th Century, women were almost universally legally subordinate to men, sometimes even expressly denied the right to vote or seen as having no distinct legal personality. International norms and most domestic regimes now generally recognize the deleteriousness of this discrimination, and enshrine attempts to eliminate it in legal regulation.⁸⁹

Explicitly or implicitly, this protection is not always present in nations which do not subscribe to “international” norms. Care must be taken to evade the “core mistake” of “label[ling] feminism as a particular cultural practice, originating from and embedded in a larger (Western) worldview.”⁹⁰ Nevertheless, in countries which do not accept the egalitarian project of gender parity, women’s rights are, either in *de jure* discriminatory law (such as in strictly applied

⁸⁸ Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Law Commission of Canada, 2001). Online: (Available .pdf download): <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720747> at 21-22.

⁸⁹ Section 15(1), *Canadian Charter of Rights and Freedoms*, *supra* note 32, amongst many other pieces of human rights legislation across jurisdictions.

⁹⁰ Marion Guerrero, “International Women’s Rights and the ‘War of Cultures’: Avoiding the ‘Westernization’ Debate” (2011) 5:3 *Vienna J on Int’l Constitutional L* 379 at 380.

“sharia” jurisdictions such as Saudi Arabia or Iran) or simply in the *de facto* legal reality, are restricted in that women in particular are denied the ability to privately order themselves sexually. In one provocative statistic compiled by the United Nations’ Department of Economic and Social Affairs (in a report titled *The World’s Women 2010: Trends and Statistics*), it was reported that “[i]n several countries the percentage of women aged 15-49 that were subjected to female genital mutilation is extremely high, and it even approaches 100 percent in Guinea, Egypt and Eritrea. Another three countries where more than half the women have undergone these procedures are Burkina Faso, Ethiopia, and Mali.”⁹¹ Similar disturbing statistics regarding everything from violence against women (up to and including what the report terms “femicide”) to representation in law-making functions reinforce the fact that in many developing countries, the law of private sexual ordering for women is almost completely non-existent. As summed up by the same report (of which I intend to make major, but not sole, use in statistical analysis):

Although it may be nominally consensual, the fact that the institution of marriage is so strongly linked to tradition and the “pride” of both the bride’s and groom’s families often places the future bride under pressure to comply with choices that are not necessarily hers. As a UNICEF report outlines, many girls, and a smaller number of boys, enter marriage without any chance of exercising their right to choose. This is more often the case with younger and less educated women. Entering into marriage at a young age almost certainly removes the girl from the educational process since assuming a wife’s responsibilities usually leaves no room for schooling. This, in turn, results in less knowledge about concepts such as contraception and family planning. Early childbearing is identified with higher health risks for both mother and child. Another serious concern relates to the fact that adolescent brides are an easy target for abusive partners.⁹²

The UNICEF report referred to in the above passage, entitled *Early Marriage: Child Spouses*,⁹³ is equally, if not more, damning of the current state of women’s private rights:

The practice of marrying girls at a young age is most common in Sub-Saharan Africa and South Asia. However, in the Middle East, North Africa and other parts of Asia, marriage at or shortly after puberty is common among those living traditional lifestyles. There are also specific parts of West and East Africa and of South Asia where marriages much earlier than puberty are not

⁹¹ United Nations Department of Economic and Social Affairs, *The World’s Women 2010: Trends and Statistics* (New York: United Nations, 2010). Online: <http://unstats.un.org/unsd/demographic/products/Worldswomen/WW_full%20report_color.pdf> at 135.

⁹² *Ibid* at 13.

⁹³ United Nations Children’s Fund: Innocenti Research Centre, *Early Marriage: Child Spouses* (Florence, Italy: United Nations Children’s Fund, 2001) online at <http://www.unicef-irc.org/publications/pdf/digest7e.pdf>.

unusual, while marriages of girls between the ages of 16 and 18 are common in parts of Latin America and in pockets of Eastern Europe.⁹⁴

My analysis will focus on the domestic law of nations not consonant with international norms as they intersect with the ability for disempowered groups, in this case women, to control their own private sexual ordering. Such a critique will focus both on the substantive law as stated and, where appropriate, contrasting this with *de facto* realities (for example, as the UNICEF report puts it--“[i]n many countries, early marriage falls into what amounts to a sanctions limbo”⁹⁵). This critique will be conducted from the perspective of attempting to enhance gender equality and female empowerment over patriarchal control of private sexual ordering.

Non-Normative Sexualities in Laws Differing from International Legal Rights Standards

If the status of women in the law of developing nations is often far from safe, the same or worse is true for those who do not conform to the ideal of heterosexuality. As stated above,⁹⁶ many countries either legally persecute their LGBTI community or pretend that they do not exist, effectively relegating persons falling into this category into legal outlaws. Even where laws have been influenced by developed nations, philosophies or other narratives privileging private ordering, the influence of religion (Abrahamic or otherwise) may view the LGBTI communities as a threat. As the United Nations High Commissioner for Human Rights, Navi Pillay, indicated on May 17, 2011, “[h]ate crimes against lesbians, gay men, bisexual and transgender people are rising [internationally].”⁹⁷ But in an excellent summary of the problem, Pillay added that “[b]ut whereas [sexism, misogyny, racism and xenophobia] are universally condemned by

⁹⁴ *Ibid* at 4.

⁹⁵ *Ibid* at 7.

⁹⁶ While the note above supports the citation that 37 countries in Africa have outlawed homosexuality, this is only half of the 70 countries worldwide which have criminalized homosexuality: see UN News Centre, “Homophobic Hate Crimes on the Rise, UN Human Rights Chief Warns”, May 17, 2011 <online: <http://www.un.org/apps/news/story.asp?NewsID=38406&Cr=Pillay&Cr1>>.

⁹⁷ *Ibid*.

governments, homophobia and transphobia are often overlooked.”⁹⁸ Where a legal system either cannot or will not help those who seek an alternative private sexual ordering in the developing world, the problem represents a denial of basic human rights as stated by international law. Nullification of the legal systems designed to protect the rights of the individual and her group, whether based on religious custom, Sirleaf Johnson’s “traditional values,” or other subjective influences, appears to needlessly impinge on human expression and free engagement with the world, and must be examined.

This section of the work will use an ontological framework to examine the problem and articulate what potential non-imperialistic solutions may be available. The developing world, recovering as it is from colonialism and under repeated attack from neo-colonialism and economic and social warfare, is familiar enough with dialogues of repression and speaking truth to power that it is to be hoped any imposition of a law granting freedom to privately order sexual and conjugal affairs would be internally generated. However, this dissertation will also identify certain transnational or international jurisprudential instruments that can be applied to give redress.

The Final Analysis: Solutions in All Types of Legal Systems

The idea of this work is not to outline problems in the law of private sexual ordering and then stop. While a thorough critique of law as it currently exists is needed, it will be incomplete without an analysis of what the law *can* and *should* be. Countries in accordance with international legal principles have, in addition to the power of electing democratic legislatures to alter the law, a plethora of legal guidelines (Constitutions, Regional Declarations, Treaties, and International Law and Covenants) to allow for overly restrictive laws regulating private sexual ordering to be challenged. This has been seen most recently in Canada, but the European Court

⁹⁸ *Ibid.*

of Human Rights also has the potential to enhance the “living tree”⁹⁹ of modern rights-based discourse. Constitutional jurisprudence in other, more conservative jurisdictions such as the United States of America and Australia has not been as successful, but a rigorous discourse combined with a framework privileging individual rights is a strong starting position. Any solution will have to incorporate a comparative law aspect as various experiences of the judiciary around the world are canvassed for persuasive arguments and workable (and more importantly, coherent and rational) systems for the legal regulation of private sexual ordering.

Nations not adopting the stated goals of international human rights afford a similarly fascinating inquiry. As stated above, the scope for international interference in the sovereign law of nations is fraught with danger. Nonetheless, as “injustice anywhere is a threat to justice everywhere,”¹⁰⁰ the situation of women and vulnerable sexualized groups in danger of legal violence must be examined, with proposed solutions ranging from co-operation to more effective legal enforcement.

⁹⁹ *Edwards v AG Canada*, *supra* note 82 at 136.

¹⁰⁰ *King*, *supra* note 27.

CHAPTER II

Theoretical and Methodological Approaches

The methodological framework for this project will, of course, shape both the input and the output of what is studied. Because the law of private sexual ordering is rapidly developing and often turns on issues of gender, sexuality, and precedent, it is appropriate to study the issues of polygamy, prostitution, and reproductive rights from a theoretical perspective that recognizes these underlying themes. After selecting the methodological and theoretical framework, the next step is analytical. The law of private sexual ordering cannot be confined to statutory, or even traditionally “legal” discourse: society can employ unwritten law, and “[practise] a social tyranny more formidable than many kinds of political oppression...to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them.”¹ Moreover, analysis of the law of private sexual ordering has not been confined to legal study, but finds important information and critique in other social science fields such as sociology, religious studies, political science, and cultural anthropology.

This chapter will explain and discuss the methodological framework through which this dissertation conducts its research and analysis. First, the methodological and theoretical frameworks of the work, namely, feminist legal theory, queer theory, and legal historicism will be discussed and justified. The three frameworks provide traditions of critical analysis, critique, resistance, and destabilization which are uniquely suited to a discussion of the current law of private sexual ordering and will be able to critique and deconstruct its contemporary instantiations. The chapter will then analyze and justify the four research methodologies used to analyze the research material within the above three frameworks. These methodologies are legal historicism, textual analysis (of jurisprudence, academic commentary, and, where appropriate,

¹ John Stuart Mill, *On Liberty*, Elizabeth Rapaport, ed (Indianapolis, IN: Hackett Publishing, 1978) at 4.

non-academic or media commentary), comparative analysis, and finally, the innovative approach of law and social science. The chapter will then conclude with a short discussion of alternate methodologies, representing a “road not taken,” which may in the future yield other interesting results. With so many interlocking issues and systems representing the modern law of sexual ordering, the use of three overarching methodological/theoretical frameworks employing four research methodologies will focus the discussion of the law of private sexual ordering, at the same time providing the ability of the text to interrogate, deconstruct, and critique its instantiations of polygamy, prostitution, and reproductive rights.

Feminist Legal Theory

Legal feminism, a series of discourses related to women and the law, will provide an excellent focus for exploring issues which often seek to remove or ridicule female agency. No agreement on what constitutes feminist methodology exists, which raises certain terminological problems. Theorists such as Angela Harris have pointed to the inherent mutability of feminism, a theoretical approach which contains diverse narratives within it, and the dangers of “gender essentialism--the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”² This criticism emphasizes that no uniform ideal represents all women, and that shared traits such as gender do not create a “true” feminine form. Methodological legal feminism, if it is to avoid this essentialism, must in a sense divide into multiple competing perspectives, each giving different weight to “various prominent threads in feminism such as formal equality, dominance/inequality, socialism, hedonic feminism, pragmatic feminism, radical feminism, and liberal feminism.”³ These perspectives can have localized foci, as a later work by Harris

² Angela P Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42:3 Stan L Rev 581 at 585.

³ Adrien Katherine Wing, “Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century” (2001) 11:2 J Contemp Legal Issues 811 at 822.

highlights: the “equation of gender equality and universalism...reproduces the assumption that rights travel from West to East, North to South. It erases feminist work in the global South, and it erases patriarchal domination within the global North.”⁴

Religion, along with the factors mentioned by Harris, can impact on women’s experience, as instantiated by popular (mis)conceptions of Islamic women and (*inter alia*) their religious apparel: “Muslim women and girls are...kept in the position of victimhood...prevented from taking their rightful place as active participants in society under the guise of guarding their safety.”⁵ The search for common ground is compounded in the study of private sexual ordering by a fundamental disagreement over agency and what constitutes feminism. In the experience of one woman in a polygynous marriage, “plural marriage is empowering for women[...]‘It provides me the environment and opportunity to maximize my female potential without all the tradeoffs and compromises that attend monogamy.’”⁶ In a differing view of female empowerment, the body tasked with interpreting the *Convention for the Elimination of All Forms of Discrimination Against Women*⁷ (CEDAW) has, on feminist principles, condemned polygamy: “[p]olygamous 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.”⁸ In another area of private sexual ordering, Kim gives an example of the diversity of thought in legal feminism:

⁴ Angela P Harris, “From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality” (2006) 14:4 Wm & Mary Bill Rts J 1539 at 1575.

⁵ Natasha Bakht, “Victim or Aggressor? Typecasting Muslim Women for Their Attire” in Natasha Bakht, ed, *Belonging and Banishment: Being Muslim in Canada* (Toronto: TSAR Books, 2008) 105 at 112.

⁶ Janet Bennion, *Polygamy in Primetime: Media, Gender, and Politics in Mormon Fundamentalism* (Waltham, MA: Brandeis University Press, 2012) at 92, and quoting Elizabeth Joseph, “Polygamy---The Ultimate Feminist Lifestyle,” May 1997, *Islam for Today*, online: <<http://www.islamfortoday.com/polygamy3>>.

⁷ 18 December 1979, 1249 UNTS 13, online: <<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>>.

⁸ *General Recommendation 21, Equality in Marriage and Family Relations*, UN CEDAWOR, 13th Sess, UN Doc A/47/38, (1994) at para 14.

Prostitution is a difficult and complex subject for feminists. Radical, social, and liberal feminist thoughts represent a few of the major doctrines on prostitution. Radical feminists contend that prostitution arises out of the patriarchal domination of women. In their view, women in the sex business are victims of male dominance, regardless of whether they entered voluntarily or involuntarily...The socialist feminist argues that capitalism exploits the 'labor of workers for the benefit of those who control the means of production.' In their view, a woman enters prostitution for purely economic reasons. Because she is at an economic disadvantage to men and patriarchy ensures a livelihood via prostitution, capitalism---together with patriarchy---pushes women into prostitution...Finally, liberal feminists view prostitution as any other job and prostitutes as sex workers. They believe that a woman should have the choice to do whatever she wants to do to earn money. Because men and women should receive equal treatment, liberal feminists oppose the image of women as victims needing special protection. Hence, they advocate for the regulation of contracts between prostitutes and their employers.⁹

These theoretical disagreements can lead to claims of bias, or even substandard research, being levelled at methodological positions, as demonstrated by Weitzer:

[S]ome [oppression paradigm] proponents also make specific empirical claims that, taken together, present an image of *concentrated, manifold victimization* [including] that *most* prostitutes enter the trade when they are 13-14 years old, were physical or sexually abused as children, were tricked or forced into the trade by pimps or traffickers, are subjected to routine violence while working, use or are addicted to drugs, suffer severe psychological problems, and desperately want to exit the sex trade...these claims...are largely drawn from nonrandom, unrepresentative, and small samples of the street-based population...we cannot even say that these generalizations apply to street prostitution, let alone the various types of indoor prostitution.¹⁰

As represented by the above debates on “polygamy” (really, in most cases, polygyny) and prostitution, feminism as a legal methodology hosts vibrant debates between dramatically different viewpoints.

Despite this volatility, the value of legal feminism cannot be understated. Throughout the various discussions and perspectives, the central underlying theme is an “emphasis on gender oppression within a system of patriarchy.”¹¹ Feminist methodology does not necessarily only extend to gender discrimination, for as Lahey notes, “[t]he legal disabilities associated with women in North America...served as a template for the drafting of other laws that imposed civil

⁹ Ji Hye Kim, “Korea’s New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature’s Intent to Protect Prostitutes from Abuse” (2007) 16:2 Pac Rim L & Pol’y J 493 at 503-504.

¹⁰ Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York: New York University Press, 2012) at 13-14.

¹¹ Wing, *supra* note 3 at 822.

disabilities on other groups.”¹²

The ability of feminism to expose and explore hidden systems of domination is particularly applicable to this work, where private sexual ordering is often controlled by a legal system overly-cognizant of gender. The importance of understanding the gendered nature of laws is necessary not only to contextualize the situation, but also to provide remedies to it, an idea articulated by Gavigan in setting “an appreciation of the power and enduring appeal of patriarchal ideologies, of their complexities and contradictions, and of the barriers and constraints they impose” as a prerequisite for “the development of alternative perspectives regarding gender and familial relations, and of real gender equality within and without the family...in Canadian society.”¹³ Legal feminism is able to contribute to both theoretical and on-the-ground solutions to discrimination: “[t]he relationship between feminist legal studies and the women’s movement engagement with law is a dialectic one, in which practice informs theory which informs practice.”¹⁴

While “[t]here are different ways to understand what feminist theory is,”¹⁵ core principles can be articulated. Kapur and Cossman’s articulation, that

[o]ne way is to see [feminism] as a theoretical orientation that pays special attention to the ways in which women have historically been oppressed as a group; of the interests that might have been advanced by this oppression; and of the ways in which this oppression and these interests might continue to distort our perceptions of reality, our factual knowledge, and our moral reasoning¹⁶

can serve as a statement of feminist perspectives in this dissertation. While the discussed examples of private sexual ordering have factual specificities that differentiate them from one another, legal feminism (understood as a context-specific group of perspectives)

¹²Kathleen A Lahey, *Are We ‘Persons’ Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 112.

¹³Shelley AM Gavigan, “Something Old, Something New? Re-Theorizing Patriarchal Relations and Privatization from the Outskirts of Family Law” (2012) 13 *Theor Inq L* 271 at 275.

¹⁴Ratna Kapur & Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (Thousand Oaks, CA: Sage Publications, 1996) at 74.

¹⁵Peter de Marneffe, *Liberalism and Prostitution* (New York: Oxford University Press, 2012) at 28.

¹⁶*Ibid.*

provides a compelling framework for analyzing cross-issue commonalities.

Legal Queer Theory

A gendered analysis of the law of private sexual ordering is complemented by the additional perspective of queer theory, which allows for a study of the impacts of law not only on all genders, but also on other sexual minorities (such as male sex workers and members of the Lesbian/Gay/Bisexual/Transgendered/Intersex [LGBTI] community) adversely affected by such laws. Ertman briefly summarizes the verb “to queer,” applied by queer theory as:

[D]eliberately left open to minimize essentialist dangers, when used as a verb it generally connotes applying the insights of queer theory to new contexts, such as law, activism, or history. To queer something is often to turn it on its head, show the contingency of its underpinnings, and perhaps reveal the subversive potential in something that seems to be the very cornerstone of traditional gender relations.¹⁷

The scope of queer theory, despite originating in studies of the LGBTI community, is wide-ranging: “[c]entral to the project...is the contestation of boundaries and categories, not only of sexual identity, but more widely to include the boundaries of normalcy itself...queer theorists constantly seek to reflect upon the contingency and ambiguity of all sexual categories.”¹⁸ It is to some extent a reaction against, and a rejection of, the rigid categorization that Rubin identifies as ubiquitous in some legal philosophies:

Variation is a fundamental property of all life, from the simplest biological organisms to the most complex human social formations. Yet sexuality is supposed to conform to a single standard. One of the most tenacious ideas about sex is that there is one best way to do it, and that everyone should do it that way.¹⁹

Queer theory’s ability to destabilize, interrogate and critique societal form is an important component of any discussion of the law of private sexual ordering which offers recommendations for future legal regimes, as this dissertation does. Legal queer theory is a

¹⁷ Martha M Ertman, “Reconstructing Marriage: An InterSEXional Approach” (1998) 75:4 Denv UL Rev 1215 at 1217, n 10.

¹⁸ Erin Fowler, “A Queer Critique on the Polygamy Debate in Canada: Law, Culture, and Diversity” (2012) 21 Dal J Leg Stud 93 at 111.

¹⁹ Gayle Rubin, “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality” in Carole S Vance, ed, *Pleasure and Danger: Exploring Female Sexuality* (Boston, MA: Routledge & Kegan Paul, 1984) 267 at 283.

versatile tool, as demonstrated by its varied applications, such as Fowler using it to examine polygamy in Canada,²⁰ and Martha Ertman's proposal to "deconstruct and reconstruct"²¹ heterosexual marriage in the United States (through a proposal to treat stay-at-home wives as secured creditors of their spouses). A final comparison of two areas I discuss is made by Rubin:

[The two groups of] [p]rostitutes and other sex workers and homosexuals and other sexual minorities...share some common features of social organization...The legal persecution of both populations is justified by an elaborate ideology which classifies them as dangerous and inferior undesirables who are not entitled to be left in peace.²²

Progress has been made in many Western jurisdictions since 1984 with regard to homosexuality, such as the landmark decision of *Lawrence v Texas*,²³ decriminalizing consensual homosexual acts in the United States of America. Yet queer theory's tradition of resistance and destabilization, coupled with the applicability of comparisons between its historical subject matter and to the situation of currently-marginalized groups such as polygamists and sex workers makes queer theory analysis important to this project.

A focus on the mutability and non-binary nature of sexual categories can help to illustrate the arbitrariness of legal classifications of conjugality and sexuality, whether laws explicitly or implicitly impose monogamy, "proper" non-commercial sexual behaviour, or "proper" female sexuality and reproductive behaviour. A queer theory critique will also have the benefit of fragmenting (without essentializing) sexuality itself: a prime example is Lahey's observation of implicit disadvantages imposed on sexualized minorities and their families: "sexual minorities in Canada...receive less legal, social, and economic support for their relationships or for their children."²⁴ Moreover, Judith Butler's concept of "a sign's strategic provisional (rather than its strategic essentialism)" whereby that sign's "identity can become a site of contest and revision,

²⁰ Fowler, *supra* note 18.

²¹ Ertman, "Reconstructing Marriage," *supra* note 17 at 1237.

²² Rubin, *supra* note 19 at 286-287.

²³ 539 US 558 (2003).

²⁴ Lahey, *supra* note 12 at 342.

indeed, take on a future set of significations that those of us who use it now may not be able to foresee,”²⁵ allows for changing meanings, denies essentialism, and combats the phenomenon whereby “Legislatures...have shied away from legislative structures that abolish categories of sex or sexuality instead of multiplying them.”²⁶

The path forward for an inquiry into the law of private sexual ordering suggests that legal queer theory is well-oriented to this subject:

[T]he law’s contribution to the construction of sexual identities can be elucidated in terms of the queer concept of ‘performativity’; queer theory’s conceptual distinction between identity and sexual practices enables a nuanced understanding of the different ways in which law practically and discursively regulates sexuality; and an alertness to the queer concept of intersectionality (a commitment to which has been suggested to be definitional of queer legal theory) may, for instance, reveal the inadequacies of legal protections predicated on less sophisticated understandings of subordination.²⁷

As Zanghellini continues, these qualities allow legal queer theory to operate not only on a theoretical level, but a political level where “since normative commitments clearly animate the Queer project (and neither could, nor should, it be otherwise),” queer legal theory can insist that “normative inquiries must feature more prominently” so as to “unleash Queer’s full potential for making original and distinctive contributions to jurisprudential knowledge.”²⁸ While obviously queer theory is not necessarily political or prescriptive, as “[d]econstruction, queer, is ‘revelatory’ [...] What is done with the revelation is not dictated,”²⁹ nonetheless the difference between constructive and de/constructive philosophies may be able to be bridged or reconciled: “queer politics occupies the critical margins...Queer politics...keeps the possibility of radical change alive at the margins...queer politics and theory, in their best guises and combinations,

²⁵Judith Butler, “Imitation and Gender Subordination” in Diana Fuss, ed, *Inside/Out: Lesbian Theories, Gay Theories* (New York: Routledge, 1991) 13 at 19.

²⁶Lahey, *supra* note 12 at 343.

²⁷Alcardo Zanghellini, “Queer, Antinormativity, Counter-Normativity and Abjection” (2009) 18 Griffith LR 1 at 4.

²⁸*Ibid* at 14.

²⁹Wayne Morgan, “Queer Law: Identity, Culture, Diversity, Law” (1995) 5 Australasian Gay & Lesbian L J 1 at 42.

offer us a possible future full of provocations and possibilities.”³⁰

One final benefit which legal queer theory provides to this dissertation relates to its advantages in critiquing and interrogating religious values. This value operates in two separate but equally important ways. First, and more obviously, queer theory can cast into doubt statements based in religion that identify a “proper” framework outside of which humanity should not transgress: “[t]he queer buzz word in terms of strategy is ‘transgression’...It claims to be transgressive by mixing the sacred with the profane, residing in contradiction and paradox[...]It is supposed to threaten.”³¹ Therefore, there is ample availability for queer theory to critique laws of private sexual ordering rooted in religion, such as in the ridiculous claims that “the Judeo-Christian moral tradition commanded or comported with [heterosexual marriage]; that it was the basis of ‘civilization’” or that “the disparity between homosexual and heterosexual relationships [must] not become a matter of moral indifference.”³² Queer theory can destabilize the monolith of religious “truth,” especially where it interacts with the law of private sexual ordering, such as where “compulsory monogamy has been tied to...patriarchal religion”³³ or religious traditions root criminalization or stigmatization of sexual minorities and/or women.

However, queer theory can also operate to destabilize the normative tendencies of law with respect to its impact on religious minorities. Underlying the “turning of law on its head” or demonstrating the “contingency of its underpinnings,”³⁴ legal queer theory can show the religious assumptions that go into the law of private sexual ordering, and sometimes function as bars to legal agency:

³⁰ Lisa Duggan, “Making it Perfectly Queer” in Lisa Duggan and Nan D Hunter, *Sex Wars: Sexual Dissent and Political Culture*, 10th Anniversary ed (New York: Routledge, 2006) 149 at 162-163.

³¹ Morgan, *supra* note 29 at 39.

³² Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2002) at 219.

³³ Fowler, *supra* note 18 at 105.

³⁴ See Ertman, “Reconstructing Marriage,” *supra* note 17.

Minority religions are often construed as somehow incapacitating group members' abilities to make decisions, compromising their exercise of agency...The idea that religion impacts on agentic capacity is...an important consideration in the examination of religious freedom and the ways in which its boundaries are shaped.³⁵

Queer theory's ability to disrupt, contest, and de/ and re/construct law can be used in the context of the law of private sexual ordering to ensure that "neutral rules and policies be adjusted to meet...religious needs" so "persons of faith [can] participate equally in social and economic life."³⁶

Legal Historicism

Santayana's maxim "those who cannot remember the past are condemned to repeat it"³⁷ demonstrates that history is an important part of any analysis. The study of history provides context to contemporary discourses, and sometimes reveals a larger pattern to events: "history leads you outward, to link patterns of changes to increasingly larger universes of interaction,"³⁸ an important tool to understand societal and legal phenomena, as well as a guide to what dis/continuities exist today. For although the past will never be a precise blueprint for the present, it continually informs contemporaneous situations: "[w]hat is past is not dead; it is not even past."³⁹ The impacts of the past, both consciously and unconsciously, are illustrated in verse form by Whitman: "It avails not, time nor place—distance avails not,/ I am with you, you men and women of a generation, or ever so many generations hence."⁴⁰

Legal historicism is unique amongst my tools because it exists as both a framework and a

³⁵ Lori G Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Toronto: UBC Press, 2008) at 100.

³⁶ Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Toronto: UBC Press, 2008) 87 at 90.

³⁷ George Santayana, *The Life of Reason*, vol 1, "Reason in Common Sense," Ch XII, "Flux and Constancy in Human Nature", online: Project Gutenberg <<http://www.gutenberg.org/files/15000/15000-h/vol1.html>>.

³⁸ Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis, MN: University of Minnesota Press, 2003) at 74.

³⁹ Christa Wolf, *A Model Childhood*, translated by Ursula Molinaro and Hedwig Rappolt (New York: Farrar, Straus and Giroux, 1980) at 3, quoted in Kathleen A Lahey, *Are We 'Persons' Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at xi.

⁴⁰ Walt Whitman, "Crossing Brooklyn Ferry" in *The Norton Anthology of American Literature*, Shorter 7th ed, Vol 1 (New York: WW Norton & Co, 2008) 1057 at 1058.

methodology. This means that not only do I take as a proper starting point (and focus), how and why history has shaped the law of private sexual ordering, but also that my techniques for examining sexual ordering emerge from the past. From a theoretical perspective, legal historicism has the ability to provide “thickly described accounts of how law has been imbricated in and has helped to structure the most routine practices of social life.”⁴¹ As Wood writes, generally, “knowledge of the past can have a profound effect on our consciousness, on our sense of ourselves. History is a supremely humanistic discipline: it may not teach us particular lessons, but it does tell us how we might live in the world.”⁴²

Moreover, legal historicism is an important antidote to a re-writing of the law for consistency and logic, ignoring the original purposes of the legal structure:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become...In Massachusetts to-day, while, on the one hand, there are a great many rules which are quite sufficiently accounted for by their manifest good sense, on the other, there are some which can only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs.⁴³

The law of private sexual ordering also provides specific examples of how legal historicism contributes to a fulsome analysis. Canadian legal historicism on private sexual ordering includes Sarah Carter’s historical text⁴⁴ juxtaposing (white, monogamous) marriage and the settlement of the Canadian West, while Constance Backhouse’s work *Petticoats and Prejudice*⁴⁵ provides valuable (if sometimes tangential to sexual ordering) insight into the status of Canadian women in the 19th century. These works show that the regulation of sexuality was

⁴¹ Robert W Gordon, “Critical Legal Histories” (1984) 36:1-2 *Stan L Rev* 57 at 125.

⁴² Gordon S Wood, *The Purpose of the Past* (New York: Penguin Press, 2008) at 6.

⁴³ Oliver Wendell Holmes, Jr, *The Common Law* (Boston, MA: Little, Brown and Company, 1923) at 1-2.

⁴⁴ Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton, AB and Athabasca, AB: The University of Alberta Press and AU Press, 2008).

⁴⁵ Constance Backhouse, *Petticoats and Prejudice* (Toronto: Women’s Press for The Osgoode Society, 1991)

marked by a comprehensive imposition of “proper” sexual behaviour.

Several anecdotal narratives provide context for the Canadian history of sexual regulation. First, regarding aboriginal customary marriages (which were potentially or actually bigamous), Backhouse traces the decision of *Connolly v Woolrich*, in which a customary aboriginal marriage was recognized by Canadian law, to a reversal in *Jones v Fraser*,⁴⁶ which ruled that only Anglo-Canadian marriage was legally acceptable, and in which the losing lawyer in *Connolly* (now a judge) wrote the majority decision.⁴⁷ Carter explains this tightening of the codification of marriage, in that “political, legal, and religious leaders of late-nineteenth-century Canada...saw the perpetuation of a particular marriage model as vital to the future stability and prosperity of the new region.”⁴⁸ This is echoed by Nelson’s work on British Columbia, where a

social imperative [to avoid the potential of biological and social deterioration] to curb female Aboriginal sexuality meshed well with the Victorian values that had ‘inexorably asserted themselves’ into Canadian society by the 1870s. As settlement advanced, marriage occupied a central role in the Euro-Canadian moral code...Proper Victorian marriage was equated with civilization.⁴⁹

The racialization of sexual minorities, and especially the sexual ordering of minorities, continues to resonate today. As Ertman notes, “[w]hite supremacy has driven...polygamy doctrine from the outset,”⁵⁰ an effect which is still felt in areas of law dealing with vulnerable persons: “immigration law has inherited a good measure of the nineteenth century reasoning that polygamy, though perhaps appropriate for ‘Asiatic and African’ peoples, was inappropriate for a White America.”⁵¹ Providing further instantiation for the importance of context, again relating to the legal treatment of polygamy, Gordon highlights the religious aspect of the law’s treatment of

⁴⁶ (1886) 12 QLR 327 (Que QB), cited in Backhouse, *Petticoats*, *ibid* at 344, n 37.

⁴⁷ Backhouse, *Petticoats*, *ibid*, at 24.

⁴⁸ Carter, *supra* note 44 at 22.

⁴⁹ Jay Nelson, “‘A Strange Revolution in the Manners of the Country’: Aboriginal-Settler Inter-marriage in Nineteenth-Century British Columbia” in John McLaren, Robert Menzies, & Dorothy E Chunn, eds, *Regulating Lives: Historical Essays on the State, Society, The Individual, and the Law* (Toronto: UBC Press, 2002) 22 at 42.

⁵⁰ Martha M Ertman, “Race Treason: The Untold Story of America’s Ban on Polygamy” (2010) 19:2 *Colum J Gender & L* 287 at 355.

⁵¹ *Ibid* at 357.

polygamy:

The logic of coercion that sustained antipolygamists... was based on the belief that to build constitutional law on any other than a Christian foundation was to betray the true source of constitutional rights and liberties. The “meaning” of liberty, in this sense, was deeply Protestant.⁵²

Without the nuance provided by legal historical analyses, laws on sexual subjects such as polygamy are robbed of their background, connotations, and context, which can result in a misinterpretation of their meaning or an ignorant endorsement of their value “neutrality.” The controversial decision of the Chief Justice of British Columbia in *Reference re: Section 293 of the Criminal Code*,⁵³ ruling that the criminalization of polygamy was constitutional in Canada, correctly recognized the scope of the interpretive task to be done, stating “I begin my review of the evidence by situating polygamy and monogamy into historical context...Polygamy has been the norm for most of human history, strict monogamy the exception...The earliest unequivocal evidence of...socially imposed universal monogamy...appears in ancient Greece and Rome.”⁵⁴ The power to understand history is the power to reveal or contest historical narratives of disability and oppression, and to contextualize needed change.

Nor is the value of historical analysis confined solely to legal development of polygamy. With respect to the law of prostitution, it is no coincidence that the Ontario Superior Court of Justice, in striking down the *de facto* criminalization of safe prostitution,⁵⁵ “examine[d] the history, interpretation and legislative objective of each of the impugned provisions.”⁵⁶ The legal history of prostitution, including single narratives, provide context and in some cases origins for modern discussions of prostitution. In World War II-era Vancouver, “the body of the prostitute became a slate on which prescriptions for respectable and decent womanly behaviour could be

⁵² Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill, NC: The University of North Carolina Press, 2002) at 232.

⁵³ 2011 BCSC 1588. The decision was not appealed and is thus of little or no lasting federal jurisprudential value.

⁵⁴ *Ibid* at paras 146, 148 and 150.

⁵⁵ *Bedford v Canada (Attorney General)*, 2010 ONSC 4264.

⁵⁶ *Ibid* at para 228.

chalked. Thus, the body of the prostitute raised issues of control and opportunity.”⁵⁷ Regarding nineteenth century prostitution, gender appears to be at the root of the issue: “[t]he predominant pattern throughout the 60 years studied was to ignore the male customers and at the level of criminal enforcement, the law was primarily directed at women...Sex discrimination lay at the heart of the criminal justice system’s purported efforts to put the laws against prostitution into practice.”⁵⁸ Still struggling for control of the female body, the law of prostitution today mirrors earlier suppressions of free will in the name of religio-moral tenets.

However, the Canadian historical record also illuminates historical nuance, as prostitutes did find some limited legal protection:

[Higher court] decisions imply an acceptance of many features of prostitution---the rights of prostitutes to go about unhindered unless they were creating serious public disturbance, the legal immunity granted to the status of a kept mistress, the rights of many individuals to ‘frequent’ bawdy houses for various legitimate purposes, etc...decisions suggest that they were resigned to the fact that prostitution was inevitable and were particularly wary of overzealous enforcement of impractical laws.⁵⁹

Historical analysis bolsters the argument that prostitution did not equate to automatic disempowerment. Backhouse uses an example:⁶⁰ “[p]rostitution had proven to be a profitable choice of occupation for Esther Arscott. She had operated her brothel as a solid and lucrative enterprise...The criminal law had intruded upon her venture with excessive zeal in the mid-1880s, but she had used every resource at her disposal, securing important and unprecedented legal victories at several points.”⁶¹ While Arscott may have only been a “madam” (and thus, to

⁵⁷ Michaela Freund, “The Politics of Naming: Constructing Prostitutes and Regulating Women in Vancouver, 1939-1945” in John McLaren, Robert Menzies, & Dorothy E Chunn, eds, *Regulating Lives: Historical Essays on the State, Society, The Individual, and the Law* (Toronto: UBC Press, 2002) 231 at 233.

⁵⁸ Constance B Backhouse, “Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society” (1985) 18:36 *Histoire sociale-Social History* 387 at 408. The “60 years” is not specifically referenced but appears to be from the first Canadian statute to mention prostitution specifically (discussed at 389), passed in 1839, to the end of the century.

⁵⁹ *Ibid* at 413.

⁶⁰ Backhouse, *Petticoats*, *supra* note 45 at 244-259. Arscott (née Forsyth) was allegedly a brothel-keeper in London, Ontario.

⁶¹ *Ibid* at 258-259.

those who believe all prostitution is exploitation, more of an exploiter than exploited), and Backhouse does contrast Arscott with the much less powerful Gorman family of Toronto,⁶² the debate mirrors contemporary controversies over agency and sex work. In this way, historical study, bolstered by specific cases (such as *R v Levecque*,⁶³ in which the Upper Canada Queen's Bench supported the right to freedom from arrest when behaving "harmlessly and decently,"⁶⁴), prevents the oversimplification or distortion of history.

Legal historical analysis of American prostitution is also valuable. One example of historical context is given by the "Mann Act,"⁶⁵ which prohibited transport of a white woman across state lines for "immoral purposes."⁶⁶ Monasky describes the racial context to the law: "only white women could be victims, because only women of color would choose to prostitute themselves."⁶⁷ With prostitution itself, "prostitution laws of one kind or another have existed in America since the early colonial period."⁶⁸ De Marneffe sees the roots of the modern law in "the early twentieth century" when "both regulation and de facto toleration were decisively repudiated by local, state and federal governments in favor of an official policy of non-tolerance."⁶⁹

Legalization of contraception and abortion also represents how law is informed by historical beliefs and documents, but also demonstrates how historical legal burdens on private sexual ordering can be shifted.⁷⁰ Highlighting how history informs law and legal change, the

⁶² *Ibid* at 229-244.

⁶³ (1870), 30 UCQBR 509, quoted in Backhouse, "Nineteenth Century Prostitution Law," *supra* note 58 at 409.

⁶⁴ *Levecque*, quoted in Backhouse, "Nineteenth Century Prostitution Law," *ibid* at 409.

⁶⁵ Cited as "White-Slave Traffic (Mann) Act, ch 395, 36 Stat 825 (1910) (codified as amended at 18 USC §§2421-2424 (2006) in Monasky, *infra* note 67.

⁶⁶ Cott, *supra* note 32 at 146.

⁶⁷ Heather Monasky, "On Comprehensive Prostitution Reform: Criminalizing the Trafficker and the Trick, But Not the Victim-Sweden's Sexköpslagen in America" (2011) 37:4 Wm Mitchell L Rev 1989 at 2020.

⁶⁸ de Marneffe, *supra* note 15 at 58.

⁶⁹ *Ibid*.

⁷⁰ See *Griswold v Connecticut*, 381 US 479 (1965); for unmarried couples, *Eisenstadt v Baird*, 405 US 438 (1972).

U.S. landmark decision on abortion, *Roe v Wade*, considered the history of Augustine, Aquinas and 19th century medicine, before striking down as unconstitutional the blanket criminalization of abortion.⁷¹ Family and sexual ordering is still mutable—for example, “a Louisiana law of 1997 created a new form of marriage, ‘covenant marriage’ ...[wherein one]...give[s] up the right to a no-fault divorce and you agree ‘that the marriage...is a lifelong commitment.’”⁷² Legal history provides insight into this, and other, contestations and developments. Stories of the past, anecdotal and systemic, have continued relevance in analyzing modern laws of sexual regulation. Historical scholarship on the legal experience of polygamy, female sexuality, and prostitution finds that like today, issues were defined by “relentless renegotiation of moral and legal boundaries, boundaries of race and gender, boundaries presented as timeless, objective, and true, even as they mutated across time and space.”⁷³ Context is necessary for modern decisions in these areas, as decisions incorporate, contest, and (re)make law respecting sexual agency, creating and contesting traditions through legal judgments: “[a] tradition, in the form of received information, is a...fragile thing. It bears within itself the seeds of diversity, or more radically, change.”⁷⁴ Legal historical study also has the salutary effect of increasing the number of legal and social texts available for analysis, giving value to this work’s research methodology of textual analysis.

Textual Analysis

Regarding the law of private sexual ordering, texts of various kinds abound. Some are explicitly legal. Most prominent in this category are statutes (including constitutional such as the

⁷¹ *Roe v Wade*, 410 US 113 (1973). For a discussion of Augustine, see 133 and n 22; for a brief canvass of Aquinas, see 134.

⁷² Lawrence Friedman, *Private Lives: Families, Individuals and the Law* (Cambridge, MA: Harvard University Press, 2004) at 80.

⁷³ Nelson, *supra* note 49 at 49 (describing the “history of marriage in the Pacific Northwest.”)

⁷⁴ H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 4th ed (New York: Oxford University Press, 2010) at 30.

United States of America's Constitution,⁷⁵ the *Canadian Charter of Rights and Freedoms*,⁷⁶ and the *European Convention on Human Rights*,⁷⁷ and ordinary statutes such as Canada's *Criminal Code*⁷⁸ and the recently-challenged *Utah Criminal Code*,⁷⁹ whose Chapter 7 is tellingly titled "Offenses Against the Family"⁸⁰). However, this category also includes regulations, treaties (such as *CEDAW*,⁸¹ the *Universal Declaration of Human Rights*,⁸² and the *International Covenant on Civil and Political Rights*⁸³), jurisprudential decisions and legal academic commentary. These will all assist in investigating the law of private sexual ordering.

However, a commitment to textual analysis opens up a much greater array of "non-legal" texts. These range from academic discourses in other fields (particularly in the social sciences, discussed below), religious texts, and of course popular discussions, which may now take place in periodicals, visual media, or the burgeoning content of the internet. By exploring the words themselves, and the context in which they are used, textual analysis provides a way for this work to delve into the deeper meanings in the law of private sexual ordering. One example of the value of textual analysis is given in the context of multiculturalism:

What [is] 'common public culture' [?]... This is what we find so disturbing about such arguments. They allude to some halcyon ideal that immigration and multiculturalism have corrupted, but shy away from saying what that ideal might be, because we all know that it contains or implies the words *Christian* and *white*.⁸⁴

The search for meaning within a text can be a highly controversial exercise, divided

⁷⁵ Particularly salient American constitutional amendments for laws on private sexual ordering are those protecting the "free exercise" of religion, and guaranteeing to all "equal protection of the laws." See US Const amend I and amend XIV, § 1.

⁷⁶ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, 1982, c 11 (UK).

⁷⁷ 4 November 1950, ETS 5, as amended.

⁷⁸ RSC 1985, c C-46.

⁷⁹ *Utah Code*, Title 76, *Utah Criminal Code*, online: Utah State Legislature, <<http://le.utah.gov/UtahCode/chapter.jsp?code=76>>.

⁸⁰ *Ibid* at Chapter 7.

⁸¹ *Supra* note 7.

⁸² GA Res 217(III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71.

⁸³ 16 December 1966, 999 UNTS 171.

⁸⁴ Darrell Bricker & John Ibbitson, *The Big Shift: The Seismic Change in Canadian Politics, Business, and Culture and What it Means for Our Future* (Toronto: HarperCollins, 2013) at 235.

between groups such as the “interpretivists” who wish to “[read] a legal text...and [render] a decision that tries to express simply ‘what the law says’”⁸⁵ (or at least what it says at face value) and those who seek for deeper structure, or a synthesis of the two: “[t]he choice between interpretivism and noninterpretivism is really no choice at all...judges—like readers—are interpreting all the time, whether they like it or not.”⁸⁶ This is related to similar questions of textual interpretation, such as the divide between “those who are willing to take authorial intention into account and those who claim to be unwilling...[a view which is] formalist in the sense that it suggests the only relevant criteria of interpretation are those that inhere in the work itself: the work considered...as a kind of artifact.”⁸⁷ As with other interpretational debates, the context of the inquiry will help determine whether a given interpretation of a text is valid: while a text such as the *Canadian Charter of Rights and Freedoms*⁸⁸ is assumed to have accepted the famous constitutional dictum of the *sui generis* “living tree”⁸⁹ approach to interpretation,⁹⁰ in other cases documents appear to have clear intent stamped upon them. Textual analysis does not foreclose additional readings, but renders them suspect when they attempt to definitively reveal *how* the text was constructed or intended to be viewed.

Another interpretational chimera concerns Baron and Epstein’s question “Is Law Narrative?”⁹¹ The short answer is that in attempting to convey a meaning, legal texts (from statutes to jurisprudence) are developing a narrative. To understand the narrative behind the text is a way of enriching its value and getting to a (not “the”) core of its meaning:

⁸⁵ Mark Kingwell, “Let’s Ask Again: Is Law Like Literature?” (1994) 6:2 Yale JL & Human 317 at 321.

⁸⁶ *Ibid* at 323.

⁸⁷ *Ibid* at 325.

⁸⁸ *Supra* note 76.

⁸⁹ Describing the Constitution as a “living tree capable of growth and expansion within its natural limits,” *Edwards v AG Canada*, [1930] AC (PC) 124 at 136.

⁹⁰ See, especially, the open-ended wording of s 15(1) of the Canadian *Charter*, *supra* note 76, which is open-ended and allows for further “analogous” protected grounds to be enumerated later.

⁹¹ Jane B Baron and Julia Epstein, “Is Law Narrative?” (1997) 45 Buff L Rev 141.

[N]arratives...are cultural productions. Narratives are generated interactively through normatively structured performances and interactions. Even the most personal of narratives rely on and invoke collective narratives--symbols, linguistic formulations, structures, and vocabularies of motive...Because of the conventionalized character of narrative, then, our stories are likely to express ideological effects and hegemonic assumptions...the structure, the content, and the performance of stories as they are defined and regulated within social settings often articulate and reproduce existing ideologies and hegemonic relations of power and inequality.⁹²

Studying how legal and non-legal texts convey meaning can uncover truths greater than the ostensible meaning of the text, showing superstructure (or underpinnings) of legal texts:

“[I]awyers and legal scholars can learn to assess more candidly their own and others’ meaningmaking habits. This includes evaluating omissions, inconsistencies, and plotlines that flow from deep (usually hidden) beliefs and assumptions about what truth and justice are and how they operate in the world.”⁹³

As with the issues of interpretivism and formalism, the idea of narrative will be treated by this work’s textual interpretation as contingent upon context, since “the general theory of interpretation—and theory generally—does not have a locked-in relationship with practices of interpretation. Theory can affect practice, and vice versa, but why and how much are questions that cannot be answered in advance and in general—that is, philosophically.”⁹⁴ The rewards for an in-depth use of textual analysis are great: this work can unlock the influences on a text, its context, and its possible meanings.

Textual analysis is ideally suited to the specific topic of the law of private sexual ordering. One example is the wording of international rights documents, which are ambiguous and can be used for either side in the debate. Instantiating this concept is *CEDAW*,⁹⁵ which, as noted above,

⁹² Patricia Ewick and Susan S Silbey, “Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative” (1995) 29:2 *Law & Soc’y Rev* 197 at 211-212.

⁹³ Richard K Sherwin, “Law Frames: Historical Truth and Narrative Necessity in a Criminal Case” (1994) 47 *Stan L Rev* 39 at 81.

⁹⁴ Kingwell, *supra* note 85 at 351.

⁹⁵ *Supra* note 7.

has been argued to provide for the “discourag[ing] and prohibi[tion]”⁹⁶ of polygamy based on its section 5(a), which reads

States Parties shall take all appropriate measures...To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁹⁷

However, *CEDAW* also provides for women to have the “same right [as men have] to enter into marriage;...the same right [as men have] freely to choose a spouse and to enter into marriage only with their free and full consent.”⁹⁸ It seems that the construction that has been put on the text of the convention seems unwarranted by the actual wording, as the wording would only take issue with the discriminatory allowing of plural spouses to men but not women (and the text is of course silent on same-sex polygamy). Moreover, the emphasis in the text on the right to choose a spouse and freely enter into marriage is arguably impaired if a free and fully consenting woman is not allowed to join a polygynous union (although of course the “same right” language can provide a counterargument).

This contestation between values is even more pronounced in the *ICCPR*,⁹⁹ which asserts and guarantees that (without any definition contrary to polygamy) “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State...The right of men and women of marriageable age to marry and to found a family shall be recognized,” but was also used as an anti-polygamy text at the British Columbia Supreme Court:

The provisions of the treaty that have been held to be violated by the practice are article 3, which requires state parties to undertake to ensure that women and men enjoy all rights under the Covenant equally, and article 26, which prohibits discrimination on the basis of sex, as well as several other grounds. Article 23(4) of the *ICCPR*, which requires state parties to “take appropriate steps to ensure

⁹⁶ *General Recommendation 21*, *supra* note 8.

⁹⁷ *CEDAW*, *supra* note 7, at Article 5(a).

⁹⁸ *Ibid* at Article 16 (1)(a) and (b).

⁹⁹ *Supra* note 83.

equality of rights and responsibilities of spouses as to marriage” is also infringed by any martial [sic] system that allows polygyny.¹⁰⁰

This textual interpretation is hardly surprising given the body which “interprets” the document has stated that “equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be abolished wherever it continues to exist.”¹⁰¹ However, as seen with *CEDAW*, the interpretation jumps to the conclusion that polygamy meets the test for prohibited grounds (sex discrimination, lack of equality, etc.) and overrides an arguably contradictory right to freedom in its own text. The conflict becomes greater when religious polygamy is introduced, since, despite a limiting clause allowing ambiguous infringements “as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others,” the *ICCPR* protects religious practice: “the right to freedom of thought, conscience and religion...shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in...*practice*.”¹⁰² Issues with textual ambiguity are also seen with respect to the other instantiations of private sexual ordering, such as *CEDAW*’s vague article on prostitution stating “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women,”¹⁰³ which does not clarify what constitutes “exploitation of” prostitution, nor how State parties should react to prostitution, nor even what prostitution is defined as. The issue of international legal regulation of prostitution will be further addressed later in this work. A final illustrative example of textual analysis

¹⁰⁰ *Reference Re: Section 293, supra* note 53 at paras 819-820.

¹⁰¹ *General Comment No. 28: Equality of rights between men and women (article 3)*, UN HRCOR, 68th Sess, (2000), UN Doc CCPR/C/21/Rev 1/Add10 at para 24.

¹⁰² *ICCPR, supra* note 83 at Article 18(1)[emphasis added].

¹⁰³ *CEDAW, supra* note 7 at Article 6.

leading to more than one possible interpretation also relates to polygamy. Section 293(1) of the Canadian *Criminal Code*¹⁰⁴ reads:

Every one who
(a) practises or enters into or in any manner agrees or consents to practise or enter into
(i) any form of polygamy, 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.

Drummond's textual critique is scathing: the section's "residual definitional content—conjuality—[is] devoid of a specific meaning."¹⁰⁵ The use of textual analysis will of course also be beneficial to an examination of constitutional documents which guarantee "freedom of religion" and, in the Canadian example, the limitation that rights are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹⁰⁶ In tandem with the need to analyze varying social, legal, political and religious texts across jurisdictions and their concomitant legal beliefs is the need to compare those legal systems and their impacts.

Comparative Analysis

The law of private sexual ordering is present across the globe, cutting across social, cultural, and importantly, legal, divides. The scope of this text aims to explore the law of private sexual ordering across (sometimes radically) different jurisdictions, and as such will employ comparative legal theory to assist in the study of disparate perspectives and legal philosophies.

Comparative law is appropriately introspective and goal-oriented:

Reflection on the functions of comparative law is a familiar exercise. Besides a better comprehension of foreign systems...two main goals are traditionally articulated. First, comparison makes possible the

¹⁰⁴ *Criminal Code*, *supra* note 78.

¹⁰⁵ Susan G Drummond, "Polygamy's Inscrutable Criminal Mischief" (2009) 47:2 Osgoode Hall LJ 317 at 323.

¹⁰⁶ *Canadian Charter of Rights and Freedoms*, *supra* note 76, at s 1.

“circulation of models” described by Sacco...More generally, comparative law must also be seen in terms of “Its Influence on National Legal Systems,” [in the reviewed text] discussed by Jan Smits, an influence...undoubtedly exerted through such channels as legislatures, courts, and even legal scholarship. A second goal that is commonly assigned to comparative law relates to its role in the current process of unification or harmonization of the law.¹⁰⁷

However, the value of comparative law methodology is not restricted to dramatically different jurisdictions nor simply an analysis of legal regimes: in the modern legal world, comparative law can interrogate “the infinite variations of the organisation of power in culturally, socially, economically very similar countries...The question is in many cases no longer how deeply [any rule] is embedded, how deep are its roots in the soil of its country, but who has planted the roots and who has cultivated the garden.”¹⁰⁸

Despite these rational uses of the methodology, the *raison d’etre* for comparative law is not confined to the utility of hybridization and globalization. Riles describes both the practical utility of comparative law as well as its animating spirit of curiosity and a desire for knowledge:

[C]omparative law has never been just about the facts of foreign law. It is the passion for understanding these differences...that ultimately motivates comparative lawyers...An international agreement is more likely to fail, or a possibility for legal reform to go unconsidered, for example, because of a lack of interest, empathy, or faith in the possibility of engagement with difference than because of a lack of information about things foreign.¹⁰⁹

Seen in this light, the intellectual exercise of empathizing with “foreign” systems of law produces not only a better academic understanding of both legal regimes, but an understanding more able to draw on both for solutions to legal, theoretical or philosophical problems. This text will remain cognizant of Kahn-Freud’s warning that “use [of the comparative method] requires a knowledge not only of the foreign law, but also of its social, and above all its political, context.”¹¹⁰

¹⁰⁷ Xavier Blanc-Jouvan, Book Review of *The Oxford Handbook of Comparative Law* by Matthias Reiman and Reinhard Zimmermann, eds, (2008) 56:4 Am J Comp L 1075 at 1078.

¹⁰⁸ Otto Kahn-Freud, “On Uses and Misuses of Comparative Law” (1974) 37 Mod L Rev 1 at 12-13.

¹⁰⁹ Annelise Riles, “Wigmore’s Treasure Box: Comparative Law in the Era of Information” (1999) 40 Harv Int’l LJ 221 at 282.

¹¹⁰ Kahn-Freud, *supra* note 108 at 27.

One of this text's central departures from the received wisdom of comparative law as articulated above will be the de-orientation of law. Both Kahn-Freud and Riles imply the project of comparative law as a gathering of the "Other," or "foreign," law, which implies an attempt (according to Foucauldian analysis) to gain power: "power and knowledge directly imply one another...there is no...knowledge that does not presuppose and constitute at the same time power relations."¹¹¹ This text will attempt to de-centre the comparison inherent in comparative law from a "familiar and foreign" to two parallel, yet equally valid, legal structures. I want to counteract "the general sense that comparative law is recessive in hegemonic circumstances (there is no need to open up to differences and otherness when one leads anyway), while it tends to become a factor of counter-hegemony in otherwise recessive circumstances."¹¹² Legal study should always critique dominant structures of power and interrogate both powerful and non-powerful legal systems. As Glenn writes, "[s]ustaining diversity means accepting (not tolerating) the major, complex legal traditions of the world (all of them). It means seeing them as mutually interdependent, such that the loss of any of them would be a loss to all the others, which would then lose a major source of support, or at least of self-interrogation."¹¹³ Rather like a rejection of Geocentrism, the knowledge that no legal system is inherently "foreign" frees up possibilities of orientation, discussion, and legal discourse.

The comparative legal research methodology also combines well with other academic disciplines to form interdisciplinary discourses. This is perhaps illustrated best by Susan Drummond's interdisciplinary text combining comparative law and legal ethnography in a study

¹¹¹ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995) [translated by Alan Sheridan] at 27.

¹¹² Ugo Mattei, "Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction" (2002) 50 *Am J Comp L* (Supplement) 87 at 96.

¹¹³ Glenn, *supra* note 74 at 378.

(pertinent to sexual ordering) of the marriage practices of a Spanish minority, the “Gitanos.”¹¹⁴ Drummond illustrates how comparative law, together with legal anthropology can “offer vitally important disciplines to get at what is going on at the local, national, and global levels, but only on the understanding that the separation between the entities to be compared is not-and has probably never been- as clear and distinct as previously construed.”¹¹⁵ Since “forces (and fears) of homogenization can also be exploited by nation-states in relation to their own minorities [to mask] the threat of its own hegemonic strategies,”¹¹⁶ and since “global cultural flows” exist in Appadurai’s categories of “*ethnoscapes*[,] *mediascapes*[,] *technoscapes*[,] *financescapes*, and...*ideoscapes*,”¹¹⁷ comparative law can be employed to help explore “the tension between homogenizing pressures in world historical processes and heterogenizing reactions that situate and shape the nature of locale and state within these global, deterritorializing influences”¹¹⁸ at the same time as it sheds light on a government’s treatment of (in this case, religious and sexual) minorities.

Comparative law methodology has been applied to the law of private sexual ordering since Montesquieu’s seminal (if regrettable) *The Spirit of the Laws*,¹¹⁹ where the author opined:

In a republic, the condition of the citizens is limited, equal, gentle, and moderate; the effects of public liberty are felt throughout...On the other hand, the servitude of women is very much in conformity with the genius of despotic government, which likes to abuse everything. Thus in Asia domestic servitude and despotic government have been seen to go hand in hand in every age.¹²⁰

Cott summarizes Montesquieu’s comparative project on sexual ordering (which conveniently ignores the subjugation of women in European legal systems) as “the source of sovereignty in

¹¹⁴ Susan Drummond, *Mapping Marriage Law in Spanish Gitano Communities* (Toronto: UBC Press, 2006).

¹¹⁵ *Ibid* at 12.

¹¹⁶ Appadurai, *supra* note 38 at 32.

¹¹⁷ *Ibid* at 33 (emphasis in original).

¹¹⁸ Drummond, *Mapping Marriage*, *supra* note 114 at 12.

¹¹⁹ Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, translated by Ann Cohler, Basia Miller & Harold Stone, eds (London: Cambridge University Press, 1989).

¹²⁰ *Ibid* at 270.

any government operated in reciprocal equilibrium with the people's motivation. Therefore, the 'general spirit, the mores, and the manners' of a society, including household arrangements and relations between the sexes, materially affected political values."¹²¹ In Montesquieu's words (using the example of "Muscovy"), "[t]his change in the mores of women will no doubt affect the government...very much...Everything is closely linked together."¹²² Montesquieu goes a step further in an important matter for this current study: "[a]s [Christianity] forbids having more than one wife, princes here are less confined, less separated from their subjects, and consequently more human; they are more disposed to give laws to themselves...Whereas Mohammedan princes constantly kill or are killed."¹²³ In reasoning that Christianity "is also our happiness in this [life]!"¹²⁴ Montesquieu is intertwining comparative methodology, religion and law, a relationship ubiquitous in the law of private sexual ordering.

Comparative law is particularly useful for the law of private sexual ordering because the vast majority of legal and societal systems regulate sexuality. For example, prostitution laws are so numerous as to be almost universally present in legal regimes, and the approaches to the issue vary from legalization of prostitution (such as in The Netherlands, Germany¹²⁵ and, after the implementation of the Supreme Court of Canada's recent decision,¹²⁶ Canada), to partial abolitionist regimes such as the "Nordic model" (whereby it is "legal to sell sex, but illegal to buy sex"¹²⁷), to outright prohibitive regimes such as the majority of the United States of

¹²¹ Cott, *supra* note 32 at 21.

¹²² Montesquieu, *supra* note 119 at 316.

¹²³ *Ibid* at 461.

¹²⁴ *Ibid*.

¹²⁵ But see de Marneffe's contention that because "criminal law [does not treat] prostitution the same way that it treats every other trade" prostitution in The Netherlands and Germany is not "fully decriminalized" despite the fact that "sale and purchase of sexual services is decriminalized and...brothels are legal": de Marneffe, *supra* note 15 at 18 [emphasis in original].

¹²⁶ *Canada (Attorney General) v Bedford*, 2013 SCC 72, declared laws indirectly criminalizing prostitution unconstitutional but delayed striking them down for one year.

¹²⁷ Monasky, *supra* note 67 at 2012.

America. This legal cacophony is supplemented by pertinent international law (most specifically, but not exclusively, the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*¹²⁸ [CSTPEPO]). The various comparisons between jurisdictions which are able to be made will assist in determining both appropriate legal aims regarding prostitution, and appropriate methods to achieve those aims. The same is true of the other instantiations of the law of private sexual ordering—regulation of polygamy and on female sexuality is rife but frequently contradictory across jurisdictions, and with different legislative histories. By studying the nuances in the differing legal regimes, and their effects, progress can be made towards an effective analysis, together with recommendations for the future of private sexual ordering. Comparative law embodies the spirit of the argument that “we need to learn a lot more about the nature and effects of possible arrangements, and the best way to do that is through experiments [involving variations across state lines].”¹²⁹ However, a comparative legal analysis would still require supplementation by a larger discussion of the social context and status of private sexual ordering. This is accomplished by the last research methodology, Law and Social Science, which is a combination of the in-depth reviews of law and attendant analyses of society inherent in the quantitative and qualitative work of the social sciences.

Law and Social Science

Interdisciplinarity is vital to this work’s goal of illuminating the law of private sexual ordering. As the Mill quotation at this chapter’s beginning¹³⁰ illustrates, the ways in which society regulates the sexual citizen are not always explicitly legal, and in finding out how this regulation is accomplished, an analysis must go beyond formal law. To paraphrase Appadurai’s comment on history, when it comes to law, “the ruthless discipline of context (in E.P.

¹²⁸ 2 December 1949, A/RES/317.

¹²⁹ Cass R Sunstein, “Of Federalism and Caste” in Joshua Cohen and Deborah Chasman, eds, *Just Marriage* (New York: Oxford University Press, 2004) 41 at 42.

¹³⁰ *Supra* note 1.

Thompson’s colorful phrase), is everything.”¹³¹ Masterpieces of interdisciplinary analysis, which gather strength from incorporating nuance from all areas of society, include Foucault’s work (such as *The History of Sexuality*¹³²) and Edward Said’s *Orientalism*.¹³³ The social sciences offer an important aid to a legal study, since these disciplines understand that “[a]nalysis...is sorting out the structures of signification—what Ryle called established codes...—and determining their social ground and import.”¹³⁴ In making sense of a legal code, we must not only look to its internal logic, but outward, into what Drummond characterizes as both liberating and in danger of overreaching, “[o]nce orthodoxies are no longer taken for granted...the familiar descent into explications of tacit knowledge once again surfaces. In the attempt to highlight the doxic forms of life that sustain these orthodoxies, we are brought right to the edge of the quagmire of context.”¹³⁵ In other words, hard-and-fast rules cannot tell us what will happen in a given social situation—context and innovation can create complex, interlocking and sometimes contradictory roles for individuals to fulfill. While certainly not the only additional perspective necessary to a legal analysis, social sciences provide a necessary component to a societal review and to make recommendations for the future. For example, social science evidence was a crucial contribution to the same-sex marriage debate surrounding the adoption of children:

Psychological research clearly alleviates concerns that children who are raised in [same-sex parental] relationships might be worse off than children raised by opposite-sex parents. No significant differences have emerged in emotional or cognitive developmental outcomes, or in terms of mental health between children raised by same-sex couples and opposite-sex couples.¹³⁶

Social sciences, including political science, sociology, psychology and anthropology, have

¹³¹ Appadurai, *supra* note 38 at 17.

¹³² Michel Foucault, *The History of Sexuality*, volumes 1-3, translated by Robert Hurley (New York: Vintage Books, 1990).

¹³³ Edward W Said, *Orientalism*, 25th Anniversary ed (New York: Vintage Books, 2003).

¹³⁴ Clifford Geertz. “Thick Description: Toward an Interpretive Theory of Culture” in Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 2000) 3 at 9.

¹³⁵ Drummond. *Mapping Marriage Law*, *supra* note 114 at 239.

¹³⁶ Nicholas Bala, “Why Canada’s Prohibition of Polygamy is Valid and Sound as Public Policy” (2009) 25:2 Can J Fam L 165 at 176.

great potential to shed light on the related issues of sex work, polygamy, and female sexuality. The social sciences are expansive enough to capture the ontological struggle described by Kernerman: “[w]hen a marginalized group sees a distorted and demeaning image of itself depicted by the dominant culture, it tries to become empowered by replacing that image, but the process of categorization and knowledge construction proceeds apace.”¹³⁷ Since a central theme of this work is “[t]o what extent should broader...society accommodate the religious and cultural demands of religious and cultural minorities[?]”,¹³⁸ the question cannot be answered without recourse to the lived social realities informed by law, and must also take into account the political and ideological positions of those with an agenda in the debate. Claims of societal interest or makeup can directly influence how a particular problem is framed, as demonstrated by the Law Reform Commission of Canada: “[b]y not giving polygamy any legal recognition, matrimonial law ensures that this phenomenon is not viable in Canada.”¹³⁹ The fundamental legal and societal importance of the interplay of the various instantiations of private sexual ordering is illustrated by a quotation of the Supreme Court of the United States as it struck down laws on miscegenation: “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”¹⁴⁰ Of course, with modern conceptions of marriage, family, and intimate relationships, the statement applies to all private sexual ordering.

With emphasis on experimentation and observation, social sciences can link instances of the legal treatment of sexuality together by referring to the common roots of the regulations. One

¹³⁷ Gerald Kernerman, *Multicultural Nationalism: Civilizing Difference, Constituting Community* (Toronto: UBC Press, 2005) at 103.

¹³⁸ Bricker and Ibbitson, *supra* note 84 at 230. The original quotation asked this question of “Canadian society.”

¹³⁹ Law Reform Commission of Canada, *Working Paper 42: Bigamy* (Ottawa: Queen’s Printer, 1985) at 29.

¹⁴⁰ *Loving v Virginia*, 388 US 1 (1967) at 12.

example is Haidt's work on morality, where in one experiment subjects were asked to morally judge adult, consensual, infertile incest. Haidt's work showed that moral judgments were made without rational basis: "[i]n these harmless-taboo scenarios, people generated far more reasons and discarded far more reasons than in any of the other scenarios. They seemed to be flailing about, throwing out reason after reason, and rarely changing their minds when [the researcher] proved that their latest reason was not relevant."¹⁴¹ Haidt concluded that "[r]easoning was merely the servant of the passions, and when the servant failed to find any good arguments, the master did not change his mind...Moral reasoning was mostly just a post hoc search for reasons to justify the judgments people had already made."¹⁴² This lens is applicable to regulation of all three specific sexual issues.

Another example of social science work with relevance for the law of private sexual ordering is Mary Douglas's anthropological work, in which she describes the marriage and social order of an African group, the Lele:

[Among the Lele people] [p]olygyny in itself made the competition for wives intense...From a man's point of view women were the most desirable objects their culture had to offer...Since men competed with one another for women there was scope for women to manoeuvre and intrigue...no woman doubted she could get another husband if it suited her.¹⁴³

A further relevant overlap is found in Altman and Ginat's sociological participant observation of Mormon fundamentalist polygamy, which concluded that, as the historical and cultural underpinnings of Mormon polygyny were initially monogamous, "contemporary fundamentalism is an emerging culture on the American landscape...a 'culture in search of itself.' The groups and people with whom we worked share some values with society as a whole but also hold fast

¹⁴¹ Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012) at 38-39.

¹⁴² *Ibid* at 40.

¹⁴³ Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (Baltimore, MD: Pelican Books, 1970) at 177-178.

to theological and cultural values that set them apart.”¹⁴⁴ In the context of prostitution,

Ethnographic material is crucial for shedding light on the ways different red-light landscapes shape the perceptions and experiences of individuals who enter or reside in such zones...the ecology of a particular red-light district is important not only sociologically but also for public policy. Different kinds of arrangements present distinctive challenges for law enforcement and order maintenance...Comparative analysis of different cases can help us assess the strengths and weaknesses of alternate models.¹⁴⁵

On the subjects of both prostitution and reproductive rights, the accuracy of statistically valid information is paramount, as without accurate data potentially skewed narratives may be adopted and acted upon.

Obviously, most social sciences do not usually examine the broad areas of prostitution, polygamy, and female sexuality/reproductive rights in one study. However, as Haidt’s work shows, social science evidence can provide a link between societal conceptions of these three issues, and can inform legal regulation of these areas by demonstrating that the psychological, sociological, or anthropological interpretive frameworks accurately explain or predict how social beliefs are translated into legal norms. Data generated by the social sciences is also invaluable to a normative discussion of legal reform. Lastly, social science critiques can provide a fresh perspective on legal issues, untrammelled by legal thought patterns, as is seen in Cragun and Cragun’s anthropological critique of polygyny laws.¹⁴⁶ After studying potential genetic problems, and humanity’s polygamous biological history, the authors conclude that “[f]rom evolutionary, anthropological, and sociological perspectives, the criminalization of polygyny makes very little sense, though the regulation of such practice to consenting adults is an obvious criterion for legalization.”¹⁴⁷ Social science evidence rightly provides grounds for analysis,

¹⁴⁴ Irwin Altman & Joseph Ginat, *Polygamous Families in Contemporary Society* (New York: Cambridge University Press, 1996) at 434.

¹⁴⁵ Weitzer, *supra* note 10 at 106-107.

¹⁴⁶ Deborah L Cragun & Ryan T Cragun, “The Intricacies and Ethics of Parental Genetic Testing” in Cardell K Jacobson and Lara Burton, eds, *Modern Polygamy in the United States: Historical, Cultural and Legal Issues* (New York: Oxford University Press, 2011) 331.

¹⁴⁷ *Ibid* at 340.

prediction, and recommendation. While predictive power of the social sciences can be overstated (countered by Bricker and Ibbitson’s humorous critique that “[t]he Anything Can Happen list is endless and includes asteroids”¹⁴⁸), its core value—scientific analysis of society—is invaluable.

The Roads Not Taken

This analysis of the law of private sexual ordering is by no means the “last word” on the topic, and indeed, the nature of the subject defies any final pronouncement. A project such as this is rhizomic in the sense that “[a] rhizome has no beginning or end; it is always in the middle, between things, interbeing, intermezzo...the rhizome is alliance, uniquely alliance...the fabric of the rhizome is ‘and...and...and...’”¹⁴⁹ Nor can this work claim that the order it studies the issues in does not, in a sense, create unique paths. Hodgins’s insight into narrative is applicable:

Some writers have suggested that a story is like a house: it doesn’t matter which door you enter so long as you visit all the rooms before you leave. Yet choosing this door instead of that door, visiting this room before that room, can make a difference. By the time you step out of the house and stand back far enough to get some perspective, your experience of the building will have been affected by the order in which you visited the rooms as much as by the contents of the rooms themselves. Imagine visiting Manhattan immediately after spending some time in the tiny mining village of Elsa in the Yukon Territory. Imagine visiting the same two places in the reverse order.¹⁵⁰

Above, this chapter mentioned works by Said and Foucault. Those works incorporated many other disciplines and methodologies in their works, and were the stronger for it. This dissertation does acknowledge and eagerly anticipates that methodologies not included, such as Third World Approaches to Law, Law and Literature, or Critical Race Studies, will have important insights and contributions to the study of the law of private sexual ordering. Where particularly strong examples of areas covered by these methodologies exist, this work will engage with the analysis on its own methodological footing, but will eagerly await the day when more attention is brought to bear on the law of private sexual ordering, illuminating the issues from all possible sides, and

¹⁴⁸ Bricker & Ibbitson, *supra* note 84 at 126.

¹⁴⁹ Gilles Deleuze & Félix Guattari, *A Thousand Plateaus*, quoted (without citation) in Kernerman, *supra* note 137 at 107.

¹⁵⁰ Jack Hodgins, *A Passion for Narrative: A Guide for Writing Fiction* (Toronto: McLelland & Stewart, 1993) at 155.

not simply the order of visitation this text reveals. Nevertheless, the flexible, critical, and broad natures of the methodologies and theoretical frameworks chosen provide this work with unique and rhizomic qualities for a much larger discussion.

The combined methodologies reveal law's attempt to stratify conjugal relationships, especially those relating to the feminine. Queer theory destabilizes the heteronormative assumptions made by "family law," while legal feminism and legal historicism orient the subject of private sexual ordering as one of fundamental importance throughout history, a subject which has historically served to incapacitate the role of the sexual feminine. I now turn to the religious, moral, and philosophical roots of these impositions.

CHAPTER III

Religion, Morality, and Sex

Religion, the “freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment,”¹ is a continually-evolving, continually contested aspect of human life. Without necessarily accepting the emphasis the above quotation places on the individual (as opposed to group spirituality), it is also clear that the significance of religion is highly personal and that religious tenets can be variously (perhaps almost innumerably) interpreted. Interpretation of religious or conscientious doctrine is an interesting theological topic, but one in which legal measures should not participate. Yet in practice the law is informed by, and influenced with, religious ideation and moral value judgments. This can be seen in the law of private sexual ordering.

The law of private sexual ordering is created by regimes which are not always reflective of the values of the people governed by the law. Globally, the dominant trend is for two major philosophical rationales to inform the law of private sexual ordering: that of religious and moral systems being incorporated into the law, and the prevailing narrative of current Western legal systems, an emphasis on harm prevention and equality. This chapter will explore the prevailing philosophies behind current legal restrictions on the sexual citizen. I will first discuss the coercive nature of the philosophies governing private sexual ordering, wherein individuals are sometimes subjected to majority wishes that may conflict with their desires or beliefs. This practice is often determined by reference to one subjective viewpoint: “[w]e have to leave everything to the majority...the mob, the mob, the mob...Take a vote on it! Show hands, and prove it by count! *Vox populi, vox Dei.*”² Imposed philosophies may be explicitly religious, attempting to coerce a particular moral standard or way of life, or simply, as with the

¹ *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 39.

² DH Lawrence, *Selected Literary Criticism*, Anthony Beal, ed (New York: The Viking Press, 1956) at 32-33.

philosophies of Plato, represent a purported formula for general order. This is represented in the modern era by the contention that major events of the last decade “have left people wary and even fearful,”³ ready to more easily fixate on Others or perceived threats to stability. This fear then eliminates the ability of dissenting individuals to access “meaningful ways of life across the full range of human activities...encompassing both public and private spheres.”⁴

Having explored these philosophical underpinnings for laws on the three instantiations of private sexual ordering discussed in this dissertation, I will proceed to critique the philosophies of enforced harmlessness, whereby individuals are no longer free to evaluate harm for themselves, and equality, which can either be enforced or exist as equality of decision-making power. Such philosophies are complex, as where law recognizes equality and autonomy as salutary goals more pressing than the imposition of morality. This view was articulated by the Supreme Court of Canada attempting to differentiate between mores and law:

To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. D. Dyzenhaus, “Obscenity and the Charter: Autonomy and Equality” (1991), 1 C.R. (4th) 367, at p. 370, refers to this as “legal moralism”, of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of “dirt for dirt’s sake” is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.

On the other hand, I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society. As Dyzenhaus, *supra*, at p. 376, writes:

[“]Moral disapprobation is recognized as an appropriate response when it has its basis in *Charter* values.[”]⁵

With this reasoning, the distinction between impermissible legislation on morality and permitted (and in fact, required) legislation to prevent harm and foster equality becomes ephemeral and potentially inconsistent. As I will demonstrate in this chapter, on the topic of private sexual

³ Darrell Bricker & John Ibbitson, *The Big Shift: The Seismic Change in Canadian Politics, Business, and Culture and What it Means for Our Future* (Toronto: Harper Collins, 2013) at 132.

⁴ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Clarendon Press, 1995) at 76.

⁵ *R v Butler*, [1992] 1 SCR 452 at 492-493.

ordering instantiated by polygamy, prostitution, and the regulation of the feminine, the concepts of “harm” and “equality” lend themselves to philosophical indeterminacy and relativism. What counts as “harm” and “equality” is thus a matter for belief inasmuch as it is for rational analysis. Thus, the choice a legal system has to make is far more complex than Berger alludes to in stating “we are met with a crucial, if vexing, ethical choice: ontological courage that risks a form of moral colonialism in a diverse society or modesty in the use of criminal law that would demand agnosticism on matters of ethical moment.”⁶ Since “matters of ethical moment” is used as a monolithic definition in that sentence, the crux of the issue, whether law can impose morality on those willingly accepting a different moral standard to the benefit of no third party, is avoided when the matter is framed as definitively “ethical.”

Finally, after engaging with the philosophical underpinnings of law’s regulation of the sexual citizen, I will examine the impact of the imposition of ideology through legislation on the law of private sexual ordering, focussing on sexual minorities engaged in the practices of polygamy, prostitution, or the behaviour of real or perceived female sexuality. In doing so, I will engage with the main philosophical question posed by these (overwhelmingly deleterious) consequences, namely, whether law can justly impose its will on conscientious objectors. I will engage with three major possibilities: that of majority rule *simpliciter*, that of a complete abdication of a legal standard when religious or moral issues become contested, and thirdly, a middle position of accommodation or the balancing of rights. These philosophical positions will be discussed in turn, with a permissive legal philosophy identified as the most in accordance with the aims of ensuring, recognition, respect, and ability for full societal participation for all people, regardless of sexual choices.

⁶ Benjamin L Berger, “Polygamy and the Predicament of Contemporary Criminal Law” in Gillian Calder & Lori G Beaman, eds, *Polygamy’s Rights and Wrongs: Perspectives on Harm, Family, and Law* (Toronto: UBC Press, 2014) 69 at 83.

This desire for social inclusivity and autonomy of religion, conscience, and preference, is in accordance with Mill's liberal dictum, written in response to "the language of downright persecution which breaks out from the press of [Britain] whenever it feels called on to notice the remarkable phenomenon of Mormonism"⁷ that "[no] community has a right to force another to be civilized."⁸ The argument that equality and full participation for sexual minorities is not always possible is problematized by Shachar. While acknowledging that not all cultural practices are egalitarian, Shachar proposes putting "female members of minority communities, especially those who have been historically vulnerable, at the center of debate" to give them "potential to become promising agents of renewal of their own cultural traditions," a project which is "the most practical hope for ensuring that women and other at-risk members do not become the primary casualties of the renewed struggles between state and religion the world over."⁹

Finally, the proposition also accords with international human rights documents, one of which, the *Universal Declaration of Human Rights*, declares that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."¹⁰ The struggle to recognize and affirm women's human rights, particularly in the context of minority communities, was a longstanding one, and pioneers such as Susan Moller Okin must be acknowledged. Okin argued against treating cultural or religious groups as a monolith when

⁷ John Stuart Mill, *On Liberty*, Elizabeth Rapoport, ed (Indianapolis, IN: Hackett Publishing, 1979) at 89.

⁸ *Ibid* at 90.

⁹ Ayelet Shachar, "Feminism and multiculturalism: mapping the terrain" in Anthony Simon Laden & David Owen, eds, *Multiculturalism and Political Theory* (New York: Cambridge University Press, 2007) 115 at 147.

¹⁰ *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71 at art 18.

discussing rights, acknowledging that “[u]nless women...are fully represented in negotiations about group rights, their interests may be harmed rather than protected by the granting of such rights.”¹¹ This applies both to minority and majority groups.

Religious and Moral Philosophical Underpinnings
The Impact of Religion on the Law of Private Sexual Ordering

That religion and moral ideas ground legal codes and enforcement is unavoidable, yet sometimes unjustifiable. Religion, as a comprehensive narrative of truth, often seeks sole decision-making power, and thereby claims dominion over law. As Geertz noted, “[t]he need for...a metaphysical grounding [of meaning] for values seems to vary quite widely in intensity from culture to culture and from individual to individual, but the tendency to desire some sort of factual basis for one’s commitments seems practically universal.”¹² This grounds the conclusion that “religion, by fusing ethos and world view, gives to a set of social values what they perhaps most need to be coercive: an appearance of objectivity.”¹³ Such “objectivity” can then inform and dictate law. Discussing one example of the law of private sexual ordering, Hitchens highlights the potentially controlling nature of belief, even for non-believers, when religious truth informs the law: “[e]very single step towards the clarification of [the argument on birth control] has been opposed root and branch by the clergy. The attempt even to educate people in the possibility of ‘family planning’ was anathematized from the first, and its early advocates and teachers were arrested...or put in jail or thrown out of their jobs.”¹⁴ This attempt to combine legal language with religious belief has not ceased: “[o]nly a few years ago, Mother Teresa denounced contraception as the moral equivalent of abortion, which ‘logically’ meant (since she

¹¹ Susan Moller Okin, “Is Multiculturalism Bad for Women?” in Joshua Cohen, Matthew Howard, & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 9 at 24.

¹² Clifford Geertz, “Ethos, World View, and the Analysis of Sacred Symbols” in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 2000) 126 at 131.

¹³ *Ibid.*

¹⁴ Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (Toronto: Emblem, 2008) at 222.

regarded abortion as murder) that a [condom] or a pill was a murder weapon also.”¹⁵ Religion can control or influence law if a desire to impose perceived universal truth, in reality a subjective viewpoint, is shared by the religion and legislators, which need not be explicitly stated.

Majority religion imprints itself, both explicitly and implicitly, onto State law. An example which was operative until the early 21st Century is *Hyde v. Hyde and Woodmansee*, a decision upon which Anglo-Canadian laws of private sexual ordering were partially founded, which summed up matrimonial law in this manner: “marriage, as understood in Christendom, may for this purpose be defined as the voluntary union...of one man and one woman, to the exclusion of all others.”¹⁶ The law of private sexual ordering today often remains openly tethered to a religious tradition, whether it be Christianity or Islam, a faith governing law from diverse areas such as Islamic Africa to Asia, while recognizing that religion is not monolithic: one text concludes “it is difficult to have an over-all picture of the laws of Muslim countries.”¹⁷ A more articulate phrasing of the same principle is that “[i]f being a Muslim is treated merely as an all or nothing adherence to a specific set of practices, this would dramatically reduce both the ideological import of Islam as a culture and an ethical philosophy, and the number of people who are Muslims.”¹⁸

Christianity’s influence on the modern law of private sexual ordering can be seen in an evolutionary theory of how early Christianity had a stake in ensuring cohesiveness, and thus determining familial structure and behaviour: “[m]embers of the sect were to become the new kin...Marriages formed in accordance with this primitive community of the faithful were not to

¹⁵ *Ibid.*

¹⁶ *Hyde v Hyde and Woodmansee* (1866), [1861-1873] All ER Rep 175 at 177.

¹⁷ René David & John EC Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3rd ed (London: Stevens, 1985) at 479.

¹⁸ Syed Mohamed Mehdi, “Bearing the Name of the Prophet” in Natasha Bakht, ed, *Belonging and Banishment: Being Muslim in Canada* (Toronto: TSAR Books, 2008) 17 at 21.

be undermined by rules from Roman or Jewish law that entrenched a parental veto.”¹⁹

Christianity adopted a more rigid approach as it spread, where

[T]he established maturity of the church was threatened by [consensualism]. From the early entrenchment of the church as an institution, church fathers persistently sought to insert the mutual consent of the parties within the framework of some more formal ceremony that underlined its importance and assured its publicity.²⁰

From the Council of Trent onwards, “the church [asserted] for itself a monopoly over other community forms of law-making founded in such things as family alliances.”²¹ Since Protestant nations adopted the Tridentine logic,²² the hold of Christianity on preferred family form was set.

Christianity and conjugal form were explicitly linked by Blackstone, “polygamy being condemned by the law of the new testament, and the policy of all prudent states, especially in these northern climates.”²³ Yet religion can prove to be an influence which provides only

subjective or contradictory direction to law: for example, the central texts of (non-Mormon)

Christianity do not explicitly condemn polygamy: “[t]he Old Testament...recognized the authenticity of both monogamy and polygamy (often without making any distinction between the two).”²⁴ More recently, as the American example shows, law was able to sustain the dominant

religious conceptions of “Christianity” and to impose it on all parties: “[t]he national

government’s insistence upon legal monogamy for ex-slaves, its war on polygamous alternatives,

and its prevention of the mailing of obscenity and contraceptive information created an

atmosphere of moral belligerence about Christian monogamous marriage as the national

¹⁹ Susan G Drummond, *Mapping Marriage Law in Spanish Gitano Communities* (Toronto: UBC Press, 2006) at 204.

²⁰ *Ibid.*

²¹ *Ibid* at 207.

²² *Ibid* at 206-207.

²³ William Blackstone, *Commentaries on the laws of England: to which is added an analysis by Barron Field*, vol 1 (New York: E. Duckykinck, 1827) at 337 [Accessed through Gale Cengage, *The Making of Modern Law* database].

²⁴ Eugene Hillman, *Polygamy Reconsidered: African plural marriage and the Christian Churches* (Maryknoll, NY: Orbis Books, 1975) at 168[emphasis in original].

standard.”²⁵ Religious underpinnings of the law can thus be philosophically justified for some when the dominant ideology is their own. While “religious” influence on law must be understood and explored, religion cannot be equated with a monolithic ideal. That variations exist in religious traditions is an important point to make: this dissertation will not enter doctrinal areas, but will instead argue that any coercive religious influence in law is misplaced.

A partially-analogous topic to the law of private sexual ordering in this regard is blasphemy. It is hard to argue that parties should be allowed to control the laws based on their religious principles: “[t]hat Mrs. Whitehouse is shocked and disgusted when she reads it may be a valid ground for making it an offence to show a blasphemy to her; but how can the fact that she is shocked and disgusted at the thought of my reading it possibly justify its being an offence to show it to me, an unbeliever who shares neither her shock nor her disgust?”²⁶ The same is equally true of consensual sexual behaviour. Yet religion continues to dog the law of private sexual ordering in ways deemed unacceptable by many in a modern pluralist society.

In evaluating the treatment of private sexual ordering in Islam, polygyny stands out as an important historical and contemporary institution (simultaneously, and interesting for this text’s investigation into the regulation of the feminine, Islamic women were also directed “to turn their eyes away from temptation and...preserve their chastity”²⁷). The primary text of Islam, the Qu’ran, is generally considered to permit, but not mandate, polygyny, based on the command “[i]f you fear that you will not deal fairly with orphan girls, you may marry whichever [other]

²⁵ Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2002) at 128.

²⁶ John Spencer, *The Independent* April 14, 1989, quoted in The International Committee for the Defence of Salman Rushdie and his Publishers, *Crime of Blasphemy*, online: <<http://www.article19.org/data/files/pdfs/publications/crime-of-blasphemy.pdf>> at 2.6.

²⁷ Surah 24, “Light,” in *The Koran*, translated by NJ Dawood, 5th ed (New York: Penguin, 1990) at 248. A similar command is given to Muslim men immediately before this passage, while a more recent translation, by MAS Abdel Haleem, substitutes “preserve their chastity” with “guard their private parts.” See *The Qu’ran*, translated by MAS Abdel Haleem (New York: Oxford University Press, 2010) Sura 24:30 at p 222.

women seem good to you, two, three, or four of them. If you fear that you cannot be equalitable [to them], then marry only one, or your slave(s): that is more likely to make you avoid bias.”²⁸ The permissive nature of the foregoing statement appears at odds with another statement later in the chapter: “[y]ou will never be able to treat your wives with equal fairness, however much you may desire to do so.”²⁹ Yet the repeated references to polygyny and the Islamic practice of polygyny has led to its acceptance in many Islamic countries.

Bala argues that “Islam *permits* polygamy but clearly does not *require* their adherents to practice polygamy,”³⁰ but reaches the erroneous conclusion that “[t]he fact that predominantly Muslim countries like Tunisia and Turkey have prohibited polygamy reveals that such a prohibition is not inconsistent with Islam.”³¹ Rather, it is not inconsistent with some interpretations of Islam. Islamic polygyny today is diverse, when countries allowing the practice range from Malaysia, where “the first wife may [not even] know that her husband has taken another wife, in fact that seems to be the case in many polygamous unions in urban Malaysia,”³² to countries such as Morocco, where family law requires that polygyny can only be practiced when it has not been disallowed by the marriage contract, that there is no “risk of inequity between the wives,” and that an “exceptional and objective justification” be proven.³³ Even then, proof of adequate resources to provide, and provide equally, is still required.³⁴ A great variety of *de jure* and *de facto* regulation of Islamic polygynous marriages exists.

The variations of Islamic regulation of private sexual ordering, which uses marriage as a

²⁸ Haleem, *ibid*, Sura 4:3, “Women,” at p 50. The square brackets are those of the translator: the “[other]” is footnoted at “d” with “[t]his is a widely accepted interpretation.”

²⁹ *Ibid* at Sura 4:129, p 63.

³⁰ Nicholas Bala, “Why Canada’s Prohibition of Polygamy is Valid and Sound as Public Policy” (2009) 25:2 Can J Fam L 165 at 204.

³¹ *Ibid*.

³² Miriam Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* (New York: Berg, 2008) at 71.

³³ Martha Bailey & Amy J Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara, CA: Praeger, 2010) at 26-27.

³⁴ *Ibid* at 27.

vehicle for accepted sexuality, inform the global context of polygamy and, as with African customary polygyny, require an understanding of the “last 200 years of colonial history, where the intercultural confrontation between colonizer and colonized often took the form of religious confrontation.”³⁵ Speaking of “animistic, polygamous peoples,” Zeitzen writes: “European administrators and missionaries made polygamy one of the main issues with which to force their way of life upon their new subjects.”³⁶ Therefore, polygamy may be a way to meet the need of “societies, arising out of the ashes of colonialism, seek[ing] nationalist definitions that distinguish them from their former colonial masters [and] establish an authentic identity.”³⁷ As such, the struggle for control over private sexual ordering is part of a larger picture, in which “Muslims struggle with and attempt to reconcile the affirmation of their heritage with the challenges of the modern world and the ongoing legacy of Western imperialism,” which is part of “a very important and continuing debate about what it means to be a Muslim [today].”³⁸

This religious and cultural ontological struggle is not limited to formal states:

As states lose their monopoly over the idea of nation, it is understandable that all sorts of groups will tend to use the logic of the nation to capture some or all of the state, or some or all of their entitlements from the state. This logic finds its maximum power to mobilize where the body meets the state, that is, in those projects that we call ethnic and often misrecognize as atavistic.³⁹

This search for identity and heritage could thus be undertaken by any religious, cultural or ethnic community seeking a common identity, and could coalesce along “Islamic” conceptions of family law. Although the danger of using history ontologically is rendering

³⁵ Zeitzen, *supra* note 32 at 34.

³⁶ *Ibid.*

³⁷ Anver M Emon, “The limits of constitutionalism in the Muslim world: History and identity in Islamic law” in Sujit Choudhury, ed, *Constitutional Design for Divided Societies: Integration or Accommodation?* (New York: Oxford University Press, 2008) 258 at 259.

³⁸ Jane I Smith, “Women in Islam” in Arvind Sharma, ed, *Today’s Woman in World Religions* (Albany, NY: State University of New York Press, 1994) 303 at 303.

³⁹ Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis, MN: University of Minnesota Press, 2003) at 157.

“premodern...rules...objective, determinate, and unassailable”⁴⁰ in ways that they were not historically so,⁴¹ examining the ontological as well as religious importance of Islam, is necessary to engage with modern legal “Islamic” influences on the law of private sexual ordering.

Neither Christianity nor Islam have a monopoly on religious influence on the law of private sexual ordering, of course. All world beliefs, from Buddhism to Hinduism to Wicca and atheism, exert a sway on the law of private sexual ordering, and vary in strength from jurisdiction to jurisdiction. This text has focussed on conservative Christian and Islamic influences simply to demonstrate the philosophical impact that religion can exert on law: by sheer numbers, these two religions have made some of the deepest impact in the Western world. The coercive nature of religious attributes can extend from prohibition on believers, all to easily to prohibitions on all people regardless of their religions and conscience. Yet it is important to remember that religion can operate in a reforming as well as conserving action: as Nussbaum notes, religion plays a “role in many struggles for moral and political justice.”⁴² Nussbaum’s own Jewish denomination, for example, demonstrates that “[t]here are a lot more female rabbis than female members of Congress.”⁴³

The Imposition of Non-Religious Codes on the Law of Private Sexual Ordering

In spite of Muller’s assertions to the contrary, religious orthodoxy is not the only system that adopts the view that there is an objective “transcendent moral order, to which we ought to

⁴⁰ Emon, *supra* note 37 at 286.

⁴¹ See, for example, *ibid* at 271, noting that “Shari’a tradition” (which regulated marriage and sexuality) “was developed by jurists who generally developed legal doctrine in a decentralized fashion outside the ambit of governmental control.”

⁴² Martha C Nussbaum, “A Plea for Difficulty” in Joshua Cohen, Matthew Howard, & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 105 at 106.

⁴³ *Ibid* at 107.

conform the ways of society.”⁴⁴ Private sexual ordering according to this view is still an appropriate area for moral regulation, despite the fact that the regulation is not based on a religious tradition. Regulation arguably increases, rather than its ostensible goal of decreasing, the discourses of sex:

Rather than the uniform concern to hide sex, rather than a general prudishness of language, what distinguishes these last three centuries is the variety, the wide dispersion of discourses that were invented for speaking about it, for having it be spoken about, for inducing to speak of itself, for listening, recording, transcribing, and redistributing what is said about it: around sex, a whole network of varying, specific, and coercive transpositions into discourse.⁴⁵

Not all of this discourse, as would be expected of an important subject like private sexual ordering, has had a religiously-motivated or inspired etiology. Yet the philosophy of moral coercion is just as strong when religion is not present, as instantiated by seminal writings of Western philosophy.

The Western legal tradition appears comfortable with combining religion and law. Philosophically, this is opposed to Aristotle’s dictum that “there cannot be a single universal [good] common to all cases, because it would be predicated not in all the categories but in one only,”⁴⁶ which contemplates a type of moral relativism, the Western legal tradition of private sexual ordering seems to be more in keeping with Plato’s seemingly repressive ideologies, instantiated in the area of private sexual ordering by a moral and expeditious coercion of individuals: “our men and women Guardians [of the Republic] should be forbidden by law to live together in separate households, and all the women should be common to all the men; similarly, children should be held in common, and no parent should know its child, or child its

⁴⁴ Jerry Z Muller, “What is Conservative and Social Political Thought?” in Jerry Z Muller, ed, *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present* (Princeton, NJ: Princeton University Press, 1997) 3 at 4.

⁴⁵ Michel Foucault, *The History of Sexuality, vol I: An Introduction*, translated by Robert Hurley (New York: Vintage Books, 1990) at 34.

⁴⁶ Aristotle, *The Nichomachean Ethics*, further revised ed, translated by JAK Thomson (New York: Penguin Books, 2004) at 10.

parent.”⁴⁷ The penalty for disobeying the public legal social structure informed by these philosophical tenets is harsh: “[i]f any man or woman [outside the prescribed ages for childbearing] takes a hand in the begetting of children for the community, we shall regard it as a sin and a crime...if any man still in his mating years lays hands on a woman of child-bearing age without the Rulers’ sanction[,] we shall regard him as putting upon the state that is a bastard on both civil and religious grounds.”⁴⁸ Regardless of whether the system is possible or not, the orientation of the discussion towards coercion and repression of private sexual ordering as a philosophical tenet is clear. Another of Plato’s works, *The Laws*, echoes *The Republic*, this time in a more repressive vision of the treatment of non-conformity: “[i]f anyone disobeys (except involuntarily)...so that he is still unmarried by the age of thirty-five, *he must* pay an annual fine.”⁴⁹ Clearly, for Plato, the imposition by law of potentially non-consensual order into private sexual ordering is permissible, and informs Popper’s characterization that for Plato, “all social change is corruption or decay or degeneration.”⁵⁰ This line of analysis finds many parallels in the modern law, regardless of whether religious considerations play a part.

The interplay between law and morality may be instinctive. One example is Haidt’s work on morality, where in one experiment subjects were asked to morally judge adult, consensual, infertile incest. Haidt’s work showed that moral judgments were made without rational basis: “[i]n these harmless-taboo scenarios, people generated far more reasons [not to allow the impugned conduct] and discarded far more reasons than in any of the other scenarios. They seemed to be flailing about, throwing out reason after reason, and rarely changing their minds

⁴⁷ Plato, *The Republic*, 2d ed, translated by Desmond Lee (New York: Penguin Books, 2007) at 168.

⁴⁸ *Ibid* at 172-173.

⁴⁹ Plato, *The Laws*, translated by Trevor J Saunders (New York: Penguin Classics, 1975) at 253.

⁵⁰ Karl Popper, *The Open Society and Its Enemies*, New One-Volume ed (Princeton, NJ: Princeton University Press, 2013) at 18.

when [the researcher] proved that their latest reason was not relevant.”⁵¹ Haidt concluded that “[r]easoning was merely the servant of the passions, and when the servant failed to find any good arguments, the master did not change his mind...Moral reasoning was mostly just a post hoc search for reasons to justify the judgments people had already made.”⁵²

Philosophical Rationales: The Avoidance of Harm and Creation of Equality

Mariana Valverde correctly identifies that harm may “act as a veritable joker card that can serve completely different purposes depending on the context.”⁵³ Harm has a multiplicity of meanings to different adjudicators. Harm can play a valuable role in assessment of a certain policy or idea. However, in the areas of prostitution, polygamy, and regulation of female sexuality, “harm” is almost always too normative to rely on. I first explore the power of harm allegations, then problematize harm specifically regarding polygamy, prostitution, and female sexuality. On these issues, reliance on harm as the basis for regulation is imprecise. Moreover, harm can be a dangerous basis for legislation as harm can be contextual: “[a]n opponent of legalizing prostitution can agree that some exchanges of sex for money are morally unobjectionable...All she needs to claim is that prostitution is *commonly* harmful, and that this is sufficient to justify some laws that function to reduce prostitution.”⁵⁴ However, an overreliance on “common” realities as opposed to an exploration of all variations of prostitution suggests there are more nuanced methods of legal control that need not impinge upon non-harmful (and indeed morally “unobjectionable”) behaviour which is today made “guilty by association” with harmful examples.

In the legal context, “[fear and risk] become embedded in notions of justice, played out in

⁵¹ Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012) at 38-39.

⁵² *Ibid* at 40.

⁵³ Mariana Valverde, “The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law” (1999) 8:2 Soc & Leg Stud 181 at 184.

⁵⁴ Peter de Marneffe, *Liberalism and Prostitution* (New York: Oxford University Press, 2012) at 46.

law through tests for risk of harm, and aided by the expert who can help...to present the 'real' risks involved...Positivist measures and language...construct knowledge of risk of harm as an authoritative statement of what should be feared and to what degree."⁵⁵ In addition to helping to classify an issue, consideration of harm is usually implicitly valid: limiting harm is usually rational. The danger is that tacit moral content of a legal provision remains concealed in harm reduction, as is seen in the following justification: "[t]he paternalistic case for prostitution law does not rest on...traditional sexual morality. It rests on the view that prostitution commonly harms sex workers and that prostitution laws reduce this harm"⁵⁶ Any moral content can be submerged in "harm."

A harm analysis has the power to normalize behaviour:

In Canada, non-monogamous patterns of intimacy continue to be ascribed the status of the 'other'---of deviation and pathology---and in need of explanation, or alternatively are ignored, hidden, avoided and marginalized. This 'mono-normative' perspective tends to universalize the exclusive, dyadic structure of the couple and elevates monogamy as the hegemonic norm.⁵⁷

Labelling an action as "harmful" immediately subjects it to analysis, as opposed to the "hegemonic norm," which is privileged. Moreover, labelling an institution as "harmful" essentializes the practice, solidifying it into a form that defies all further variations and evidence. Polygamy provides an example: "[w]ithout an understanding of cultural differences in the expression of polygamy, we are guilty of labelling all polygamy as equally harmful. We are misguided in believing that there is a single definition of abuses against women and that all abuse is of the same magnitude."⁵⁸ Essentialization is also seen in the claim that "prostitution is a

⁵⁵ Lori G Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Toronto: UBC Press, 2008) at 6.

⁵⁶ de Marneffe, *supra* note 54 at 45.

⁵⁷ Erin Fowler, "A Queer Critique on the Polygamy Debate in Canada: Law, Culture, and Diversity" (2012) 21 Dal J Leg Stud 93 at 94.

⁵⁸ Janet Bennion, *Polygamy in Primetime: Media, Gender, and Politics in Mormon Fundamentalism* (Waltham, MA: Brandeis University Press, 2012) at 225.

terrible harm to women [and] that prostitution is abusive in its very nature.”⁵⁹ A lack of nuance with regard to any subject’s harms is dangerous.

Finally, “harm” has the power to eliminate voluntariness for individuals or groups attempting to resist social norms: “[t]he question remains...whether women should be permitted the so-called ‘liberty of self-degradation.’”⁶⁰ Although Sigman answers this question in the affirmative for liberty, her heavy qualification illustrates the power of harm: “[a]bsent any other harms, it is unclear why adult women should not be [free to choose polygamy].”⁶¹ Harm can be described as a discourse on agency:

The law sets up boundaries within which choice should, can, and may be made. It structures the parameters of who can choose and when. Together with other discourses, it creates a story about what is ‘real’ agency, or who is freely choosing. The construction of human agency within law becomes part of the disciplinary mechanism of both risk of harm and uncertainty.⁶²

Thus, law and harm are interrelated in a dispute about what harm should be determinative as a limit on freedom.

The concept of “harm” is a normative one (varying through socio-cultural and religious tenets), where “no two people can define exactly what they mean by it...For example, no two cultures can agree on what constitutes female subordination and how best to deal with it.”⁶³ Harm is flexible enough to justify any position: in an argument for legal recognition of polygyny, Campbell speaks of “facilitating meaningful choices by women,”⁶⁴ a position implicitly contradicted by the assertion that polygamy itself is harmful. One of the key contestations is about what “harm” is, and how and when people can choose harmful activities, and why. The

⁵⁹ Melissa Farley, testimony quoted in *Bedford v Canada (Attorney General)*, 2010 ONSC 4264 at para 355.

⁶⁰ Shayna M Sigman, “Everything Lawyers Know About Polygamy is Wrong” (2006) 16 *Cornell JL & Pub Pol’y* 101 at 172.

⁶¹ *Ibid.*

⁶² Beaman, *supra* note 55 at 102.

⁶³ Bennion, *Polygamy in Primetime*, *supra* note 58 at 224.

⁶⁴ Angela Campbell, “How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis” in Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* (2005), online: <<http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf>> at 37.

*Polygamy Reference*⁶⁵ illustrates that harm can mask what may in reality be morality-driven reasoning. After concluding that polygamy is inherently harmful, the decision continues:

The structure of polygamy creates conditions that increase the risk that the other offences ...may occur. Parliament is entitled to take preventative measures and is not limited to reacting once harm occurs.⁶⁶

In this way, harm (or apprehended harm) can prohibit any action on a normative assessment.

Equality, as alluded to in Chapter 2 in the discussion of the ambiguous wording of international documents, is perhaps a harder ideal to discuss, since it is often in the eye of the beholder. Religious equality can arguably range from the formal equality of laïcité (where every religion is ostensibly equal in its removal from public society) to the substantive equality of allowing disparate treatment of religious minorities where available (such as the right to, for example, wear a Jewish yarmulke or Sikh turban in a courtroom despite a general prohibition on head coverings). Minority sexual ordering (such as polygamy or prostitution) can arguably be inegalitarian, as it potentially creates disparities according to gender. Yet allowing for personal autonomy, assuming that society protects decisions an individual makes (the right to exit inegalitarian situations), arguably creates equality of choice. When applied to religion, it seems that enforced equality as a principle is unhelpful in finding legal solutions.

Religion, Morality, and Plurality

A good example of how religion influences law, which then completes the cycle by impacting on religious freedom is demonstrated by polygamy. Johnson identifies the problematic inconsistencies with respect to the claim that penalizing polygamy somehow reflects only equality concerns:

I share a concern with the persistent gendered double standard of male and female sexuality (and sexual fidelity). This is hardly, of course, a double standard that has been eradicated in mainstream society. But this double standard may well be echoed (perhaps even amplified) in polygamous practices. I would love to believe that the prohibition of polygamy was passed in order to affirm and

⁶⁵ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

⁶⁶ *Ibid* at para 1195.

support gender equality. But this seems a stretch. The *Criminal Code* [of Canada] does not identify women's oppression as the harm; the harm is to conjugal rights. Even if we were to agree that polygamy most frequently involves one man with multiple women, this is not what the section proscribes. It prohibits *all* forms of multiple conjugal union (polygamy, polyandry, polygyny, polyamory), whether rooted in beliefs that are discriminatory or egalitarian. If the provision is really about *gender* inequality, it seems a poorly drafted tool.⁶⁷

This is further demonstrated by the history of Mormon polygamy in Utah, where the focus shifted from female empowerment once it became clear that polygamous women (“Mormons gave women the vote early in 1870”⁶⁸) would not support polygamy's abolition: “[w]oman suffrage for Utah seemed to validate the theory that women *could* have no independent political voice, or alternatively that religious difference meant that Mormon women were as guilty as Mormon men.”⁶⁹ The federal government revoked the suffrage in 1887 when Mormon women did not prove to be compliant to its wishes, and, together with other reforms, “brought women as well as men into the criminal and political focus of federal law.”⁷⁰ It seems that, in this case and perhaps the contemporary situation, gender equality means empowering only those women who agree with the legislator.

Harm and equality concerns cannot be used selectively against sexual minorities, as is arguably the case when the law singles out sexual minorities for illiberal practices, as Eisenberg notes from British Columbia's *Polygamy Reference*: “[m]any of the harms identified by the judge, ranging from early marriage to exposing children to negative stereotypes, also exist outside polygamous communities and relationships...a more inclusive test for harm would have

⁶⁷ Rebecca Johnson, “Reflecting on Polygamy: What's the Harm?” in Gillian Calder and Lori G Beaman, eds, *Polygamy's Rights and Wrongs: Perspectives on Harm, Family, and Law* (Toronto: UBC Press, 2014) 97 at 107 [emphasis in original].

⁶⁸ Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill, NC: University of North Carolina Press, 2002) at 97.

⁶⁹ *Ibid* at 171.

⁷⁰ *Ibid* at 180.

required the Court to focus on safeguards and to identify the distinctive features that make [polygamy] safeguards more difficult or costly to implement.”⁷¹

Two approximate harm claims against polygamy can be identified: moral/philosophical (“normative”) harm, which is harm recognized only if a subjective viewpoint is adopted, and “objective” harm, which can theoretically be accepted by all, or mostly all, parties regardless of subjective belief. These categories are not mutually exclusive, but serve as guidelines in discussing perceptions of harm in polygamy (most objections to “polygamy” are objections to polygyny, with polyandry rarely attracting attention due to the conception that humans show “an overwhelming preference for monandry,”⁷²) and rarity: “while...85 percent of human societies have practiced polygyny, polyandry is very rare (.1 percent).”⁷³ Ultimately, the concept of harm regarding polygamy, as Campbell observes regarding polygyny’s perceived harm to women, “seem[s] to drive current legal and policy understandings of plural marriage.”⁷⁴ The variability in polygamous rationales and family forms (such as Islamic, Christian, “customary,” or polyamorous), suggests that harm is not uniform and “it would be contrived and inappropriate to imagine that a single policy response to polygamy would be effective in all plural marriage societies and families.”⁷⁵

Examples of the alarmist normative harm claims exhibit essentializing tendencies and revolve around equality concerns, such as Bramham’s claim that

[L]iberal societies...by being tolerant...can become unwitting accomplices in endangering,

⁷¹ Avigail Eisenberg, “How Should Public Institutions Assess Religious Identity?: The Case of Polygamy” in Gillian Calder & Lori G Beaman, eds, *Polygamy’s Rights and Wrongs: Perspectives on Harm, Family, and Law* (Toronto: UBC Press, 2014) 46 at 64.

⁷² Alan Trevithick, “On a Panhuman Preference For Monandry: Is Polyandry an Exception?” (1997) 28:3 J Comparative Family Studies 154 at 175.

⁷³ Carrie A Miles, “‘What’s Love Got to Do with It?’: Earthly Experience of Celestial Marriage, Past and Present” in Cardell K Jacobson & Lara Burton, eds, *Modern Polygamy in the United States: Historical, Cultural and Legal Issues* (New York: Oxford University Press, 2011) 185 at 188.

⁷⁴ Angela Campbell, “Bountiful Voices” (2009) 47:2 Osgoode Hall LJ 183 at 191.

⁷⁵ Campbell, “How Have Policy Approaches Responded,” *supra* note 64 at 34.

oppressing or persecuting some of the very groups they ought to be protecting...The answer lies in core values and beliefs...in...all liberal democracies, equality is at the top of the list, not diversity. Merely being different isn't enough to override another person's human rights.⁷⁶

Arguably, the ability to make fundamental decisions about private sexual ordering is a “person’s human right,” especially as it is enshrined in the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:...(b) The same right freely to choose a spouse.⁷⁷

Recognitions of harm as normative beliefs sometimes appeal to emotion. A good example of this is the use of guilt-by-association and essentializing cultural misogyny:

[I]n the Middle East...plural wives refer to one another as ‘troubles,’ and in Afghanistan...girls have been known to set themselves on fire rather than marry into such unions. In one extreme, polygamy practiced by the Yanomamo people of the Amazon consists of the men of one village sneaking up on and attacking and killing the men of a neighboring village. They grab the screaming babies, bash their brains out on the rocks and spear the older children, pinning their bodies to the ground, or throw them off the cliffs...In triumph, the Yanomamo men then lead the captured women back to their new lives as secondary wives.⁷⁸

Moore-Emmett then compares the campaign for legalization of polygyny to a “certain segment of African slaves in America who fought against their own emancipation,” female genital mutilation, foot-binding, and denial of female suffrage.⁷⁹ Moreover, any deviation is dismissed as false: “[w]hile happiness can be a very subjective state of mind...women have confided to me during interviews that they were commanded by their leaders to be happy.”⁸⁰ The allegation is that polygyny is always harmful and the product of violence, and any evidence to the contrary is illegitimate. “Harm” should always be evaluated against observer bias.

⁷⁶ Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada's Polygamous Mormon Sect* (Toronto: Vintage Canada, 2009) at 402.

⁷⁷ *Convention on the Elimination of All Forms of Discrimination against Women [CEDAW]* 18 December 1979, 1249 UNTS 13, online: <<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>>, Article 16.

⁷⁸ Andrea Moore-Emmett, *God's Brothel: The Extortion of Sex for Salvation in Contemporary Mormon and Christian Fundamentalist Polygamy and the Stories of 18 Women Who Escaped* (San Francisco, CA: Pince-Nez, 2004) at 39-40.

⁷⁹ *Ibid* at 41.

⁸⁰ *Ibid* at 41.

The more subtle contention that polygamy is invariably unequal and thus harmful is seen in a statement by a body set up to interpret *CEDAW*: “[p]olygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be...prohibited.”⁸¹ Apparently meaning “polygyny” (since polyandry and polyamory can be empowering), this argument asserts that inequality (even willingly experienced) should curtail individual freedom and choice. At best, this is a normative belief. Moreover, it potentially ignores lived reality:

[Among the Lele people] [p]olygyny in itself made the competition for wives intense...From a man’s point of view women were the most desirable objects their culture had to offer...Since men competed with one another for women there was scope for women to manoeuvre and intrigue...no woman doubted she could get another husband if it suited her.⁸²

This was also found in Mormon polygyny: “mothers have significant control over the family. No matter how much the patriarchal order might give the husband and father top billing...it is the mother in reality who has a great deal to do with the training of their own children and the management of their households.”⁸³ “Inequality” can, then, be a superficial judgment. As Bhikhu Parekh argues:

Since no culture exhausts the full range of human possibilities, multiculturalism...requires liberalism to become self-critical and to engage in an open-minded dialogue with other doctrines and cultures. It rejects the liberal claim to enjoy the monopoly of moral good and to be the final arbiter of all moral values, its crude and tendentious division of all ways of life and thought into liberal and nonliberal, and its persistent tendency to avoid a dialogue with other cultures by viewing them as nothing more than minority cultures whom it would “grant” such rights as it unilaterally determines.⁸⁴

The issue of perceived inequality is an important cornerstone for all examples of private sexual ordering discussed in this text. It will be expanded upon further in subsequent chapters. Next, we turn to the concept of “harm.”

⁸¹ Committee on *CEDAW*, General Recommendation Number 21, quoted in Susan Drummond, “Polygamy’s Inscrutable Criminal Mischief” (2009) 47:2 *Osgoode Hall LJ* 317 at 361-362.

⁸² Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (Baltimore, MD: Pelican Books, 1970) at 177-178.

⁸³ Janet Bennion, *Women of Principle: Female Networking in Contemporary Mormon Polygyny* (New York: Oxford University Press, 1998) at 154.

⁸⁴ Bhikhu Parekh, “A Varied Moral World” in Joshua Cohen, Matthew Howard, & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 69 at 74.

“Harms” can be alleged circumstantially. One claim links polygyny to crime: “[a] non-trivial increase in the incidence of polygyny, which is quite plausible if polygyny were legalized...would result in increased crime and antisocial behaviour by the pool of unmarried males it would create.”⁸⁵ This pseudo-scientific argument ties family structure to civility (a strategy with a long history, as Francis Lieber argues⁸⁶). It is reinforced by dubious statistics: “a 0.01 increase in sex ratio was associated with a 3% increase in property and violent crimes.”⁸⁷ Whether polygyny would increase, the applicability of different social contexts, and even the correctness of the statistics (real and hypothetical), is a matter of faith.

Strassberg makes another philosophical objection to polygyny, making the implicit assumption that marriage determines societal demographics and political structure. Strassberg, using Hegelian theory, argues that polygyny and, possibly polyamory, harms society by failing to “[provide] a constraining enough environment to create the conflict that pushes children to define themselves as distinct from their parents.”⁸⁸ In failing, unlike monogamous marriage, to “[make] possible...both a private sphere of love and emotion capable of developing individuals through attention to their particular needs and a public sphere of rights and reason,” and “[teach]...individuals that social unity is the true experience of individuality,” polygyny “harms” society. Even polyamory, free from patriarchy, raises “serious concerns about how polyamory could affect individual autonomy, the maintenance of distinctive public and private spheres, and

⁸⁵ *Reference re. Section 293*, *supra* note 65 at para 499, discussing the evidence of Joseph Henrich.

⁸⁶ Francis Lieber, a respected political scientist quoted in *Reynolds v United States*, 98 US 145 (1879), wrote in 1855 that “monogamic marriage...is one of the pre-existing conditions of our existence as civilized white men...Strike it out, and you destroy our very being.” Francis Lieber, “The Mormons: Shall Utah be Admitted into the Union?” 5 Putnam’s Monthly 225 at 233-234, as quoted in Martha M Ertman, “Race Treason: The Untold Story of America’s Ban on Polygamy” (2010) 19:2 Colum J Gender & L 287 at 333.

⁸⁷ *Reference re Section 293*, *supra* note 65 at para 515.

⁸⁸ Maura I Strassberg, “The Challenge of Post-Modern Polygamy: Considering Polyamory” 31:3 (2003) Capital UL Rev 439 at 560.

individual reconciliation with social life and identification with the state.”⁸⁹

Strassberg’s inventive apologetia for the monogamous nuclear family fails both to satisfactorily account for the continuing integrity of liberal democratic society in the face of the relaxation of marriage norms, and also to prove that no individual growing up in a polygynous or polyamorous family can think individually or is interested in politics.⁹⁰ In linking plural unions to totalitarianism, Strassberg uses the framework of a philosopher who betrays totalitarian sentiment: “[f]reedom is nothing but the recognition and adoption of such universal subjects as right and law.”⁹¹ The objection to polygamy that it would harm the nation’s abilities (like the statement “in Asia domestic servitude and despotic government have been seen to go hand in hand in every age,”⁹²) is not convincing in either identifying or assessing harm.

“Objective” harm critiques of polygyny are stronger. Opponents of polygamy point to sociological analysis of Bedouin polygyny, which found that

Mental health problems are common among Bedouin-Arab women in plural marriages...low self-esteem, depression, nervousness and somatic symptoms are especially common, particularly among senior wives...Bedouin-Arab women in plural marriages are more likely to become psychiatric patients.⁹³

Bennion’s work among the Apostolic United Brethren (or AUB, a polygynous Mormon sect) found that it is common for “[women who deviate from traditional sex roles] to be labeled witches, lesbians, apostates, and devils because of their potential threat to male authority and

⁸⁹ *Ibid* at 562.

⁹⁰ Strassberg, *ibid*, intuitively that her critique “may explain why polyamorous people do not seem very interested in political action or a legal institution of polyamorous marriage,” despite earlier (at 549) quoting a survey of 200 readers of the “national polyamory magazine” stating “68% favored state approval of group marriage.”

⁹¹ GWF Hegel, quoted in Strassberg, *ibid*, 467 at n 187.

⁹² Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, translated by Anne Cohler, Basia Miller & Harold Stone, eds (New York: Cambridge University Press, 1997) at 270.

⁹³ Nicholas Bala et al, “An International Review of Polygamy: Legal and Policy Implications for Canada” in Status of Women Canada *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* (2005), online: <<http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf>> at 14.

established male-female sex roles.”⁹⁴ In addition to these “circumscriptive and marginalized conditions of women,”⁹⁵ other harms stem from the large families which can be a feature of polygamous families: a “popular Allredite [AUB] tenet” is that “[t]he Lord understands it when we find creative ways of getting by---if that means stealing from the Gentiles [non-Mormons], then that is what we have to do.”⁹⁶ Obviously, neither of these stated harms lend stability or credibility to this cultural structure, although it is interesting to note the State’s inability to, or disinterest in, the alleviation of the poverty of these plural families.

Bennion also documents incest in an independent fundamentalist family,⁹⁷ the AUB,⁹⁸ and another sect (the Kingston family group): “[t]he Kingston clan has often used [Lot’s biblical incest] to justify incestuous relationships.”⁹⁹ Similarly, among the endogamous Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS), genetic conditions from inbreeding are beginning to occur, as “during the 1990s, fumarase deficiency had been reported in at least 20 children in [the main FLDS location of] Hilldale [*sic*], Utah and Colorado City, Arizona.”¹⁰⁰ Fumarase deficiency is a serious genetic disorder, often leading to early death, while “those who do survive beyond infancy typically have IQs below 25...Many are never able to walk or even sit without support.”¹⁰¹ This harm is serious, but is not an indictment of polygyny, as monogamous endogamous communities such as the Old Order Amish also experience elevated risk for genetic

⁹⁴ Bennion, *Women of Principle*, *supra* note 83 at 152.

⁹⁵ *Ibid*,

⁹⁶ *Ibid* at 76. This is related to welfare fraud, which Bennion describes in a later work: “I have documented welfare abuse in my research among both the Allred group and the FLDS. The typical explanation I heard from both wives and patriarchs was that using the government is justified as it is the enemy.” Bennion, *Polygamy in Primetime*, *supra* note 58 at 221.

⁹⁷ Bennion, *Polygamy in Primetime*, *ibid*, at 274.

⁹⁸ *Ibid* at 275-276.

⁹⁹ *Ibid* at 276.

¹⁰⁰ Deborah L Cragun & Ryan T Cragun, “The Intricacies and Ethics of Parental Genetic Testing” in Cardell K Jacobson & Lara Burton, eds, *Modern Polygamy in the United States: Historical, Cultural and Legal Issues* (New York: Oxford University Press, 2011) 331 at 338.

¹⁰¹ *Ibid*.

disorders,¹⁰² and “[d]espite the increased risks for recessive disorders that are present among endogamous populations (such as the FLDS...), the absolute risks remain quite low.”¹⁰³

Finally, “[p]olygyny can actually increase genetic variation in populations that are not endogamous or consanguineous.”¹⁰⁴ Inbreeding, not polygyny, is the harmful practice here.

Altman and Ginat identify another potential structural “harm:”

Barry couldn’t recall the exact number of children in the family...Ira has 8 wives and 43 children. He had considerable difficulty remembering the number of children in the family, which child belonged with which mother, whether they were in plural marriages, had left the group, or other facts. At one point, he said, ‘Sometimes I cannot even remember my own children’s names’...When we visited one of the family’s homes, four children were in the living room. As Seymour introduced us, he asked one of his sons what his name was-he had forgotten.¹⁰⁵

While fundamentalist Mormon polygyny is unique for its attempt to have as many children as possible, and Altman and Ginat noted in the same sect that some “fathers are in contact with, attentive to, and concerned about their children’s lives,”¹⁰⁶ the general conclusion that “[f]athers generally seemed to treat their children...in a distant, cool, and detached way”¹⁰⁷ may point to the “harm” of unhealthy child-father relationships. Lack of bonding can lead to abuse:

In economically deprived families, the father will often travel far from the home for work. He may be absent for long intervals. Under such conditions sexual abuse may occur. A man who is not often present during the imprinting years of his children’s lives may become sexually attracted to the girls as they ‘blossom.’¹⁰⁸

Harms such as these cannot be ignored. But the question being begged is whether polygamy inevitably causes them. A causal connection across all polygamy has never been shown, and so to attack polygamy with tales of abuse is disingenuous. A rational counterargument is that “all of the other alleged abusive and exploitative acts (child and spousal

¹⁰² *Ibid* at 339-340.

¹⁰³ *Ibid* at 340.

¹⁰⁴ *Ibid*.

¹⁰⁵ Irwin Altman & Joseph Ginat, *Polygamous Families in Contemporary Society* (New York: Cambridge University Press, 2009 [First Published 1996]) at 424-426.

¹⁰⁶ *Ibid* at 423.

¹⁰⁷ *Ibid* at 424.

¹⁰⁸ Janet Bennion, “The Many Faces of Polygamy: An Analysis of the Variability in Modern Mormon Fundamentalism in the Intermountain West” in Cardell K Jacobson & Lara Burton, eds, *Modern Polygamy in the United States: Historical, Cultural and Legal Issues* (New York: Oxford University Press, 2011) 163 at 179.

abuse) [allegedly associated with polygyny] are clearly prohibited by existing, ordinary criminal provisions.”¹⁰⁹ Harmful conduct should be prosecuted without attacking legal activities.

Religion, Morality, and Prostitution

Similarly to polygamy, prostitution has suffered a subjective attack on religio-moral grounds. Prostitution is specifically attacked by the *CEDAW*, where Article 6 reads “States Parties shall take all appropriate measures, including legislation, to suppress all forms of...exploitation of prostitution of women.”¹¹⁰ The “harm” inherent in sex work is most often phrased as harm to its practitioners, engaging a hotly-contested debate on its (supposedly monolithic) objective realities. Less frequently, its harm is subjectively “moral.” This instance of private sexual ordering provides similarities to other narratives such as polygamy, but provides its own unique context to legal regulation of the consenting sexual citizen.

Harm to prostitutes from sex work is a hotly debated topic, but the proponents of this view argue at both a theoretical and practical level. Arguments purport to show that “prostitution is more akin to slavery than to employment,”¹¹¹ and use “objective” harm claims as bases:

The majority of women who become prostitutes have a history of sexual abuse or incest...Pimps or other third party recruiters and traffickers control the vast majority of prostitutes. These managers are viciously abusive...Becoming a prostitute entails ‘the systematic destruction’ of all that is individual...about [a] woman, the vitiation of her ideas, opinions, and preferences.¹¹²

That this is the experience of some is certain. However, ignoring the varying motivations of sex work, the types, and even stigmatizing those “living off the avails of prostitution”¹¹³ (who can sometimes help sex workers¹¹⁴) can rob experts of credibility:

¹⁰⁹ British Columbia Civil Liberties Association, “Annual General Meeting Newsletter, 2001,” quoted in Bailey & Kaufman, *supra* note 33 at 156.

¹¹⁰ *CEDAW*, *supra* note 81 at Article 6.

¹¹¹ Lauren Kaplin, “When Money Changes Hands: ‘Unwelcomeness’ in Sex for Money” (2011) 33 *Women’s Rts L Rep* 43 at 44.

¹¹² *Ibid* at 45-46.

¹¹³ This phrasing, used by s 212 of the *Criminal Code*, RSC 1985, c C46, captures more than just pimping.

¹¹⁴ See, eg, the Court of Appeal for Ontario’s judgment in *Canada (Attorney General) v Bedford*, 2012 ONCA 186 at para 249 regarding individuals “involved in some way with the business of the prostitute...who not only does not exploit the prostitute, but may actually be protecting her,” by, for example (at para 251) “perform[ing] precisely the

Although Dr. Farley has conducted a great deal of research on prostitution, her advocacy appears to have permeated her opinions. For example, Dr. Farley's unqualified assertion in her affidavit that prostitution is inherently violent appears to contradict her own findings...Similarly...Drs. Raymond and Poulin were more like advocates than experts offering independent opinions to the court. At times, they made bold, sweeping statements that were not reflected in their research.¹¹⁵

Weitzer drives home this point:

[S]ome [oppression paradigm] proponents also make specific empirical claims that, taken together, present an image of *concentrated, manifold victimization* [including] that *most* prostitutes enter the trade when they are 13-14 years old, were physical or sexually abused as children, were tricked or forced into the trade by pimps or traffickers, are subjected to routine violence while working, use or are addicted to drugs, suffer severe psychological problems, and desperately want to exit the sex trade...these claims...are largely drawn from nonrandom, unrepresentative, and small samples of the street-based population...we cannot even say that these generalizations apply to street prostitution, let alone the various types of indoor prostitution.¹¹⁶

Abuses do exist, but blurring the line between advocacy and research can distort recognition of harms. For example, Terri Jean Bedford, an applicant attempting to decriminalize sex work in Canada, has been “‘raped and gang-raped too many times to talk about,’ beaten on the head with a baseball bat, and tortured physically and psychologically.’”¹¹⁷ The “harm,” however, ought to be causally located not in the violence itself, but in criminalization of protective measures, an idea supported by European findings:

In favourable environments, a sex worker can have absolute control over clients, safer sex practices and condom use, but in less favourable environments the same sex worker does not have the same autonomy, particularly if controlled by a third party or subject to clampdowns or harassment by law enforcement. It is not the actual selling of sexual services as such that determines the levels of risk — it is the social determinants, working conditions and other contextual factors...the social, legal and economic frameworks are particularly important.¹¹⁸

Statistics of violence do not prove causation of harm by prostitution itself.

Further, it is not clear that harms are best addressed through regulation of prostitution.

Even if abuse created prostitutes, the solution would be to attack abuse, not prostitution. And

sorts of simple, common sense tasks – screening customers, booking hotel rooms, and acting as the prostitutes’ ‘safe call’ – that the application judge found could dramatically improve prostitutes’ safety.”

¹¹⁵ Bedford, ONSC, *supra* note 59 at paras 353 and 357.

¹¹⁶ Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York: New York University Press, 2012) at 13-14.

¹¹⁷ Bedford, ONSC, *supra* note 59 at para 26.

¹¹⁸ TAMPEP (European Network for HIV/STI Prevention and Health Promotion Among Migrant Sex Workers), *Sex Work in Europe: A Mapping of the Prostitution Scene in 25 European Countries* (Amsterdam: TAMPEP, 2009) online: <<http://tampep.eu/documents/TAMPEP%202009%20European%20Mapping%20Report.pdf>> at 35.

“traditional regulatory approaches inflict serious harm on commercial sex workers and do little to protect buyers or the general public.”¹¹⁹ As always, “harm” is in the eye of the beholder, as is how best to deal with it. The “harm” of prostitution can be rooted in deeper social issues: “Korean culture, steeped in Confucianism, is unlikely to accept the notion of a woman exercising her legitimate choice to earn a living in prostitution.”¹²⁰ “Harm” to prostitutes is not always rooted in prostitution itself.

This can also be seen in theoretical arguments against prostitution, where in one strategy “[p]rostitutes are recast as ‘sex slaves’ and ‘prostituted women,’ thereby erasing any semblance of human agency.”¹²¹ The harm claim is that

[P]rostitution is not only rooted in inequality; it also *perpetuates* inequality both symbolically and instrumentally... this fundamental harm will persist no matter how prostitution, pornography and stripping are organized...legalizing these practices...will not alter the gender inequality that is intrinsic to sexual commerce.¹²²

This reasoning was echoed in *Bedford*, when counsel for Ontario’s Attorney General argued “all [commercial sex] is inconsistent with respect for the human dignity of the seller... ‘harm’ should...include the commodification of sex and attitudinal harm that would accrue to women as a result of legally sanctioned prostitution,”¹²³ an assertion belied by de Marneffe’s observation that

[t]he claim, however, that no one freely chooses to do sex work is clearly contradicted by the available evidence...It remains the case that *some* women who are not drug addicts freely choose to do this work because they prefer it to their other employment options. They can make more money at prostitution than at other jobs. They like the flexible hours and being their own boss. Although sometimes unpleasant, they do not find this work unbearable. In considering whether a prostitution law violates the rights of sex workers, one must consider the rights of every sex worker whose freedom this policy limits.¹²⁴

¹¹⁹ Sylvia A Law, “Commercial Sex: Beyond Decriminalization” (2000) S Cal L Rev 523 at 553.

¹²⁰ Ji Hye Kim, “Korea’s New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature’s Intent to Protect Prostitutes from Abuse” (2007) 16:2 Pac Rim L & Pol’y J 493 at 519.

¹²¹ Weitzer, *supra* note 116 at 12-13.

¹²² *Ibid* at 10-11.

¹²³ *Bedford*, ONSC, *supra* note 59 at para 220.

¹²⁴ de Marneffe, *supra* note 54 at 115 [emphasis in original].

As with all other theoretical identifications of harm, the claim that selling sex can never be considered “voluntary,” or regardless should be eliminated due to the harm individuals suffer, is essentializing and a matter of belief, not reason.

An appeal to the “threat [prostitution] poses to marriage, the family, and society’s moral fiber”¹²⁵ is obviously not an attack based on universally-recognized harm, especially given the relaxation of strictures on moral-legal coercion concerning sexuality. As the majority noted in *Lawrence v. Texas*, concerning related morality-based objections to homosexuality,

[C]ondemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family... These considerations do not answer the question before us... The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’¹²⁶

The Regulation of Female Sexuality and Reproductive Rights

Legal interference with the female body is distressingly common, one I will discuss in later chapters through early marriage, enforced “modesty,” contraception, and female genital cutting (also known as “mutilation”). Harm again proves to be a fluid concept, solidified only by normative claim. For example, “private” realm harms involve complex interplays with State regulation:

Feminist legal strategies had to work both sides of the private/public divide that marriage inhabited... To defend reproductive choice... or to try to secure equalitarian marriages, it was necessary to see intimate decisions taking place in a sheltered private realm. But in order to protect wives and daughters from being overpowered physically by the men in their households, feminists wanted to bring public authority into the private domestic sanctum.¹²⁷

Similarly to debates on familial privacy, the regulation of reproductive rights continues to be contested, explicitly in America, where *Roe v. Wade*¹²⁸ held that abortion within the first two trimesters could not be prohibited:

[A]fter [the first trimester of pregnancy], a State may regulate the abortion procedure to the extent

¹²⁵ Weitzer, *supra* note 116 at 10.

¹²⁶ *Lawrence v Texas*, 539 US 558 (2003) at 571.

¹²⁷ Cott, *supra* note 25 at 210.

¹²⁸ 410 US 113 (1973).

that the regulation reasonably relates to the preservation and protection of maternal health...This means, on the other hand, that, for the period of pregnancy prior to this ‘compelling’ point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that...the patient’s pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.¹²⁹

The decision unequivocally protects the right to freedom from State interference, but remains vulnerable: “[r]eligious conservatives are determined to get rid of *Roe*...Congress has in fact nibbled away at the decision...the future of *Roe v. Wade* is still somewhat cloudy.”¹³⁰ The philosophy of harm is central to the debate on reproductive rights, as whether a fetus can be a valid site for “harm” informs much of the debate. It is important to identify the normative nature of “harms” which determine the debate, whether bodily autonomy or fetal sanctity. As Friedman notes, summarizing “pro-life” mindsets, “[y]ou cannot compromise with murder.”¹³¹

Legal regulation of female sexuality also occurs around social participation. Harmful, or “bad,” choices, also inform the “good/bad” dichotomy with which improper sexuality is disciplined in a myriad of contexts, where:

[S]exual norms, practices, and representations are deeply implicated in contemporary debates over good and bad citizenship. In each of these areas, individuals are being called upon to manage their sexual choices, to make sure that given the range of options that are available to them, they make the best-which often means privatized, familialized, and self-disciplined-choice.¹³²

“Harm” is more complex when it regulates female sexuality in systems not consonant with international strictures:

Like the Inquisition in the 1600s...modern day inquisitions are attempts to secure the supremacy of fundamentalist religions and their hierarchies of gender, sexuality, and reproduction. The modern day inquisitions...use hostile stereotypes and social condemnation, among other mechanisms, to control sexuality and reproduction and to privilege male dominance.¹³³

While the essentialization of religion as a harmful force is troubling, Cook illustrates several

¹²⁹ *Ibid* at 163.

¹³⁰ Lawrence Friedman, *Private Lives: Families, Individuals and the Law* (Cambridge, MA: Harvard University Press, 2004) at 170-171.

¹³¹ *Ibid* at 171.

¹³² Brenda Cossman, “Sexual Citizens: Freedom, Vibrators, and Belonging” in Linda C McClain and Joanna L Grossman, eds, *Gender Equality: Dimensions of Women’s Equal Citizenship* (New York: Cambridge University Press, 2009) 289 at 293.

¹³³ Rebecca J Cook, “Modern Day Inquisitions” (2011) 65:3 U Miami L Rev 767 at 768.

areas where female sexuality is negatively regulated, such as the restriction/prohibition of medical drugs that bear on female sexuality (such as emergency contraception or post-abortion drugs),¹³⁴ and restriction on reproductive control through “Protection of Life Provisions.”¹³⁵ The feminine seems to be seen as harmful: one glaring example is “the fact that Viagra gets covered by health insurance plans, and not contraceptives.”¹³⁶ The varying definitions of harm highlight the fact that competing conceptions of harm render the debate on what “harm” exists here (either unregulated, or regulated, female sexuality) normative.

Normativity permeates the debate on female sexuality in areas that have not entrenched egalitarianism. An example of the impact normative positions on sex equality can have on society is demonstrated by early marriage, where “key concerns are the denial of childhood and adolescence, the curtailment of personal freedom and the lack of opportunity to develop a full sense of selfhood as well as the denial of psychosocial and emotional well-being, reproductive health and educational opportunity.”¹³⁷ Based on a Western perspective on freedom of choice, sexual equality, and protection for female sexuality and reproductive rights, the “harm” of discriminatory practices in systems that do not share the same stated goals is plain to see. Approaching these issues from a harm prevention aspect, however, leads to a potentially religiously or culturally chauvinist tension between rights discourse and sociocultural practices (some involving only consenting adults). Harm is too elusive a concept with which to cross-culturally analyze the regulation of female sexuality unless a normative standpoint is explicitly taken.

¹³⁴ *Ibid* at 779-781.

¹³⁵ *Ibid* at 784-789.

¹³⁶ *Ibid* at 781.

¹³⁷ United Nations Children’s Fund: Innocenti Research Centre Digest, *Early Marriage: Child Spouses* (Florence, Italy: United Nations Children’s Fund, 2001), online: <<http://www.unicef-irc.org/publications/pdf/digest7e.pdf>> at 9.

Alternatives are possible, such as Eisenberg's "difference principle," where

competing [identity-related] claims can often be compared once they are translated into the specific identity-related values and interests at stake in the conflict. The interests and values at stake are assessed in the contexts in which they arise. Solutions are based on values that are considered crucial in these contexts.¹³⁸

However, no perfect alignment seems possible, frustrating solutions. Eisenberg claims that this approach aims to "narrow the cases that are considered truly difficult ones,"¹³⁹ illustrating that when assessing any competing values (such as "harm"), a perfect solution may be impossible.

The best solution may be to recognize the relativity of harm:

[T]he marriage of a young fifteen-year-old to an already married man may not be an act of sexual abuse but a culturally approved venue for increasing offspring...It is not the path my daughters or granddaughters would ever take, but does that make it wrong for those raised in such a context to believe that the practice can fulfill them?¹⁴⁰

The concept of harm as it is applied to the areas of polygamy, prostitution and regulation of female sexuality (including reproductive rights) is at best only part of a full consideration of a practice on its merits. The shifting definitions of the term, its ability to essentialize people and practices, and the manner in which harm is seen as conclusive of a debate render the concept a dangerous one for nuanced discussions. Harm has a place in the discussion on legal regulation of private sexual ordering, but should not have uncontested primacy in the debate.

The more subtle contention that certain practices impugned by the laws of private sexual ordering are invariably unequal is another philosophical rationale which can govern the sexual citizen. An example is seen in the one-size-fits-all comment of Okin that

[i]n polygamous cultures...men readily acknowledge that the practice accords with their self-interest and is a means of controlling women...Women apparently see polygamy very differently. French African immigrant women deny that they like polygamy and say that not only are they given 'no choice' in the matter, but their female forebears in Africa did not like it either.¹⁴¹

¹³⁸ Avigail Eisenberg, "Diversity and Equality: Three Approaches to Cultural and Sexual Difference" (2003) 11 J Political Philosophy 41 at 62.

¹³⁹ *Ibid.*

¹⁴⁰ Bennion, *Polygamy in Primetime*, *supra* note 58 at 225.

¹⁴¹ Susan Moller Okin, "Is Multiculturalism Bad for Women?" in Joshua Cohen, Matthew Howard, & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 9 at 15.

As noted above, normative arguments cannot be applied indiscriminately. It is possible that in practicing polygamy, women are exercising agency and freedom of choice in a way that is liberating. The fact that their choice does not align with the “right” decision as determined by a majority is not an objection which respects autonomy or pluralism. This is seen in Sigman’s critique that

there is...a libertarian aspect to evaluating women’s participation in polygamy. The societal decision to remove the choice of polygamy from women was and is paternalistic. Both in nineteenth century America and today, some adult women prefer polygyny. Some reasons are strictly religious...whereas others are more pragmatic...prohibiting polygamy infantilizes women, declaring them incapable of providing consent and foreclosing true choice by criminalizing one of their options for family living.¹⁴²

Similar narratives of empowerment exist within prostitution: “[a] majority of indoor [sex] workers in several...studies similarly report that they enjoy the job, feel that their work has at least some positive effect on their lives, or believe that they provide a valuable service,”¹⁴³ and the notion of feminine empowerment is key to the resistance of patriarchal regulation of the feminine. “Inequality” can thus be a superficial, or worse, subjective, judgment, which nonetheless provides the philosophical perspective for regulation.

Impact of Sexual Law on Religious Philosophies

The philosophical imposition of religious teachings upon those who do not follow that creed can imperil the legal order, and the smooth operation of society itself, as it challenges the social contract that the law is based on, namely, the rule of law:

There can, in fact, be considerable differences in citizens’ conceptions of justice provided that these conceptions lead to similar political judgments. And this is possible, since different premises can yield the same conclusion. In this case there exists what we may refer to as overlapping rather than strict consensus. In general, the overlapping of professed conceptions of justice suffices for civil disobedience to be a reasonable and prudent form of political dissent. Of course, this overlapping need not be perfect; it is enough that a condition of reciprocity is satisfied. Both sides must believe that however much their conceptions of justice differ, their views support the same judgment in the situation at hand, and would do so even should their respective positions be interchanged. Eventually,

¹⁴² Sigman, *supra* note 60 at 172.

¹⁴³ Weitzer, *supra* note 116 at 28.

though, there comes a point beyond which the requisite agreement in judgment breaks down and society splits...¹⁴⁴

One potential impact on this “overlapping consensus” is that it is strengthened when the State plays a (relatively) neutral role, and its principles are not (to the extent possible) partial to the majority, allowing for dissent, especially conscientious dissent:

Our loyalty to the liberal polity requires us to tolerate a diversity in the public sphere and a normative multiplicity of communities around us, but at the same time we expect that the state and other communities will allow us a generous freedom to live by our own norms within the private spheres of our own religious communities.¹⁴⁵

This principle allows for full participation in social life for minorities characterized by minority beliefs, whether sexual or religious minorities, which is in accord with at least one prominent conception of the public sphere, described by Ryder, wherein “[w]ithout the ability to demand that neutral rules and policies be adjusted to meet their religious needs, persons of faith cannot participate equally in social and economic life.”¹⁴⁶ The same is true of sexual and conscientious minorities as well, who may be unjustly burdened by a law which is ostensibly equal to all. In this case, slight modifications to the law allow full participation in social life.

As alluded to above, religion is not uniform, and cannot be treated as such even within one faith tradition or congregation. When assessing belief, a persuasive method is the one adopted by the Supreme Court of Canada, which allows for the individuality and subjectivity of belief, requiring

[A] practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual’s spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and[...]he or she is sincere in his or her belief.¹⁴⁷

¹⁴⁴ John Rawls, *A Theory of Justice*, revised ed (Cambridge, MA: Belknap Press, 1999) at 340.

¹⁴⁵ Alvin Esau, “Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Toronto: UBC Press, 2008) 110 at 134.

¹⁴⁶ Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” in Moon, *ibid*, 87 at 90.

¹⁴⁷ *Syndicat Northcrest*, *supra* note 1 at para 56.

Having established that an individual or group believes (conscientiously or religiously) that a particular form of private sexual ordering is required, the law has three main responses to create a dialogue: outright prohibition, complete acceptance of the practice, or a more nuanced balancing of interests between the law and the impugned group. Two of these options can be rationally disposed of rather quickly. I will argue, as Ryder implies in the above quotation, that the importance of societal participation for all groups outweighs any theoretical gain from enforcing complete uniformity.

Law's first option, that of enforcing conformity, is in accordance with the Platonic ideal that free-thinkers must be contained. However, this rationale does not withstand scrutiny in a modern, diverse society where social cohesion is deemed to be essential:

[The past heterosexual definition of marriage] spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.¹⁴⁸

Moreover, such an approach is contrary to the nature of current legal codes consonant with international legal norms, which guarantee freedom of conscience, religion, and cultural practice, and do not meet the standards of "foundational neutrality": "[t]he foundational principle of neutrality is that a principle of political justice or a principle of liberty...is valid only if it can be justified without making any assumptions about what kinds of life are best for people."¹⁴⁹ While these rights are not absolute, as alluded to by the Supreme Court quotation above, the curtailment of the rights calls out for more than simply a justification that they are prohibited because they are different.

¹⁴⁸ *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22.

¹⁴⁹ de Marneffe, *supra* note 54 at 135.

As a final point, attempting to suppress minority practices is a hard-fought legal and political process, where sites of resistance in law are always possible and are in fact probable. Most groups recognize that rights must be fought for, at least in the legal and social arenas: “rights are not gifts...they are won through concerted collective action arising from both a vibrant civil society and public subsidy.”¹⁵⁰ A group that does not feel it is being treated fairly will remain a constant threat to the rule of law, as well as a constant challenge: “[t]he universal and chief cause of this revolutionary feeling [is]...the desire of equality, when men think that they are equal to others who have more than themselves; or, again, the desire of inequality or superiority.”¹⁵¹ To attempt to reverse the rights revolution, or to halt the existing expansion of facially-neutral legal rules, would be a costly and likely fruitless endeavour for legislators.

This is similarly the case for a complete abandonment of value judgment by law. A State which truly had no place in the bedrooms of the nation would ignore socially deleterious and non-consensual practices such as, to name only a few, domestic violence, sexual assault, or abuse of vulnerable people (such as children). The argument that “[t]hat government is best which governs least”¹⁵² is made dubious by objections that it completely abandons society’s interests to the strongest parties. As U.S. Chief Justice Waite opined, albeit problematically, an inability for State law to engage with religion would allow “every citizen to become a law unto himself,” resulting in a situation where “[g]overnment could exist only in name.”¹⁵³ Clearly, all-or-nothing approaches, while philosophically defensible, are unlikely to generate the most favourable results.

¹⁵⁰ Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago, Ill: University of Chicago Press, 1998) at 197.

¹⁵¹ Aristotle, *Politics*, translated by Benjamin Jowett, in Richard McKeon, ed, *The Basic Works of Aristotle* (New York: Modern Library, 2001) at 1235.

¹⁵² Henry David Thoreau, “Civil Disobedience”, online: <<http://thoreau.eserver.org/civil1.html>>.

¹⁵³ *Reynolds*, *supra* note 86 at 166-167.

The test then becomes how to assess competing rights, such as how to decide when people are making decisions the State should respect and when harm or equality concerns militate in favour of criminal or civil prohibition. While various attempts have been made to either solve the dilemma or at least eliminate all but the hardest decisions,¹⁵⁴ the issue of where to draw the legal line continues to bedevil a philosophical discussion of the law and may never be solved. However, an approach that recognizes agency even where it is traditionally rendered dubious by a “[r]efusal to ‘do the right thing’ or to take care of oneself,” which is “interpreted as an inability to exercise agency”¹⁵⁵ is to be encouraged: moreover, the commitment to equality and harmlessness in the law of private sexual agency should not be conflated with the attempt to erase any religious or conscientious position that defies a subjective definition of harm or equality, and certainly not when the “victim” of such inequality is only the individual making the choice. Philosophically, the answer to the correct balancing of the law will be contextual, and the main progression would be to remove from the law of private sexual ordering influences or perspectives which privilege subjective viewpoints at the expense of other lifestyles or faith matrices.

Conclusion

Religious and moral content permeates law, and the law of private sexual ordering is no exception. This chapter explored both the legal inputs that religion provided and the impacts that were felt by religious and other conscientious communities characterized by their sexuality, in the face of legislation drafted in accordance with a discordant majority vision. This chapter further argued that while both the tyranny of the majority and absolute licence were tenable legal philosophies, the correct theoretical response for law to make to diversity in the law of private

¹⁵⁴ See, for example, Eisenberg, “Diversity and Equality,” *supra* note 138, and Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (London: Ashgate, 2014).

¹⁵⁵ Beaman, *Defining Harm*, *supra* note 55 at 100.

sexual ordering was a balance between competing imperatives, neither ruling out subjective harm- and equality-based proscriptions, nor allowing full rein to subjective viewpoints. Religion can be a force for good, and provided it is based on theories of pluralistic equality, in all but extreme situations legal acceptance rather than repression of religious communities and their sexual ordering is the proper solution. Such a contextual argument must be made with references to on-the-ground realities, but holds true philosophically for the specific instances of polygamy, prostitution, and the regulation of female sexuality.

CHAPTER IV

Polygamy: Misunderstood or Malign?

“We’re defenders of marriage/in three-button suits/we’ll raise our double-standard and see who salutes... defending the institution/against people who want to get married.”¹ Roy Zimmerman’s satirical attack on advocates against same-sex matrimony aptly fits the debate on polygamy, which is often criminalized and always discouraged by developed Western legal systems and systems they influence. This disparagement raises issues of “religious persecution and class bias,” while blocking a system which could provide “consenting adults with the religious and sexual autonomy to enter into whatever family structure they find most favorable, without hindrance or judgment from the government.”² Yet this principled approach favouring autonomy is eschewed by most legal systems.

Posner notes that despite polygyny’s ubiquity in “non-Western societies” to the extent that “it can fairly be regarded as the norm,”³ this ubiquity is counterbalanced by the fact that “[t]he taboo against polygamy in Christian societies runs so deep that there is little felt need to justify it and therefore little sensitivity to the contradictions that such efforts to justify it as are made often involve.”⁴ Societal realism regarding “the range of family formations...and what we know about both the joys and the harms that emerge there”⁵ has, in polygamy’s case, outstripped outdated laws regulating the practice. This is seen in lyrics of the popular rap song “No Church in the Wild,” which describes the idea that “love is cursed/by monogamy.”⁶

¹ Roy Zimmerman, “Defenders of Marriage”, online: Youtube <<https://www.youtube.com/watch?v=bja2ttzGOFM>>.

² Ashley E Morin, “Use it or Lose it: The Enforcement of Polygamy Laws in America” (2014) 66:2 Rutgers L Rev 497 at 524.

³ Richard A Posner, *Sex and Reason* (Cambridge, MA: Harvard University Press, 1998) at 69.

⁴ *Ibid* at 253.

⁵ Rebecca Johnson, “Reflecting on Polygamy: What’s the Harm?” in Gillian Calder & Lori G Beaman, eds, *Polygamy’s Rights and Wrongs* (Toronto: UBC Press, 2014) 97 at 114.

⁶ Kanye West and Jay-Z, “No Church in the Wild”, online: Youtube.com <<https://www.youtube.com/watch?v=FJt7gNi3Nr4>>.

Polygamy can be culturally portrayed as negatively impacting on family, as with the African traditional narrative of Ariwehu and her husband Ohia, who had secretly learned the language of the animals, but whose marriage is ruined by a second wife, who “could not bear to see Ohia and Ariwehu together, and if they spoke or laughed when she was near, she flew into a rage and accused them of ridiculing her. She crept around the compound, listening to all they said, always ready to complain or to weep if she heard so much as a sentence pass their lips.”⁷ The situation ends with Ohia committing suicide. Similarly, heartbreak ensues for Wang Lung’s first wife O-lan when Wang Lung takes her two pearls, her only jewellery, for his second wife in Pearl Buck’s *The Good Earth*.⁸ Common sense and even literary works seem to suggest polygamy is indeed pernicious.

But polygamy is more than a popular stereotype of a “cruel system [and its practitioners know] it: a co-wife was called a *kishiya*—a ‘jealous one.’”⁹ It is a microcosm of law’s interaction with the diverse practices of sexual citizens. The central issue at stake in polygamy is typical of the law of private sexual ordering: what justification exists for constraining sexual and conjugal freedom, especially as citizens now have recourse to greater freedom in their sexual and familial relationships, such as non-formalized non-dyadic arrangements? This question in the context of polygamy must account for the myriad forms of plural relationships, such as polyamory and homosexual polygamy. Yet objections to plural relationships are sometimes more visceral than intellectual. Denike highlights racist subtexts in North America’s criminalization of polygamy, persuasively arguing that this influence, together with other such dubious historical rationales for criminalizing polygamy, must be removed from contemporary discourse:

⁷ “The Man who Learned the Language of the Animals” in *African Myths and Legends*, retold by Kathleen Arnott (New York: Oxford University Press, 1992) 5 at 10.

⁸ Pearl S Buck, *The Good Earth* (New York: Washington Square Press, 2005) at 199-200. “O-lan returned to the beating of his clothes and when tears dropped slowly and heavily from her eyes she did not put up her hand to wipe them away; only she beat the more steadily with her wooden stick upon the clothes spread over the stone.”

⁹ Gaye Shortland, *Polygamy: A Novel* (Dublin, Ireland: Poolbeg Press, 1998) at 20 [emphasis in original].

To determine where polygamy belongs in the public policy and cultural practice of Canada and the United States today, the challenge will invariably be what such analyses suggest is both necessary and nearly impossible: to extract polygamy from the racial/national/sexual frameworks that have made it mean what it does for us and to throw into relief the significance of race-thinking in making it out to be so odious to us and unworthy of legal recognition or constitutional protection.¹⁰

This discourse has not changed: in 2014 the Canadian government introduced the “Zero Tolerance for Barbaric Practices Act” which, now passed with the word “Cultural” added,¹¹ bars polygamous refugees or immigrants from entering Canada.¹²

At this point, it is necessary to delve deeply into the contested nature(s) of plural conjugal ordering so as to provide a comprehensive picture of what the practices are, and could be, in the modern world. This first of two chapters on polygamy provides a definition and an introduction to polygamy and an outline of its historical and modern practice, including a discussion of the religious context and traditions of polygamy, its legal treatment, and a discussion of the claim that polygamy is inherently “harmful.” This is followed by an examination of the implications of polygamy for issues such as agency and freedom of religion/conscience. Polygamy’s legal stigma demonstrates Thornton’s insight that Western law incorporates a “developmental model” which “defined northwest Europe (and its North American diaspora) to be at the height of a uniform trajectory of development that portrayed other societies along the same trajectory, but at lower levels of development...viewed as traditional, backward, less developed, and barbaric.”¹³

Further, as seen in all areas of the legal regulation of private sexual ordering, the Foucauldian theory of “governmentality”—the use of power in multiple loci to control and discipline the population through methods of a power-knowledge dichotomy, or as Foucault

¹⁰ Margaret Denike, “Polygamy and Race-Thinking: A Genealogy” in Gillian Calder & Lori G Beaman, eds, *Polygamy’s Rights and Wrongs* (Toronto: UBC Press, 2014) 142 at 161-162.

¹¹ The *Zero Tolerance for Barbaric Cultural Practices Act*, SC 2015, c 29, received Royal Assent June 18, 2015.

¹² Daphne Bramham, “Ottawa aims to end barbaric practices, such as polygamy” (9 December 2014), *The Vancouver Sun*, online: VancouverSun.com, <<http://www.vancouversun.com/life/Daphne+Bramham+Ottawa+aims+barbaric+practices+such+polygamy/10454467/story.html>>.

¹³ Arland Thornton, “The International Fight Against Barbarism” in Cardell K Jacobson & Lara Burton, eds, *Modern Polygamy in the United States: Historical, Cultural and Legal Issues* (New York: Oxford University Press, 2011) 259 at 286.

himself phrased it, “sexuality represents the precise point where the disciplinary and the regulatory, the body and the population, are articulated”¹⁴—exists in the regulation of polygyny. Historically, “[e]ven as the body was central to political subjectivity, the body became a political object in ways that rendered some bodies valuable to the nation, to the exclusion of other bodies.”¹⁵ The polygamous body was seen as aberrant, needing discipline, which is still imposed by the law today. This chapter aims to focus on the various legal regimes governing polygamy, and how each impacts on agency, equality, or both.

In discussing the legal and societal perception of polygamy, it is important to bear in mind two mutually-reinforcing phenomena: one is the tendency to ignore the fact that “the charge that polygyny is oppressive to women is contingent; the validity of the charge depends on the individual relationship, just as in monogamous marriage.”¹⁶ The second is that, despite the complex and contingent nature of polygamy, it is subjected to what Malak, in a critique of Islamophobia, terms “saleable sensationalism that panders to popular prejudice.”¹⁷ While critiques of fundamentalist Mormon polygyny best exemplify this description, opponents of polygyny attempt to conflate all instance of it with other (rare) cultural practices: “[i]n Canada, the murder charges against a polygamous Muslim man...for the death of the first wife and three daughters, has confronted the public with the ‘underground’ reality of Muslim polygamy in this country.”¹⁸ Craig Jones, lead counsel for the Attorney General of British Columbia when that

¹⁴ Michel Foucault, “17 March 1976” in Michel Foucault, *“Society Must be Defended”: Lectures at the Collège de France, 1975-1976*, translated by David Macey (New York: Picador Press, 2003) 239 at 252.

¹⁵ Christine Talbot, “‘Turkey Is in Our Midst’: Orientalism and Contagion in Nineteenth Century Anti-Mormonism” (2006) 8:2 *JL & Fam Stud* 363 at 366.

¹⁶ Elizabeth F Emens, “Just Monogamy?” in Joshua Cohen & Deborah Chasman, eds, *Just Marriage* (New York: Oxford University Press, 2004) 75 at 77.

¹⁷ Amin Malak, “Towards a Dialogical Discourse for Canadian Muslims” in Natasha Bakht, ed, *Belonging and Banishment: Being Muslim in Canada* (Toronto: TSAR Books, 2008) 74 at 79.

¹⁸ Nicholas Bala, “Why Canada’s Prohibition of Polygamy is Valid and Sound as Public Policy” (2009) 25:2 *Can J Fam L* 165 at 167.

province successfully tested the constitutionality of polygamy's criminalization,¹⁹ also ties polygyny (through religion) to "clearly criminal activities...closely connected with deep religious or cultural beliefs" such as "female genital mutilation, 'honour killings,' ritual animal sacrifice, and cannibalism."²⁰ These issues have little or nothing to do with polygamy. They are simply a further attempt to "Other" the practice. These objections are not new: 18th century philosopher David Hume opined (despite the lack of legal female personhood in marriage at the time) that polygamy "destroys that nearness of rank, not to say equality, which nature has established between the sexes."²¹

To some extent the law has been influenced by these narratives, which raises the question of how different polygamy intrinsically is:

[L]aw...has, until now, treated [Bountiful, British Columbia, a polygynous fundamentalist Mormon community], (and others like it) as an "othered" space. Casting Bountiful as monolithic, cloistered, hostile, perverse, and aberrant fuels the current legal rejection of polygamy. But once residents of Bountiful begin to resemble "us" in some important ways, it becomes more challenging to come up with persuasive rationales as to why their lifestyle should trigger a risk of incarceration while "ours" (*i.e.*, monogamous unions, particularly heterosexual ones that have proceeded through the formal step of marriage) is not only tolerated, but actively promoted by the state.²²

In another recent work, Campbell broadens this critique so as to highlight Western society's similarities with all types of polygamy, whether familiar to Western culture or not, and not necessarily driven by religious or cultural mandates: "[f]ormal rules crafted by the state also miss the central relevance of marriage as an institution within polygamous cultures...It further mistakes polygamy as an exclusively religious and cultural phenomenon, overlooking secular instantiations of the practice."²³

¹⁹ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588.

²⁰ Craig Jones, *A Cruel Arithmetic: Inside the Case Against Polygamy* (Toronto: Irwin Law, 2012) at 278.

²¹ David Hume, "Of Polygamy and Divorces" in *Essays, Moral, Political, and Literary*, Eugene F Miller, ed (Indianapolis, IN: Liberty Fund, 1987), online: Library of Economics and Liberty <<http://www.econlib.org/library/LFBooks/Hume/hmMPL19.html>> at line 9.

²² Angela Campbell, "Bountiful Voices" (2009) 47:2 Osgoode Hall LJ 183 at 228.

²³ Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Burlington, VT: Ashgate, 2013) at 94.

The Terminology of Polygamy

“Polygamy” is an umbrella concept for a human conjugal relationship with multiple partners. Traditionally, polygamy comprises “polygyny” (one man having more than one female spouse) and “polyandry” (one woman having more than one male spouse). Of the two forms, Trevithick argues that human societies show “an overwhelming preference for monandry,”²⁴ and that polyandry is a rarity: “while...85 percent of human societies have practiced polygyny, polyandry is very rare (.1 percent).”²⁵ Practices of polygyny obviously differ greatly across the globe in issues such as number of wives permitted (an unlimited number in some systems, a limit of four contemporaneous wives in Islamic polygyny), motivation, and lifestyle (variations which will be further discussed later in the chapter). However, cross-cultural similarities can sometimes be observed: “[t]he Masai of Kenya, as an example of African polygyny, show attitudes and behaviors among co-wives remarkably similar to the Mormon polygynous women.”²⁶

Polyandry can have positive or negative impacts on female status within a society, a status which is not necessarily correlative to marital arrangement. For example, “women in polyandrous populations in the Jaunsar Bawar region of India are assigned an extremely low status in their husbands’ household, and are treated as little more than slaves. By contrast, polyandry among the Native American Shoshone is related to a high status assigned to females.”²⁷ Where polygyny is triggered by the death of a wife’s first husband (and she then marries his brother), the practice is termed “levirate” marriage. Levirate marriage can be seen as a potential good for women in societies that require male partnership for survival.

²⁴ Alan Trevithick, “On a Panhuman Preference For Monandry: Is Polyandry an Exception?” 28:3 (1997) *J Comparative Family Studies* 154 at 175.

²⁵ Carrie A Miles, “‘What’s Love Got to Do with It?’: Earthly Experience of Celestial Marriage, Past and Present” in Cardell K Jacobson & Lara Burton, eds, *Modern Polygamy in the United States: Historical, Cultural and Legal Issues* (New York: Oxford University Press, 2011) 185 at 188.

²⁶ Janet Bennion, *Women of Principle: Female Networking in Contemporary Mormon Polygyny* (New York: Oxford University Press, 1998) at 154-155.

²⁷ Miriam Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* (New York: Berg, 2008) at 131-132.

In principle, polygamy also encompasses the practice of homosexual or bisexual polygamy (multiple spouses of the same, or same and opposite sexes). Polygamy can also include the practice of “polyamory,” which contextually allows for units of multiple individuals who are bonded sexually between members.²⁸ Polyamory is a fluid system, with its proponents suggesting it is based on substance rather than form: “[I]ove, which is allowed to expand, often grows to include a number of people. But to me, polyamory has more to do with an internal attitude of letting love evolve without expectations or demands that it look a particular way than it does with the number of partners involved.”²⁹ Other terms include “polygynandry” (systems where both are simultaneously practiced) and “cicisbeism” (where another person has sexual access to a female marital partner without formal marital status, described by Zeitzen as a “female version of concubinage”³⁰). All terms encompassing family structures with a plurality of partners generally ignore the idea of joint membership, for example if a woman married to a polygynous man were herself to be formally polyandrous (and to add further complexity, if one of her male spouses were to then practice polygyny himself). While this is not necessarily a legal issue regarding formalization (either through the ability of complex records to be kept and the requirement that all such relationships be disclosed), in jurisdictions which criminalize plural cohabitation (such as Canada and the United States of America), simply cohabiting could attract penal sanctions and thus remains a legal issue relating to polygamy.

²⁸ Maura Strassberg has characterized polyamory as “postmodern polygamy”. See Maura I Strassberg, “The Challenge of Post-Modern Polygamy: Considering Polyamory” 31:3 (2003) *Capital UL Rev* 439). Elizabeth Emens has characterized polyamory as “the practice of sustaining sexual, loving relationships among more than two.” Emens, *supra* note 16 at 77.

²⁹ Deborah Anapol, *Polyamory in the Twenty-First Century: Love and Intimacy with Multiple Partners* (Toronto: Rowman & Littlefield, 2011) at 1.

³⁰ Zeitzen, *supra* note 27 at 22.

Finally, “de facto polygamy”³¹ in the form of adulterous or open relationships occurs in Western society, rendering the criminalization of explicit polygamy hypocritical, as in the case of “men in the contemporary Western world—where we explicitly condemn polygamy but pass no laws against men who take mistresses—[who] secretly have two families or two long-term partners.”³² Yet this is not normally illegal, or at least is legally ignored,³³ leading inexorably to the conclusion that “[g]iven the range of behaviours and arrangements that the law views as consistent with monogamy, it has become increasingly difficult to decipher the specific harm that the [Canadian criminalization of polygamy] is intended to thwart.”³⁴ This insight applies cross-jurisdictionally.

For the sake of clarity, I will eschew more complex terms (which often turn on normative validity assigned to relationships), accepting all *de facto* polygamous unions as such, without extending the definition of polygamy to practices such as serial monogamy, which has been unconvincingly characterized as “slow-motion polygyny.”³⁵

The Realities of Polygamy Today

Polygamy has historically been practiced globally, and continues to be practiced worldwide: “[i]t should be noted that polygyny as a marriage form is prevalent throughout the world (80% of the world’s cultures practice it). In historical terms, it is monogamy that is in need

³¹ The term is widespread within Zeitzen, *ibid*, who notes at 5 that “[t]he definition of polygamy... hinges on the definition of marriage, and there is no consensus in anthropology about what exactly marriage is.”

³² Janet Bennion, *Polygamy in Primetime: Media, Gender, and Politics in Mormon Fundamentalism* (Waltham, MA: Brandeis University Press, 2012) at 11.

³³ Adultery has never been illegal in post-Confederation Canada: see Martha Bailey & Amy J Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara, CA: Praeger, 2010) at 160. In the United States of America, while adultery remains technically illegal in over 20 states (see The Economist, “Love Free or Die”, (19 April 2014) <http://www.economist.com/news/united-states/21600999-time-check-motel-new-hampshire-love-free-or-die>), the case of *Lawrence v Texas*, 539 US 558 (2003), which ruled criminalization of adult consensual conduct unconstitutional in the same-sex context, renders these laws constitutionally suspect and they have not been enforced since 1983 (see “Love Free or Die,” *supra*).

³⁴ Susan G Drummond, “Polygamy’s Inscrutable Criminal Mischief” (2009) 47:2 Osgoode Hall LJ 317 at 368.

³⁵ Steven Josephson, quoted in Bennion, *Polygamy in Primetime*, *supra* note 32 at 11.

of explanation, not polygamy.”³⁶ A 1967 ethnographic analysis revealed “an overwhelming 85 percent of recorded societies were polygamous.”³⁷ Altman and Ginat’s analysis of 1981 data “from 563 cultures in six regions of the world” found that “78% of the cultures practiced polygyny, less than 1% practiced polyandry, and 21% were strictly monogamous.”³⁸ Altman and Ginat conclude that “polygyny appears to be common practice among world cultures.”³⁹

Polygamy, or more accurately polygyny, has been the historical marital pattern of humanity: “[g]enetic evidence suggests that polygyny was practiced among humans until fairly recently in our evolutionary past...From evolutionary, anthropological, and sociological perspectives, the criminalization of polygamy makes very little sense.”⁴⁰ One sociologist went so far as to opine that polygamy was only really inhibited by one religio-cultural tradition: “[n]o authenticated instance is known outside Christian nations of people among whom polygyny is the object of moral reprobation or is condemned or forbidden by tribal custom.”⁴¹

“Polygynous” societies still demonstrate hierarchical mating strategies. This results in significant levels of monogamy: “a relatively small proportion of men in polygynous cultures marry more than one wife—often fewer than 10% and usually no more than 25-35%.”⁴² The practice is exceedingly rare in Central and South America, but “[a]lthough accurate and current statistics are unavailable, estimates cast one-fifth to as many as one-half of all marriages in Africa as polygamous.”⁴³ Estimates of polygamous individuals in North America vary, with

³⁶ Bennion, *Women of Principle*, *supra* note 26 at 154.

³⁷ Zeitzgen, *supra* note 27 at 14.

³⁸ Irwin Altman & Joseph Ginat, *Polygamous Families in Contemporary Society* (New York: Cambridge University Press, 2009 [First Published 1996]) at 40.

³⁹ *Ibid.*

⁴⁰ Deborah L Cragun & Ryan T Cragun, “The Intricacies and Ethics of Parental Genetic Testing” in Cardell K Jacobson & Lara Burton, eds, *Modern Polygamy in the United States: Historical, Cultural and Legal Issues* (New York: Oxford University Press, 2011) 331 at 340.

⁴¹ Robert Briffault, *The Mothers: A Study of the Origins of Sentiment and Institutions*, vol 2 (London: Allen & Unwin, 1952) at 256.

⁴² Altman & Ginat, *supra* note 38 at 40.

⁴³ Bailey & Kaufman, *supra* note 33 at 14.

estimates ranging between “thirty-seven thousand to one million across the continent,”⁴⁴ and while that number of (mostly polygynous) people pales in comparison to other family forms, the practice’s scarcity in some geographical areas belies its theoretical importance to the conception of marriage and is not a reason to ignore polygamy.⁴⁵

Even were only one family engaged in polygamy, the issue still represents a significant challenge for legal theory. As Berger observes, “[a]ny pre-political definition of the family would be suspect in a liberally dedicated criminal law, which ought not to assume any position on the ontological status of the family or marriage. To do so is to wade into the messy world of metaphysics – the liberally poisonous atmosphere of comprehensive doctrines.”⁴⁶ Moreover, due to a number of communities (discussed below) prepared to argue that “it’s part of my religion so I mean, there was nothing that was going to stop me from doing what God wanted me to do,”⁴⁷ it does not appear that polygamy will disappear at any time in the near future, on any continent. Bailey and Kaufman observe that “[t]he vast majority of people living in [illegal] plural unions do so because of deeply held religious convictions that, for them, trump secular law.”⁴⁸ Experience has shown that polygyny has resisted both colonial disruption and outright prosecution. It appears impossible (even if this was desirable) to stamp it out. Jones’s one-sided characterization of arguments for polygamy as “zombies[...]they simply can’t be entirely killed”⁴⁹ applies to both sides of the debate.

⁴⁴ Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada’s Polygamous Mormon Sect* (Toronto: Vintage Canada, 2009) at 3. A more reasonable estimate, contained within Bennion, *Polygamy in Primetime*, *supra* note 32 at 243, is “30,000 to 100,000 people.”

⁴⁵ Eugene Hillman, *Polygamy Reconsidered: African plural marriage and the Christian Churches* (Maryknoll, NY: Orbis Books, 1975) at 191.

⁴⁶ Benjamin L Berger, “Polygamy and the Predicament of Contemporary Criminal Law” in Gillian Calder & Lori G Beaman, eds, *Polygamy’s Rights and Wrongs* (Toronto: UBC Press, 2014) 69 at 77.

⁴⁷ Participant #6, quoted in Campbell, “Bountiful Voices,” *supra* note 22 at 220.

⁴⁸ Bailey & Kaufman, *supra* note 33 at 160.

⁴⁹ Jones, *supra* note 20 at 341.

Religion and Polygamy

Among the examples of private sexual ordering in this work, polygamy stands out for its often religious influence: “marriage in most polygamous traditions was entwined with religious beliefs.”⁵⁰ In one example, the five heroes of the Hindu sacred text the *Mahabharata* each marry the same wife Draupadi after being enjoined to “share equally,”⁵¹ while those heroes, the Pandavas, are conceived through divine cecisbeism when their adopted father Pandu cannot conceive children and thus orders his wife to produce heirs with the gods.⁵² In the Judaeo-Christian tradition, polygyny was practiced by religious figures such as the patriarchs Abraham,⁵³ Jacob,⁵⁴ King David, and King Solomon, whom the Bible records as having “seven hundred wives, princesses, and three hundred concubines.”⁵⁵ Nevertheless, the Tanakh (also known as the Christian “Old Testament”) appears wary of polygyny, prescribing (in a passage allegedly preceding Solomon and David) that “[t]he king...must not take many wives, or his heart will be led astray.”⁵⁶

Polygamy is not explicitly mentioned or practiced in the “New Testament” of the Christian Bible, leading some commentators to assert that it has been erased from Christian religious significance. This can be seen in Augustine’s comment that polygamy (where monogamous partners are fertile) is “certainly not licit today...then [marital behaviour] was according to the

⁵⁰ *Ibid* at 278.

⁵¹ *The Mahabharata*, translated and abridged by John D Smith (New York: Penguin, 2009) at 72-73.

⁵² *Ibid* at 46-51.

⁵³ This example is far from straightforward. Abraham (also known as Abram) remained monogamously married to Sarah (also known as Sarai) until the infertile Sarah encouraged him to have an heir with her handmaid Hagar. While Hagar’s child, Ishmael, was treated as a son by Abraham, and most translations describe Abraham as taking Hagar to wife, at Sarah’s insistence Abraham banishes Hagar and Ishmael permanently. This calls into question whether this can be conceived of as a marriage, rather than as a forced pregnancy with a slave. See, in the Tanakh, Genesis, chapters 16 and 21.

⁵⁴ Again, this characterization is problematic. Jacob laboured for seven years for his uncle Laban so as to gain permission to marry his cousin Rachel, but Laban tricked Jacob by instead marrying him to his other cousin Leah. Jacob had to labour for Laban another seven years to marry Rachel as a second wife, and never married again, although both sisters provided Jacob with their handmaidens as a means of increasing his number of children. However, these handmaids are, like Hagar, only doubtfully considered wives, and certainly not equal in status to Leah and Rachel. See the Tanakh (Old Testament), Genesis, chapters 29-31.

⁵⁵ Tanakh (Old Testament), *ibid*, First Book of Kings 11:3.

⁵⁶ *Ibid*, Deuteronomy 17:6-7.

flesh, but now according to the spirit, but it was merely the difference between eras that made the procedure of the fathers different.”⁵⁷ However, there is some doctrinal basis for religious adherents of Judaism and Christianity to practice discretionary (as opposed to mandatory) polygyny. Indeed, in Lebanon, people of the Jewish faith (legally described as “Israelites”) are one of the groups allowed to practice polygyny.⁵⁸ Nevertheless, the practice is rare to non-existent among mainstream Jewish and Christian religious communities.

In Islam, the practice of polygyny, which is again subject to controversies of interpretation, is generally considered to be sanctioned, if not necessarily encouraged. The central human figure in Islam, its prophet Muhammad, practiced polygyny after the death of his first wife.⁵⁹ The Quranic passage generally cited to sanction polygamy in Islam (also quoted in this dissertation’s third chapter) reveals that the practice is not obligatory: “[i]f you fear that you will not deal fairly with orphan girls, you may marry whichever other women seem good to you, two, three, or four. If you fear you cannot be equitable to them, then marry only one, or your slave(s): that is more likely to make you avoid bias.”⁶⁰ The intended interpretation of the passage is thus disputed, with divergent marital practices allowed: “[o]ne particular Islamic sect historically allowed for nine wives based on their opinion that the numbers in the Quranic verse of ‘two, three and four’ (based on a different translation of the Quran) could be added to provide for a maximum number of nine wives.”⁶¹

Given the contested (and apparently non-mandatory) nature of polygyny in Islam, the practice is viewed by some as historical, rather than religiously mandated. Strength for this view

⁵⁷ Augustine, *De Bono Coniugali* in Augustine, *De Bono Coniugali and De Sancta Virginitate*, translated by PG Walsh (New York: Oxford University Press, 2001) 2 at 35 and 37.

⁵⁸ Bailey & Kaufman, *supra* note 33 at 50.

⁵⁹ Leila Ahmed, *Women and Gender in Islam* (New Haven, CT: Yale University Press, 1992) at 49.

⁶⁰ Sura Four, “Women”, verse 3 in *The Qur’an*, translated by MAS Abdul Haleem (New York: Oxford University Press, 2010) at page 50.

⁶¹ Ghulam Ali, *Polygamy and the Nature of Marriage in Islam and the West* (LLM Thesis, University of Toronto Faculty of Law, 2012) [unpublished] at 22.

can be drawn from the fact that legally, polygamy has been restricted by explicitly Islamic states in the 20th and 21st centuries:

Modernist interpretations of the conditions framing polygamy in Islam have led to a complete ban in Tunisia while Turkey's embrace of secularism saw polygamy criminalized there in 1926. Countries like Egypt, Pakistan, and Iran have introduced strict requirements based on the need for material justice amongst wives. Similarly, Iraq and some Malaysian states require permission from the court before the husband is allowed to enter into another marriage.⁶²

This line of reasoning is found in al-Hibri's statement that Islam may not sanction polygyny:

The Qu'ranic statement on polygamy is more complex than some scholars are willing to admit. For example, the permission to marry up to four wives is premised upon the possibility that orphan women may be oppressed. The significance of this condition has been overlooked by many scholars. Yet, it clearly links the permission to marry more than one woman to a specific situation and an obsolete practice which were both in existence at the time of the Prophet...[It has] questionable application to contexts broader than those referred to in the revelation.⁶³

I do not wish to argue that these statements are theologically erroneous. However, I do wish to point to the contested nature of the belief, where al-Hibri's interpretations would not be shared throughout the Islamic community. Since this is not a theological inquiry (and bearing in mind the dangers of essentializing religious beliefs), it is necessary to state that the "Islamic" position on polygyny does not represent a monolithic, uniform belief. Rather, the banning of polygyny is consistent with some interpretations of Islam but curtails the religiously-based practices of others.

One of the most controversial polygamist groups in the West follows the Mormon religious tradition. Mormon polygamy began around "1831 when Joseph Smith Jr...claimed to have a revelation that it was his duty to restore plural marriage to the earth."⁶⁴ The Book of Mormon contains various passages condemning polygamy, the most notable stating "David and Solomon truly had many wives and concubines, which thing was abominable before me, saith the Lord" and commands "there shall not any man among you have save it be one wife; and concubines he

⁶² *Ibid* at 25-26.

⁶³ Azizah Yahia al-Hibri, "Muslim Women's Rights in the Global Village: Challenges and Opportunities" (2000) 15:1-2 *JL & Religion* 37 at 59.

⁶⁴ Bennion, *Polygamy in Primetime*, *supra* note 32 at 23.

shall have none.”⁶⁵ These passages were augmented by a statement that “one man should have one wife; and one woman, but one husband, except in the case of death” placed in the authoritative *Doctrine and Covenants* in 1835, before being removed in 1876.⁶⁶ Nonetheless, a revelation allegedly received by Joseph Smith, Jr., on July 12, 1843,⁶⁷ was directly contradictory to prior teachings: “if any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then is he justified.”⁶⁸ Since then, Mormon prophets have preached the necessity of polygyny: under the leadership of prophet Brigham Young, the Mormon church openly declared its acceptance of polygyny in 1852 as “official church doctrine.”⁶⁹ Since polygamy was disavowed by the “mainstream” Mormon church in 1890 (following a period of intense pressure and criminal prosecutions), breakaway groups have continued to practice polygamy, such as the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS) and the Apostolic United Brethren (AUB). The FLDS maintains communities in Utah (most notoriously the neighbouring towns of Hildale, Utah, and Colorado City, Arizona, comprised almost entirely of FLDS members) and British Columbia (the self-described “Bountiful,”⁷⁰ British Columbia, which experienced a schism into two rival polygamous groups), while the AUB operates a community in Pinesdale, Montana. Other fundamentalist Mormon groups also exist, including the phenomenon of “independents,” who operate without adherence to a larger church. While

⁶⁵ Jacob 2:24 and 2:27, in *The Book of Mormon: Another Testament of Jesus Christ* (Salt Lake City, Utah: The Church of Jesus Christ of Latter-day Saints, 2012). See further, in the *Book of Mormon*, Jacob 3:5, and obliquely, Mosiah 11:2 and Ether 10:5.

⁶⁶ Richard S Van Wagoner, *Mormon Polygamy: A History*, 2nd ed (Salt Lake City, UT: Signature Books, 1986) at 6 and 14 at n 8.

⁶⁷ *Ibid* at 14, n 8.

⁶⁸ Church of Jesus Christ of Latter-day Saints, *Doctrine and Covenants*, 132, online: Church of Jesus Christ of Latter-day Saints <<https://www.lds.org/scriptures/dc-testament/dc/132?lang=eng>>.

⁶⁹ Altman & Ginat, *supra* note 38 at 32.

⁷⁰ The location of Bountiful is not an official place name, or as Bramham puts it, “you won’t find it on any map because it’s a made-up name,” as if official names were somehow discovered, not made up. See Bramham, *supra* note 44 at 10.

polygamy is seen as being mandatory, and essential to religious salvation, the lived reality of this belief fluctuates:

Most participants indicated that a wife's choice to live monogamously was not questioned or criticized by other women, nor did it alter the esteem in which she would be held by other community members who remained faithful to polygamy...The practice of monogamy in Bountiful was attributed to simple demographics. That is, there would not be enough women to go around for all men in the community should everyone seek to live polygamously. Participants explained that only about one in every twenty community marriages are plural, and that while "the principle" of FLDS life centres on polygamy, if it isn't practicable, a monogamous follower is redeemed as long as "you're open enough [to it] in your heart."⁷¹

However, doctrine remains (for the majority) consistent that polygyny is required for salvation:

Doctrine and Covenants section 131 provides that participation in "the new and everlasting covenant of marriage" must be entered into "in order to obtain the highest [heaven]."⁷² This, passage underscores the religious importance of marriage to Mormonism, and augmented by later fundamentalist revelation, is one basis for the requirement to practice polygyny.

An Example: Mormon Polygyny and Alleged Harm

North American Mormon polygyny, developed in the 19th century, is somewhat idiosyncratic amongst global examples of polygyny for its religiously-mandatory nature, extreme emphasis on reproduction, and sanction of an unlimited number of wives. Yet this form of polygyny grounds a significant portion of arguments against polygamy generally. Many (but not all) of the abuses associated with North American fundamentalist Mormon polygyny, such as domestic violence, sexual assault, underage marriage, forced marriage, poverty, and the indoctrination of children, revolve around the largest of the polygamist Mormon sects (with approximately 10,000 members)⁷³, the FLDS.

Other sects can be less isolated and more attuned to majority society, as Jankowiak observes: "[c]ontemporary Mormon fundamentalists are unlike those religious sects that

⁷¹ Angela Campbell, "Bountiful Voices," *supra* note 22 at 198.

⁷² Church of Jesus Christ of Latter-day Saints, *Doctrine and Covenants* 131, online: Church of Jesus Christ of Latter-day Saints <<https://www.lds.org/scriptures/dc-testament/dc/131.1-4?lang=eng>>.

⁷³ Bennion, *Polygamy in Primetime*, *supra* note 32 at 27.

disapprove of and withdraw from mainstream American culture. For most Centennial Park residents, life is to be enjoyed, and they do not hesitate to partake of some of life's delights (e.g. they drink coffee and alcohol, visit the national parks, and shop at the nearby mall."⁷⁴ Jankowiak describes how religion is interwoven into appreciation for mainstream issues: "[c]ommon dinner topics range from religious issues, current events, the entertainment value of 'The Lord of the Rings,' and the benefits of flax-seed oil for preventing illness."⁷⁵ The danger of one sect such as the FLDS defining all Mormon polygyny is addressed by the polygynist Kody Brown, who writes,

when people hear the phrase "Mormon fundamentalist," they probably think about a small subset of our population---the [FLDS]. For too long this organization, and the handful of abusive men who ran it, have been the poster children of polygamy in America...[Warren Jeffs] ruled his organization with an iron fist, creating a climate rampant with abuse and fear. He not only tolerated but also promoted child brides. He summarily reassigned the wives of men he deemed unworthy to new husbands. These are not my beliefs. This is not my world...I want to make it clear that the practices of the FLDS have no place in my universe...In our faith, incest and spousal abuse are serious crimes, which, when discovered, result in immediate legal action.⁷⁶

Additionally, perhaps because of the relatively-independent nature of the Brown family, no male children have been excluded from the group in the "Lost Boys" phenomenon discussed below.

Amongst the FLDS, critics point to the statistically-high incidence of birth defects, especially fumarase deficiency, a serious genetic disorder, often leading to early death, with symptoms of "severe mental retardation, seizures, muscle problems, and brain malformations...Those who do survive beyond infancy typically have IQs below 25, and their speech is limited, consisting of no more than a handful of words. Many are never able to walk or even sit without support."⁷⁷ "[D]uring the 1990s, fumarase deficiency had been reported in at least 20 children in [the main FLDS location of] Hilldale [*sic*], Utah and Colorado City,

⁷⁴ William Jankowiak, "Co-Wives, Husband, and the Mormon Polygynous Family" (2008) 47:3 *Ethnology* 163 at 165.

⁷⁵ *Ibid.*

⁷⁶ Kody Brown, in Kody Brown et al, *Becoming Sister Wives: The Story of an Unconventional Marriage* (New York: Gallery Books, 2013) at 3.

⁷⁷ Cragun & Cragun, *supra* note 40 at 338.

Arizona.”⁷⁸ This harm is serious, but is not an indictment of polygyny, as monogamous endogamous communities such as the Old Order Amish also experience elevated risk for “many rare genetic disorders,”⁷⁹ and “[d]espite the increased risks for recessive disorders that are present among endogamous populations (such as the FLDS...), the absolute risks remain quite low.”⁸⁰ Peters, a participant observer of polygynous fundamentalist Mormons, argues that polygyny is (impliedly unhealthily) tied to sexuality and to power over sexuality. Her research also found that polygyny as practiced in fundamentalist Mormonism was isolationist in outlook: “[c]learly the community closed up on me because I did not conform to their version of sexuality—which also meant surrendering [*sic*] to the invisible and visible power behind it.”⁸¹ This issue seems contextual, although it is unsurprising if, as in other human societies, sex plays a key role in socialization and interaction.

Other more serious criticisms of contemporary Mormon polygyny involve underage marriage (which can be involuntary and lead, with church connivance, to rape⁸²), sexual abuse of children,⁸³ and the phenomenon known as the “Lost Boys,” where young men are essentially driven out of the community to allow for a surplus of women to facilitate polygynous marriages, or as Janet Bennion describes,

⁷⁸ *Ibid.*

⁷⁹ *Ibid* at 339.

⁸⁰ *Ibid* at 340.

⁸¹ Marla Peters, *Pearls Before Swine* (MA thesis, University of Alberta Department of Sociology, 1994) [unpublished] at 207.

⁸² For a particular incidence of this behaviour which resulted in an (overturned) conviction against FLDS head Warren Jeffs, see Elissa Wall & Lisa Pulitzer, *Stolen Innocence: My story of growing up in a polygamous sect, becoming a teenage bride, and breaking free* (New York: HarperElement, 2008). Jeffs was subsequently convicted of crimes stemming from underage FLDS polygyny in Texas and sentenced to life imprisonment plus 20 years in jail: see Paul Bentley, “Warren Jeffs sentenced to life plus 20 years in prison as picture emerges of 50 brides, bred to worship the polygamous ‘prophet’” *Daily Mail* (9 August 2011), online: DailyMail.co.uk <<http://www.dailymail.co.uk/news/article-2024150/Warren-Jeffs-trial-Paedophile-gets-life-sentence-50-brides-photo-emerges.html>>.

⁸³ For allegations of child sexual abuse (outside of underage marriage) by Warren Jeffs, see Brent W Jeffs & Maia Szalavitz, *Lost Boy: The True Story of One Man’s Exile from a Polygamist Cult and His Brave Journey to Reclaim His Life* (New York: Broadway Books, 2009).

400 young men left or were forced from the community and ended up fending for themselves on the streets of Las Vegas, Salt Lake City, and St. George, Utah. Dan Fischer, a former member of the FLDS, has worked with 300 such young men, a few of whom were as young as thirteen when he began working with them, over the past seven years. The reason he gives for this expulsion verifies my 1994 findings that a 'successful' polygamous group must somehow expel its males to limit competition for the small pool of marriageable young women.⁸⁴

The phenomenon of “lost boys” occurs in other polygynous groups such as the AUB, where Bennion found that “younger or nonfavorite sons are more or less abandoned by their busy polygynist fathers. They will not be encouraged to remain in the group as they are in direct competition for the valuable community resources with their own fathers and brothers, as well as all the other men.”⁸⁵ However, it is possible that in a single-revelator system such as the FLDS, recent examples of repression and abuse reflect a system destabilized by the sect’s leader (in the case of the FLDS, current prophet and convicted felon Warren Jeffs), as opposed to indicating a fundamentally flawed or repressive system.⁸⁶

Campbell’s findings suggest that alleged abuses are not inherent to fundamentalist Mormon polygamy. Her research focusses on a community (Bountiful, British Columbia) where some members have split from the Jeffs-dominated FLDS sect: “Participant 13 recalled that immediately after the Split, many young women in her side of the community changed their style of dress to distance themselves from the ‘Warrenites.’ They began wearing mainstream clothing such as jeans and shorter skirts, and they opted for shorter hair and pierced ears. With this came a choice by many to marry monogamously.”⁸⁷ As polygynist Kody Brown states, “[i]f we weren’t

⁸⁴ Bennion, *Polygamy in Primetime*, *supra* note 32 at 30-31.

⁸⁵ Bennion, *Women of Principle*, *supra* note 26 at 87.

⁸⁶ A similar tension arose in the Apostolic United Brethren with a charismatic leader named John Ray who exerted a significant influence in the during the 1970s “John Ray years.” He was ultimately made unwelcome in the community and his “influence” was “cleansed:” see *ibid* at 30. This implies that abuses or repressive behaviour in the FLDS may also be a fluctuating, rather than static, system.

⁸⁷ Angela Campbell, “Plus ça Change?: Bountiful’s Diverse and Durable Marriage Practices” in Gillian Calder & Lori G Beaman, eds, *Polygamy’s Rights and Wrongs* (Toronto: UBC Press, 2014) at 32.

on TV, you wouldn't be able to pick my family out of a crowd. We dress like anyone else--- maybe a tiny bit more modestly, but definitely modernly.”⁸⁸

Even where abuses are alleged (such as sexual abuse, underage marriage, and non-education/removal of young men), the harm lies not with polygyny itself, but rather with one specific group using one specific method of practicing polygyny. An example of abusive polygamy no more dictates a particular legal response than an example of any abusive family structure requires banning that structure. If the FLDS were not isolationist (and thus could attract converts), or did not set a goal of maximum fertility, demographic and other abuses would not likely be as widespread. Criticism of particular instances of polygyny must be careful not to take these examples as the only methods by which polygyny can be practiced. To do so would result in the collateral outlawing of other, less radical, polygamists, such as those without any questions of participant agency.

Polygamy and the Law-An Introduction

Despite notable examples of legal facilitation, polygamy is treated with suspicion by the law the world over, and in contrast to Zimmerman's biting critique against protecting marriage from “people who want to get married,” law is more likely to adopt Justice Scalia's uncritical comparison (in a case involving homosexual anti-discrimination) that “one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even “animus” toward such conduct.”⁸⁹ The comparison to dramatically different “reprehensible” conduct reveals shaky underpinnings to legal attacks on polygamy. While some jurisdictions allow some forms of polygamy based on religious teachings (most prominently Islamic jurisdictions sanctioning polygyny), it can be broadly stated that no jurisdiction allows unqualified polygamy (those jurisdictions, for example, in addition to potential restrictions on

⁸⁸ Brown et al, *supra* note 76 at 3.

⁸⁹ *Romer v Evans*, 517 US 620 (1996) at 644, per Scalia J in dissent.

polygyny, do not sanction polyandry or polyamory). A striking historical example of the tight legal control of family form, even where a type of plural marriage was allowed, is the 16th century Munster Anabaptists, who practiced polygyny but nevertheless executed a woman “because she had two husbands (polygamy was a strictly one-way matter for the sectarians).”⁹⁰ In the Republic of South Africa, polygyny is reserved only to “customary” tribal marriages⁹¹ (such as the ones enjoyed by Jacob Zuma,⁹² current President of the Republic), while in India (and in Lebanon), one’s entitlement to plural marriage is based on religious affiliation. In India, Islamic polygyny may be practiced, but Hindu polygyny may not,⁹³ a situation characterized by Choudhury as revealing “the tension between uniformity...on one hand and the tolerance for legal pluralism that continues to accommodate various religious family law regimes on the other.”⁹⁴ Although polygamous familial arrangements are allowed in some countries, no national legal system unqualifiedly adopts the plural family form: jurisdictions pick and choose acceptable forms of polygamy from the options, and disempower the rest. Therefore, it seems that law almost unanimously lacks a principled approach to polygamous private sexual ordering, instead attempting to approach familial form on a case-by-case basis.

Law’s antipathy towards polygamy *qua* polygamy is especially confusing since law often separates the practice of polygamy from the related (and arguably overlapping) offence of “bigamy.” Bigamy is generally defined so that “[t]he essential gravity of the offense remains the deception which the bigamist exhibits, in some cases, where he has said nothing about the original marriage to the new partner; but, perhaps, more importantly which he exhibits in all

⁹⁰ John Cairncross, *After Polygamy was Made a Sin: The Social History of Christian Polygamy* (No Location: Orphan Copyright Works Project, 1974) at 18.

⁹¹ Penelope E Andrews, “Who’s Afraid of Polygamy?: Exploring the Boundaries of Family, Equality and Custom in South Africa (2009) 2009 Utah L Rev 351 at 376.

⁹² *Ibid* at 351.

⁹³ Bailey & Kaufman, *supra* note 33 at 7.

⁹⁴ Cyra Akila Choudhury, “Between Tradition and Progress: A Comparative Perspective on Polygamy in the United States and India” (2012) 83:4 U Colo L Rev 963 at 999.

cases by the falsification of state records in the application for the marriage license,”⁹⁵ to say nothing of the deception against the first partner who may remain ignorant of the new union. Since polygamy does not necessarily involve deception against the participants or the State, it is unclear what the principled objection towards polygamy could be. Fowler highlights the arbitrary nature of criminalizing polygamy, as well as the damage such arbitrariness creates:

From the viewpoint of liberal theory, the state should remain neutral with respect to competing conceptions of what marriage is and of how individuals’ needs for sex and emotional intimacy, material support in daily life, reproduction and childrearing are to be met. The state fails to be neutral when it chooses one form of marriage to support. We must question the desirability of defining a single form of state marriage.⁹⁶

The History of Law and Polygamy

Certain historical examples demonstrate that the Western legal regulation of polygamy reveals highly suspect motives throughout attempts to restrain what Chief Justice Waite, in an already-quoted (and infamous) passage which remains the governing American law, characterized as something which “has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”⁹⁷ This is of course not true: “[p]olygamy appears to have been possible in the majority of Indian and Inuit cultures where wealth and food supply would permit.”⁹⁸

European law has, of course, a much longer history of prosecuting (or persecuting) polygamy, law which has informed, and continues to inform, many of the national legal attitudes around the world. There was some historical controversy in European Christianity about the appropriateness of polygamy. Examples of the acceptance of plural family structure include “Charlemagne and his sons, and later, in the twelfth century, the emperor Frederick Barbarossa,

⁹⁵ *R v Friar*, unreported (Ont Co Ct, 1983) per Borins J, quoted in *R v Sauve*, [1997] AJ No 525 (Prov Ct) at para 3.

⁹⁶ Erin Fowler, “A Queer Critique on the Polygamy Debate in Canada” (2012) 21 Dal J Leg Stud 93 at 123.

⁹⁷ *Reynolds v United States*, 98 US 145 (1879) at 164.

⁹⁸ Bradford W Morse, “Indian and Inuit Family Law and the Canadian Legal System” (1980) 8:2 Am Indian L Rev 199 at 214.

all [having] more than one wife in marriages at least tolerated by the Church. In a decretal of 726, Pope Gregory II decreed that ‘when a man has a sick wife who cannot discharge the marital functions, he may take a second one, provided he looks after the first one.’”⁹⁹ Political factors of course also played a role in occurrences such as the endorsement of royal polygamy in certain circumstances by Protestant reformers Luther and Melancthon¹⁰⁰. However, *de jure* polygamy was not permitted in European law for both historical and religious reasons:

[W]hile Christian authorities advocated SIUM [socially imposed universal monogamy] with explicit reference to religious (Old Testament) scripture, SIUM as a Roman custom had already been dominant when Christianity arrived on the scene... The subsequent collapse of the Roman Empire coincided with an expansion of polygamous societies. Arab conquests in the Middle East, North Africa and Spain spread Islam, a belief system that accepted polygamy. Polygamy was also practiced by certain post-Roman Germanic peoples. For these groups, SIUM was not an established practice in the same way it had been for the ancient Greeks and Romans. As a consequence, insistence on SIUM and the rejection of polygamy became more specifically associated with Christian doctrine. SIUM was predominantly maintained by the Christian Church in the centuries following the decline of the Roman Empire. As Christianity spread during the Middle Ages, SIUM once again came to be seen as both a religious and a European (or Western) custom. The re-consolidation and eventual dominance of SIUM in medieval and modern Europe reflected not only a continuous practice from the Roman to the post-Roman periods, but was also, at least in part, the result of Church efforts to impose SIUM as a universal norm and practice. European colonization and immigration, together with Christian missionary activities, gradually elevated SIUM to the globally dominant norm.¹⁰¹

Such a volatile mix of culture, law, and religion highlights the problematic nature of the “globally dominant norm.” The European religious horror at polygamy is perhaps best expressed by the conclusion of the Council of Trent, which stated: “[i]f anyone says that it is lawful for Christians to have several wives at the same time, and that it is not forbidden by any divine law (Matt. 19:4f), let him be anathema.”¹⁰² The English legal tradition criminalized polygamy approximately a half-century after Trent, in 1604,¹⁰³ again with a view to nation-building: English King James I remarking, as he ruled over both Scotland and England, that it was “no

⁹⁹ Anne McLaren, “Monogamy, Polygamy and the True State: James I’s Rhetoric of Empire” (2004) 25:3 History Political Thought 446 at 469-470.

¹⁰⁰ Cairncross, *supra* note 90 at 40-41 and 55.

¹⁰¹ *Reference Re: S 293*, *supra* note 18 at paras 157-161, drawing on the testimony of Dr Walter Scheidel, Chair of the Department of Classics, Leland Stanford Jr (Stanford) University.

¹⁰² Quoted in Eugene Hillman, “Polygamy and the Council of Trent” (1973) 33:3 Jurist 358 at 360.

¹⁰³ McLaren, *supra* note 99 at 473.

more possible...for one king to govern two countries contiguous...than for one head to govern two bodies, or one man to be husband of two wives.”¹⁰⁴

In Canada, processes of legal colonization were at work in the criminalization of polygamy. Carter speaks of the “concerns Canadian colonizers shared with the broader colonizing world about the ‘intimacies of empire.’”¹⁰⁵ In the Canadian context, it was no coincidence that “[i]t was the missionaries in Western Canada who made the first efforts to discourage polygamy,”¹⁰⁶ and a leading case which repudiated aboriginal “fur trade marriage” was replete with references to race and nation-building:

Civilization introduces obligatory duties, for the protection of women and children. In Christian countries, the relation of husband and wife is distinguished by an amplification of reciprocal, obligatory duties and consequences, as affecting property...forming a striking contrast to the relations of male and female in savage life...Marriage, as understood by Christians, is the union for life of one man with one woman, to the exclusion of all others; any intercourse without these distinctive qualities cannot amount to a Christian marriage.¹⁰⁷

This is bolstered by Canadian parliamentary discourse, in which the government was attacked for its supposed ambivalence toward polygamy, claiming that legal recognition of aboriginal polygyny would be to: “within the walls of this great national temple of justice and righteousness, to ask this christian Parliament to put a clause on the Statute Book of Canada that exalts heathen polygamy, with its practices, above christian religion, with its virtues.”¹⁰⁸ A report of the Prime Minister, John Macdonald, reinforces this conception: “[i]n heathen tribes of Indians...the...evil of polygamy has always been practised, and heathen Indians will only be brought to refrain from practising it when the enlightenment, which ever attends the inauguration of the christian religion among the heathen, shall have changed their views in this as well as in

¹⁰⁴ James I, *A Speech . . . Delivered the Last Day of March 1607*, quoted in McLaren, *ibid* at 469.

¹⁰⁵ Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton, AB and Athabasca, AB: The University of Alberta Press and AU Press, 2008) at 194.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Jones v Fraser* (1886), 12 QLR 327 (QB) at 355-356. *Jones* was affirmed on other grounds by the Supreme Court of Canada, (1886), 13 SCR 342.

¹⁰⁸ Mr. Paterson (Brant), House of Commons Debates, 5th Parliament, 3rd Session, vol 3 (26 May 1885) 2127.

other matters.”¹⁰⁹ Carter concludes on the racialized and gendered suppression of Canadian polygamy that:

Polygamy became a towering example of the shortcomings of Aboriginal societies that were understood to subordinate women, in contrast to the ideal of monogamous marriage, which was cherished as an institution that elevated women...It was thought that jealousy and friction among the wives was inevitable. The husbands in polygamous marriages were seen as idle, debauched, and tyrannical. The sexual desires of the husband were seen as a main motivation for polygamy. As John Moore has noted, this notion probably tells us more about the sexual fantasies of European male observers than about the culture and values of Aboriginal people.¹¹⁰

The racialization of the law was demonstrated in the successful prosecution of a polygamous Kainai man in *R v. Bear's Shin Bone*,¹¹¹ when criminal law was used to deliver “a legal death blow [to First Nations’ customs].”¹¹²

However, having achieved its goal of imposing racialized and religiously-based heteronormativity and conformity, the anti-polygamy provision foundered against non-Aboriginals. Canadian problems with prosecuting polygamy began as early as 1891, when a conviction for polygamy was quashed in *R v. Labrie*¹¹³ for disclosing adulterous cohabitation, but nothing legally rising to the level of a “form of contract between the parties, which they might suppose to be binding on them, but which the law was intended to prohibit.”¹¹⁴ Difficulties with prosecution were exacerbated in 1893 when Chief Justice Armour of the Ontario County Court in *R v. Liston* ruled that polygamy “was intended to apply only to Mormons.”¹¹⁵ Despite this, criminal sanction still acted to discipline sexual ordering, such as with the successful 1906

¹⁰⁹ Quoted in *ibid* at 2126-2127.

¹¹⁰ Carter, *supra* note 105 at 129.

¹¹¹ (1899), 3 CCC 329 (NWT SC).

¹¹² Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women’s Press for the Osgoode Society, 1991) at 25.

¹¹³ (1891), 7 MLR 211 (Que QB). Labrie was tried and convicted by a jury, but the presiding judge, G Baby J, did not sentence him and instead referred the novel case to a 5-member panel of the Court of Queen’s Bench, which quashed the conviction.

¹¹⁴ *Ibid* at 213.

¹¹⁵ Summarized in WE Raney, “Bigamy and Divorces” (1898) 34:15 Can LJ 546 at 546 (note “b”).

prosecution in *R v. Harris*,¹¹⁶ complete with a societal denunciation of the facts, where “the parties are living together in open continuous adultery” (despite claiming to be married and producing a marriage certificate) “to the scandal of the public.”¹¹⁷

However, even before part of Canada’s polygamy law specifically mentioning Mormonism was removed in 1954,¹¹⁸ the provision had been weakened by the Court of Appeal for Ontario, which held in *R v. Tolhurst and Wright*¹¹⁹ that the provision did not cover a case in which two married accused were living with each other instead of their spouses, reasoning that the polygamy “section does not cover adultery, however much the conduct is to be condemned and however unfortunate the circumstances.”¹²⁰ This judicial limitation of the section to relationships undergoing “some form of union under the guise of marriage”¹²¹ informs the modern debate about the scope of the conduct captured by the polygamy provision (such as the question as to whether polyamory constitutes a violation) in Canada, and whether the provision is open to attack based on vagueness or overbreadth, answered in the negative by British Columbia’s Supreme Court.¹²²

American prosecutions of polygamy illustrated similar racial and religious concerns. The criminalization of polygamy, and its attempted extirpation was justified as late as 1946 with the idea that

“[t]he organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world”... The establishment or maintenance of polygamous households is a notorious example of promiscuity. The permanent advertisement of their existence is an example of

¹¹⁶ (1906), 11 CCC 254 (Que CSP). Both Nicholas Bala and Lisa M Kelly identify the accused, John Harris, as being aboriginal, though nothing in the case indicates this: see Lisa M Kelly, “Bringing International Human Rights Law Home: An Evaluation of Canada’s Family Law Treatment of Polygamy” (2007) 65 UT Fac L Rev 1 at 4 (n10) and Bala, “Canada’s Prohibition,” *supra* note 17 at 183-184 (n 41).

¹¹⁷ *R v Harris, ibid*, at para 7.

¹¹⁸ Bailey & Kaufman, *supra* note 33 at 124.

¹¹⁹ [1937] OR 570 (CA).

¹²⁰ *Ibid* at para 3.

¹²¹ *Ibid* at para 4.

¹²² *Reference re: Section 293, supra* note 19 at para 1225.

the sharp repercussions which they have in the community.¹²³

The context of American legal treatment of polygamy is one of asserting majority control: “the secular power of the federal government over marriage...was coated in polygamy cases with a sweet deference to Protestant mandates.”¹²⁴ The imposition of Christian heterosexual marriage through suppression of polygamy was part of a larger struggle: “[t]he national government’s insistence upon legal monogamy for ex-slaves, its war on polygamous alternatives, and its prevention of the mailing of obscenity and contraceptive information created an atmosphere of moral belligerence about Christian monogamous marriage as the national standard.”¹²⁵ This contributed to a racially-charged environment where white polygynous individuals were seen as aberrant: “the most influential [American] decision makers grounded federal antipolygamy statutes and case law on the political and race treason of Mormons in establishing a separatist theocracy.”¹²⁶ The biased and subjective perspective which the criminalization of polygamy adopted has received extensive academic interest and denunciation.

In the United States,

[i]n the 1880s, Republicans compared Mormon polygamy to Chinese, Muslim, and South Asian ‘despotic’ cultural practices, like concubinage, coolieism, and prostitution...Republicans portrayed anti-polygamy as the struggle of a unified, explicitly white nation against the entire Mormon community, claiming its deviant marriage practices set it apart from the rest of the white race.¹²⁷

¹²³ *Cleveland v United States*, 329 US 14 at 19, with passage in quotations quoting *Mormon Church v United States*, 136 US 1 (1890) at 49.

¹²⁴ Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill, NC: The University of North Carolina Press, 2002) at 140.

¹²⁵ Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2002 [First published 2000]) at 128.

¹²⁶ Martha M Ertman, “Race Treason: The Untold Story of America’s Ban on Polygamy” (2010) 19:2 *Colum J Gender & L* 287 at 331.

¹²⁷ Kelly Elizabeth Phipps, “Marriage and Redemption: Mormon Polygamy in the Congressional Imagination, 1862-1887” (2009) 95:2 *Va L Rev* 435 at 440.

As previously noted, Ertman identifies this bias as continuing: “[American] immigration law has inherited a good measure of the nineteenth century reasoning that polygamy, though perhaps appropriate for ‘Asiatic and African’ peoples, was inappropriate for a White America.”¹²⁸

Law and Polygamy Today

Despite the historical baggage of racism and sexism, polygamy remains the object of legal attack, in the areas (which I will discuss in turn) of criminal law, family law, and international migration law. Polygamy is either criminalized or legally unrecognized in the vast majority of developed Western nations. This is perhaps because of the mindset espoused in a report by Cook and Kelly which, while acknowledging that “[p]olygyny is practised in various different ways depending on the religious, customary, cultural and socio-economic context,”¹²⁹ argues that this should not be a bar to a sweeping statement on polygamy: “[w]here polygyny exists, it often stereotypes women into reproductive and service roles. As a result of such stereotypes as well as its inherent structural inequality, women can never be truly equal in polygynous unions.”¹³⁰ The term “often” should be emphasized here (thus undermining the idea that polygamy is *always* a certain way), and the statement further disempowers women by unilaterally deciding that “stereotypical” roles should not be open to them, even by choice. Such thwarting of individual choice and freedom is properly condemned for its non-consensual nature: “State relationships are not voluntary. Indeed, a number of feminists have compared the social relationship of the State to domestic violence—what else is a relationship where someone says that whatever they do is for your own protection and that you can never leave them to organize your own relationships on different terms?”¹³¹

¹²⁸ Ertman, *supra* note 126 at 357.

¹²⁹ Rebecca J Cook & Lisa M Kelly, *Polygamy and Canada’s Obligations under International Human Rights Law* (2006), online: Department of Justice Canada < <http://www.justice.gc.ca/eng/rp-pr/other-autre/poly/poly.pdf> > at 7.

¹³⁰ *Ibid.*

¹³¹ Jamie Heckert, “Love without Borders?: Intimacy, Identity and the State of Compulsory Monogamy” in Meg Barker & Darren Langdridge, eds, *Understanding Non-Monogamies* (New York: Routledge, 2010) 255 at 263.

Globally, the *ex cathedra* statement made by the committee overseeing CEDAW (as mentioned in Chapter 1) bears repeating: polygamy “contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be...prohibited.”¹³² This was echoed by the UN’s Human Rights Commission, which opined that “equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”¹³³ The latter statement is incoherent insofar as polyandry exists, and even if it does not, insofar as polygamy is not incompatible with a guarantee that both men and women are free to enter into marriage only with full knowledge of its circumstances and their consent. Sometimes, the practice may respond to a real or perceived demographic problem: “while polygyny is not given legal or moral sanction, there is clearly a need for it, particularly for African American women, especially in light of the shortage of African American men.”¹³⁴ In cases such as these, polygyny may play a role in maintaining group integrity and ontology, thus implicitly rebutting the statement that it “violates the dignity” of its participants. The argument that “[t]he principle that communal religious freedom cannot override women’s right to equality would mandate prohibition of [polygamy]”¹³⁵ fails to acknowledge that people often orient themselves in alliance with a group, and does not address the inconsistency of argument if the individual is able to exit the group but chooses not to.

¹³² CEDAW, General Recommendation Number 21, quoted in Drummond, “Polygamy’s Inscrutable Mischief,” *supra* note 34 at 361-362.

¹³³ *General Comment No 28: Equality of Rights Between Men and Women (Article 3)*, UN HRCOR, 68th Sess, UN Doc CCPR/C/21/Rev 1/Add 10 (2000) at para 24, quoted in Kelly, “Bringing International Human Rights Law Home,” *supra* note 116 at 15.

¹³⁴ Patricia Dixon-Spear, *We Want for Our Sisters What We Want for Ourselves: African American Women who Practice Polygyny by Consent* (Baltimore, MD: Inprint, 2009) at 55.

¹³⁵ Anat Scolnicov, *The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights* (New York: Routledge, 2011) at 139.

But the problems with the statements by the international bodies are more profound than simple semantics. Even accounting for the obvious conflation of polygamy with polygyny, these statements are highly problematic. One of the clearest problems is that the statements de-contextualize the practice, creating a false dichotomy between “harmful” polygamy and (presumably less harmful) monogamy. No familial form is immune from abuse:

Years of teaching criminal law cases have made it painfully visible to me that far too many women are battered by their intimate partners, too many children suffer physical and sexual abuse at the hands of family members and friends. But the cases I teach are ones that arise in the context of traditional norms of conjugality. Traditional conjugality does not seem to protect us.¹³⁶

This logic was recently adopted by a District Court in Utah, which, in striking down the criminalization of (governmentally unrecognized) polygamous cohabitation, stated: “[w]ith the cohabitation prong stricken...investigators and prosecutors can focus on the independent crimes that are being committed, if any.”¹³⁷ Echoing the concerns of many commentators, Justice Waddoups concluded that the criminalization of polygamous cohabitation: “actually inhibits the advancement of this compelling State interest of ‘protecting vulnerable individuals from exploitation and abuse.’”¹³⁸ The decision implicitly recognizes the pertinent insight of the Supreme Court of Canada that “[f]or better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.”¹³⁹

Legal regulation of polygamy can, of course, take several forms. The most blatant is criminalization, seen in several countries. Section 293 of Canada’s *Criminal Code* prohibits polygamy in “any form” as well as “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,” and threatens the parties, assistants, and celebrants with up to five years’ imprisonment.¹⁴⁰ Polygamy is

¹³⁶ Rebecca Johnson, *supra* note 5 at 113.

¹³⁷ *Brown v Buhman*, 947 F Supp 2d 1170 (D Utah Dec 13, 2013) at 72.

¹³⁸ *Ibid.*

¹³⁹ *Trinity Western University v College of Teachers*, 2001 SCC 31 at para 36.

¹⁴⁰ *Criminal Code*, RSC 1985, c C46 at s 293.

criminally illegal in each jurisdiction of the United States of America, while France, where polygamy is punishable by a 45,000 Euro fine and/or one years' imprisonment,¹⁴¹ illustrates the general trend that “[Western European] family law...emphasizes monogamy, and in so doing...calls into question the legal rights of the polygamous.”¹⁴² The harm is not necessarily only suffered through prosecutions, but through the constant state of being an outlaw, which can affect social interactions: “even though the threat of law enforcement does not necessarily have a practical impact on day-to-day life in Bountiful, the symbolism of criminalization may wield important effects. Connected to the matter of stigma is law’s role as a vehicle of moral expression, which can muster hostility and intolerance for communities engaging in prohibited conduct.”¹⁴³

This emphasis extends far beyond criminal law, no matter how harmful or invasive the State’s criminalization of a familial form based on the possibility of abuse. Polygamy which attracts the attention of the government can also result in the loss of custody of children:

One particularly undesirable consequence of the current lack of legal recognition is the threat that a polyamorous relationship may be grounds for the removal of children from parental custody and/or termination of parental rights. In the *Divilbiss* case in Tennessee, a 4 year old girl was removed from a home she shared with her mother, father, and her father’s male lover to the custody of her grandparents after the parents had appeared on an MTV [television] program to discuss their polyamorous relationship. The judge ruled that the *Divilbiss* child would be allowed to return to her mother when the mother had completed some parenting classes and there were no longer three adults in the household.¹⁴⁴

Obviously, a law which threatens to remove children from their parents for their chosen family form (irrespective of the context or factual situation), does not allow people to order their consensual private lives, and indeed is ontologically damaging in that it forces a conflict between

¹⁴¹ Jennifer A Selby, “Polygamy in the Parisian Banlieues: Debate and Discourse on the 2005 French Suburban Riots” in Gillian Calder & Lori G Beaman, eds, *Polygamy’s Rights and Wrongs* (Toronto: UBC Press, 2014) 120 at 126.

¹⁴² *Ibid.*

¹⁴³ Campbell, “Bountiful Voices,” *supra* note 22 at 222.

¹⁴⁴ Strassberg, “The Challenge of Post-Modern Polygamy,” *supra* note 28 at 449, n 58, citations omitted.

identity and legality. The harm is compounded by the chilling effect such regulation has on speech, in this case by participating in a television program.

Regardless of whether any immediate legal threat is made, family law in Western developed nations almost universally treats polygamous marriage as a legal nullity, resulting in additional problems for what would otherwise have been an easily classified status. For example, in both Canada and the United States, not only is plural marriage not recognized, but even (with a few exceptions¹⁴⁵) validly-celebrated polygamous marriages in jurisdictions which legally sanction such partnerships are deemed invalid. This legal invisibility is rationally indefensible.

For family law to ignore polygamy abdicates the field, tacitly allowing polygamists to evade all social regulation. By keeping practicing polygamists at arms' length from the law, family law is completely excluding part of society from the ability to form legally-recognized relationships. Since "people will continue to live in polygamy whether it is banned or not, just as people continued to drink during Prohibition"¹⁴⁶ family law is creating a set of outlaws, simultaneously disempowering both itself (by limiting its scope) and those it ignores. This is even more philosophically hypocritical as family law advances to recognize non-marital relationships. Ignoring polygamy is unlikely to meet the aim stated by Canada's Law Reform Commission: "[b]y not giving polygamy any legal recognition, matrimonial law ensures that this phenomenon is not viable in Canada."¹⁴⁷ Ignoring polygyny will not make it disappear.

Finally, the lack of family law intervention leaves the law uncertain to an impermissible

¹⁴⁵ Such as the Ontario, Prince Edward Island, Yukon Territory, Northwest Territories, and Nunavut laws on property division upon marital breakdown, joined by Australia. See Bailey and Kaufman, *supra* note 33 at 151. A greater number of Canadian regimes also provide for spousal support payments to the polygamous spouse in need, a right which seems to be available under most Canadian legal regimes (with the exception of Quebec) if the polygamous spouse has cohabited for a significantly long period of time, or if the relationship has been registered as a domestic partnership, or if the spouses have a child together.

¹⁴⁶ Bennion, *Polygamy in Primetime*, *supra* note 32 at 244.

¹⁴⁷ Law Reform Commission of Canada, *Working Paper 42: Bigamy* (Ottawa: Queen's Printer, 1985) at 29.

extent. *Blackmore v Blackmore*,¹⁴⁸ a 2007 British Columbia Supreme Court family law case concerning a polygynous man and female spouse, awarded full custody to a (monogamous) mother, ostensibly in part because the children would otherwise be exposed to polygamy.¹⁴⁹ Yet in an earlier case the Utah Supreme Court disregarded polygamy as a determinative consideration, ruling that applicants “could not be prohibited from adopting [children related through a plural marriage] purely because of the polygamist lifestyle.”¹⁵⁰ The discrepancy can be attributed to the different jurisdictions, but failure of family law to countenance polygamy leads to *ad hoc* decision-making.

This legal dilemma extends to polygamous immigration. The door to North America is firmly shut against polygamists. A worse situation occurred in France, where the *loi Pasqua* targeted legally-immigrated polygamists, forcing polygamous wives into horrific positions:

If...a polygamous man had children with French citizenship, he could not be deported, but could be deprived of necessary papers to work in the country. As a result, he and his family could end up living in abject poverty. The French Pasqua law came at tremendous expense to women married polygamously, and to their children. The forced de-cohabitation of polygamous husbands and all but one wife left many women with no choice but to leave the household with few financial resources... they...often ended up living as squatters in abandoned buildings.¹⁵¹

Similarly to this unacceptable legal framework, Canadian law allows a polygynist to immigrate with one wife only.¹⁵² Bailey et al identify the damage inflicted by this policy: “refusing to permit immigration of all parties to a valid foreign polygamous marriage...would most likely harm women who are parties to such marriages and are left behind.”¹⁵³ This lack of family

¹⁴⁸ 2007 BCSC 1735.

¹⁴⁹ Bailey & Kaufman, *supra* note 33 at 113-115.

¹⁵⁰ Bennion, *Polygamy in Primetime*, *supra* note 32 at 231.

¹⁵¹ Angela Campbell, “How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis” in Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* (2005), online: < <http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf>> at 18.

¹⁵² Bala, “Canada’s Prohibition,” *supra* note 18 at 215-216.

¹⁵³ Martha Bailey et al, “Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada” in Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* (2005), online: < <http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf>> at 16.

reunification seemingly also violates the *Convention on the Rights of the Child*, Article 9(1) of which states: “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”¹⁵⁴ Since a child’s mother (or in rare cases, father) may be legally excluded while the child is admitted with her/his other biological parent¹⁵⁵, this scenario would violate international law. In addition, such a policy would put (dubious) principle above the potential suffering of family members, especially women and children. American immigration jurisprudence has continued to support “the long-standing view of polygamy as foreign, barbaric, and un-Christian.”¹⁵⁶ Since a floodgates argument is implausible, polygamy should not be a factor when determining admissibility.

Legal Justifications for Criminalization-The “Harms” of Polygamy

The strongest legal argument against the decriminalization or legalization of polygamous marriage is a claim of harm, in the modern era to children and women within the family structure. Claims of harm (albeit different forms of harm) sustained both the 19th century American Supreme Court in *Reynolds*, and the 21st century *CEDAW*, North American, and European narratives concerning polygamy. The charge that polygamy causes harms, a playing of Valverde’s “joker card,”¹⁵⁷ logically leads, if substantiated, to a principled application of legal deterrence, which could include criminalization. In this way, the actors of polygamy, now seen as self-harming (or even worse, harming others), can now be restrained: “national and

¹⁵⁴ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Art 9 (1).

¹⁵⁵ Of course, a child is not limited to two parents in anything but a biological sense. Legally, co-wives of a child’s mother could be, and sometimes should be, recognized as parents, and this situation is just one example of scenarios where the dichotomous model of parenthood is challenged. The case of *AA v BB and CC*, 2007 ONCA 2, found that children can legally have more than two parents (in that case, in a same-sex union surrogacy context), which is directly applicable to non-monogamous sexual ordering and parenting, for example in polygamy or polyamory.

¹⁵⁶ Ertman, *supra* note 126 at 356-357.

¹⁵⁷ Harm can “act as a veritable joker card that can serve completely different purposes depending on the context.” Mariana Valverde, “The Harms of Sex and the Risk of Breasts: Obscenity and Indecency in Canadian Law” (1999) 8:2 Soc & Leg Stud 181 at 184.

international commitments to religious freedom do not require states to legally recognize practices that undermine internationally guaranteed equality rights.”¹⁵⁸

Sometimes the harms alleged are not merely against oneself or other individuals, but against society itself. One is the historical concern described by Cott: “[i]f marriage molded the form of government, as the [American] founders’ political philosophy assumed, Utah [polygamy] presented more than a religious and social aberration. It was a political threat to the integrity of the United States.”¹⁵⁹ This is echoed in the reasoning of Strassberg, who argued that “the polygynous family forms the basis of despotic government by producing citizens who are not prepared to view themselves as autonomous individuals with rights, but rather are prepared to view themselves as members of a larger group whose lives should be substantially controlled by a leader with near absolute power.”¹⁶⁰ This is another potent allegation of harm which again, if substantiated, raises important questions for society’s philosophical ability to legislate against the freedom of the individual for the protection of the many. The statistical argument that “Regression analyses [in China] show that a 0.01 increase in sex ratio is associated with a 3 per cent increase in property and violent crimes, controlling for a number of demographic and economic variables”¹⁶¹ is based on dubious assertions: “[i]n many non-industrialized societies, young unmarried men form groups of marauders who go on raids to steal wealth and wives, raping and pillaging. Polygynous societies engage in more warfare, often with the goal of capturing women. Cross-cultural analyses, though crude, indicate that polygynous societies also have more crime relative to more monogamous societies.”¹⁶² Context is completely absent from this passage, and people are labelled as more criminal (and more likely to “rape and pillage”)

¹⁵⁸ Kelly, “Bringing International Human Rights Law Home,” *supra* note 116 at 25.

¹⁵⁹ Cott, *supra* note 125 at 72-73.

¹⁶⁰ Strassberg, “The Challenge of Post-Modern Polygamy,” *supra* note 28 at 483.

¹⁶¹ Joseph Henrich, Robert Boyd & Peter J Richerson, “The puzzle of monogamous marriage” (2012) 367:1589 *Philosophical Transactions Royal Society Biological Sciences* 657 at 662.

¹⁶² *Ibid* at 663.

based on nothing more than their family form. The non-nuanced and conclusion-driven nature of such pseudo-statistical analysis is demonstrated by the group's conclusion that "the peculiar institutions of monogamous marriage may help explain why democratic ideals and notions of equality and human rights first emerged in the West."¹⁶³ Even assuming this was true (which has not been established), would harm arising from demographics justify interference in personal liberty to such a great extent?

Given the different contexts among the practices of polygyny and their cultural situations, neither individual horror stories nor statistics can function as an indictment of polygyny until all other factors are controlled. It is true that Al-Krenawi and Graham's work with Bedou living polygamously in Israel found "[w]omen in polygamous marriages scored significantly higher ratings in all psychological dimensions in the [Brief Symptom Inventory]: somatisation, interpersonal sensitivity, depression, anxiety, phobic anxiety, paranoid ideation, psychoticism and [General Severity Index]."¹⁶⁴ However, polygyny may be a culturally-acceptable alternative to divorce,¹⁶⁵ which another Al-Krenawi and Graham study found was devastating in this group: "divorce is highly stigmatizing, resulting in a woman's loss of social status, support, economic means, and in some instances the loss of custody of her children."¹⁶⁶ This was borne out in the research findings: "[divorced women] reported higher levels of somatization, paranoid ideation...[and] also scored higher than [never married or married women] in obsession-compulsion, depression, anxiety, phobic anxiety, and psychoticism."¹⁶⁷ Another study on the same ethnic group found that there was no appreciable difference in educational outcomes

¹⁶³ *Ibid* at 667.

¹⁶⁴ Alean Al-Krenawi & John R Graham, "A Comparison of Family Functioning, Life and Marital Satisfaction, and Mental Health of Women in Polygamous and Monogamous Marriages" (2006) 52 *Intl J Social Psychiatry* 5 at 13.

¹⁶⁵ Omar M Khasawneh, Abdul Hakeem Yacin Hijazi & Nassmat Hassan Salman, "Polygamy and Its Impact on the Upbringing of Children: A Jordanian Perspective" (2011) 42:4 *J Comparative Family Studies* 563 at 565, noting that "divorce is explained in the Islamic teachings as the acceptable thing detested most by the Creator."

¹⁶⁶ Alean Al-Krenawi & John R Graham, "Somatization Among Bedouin-Arab Women: Differentiated by Marital Status" (2004) 42:1-2 *J Divorce Remarriage* 131 at 133.

¹⁶⁷ *Ibid* at 139.

between children of polygamy and monogamy,¹⁶⁸ disputing what was, up until then, a central belief and way to disparage polygamy. Moreover, al-Krenawi's research has been countered by other research suggesting that polygyny may, in some cases, contribute to the stability of a wife's mental health.¹⁶⁹

However, this "harm" needs to be contextualized with the situation of isolation these groups either cultivate or endure: "[i]solation can be used as a way to conceal sexual and physical abuses against women and children."¹⁷⁰ If legal penalties against polygamy were eliminated, scrutiny could become more comprehensive, and there would be less incentive for otherwise law-abiding individuals to isolate themselves: "[p]olygamous families would be treated no differently from monogamous families; both would be subjected to scrutiny about domestic violence, welfare fraud, or 'deadbeat dads.'"¹⁷¹

In sum, harms which are personal, societal, and systemic are alleged against polygamy. Because of the variation between non-monogamous systems, it does not seem that polygamy *qua* polygamy can ever be pinpointed as the root of abuse. Studies which attempt to do so are at best choosing one conclusion to the exclusion or rejection of other plausible explanations, or attempting to link harms (such as child abuse and underage marriage) to a conceptually unrelated practice.

Agency and Freedom of Religion/Conscience

Locating agency is at any time a struggle entailing identifying an individual's sphere of conduct, isolating it from socialization, and "interpreting" it. The conflict between agency and equality which polygyny demonstrates is almost impossible for the law to resolve on a

¹⁶⁸ Salman Elbedour et al, "Intelligence and Family Marital Structure: The Case of Adolescents from Monogamous and Polygamous Families among Bedouin Arabs in Israel" (2003) 143 J Social Psychology 95.

¹⁶⁹ Sangeetha Madhavan, "Best of Friends and Worst of Enemies: Competition and Collaboration in Polygyny" (2004) 1 Ethnology 69.

¹⁷⁰ Bennion, *Polygamy in Primetime*, *supra* note 32 at 264.

¹⁷¹ *Ibid.*

completely defensible basis, but Campbell is correct in noting that State law problematically supposes that “the institution of marriage and the virtues presumed to be inherent in it are unimportant to polygamists.”¹⁷² Driggs provides considerable insight when he writes: “‘obedient’ can be a loaded term. It should not be read as pliant.”¹⁷³ Arta Johnson’s description of one instance of Mormon polygyny provides an example of the conflict: “[m]y dear friend and his first wife who went to live in a polygamous colony were adults who made a choice. No nation building, no procreating, and no coercion of either wife or husband were involved; theirs was the classic free-will choice. But still, in this father’s request of his daughter, the belief and practice of patriarchy were made visible.”¹⁷⁴ The fact that a decision to enter into a family form, in this case polygyny, gratifies (and may be informed by) patriarchal institutions is difficult to reconcile with mainstream notions of equality.

But it is not rational to deny agency simply because the choice is repugnant to others, denying the “liberty of self-degradation.”¹⁷⁵ This is especially true when participants identify unique benefits, such as Meri Brown, whose limited biological fertility was overcome through a focus on her fellow wives’ children: “[i]f I hadn’t chosen polygamy...I would never have achieved the large family I’d always dreamed of having. Plural marriage has blessed me with what my body denied me.”¹⁷⁶ The choices of others can always be explained away as non-agentic, especially with a controversial practice such as polygyny: “[i]s it always possible to trust that women’s voices are legitimate and authentic? What if women are so blinded by the control to which they are subject in patriarchal cultures that they fail to see the ‘truth,’ that is, their

¹⁷² Campbell, *Sister Wives, Surrogates and Sex Workers*, *supra* note 23 at 84.

¹⁷³ Ken Driggs, “Twenty Years of Observations about the Fundamentalist Polygamists” in Cardell K Jacobson & Lara Burton, eds, *Modern Polygamy in the United States: Historical, Cultural, and Legal Issues* (New York: Oxford University Press, 2011) 77 at 81.

¹⁷⁴ Arta Blanche Johnson, “Are They Not Us?: A Personal Reflection on Polygamy” in Gillian Calder & Lori G Beaman, eds, *Polygamy’s Rights and Wrongs* (Toronto: UBC Press, 2014) 89 at 93.

¹⁷⁵ Kate Field, quoted in Sarah Barringer Gordon, “‘The Liberty of Self-Degradation’: Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America” (1996) 83:3 *J American History* 815 at 815.

¹⁷⁶ Meri Brown, in Brown et al, *supra* note 76 at 100-101.

oppression within male-dominated social and legal orders?”¹⁷⁷ While acknowledging the possibility, Campbell dismisses this concern as “problematic and largely unanswerable,” as well as a threat to understanding other perspectives:

[B]ecause the notion of false consciousness propagates a single ‘truth’ about women’s experiences, it is critiqued for unduly essentializing women and for failing to give appropriate weight to cultural difference and to women’s experiences as a source of knowledge....espousing the idea of false consciousness leaves women, especially those who offer their perspectives from within cultural minority groups, disempowered and “othered.” Rather than bearing any agency, they continue to be spoken for in the discourse, except that now they are spoken for by enlightened (Western) women who have somehow surmounted patriarchal brainwashing rather than by the male leaders of their own communities.¹⁷⁸

As Campbell herself demonstrates, it is necessary to recognize voices from all perspectives, even as a legitimate question remains whether (any and all) voices in the debate are truly agentic.

Nevertheless, the idea that contrary perspectives can never be valid is aggressively expressed, in relation to Campbell’s own research, by Jones: “Campbell’s research was scarcely worthy of the name: she was co-opted by Winston Blackmore [head of one portion of the Bountiful community] and his proxies with what in the end was a simple bargain...privileged ‘access’ ...and Blackmore would get an academic topspin added to his public relations volleys.”¹⁷⁹ A blanket accusation of invalid research based on its findings is neither verifiable nor falsifiable, and contributes nothing to an intelligent debate.

This chapter has attempted to frame the debate about the modern legal treatment of polygamy, most notably polygyny, by orienting it within its historical, religious, and societal contexts. Of course, the issue of polygamy defies easy answers: some commentators decry the institution for its seeming link to abuses (serious crimes such as rape and domestic violence), while others point to the intrinsic “inequality” of polygamy (which almost invariably really means polygyny). Both critiques are problematic, however, as they subsume participant agency

¹⁷⁷ Angela Campbell, “Wives’ Tales: Reflections on Research in Bountiful” (2008) 23:1-2 CJLS 121 at 129.

¹⁷⁸ *Ibid* at 129-130.

¹⁷⁹ Jones, *supra* note 20 at 341.

and eliminate choice in the name of, at best, protecting people from themselves. This “help” results in isolation, as seen through the legal reception of polygamy in the areas of criminal, family, and transnational law.

I have laid out the factual and legal framework for a re-evaluation of plural relationships from the perspective of maximizing individual agency and freedom, including the freedom of association, as opposed to a top-down approach that necessitates bringing those perceived as “deviants” into line. In the next chapter, I will argue that the law can and must do better in engaging with polygamy rather than relying on dated essentialization which violates freedom of choice and religion. The next chapter delves further into the issue, suggesting ways of combining freedom and autonomy with the two competing tensions in polygamy: equality and freedom.

CHAPTER V

Introduction

Having illustrated that polygamy is in fact an umbrella term for a myriad of practices, not all of which can be objectively characterized as harmful, I will now argue that legal reform to allow “non-harmful” instances of polygamy would be a net gain for the dual imperatives of respect for religious community and identity, as well as for the principle of minimal State involvement in an individual’s decision-making.

Western law has an ongoing problem of confronting religiously and conscientiously-inspired polygamy. This has persisted for well over a century:

[I]t is doubtful whether the practice can be eliminated without the utilization of totalitarian methods of enforcement. The Fundamentalists are not criminals under the common connotation of the term, but rather a deeply religious group of people who follow their religious practice under what is generally conceded to be the sincere belief that to do so is to obey the commandments of God and to insure salvation. They can be more accurately termed religious fanatics, but as such it is doubtful that ordinary sanctions and criminal theories can be applied.¹

Furthermore, the issue of polygamy “involves marriage, procreation, family rearing, and the intimate acts of the bedroom. The right to engage in a polygamous union can be broadly characterized as the freedom to construct one’s family in any manner one chooses.”² The issue is thus an integral one not only for the concept of private sexual ordering, but engages with many of the building blocks generally considered to be fundamental to society.

With polygamy’s forms, “harms,” and controversies enumerated in the previous chapter, the question becomes: how should law interact with the practice of polygamy? Several methods are available. The first, a theocratic option (echoing Joseph Smith’s Presidential campaign, in

¹ Jerry R Andersen, “Polygamy in Utah” (1957) 5:3 Utah L Rev 381 at 388. The term “religious fanatic” has become problematic, but I believe is used here only to underscore the centrality and overriding nature of the group’s faith, with no pejorative intent.

² Alyssa Rower, “The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment” (2004) 38:3 Fam LQ 711 at 725.

which he proposed turning America into a “theodemocracy”³), will be attractive to those who would use law to impose a social order. But such imposition is antithetical to individual freedom, even under the guise of “protecting” others from offence, as Hart notes: “a right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognises individual liberty as a value.”⁴ If an explicitly religio-moral standpoint is rejected, must the law on polygamy be made “neutral,” that is, evacuated of all moral judgment? And if this is desirable, what would such a system look like? Ultimately, the comments of Isaiah Berlin are pertinent:

The dilemma is logically insoluble: we cannot sacrifice either freedom or the organization needed for its defence, or a minimum standard of welfare. The way out must therefore lie in some logically untidy, flexible, and even ambiguous compromise. Every situation calls for its own specific policy, since out of the crooked timber of humanity, as Kant once remarked, no straight thing was ever made.”⁵

Berlin’s comments illustrate that no one single solution to the issue of the legal regulation of polygamy is ever likely to be found. Nevertheless, “untidiness” need not lead to nihilism or indeterminacy.

Outline

This chapter articulates the numerous methods of legal response to polygamy by grouping disparate legal approaches to three dominant themes. I will adopt the admittedly subjective principle that law should respect, and in some cases facilitate, the cultural, conscientious, and religious practices of minorities where these practices do not harm third parties (acknowledging Mill’s concession that “[i]f anyone does an act hurtful to others, there is a *prima facie* case for punishing him by law”⁶). A corollary to this principle is that an individual’s freedom to make

³ Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill, NC: The University of North Carolina Press, 2002) at 95.

⁴ HLA Hart, *Law, Liberty, and Morality* (New York: Vintage Books, 1963) at 46.

⁵ Isaiah Berlin, “Political Ideas in the Twentieth Century” in Isaiah Berlin, *Four Essays on Liberty* (New York: Oxford University Press, 1969) 1 at 39.

⁶ John Stuart Mill, *On Liberty*, Elizabeth Rapaport, ed (Indianapolis, IN: Hackett Publishing, 1978) at 10.

decisions about their privately sexual ordering (in this case, to practice a form of plural relationship) cannot be automatically outweighed by social tastes of what constitutes propriety. This is the case even if societal distortion can be proven to occur as an inexorable result of polygamy (which in most cases, it cannot). Such a position, that individual rights are not trumped by social mores, necessarily adopts the idea that “[p]olitical decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life...the government does not treat [citizens] as equals if it prefers one conception to another.”⁷ The general position is compatible with both a commitment to equality (in the form of an available, not imposed ideal), and the position “in which universal norms are combined with the concerns and realities of local women’s lives to reach solutions that are sensitive to cultural differences.”⁸

Non-harmful but minority positions must be legally respected and protected. The issue is one of ensuring legal liberty to make unpopular decisions: as a non-academic commentator notes,

not everything that is sinful should be viewed as illegal. In our pluralistic society, where people of various worldviews and value systems are attempting to live together...we need to tolerate many things we consider to be morally wrong. We should only legislate against those practices that pose serious threats to the fundamental rights of other human beings.⁹

This can be conceptualized as a social good, creating social possibilities and room for human expression: “[i]f marriage is to achieve its possibilities, husbands and wives must learn to understand that whatever the law may say, in their private lives they must be free.”¹⁰ Going further still, I argue that “toleration” of minority conjugal practices (in this case polygamy) must

⁷ Ronald Dworkin, “Liberalism,” in Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) 181 at 191.

⁸ Vedna Jivan & Christine Forster, “What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism Through Women’s Use of CEDAW” (2005) 9 SYBIL 103 at 123.

⁹ Richard Mouw, “Polygamists Should Be Tolerated” in Ronnie D Lankford, Jr, ed, *At Issue: Polygamy* (New York: Greenhaven Press, 2009) 11 at 12.

¹⁰ Bertrand Russell, *Marriage and Morals* (New York: Bantam, 1963) at 97.

be careful not to reify the existing power imbalance between minority and majority: accommodation risks falling into the barely-concealed disdain of the other, wherein “a tolerated belief or practice has to be seen as false or bad in order to be a candidate for toleration; otherwise, we would not speak of toleration but of either indifference or affirmation.”¹¹ Berlin’s untidiness and Russell’s freedom (and indeed Kant’s crookedness) leave no party with the high ground while assessing the proper ordering of human sexuality. As Drummond notes, the historical monolith of Western monogamy is simply a matter of perspective: “[t]he lack of pluralism characteristic of most histories of the Western family derives from a lack of attentiveness to the plurality of venues in which family normativity is expressed.”¹² No family form should be privileged above others in a modern legal assessment, especially given the fact of (sometimes buried) historical diversity.

Generally, the legal treatment of polygamy can be conceived with Bailey and Kaufman’s categories of “criminalization and civil recognition,”¹³ although apart from criminalization the question arises whether polygamy is merely tolerated or accepted by law. This chapter, after briefly exploring the benefits (and limits) of legally-imposed sexual norms, will explore all options in the contexts of criminal, family, civil and public law. Ultimately, I conclude that while a permissive legal approach to polygamy will not result in a nihilistic “anything goes” approach, the available literature across the world suggests that a legal system which engages with, and does not attempt to suppress, polygamy’s varied forms is the system likely to generate the greatest societal return and be the most theoretically defensible.

¹¹ Rainier Forst, “A critical theory of multicultural toleration” in Anthony Simon Laden & David Owen, eds, *Multiculturalism and Political Theory* (New York: Cambridge University Press, 2007) 292 at 293.

¹² Susan G Drummond, *Mapping Marriage Law in Spanish Gitano Communities* (Toronto: UBC Press, 2006) at 214.

¹³ Martha Bailey & Amy J Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara, CA: Praeger, 2010) at 158.

Whatever the prevailing legal regime in the future, Jones’s “zombies”¹⁴ will continue to walk on both sides of the polygamy debate. Polygamy will be decried as unequal and harmful, as it will be defended as a voluntary practice which enables religious fulfillment and creates a stable home life. And, of course, it will be practiced throughout the world for years to come. Polygamy is an excellent example of an area where contested legal approaches to the regulation of private sexual ordering exist. An approach consonant with respect for human rights, individual autonomy, and religious freedom must take into account potential harms (and how best to address them), personal freedom, and insights gathered from various perspectives in order to be just and effective. In making judgments and recommendations, it is important to bear in mind former polygamist Carolyn Jessop’s comment that “ultimately it’s facts---not signs, impressions, assumptions, or opinions---that speak the loudest.”¹⁵

How Should Law Interact with Religious Polygamy?

The first point of discussion should be on the influences of law, such as religion. As described in the last chapter, the legal imposition of monogamy in the West, was at the least informed by “marriage, as understood in Christendom”¹⁶ and spread through a largely religious and racial conception of progress. As such, despite the secular mechanisms and oversight which law in States consonant with international egalitarian norms is now largely subject to, it is important to remember (which has been noted in previous chapters of this work) that definitions of conjugal propriety as defined and upheld by “modern” law “spoke to a society of shared social

¹⁴ As noted in the last chapter, “‘common sense’ civil libertarian arguments” which “simply can’t be killed,” in Craig Jones, *A Cruel Arithmetic: Inside the Case Against Polygamy* (Toronto: Irwin Law, 2012) at 341. I prefer to use the term to describe both sides of the debate, both the common sense arguments that civil liberties must be respected (an idea that hopefully cannot be killed) and the idea that equality requires suppression of polygamy (an argument which also appears to be undead).

¹⁵ Carolyn Jessop & Laura Palmer, *Triumph: Life After the Cult-A Survivor’s Lessons* (New York: Three Rivers Press, 2010) at 123-124.

¹⁶ *Hyde v Hyde* (1866), LR 1 PD 130 (Eng PDA), at 133.

values where marriage and religion were thought to be inseparable.”¹⁷ Monogamous marriage was bound up in racial and religious discourses: monogamy was perceived, at the height of polygamy’s prosecution in North America, as “the key to the liberty, happiness and power that Christian, European and North American white women allegedly enjoyed.”¹⁸ It is no coincidence that Aboriginal, Islamic, African Tribal, Wiccan or Hindu polygamous marriage practices are not present alongside Christian conceptions of marriage in “secular” law. This pseudo-secularism raises the question of whether it is necessary to expunge latent religious influences on the law of marriage (in this case as antagonistic towards polygamy), and if so, how to accommodate religious freedom to practice polygamy.

While the concern is largely a paper tiger, Waite C.J. is correct when he opines that if religious belief were to automatically overrule legal provisions in every case, the result “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”¹⁹ Of course, this is not being proposed by any commentator. However, it seems reasonable that laws guaranteeing free exercise of religion²⁰ should carry more weight than simply allowing for the unencumbered practice of religion where it is convenient or acceptable to the majority. Compounding the issue is the determination of people who believe that, as quoted in the last chapter, “there was nothing that was going to stop me from doing what God wanted me to do.”²¹ While there is the “possibility that some men and women may have motives above and beyond religious beliefs as a reason for joining the fundamentalist

¹⁷ *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22.

¹⁸ Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008) at 27.

¹⁹ *Ibid* at 167.

²⁰ Such as, *inter alia*, the First Amendment to the *United States Constitution*, Article 18 of the *Universal Declaration of Human Rights*, Article 8 of the *African Charter on Human and Peoples’ Rights*, Article 9 of the *European Convention on Human Rights*, and section 2(a) of the *Canadian Charter of Rights and Freedoms*.

²¹ “Participant #6”, quoted in Angela Campbell, “Bountiful Voices” (2009) 47:2 Osgoode Hall LJ 183 at 220.

movement,”²² pressures (as noted in Mormon polygyny but roughly comparable to other polygamous experiences) such as “financial burdens, the needs of large families, family tensions and conflicts, and so on”²³ would seem to make the practice unappealing for charlatans. Regardless, some sort of shibboleth test for sincere religious belief would be not only unwieldy, but ineffective in ensuring a “correct” result. Thus, in most cases, courts should be generous with any requirement that an individual demonstrate that, in the test established by the Supreme Court of Canada,

he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual’s spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief.²⁴

Ultimately, the freedom of religious practice is easy to agree with in principle, but thorny in practical cases such as polygamy. This difficulty is illustrated by Professor Bakht’s comments on tensions inherent in a multicultural society:

That individuals should have equal access to a secure cultural context is for the most part uncontroversial, as the many legal and political instruments protecting minority rights...indicate. How to go about securing such a cultural context for divergent minorities leads to difficult but critical discussions about such things as the limits of accommodation and the balancing of seemingly opposing values.²⁵

Acknowledging the contested nature of the balancing between religious freedom in a diverse society and bright-line rules, it is erroneous to argue (even assuming the statement is factually accurate, which is dubious) that “the pre-Christian institution of monogamy in the West, as well as the secularization of modern marriage law, show that monogamy is not rooted in any one religion, and severely detracts from the idea that monogamy perpetuates religious

²² Irwin Altman & Joseph Ginat, *Polygamous Families in Contemporary Society* (New York: Cambridge University Press, 1996) at 439.

²³ *Ibid* at 439.

²⁴ *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 56.

²⁵ Natasha Bakht, Book Review of *Diversity and Equality: The Changing Framework of Freedom in Canada* by Avigail Eisenberg, ed, (2007) 12:2 Rev Const Stud 301 at 301.

discrimination.”²⁶ Monogamy itself does not perpetuate religious discrimination. But the legal imposition of monogamy does, and the roots of such a law are a *non sequitur* to whether discrimination occurs or not (it is obviously also highly debatable that a system which retains many Christian traditions as law is factually secular). So how to approach religious difference as demonstrated by polygamy?

Assuming that societal participation by diverse groups is seen as a legitimate goal, the first step is to articulate the need for religious “accommodation” so as to ensure religious groups’ ability to participate in society. As Eisenberg writes, “from the perspective of accommodation, the solution to seemingly neutral rules that can nonetheless disadvantage some groups unintentionally is to adjust the rules to accommodate the difference...the aim of reasonable accommodation is not to abandon the rule but to mitigate its discriminatory effects.”²⁷ It is debatable (as discussed below) whether the underlying rules on polygamy should remain unchanged except for specifically enumerated religious or conscientious exceptions. A universally-applied rule with exemptions for some groups implies that “[l]aw is the curator--- rather than a component---of cultural pluralism...it is exceedingly difficult to appreciate what is at stake *for the law* in its engagement with religion and to see the tenacity and force with which it protects its symbolic, structural and normative commitments.”²⁸ However, law respecting religion is at least a first step towards an inclusive law that respects, where possible, the rights of people to believe in and practice a religious reality not in conformity with the majority, or law’s, “normative commitments.” Not all polygamy is rooted in religion or conscience, but the law has a duty, in the absence of compelling counter-concerns, to balance religious liberty with legal

²⁶ Thomas Buck Jr, “From Big Love to the Big House: Justifying anti-Polygamy Laws in an Age of Expanding Rights” (2012) 26:2 Emory Int’l L Rev 939 at 995.

²⁷ Avigail Eisenberg, “Rights in the Age of Identity Politics” (2013) 50:3 Osgoode Hall LJ 609 at 624.

²⁸ Benjamin L Berger, “The Cultural Limits of Legal Tolerance” (2008) 21:2 Can JL & Jur 245 at 247.

strictures. To do otherwise falls into the legal category of mere force or coercion, upheld by neither reason nor principle. It is arbitrary rigidity, which can be characterized by George Orwell's vision of totalitarianism: "imagine a boot stamping on a human face---forever."²⁹

The First Option- Arbitrary Rigidity

I have chosen the above description of law's first option because the option contemplates several different ranges for its arbitrariness. Of course, the typical use of the term would apply to prohibition---but laws which regulate polygamy based on the personal status of the individual (such as India, where access to polygamy is determined by religion, or the Republic of South Africa, where polygamy is available only where it is "customary"), or which are imposed universally via specific interpretations of religious law, also fall under this rubric. Essentially, the first option allows law to legislate without principle, taking "a policeman's outlook on the whole of human life---the outlook, that is to say, which is always looking for an opportunity to forbid something."³⁰ Such a self-righteous and uncurious attitude is revealed in a historical Canadian parliamentary discussion concerning corporal punishment for sexual offences: "I have no objection to a man being whipped [for gross indecency] as soundly as the hon. Minister desires."³¹ After that discussion, which turned on indecency (including punishment for homosexuality), the House of Commons turned a rigid and disapproving legal eye to polygamy, which one Member of Parliament characterized as a "serious moral and national ulcer:"³² a member of the government responded that he was "willing to increase the penalty"³³ (presumably to any level of severity), to which an opposition member added, "I think

²⁹ Spoken by "O'Brien," in George Orwell, *1984* (New York: Signet Classics, 1977) at 267.

³⁰ Russell, *supra* note 10 at 95.

³¹ Sir Richard Cartwright, House of Commons Debates, 6th Parliament, 4th Session, No 24 (10 April 1890) 3171.

³² Mr. Mulock, House of Commons Debates, 6th Parliament, 4th Session, No 24 (10 April 1890) 3177.

³³ Sir John Thompson, House of Commons Debates, 6th Parliament, 4th Session, No 24 (10 April 1890) 3177.

imprisonment ought to be made imperative.”³⁴ This was followed by a pronouncement from the Prime Minister: “they [Mormons] ought not to get any encouragement as regards the continuance of that peculiar institution of their religion [polygamy], which is so objectionable.”³⁵ As in the case of whipping people who commit “indecenty,” it seems apparent that polygamy is being suppressed as a “moral ulcer.” It was seen as the Other, to be eliminated by the same methods as are employed over a century later.

The strongest rationale for legal prohibition of polygamy is that such criminalization (or similar legal limiting of polygamous forms) is not arbitrary, but is either required to prevent harm (to society and its members) or mandated by an external force such as God. Rational argument cannot proceed against the second argument, since it is by definition an unprovable, tautological fact claim. However, the idea that harm would result to society under demographic principles is unsupportable for two main reasons. First, the argument that “[a] non-trivial increase in the incidence of polygyny...if polygyny were legalized...would result in increased crime and antisocial behaviour by the pool of unmarried males it would create,”³⁶ reinforced by statistics: “a 0.01 increase in sex ratio was associated with a 3% increase in property and violent crimes”³⁷ is speculative. There is no way of predicting whether polygamy will increase, or whether factors such as socio-economic, geographic or educational levels will impact on the levels of polygamy or its effects. As Colby Cosh notes in a historical discussion of 19th century European attempted assassinations, disoriented youth can be a danger in any system:

[T]his period of European (and American) history was crawling with young, often solitary male terrorists, most of whom showed signs of mental disorder when caught and tried, and most of whom

³⁴ Mr. Blake, House of Commons Debates, 6th Parliament, 4th Session, No 24 (10 April 1890) 3177.

³⁵ Sir John A Macdonald, House of Commons Debates, 6th Parliament, 4th Session, No 24 (10 April 1890) 3180.

³⁶ *Reference re. Section 293, of the Criminal Code of Canada*, 2011 BCSC 1588 at para 499, discussing the evidence of Joseph Henrich.

³⁷ *Ibid* at para 515.

were attached to some prevailing utopian cause. They tended to be anarchists, nationalists or socialists, but the distinctions are not always clear, and were not thought particularly important.³⁸

As this phenomenon occurred in a monogamous society, it seems unlikely that societal demographics can be isolated from socioeconomic and political factors to predict crime rates.

Perhaps more importantly, the second reason is that this argument ignores same-sex polygamy, which does not have the same demographic impact, yet the demographic “harm to society” trope is still used as justification against such a practice. The justification is no less risible than one offered during the attempted decriminalization of homosexual group sex in Canada, when one police chief opined, “once you replace the concept of two persons with an undefined number, you are providing a loophole which organized crime will be glad to take advantage of.”³⁹ The warnings range from speculative to ludicrous, but no matter the context, mono-normativity dies hard.

The lack of non-normative, universal regulation would be troubling for a society in which individuals were ostensibly free to choose their own family, and their own destiny. Under this reasoning, the situation in Malaysia, where polygyny is allowed but “the first wife may [not even] know that her husband has taken another wife, in fact that seems to be the case in many polygamous unions in urban Malaysia,”⁴⁰ would fall into this category. Restricted access to private sexual ordering can be (and under this model, is,) implemented legally, but this option is unsatisfactory for several reasons. First, it is blatantly discriminatory. Provision for the legal enshrinement of an arbitrary position, even if it is the majority position, denies other individuals the rights guaranteed by the *Universal Declaration of Human Rights*, namely the “right to marry

³⁸ Colby Cosh, “Those old terrorist tendencies” (7 December 2014) Maclean’s, online:Macleans.ca <<http://www.macleans.ca/society/those-old-terrorist-tendencies/>>.

³⁹ Police Chief G Lafrance, quoted in Thomas Hooper, “‘More Than Two is a Crowd’: Mononormativity and Gross Indecency in the *Criminal Code*, 1981-82” (2014) 48 J Canadian Studies 53 at 73.

⁴⁰ Miriam Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* (New York: Berg, 2008) at 71.

and found a family [without any limitation based on gender, sexuality, or religion].”⁴¹ The imposition of arbitrary regulations is also almost impossible to sustain: in the case of the prohibition of polygamy, criminalization has failed to eliminate or adequately curtail the practice, leading to the insight that “people will continue to live in polygamy whether it is banned or not, just as people continued to drink during Prohibition.”⁴² When prohibition is effective, it is often at a high, and arguably unacceptable, human cost: for example, contemporary French efforts to eliminate polygyny (which exists in France as a result of prior French pro-polygamy immigration policies) has resulted in a situation where the most vulnerable participants in polygamy are further marginalized. As noted in the last chapter, “forced de-cohabitation of polygamous husbands and all but one wife left many women with no choice but to leave the household with few financial resources.”⁴³

Even where criminalized behaviour is not often prosecuted, it nevertheless impacts negatively on people’s behaviour and perceptions: “[b]ecause it was only a few decades ago that arrests, raids, and other punitive actions occurred, Mormon fundamentalists are always wary about the future.”⁴⁴ After this was written, the seizure by child welfare authorities in Texas of over 400 children⁴⁵ based on the impersonation of a Mormon teenager in distress by a

⁴¹ *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), online: United Nations <<http://www.un.org/en/documents/udhr/>>. Article 16(1) sets out the quoted material (expressly guaranteed against limitation based on religion, nationality, or race), while Article 2 provides that rights guaranteed in the document apply “without distinction of any kind,” specifically mentioning sex and whose wording on the face of it includes sexual orientation.

⁴² Janet Bennion, *Polygamy in Primetime: Media, Gender, and Politics in Mormon Fundamentalism* (Waltham, MA: Brandeis University Press, 2012) at 244.

⁴³ Angela Campbell, “How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis” in Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* (2005), online: <<http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf>> at 18.

⁴⁴ Altman & Ginat, *supra* note 22 at 443.

⁴⁵ Linda F Smith, “Child Protection Law and the FLDS Raid in Texas” in Cardell K Jacobson & Lara Burton, eds, *Modern Polygamy in the United States* (New York: Oxford University Press, 2011) 301 at 304.

psychologically disturbed woman⁴⁶ has demonstrated that law can, even after periods of tolerance, suddenly move to enforcement.

As an additional reason to alter the current legal treatment of polygamy, its legal imposition of a rigid and non-negotiable standard of behaviour excludes minorities, both religious and cultural, from the public sphere. As Sherene Razack notes in a crucial commentary,

[t]he close connection between assertions of cultural difference and racism has meant that in white societies the smallest reference to cultural differences between the European majority and Third World peoples (Muslims in particular) triggers an instant chain of associations (the veil, female genital mutilation, arranged marriages) that ends with the declared superiority of European culture, imagined as a homogeneous composite of values including a unique commitment to democracy and human rights, and to the human rights of women in particular. Culture clash, where the West has values and modernity and the non-West has culture, consolidates membership in the dominant group; it provides belonging through enabling dominant groups to imagine that they share something in common, something that marks them as superior.⁴⁷

Wallerstein builds on this point: “[g]aining acceptance for the moral right to dominate has been the key element in achieving the legitimation of power. And in order to do that, it had to be demonstrated that the *long-run* effect of the domination was to the benefit of the dominated, even if the *short-run* effect seemed to be negative.”⁴⁸ In other words, and building upon the CEDAW committee’s concept that even voluntary polygamy must be “discouraged and prohibited” so as to ensure “equality,”⁴⁹ individuals who dissent from what is termed their benefit lose their voice under a rigid law. This “casting out” of individuals from societal participation is philosophically unacceptable, and leads to a bifurcated system between majority and minority groups. This is again illustrated by France, where “[v]isible Muslims who may have their own interpretations of gender – particularly African-born immigrants who live in polygamous arrangements – are

⁴⁶ *Ibid* at 302.

⁴⁷ Sherene H Razack, *Casting Out: The Eviction of Muslims from Western Law & Politics* (Toronto: University of Toronto Press, 2008) at 88.

⁴⁸ Immanuel Wallerstein, *European Universalism: The Rhetoric of Power* (New York: The New Press, 2006) at 72 [emphasis in original].

⁴⁹ Committee on the Elimination of Discrimination Against Women, *General Recommendation No 21* (13th Session, 1994) online: <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>> at no 14.

deemed non-normative and as threatening to accepted social norms.”⁵⁰ This was exemplified by future President Jacques Chirac stating in 1991 that he sympathized with the “poor French man...[who] sees his next-door neighbour – a family where there is one father, three or four wives and twenty-odd kids, getting fifty thousand francs in social security payments without going to work,” and differentiating this neighbour with a person who is “French French.”⁵¹ Racism and ethnocentrism push marginalized people out of social participation, and one way in which to do so involves the suppression or exclusion of polygamous families.

The legal imposition of an arbitrary (usually majority-sanctioned) rule is compatible with the Platonic goal of justice which consists of “keeping what is properly one’s own and doing one’s own job”⁵² according to an externally-imposed (potentially naturalistic) legal standard. However, such an approach leads to a barren conception of human freedom, and can be condemned with the observation that “[a]lthough in given circumstances it is justified that the majority...has the constitutional right to make law, this does not imply that the laws enacted are just.”⁵³ While the need to seek justice is a subjective good (and to some extent arbitrary), there appears to be no neutral utility in using law to coerce individuals into a particular moral code of conduct. Thus, “[t]he use of legal punishment to freeze into immobility the morality dominant at a particular time in a society’s existence may possibly succeed, but even where it does it contributes nothing to the survival of the animating spirit and formal values of social morality and may do much to harm them.”⁵⁴ Arbitrary rigidity is clearly not a valid option for a society

⁵⁰ Jennifer A Selby, “Polygamy in the Parisian Banlieues: Debate and Discourse on the 2005 French Suburban Riots” in Gillian Calder and Lori G Beaman, eds, *Polygamy’s Rights and Wrongs* (Toronto: UBC Press, 2014) 120 at 134.

⁵¹ *Ibid* at 123.

⁵² Plato, *The Republic*, translated by Desmond Lee (New York: Penguin Books, 2007) at Book V, 434a (page 138).

⁵³ John Rawls, *A Theory of Justice*, revised ed (Cambridge, MA: Belknap Press, 1999) at 313.

⁵⁴ Hart, *supra* note 4 at 72.

premised on respect for individual autonomy. But can less restrictive, albeit still possibly rigid, legal rulemaking provide a satisfactory answer?

The Second Option: Governmental Regulation

The second option for legally governing polygamy is to develop or adopt legal measures that permissively regulate the practice, similar to the current legal regime governing monogamous marriage. Direct governmental regulation of polygamy---that is, legally permitting and regulating polygamous familial arrangements, at least up to a point---is less problematic than many commentators assert. Bailey and Kaufman assert that legalization is not desirable because “[p]lural unions are not part of Western society” and “[t]here are deep inequalities in plural unions [amongst adults].”⁵⁵ However, this comment is not only essentializing, it misses the mark. Government already privileges private ordering---no State condemnation, for example, attaches to patriarchal monogamous marriage. The real harm to be feared is surely not that governmental neutrality on marital form would “undermine the monogamous nature of marriage [in Canada and the United States of America].”⁵⁶

Direct State supervision of polygamy would create much-needed data records and serve to partially combat abuse through inspection (thus limiting the ability of isolated groups to contravene laws “associated” with polygamy). This is not a novel observation: as Bennion notes, “[l]egalizing the polygamist family would allow it to be regulated with the same force of law as monogamy is regulated, including registration and documentation of marriages, societal tolerance and acceptance, and appropriate legal models that provide for multiple-spouse families.”⁵⁷ The question remains why, especially with modern conceptions of freedom of religion and conscience, where “[f]amily’ is still meaningful; but we can define family in ways

⁵⁵ Bailey & Kaufman, *supra* note 13 at 169.

⁵⁶ *Ibid* at 184.

⁵⁷ Bennion, *Polygamy in Primetime*, *supra* note 42 at 257.

that would have startled our grandparents,”⁵⁸ such utility is ignored in the face of societal inertia. This is especially troubling as the inertia is unapologetically based upon Christian social norms “forc[ing] [a] way of life on their new subjects.”⁵⁹ The law’s discriminatory religious influences and outcomes on religious minorities militates in favour of a more neutral, more pluralistic law.

Moreover, disallowing personal freedom in the choice of conjugal form is not universally inevitably proportional to the alleged harms avoided. Polygamy is not insuperably linked to any of the harms it is often associated with, such as underage marriage, sexual abuse, large families, or poverty. Requiring marriage licences and normal social oversight (as applied to all society by law enforcement and other administrative groups) deters all of these other social problems: “it is not the fundamentalist Mormon religion, but certain practitioners, that need to be prosecuted...Government should create and adapt a legal framework around polygyny to better regulate truly deviant practitioners.”⁶⁰ The suggestion of creating a positive legal framework for polygamists would at least partially prevent an otherwise law-abiding group from shielding indisputably criminal actions. Legalization does not eliminate illegality. There is also the possibility that, in Bramham’s hyperbolic words, “bullies and rapists and child abusers who act in the fanatical certainty that God is directing them”⁶¹ will continue to ignore uncontroversial laws (such as assault, kidnapping, and physical or verbal coercion) and evade law enforcement; the decoupling of such illegal acts from polygamous sexual ordering will at least make serious illegality more conspicuous. As Sigman writes, describing North American polygyny, “children are taught from an early age that if they cooperate with the authorities or testify against the

⁵⁸ Lawrence M Friedman, *Private Lives: Families, Individuals, and the Law* (Cambridge, MA: Harvard University Press, 2004) at 187.

⁵⁹ Zeitzen, *supra* note 40 at 34.

⁶⁰ Emily J Duncan, “The Positive Effects of Legalizing Polygamy: ‘Love is a Many-Splendored Thing’” (2008) 15:2 *Duke J Gender L & Pol’y* 315 at 337.

⁶¹ Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada’s Polygamous Mormon Sect* (Toronto: Vintage, 2009) at 438.

family, they could be removed from their families and placed in foster care. Although this type of threat silences children and adolescents in monogamous families as well, the added history of children having been removed from their polygamous families gives credence to these type of remarks.”⁶²

Craig Jones makes an interesting argument in asserting that “the alternative [to prohibiting polygamy]...would cause serious adverse consequences throughout society---real consequences to real people---regardless of whether it was harmful to its participants in any particular manifestation.”⁶³ However, this is not only a statistically unprovable claim, but requires individual freedoms (widely acknowledged to be central as human rights, such as, *inter alia*, the “right of men and women of marriageable age to marry and to found a family”⁶⁴) to be curtailed for the “greater good” of society. This is an extremely dangerous step and theoretical starting point, but similar dire predictions of social upheaval and dissolution have been made with similar increases in the liberty accorded to private sexual ordering, such as miscegenation,⁶⁵ divorce, and same-sex marriage, without any evidence of social harm after these changes have been implemented. As Bala notes in the context of same-sex marriage, “same-sex marriages serve many of the same social, economic and psychological functions as traditional opposite-sex monogamous marriages, and there is no evidence that the legal recognition of these relationships

⁶² Shayna M Sigman, “Everything Lawyers Know About Polygamy is Wrong” (2006) 16 Cornell JL & Pub Pol’y 101 at 180.

⁶³ Jones, *supra* note 14 at 29-30.

⁶⁴ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 23(2) (entered into force 23 March 1976).

⁶⁵ Not coincidentally, the leader of the government which criminalized polygamy, John A Macdonald, opined in a speech in the House of Commons that “the Aryan races will not wholesomely amalgamate with the Africans or the Asiatics. It is not desired that they should come; that we should have a mongrel race; that the Aryan character of the future of British America should be destroyed by a cross or crosses of that kind.” John A Macdonald, House of Commons Debates (May 4, 1885) at 1589, quoted in Joanna Sweet, “Equality, Democracy, Monogamy: Discourses of Canadian Nation Building in the 2010-2011 British Columbia Polygamy Reference” (2013) 28 CJLS 1 at 7.

is harmful. Recognition of same-sex marriage has *promoted equality*.⁶⁶ The statement, intended as disparagement, that “[in distancing marital form from ‘nature’], marriage does become a matter solely of convention and opinion, and therefore it can be given virtually any shape by the positive law,”⁶⁷ actually illustrates an opportunity for society to act on the principles of human rights, allowing personal choice in private ordering both inside and outside marriage (validating, rather than suppressing, diversity in “convention and opinion”). At least some forms of polygamy (such as polyamory or Mormon polygyny) are still relatively new and developing: these lifestyles could be shaped by, and in turn shape, legal systems. “Members of modern plural families and those in newly emerging family forms are...inexperienced, and all must experiment and engage in a process of trial and error to figure out how to live in a viable way,”⁶⁸ and the law could simultaneously evolve and adapt as these individuals seek religious and conscientious self-actualization in modern society.

It seems that polygamy would be best if the law explicitly offered “more ways to see the beauty, resilience, and diversity that can flow when families organize themselves around the functions of care rather than the rigidities of form.”⁶⁹ Legislation could be re-written in multiple areas to accommodate the formal and essential validity of marriage (requiring fully informed consent) and also the same type of legislative drafting that occurred during the transition from heterosexual-only marriage to marriage between two partners. No jurisdiction would create perfect law, and some changes may be necessary, but the ongoing modernization of family law (and criminal law) cannot be challenged by the complaint that the *status quo* is simply easier,

⁶⁶ Nicholas Bala, “Why Canada’s Prohibition of Polygamy is Valid and Sound Social Policy” (2009) 25 Can J Fam L 165 at 178 [emphasis in original].

⁶⁷ Congressional Testimony of Prof. Hadley Arkes, quoted in Martha Ertman, “Race Treason: The Untold Story of America’s Ban on Polygamy” (2010) 19:2 Colum J Gender & L 287 at 361.

⁶⁸ Altman & Ginat, *supra* note 22 at 439.

⁶⁹ Gillian Calder, “Conclusion: ‘To the Exclusion of All Others’ - Polygamy, Monogamy, and the Legal Family in Canada” in Gillian Calder and Lori G Beaman, eds, *Polygamy’s Rights and Wrongs* (Toronto: UBC Press, 2014) 215 at 231.

especially when it locks some families out from the law and law's benefits. The paucity of Western precedent for dealing with legally-recognized formal polygamy represents both a challenge and an opportunity for the law, an undiscovered country: "[e]ven assuming polygamy gains the necessary critical mass of cultural and political acceptance, the legal framework that would underlie legalized polygamy remains a mystery."⁷⁰ Differing regimes in multiple jurisdictions provide the opportunity for "beyond [floors of minimal entitlements], a great deal of variation," which satisfies the "need to learn more about the nature and effects of possible [conjugal] arrangements, and the best way to do that is through experiments."⁷¹ As noted in the previous chapter, polygamy encompasses a vast array of practices, and is not necessarily limited by the same single-spouse-to-spouse connection of monogamous marriage. A corresponding wide variety of legal treatments to match the diversity of polygamous forms (all legal frameworks above Sunstein's minimal entitlements) would enable a comprehensive study of what systems work, and why, while enabling greater freedom for private sexual ordering.

The Third Option: Indirect Regulation of Polygamy

However, the formal legal regulation of polygamous marriage is not the only option for State oversight and control of individuals engaged in polygamy. The incidents of legally-practiced polygamy would create many legal openings for regulation throughout law, in as wide a range of statutory areas as immigration, tax, child, and spousal law.

Currently, Western law is inimical to polygamy in all of these areas of law. However, a blueprint for how to ensure that the property and support obligations of spouses is recognized and upheld by the law existing in Canada, where five jurisdictions (Ontario,⁷² Prince Edward

⁷⁰ Samuel D Brunson, "Taxing Polygamy" (2013) 91 Wash L Rev 113 at 145.

⁷¹ Cass R Sunstein, "Of Federalism and Caste" in Joshua Cohen and Deborah Chasman, eds, *Mary Lyndon Shanley: Just Marriage* (New York: Oxford University Press, 2004) 41 at 42.

⁷² *Family Law Act*, RSO 1990, c F3, s 1(2).

Island,⁷³ and the territorial family regimes⁷⁴) provide for marital property division obligations if the marriage is polygamous but entered into in a jurisdiction where the marriage is valid.⁷⁵ All Canadian jurisdictions except Quebec would appear to capture polygamous cohabitation within their definitions of *de facto*, or “common-law,” marriage, since they only require cohabitation for a defined period of time (or cohabitation with the joint parenting of a child).

Such protection in family law statutes unconnected with formal marriage could create a system where “women would have the legal option of divorce to dissolve an unhappy or abusive alliance.”⁷⁶ This set-up would allow for the regulation of polygamy without expressly engaging with the practice, and would further contribute to “ensuring plural wives have access to legal remedies upon relationship breakdown.”⁷⁷ The consideration of legally-enforced support for women who would no longer be committing a crime could “force the patriarch either to provide independently for his family or to marry fewer women...the patriarch would be responsible for supporting his family and could no longer rely on welfare [gained through governmental assumption that his plural wives were single mothers].”⁷⁸ This quotation assumes that polygynous female spouses do not engage in waged work outside the home (a sometimes incorrect assumption⁷⁹), and in some cases a plural wife may owe support obligations to her

⁷³ *Family Law Act*, RSPEI 1988, c F2.1, s 1(2).

⁷⁴ *Family Property and Support Act*, RSY 2002 c 83, s 1, and *Family Law Act*, SNWT 1997, c 18, s 1(2) (also in force in Nunavut).

⁷⁵ Yukon Territory goes furthest in recognition of polygamy, allowing for the recognition of polygamous marriages (for the purposes of property division and corollary relief) entered into anywhere in good faith where the marriage is valid, if cohabitation occurs at or had occurred within 1 year relationship breakdown. The approaches of jurisdictions granting some recognition to underlying realities of relationships seems more efficient than non-recognition, which resulted in a divorce claimant having her (polygamous) marriage judicially annulled in Alberta’s *Azam v Jan*, 2013 ABQB 301. The Alberta case thus ignored any property division rights the plaintiff, a polygynous wife, may have justifiably advanced, despite the fact that she led evidence (para 4) that she believed the marriage to be monogamous.

⁷⁶ Bennion, *Polygamy in Primetime*, *supra* note 42 at 256.

⁷⁷ Bailey and Kaufman *supra* note 13 at 186.

⁷⁸ Rower, *supra* note 2 at 728.

⁷⁹ See, for example, Campbell’s statement on her female polygynous research subjects that “[m]ost were either employed outside the home or pursuing college programs. Several worked in the community, most notably as

impecunious husband, but support obligations can ameliorate economic constraints on the ability of a plural spouse to leave. The imposition of support obligations would also be a powerful incentive to limit the size of polygamous families for sects which do not self-limit the number of spouses an individual may have, although any regime would have to balance the rights of the spouse who required support with the support of spouses and children remaining in the polygamous relationship.⁸⁰ This is not an insurmountable goal:

[C]ourts already wrestle with how to award spousal and child support when there is more than one family unit. The issue is not unique to plural or polygamous families; consider the portion of the population who live monogamously but have married, had children, divorced, and then remarried and had children with a new spouse. The reality is that family court judges are already familiar with situations in which a person has support obligations to more than one family unit.

Family law already maintains a central role in the regulation of private sexual ordering, one that does not, however, directly interfere with an individual's ability to choose a mate and contribute to a family. Family law provisions could thus play an influential role in a legal system engaged in an indirect dialogue with polygamy. As seen in the case of *Blackmore v Blackmore*,⁸¹ child custody law, with respect to the "best interests of the child" test, can impact on the practice of polygamy. In that case, a monogamous family dissolved, with the judge granting sole custody to the mother. The father's participation in a group which practiced polygamy (even though he himself did not) was "one more reason...why Ms. Blackmore [the mother who had left the polygamous community] should have sole interim custody and guardianship."⁸² An order for either joint custody or sole custody where otherwise children would be exposed to unhealthy

teachers in community schools, as care-aids for the dependent or elderly, or as nurse-midwives. Some also worked outside of Bountiful, in stores or shops in nearby Creston or Cranbrook" Campbell, "Bountiful Voices," *supra* note 21 at 207. Anecdotally, Carolyn Jessop worked outside the home as a teacher and outside her FLDS community running a motel (see Jessop & Palmer, *Escape*, *infra* note 93 at 186 and 241-246), and Jane Blackmore served as Bountiful's midwife (see Bramham, *supra* note 61 at 131 and 388). Obviously, there is nothing inherent in the practice of polygamy (as opposed to the practices of specific groups) dictating marital financial or working conditions.

⁸⁰ Bailey & Kaufman, *supra* note 13 at 184-185.

⁸¹ 2007 BCSC 1735.

⁸² *Blackmore v Blackmore*, 2007 BCSC 1735 at para 22.

stereotypes (not necessarily in polygamy) represents a powerful way for law to ensure polygamy is regulated and non-abusive without formal legal recognition. More importantly, it can operate on a contextual, case-by-case basis (unlike either full legalization or criminalization). While courts and the public may continue to be suspicious of polygamous parents as adequate caregivers (similarly to the concerns of Strassberg⁸³ and Bala⁸⁴ that polygamous families are inherently unstable), adjudicating with reference to specific facts at least humanizes the participants in the process, recognizing that not all individuals practicing the same form of private sexual ordering are identical.

With respect to tax law, legislation would likely need to be developed to better interact with the fiscal realities of a polygamous family. Yet this is not a hardship: in the American context, Brunson identifies “five potential tax regimes that could account for polygamous relationships.”⁸⁵ Tax law could be a powerful tool to help regulate polygamy (assuming polygamists would comply with tax law which, as Brunson points out, is currently the null hypothesis: “[c]ritics of polygamy have not provided any evidence that polygamists are so different from other Americans that, if they worked in jobs subject to wage withholding and reporting, they would continue to evade taxes”⁸⁶). The use of tax legislation as a tool to normalize polygamy could incentivize a change in the reproductive choices of polygamists, limiting the number of children born into polygamy, and could foster greater integration with society. This (albeit subjective) plan would address traditional concerns about polygamy, and the “fundamentalists” who practice it.

⁸³ Strassberg argues that polygyny and, possibly polyamory, fails “to create the conflict that pushes children to define themselves as distinct from their parents.” See Maura I Strassberg, “The Challenge of Post-Modern Polygamy: Considering Polyamory” 31:3 (2003) *Capital UL Rev* 439 at 560. Familial conflict is thus characterized as beneficial, although Strassberg’s claim that this is the case appears to require further categorization.

⁸⁴ Bala, without qualification, calls polygamy “a family environment...more likely to be harmful than a monogamous relationship.” See Bala, *supra* note 66 at 190.

⁸⁵ Brunson, *supra* note 70 at 148.

⁸⁶ *Ibid* at 144.

Important Components of Any Legal System of Polygamy

Women in Polygamy

An essential component of any legal system regarding polygamy is an ability to identify and evaluate potential harms to vulnerable groups such as children and women. Social science research on Bedouin-Israeli polygyny has highlighted concerns related to the mental health of women in polygyny, while asserting that “polygyny itself may not be detrimental to family members’ adjustment; and in cases where the family functions well, children’s adjustment, as well as the adjustment of mothers and fathers, will not be impaired.”⁸⁷ Nevertheless, an earlier study found “women in polygamous marriages showed significantly more psychological distress than their counterparts in monogamous marriage... in every dimension – psychological, life satisfaction, marital and familial – women from polygamous families report more difficulty than their counterparts from monogamous families.”⁸⁸ There are methodological concerns concerning the study (for example, 66.7% of the respondents were in monogamous relationships, and the average age for polygamous women was 4 years older, the disparity between age 35 and 39⁸⁹) and it is questionable whether the study’s results are valid outside its particular cultural context, such as Canada or Europe, where healthcare and psychological care are more readily available. As Jones expressed, discussing his experience in British Columbia’s polygamy case,

it was difficult to rely too heavily on studies of Bedouin Arabs given the vast differences in cultures and economies when compared to the developed West. Education or mental health outcomes may be worse for polygamist Bedouin wives and their children compared to their monogamist neighbours, but could you really extrapolate that as proof of harm from multipartner conjugality in Canada, with its economic security, universal health care, and relative gender equality?⁹⁰)

⁸⁷ Vered Slonim-Nevo, Alean Al-Krenawi & Bar Yuval-Shani, “Polygynous Marriage in the Middle East: Stories of Success and Failures” (2008) 47:3 *Ethology* 195 at 197.

⁸⁸ Alean Al-Krenawi & John R Graham, “A Comparison of Family Functioning, Life and Marital Satisfaction, and Mental Health of Women in Polygamous and Monogamous Marriages” (2006) 52 *International Journal of Social Psychiatry* 5 at 10.

⁸⁹ *Ibid* at 7.

⁹⁰ Jones, *supra* note 14 at 20.

An imposed reality on the study's participants also subtly denies them agency and de-personalizes them into their potential stresses. Whether the association is causative or correlative is ignored: in effect, the subjects become subjected to the perceptions of the researcher. This is problematic, and can lead to inaccurate findings: as another researcher studying Bedou-Israeli women in polygyny concluded, "Bedouin women are not helpless, frozen in time and space. They play a role and they are still in the midst of change."⁹¹

Nevertheless, the concern that some adult participants in polygamy are vulnerable must be addressed. Concern for women in polygamy is sometimes popularly described as a biological inability for humans (particularly women) to engage in polygamy: "[d]ozens of academic studies and books have noted for decades that women are hard-wired for the kind of intimacy that's impossible to find in a plural marriage."⁹² Carolyn Jessop also generalizes across all (fundamentalist Mormon) polygyny: "[I]ike every other polygamist wife, I had no say in whom I would marry and no way to divorce my husband if it did not work out. Sex was the only currency I had to spend in my marriage---every polygamist wife knows that...A woman's value is assigned in marriage, not earned."⁹³ This generalization as to placement marriage and divorce is not correct (as some fundamentalist Mormon sects allow for female-initiated marriage and divorce⁹⁴), but also groups all instances of polygamy even in Jessop's group together without variation.

In addition to concerns about the efficacy of polygamy for human happiness, narratives like Bramham's and Jessop's deprive women of agency, assuming that no agentic woman could

⁹¹ Rawia Abu Rabia, "Redefining Polygamy among the Palestinian Bedouins in Israel: Colonialism, Patriarchy, and Resistance" (2011) 19:2 *Am UJ Gender, Soc Pol'y & L* 459 at 491.

⁹² Bramham, *supra* note 61 at 360.

⁹³ Carolyn Jessop & Laura Palmer, *Escape* (New York: Broadway Books, 2008) at 117.

⁹⁴ For courtship variations, see Bennion, *Polygamy in Primetime*, *supra* note 42 at 118-119. For divorce amongst the polygamous Mormon group the Apostolic United Brethren, see Janet Bennion, *Women of Principle* (New York: Oxford University Press, 1998) at 88-89.

possibly want to be involved in polygamy. This ignores findings that polygyny can provide “a degree of freedom and solidarity [to women] apart from the formal realm of society, and their actions are deemed significant and prestigious to others in the same position.”⁹⁵ While such analysis does not assume all women are happy or voluntarily live in polygyny, it does underscore the danger of speaking for women in polygyny or assuming that no woman would choose such a lifestyle. As Beaman notes, “[a]rguments that begin from certainty in one’s own enlightened position and a portrayal of the ‘other’ as duped, unenlightened, or brainwashed should raise red flags for all of us.”⁹⁶ Moya Lockett analyzes three contemporary television programs which engage with plural conjugality: *Sister Wives* (a “reality” program), *Big Love* (fiction) and *The Girls Next Door*, focussing on women who live at the Playboy mansion. Lockett concludes that the success of the shows indicates that mono-normativity is currently more challenged than in the past, and that other familial forms can be seen as having benefits for women:

In showcasing the importance of female relationships, these shows foreground how time-starved neoliberal culture’s emphasis on the individual isolates women, something with significant consequences for domestic labor, relationships and recreation, and femininity itself. The female group might be seen as a response to this situation, offering more than just camaraderie as it shows the proliferation of identity and the range of feminine difference.⁹⁷

It is imperative for a legal system which allows for conjugal choice (monogamous or polygamous, formal or informal) to ensure that an individual enters the relationship willingly. A corollary to that is allowing for the free exit of individuals from the relationship where need be. Such an approach would allow for greater exercise of agency and would acknowledge the diversity within religious traditions as illustrated by adolescent Muslim women:

Given that...young Muslims are positioned at the intersection of different, ambivalent and sometimes contrasting discourses and traditions, it is not possible to see the ‘self’ they relate to and work on as reflecting one particular and integrated cultural or religious understanding of self and personhood.

⁹⁵ Bennion, *Women of Principle*, *ibid* at 153.

⁹⁶ Lori G Beaman, “Who Decides? Harm, Polygamy and Limits on Freedom” (2006) 10 *Nova Religio* 43 at 46.

⁹⁷ Moya Lockett, “Playmates and Polygamists: Feminine Textuality in *Big Love*, *Sister Wives* and *The Girls Next Door*” (2013) (No Volume Number) *Feminist Media Studies* 1 at 13.

This also complicates the notions of 'self-realization', which does not unfold within a single teleology or discursive formation.⁹⁸

Since there is therefore no one set of reasons that any individual enters into polygyny, there is therefore no need to treat every polygynous individual as non-agentic or incapable of making their own decisions.

If individuals are suffering disproportionately in a freely-chosen polygamous relationship, as Al-Krenawi's data suggest they would, but wish to stay in the relationship, law should ensure that the support mechanisms mentioned by Jones (healthcare, psychological care, and where necessary social assistance) be made available to the individuals. With these safeguards in place, the issue of whether mental health outcomes are (without treatment) worse for a freely-consenting individual with other options who lives in polygamy becomes moot. The issue then becomes one of freely-chosen lifestyle stress, analogous to the control society gives individuals over their personal health through diet, stress levels, exercise, and recreational activities. Freedom of individual choice, especially touching upon such basic issues as sexuality and conjugality, is a central premise of modern law and should be respected where possible.

Children in Polygamy

A much more difficult issue is children born into polygamous communities. The standard aims of childrearing and family harmony do not appear to differ between polygamous and monogamous families, at least in the fundamentalist Mormon tradition:

The plural family lies at the heart of the fundamentalists' communitarian impulses to create a spiritually unified and harmonious society. The maintenance of harmony, unity, and regularity depends on the strength not only of father-son relationships and mother-children relationships, but also the relationships between co-wives. The plural family is held together as much by a collective will and effort to maintain an image of a harmonious family as it is by individual actions.⁹⁹

⁹⁸ Christine M Jacobsen, "Troublesome Threesome: Feminism, Anthropology and Muslim Women's Piety" (2011) 98 *Feminist Rev* 65 at 78.

⁹⁹ William Jankowiak, "Co-Wives, Husband, and the Mormon Polygynous Family" (2008) 47:3 *Ethnology* 163 at 167.

However, safeguards for deleterious conduct must not rely only on self-control. As Chmell argues, “[f]emale adolescents in polygamous communities must be provided adequate schooling, resources, and information to decide for themselves whether they would like to perpetuate the polygamous traditions of their communities.”¹⁰⁰ This much is obvious, and is a tension between all adolescents and the parents who must simultaneously control them and allow them to create their own future. Chmell objects that “[f]emale adolescents should not be...forced to dress a certain way, or prohibited from exploring self-fulfilling lifestyles,”¹⁰¹ a proposition that must sometimes be at odds from commonly-understood powers of parenting, with the extent of power in the eye of the beholder. Regarding the issue of female children who may be pressured to remain in the group against their wishes, Bennion has a similar prescription: “[t]he solution is to make sure that there are constitutional and legal ways for women to exercise their free will and to leave a group easily if they wish to do so.”¹⁰²

This solution, while attractive, may be meretricious: it satisfies the formal requirement of individual free will, but potentially ignores the context in which the decision is made. This leads to the central issue of children born into polygamy (and indeed children exposed to any deviant religious or cultural teaching), as controversially postulated by Hitchens: “[i]s religion child abuse?”¹⁰³ Hitchens notes that “religion has always hoped to practice upon the unformed and undefended minds of the young, and has gone to great lengths to make sure of this privilege,”¹⁰⁴ but in reality, almost all pedagogical systems could be characterized in this way, religious or not.

¹⁰⁰ Alexis Chmell, “Always a Minor, Never a Wife: The Female Adolescent Experience in Polygamous Communities” (2011) 1 DePaul J Women, Gender & L 111 at 111.

¹⁰¹ *Ibid* at 145.

¹⁰² Bennion, *Polygamy in Primetime*, *supra* note 42 at 281.

¹⁰³ This question titles Chapter Sixteen (pages 217-228) in Christopher Hitchens, *God is not Great: How Religion Poisons Everything* (Toronto: Emblem, 2008).

¹⁰⁴ *Ibid* at 217.

The issue becomes one of how much freedom should be granted to parents by law to inculcate ideas into their children which are at odds with the mainstream society.

International documents also set reasonable limits for the protection of children, but also protect children and religious or cultural childrearing from undue State interference.

International covenants such as the *International Covenant on Civil and Political Rights* bind State parties to “have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions,”¹⁰⁵ and further guarantee (including for children) that “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”¹⁰⁶ The right that “a child belonging to [a religious or cultural] minority...shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture [or] to profess and practise his or her own religion”¹⁰⁷ is guaranteed by the *Convention on the Rights of the Child*, a document which mirrors the ICCPR’s parental powers: “State parties shall respect the responsibilities, rights and duties of parents...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”¹⁰⁸ The wording of these documents implies that the State cannot take action against citizens’ ability to teach doctrines with which it disagrees.

Examples abound: the Roman Catholic church teaches that engaging in homosexual acts is sinful, while some religious sects believe women are inferior to men (at least in social power and competence). The State does not agree, but it is an almost entirely impracticable argument to

¹⁰⁵ *International Covenant on Civil and Political Rights*, *supra* note 64 at art 18(4).

¹⁰⁶ *Ibid* at art 18 (2).

¹⁰⁷ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 art 30 (entered into force 2 September 1990).

¹⁰⁸ *Ibid* at art 5.

claim that this gives law the right to intercede and remove parental rights. Thus, even if the statement that “the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and that this includes, to some extent, matters of conscience and religious conviction,”¹⁰⁹ is true, the law cannot lightly override parental rights and cannot do so merely for contested matters of ethics.

If parents are allowed to teach their children in various anti-social ways without society imposing constraints based on “[t]he rhetoric of coercion, force, and brainwashing [which] frequently enters into the legal method processes that consider religious freedom and its limits,”¹¹⁰ then families should be able to teach their children that polygamy is beneficial, even (in keeping with their religious beliefs) religiously required. This results in an important difference of perspectives, where “the marriage of a young fifteen-year-old to an already married man may not be an act of sexual abuse but a culturally approved venue for increasing offspring for the lineage and fulfilling a valued role for young women as ‘Handmaids of the Lord.’”¹¹¹ I am not arguing this perspective, nor do I challenge the necessity of laws protecting children, but I would agree with Bennion that “[h]arm itself is a culturally relative term,”¹¹² and that law must be explicit in its disempowerment of rival conceptions of “children,” “choice,” and agency. In a system in which parental rights extend beyond teaching what is socially unacceptable, it appears hypocritical to condemn raising children to accept or even practice polygamy. As Chandran Kukathas points out, “the public sphere of liberal society is one in which many fundamental disputes have not been resolved. Indeed, it is a defining characteristic of liberalism that it conceives of that public sphere as one in which the existence of disagreement cannot be denied,

¹⁰⁹ *Prince v Massachusetts*, 321 US 158 (1944) at 167.

¹¹⁰ Lori G Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Toronto: UBC Press, 2008) at 104.

¹¹¹ Bennion, *Polygamy in Primetime*, *supra* note 42 at 225.

¹¹² *Ibid* at 224.

or wished away or suppressed.”¹¹³ It is not appropriate to pretend that disagreement cannot exist in education as in other facets of society.

But whether polygamy inevitably harms children is an open question. A 2011 Jordanian study of two polygamous families with a total of 20 children found that “a number of children believed that polygamy did not affect their upbringing, education, or financial support. They also viewed polygamy to be necessary being [*sic*] a solution to many social and family problems. Many children avowed that their fathers did not discriminate or separate between them.”¹¹⁴ While again there are methodological concerns (such as the small sample size and the fact that interviews were seemingly conducted with all family members simultaneously¹¹⁵), these findings cannot be ignored. Furthermore, the study appears to find a simple but important factor in the success of Islamic polygyny: “[t]he husband’s economic status greatly affects the family’s prevailing life style.”¹¹⁶ This factor can likely be expanded beyond Islamic polygyny to all polygamy: the more resources a family has, the better likelihood that a child will grow up in a healthy environment.

What Role Can Law Play in Establishing a Convincing Polygamy Regime?

Polygamy remains uncontroversially criminalized throughout most of the non-Islamic world, and shows the wide-ranging scope of the denunciation: “[a] majority of countries today prohibit polygamy. Through criminal prohibitions of either polygamy or bigamy, the practice is prohibited throughout the Americas, Europe, Australia and Oceania, and large parts of Asia, including China and Japan.”¹¹⁷ An explanation for the current legal landscape can be found in a

¹¹³ Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (New York: Oxford University Press, 2003) at 128.

¹¹⁴ Omar M Khasawneh, Abdul Hakeem Yacin Hijazi & Nassmat Hassan Salman, “Polygamy and Its Impact on the Upbringing of Children: A Jordanian Perspective” (2011) 42:4 J Comparative Family Studies 563 at 572.

¹¹⁵ *Ibid* at 570-571.

¹¹⁶ *Ibid* at 573.

¹¹⁷ *Reference re Section 293, supra* note 36 at para 234.

May 2008 Gallup poll of Americans which found that 90% of respondents characterized polygamy as “morally wrong” and 66% stated that government has the right to prohibit polygamous marriages.¹¹⁸ International rights documents assert that polygamy damages equality and is therefore pernicious, and elected leaders seem to pay little or no political penalty for statements such as “[p]olygamy...is contrary to Canadian values and has no place in our country.”¹¹⁹ Where no other recourse is available, legal rights may be asserted in conjunction with public interest or human rights litigation:

Courts may not always be the most effective dispute resolution forums, but they are often the most accessible; they are open as of right and can force more economically or politically powerful parties to the bargaining table...litigation can build public awareness, help frame problems as injustices, and reinforce a sense of collective identity, all of which can build a political base for reform.¹²⁰

It seems therefore that legal challenges to the criminalization and legal non-recognition of polygamy, while unsuccessful in the past, could be useful not only in an attempt to achieve a positive jurisprudential result (which may occur as society changes to allow greater personal freedom in sexual ordering), but also as a tool to raise awareness and mobilize support against governmental mono-normativity. The litigation can also call attention to “a recurring theme in debates that focus on gender and culture...which juxtapose the ‘uneducated,’ ‘oppressed’ woman (whether by function of her religion or her culture) with the ‘liberal,’ ‘educated,’ ‘free’ Western woman.”¹²¹ Further litigation challenging the de-legitimization of polygamy can question the role of consent and knowledge in inquiring “whether ‘mainstream’ Canadian women are brainwashed into thinking that monogamous, heterosexual marriages are the best choices or that

¹¹⁸ Cited in Arland Thornton, “The International Fight Against Barbarism: Historical and Comparative Perspectives on Marriage Timing, Consent, and Polygamy” in Cardell K Jacobson & Lara Burton, eds, *Modern Polygamy in the United States: Historical, Cultural, and Legal Issues* (New York: Oxford University Press, 2011) 259 at 283-284.

¹¹⁹ Canadian Ministry of Immigration Spokesperson Alexis Pavlich, quoted in Mark Dunn, “Officials say Saudi immigrants hiding polygamous marriage status not welcome” *Toronto Sun* (15 October 2012), online: TorontoSun.com < <http://www.torontosun.com/2012/10/15/officials-say-saudi-immigrants-hiding-polygamous-marriage-status-not-welcome>>.

¹²⁰ Scott L Cummings and Deborah L Rhode, “Public Interest Litigation: Insights from Theory and Practice” (2009) 36:4 *Fordham Urb LJ* 603 at 648.

¹²¹ Sweet, *supra* note 65 at 14.

they lead to gender equality.”¹²² Such judicial inquiry can also problematize a judicial discourse (as seen in British Columbia’s constitutional reference on polygamy) whereby “[‘mainstream’ Canadian women’s] lifestyles are taken as the template that will help to ‘save’ the ‘oppressed’ and ‘uneducated’ women from their culture and religion.”¹²³

Court challenges cannot necessarily be “head-on” against laws solely on the basis of religious freedom. This has been demonstrated in several American cases (starting with *Reynolds*, but extending to more recent cases such as *Potter v Murray City*,¹²⁴ in which a police officer failed in a bid to deem his firing for practicing polygamy illegal, to *State v Holm*,¹²⁵ in which the Utah Supreme Court upheld another police officer’s conviction for bigamy (and sexual contact with his polygamous wife, a minor). This has also been borne out by a constitutional reference (albeit at a low, and nationally non-binding, level of court) in Canada in *Reference re: Section 293 of the Criminal Code of Canada*,¹²⁶ which determined that a provision criminalizing polygamy was constitutionally valid (apart from the criminalizing of behaviour of polygamous wives who were not of the age of majority). In a religious freedom case in Europe analogous to polygamy, a Turkish woman, Leyla Sahin, was denied the right to wear a hijab at university. The European Court of Human Rights relied on the limitations included in Article 9 of the European Convention on Human Rights which permit “limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”¹²⁷ Such a

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ 760 F 2d 1065 (10th Cir, 1985).

¹²⁵ 137 P 3d 726 (Utah SC, 2006) (cert. denied, 549 US 1252 (2007)).

¹²⁶ *Supra* note 36.

¹²⁷ *European Convention on Human Rights*, *supra* note 20 at Article 9(2).

limitations clause is vague enough to easily be applied to prohibit polygamy, and the Court reasoned that

Article 9 does not protect every act motivated or inspired by a religion or belief...[in democracies where] several religions coexist...it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.¹²⁸

This case sends clear messages to practices such as polygamy: while all practices are equal, some are more equal than others, and governments can ban unpopular activities by finding good excuses to protect “public order, health or morals.” A legal culture where “respect for beliefs” entails restricting beliefs seems to be barren ground for litigation in favour of religious rights.

Yet legal cases are not hopeless. Despite the British Columbia Supreme Court's decision that polygamy can constitutionally be prohibited, only two prosecutions, against sect leaders, have been commenced in British Columbia,¹²⁹ perhaps indicating the legal profession's skepticism of the result. The recent case of *Brown v Buhman*,¹³⁰ struck down the criminalization of polygamous cohabitation, and if it is upheld on appeal, represents a significant reversal of the legal treatment of polygamy in the United States of America (and a *de facto* reversal of *Potter* and *Holm*). Polygamy need not be inextricably tied to fundamentalist Mormonism, or even religious practice, in litigation challenging its criminalization (indeed, most forms of polyamory seem to have been ignored by the British Columbia decision, which found that the ambiguous *Criminal Code* provision requires “multiple marriages, that is, pair-bonding relationships sanctioned by civil, religious or other means”¹³¹). To insist on requiring “religious” content to

¹²⁸ *Leyla Sahin v Turkey*, Application no 44774/98, ECHR (November 10, 2005) at paras 105-106.

¹²⁹ Prosecutions against acknowledged polygamist Winston Blackmore and the FLDS leader in “Bountiful,” James Oler, are ongoing. See Canadian Press, “Winston Blackmore asks court to quash polygamy charge” (28 February 2015), online: CBC.ca < <http://www.cbc.ca/news/canada/british-columbia/winston-blackmore-asks-court-to-quash-polygamy-charge-1.2977380>>.

¹³⁰ 947 F Supp 2d 1170 (D Utah Dec 13, 2013).

¹³¹ *Reference re s 293, supra* note 36 at para 987.

legally protect private sexual ordering not only penalizes “non-religious” people but engages in an essentializing and ultimately fruitless definition of what religion is.

A stable, non-coercive, and well-educated (in addition to “freely” chosen) polygamous relationship would provide much more difficult problems for anti-polygamy egalitarianism (both theoretically and in litigation) than the applications of groups which are already viewed with suspicion. Solid social science evidence, of the kind offered by Beaman, Bennion, and Campbell, can assist in revealing that in many ways, polygamy creates a false dichotomy between practicing and non-practicing individuals in society, whatever their other characteristics, falsely separating monogamous society from: “those who, despite our protestations, are very much like us.”¹³² Challenging the various legal disabilities polygamists labour under may be successful, but may not. Law’s victory will come in keeping up the pressure on restrictive and arbitrary classifications of polygamy and polygamists, to highlight the diversity of this form of private sexual ordering, and in attempting to ensure that neutral principles indeed govern how people are allowed to structure their families. By interrogating subjective mono-normativity, litigation can succeed in achieving long-term reform even if in the short term the judiciary ultimately adopts dubious reasoning or social science evidence. As the B.C. Civil Liberties Association correctly noted, nothing prevents serious breaches of the law such as forced marriage or rape from being prosecuted if they are found in polygamous groups.

Conclusion

An antagonistic legal approach to polygamy does not reflect polygamy’s diversity of form or its diversity of motivation. National law, abetted by international documents, attempts to eliminate a familial conjugal form that has existed for millennia and has been practiced by an overwhelming majority of human cultures. This is both counterproductive (in that polygamy has

¹³² Rebecca Johnson, “Reflecting on Polygamy: What’s the Harm?” in Gillian Calder & Lori G Beaman, eds, *Polygamy’s Rights and Wrongs* (Toronto: UBC Press, 2014) 97 at 114.

not been eliminated nor even extirpated by such measures) and inconsistent with the prevailing philosophies of modern law, which privileges the rights of individuals to determine their familial form and private sexual ordering.

This chapter examined three main options for the legal regulation of polygamy: the enduring *status quo*, whereby polygamy is marginalized and usually criminalized; the direct facilitation of polygamy by law, through an explicit legal mechanism for entering polygamous marriage; and finally a hybrid approach, whereby law does not directly provide for polygamy, but rather regulates conjugal plural cohabitation using law's basket of civil law powers, such as tax law, children's and education law, spousal support law (and indeed all family law mechanisms), and as many other legal areas as polygamy engages. No solution will be a panacea: there will still remain individuals who, by reason of religion or conscience, refuse to be regulated by law. Law cannot answer this challenge with further law on polygamy. What it can do, however, is to explore the perspective that, in a sense, "[a]t least 99 percent of all polygamists are peaceful, law-abiding people, no threat to anybody. It's unfortunate that they're stigmatized by a band of renegades."¹³³ Allowing for more peaceful people, of all cultures, to engage in their own seeking of the good life empowers society, confirms a legal commitment to human rights and diversity, and allows for the removal of dated religio-moral influences from law.

¹³³ FBI Agent quoted in Bella Stumbo, "No Tidy Stereotype; Polygamists: Tale of Two Families", (13 May 1988) *Los Angeles Times* at 1.

CHAPTER VI

Sex Work: Multiple Practices, Multiple Perspectives

In addition to practitioners of polygamy, another legal “Other” viewed through the lens of private sexual ordering is the sex worker, or prostitute. Prostitution is varied in form (two well-known forms are street-walking and the “call girl”), and encompasses both men and women, although academic critiques, especially those hostile to sex work, tend to focus on women’s role as sex workers. Despite legal approbation, the female prostitute “remains, while creeds and civilizations rise and fall, the eternal priestess of humanity, blasted for the sins of the people.”¹ This blast has both religio-moral and legal components in the modern world.

The counter-intuitiveness of the legal harassment of prostitution is highlighted by the logic of comedian George Carlin: commerce is legal, and sex is legal, so why isn’t sexual commerce legal?² Unlike polygamy, prostitution is relatively easily to define and describe. *Black’s Law Dictionary* defines prostitution as “[t]he act or practice of engaging in sexual activity for money or its equivalent; commercialized sex,”³ which is troublingly supplemented by a second definition “[t]he act of debasing.”⁴ In this work I will adopt the first definition, any exchange of value (monetary or otherwise) for sexual activity. The definition is broad, but necessarily so to capture all examples of the sex trade. Despite attempts to conflate prostitution with involuntary human trafficking, and despite trafficking being one method used to obtain sex workers, in this chapter I distinguish prostitution from human trafficking and sexual slavery (whereby prostitution is forced upon someone and is in no sense voluntary). I wholeheartedly concur that

¹ WEH Lecky, *The History of European Morals*, vol 2 (p 299), quoted in Patricia Hollis, *Women in Public 1850-1900: Documents of the Victorian Women’s Movement* (New York: Routledge, 2012) at 7.1.2, p 203. Of course, while many texts treat the prostitute as quintessentially female, prostitution is both a male and female phenomenon unconstrained by sexualities.

² I am paraphrasing and have omitted profanity. See George Carlin, online: Youtube.com <<https://www.youtube.com/watch?v=1prYbbsDs7Q>>.

³ *Black’s Law Dictionary*, 4th Pocket ed (St Paul, MN: West, 2011) at 608.

⁴ *Ibid.*

these latter practices must be eliminated to the greatest extent possible by law. However, prostitution is not synonymous with these problems, and as an agentic practice presents more nuanced problems for legal regulation. Moreover, despite the understandable and important focus on female prostitution as a practice of patriarchy, no definition or study of prostitution should ignore the reality of male and transsexual prostitution, which will be discussed in this chapter. Differences between types of prostitution complicate simplistic narratives of domination.

Like the conceptually-related practice of polygamy, prostitution is harshly controlled by law, perhaps because it “is a constant reminder that the monogamous family is at odds with certain forms of human sexual expression.”⁵ It provides, moreover, an analog to marriage, with “the cash nexus between the sexes announced in currency, rather than through the subtlety of a marriage contract (which still recognizes the principle of sex in return for commodities and historically has insisted upon it).”⁶ Bentham also remarked on the arbitrariness of a law where “it is forbidden to sell oneself for a quarter of an hour, but allowed to sell oneself for life.”⁷ This tension runs throughout the law of private sexual ordering, as recognized by Campbell: “like the polygamous wife and the surrogate, the sex worker is understood as limited in her ability to withstand pressures operating to her detriment. Related preoccupations about her vulnerabilities course through legislative and policy debates, ignoring the dependencies that characterize the human condition more broadly.”⁸

⁵ Patricia Hughes, “Tensions in Canadian Society: The Fraser Committee Report” (1986) 6 Windsor YB Access Just 282 at 285.

⁶ Kate Millett, *The Prostitution Papers: A Quartet for Female Voice* (New York: Ballantine, 1976) at 93.

⁷ Jeremy Bentham Manuscript in the University College London Library Special Collections, box 32, folio112, quoted in Mary Sokol, *Bentham, Law and Marriage: A Utilitarian Code of Law in Historical Contexts* (New York: Continuum, 2011) at 28.

⁸ Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Burlington, VT: Ashgate, 2013) at 173.

Responses to prostitution are highly contested at a theoretical level.⁹ Much like polygamy, practitioners are seen as exploited, incapable of exercising true agency, and such a vision informs attempts (whether aimed at sex workers or merely their clients) to limit or eliminate sex work. The legal war on sex work ranges from the Nordic model, which aims to eliminate demand for sex work but ostensibly leaves prostitutes within the law, and the outright criminalization of all aspects of the sex trade. Canada has recently adopted a modified version of the Nordic Model,¹⁰ although it has not yet been subject to judicial comment. Alternate models which will be discussed in greater detail later in this chapter and in Chapter 7 include partial decriminalization, which aims to discourage prostitution without necessarily eliminating it, and full legalization (subject to employment safety regulations). Needless to say, all sides of the debate properly decry human trafficking, involuntary prostitution, and child prostitution. However, even where basic facts can be agreed upon, how the phenomenon of sex work should be viewed and how it should be responded to are matters of significant and presumably insoluble debate.

Prostitution is consistently denied the status of a legitimate form of private sexual ordering. Kapur and Cossman's critical comment on Indian legislation is applicable to all criminalization: "it is the very nature of the sexuality in question...sex for sale, that makes it public, and therefore within the legitimate reach of the criminal law. Sex work, even within the privacy of a sex worker's home, can never really be private. Its very nature, for sale and outside marriage, places

⁹ The debate is particularly contentious amongst feminist scholarship. Sheila Jeffreys, despite conceding that "[m]ost feminist scholars now take...or show sympathy towards" the claim that "prostitution should be seen as legitimate work, and an expression of women's choice and agency," identifies a "fierce feminist controversy over prostitution, between the 'sex work' approach, and the approaches of those usually referred to as abolitionists or neo-abolitionists." See Sheila Jeffreys, "Prostitution, trafficking, and feminism: An update on the debate" (2009) 32 *Women's Studies International Forum* 316 at 316-317. Jeffreys falls into the latter camp, illustrating that the debate is far from over.

¹⁰ The *Protection of Communities and Exploited Persons Act*, SC 2014, c25 criminalizes the purchase of sexual services, and restricts where sex workers can work and how they can advertise their services.

it firmly outside of the realm of familial privacy.”¹¹ The central question, as with many instances of the legal regulation of private sexual ordering, is summed up by Charles Taylor: “[t]he issue is ultimately one of whether one gives a decisive privilege to one historically-embedded order of Christian life, be it past or present, or whether one refuses paradigmatic status to any.”¹²

Laws on prostitution range from relatively non-interventionist (in jurisdictions which legalize prostitution such as Germany,¹³ the Netherlands,¹⁴ and Nevada¹⁵) to the criminalization of the purchase but not sale of sexual services (the “Nordic Model,” in place in Scandinavia), to the blanket criminalization of all aspects of the sex trade. The danger, as with polygamy, is a legal inability to see within the practice differences (which alleviate or eliminate harm) as well as the similarities of prostitution, an inability Shaver characterizes as: “[s]weeping generalizations about the inferiority of commercial sex coupled with the strong tendency to disregard the fact of male prostitution.”¹⁶ This tendency can be seen in the statement of the Court of Appeal for Ontario that “[t]he reason that Parliament wants to eradicate prostitution is because it is harmful,

¹¹ Ratna Kapur & Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (Thousand Oaks, CA: Sage Publications, 1996) at 124.

¹² Charles Taylor, *A Secular Age* (Cambridge, MA: Belknap Press, 2007) at 766.

¹³ Federal German law regulates prostitution, aiming to treat sex work “like any other work” but placing restrictions on where it can be practiced, minimum age and mental faculty, what can be demanded of sex workers by their employers, and requiring record-keeping. See Rebecca Pates, “Liberal Laws Juxtaposed with Rigid Control: an Analysis of the Logics of Governing Sex Work in Germany” (2012) 9:3 *Sexuality Research & Social Policy* 212 at 212.

¹⁴ “In 1999, the Netherlands was one of the first countries to legalize prostitution; it lifted the ban on brothels, recognized prostitution as sex work and delegated the regulation of the sex industry to local authority. Forced prostitution—including human trafficking—remained a criminal offence. People working in the sex industry were to become entitled to the social rights usually accruing to workers. Only EU citizens could work legally as prostitutes; those from the outside were not to receive work permits and thus become undocumented workers without rights and protection once their temporary visa expire. The new act took effect in 2000.” See Joyce Outshoorn, “Policy Change in Prostitution in the Netherlands: from Legalization to Strict Control” (2012) 9:3 *Sexuality Research & Social Policy* 233 at 233.

¹⁵ Nevada’s brothels are “prohibited in major metropolitan areas” but some rural counties have “over three decades of legal prostitution.” See Kathryn Hausbeck & Barbara G Brents, “Nevada’s Legal Brothels” in Ronald Weitzer, ed, *Sex for Sale: Prostitution, Pornography, and the Sex Industry*, 2nd ed (New York: Routledge, 2010) 255 at 255-256.

¹⁶ Frances M Shaver, “The Regulation of Prostitution: Setting the Morality Trap” in Bernard Schissel & Linda Mahood, eds, *Social Control in Canada: Issues in the Social Construction of Deviance* (Toronto: Oxford University Press, 1996) 203 at 217.

a form of violence against women, related to men's historical dominance over women.”¹⁷ But is it inevitably so? The discourse must also take into account the argument that the legal regulation of prostitution has been co-opted by “an unholy alliance of moral and political forces which aimed at the thorough repression and control of people's sexuality. Christianity and the state have seen it as being in their interests to police our bodies in order to make us more docile and manageable.”¹⁸

Opposing this narrative of greater social tolerance for the sexual and social practice of prostitution is the claim that prostitution is objectively harmful: that, like rape and domestic violence, it represents “[women's] physical enslavement... These three are the bedrock of our oppression.”¹⁹ A further complication is that sex work, similar to other forms of private sexual ordering, can operate within, and even help reify, existing structures of normativity or discipline: “it is... possible to argue that there is no inherently destabilizing essence to singlehood, promiscuity, sex work, polyamory, even queerness itself; all can serve to further the capitalist state's reach.”²⁰

One of the strongest criticisms of full or partial prohibition (such as the Nordic Model) is that law is transformed into a blunt instrument incapable of differentiating between harmful and beneficial sexual behaviour: “this policy criminalizes the purchase of a service that may have genuine psychological benefits for some clients... The psychological health of these [purchasers] may not be ideal, but we should still recognize that they may genuinely benefit from these services.”²¹ This is anecdotally seen in the recent film *The Sessions*, where an almost completely

¹⁷ *R v Mara and East* (1996), 105 CCC (3d) 147 (Ont CA) at para 33 (WL).

¹⁸ Nickie Roberts, *Whores in History: Prostitution in Western Society* (London: Harper Collins, 1992) at 354.

¹⁹ Millett, *supra* note 6 at 3.

²⁰ Tom Boellstorff, “When Marriage Falls: Queer Coincidences in Straight Time” (2007) 13:2-3 GLQ 227 at 235.

²¹ Peter de Marneffe, *Liberalism and Prostitution* (New York: Oxford University Press, 2012) at 39.

paralyzed man is given sexual fulfillment (and confidence) through paid sexual encounters.²²

Homosexual prostitution also likely benefits purchasers, given “the legal and social impediments to sexual relationships between men and the fact that, homosexual activity being a minority interest, potential partners are fewer.”²³ This benefit can be combined with prospective benefits that homosexual sex trade workers may feel they receive, such as the phenomenon that in societies which repress homosexuality “[i]t was within the subculture [of prostitution] that male prostitutes found the potential for ‘wholeness.’”²⁴ Research summarized by Weitzer mirrored this finding of wholeness:

A Brazilian study reported that for transgender sex workers, prostitution was the only sphere of life that enhanced their self-image. Prostitution gave them a “sense of personal worth, self-confidence, and self-esteem.”...In focus groups in San Francisco, researchers discovered that “sex work involvement provided many young transgender women of color feelings of community and social support, which they often lacked in their family contexts.”²⁵

Prohibition thus indiscriminately penalizes potentially beneficial sexual behaviour. Another criticism of criminalization is that it does not appear to be the only method to control the private sexual ordering of commercial sex, as “[i]t is...not clear whether greater permissibility arises as a result of governance design premised on regulatory approaches outside of the criminal law,”²⁶ suggesting that criminalization may not be a proportional response even if its aims are accepted.

A related argument against partial decriminalization (such as the Nordic Model) is that while prostitution is then technically legal, the threat of prosecution of one side of the transaction will force both sides into an illegal, stigmatized space, furthering the phenomenon where “in an effort to elude public and police attention, illegal sex work occurs ‘in the shadows,’ and such

²² I am indebted to Professor Natasha Bakht for this observation.

²³ Donald J West & Buz de Villiers, *Male Prostitution* (New York: Harrington Park Press, 1993) at 263-264.

²⁴ Debra Kay Boyer, *Male Prostitution: A Cultural Expression of Male Homosexuality* (PhD Thesis, University of Washington, 1986) [unpublished] at 223.

²⁵ Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York: New York University Press, 2012) at 9.

²⁶ *Ibid* at 171.

relegation to secluded areas elevates opportunities for violence.”²⁷ This model thus separates *de jure* law from *de facto* reality.

This chapter will provide a genealogy of the law regulating this form of private sexual ordering, attempting to situate the philosophical, historical, and religio-moral context in which modern law operates, while examining interdisciplinary insight into prostitution and its legal discipline. While the next chapter of this work will thoroughly explore various options for legal responses to voluntary prostitution, in this chapter I will highlight both the philosophically subjective nature of the criminalization of sex work, and suggest (using international data) that prohibition of the “world’s oldest profession” does not often achieve its intended, or even particularly salutary, results.

The Global Situation of Prostitution and the Law

One interesting statistic about the prevalence of prostitution from Harper’s Index states that the ratio of money spent by Britons on prostitution to that spent on hairdressing is 1:1.²⁸ While a detailed, nation-by-nation portrait is beyond the scope of this chapter, examples of tension between law and prostitution abound throughout the world. I have chosen to highlight jurisdictions with particularly illuminating and/or common responses to prostitution. As with polygamy, most legal national jurisdictions, as well as international documents, are hostile to the practice of prostitution. As already noted, the *Convention for the Elimination of All Forms of Discrimination Against Women* opines vaguely that its signees “shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”²⁹ The language is ungainly (as the suggestion that government can act outside of legislation implies): what constitutes exploitation of prostitution, and does such a

²⁷ Campbell, *supra* note 8 at 187.

²⁸ “Harper’s Index” in Harper’s Magazine 330:1978 (2015 March) at 9.

²⁹ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 art 6 (entered into force 3 September 1981) [CEDAW].

position include prostitution itself? The delicate balance between agency and equality is again highlighted by the clearer, but more problematic, *Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others*, Article 1 of which requires States to: “punish any person who, to gratify the passions of another, “Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;...Exploits the prostitution of another person, even with the consent of that person.”³⁰ The language “harkens back to another era, the turn from the nineteenth to the twentieth century during which social panic about the ‘white slave trade’ ran high and the seduction of women was a crime in and of itself.”³¹

Moreover, how is this condemnation with ambiguous language in international documents reconciled with the associational rights guaranteed by documents such as the *International Covenant on Civil and Political Rights* and the *Universal Declaration of Human Rights*, whereby the right to free association can only be overridden by laws which “are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others?”³² If the practice is related to a religious belief (which is unlikely in the modern era but not impossible), how are the competing international rights balanced?

Asian law (with the partial exception of the Anglocentric jurisdictions of Australia and New Zealand) is similarly hostile and essentializing to prostitution (particularly so in the Middle

³⁰ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317 art 1 (entered into force 25 July 1951).

³¹ Janet Halley et al, “From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism” (2006) 29:2 Harv JL & Gender 335 at 354.

³² *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 22(2) (entered into force 23 March 1976).

East: prostitution is outlawed in both Saudi Arabia³³ and Iran³⁴). By contrast, prostitution is legal if uncoerced in New Zealand.³⁵ Australian jurisdiction over prostitution resides with its states and territories, which range from the “criminalization model” in Tasmania where “trading sex in itself is not subject to criminalization...[but] the *Sex Industry Offences Act 2005* prohibits a number of related activities,”³⁶ to the “general decriminalization model” of New South Wales, where brothel-keeping, living off the avails of another’s prostitution and solicitation are restricted but not banned,³⁷ to Queensland, where licenced brothels and “sole operators” in private are allowed, but all other related practices are criminalized.³⁸

Under Indian law, “prostitution is legal but maintaining a brothel, living off the earnings of a prostitute, soliciting, or seducing a customer for the purposes of prostitution are punishable offences.”³⁹ This essentially makes all prostitution a *de facto* illegal act. Kapur and Cossman note, “[t]he *Immoral Trafficking Prevention Act, 1956*, prohibits trafficking, as well as solicitation. And in so doing, the law casts its [sic] net very widely.”⁴⁰ In addition to the prohibition on public prostitution and all forms of solicitation, “[s]ection 3 prohibits the keeping of brothels. And under section 20, a woman can be brought before a magistrate to show cause that she is not a prostitute.”⁴¹ The law is gendered and attacks not only impugned conduct, but the personhood of the “offender,” who may be hunted regardless of her current actions. A similar (but perhaps less egregiously-reasoned) prohibition exists in the People’s Republic of China:

³³ Syed Saleem Shahzad, “Brothels and bombs in Saudi Arabia” *Asia Times* (9 December 2003), online: Asia Times Online < http://www.atimes.com/atimes/Middle_East/EL09Ak01.html>.

³⁴ US Department of State, *2008 Human Rights Report: Iran* (25 February 2009), online: < <http://www.state.gov/j/drl/rls/hrrpt/2008/nea/119115.htm>>.

³⁵ *Prostitution Reform Act 2003* (NZ), 2003/28.

³⁶ Campbell, *supra* note 8 at 165.

³⁷ *Ibid* at 167-170.

³⁸ *Ibid* at 170-171.

³⁹ Nilufer Medora, “Prostitution in India: A Global Problem” in Rochelle L Dalla et al, eds, *Global Perspectives on Prostitution and Sex Trafficking: Africa, Asia, Middle East, and Oceania* (New York: Lexington Books, 2011) 67 at 68.

⁴⁰ Kapur & Cossman, *supra* note 11 at 123.

⁴¹ *Ibid*.

Despite their [*sic*] omnipresence in all major cities and towns, prostitution remains illegal in China. Prostitution (*maiyin piaochang*) is defined as “improper sexual conduct between the two sexes with money or property as the medium of exchange.” It is banned because these activities “seriously corrupt people's minds, poison the social atmosphere, and endanger social stability. They also endanger [*sic*, likely “engender”] other types of criminal offenses and seriously damage the construction of socialist spiritual civilization in China.”⁴²

African national legal regimes also criminalize prostitution, often in legal regimes inextricably linked to colonization and imperialism, as well as social chauvinism. Phillips notes that while “[s]tudies have identified many culturally, geographically and historically specific forms of prostitution in Africa, only some of which correspond to the notoriously vague Western stereotype[,] Europeans did not find what, to them, were recognisable forms of prostitution in large parts of sub-Saharan Africa.”⁴³ This implies that current laws responding to European conceptions of prostitution ignore or try to override traditional African practices and culture, perpetuating colonial legacies. A law first passed in 1960 in Ghana criminalizes prostitution *per se*, as well as soliciting, punishable by a fine of approximately \$345 USD.⁴⁴ As Meshelemiah predictably notes, “[d]espite these very tough laws and severe penalties for prostitution, prostitution is still a big problem in [Ghana]. This can be explained by lack of enforcement, corruption of the system...poverty, urbanization, exploitation, the simple economic law of supply and demand, a drought of economic opportunities in a region, and a burgeoning sex industry.”⁴⁵ The situation is relatively uniform: “[t]he vast majority of African countries maintain one of two distinct legal frameworks regarding sex work. In the first legal regime, prostitution itself...is illegal...In the second legal regime, prostitution is not explicitly criminalized, [but laws

⁴² Liqun Cao & Steven Stack, “Exploring *terra incognita*: Family values and prostitution acceptance in China” (2010) 38 J Criminal Justice 531 at 532, partially quoting Tao Ouyang, “Prostitution offenses in contemporary China” (1997) 30 Chinese Sociology & Anthropology 45.

⁴³ Richard Phillips, *Sex, politics and empire: A postcolonial geography* (New York: Manchester University Press, 2006) at 122.

⁴⁴ Jacquelyn CA Meshelemiah, “Tourism and Prostitution in West Africa: A Glimpse of the ‘Roamers’ in Ghana” in Rochelle L Dalla et al, eds, *Global Perspectives on Prostitution and Sex Trafficking: Africa, Asia, Middle East, and Oceania* (New York: Lexington Books, 2011) 31 at 42.

⁴⁵ *Ibid.*

render] it nearly impossible for sex workers to legally engage in prostitution.”⁴⁶ These systems are almost universal: “Senegal is the only African country in which prostitution is both legal and regulated. There is no African country in which prostitution is entirely decriminalized.”⁴⁷

Prostitution (including solicitation and the keeping of brothels) is illegal in the Republic of South Africa, despite a recent study which concluded that the prevailing accusations of anti-prostitution advocates were not correct:

There is little evidence to substantiate the popular notions that in the South African context: (1) it is common for deception and force to be used in recruitment into prostitution; (2) there are many child prostitutes; (3) trafficking results from clients’ demands for young and foreign prostitutes; (4) rural women and girls and those from poor backgrounds are attractive targets for traffickers; (5) the sex industry is dominated by organized criminal groups; (6) sex workers are typically controlled through drugs and addiction; and (7) foreign sex workers are trafficked in significant numbers into the South African sex sector.⁴⁸

European law on prostitution is, as mentioned previously, divided between all legal options regarding prostitution. The United Kingdom continues to criminalize prostitution, as “British law criminalizes activities associated with sex work but not the trade in sexual services itself.”⁴⁹ Criminalization is the approach to both solicitation and brothel keeping,⁵⁰ despite an innovative report recommending, as early as 1957, that “[i]t is not in our view, the function of the law to intervene in the private lives of citizens.”⁵¹ One example of enforcement ended in complete failure: “[i]n April 2004, more than 150 officers raided brothels across Yorkshire...Fifty-nine people were arrested [including one who was identified as a victim of human trafficking]...Yet,

⁴⁶ Chi Mgbako & Laura A Smith, “Sex Work and Human Rights in Africa” (2010) 33:4 Fordham Intl LJ 1178 at 1181 and 1183.

⁴⁷ *Ibid* at 1185.

⁴⁸ Chandré Gould, “Sex Trafficking and Prostitution in South Africa” (2014) *Annals American Political & Social Science* 183 at 199.

⁴⁹ Campbell, *supra* note 8 at 165.

⁵⁰ Sarah Kingston, *Prostitution in the Community: Attitudes, action and resistance* (New York: Routledge, 2014) at 35-36 and 141.

⁵¹ *Report of the Departmental Committee on Homosexual Offences and Prostitution* (“Wolfenden Report”) (London: Her Majesty’s Stationary Office, 1957) at 10.

despite the arrests made, no evidence of human trafficking was found.”⁵² In the end, the case against 13 defendants was thrown out as an abuse of process, as the judge found that “police had led sauna owners and staff to believe they would not be prosecuted, if they abided by certain ground rules.”⁵³ The waste of time and effort, erroneous assumptions, and legal uncertainty in this case demonstrate that attempts to enforce the criminalization of prostitution can, in some cases, be extremely counter-productive.

In the Netherlands and Germany, prostitution is legal and regulated, on the theory that regulation can remove many if not all of the negative practices sometimes associated with prostitution. In some ways it has been successful: “[a] recent survey of 94 window workers reported that 61 percent of them had never experienced a threatening situation at work, 81 percent had never been harassed by a client, and 93 percent had never been abused at work. Almost all of those who had such an experience reported that it happened only rarely.”⁵⁴ As a quotation regarding legal European prostitution shows, legalization also helps with a cultural change in the attitude towards prostitution:

If individual actors remain disreputable, brothels and escort agencies have become somewhat ‘normalized,’ insofar as they are officially treated as ordinary businesses. One possible by-product of legalized prostitution is that it can create a climate in which policies can be discussed in an open, conventional manner. Furthermore, the very existence and longevity of trade associations for brothel and window owners increases their credibility. In the Netherlands they are routinely consulted by government agencies and are seen as important players in policy discussions. Over a lengthy period of time, therefore, legal prostitution may win a measure of legitimacy that is not possible when it is criminalized and marginalized.⁵⁵

Moreover, a transnational study found that “[m]any additional factors tie in to the issue of violence, particularly crackdowns on prostitution through new laws that enable increased (legal) discrimination, exclusion, isolation and criminalisation of sex workers, rendering them easy

⁵² Kingston, *supra* note 50 at 141.

⁵³ *Ibid* at 142.

⁵⁴ Weitzer, *supra* note 25 at 198.

⁵⁵ *Ibid* at 202-203.

targets for criminals, robbery, extortion and hate crimes,”⁵⁶ suggesting that laws targeting sex workers actually make prostitution less safe, and more socially damaging. This has not prevented France from starting to move to a more abolitionist system,⁵⁷ indicating that the Dutch and German experiences are somewhat in the eye of the beholder.

In Canada, the law remains in flux after the Supreme Court of Canada ruled that the quasi-criminalization of prostitution (prostitution in Canada remains legal but various forms, such as brothels, assistants, and public prostitution, are criminalized⁵⁸) violated prostitutes’ constitutionally-protected right to security of the person and invalidated the criminal provisions (but suspended declarations of invalidity until December 2014).⁵⁹ The government of Canada has since passed legislation (prohibiting the advertisement of prostitution, all purchase of sexual services, and criminalizing a vaguely-defined sale of sexual services where minors may be present),⁶⁰ but as will be discussed later, it is unclear whether the legislation would be deemed constitutional. Several commentators have expressed doubt that the proposed legal regime will withstand judicial consideration.⁶¹ Moreover, *de facto* legal criminalization may reveal disparity

⁵⁶ TAMPEP (European Network for HIV/STI Prevention and Health Promotion Among Migrant Sex Workers), *Sex Work in Europe: A Mapping of the Prostitution Scene in 25 European Countries* (Amsterdam: TAMPEP, 2009) online: <<http://tampep.eu/documents/TAMPEP%202009%20European%20Mapping%20Report.pdf>> 36-37.

⁵⁷ “Turning off the red light”, *The Economist* 409:8865 (7 December 2013) 55.

⁵⁸ Sections 210 (bawdy-house prohibition), 212(1)(j) (living off the avails of prostitution), and 213(1)(c) (soliciting in public) of the *Criminal Code*, RSC 1985, c C46.

⁵⁹ *Canada (Attorney General) v Bedford*, 2013 SCC 72.

⁶⁰ *Protection of Communities and Exploited Persons Act*, *supra* note 10.

⁶¹ See, for example, Jesse Kline, “The wrong way to deal with prostitution”, *The National Post* (3 April 2014), online: NationalPost.com <<http://fullcomment.nationalpost.com/2014/04/03/jesse-kline-the-wrong-way-to-deal-with-prostitution/>>, John Ivison, “Peter MacKay’s prostitution law a failure on all counts”, *The National Post* (4 June 2014), online: NationalPost.com <<http://fullcomment.nationalpost.com/2014/06/04/john-ivison-peter-mackays-prostitution-law-a-failure-on-all-counts/>>, Lysiane Gagnon, “Sex-work bill defies logic”, *The Globe and Mail* (11 June 2014), online: GlobeandMail.com <<http://www.theglobeandmail.com/globe-debate/sex-work-bill-defies-logic/article19113791/>>, and Terri-Jean Bedford, who successfully challenged the last laws criminalizing sex work in Canada, Terri-Jean Bedford, “Terri-Jean Bedford on the proposed new sex work law Bill C-36”, (20 June 2014) online: Rabble.ca <http://rabble.ca/news/2014/06/terri-jean-bedford-on-proposed-new-sex-work-law-bill-c-36?utm_content=buffer74835&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer>, which stated that the proposed bill “will not survive the courts, is not enforceable on any significant scale and is a gift to organized crime if it does stand up.” Even Tom Flanagan, a normally conservative academic who opposes polygamy, condemned the bill in his piece Tom Flanagan, “The prostitution bill is a bizarre work of moral panic”,

between public opinion and the law: as early as 1998, a poll reported that 71% of Canadians “[f]avor[ed] [l]egalization of prostitution,⁶² and “[p]ublic opinion surveys do not support [the] assertion that there is a consensus in Canada that prostitution should be prohibited. Nor do public opinions support Prime Minister Stephen Harper’s claim that most Canadians support...prohibitionist logic.”⁶³ Yet unfortunately, Canada’s current characterization of prostitution as *de facto* criminal activity, like that of many other Western nations and international documents, provides an example of moralistic and counter-productive laws on prostitution. On another note, people unable to enjoy full autonomy under other legal systems cannot escape this imposition on their legal autonomy: “it is difficult to be seen as a political victim when the allegedly criminal activities that are the basis for prosecution are also liable to attract criminal charges in Canada.”⁶⁴

In the United States of America, by contrast, the criminalization of the purchase and sale of sex continues unabated. While the state of Nevada allows for legal prostitution in some of its territory, the vast majority of American states maintain a blanket criminalization of prostitution, regardless of its form, function, or any other pertinent concerns (such as religious freedom). The seminal Supreme Court case of *Lawrence v. Texas* provided hope for greater freedom for private sexual ordering in the statement that

The [homosexual] petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.⁶⁵

The Globe and Mail (20 June 2014), online: [GlobeandMail.com < http://www.theglobeandmail.com/globe-debate/prostitution-bill-has-the-makings-of-another-moral-panic/article19256534/>](http://www.theglobeandmail.com/globe-debate/prostitution-bill-has-the-makings-of-another-moral-panic/article19256534/).

⁶² Cited in Weitzer, *supra* note 25 at 78. The respondents divided further into “legal and tightly regulated”=65%, ‘completely legal’=6%.”

⁶³ John Lowman & Christine Louie, “Public Opinion on Prostitution Law Reform in Canada” (2012) 54:2 Can J Corr 245 at 256.

⁶⁴ Kathleen A Lahey, *Are We ‘Persons’ Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 138.

⁶⁵ *Lawrence v Texas*, 539 US 558 (2003) at 578.

This is especially true when considering a concurring judgment which stated that “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law,’”⁶⁶ despite the majority specifically distinguishing homosexual sex from prostitution.⁶⁷ The hope that private commercial sexualized activity would be protected by the same logic as other private sexual ordering has not been borne out in practice: “[a]lmost all states prohibit solicitation for prostitution as well as pimping, procuring, operating a brothel, and running any other business that offers or allows sex for sale.”⁶⁸

In fact, as recently as 2009, approximately 60,000 Americans were arrested on prostitution-related charges,⁶⁹ a cost to the system which also creates lasting harm for those arrested: “arrest and punishment can be considered harmful because of the stigma of a criminal record.”⁷⁰ Yet the system does not necessarily reform or deter offenders: a participant in the court treatment of prostitution in New York noted “the...familiarity...between the clerks, the judges, the women themselves, everyone in the court. Everyone accepts the fact that each woman who comes in will be in again and again, will go through the same routine.”⁷¹ Much of South America has adopted a regulatory, rather than criminal, regime: such countries appear more alive to issues of freedom in private sexual ordering than prohibition-oriented regimes such as the supposed superpower the USA.

Both international and national regimes can clearly be influenced by the laws and legal philosophies of hegemonic countries (which, in this case, are almost exclusively prohibitionist on

⁶⁶ *Ibid* at 583, per O’Connor J, concurring.

⁶⁷ *Ibid* at 578.

⁶⁸ Weitzer, *supra* note 25 at 48.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* at 49.

⁷¹ “L,” quoted in Millett, *supra* note 6 at 135.

prostitution). This can be done explicitly, such as where, under American law, “[u]nder the Victims of Trafficking and Violence Protection Act of 2000, if a country did not meet the minimum standard for curbing trafficking, it would risk losing non-humanitarian, non-trade related assistance from the U.S.”⁷² In the case of the Republic of Korea (“South Korea”), the rules went beyond trafficking to influencing legal treatment of all prostitution: “Korea, as a tier 3 country, had fallen below the minimum standard and faced great international humiliation as well as scorn from the United States. Thus, the group welcomed KWAU’s [Korean Women’s Association United, a prohibitionist group] proposed legislation and supported the group’s lobbying efforts.”⁷³ The issues of funding and labelling illustrates

the chilling effect that the prohibitionist agenda has had on the public discourse around sex work. It has indeed created a Cold War sensibility, where sharp lines are drawn between those who want to abolish sex work and sex trafficking and those who are more ambivalent about such an absolutist stance. There is anecdotal evidence to suggest that individuals and groups participating in discussions on sex work and sex trafficking must respect zones of unspeakability for fear of being known publicly as supporters of the legalization of sex work. After all, NGOs [non-governmental organizations] perceived to advocate the legalization of sex work have been visited with swift sanctions through the loss of international funding. All this has the real potential for irreversibly shifting the balance of power at the national level, where on the one hand, sex worker organizations are being starved of their already limited funds, while domestic organizations towing [*sic*] an abolitionist feminist line and international outposts of U.S. church-based organizations are flush with funds to ostensibly counter sex trafficking and rescue sex workers from sex work.⁷⁴

Obviously, while combatting involuntary sex trafficking is an important and laudable aim, leaving the terminology and funding decisions (which can both directly and indirectly shape national law) in the hands of a biased group threatens the debate with mischaracterization and leaves sex workers as collateral damage in an ideological debate. This seems bolstered by Mai’s sociological work with migrant sex workers in the United Kingdom:

Only a small minority of the migrant female sex workers I interviewed in London felt that they had been deceived and forced into selling sex in circumstances within which they had no share of control or consent. More frequently, women felt that they had been subject to different forms of exploitation, whose terms and understandings were mainly related to unsatisfactory payment and working

⁷² Ji Hye Kim, “Korea’s New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature’s Intent to Protect Prostitutes from Abuse” (2007) 16:2 Pac Rim L & Pol’y J 493 at 506.

⁷³ *Ibid* at 505-506.

⁷⁴ Halley et al, *supra* note 31 at 370-371.

conditions, rather than to the involvement in sex work per se. Migrants' understandings and experiences of exploitation and advantage were embedded within wider sets of needs and priorities that varied greatly according to their personal life histories and socio-economic circumstances.⁷⁵

This was echoed in a work on globalization and sex work in Kuala Lumpur, which found that “[w]hile some women initially were driven by the socioeconomic imperative of assisting family members, others did so to escape patriarchal or religious constraints, as well. Subsequently, transnational migration for sex work offers the women new avenues for life- or self-enhancement.”⁷⁶ A law which recognized potential benefits of transnational sex work like “unprecedented opportunities to travel and experience the world, to pursue part-time programs of study, to consume the latest couture apparel, to purchase land or homes, and to set up businesses”⁷⁷ and protected migrant sex workers from Mai’s phrase of “unsatisfactory payment and working conditions” would appear to offer more protection than rhetoric on trafficking or exploitation.

Moreover, the issue is not simply funding and lobbying, but a continuing culture of hegemony which influences legal regulation of prostitution. The almost-universal Othering of prostitution can be traced back to the period where sexual practice was used as an explicit dichotomy to divide humanity into inferior and superior groups, as shown by Flaubert’s epistolary description that “the oriental woman is no more than a machine: she makes no distinction between one man and another man.”⁷⁸ As described below legislation governing prostitution is often decades old, reifying the fact that “universal values are the social creation of the dominant strata in a particular world-system...not global universalism but European

⁷⁵ Nick Mai, “Embodied Cosmopolitanisms: The Subjective Mobility of Migrants Working in the Global Sex Industry” (2013) 20 *Gender, Place & Culture* 107 at 113-114.

⁷⁶ Christine BN Chin, *Cosmopolitan Sex Workers: Women and Migration in a Global City* (New York: Oxford University Press, 2013) at 176.

⁷⁷ *Ibid.*

⁷⁸ Gustave Flaubert to Louise Colet, quoted in Edward W Said, *Orientalism*, 25th Anniversary ed (New York: Vintage Books, 2003) at 187.

universalism, a set of doctrines and ethical views that derive from a European context, and aspire to be, or are presented as, global universal values---what many of its espousers call natural law.”⁷⁹ Such unspoken influences on law and methods of control threaten a human rights and autonomy approach to the regulation of sexual ordering. However, Wallerstein is not pessimistic: “[i]t is not that there may not be global universal values. It is rather that we are far from yet knowing what these values are.”⁸⁰ Principles of autonomy and acceptance, not ideological coercion either directly or indirectly, have the potential to guide laws on prostitution in the future.

The experience of people in the sex trade is not uniform, with some evidence that marginalized groups are more vulnerable within sex work:

[D]istinct postcolonial realities existent in Canada, the United Kingdom and Australia...contribute to sex work’s demographics in these jurisdictions. Available evidence indicates that Aboriginal women in Canada are disproportionately represented in the sex trade, particularly at street level. Australian...historical scholarship emphasizes the prevalence of Aboriginal sex workers during the country’s colonial period. Contemporary research also speaks to indigenous women’s involvement in transactional sex particularly as a result of stark economic marginalization and homelessness. Moreover, migrant and trafficked women, particularly from Asia, Eastern Europe and Latin America, appear to make up a significant and growing number of sex workers in [Canada, the UK and Australia]. These women may contest a plurality of subordinating forces at once: racism, undocumented status, language barriers, compromised economic circumstances, social stigma and criminalization. Such factors are core to the way in which women experience sex work and its governance.⁸¹

The same is true for homosexual male prostitution:

The most important conclusion to come out of this survey [of 50 men who had worked or work as male prostitutes, in West London, UK] is the danger of generalisation about male sex workers. There are enormous variations in lifestyle, in the organisation of the business, in the environment in which it is carried on, in the sexual activities involved, in the relationship between customer and client, in the amount of money that changes hands and in the degree of concealment from legal scrutiny.⁸²

Moreover, cross-border emigration for prostitution does not automatically equal trafficking:

“where sex workers make the decision to migrate, their agency should be acknowledged and

⁷⁹ Immanuel Wallerstein, *European Universalism: The Rhetoric of Power* (New York: The New Press, 2006) at 27.

⁸⁰ *Ibid* at 28.

⁸¹ Campbell, *supra* note 8 at 144.

⁸² West & de Villiers, *supra* note 23 at 324.

respected...the sexual slavery position disempowers sex workers by disregarding their decisions to migrate...and labelling all women in migration as victims.”⁸³ The variety of experiences for all of these socio-economic and demographic factors, and their sometimes negative impacts, must be borne in mind to achieve a realistic picture of sex work, strengthening Weitzer’s argument that “[v]ictimization, exploitation, agency, job satisfaction, self-esteem, and other dimensions should be treated as *variables* (not constants) that differ between types of sex work, geographical locations, and other structural conditions.”⁸⁴ In other words, there is no one answer to the questions raised by prostitution, nor should different types of sex work create legal essentialism.

Religion, Law, and Prostitution

As with polygamy, differing religious approaches to prostitution are not reflected in the current law of Western nations and international regulations which, while perhaps not consisting only of religious mores, incorporate religious notions of the uncleanness and religious perversity of prostitution. Unlike polygamy, the roots of the criminalization of prostitution cannot be traced back to Greco-Roman civilization, where “[s]exuality and prostitution were accepted facts of life in ancient Rome; openly displayed, exploited, discussed and celebrated. The Roman state was not ashamed to profit publicly from the trade; after the emperor Caligula imposed a tax on whores, it enjoyed immense profits.”⁸⁵ This is reinforced by traditions of religious prostitution found in parts of South Asia, where “[i]n medieval India, religious prostitution was a central institution in the temples, and secular whores were accepted by both state and society...the tradition of the *devadasi*, or temple dancer/whore, continued well into our own society --- until

⁸³ Gabrielle Simm, “Negotiating the United Nations Trafficking Protocol: Feminist Debates” (2004) 23 Australian YB Intl L 135 at 137.

⁸⁴ Weitzer, *supra* note 25 at 18.

⁸⁵ Roberts, *supra* note 18 at 54.

Western mores became the norm amongst the rulers of Indian society.”⁸⁶ Nevertheless, the characterization of prostitution by religion is extremely important to legal regulation, as if it can successfully be religiously stigmatized, it is likely to be legally stigmatized as well: “people turn into virtual zombies when they are persuaded that their religion is under attack.”⁸⁷ The law is then called upon to reify “religious” principles.

Despite the supposed antipathy towards prostitution of Abrahamic religion which informs Western law on commercialized sex, as may be expected in traditionally patriarchal societies, prostitution remains alluring despite being religiously discouraged. Theologically, the Tanakh (considered sacred by Judaism and Christianity), while hardly condoning prostitution,⁸⁸ contains several positive allusions to prostitution,⁸⁹ while in Christianity’s New Testament Jesus associates with prostitutes and while condemning the practice, does not violently attack them as he does the moneylenders in the temple.⁹⁰ Early “patristic” Christianity also had a complex relationship with prostitution: Augustine, not known for nuanced opinions on sexual ordering, warned: “[s]uppress prostitution, and capricious lusts will overthrow society.”⁹¹ This confusion of repugnance and pragmatism enabled prostitution to be both denounced and tolerated by

⁸⁶ *Ibid* at 354-355 [emphasis in original].

⁸⁷ Wole Soyinka, attributed in M Ozonnia Ojielo, “Human Rights and Sharia’h Justice in Nigeria” (2003) 9 Ann Surv Intl & Comp L 135 at 160.

⁸⁸ For statements implying disapprobation of prostitution, see Leviticus 19:29, “[d]o not degrade your daughter by making her a prostitute, or the land will turn to prostitution and be filled with wickedness,” and Deuteronomy 23:17-18, “No Israelite man or woman is to become a shrine prostitute. You must not bring the earnings of a female prostitute or of a male prostitute into the house of the Lord your God to pay any vow, because the Lord your God detests them both.”

⁸⁹ See, for example, the story of Tamar and Judah at Genesis 38: 13-26, the sole survivor of Jericho, the prostitute Rahab, in Joshua, chapter 2 and 6: 21-25 (and who appears to be named in the genealogy of Jesus in Matthew 1:5), and (in some translations, although notably not the New International Version, where she is described as a “promiscuous woman”) the story of Hosea and his wife Gomer at Hosea 1-3, in which Hosea’s marriage is compared to God’s relationship to Israel. Less positive, but still seemingly permissive, can be found at Proverbs 6:26, “a prostitute can be had for a loaf of bread” (contrasting this with the harms of adultery).

⁹⁰ Although direct references to Jesus associating with prostitutes are matters of interpretation (such as the status of Mary Magdalene), this appears to be the subtext to Luke 7:36-48. A Pauline epistle appears to specifically condemn prostitution: “[t]he body, however, is not meant for sexual immorality but for the Lord, and the Lord for the body....Do you not know that your bodies are members of Christ himself? Shall I then take the members of Christ and unite them with a prostitute? Never!” 1 Corinthians 6: 13 and 15.

⁹¹ Quoted in Roberts, *supra* note 18 at 55.

Christianity: “[a]lthough it would be many centuries before the Christians could achieve the kind of power that would enable them to persecute, torture and punish prostitutes, the Church was already institutionalizing the hatred of female sexuality to a degree previously unseen.”⁹² In eighteenth century England, the fruits of this religious work were demonstrated: “prostitution and ‘bastard-bearing’ were among the sexual and public disorder offences subject to the jurisdiction of the church courts; church court punishments relied on publicly shaming the offender.”⁹³

In Islam, prostitution is discouraged based on Sura 4, which states that “[o]ther women are lawful to you, so long as you seek them in marriage...looking for wedlock rather than fornication.”⁹⁴ This is bolstered by further non-Quranic teachings:

For the Islamic common sense, ‘only the whore loses her virginity before marriage’. The prostitute is considered to be not only a woman who sells herself for money but one who first gave herself ‘entirely’ before marriage...The deflowered body is no longer ‘an inviolable residence (horma) which develops and protects the ego’. This hated and despicable body can be sold, given to anyone, anytime, anywhere.⁹⁵

Yet the Qu’ran also appears to take a nuanced view of the moral culpability of prostitution: Sura 24 forbids forcing slave-girls into prostitution and states that “God will be forgiving and merciful” to slaves forced into prostitution.⁹⁶ Islam has not unqualifiedly criminalized the “world’s oldest profession,” either. Practices that are in some ways analogous to prostitution are sanctioned under some interpretations of Islam:

Official temporary marriage---“*muta’a*” in Arabic, and “*sigheh*” in Persian...is available to *Shi’ia* Muslims...“*Misyar*” marriage, which is permitted by some *Sunnis*...is frequently intended to be temporary...and in practice often is temporary...An increasingly common form of sexual temporary marriage is referred to as a ‘summer marriage’ or ‘travel-related’ marriage, which is generally some

⁹² Roberts, *ibid*, at 64.

⁹³ Sokol, *supra* note 7 at 24.

⁹⁴ Sura 4:24, “Women,” in *The Qur’an*, translated by MAS Abdul Haleem (New York: Oxford University Press, 2010) at page 53.

⁹⁵ Abdessamad Djalmy, “Sexuality and Islam” (2010) 15 *European J Contraception & Reproductive Health Care* 160 at 164.

⁹⁶ Sura 24:33. Abdel Haleem, *supra* note 94 at 223.

form of *misyar* marriage. Typically, a girl from a poor family will contract marriage with a visitor from another country, and will be divorced upon his departure.⁹⁷

By adding the pecuniary and temporary nature to sexual contact, the (contested) practices discussed here can be conceived of as *de facto* sex work for women, within a religiously-tolerant framework. Terminological differences do not change the underlying nature of the practice, although it is interesting to note the practice's acceptance compared to other forms of sex work, suggesting the objection may be more to form rather than substance of sexual transactions.

The acceptance of temporary marriage today is bolstered by pragmatic legal regulation of sex work in the past. Under Islamic law of the late Middle Ages and beyond, prostitution survived: “[t]he prevalence of prostitutes in Egypt, Cairo in particular, is mentioned by many contemporary [for the time] Arab authors, who note that the prostitutes had to pay taxes in order to work...prostitutes in [18th century] Aleppo were licensed by a state officer to whom they paid protection money.”⁹⁸ There were also potential protections, or at least statuses, for prostitutes: “Eighteenth-century and later sources mention guilds for prostitutes...but the guilds were almost certainly little more than organizations whose function was to facilitate state control and taxation.”⁹⁹ Despite this, prostitution was “of a low to disreputable status.”¹⁰⁰ In the Islamic case, religious antipathy towards prostitution may retard any legal reform: “given the strong condemnation of prostitution in [the Islamic] culture zone, gains in economic security may not produce the expected gains in self-expressionism and tolerance of deviant behavior.”¹⁰¹

⁹⁷ Martha Bailey & Amy J Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara, CA: Praeger, 2010) at 10-11.

⁹⁸ Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, CT: Yale University Press, 1992) at 115.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Steven Stack, Amy Adamczyk, & Liqun Cao, “Survivalism and Public Opinion on Criminality: A Cross-National Analysis of Prostitution” (2010) 88:4 *Social Forces* 1703 at 1721.

Religious considerations do appear to colour societal attitudes to law, as seen in one example:

West African countries that include Ghana, Nigeria, Togo, Benin, Mali, Sierra Leone, Guinea, Liberia, Burkina Faso, Cote d'Ivoire, Cape Verde, Gambia, Guinea-Bissau, Mauritania, Niger, and the Senegal [*sic*] are home to more individuals who attend religious services and affiliate with a specific religion than any place in the world. It is estimated that 99% of West African adults identify with a religious denomination and 82% attend religious services at least weekly... This overwhelming identification with Christianity and Islam helps to explain, in part, the strong stance that many West Africans like the Ghanaians have taken and continue to take towards prostitution. It is seen as a sin by immoral women driven by a hunger for debauchery and decadence.¹⁰²

While no social or statistical analysis can confidently predict the future, the centrality of religion to law on the issue of prostitution means that religious aspects will likely continue to colour law.

Historical Legal Approaches to Prostitution

Historical analysis is needed to give context to prostitution, and attempts to regulate the issue. At the same time, historical analysis problematizes the term, pointing to the variety in forms throughout history: “[p]rostitution is not a single thing. It can only be well understood in its social and historical context. Ancient Greek *hetairai*, such as Pericles’ mistress Aspasia, have very little in common with a modern call girl. Even more important, within a given culture there are always many different types and levels of prostitution.”¹⁰³ Legal history can help contextualize and broaden selective or myopic study of certain types of prostitution throughout history, thus avoiding erroneous comparisons or conclusions about the history of sex work. It is reasonable to infer that Moore’s general historical principles (“themes across time and culture”) about female prostitution hold true for all prostitution: “[f]irst, sex can be defined as a commodity to be purposefully exchanged. Second, demand exists in the true economic

¹⁰² Meshelemiah, *supra* note 44 at 42-43.

¹⁰³ Martha C Nussbaum, “‘Whether from Reason or Prejudice’: Taking Money for Bodily Services” (1998) 27:2 J Leg Stud 693 at 700 [emphasis in original].

theoretical form in this purposeful trading of sex for something else of value. And third, some females have chosen to be part of this exchange.”¹⁰⁴

The legal regulation of prostitution has been consistently de-humanizing but not necessarily prohibitive. In the Islamic context, “[o]ver the centuries, Islamic societies have accorded prostitution much the same levels of intermittent toleration, regulation and repression as their Christian counterparts.”¹⁰⁵ This comparison of two complex and shifting systems is apt: “[a]t common law prostitution was not a crime...nor was it punishable in common law tribunals.”¹⁰⁶ William Blackstone remarks, describing a non-hostile law, that “[t]he civil law seems to suppose a common harlot incapable of any injuries of this kind [rape]: not allowing any punishment for violating the chastity of her, who hath indeed no chastity at all, or at least no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from a common strumpet.”¹⁰⁷

In pre-Confederation Canada, the status of prostitution was socially disreputable, but not completely banned: “enforcement during pre-Confederation was sporadic and capricious. Prostitution was likely to be tolerated in port cities such as Halifax and on the Western frontier, where there was a large surplus male population, and repressed when it was seen as a direct threat to respectable members of the population.”¹⁰⁸ Prostitutes were likely unable to go to the law for protection, as in the “Sayer Street Outrage,” sexual assaults against the inhabitants of a Toronto brothel in 1858, where none of the alleged perpetrators were punished despite clear

¹⁰⁴ Tami Moore, “The Bartering of Female Sexuality Through the Ages” in Rochelle L Dalla et al, eds, *Global Perspectives on Prostitution and Sex Trafficking: Europe, Latin America, North America, and Global* (New York: Lexington, 2011) 277 at 278.

¹⁰⁵ Bruce Dunne, “Power and Sexuality in the Middle East” (1998) 206 *Middle East Report* 8 at 9.

¹⁰⁶ Charles Rosenbleet and Barbara J Pariente, “The Prostitution of the Criminal Law” (1973) 11:2 *Am Crim L Rev* 373 at 373 and n 4.

¹⁰⁷ William Blackstone, *Commentaries on the laws of England: to which is added an analysis by Barron Field*, vol 2, Book 4 (New York: E Ducykinck, 1830) at 157 [Accessed through Gale Cengage, *The Making of Modern Law* database].

¹⁰⁸ Shaver, *supra* note 16 at 211.

testimony of the victims.¹⁰⁹ However, the “harm” of prostitution in 19th century Canada was dependent on context, and was not inevitable, as demonstrated through Backhouse’s contrasting examples of street prostitutes in Toronto who were emblematic of “a ticket to public exposure, police harassment, and downward social mobility”¹¹⁰ with Esther Forsyth Arscott, a brothel operator in London, Ontario, for whom “[p]rostitution had proven to be a profitable choice of occupation for Esther Arscott...a woman who had bested them all.”¹¹¹ The type of prostitution engaged in thus appears to have determined, with multiple possibilities, whether the practice of prostitution was deleterious to 19th century Canadian sex workers, suggesting that there were differing experiences regarding the voluntariness of the occupation.

By the turn of the 20th century, reform movements had begun to attack prostitution in Canada and call for its prohibition. This was a movement with a subjective outlook:

[T]he reformers did have a shared patriarchal conception of the family...Underlying the diversity of issues addressed by these women, be it race suicide, prostitution, prohibition or women’s employment, the common denominator was reproduction, defense of a patriarchal sexual code and the promotion of motherhood. As enthusiastic proponents of the patriarchal family, they justified their own involvement in extra-familial organizations as mothering on a national scale.¹¹²

While the unabashed coercion of such a movement is clear from the above passage, the imposition of narratives onto the supposedly-deleterious “Other”---prostitutes---is also demonstrated. Criminalization of prostitution in Canada raises familiar Foucauldian issues of discipline and punishment. This is seen in Freund’s discussion of World War II-era Vancouver: “the body of the prostitute became a slate on which prescriptions for respectable and decent womanly behaviour could be chalked. Thus, the body of the prostitute raised issues of control

¹⁰⁹ Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women’s Press for The Osgoode Society, 1991) at 99 and 101. For the complete story of the incident, see Backhouse, 80-101.

¹¹⁰ *Ibid* at 244.

¹¹¹ *Ibid* at 258-259.

¹¹² Jane Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women’s Press, 1992) at 71.

and opportunity.”¹¹³ Shaver comments that “[i]n Canada, although the objective properties and conditions of prostitution changed only slightly, the rhetoric surrounding it moved full circle from social nuisance, to social purist, to social nuisance.”¹¹⁴

“[P]rostitution laws of one kind or another have existed in America since the early colonial period.”¹¹⁵ In the United States of America, sexual behaviour was seen as integral to social stability:

By mid-century, family critics warned that divorce and desertion, male licentiousness, and women’s rights threatened the very fabric of the republic...In response came increasingly pessimistic calls for the elimination of family diversity and the imposition of orthodox republican ideals on all households. These demands were issued by voluntary associations like the New York Moral Reform Society, founded in 1834 to combat prostitution and the double standard.¹¹⁶

The current legal treatment of prostitution arose in “the early twentieth century” when “both regulation and de facto toleration were decisively repudiated by local, state and federal governments in favor of an official policy of non-tolerance.”¹¹⁷ This lack of tolerance (in a broader sense than de Marneffe meant) has continued: “since Nevada legalized brothels in 1971, no other state has seriously considered legalization. Legislators fear being branded as ‘condoning’ prostitution.”¹¹⁸ Prostitution came to be seen, in the words of the Supreme Court of the United States, as a phenomenon where

women...for hire or without hire, offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to ‘the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.’¹¹⁹

¹¹³ Michaela Freund, “The Politics of Naming: Constructing Prostitutes and Regulating Women in Vancouver, 1939-1945” in John McLaren, Robert Menzies, & Dorothy E Chunn, eds, *Regulating Lives: Historical Essays on the State, Society, The Individual, and the Law* (Toronto: UBC Press, 2002) 231 at 233.

¹¹⁴ Shaver, *supra* note 16 at 219.

¹¹⁵ de Marneffe, *supra* note 21 at 58.

¹¹⁶ Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill, NC: University of North Carolina Press, 1985) at 10-11.

¹¹⁷ *Ibid.*

¹¹⁸ Weitzer, *supra* note 25 at 52.

¹¹⁹ *United States v Bitty*, 208 US 393 (1908) at 399. Interestingly, illustrating the interconnectedness of private sexual ordering, the case quoted from in *Bitty* is *Murphy v Ramsey*, 114 US 15 (at 45), a prosecution of Mormon polygyny.

The criminalization of American prostitution created a heavy burden on social outcasts who now became criminals as well: “[e]very aspect of their existence was criminalized; it became increasingly difficult for them to work as whores and, because the social purity fanatics had intensified the whore-stigma, it was even more difficult for them to find straight jobs. Thus they were condemned to be both professionals and criminals.”¹²⁰ In the post-bellum era of social reform, “[p]rostitution thus invoked and resonated with these themes of urban disorder [pervasive social changes], the separation of male and female fields of activity, and increasingly differentiated moral discourses...The prostitute became a powerful and emotive symbol of these worrying changes in social and gender relations; she became ‘a master symbol, a code word for a wide range of anxieties.’”¹²¹

These issues have not lessened, nor has American legislation provided a satisfactory answer to the ancient question of “who watches the watchers?”¹²² In Canadian homosexual prostitution, an expert stated: “I’ve heard of police officers who force prostitutes to perform oral sex on them. I’ve heard it happen to a male or transgendered prostitute about five times.”¹²³ A particularly disturbing account describes the implied dichotomy of legal personality: “[n]ow I’m off the street. And if a cop comes up to me and sticks his hand in my shirt, feeling me up to look for something, you can believe it baby I’m gonna call a lawyer or the ACLU or something. But in those days it was pretty different.”¹²⁴

¹²⁰ Roberts, *supra* note 18 at 266.

¹²¹ Alan Hunt, *Governing Morals: A Social History of Moral Regulation* (New York: Cambridge University Press, 1999) at 119.

¹²² Common translation of Juvenal, *Satires*, Book VI, lines 347-348. The original Latin, able to be translated variously, is “quis custodiet ipsos custodes?”

¹²³ Jamie-Lee Hamilton, quoted in Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005) at 88.

¹²⁴ “M,” quoted in Millett, *supra* note 6 at 112.

The history of the legal regulation reveals more nuance and accommodation than is currently evident in the polarized debate. However, this debate, as seen expressly in the Canadian and French examples, continues to evolve. How law may relate to this instance of private sexual ordering in the future is not predictable from its so far varied, and for the moment repressive, history:

Although the history of prostitution is complex and cumbersome, it has never been quite as difficult to categorize and analyze as it is becoming in this age of technology and globalization. The marketplace remains steady, if not increasing in demand. The numbers of pornographic sites on computers worldwide seem to illustrate a growing interest in sex among the population. These sites also reflect the emerging problems for future discussions of prostitution.¹²⁵

Objections to Prostitution Based on Subjective Morality

Moral objections to prostitution provide an example for the phenomenon whereby “because of the symbolic value of numbers in morality politics, policy makers and experts have little interest in actual numbers, and more in startling images and symbols.”¹²⁶ Prostitution is claimed by some commentators to be either harmful as a moral evil, or against natural tendencies of human society and reproduction. As far as these statements reflect intrinsic belief, debate is impossible. But the rationales are not restricted to unarguable principles:

a critical morality based on the theory that all social morality had the status of divine commands or of eternal truth discovered by reason...is perhaps least plausible in relation to sexual morals... Nonetheless, the attempt to defend the legal enforcement of morality...would be something more than the simple unargued assertion that it was justified.¹²⁷

As a basis for universal legal application, enforced transcendent morality is dangerous: “[l]aw as politics is made invisible by the inevitability of nature. The rule of law through nature masks the hierarchy it seeks to protect. Hierarchy is presented as the differences *in* nature, and

¹²⁵ Moore, *supra* note 104 at 287.

¹²⁶ Hendrik Wagenaar & Sietske Altink, “Prostitution as Morality Politics or Why It Is Exceedingly Difficult to Design and Sustain Effective Prostitution Policy” (2012) 9:3 *Sexuality Research & Social Policy* 279 at 285.

¹²⁷ HLA Hart, *Law, Liberty, and Morality* (New York: Vintage, 1963) at 73.

natural law is in part the reasonable way to interpret these differences.”¹²⁸ The perspective that prostitution is harmful because it is against nature is thus presupposed and hidden inside some moral theories which find their way into legal commentary. Zawisza meets moral arguments on their own field, asserting that

prostitution, as such, is not coercive or immoral, so long as valid consent is obtained. Indeed, any sex act that occurs between freely, informed consenting adults is morally acceptable. Prostitution is a combination of consenting sex and contractual exchange. Any governing set of rules and morals that govern prostitution are based on this dual aspect of the act. If the act is between such validly consenting adults, who agree to the terms of the contract and fulfill the terms, there should be no moral issue with prostitution at all.¹²⁹

While this ambitious argument is tenable, it and its premises will not be accepted by all of those who object to prostitution on morally coercive grounds. Nor is Hare’s optimism in the argument that “morality compels us to accommodate ourselves to the preferences of others, and this has the effect that when we are thinking morally and doing it rationally we shall all prefer the same moral prescriptions about matters which affect other people”¹³⁰ necessarily warranted. However, accepting the view that “government should be as neutral as possible toward different conceptions of a good life,”¹³¹ then the argument that prostitution is immoral is irrelevant to whether it should be legally regulated.

The ethical propriety of prostitution is a question for individual conscience. The effects of the coercive imposition of morality is not: “stigmatisation and discrimination of sex workers compounded with the criminalisation of sex workers and the sex industry further inhibits access to HIV-related services, legal protection from violence, or other social, health or even educational programmes.”¹³² In a pluralist society, it is important that the principle of ensuring

¹²⁸ Zillah R Eisenstein, *The Female Body and the Law* (Los Angeles, CA: University of California Press, 1988) at 50.

¹²⁹ Kathryn Zawisza, *The Ins and Outs of Prostitution: A Moral Analysis* (MA Thesis, University of Arkansas Department of Philosophy, 2011) [unpublished] at 127.

¹³⁰ RM Hare, *Moral Thinking: Its Levels, Method and Point* (New York: Oxford Clarendon Press, 1981) at 228.

¹³¹ de Marneffe, *supra* note 21 at 133.

¹³² TAMPEP, *supra* note 56 at 75.

rational ideas, rather than subjective beliefs, informs law. As recognized by a majority judgment of the Court of Appeal for Ontario, “[p]rostitution is a controversial topic, one that provokes heated and heartfelt debate about morality, equality, personal autonomy and public safety. It is not the court’s role to engage in that debate.”¹³³ At best, morality only supplements rational analysis, while at worst, it makes normative claims which detract from a reasoned debate.

Agentic Concerns in Prostitution

Bertrand Russell draws an amusing, but biased, comparison highlighting the dangers of using objective criteria to judge human behaviour: “[p]rostitution] is a life against instinct---quite as much against instinct as the life of a nun.”¹³⁴ The practice of prostitution, like many instances of illegal or discouraged private sexual ordering, is rhizomic. No one actor or ideology controls how the practice is structured: “for centuries a tremendous moral and sociological confusion has surrounded the entire issue, a phenomenon one can account for only by considering the monumental sexual repression within our culture, and its steady inability, after having created both the prostitute and her plight, to recognize her as human in any meaningful sense at all.”¹³⁵ Yet, the person as actor is a central concept to sexual relations, as underscored by Law: “the dominant paradigm of sex says that individual, mutual, informed consent separates good from evil. Consensual sex is highly valued. Non-consensual sex is a serious crime. Consent is key.”¹³⁶

Nozick’s statement that “[a] person’s choice among differing degrees of unpalatable alternatives is not rendered nonvoluntary by the fact that others voluntarily chose and acted within their rights in a way that did not provide him with a more palatable alternative”¹³⁷ seems overly harsh as a universal principle, depending on what alternatives are available and what

¹³³ *Canada (Attorney General) v Bedford*, 2012 ONCA 186, at para 9.

¹³⁴ Bertrand Russell, *Marriage and Morals* (New York: Bantam Books, 1963) at 101.

¹³⁵ Millett, *supra* note 6 at 84.

¹³⁶ Sylvia A Law, “Commercial Sex: Beyond Decriminalization” (2000) 73:3 S Cal L Rev 523 at 589.

¹³⁷ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 263-264.

“others” have chosen to do. However, simply because a choice is (or is perceived to be) not optimal or unpleasant does not necessarily mean it was made involuntarily. This theme was emphasized by an ex-sex worker interviewed by Millett:

I lead my own life. I’m not going to let any john tell me. I may have hated prostitution but I had the *right* to do it. I don’t like people telling me not to do it. Gets me mad, when they tell me not to do it-- that I’m too good for it and so on and so forth...I hear them saying, “I’m superior, what a wonderful person I am to speak to you and lift you up, you fallen woman.”¹³⁸

Even if this perception does not always mirror social reality, law must take into account actual experiences and choices if it is to regulate prostitution from a rational position. Law must understand that agentic concerns may be complicated in practice: “[u]ltimately, state law’s underlying dichotomy between choice and agency on one hand, and coercion and victimization on the other, is not communicated by sex workers’ experiential knowledge as relayed through empirical research. Rather, this knowledge nuances and problematizes these concepts, suggesting possibilities for their coexistence despite their apparent polarization.”¹³⁹

Western nations have a multiplicity of legal understandings of prostitution, which has sometimes been transmitted to non-Western areas through colonization. While it is clear that “the selling of sex is not perceived in the same way as selling books, baked goods or cars [...] Many people believe it is inherently degrading,”¹⁴⁰ this does not suggest a clear-cut solution to the issue of legal regulation of prostitution. Nor are the traditional arguments against prostitution, such as public health concerns, particularly persuasive: in The Netherlands, for example, where prostitution is legal, “[s]exually transmitted diseases are now less prevalent among prostitutes than among the population at large, and free anonymous health services are available within Amsterdam’s Red Light District.”¹⁴¹ While campaigns to control the spread of sexually

¹³⁸ “J,” quoted in Millett, *supra* note 6 at 80-81.

¹³⁹ Campbell, *supra* note 8 at 192.

¹⁴⁰ Hughes, *supra* note 5 at 322.

¹⁴¹ *Bedford v Canada (Attorney General)*, 2010 ONSC 4264 at para 188.

transmitted diseases are “both liberatory and repressive” in that they “increase government surveillance and regulation, and may mean greater interference in areas sometimes thought of as private,”¹⁴² the more repressive regimes tend to be, the more secrecy attaches to the sex trade, making sexually transmitted diseases harder to track and contain.

Another historical concern, that “[p]rostitution and marriage were opposites: where marriage implied mutual love and consent, legality and formality, willing bonds for a good bargain, prostitution signified sordid monetary exchange and desperation or coercion on the part of the woman involved”¹⁴³ flounders in the multiple forms of marriage and conjugal intimacy acceptable in the 21st century. The family forms now demonstrated belie the falseness of any dichotomy of sexual behaviour. However, support for the criminalization of prostitution, like polygamy, can be maintained by the assertion that prostitutes lack agency: or in the words of the Canadian Minister of Justice, an abolitionist, “the vast majority of those who sell sexual services do not do so by choice. We view the vast majority of those involved in selling sexual services as victims.”¹⁴⁴ The spectre of a lack of agency haunts prostitution as much as it does polygamy.

Yet, just as it should not be automatically denied, agency should not be universally assumed. Situations of coerced prostitution have been documented, such as Kim’s discussion of South Korean prostitution wherein female prostitutes are exposed to “debt bondage and employment abuses” as well as “commonly experienc[ing] physical and mental abuse.”¹⁴⁵ In North America, the results of a non-random, small sample size (but not fabricated) study that “88% of prostitutes surveyed in the United States report that they do not want the lifestyle they

¹⁴² Dennis Altman, “Taboos and Denial in Government Responses” in Nana K Poku, Alan Whiteside and Bjorg Sandkjaer, eds, *AIDS and Governance* (Burlington, VT: Ashgate, 2007) 133 at 134.

¹⁴³ Nancy F Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000) at 136.

¹⁴⁴ Susana Mas, “Prostitution bill would make it illegal to buy, sell sex in public” (4 June 2014) CBC News, online: CBC.ca < <http://www.cbc.ca/news/politics/prostitution-bill-would-make-it-illegal-to-buy-sell-sex-in-public-1.2664683>>.

¹⁴⁵ Kim, *supra* note 72 at 500.

have ‘chosen,’ going so far as to describe prostitution ‘as ‘volunteer slavery’ and as ‘the choice made by those who have no choice.’”¹⁴⁶ Agentic concerns can be divided into two types: the first, an essentialist position, arguing that prostitution can never be agentic based on the idea that, as made by counsel for the Attorney General of Ontario,

all sexual gratification in exchange for payment is inconsistent with respect for the human dignity of the seller of sexual services. Because the law requires that a criminal prohibition must be founded upon a demonstrable apprehension of harm, the AG Ontario argues that the term “harm” should be interpreted to include the commodification of sex and attitudinal harm that would accrue to women as a result of legally sanctioned prostitution.¹⁴⁷

This position leads to an argument for criminalization, so as to protect non-agentic people from their own decisions: “[r]espect for human beings and for the ideal of giving every person an opportunity to achieve, in John Dewey’s phrase, the greatest quality as well as quantity of experience, is clearly inconsistent with condoning prostitution.”¹⁴⁸ The second position, that prostitution may in some cases rob people of agency, is a more nuanced, and more powerful, argument for opponents of criminalization to meet. However, by nature of its contingency its claims are also easier to satisfy: if only *some* behaviours associated with the sex trade entrap sex workers (activities such as assault and narcotics, perhaps, which are criminalized with very few situational exceptions), prohibition or criminalization can be justified in only *some* instances.

The first position, that prostitution is always harmful and always involves “the lack of choice women have over being used in prostitution,”¹⁴⁹ is relatively easy to de-fang. Even the sensationalist study quoted above ignores the 12% of respondents who rejected the narrative of lack of agency. Economic aspects make prostitution attractive in some scenarios: “I don’t think you can ever eliminate the economic factor motivating women to prostitution...All prostitutes

¹⁴⁶ Lauren Kaplin, “When Money Changes Hands: Unwelcomeness in Sex for Money” (2011) 33 Women’s Rts L Rep 43 at 43.

¹⁴⁷ *Bedford*, ONSC, *supra* note 141 at para 220.

¹⁴⁸ Charles Winick & Paul M Kinsie, *The Lively Commerce* (Chicago, IL: Quadrangle Books, 1971) at 287.

¹⁴⁹ Sheila Jeffreys, *The Idea of Prostitution* (North Melbourne, AU: Spinifex, 1997) at 330.

are in it for the money. With most uptown call girls, the choice is not between starvation and life, but it is a choice between \$5,000 and \$25,000 or between \$10,000 and \$50,000. That's a pretty big choice: a pretty big difference."¹⁵⁰ While not every sex worker may be "in it for the money," the economic incentive cannot be ignored. Moreover, the argument that "[t]he removal of barriers between sex and commerce would curb the freedom with which individuals are able to make sexual choices...the characterisation of prostitution as a legitimate work choice does nothing to foster sexual autonomy...but undermines human dignity and self-worth"¹⁵¹ fails to state why legally curtailing people's sexual autonomy by disallowing the sale of sex is somehow more respectful or affirming than allowing people to freely engage in sexual ordering. Seen from a different perspective, the lack of agentic capacity by the prostitute is actually encouraged by those attempting to repress not only prostitution, but unconventional sexuality:

Legislation against the sex trade historically goes hand in hand with intolerance of sexual freedom in general, and women's sexual freedom in particular...The whore is seen as dangerously free: her financial and sexual autonomy strikes at the heart of patriarchy...And the whore is free in the sense that she does not bind her sexuality to any one man; on the contrary, she openly challenges the notion of female monogamy.¹⁵²

Cossman also make the point that prostitution is a surrogate for societal control of sex.

Discussing an American case where the court upheld legislation restricting sex toys, she writes:

"the court is concerned with its ability to patrol the borders of good sex. If the privacy of the bedroom becomes the dividing line between good and bad sex and therefore between legitimate and illegitimate regulation, the use of child pornography and/or prostitution, will necessarily fall on the side of the good and, therefore, unregulated sex."¹⁵³ Cossman's tongue-in-cheek articulation of the slippery slope argument belies the ridiculousness of such analogies.

¹⁵⁰ "J," quoted in Millett, *supra* note 6 at 62.

¹⁵¹ Amanda Foong, "The Prostitution Debate: Breaking Down Barriers" (2008) 33:4 *Alternative LJ* 205 at 208.

¹⁵² Roberts, *supra* note 18 at 354.

¹⁵³ Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford, CA: Stanford University Press, 2007) at 37.

The second denial of agency, that prostitution can (or even often) results from a lack of choice, is much more difficult to combat. It is true that studies that suggest a majority of prostitutes do not choose the profession or are kept in it against their will are not academically rigorous (or as Weitzer states, “when these claims are generalized to ‘most’ sex workers, they are fallacies: they are largely or wholly drawn from nonrandom, unrepresentative, and small samples of the street-based population”¹⁵⁴). Nevertheless, anecdotal narratives suggest that there is some truth to the claim that not all prostitution is voluntarily entered or continued. But this argument is therefore contextual and non-essentializing. While it can be accused of glibness, Nussbaum’s comment that sex work falls into the same broad category as other non-stigmatized professions is correct:

Professors, factory workers, lawyers, opera singers, prostitutes, doctors, legislators---we all do things with parts of our bodies for which we receive a wage in return. Some people get good wages, and some do not; some have a relatively high degree of control over their working conditions, and some have little control; some have many employment options, and some have very few. And some are socially stigmatized, and some are not.¹⁵⁵

While this argument is not supportive of unrestricted working conditions, it nevertheless suggests that government should ensure minimum safety requirements and non-discrimination based on the similarities between sex work and other occupations, rather than its (morally and religiously-perceived) differences. Furthermore, the philosophical argument of Rawls, that justice, to be fair, requires objective criteria, is directly applicable to laws which would paternalistically find harm even if the harm was chosen by its sufferer:

[C]riteria of excellence [broadly, the argument that society must order itself “so as to maximize the achievement of human excellence”] are imprecise as political principles, and their application to public questions is bound to be unsettled and idiosyncratic, however reasonably they may be invoked and accepted within narrower frames of thought. It is for this reason, among others, that justice as fairness requires us to show that modes of conduct interfere with the basic liberties of others or else violate some obligation or natural duty before they can be restricted. For it is when arguments to this conclusion fail that individuals are tempted to appeal to perfectionist criteria in an ad hoc manner. When it is said, for example, that certain kinds of sexual relationships are degrading and shameful,

¹⁵⁴ Weitzer, *supra* note 25 at 13.

¹⁵⁵ Nussbaum, *supra* note 103 at 693-694.

and should be prohibited on this basis, if only for the sake of the individuals in question irrespective of their wishes, it is often because a reasonable case cannot be made in terms of the principles of justice. Instead we fall back on notions of excellence.¹⁵⁶

This seeming over-emphasis by law on the harm faced by prostitutes is persuasively described as hypocritical. Cossman points out that modern Western society, in its expansive tolerance for pornography, seems to be creating a double-standard: “the very regulation of prostitution continues to be premised on the idea that the commodification of sex is, in and of itself, a social or moral harm. Yet, the commodification of sex...has become so widespread... that it has become difficult to suggest that the marketization of sex is *per se* a transgression.”¹⁵⁷ More directly, the hypocrisy of criminalization is described by a former sex worker: “I could be doing all kinds of self-destructive things and they wouldn’t mind. They wouldn’t criticize me for self-destructiveness if I were just as compliant or masochistic outside of prostitution... I could be doing much worse things to myself, and they would approve.”¹⁵⁸

Conclusion

Bentham summarized prostitution as “there rages on this subject an appetite for contradiction: an appetite almost universal, and where it prevails insatiable.”¹⁵⁹ Any activity as central to society, religion, and law as sex will necessarily be a topic of sustained interest and controversy. Prostitution bears this out. But while “[v]ariations in the perception of harm also occur with respect to the perceiver’s point of reference...it is the voices of those most directly involved---the sex workers---that have the least impact on the social construction of prostitution.”¹⁶⁰ National and international laws do not usually trouble to connect prostitution (as an essentialized and monolithic practice) with morally neutral reasons for its regulation, whether

¹⁵⁶ John Rawls, *A Theory of Justice*, revised ed (Cambridge, MA: Belknap Press, 1999) at 290-291. The definition of “perfectionism” quoted is at *ibid*, 285-286.

¹⁵⁷ Cossman, *Sexual Citizens*, *supra* note 153 at 63.

¹⁵⁸ “J,” quoted in Millett, *supra* note 6 at 81.

¹⁵⁹ Bentham, *supra* note 7 at box 151, folio 164, quoted in Sokol, *supra* note 7 at 26.

¹⁶⁰ Shaver, *supra* note 16 at 219.

abolitionist, permissive, or somewhere in between. Prostitution remains a key example of the legal regulation of private sexual ordering (together with polygamy), as “[e]xcept in relation to commercial sex, the law has largely rejected the idea that criminal sanctions may be used to enforce the conservative vision of patriarchal, monogamous family relations.”¹⁶¹

At worst, criminalization of prostitution results in the pessimistic observation that “[s]ince no one takes it seriously the entire legal regulation of prostitution is just bullshit, based on nothing but some kind of...sense that they must just get this show into production over and over again, not because it matters or because it’ll change anything or because anyone believes there is anything wrong with it at all---but because it is essential to keep up appearances.”¹⁶² Prostitution is often criminalized based on vague or overbroad concepts of “harm,” agency, or societal cleanliness and purity by laws which deny sex workers a voice unless it is the voice of a victim. Law must take into account the social realities and differing contexts of prostitution, and move away from a religious or morally-infused legal regime.

This chapter has described the religious, historical, and legal realities of prostitution through a legal lens, in order to clarify and isolate the problematic treatment of modern law and the sex trade. It has been demonstrated that the modern abolitionist approach to prostitution is neither as old a concept as is sometimes assumed, nor a policy beneficial in all its effects. The factual matrix inherent to the prostitution debate calls for legal solutions that transcend the imposition of dogmatic theory onto multiple lived realities. In the next chapter, I will attempt to further analyze and problematize modern laws relating to prostitution, arguing that criminalization of humanity’s sexual instincts is, at best, quixotic, and at worst, unjustifiably oppressive.

¹⁶¹ Law, *supra* note 136 at 545.

¹⁶² “L,” quoted in Millett, *supra* note 6 at 148-149.

CHAPTER VII

Towards a Workable Legal Treatment of Sex Work

Prostitution (also known as “sex work,” terms I will use synonymously) provides another useful example of the tensions surrounding the influences on, and impacts of, the law of private sexual ordering. With respect to polygamy, a system of regulation respecting autonomy and pluralism requires that religious practices be protected from legal repression or essentialization. With regard to prostitution, legal processes must be protected against religiously or morally-motivated discriminatory impulses. The issue of the legal treatment of prostitution resists any uniform, one-size-fits-all solution. Complications arise with disparate practices (some coercive and dependency-related, others not). Disparate affected groups (from sex workers and ancillary occupations, to sex purchasers, to the general public, have responses which range from “not in my backyard” (“manifested in a desire to create geographic distance”¹) to a desire to compel a morality where “it is non-believers who are affected by [religiously-based] law rather than those who believe.”²

The issue also gives rise to such emotionally-charged and inapt analogies as Lisa Thompson’s statement that “women in prostitution experience varying degrees of autonomy within a larger framework of abuse and exploitation...the slave working in the more comfortable conditions of the master’s house remains as much a slave as the slave picking cotton in the sun-scorched fields.”³ The variety seen in sex work, however, indicates that while some individuals may require assistance from law, “sex workers are not uniformly deprived, desperate, or

¹ Sarah Kingston, *Prostitution in the Community: Attitudes, action and resistance* (New York: Routledge, 2014) at 166.

² The International Committee for the Defence of Salman Rushdie and his Publishers, *Untitled*, online: <<http://www.article19.org/data/files/pdfs/publications/crime-of-blasphemy.pdf>>.

³ Lisa L Thompson, “There Is Not a Condom for This: The Clash between HIV/AIDS Prevention and Sex Trafficking Abolition” in Rochelle L Dalla et al, eds, *Global Perspectives on Prostitution and Sex Trafficking: Europe, Latin America, North America, and Global* (Toronto: Lexington Books, 2011) 315 at 324.

disposed to risk.”⁴ Nevertheless, it is imperative to adopt Bouclin’s suggestion that interpreting consent in the framework of prostitution must “be conceived in terms that are situational, contextual, relational...depending on the power dynamics that exist in any given moment or situation.”⁵ Coerced sex work should be unacceptable to all perspectives.

Prostitution acutely feels “the burden of social control-the social mechanisms designed to discipline members of society into prescribed modes of behaviour, mechanisms that target those groups deemed most problematic for particular intervention and control.”⁶ In the dynamism of the modern world, prostitution has become both easier to practice and easier to attack:

[M]ajor shifts and the increased fluidity in the movement of people, capital, and commodities brought about by globalization and late-capitalist restructuring, alongside a burgeoning sex industry, have incited a similar broad coalition of the religious right, moral puritans, and radical feminists around an abolitionist mission.⁷

At the most basic level, this imposition on civil discourse can inhibit social discussion, development, and evolution: “[t]o use coercion to maintain the moral *status quo* at any point in a society’s history would be artificially to arrest the process which gives social institutions their value.”⁸ It can also lead to the “pervasive, pernicious workings of stigma”⁹ for vulnerable groups such as women and the LGBTQI community: “[l]egal restrictions on consensual adult sexual behaviour are incompatible with civil liberty and with the self-determination [these] minority movements campaign for.”¹⁰ This chaos is complemented by disparate social science research

⁴ Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Burlington, VT: Ashgate, 2013) at 195.

⁵ Suzanne Bouclin, “Regulating sex work in Canada” (2012) 2012:3 Public L 387 at 394.

⁶ Leslie Ann Jeffrey & Gayle MacDonald, *Sex Workers in the Maritimes Talk Back* (Toronto: UBC Press, 2006) at 105.

⁷ Jane Scoular, “What’s Law Got To Do With it? How and Why Law Matters in the Regulation of Sex Work” in Jane Scoular & Teela Sanders, eds, *Regulating Sex/Work: From Crime Control to Neo-liberalism?* (Chichester, UK: Wiley-Blackwell, 2010) 12 at 16.

⁸ HLA Hart, *Law, Liberty, and Morality* (New York: Vintage Books, 1963) at 75.

⁹ Ine Vanwesenbeeck, “Sex Workers’ Rights and Health: The Case of the Netherlands” in Rochelle L Dalla et al, eds, *Global Perspectives on Prostitution and Sex Trafficking: Europe, Latin America, North America, and Global* (Toronto: Lexington Books, 2011) 3 at 20.

¹⁰ Nickie Roberts, *Whores in History: Prostitution in Western Society* (New York: HarperCollins, 1992) at 355.

leading to Selley's comment that "you can find research and advocacy backing up almost literally any position on the matter."¹¹ When seen against the background of social policy with respect to sexual ordering, the continuous debate over prostitution provides an example that "governing the hearth has been too vital to the social order to long remain out of the limelight."¹² In many cases, this means the extirpation of commercial sex.

I will argue that law must reject Stephens's problematic dictum that law can legitimately serve as "a persecution of the grosser forms of vice."¹³ Since "vice" is a relative term, law should eschew adopting a specific moral vision, and must instead base regulation on the (admittedly problematic) assessment of harm. As with other areas of private sexual ordering, freely consenting adults should be free from arbitrary or grossly disproportionate¹⁴ rules governing how they choose to act as sexual citizens. Nevertheless, affirmative philosophical underpinnings should not blind law to the potential, as with any other occupation, for exploitative, violent, or psychologically damaging work environments. Weitzer is perspicacious in stating that "[w]hile exploitation and empowerment are certainly present in sex work, there is sufficient variation across time, place, and sector to demonstrate that sex work cannot be reduced to one or the other."¹⁵ What is needed is not an abdication of law's role in private sexual ordering, but an understanding that context and circumstances should be taken into account, rather than notions of "sin" or "degradation" coercively controlling the actions of consenting adults. The legal regime

¹¹ Chris Selley, "It ain't easy being the 'change' candidate", National Post (11 July 2014), online: NationalPost.com <<http://fullcomment.nationalpost.com/2014/07/11/chris-selley-it-aint-easy-being-the-change-candidate/>>.

¹² Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill, NC: University of North Carolina Press, 1985) at 307.

¹³ James Fitzjames Stephen, *Liberty, Equality, Fraternity*, RJ White, 2nd ed (New York: Cambridge University Press, 1967) at 152.

¹⁴ Arbitrariness and gross disproportionality are two constitutionally impermissible traits of legislation in Canada. The Supreme Court of Canada upheld a decision declaring laws against sex work unconstitutional on these bases in *Canada (Attorney General) v Bedford*, 2013 SCC 72.

¹⁵ Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York: New York University Press, 2012) at 16.

must also represent the input of all stakeholders, starting with sex work practitioners who can provide valuable insight into the issues involved:

[I]t would be the prostitutes themselves who are in the best position to direct young movement lawyers, law students, and legal assistants toward those incidents in the prostitute's life that would make the most promising test-case material in a long-range legal struggle, not only to change the present laws so oppressive to prostitutes, but to extend every form of civil rights to a group so long and so generally denied them.¹⁶

Simply put, the legal project must determine “how best to balance individual liberty and protection from harm from the liberal point of view, a point of view that takes seriously the idea that individuals have moral rights to liberty.”¹⁷

The previous chapter dealt with realities and philosophical underpinnings of the law of prostitution. Building on that discussion, in this chapter I explore major options for the law of prostitution and conclude that freedom of conscience and morality are positive societal goods, and that law should, so far as is reasonably possible, privilege individual autonomy concerning sexual decisions. I will begin, as with polygamy, by exploring the arguments for and against an explicitly moralistic or religious system; I will then proceed to explore the alternative ways in which law can interact with individuals who choose to sell or purchase sexual services. In making this exploration, I will argue that absent clear evidence of abuse or coercion, law should privilege individual choices to privately order conjugal behaviour in a commercial manner, and should recognize that ancillary services are needed to allow prostitution to be conducted safely and in a non-disruptive manner. While criminalization may be embarked upon with the best of intentions, I will canvass practical and theoretical results of criminalizing sexual services, arguing that this approach is ultimately inconsistent with both human rights and pragmatic harm reduction strategies. I then examine the theoretical promise of legalization/decriminalization, and

¹⁶ Kate Millett, *The Prostitution Papers: A Quartet for Female Voice* (New York: Ballantine Books, 1976) at 107-108.

¹⁷ Peter de Marneffe, *Liberalism and Prostitution* (New York: Oxford University Press, 2010) at 11.

in doing so I briefly discuss several caveats, focussing on the need, as with polygamy, to allow for prostitution not to be an individual's only or default choice, and society's need to ensure that individuals who wish to leave the "world's oldest profession" are able to do so. Before concluding, I offer thoughts on how legal change in the regulation of prostitution could be achieved.

The Interplay of Religion, Morality, Prostitution, and Law

In this section I discuss the nature of religious influence on laws regulating sex work, arguing that despite detailed and in some ways salutary comments made by religion upon the phenomenon, law must be devoid of subjective viewpoints on the propriety of selling sexual services. Religion and morality exert powerful control over humanity, and law is no exception. These issues are by nature subjective: "[t]he moral approach is driven by the belief that values and worth are not defined by humanistic forces but rather that value and worth are derived from an external, overriding grand narrative. Intrinsic to this approach is a belief in a predetermined external moral framework."¹⁸ Religion and moral systems have generally, and understandably, given central importance to sexual ordering, as befits a central human preoccupation:

The relationship between physical health and mental health is now well understood to have a strong connection to the sexual function, or dysfunction. Can it be coincidence, then, that all religions claim the right to legislate in matters of sex? The principal way in which believers inflict on themselves, on each other, and on nonbelievers, has always been their claim to monopoly in this sphere.¹⁹

This argument is especially important to the religiously-decried practice of prostitution, which appears as "a dense signifier around which a variety of social anxieties"²⁰ can be centred. To some religions and moral structures, prostitution presents the problem of ritual pollution, as seen in Douglas's discussion of "dirt...recognizably out of place, a threat to good order, and thus

¹⁸ Christopher Carey, "Collaboration and Conflict: Exploring the Intersections Between the Prostitution and Anti-Trafficking Communities" in Rochelle L Dalla *et al*, eds, *Global Perspectives on Prostitution and Sex Trafficking: Europe, Latin America, North America, and Global* (Toronto: Lexington Books, 2011) 337 at 347.

¹⁹ Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (New York: Emblem, 2008) at 53.

²⁰ Jo Phoenix, "Frameworks of understanding" in Jo Phoenix, ed, *Regulating Sex for Sale: Prostitution, Policy Reform and the UK* (Portland, OR: The Policy Press, 2009) 1 at 14.

regarded as objectionable and vigorously brushed away.”²¹ Kingston argues such objections to prostitution are a response to observing sex work “when on the street,”²² but regardless of setting, religion can operate to label prostitution as dirty, something to be suppressed and “brushed away.” It is no coincidence that to “protect...morals” allows States to limit manifestation of belief under the *International Covenant on Civil and Political Rights*.²³ In this sense, morals are used to regulate “out of place” beliefs and practices where no other argument will suffice. Prostitution can also wreak havoc with a non-religious but morally based system, such as that envisioned by Plato’s *The Laws*, where after a detailed account of the necessity of marriage (and marital laws) the author opines that “[t]he young couple should produce children and bring them up, handing on the torch of life from generation to generation.”²⁴ Prostitution can (albeit not necessarily) impact on this conception of familial propagation.

Law must acknowledge the thought processes of believers, so as to ensure societal inclusion of all viewpoints and a general respect for the administration of justice: “[a] vision of law which sees it as not only a system for regulating conduct, but also as a source of creating and sustaining common meanings in a community, makes it especially important to take seriously the sincere feelings of those who rely on faith-based arguments.”²⁵ Of course, this is not an argument for unqualified adoption of subjective religious and moral perspectives by law. Malik’s next statement that “[t]he self-perception of these individuals that their views have been considered and given some weight by legal institutions becomes important in order to ensure their

²¹ Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (New York: Pelican Books, 1970) at 189.

²² Kingston, *supra* note 1 at 165.

²³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 18 (entered into force 23 March 1976).

²⁴ Plato, *The Laws*, translated by Trevor J Saunders (New York: Penguin Books, 1975) 256 (Book 6; lines 776).

²⁵ Maleiha Malik, “Faith and the State of Jurisprudence” in Peter Oliver, Sionaidh Douglas Scott & Victor Tadros, eds, *Faith in Law: Essays in Legal Theory* (Portland, OR: Hart Publishing, 2000) 129 at 148.

identification with the legal system,”²⁶ is true, recognizing belief as a legitimate voice in a legal debate does not lead to the conclusion that law should inevitably yield to sincere religious belief. On the other hand, sincere belief should not be impinged upon without good, and immediately demonstrable, justification.

Historically, prostitution in the West has been entangled with the belief that “[i]n the moral scheme of the national polity, formal monogamy was the approved channel for sexual desire...Purity reformers intended...to stamp out extramarital sexual relations and to make sure that sex stayed linked to monogamous marriage and childbearing, as fundamental Christian morality required.”²⁷ Morality and religion exert considerable influence on the legal regulation of prostitution, especially cosmologies which claim transcendent truth and demand obedience from all of society. The propriety of coercive imposition of morality varies by symbolic location: “[t]he moral domain varies by culture. It is unusually narrow in Western, educated, and individualistic cultures. Sociocentric cultures broaden the moral domain to encompass and regulate more aspects of life.”²⁸ The sociocentric approach thus raises problems for individual rights and autonomy. The problem is exacerbated when such a culture’s adherents are a demographic minority: “[l]iberal democracies, if they do anything at all, must ensure that the rights of their members are realized...[but] by granting groups power to organize their internal affairs as they see fit, power would in effect be vested in the most powerful elites within these groups...This places individual members of these groups at risk.”²⁹ Thus, the tension between

²⁶ *Ibid.*

²⁷ Nancy F Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000) at 123.

²⁸ Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012) at 26.

²⁹ Daniel M Weinstock, “Liberalism, multiculturalism, and the problem of internal minorities” in Anthony Simon Laden & David Owen, eds, *Multiculturalism and Political Theory* (New York: Cambridge University Press, 2007) 244 at 246.

pluralism and respect for human rights is central to the debate about prostitution and the numerous ways it is theorized.

The treatment of sex workers by a religio-moral group (either in the minority or the majority) provides an instance of the dilemma of deviant/differing groups within a larger discourse. The “moralistic approach” employed towards sex work in South Asia “can be understood as part of a neo-colonial expansion---something in between the colonizers and the post-colonial resistance movements of South Asia.”³⁰ Such a moralistic approach demonstrates the coercive and sometimes imported nature of values regarding sex work: not quite alien, but not familiar, either. Terminology can also become a source of conflict as terminologies and perceptions reveal discontinuities and interesting juxtapositions: while “the teachings of the Koran are [thought] enough in themselves to inhibit prostitution,” some forms of Islam which accept this teaching allow for “‘temporary marriages’ ...in which wedding certificates are available for a few hours, sometimes in specially designated houses, with a divorce declaration ready at hand at the conclusion of business. You could almost call it prostitution...”³¹ One culture’s vice with respect to prostitution is another culture’s respected practice, which complicates the task of legislating in a pluralist society. However, external imposition of rules upon a culture should be only a last resort, if for no other reason than that locally-inspired change “will be...exponential compared to somebody coming in with their ideas and implementing them.”³²

Another concern is the related issue that “[i]t is by no means clear, from a feminist point of view, that minority group rights are ‘part of the solution.’ They may well exacerbate the

³⁰ Carey, *supra* note 18 at 347.

³¹ Hitchens, *supra* note 19 at 46.

³² Interview with “research participant Sahar,” October 17, 2005 quoted in Carey, *supra* note 18 at 348.

problem.”³³ This concern cuts two ways: first, sex workers may face patriarchal discrimination in the law, based on religious or moral minority beliefs which request recognition, or secondly, a minority’s more tolerant practices may enter into conflict with a dominant majority view of private sexual ordering. In both cases, difficult issues are raised for how “accommodation” of differing views can be, or should, be achieved by law. Self-determination and the ability to set (non-coercive) moral standards is an important ability to ensure the free development of ideas and individual freedom of conscience and religion. Yet a nihilistic system which does not set any standards is as dangerous as its obverse. International rights documents (such as the *Convention on the Elimination for All Forms of Discrimination Against Women*, which binds State parties to “take all appropriate measures, including legislation, to ensure the full development and advancement of women”³⁴) provide a baseline for protection of sexual minorities such as commercialized sex workers, at the same time protecting, to the greatest extent possible, minorities who wish to dissent from a permissive approach to prostitution.

Religiously- or conscientiously-based exemptions from law are necessary to respect human rights but are nonetheless difficult to implement. While legislators and legal regimes must be attuned to the criticism that “universal values are the social creation of the dominant strata in a particular world-system,”³⁵ this does not end the debate. Conceptual difficulties plague law. Attempts to administer special rules for special groups of citizens risks creating multiplicative systems based on personal status. Robert Boston urges that “separation of church and state, like other great constitutional principles, is for everyone. Its protection extends equally to

³³ Susan Moller Okin, “Is Multiculturalism Bad for Women?” in Joshua Cohen, Matthew Howard, & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 7 at 22.

³⁴ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 art 3 (entered into force 3 September 1981) [CEDAW].

³⁵ Immanuel Wallerstein, *European Universalism: The Rhetoric of Power* (New York: The New Press, 2006) at 27.

all...regardless of sex, age, race, or creed.”³⁶ While legal positions informed by a subjective religio-moral viewpoint can extend equal protection to all parties, such a system is dangerously divorced from the principle of egalitarianism and from a perspective accessible to all citizens of a society. As with polygamy, the government should allow free choice, only stepping in to guarantee an individual’s right to leave a constrictive community. It should not, as the law on prostitution now does, create and sustain an intolerant approach to any community.

Hughes raises (in the Canadian context) the focus of the complex contributors to current laws on prostitution, and the problem in gaining the proper consensus of influences to move forward with the law:

Almost inevitably, Canadians expect ‘government’ to do something-but even as we cast our eyes in that direction, some of us are also fearful of the state’s political dominance and intrusive morality. Some of us have serious doubts about whether the state is primarily protector or dominator-and on whose behalf...prostitution raise[s] challenging questions about the proper places of politics, morality, religion and law in controlling what many consider to be private activity: sexual behaviour and its portrayal. [It] reflect[s] the great tension that exists in Canadian society between public and private spheres of activity.³⁷

Moral and religious views on prostitution (many of them negative in contemporary societies) necessarily rely on unprovable assertions which should logically (as long as freedom of conscience is recognized as a public good) not bind those who do not subscribe to them. Imposing subjectivity through law will always be problematic: “[s]ubjective accounts of value ... offer people other than the subject no reason to regard an object, in this case a belief or practice, as valuable and so worthy of respect.”³⁸ When such accounts of value underpin analytical arguments, the arguments are at best unscientific, at worst rooted in bias. An example is the assertion that prostitution is undesirable because “[s]exual relations should be a mutual delight,

³⁶ Robert Boston, *Why the Religious Right Is Wrong about Separation of Church and State*, 2nd ed (Amherst, NY: Prometheus Books, 2003) at 246.

³⁷ Patricia Hughes, “Tensions in Canadian Society: The Fraser Committee Report” 6 (1986) Windsor YB Access Just 282 at 283.

³⁸ Timothy Macklem, “Reason and Religion” in Peter Oliver, Sionaidh Douglas Scott & Victor Tadros, eds, *Faith in Law: Essays in Legal Theory* (Portland, OR: Hart Publishing, 2000) 69 at 79-80.

entered into solely from the spontaneous impulse of both parties. Where this is not the case, everything that is valuable is absent.”³⁹ Russell’s value-laden universalism continues that “[i]f, nevertheless, it is performed from the sheer strength of the physical urge, it is likely to lead to remorse, and in remorse a man’s judgments of value are disordered.”⁴⁰ In one example, New South Wales (where brothels are regulated), this imagined stigma forms the basis of discrimination: “[c]ouncils have tried to restrict brothels due to a perception that brothels are criminogenic...Community objections to brothel development applications frequently cite fears that brothels will attract criminal elements, drug-taking pimps, and illegal immigrants...illegal behaviour is perceived to be contagious.”⁴¹ However, “there is no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society.”⁴²

A central insight into prostitution was provided by Hart’s general statement that

[r]ecognition of individual liberty as a value involves, as a minimum, acceptance of the principle that the individual may do what he wants, even if others are distressed when they learn what it is that he does---unless, of course, there are other good grounds for forbidding it. No social order which accords to individual liberty any value could also accord the right to be protected from distress thus occasioned.⁴³

Morality need not be absent from a societal discussion on prostitution, despite the need for morally neutral law. Even the radically libertarian John Stuart Mill agreed that governmental religious neutrality (with corresponding protection from non-governmental coercion⁴⁴) did not disallow hortatory actions:

³⁹ Bertrand Russell, *Marriage and Morals* (New York: Bantam Books, 1963) at 103.

⁴⁰ *Ibid.*

⁴¹ Penny Crofts & Jason Prior, “Oscillations in the Regulation of the Sex Industry in New South Wales, Australia: Disorderly or Pragmatic?” in Rochelle L Dalla et al, eds, *Global Perspectives on Prostitution and Sex Trafficking: Africa, Asia, Middle East, and Oceania* (Toronto: Lexington Books, 2011) 257 at 265-66.

⁴² Hart, *supra* note 8 at 51.

⁴³ *Ibid* at 47.

⁴⁴ “powers of society over the individual...by the force of opinion.” See John Stuart Mill, *On Liberty*, Elizabeth Rapaport, ed (Indianapolis, IN: Hackett Publishing, 1978) at 13.

disinterested benevolence can find other instruments to persuade people to their good than whips and scourges, either of the literal or metaphorical sort... Human beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter... But neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years that he shall not do with his life for his own benefit what he chooses to do with it.⁴⁵

Ultimately, if one accepts the premise that law can and should be divorced from religion (not a proposition accepted by all parties), then the issue encompasses utility as well as principle, and thus can be distinguished from purely religious, moral, or philosophical value judgments on prostitution. This divide was highlighted in submissions made in *Bedford*:

[I]t is submitted that the demonstrated effect of these provisions is to materially contribute to an increased risk of harm by preventing sex trade workers from resorting to safer legal options for the pursuit of the legal act of selling sexual services. This challenge does not question the constitutional validity of the purpose or objective underlying the impugned provisions, but rather challenges the means chosen to achieve these legislative objectives.⁴⁶

Yet, the objection to the use of legal coercion to maintain societal standards against prostitution is not necessarily agnostic on the purpose behind legislation. A society which allows for free expression rather than repression in private sexual ordering gains the ability for societal discourse and growth:

No doubt it is true that if deviations from conventional sexual morality are tolerated by the law and come to be known, the conventional morality might change in a permissive direction... if the conventional morality did so change, the society in question would not have been destroyed or “subverted.” We should compare such a development not to the violent overthrow of government but to a peaceful constitutional change in its form, consistent not only with the preservation of a society but with its advance.⁴⁷

Religion and morality are necessary incidents of society. But they cannot have the determinative influence on the issue of sex work, lest, as mentioned above, religious and moral guidelines bind third parties to whom they have no conscientious application. So, while “it may well be difficult for some people to tolerate those who are sexually different from them [and] [i]t may be difficult for some to admit to the reality of our society, in which sex- like everything

⁴⁵ *Ibid* at 74.

⁴⁶ *Bedford v Canada*, (Superior Court Level) Factum of the Applicants, online: <http://184.70.147.70/lowman_prostitution/HTML/Ontario_Charter_Challenge/Facta/Applicants_Factum.pdf> at page 200, paragraph 431.

⁴⁷ Hart, *supra* note 8 at 52.

else- has become a commodity,”⁴⁸ this does not give individuals or groups the theoretical right to legislate their own religious or moral beliefs into the secular, universally-applicable law. Such societal coercions, “if they are not justified as sanctions, are delicts or wrongs.”⁴⁹

Paternalism and Prostitution Law

Implicit in the debate on the legal regulation of private sexual ordering (and directly applicable to the prostitution debate) is the issue of what constitutes legitimate governmental interference in the lives of individuals: can the government legitimately restrict an individual’s liberty, against her own will, for her (and only her) own good? John Stuart Mill famously argued that paternalistic law is illegitimate if it aims only at the individual: “[h]is own good either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise or even right.”⁵⁰ This philosophical position is vulnerable to several criticisms, notably the argument that “in an organised society it is impossible to identify classes of actions which harm no one but the individual who does them.”⁵¹ Mill’s “harm principle” and Thoreau’s related articulation that “[t]he authority of government...is still an impure one: to be strictly just, it must have the sanction and consent of the governed”⁵² can be recognized as extreme libertarian positions. But they contain a fundamental truth that government can harm when it denies individuals freedom of choice based on subjective principles unable to be rationally defended.

The issue of governmental paternalism is directly applicable to prostitution in similar ways to other issues of sexual ordering, the basic question of which is why government should be

⁴⁸ Roberts, *supra* note 10 at 357.

⁴⁹ Hart, *supra* note 8 at 21.

⁵⁰ Mill, *supra* note 44 at 9.

⁵¹ Hart, *supra* note 8 at 5.

⁵² Henry David Thoreau, “Civil Disobedience” in Henry David Thoreau, *Walden and Civil Disobedience* (New York: Barnes and Noble Classics, 2005) 265 at 286.

allowed to interfere in an individual's private, non-permanent choices: "consensuality has not emerged as the new bright line between citizen and outlaw...From sodomy to indecency, premarital sex to adultery, s/m sex to commercial sex workers, consent does not operate as an automatic citizenship sanction."⁵³ Prostitution stands out amongst these examples for its prevalence and for the comparative condemnation it receives (compared especially to premarital sex). While the issue of paternalism haunts the entire range of issues falling under legal regulation of sexual ordering, the widespread, coercive and majority-enabled regimes targeting sex work stand out for further analysis of their paternalism.

For other "crimes" of sexual ordering, it is a relatively easy reply to invoke the rule that "[a] paternalistic policy is justified only if the reasons for it outweigh the reasons against it"⁵⁴ and consequently engage in a reasoned weighing of interests based on non-controversial situations. Therefore, issues such as female sexual rights and (in many cases) polygamy can be shown to have arguments that arguably tip the balance against paternalistic legal regulation. Such is also the case with prostitution. If religio-moral considerations are abandoned as justifications against prostitution and only "harm" remains as the criterion inspiring legal regulation, paternalism (with a myriad of inspirations) separates from moralism to continue the debate: "paternalism---the protection of people against themselves---is a perfectly coherent policy...The neglect of the distinction between paternalism and what I have termed legal moralism is important as a form of a more general error."⁵⁵ The more general error described by Hart is looking first for morality in law, rather than harm prevention. Thus, even when morality is removed from the equation, the proper scope of the criminal law remains undefined. De

⁵³ Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford University Press, 2007) at 197.

⁵⁴ de Marneffe, *supra* note 17 at 66.

⁵⁵ Hart, *supra* note 8 at 31-34.

Marneffe forcefully argues that paternalism with respect to prostitution is a valid legislative basis:

One might think that if the government should not take a position on the *morality* of prostitution, then prostitution should be *legalized*, but this is a non sequitur. The inference makes sense only on the assumption that immorality is the only reason for prostitution laws, and this is not the only reason. A much stronger reason is that that [*sic*] more people will be harmed in lasting ways if prostitution is legalized.⁵⁶

There is evidence that prostitution, while not always or inevitably harmful, is an occupation which can increase stress on the individual. A Dutch study of legally-working prostitutes found that “female indoor sex workers in the Netherlands do not exhibit a higher level of work-related emotional exhaustion or a lower level of work-related personal competence than a comparison group of female health care workers (mostly nurses)...However, sex workers’ scores on depersonalization, the third dimension of burnout, were significantly higher.”⁵⁷ This suggests that a paternalistic argument could find some basis in fact for regulating sex workers “for their own good.”

However, the importation of paternalism into laws on prostitution is problematic, to say the least. On one hand, it disregards the voices of the people it supposedly protects, who may opine that “[m]y body belongs to me, and I’ll do what I like with it. I might well have wanted to do something else, I might well dream of another life; but in the meantime I’m a woman, a woman as respectable as any other, a grown woman, and I can’t stand people who want to make decisions for me.”⁵⁸ A study of homosexual male prostitutes concluded that “[m]ost...had decided to take up the work because they were attracted to it rather than because they had no alternative means of livelihood. Many obtained satisfaction from pleasing customers and

⁵⁶ de Marneffe, *supra* note 17 at 162.

⁵⁷ Vanwesenbeeck, *supra* note 9 at 17.

⁵⁸ “D, a French prostitute,” quoted in Roberts, *supra* note 10 at 325.

sometimes finding pleasure themselves.”⁵⁹ In the case of paternalism over sexual relations such as prostitution, it may also “create misery of a quite special degree...the suppression of sexual impulses generally is...something which affects the development or balance of the individual’s emotional life, happiness, and personality.”⁶⁰ Theoretically, paternalistic legal control frustrates individuals’ “opportunity to exploit their knowledge of what is good for them, by acting on their best sense of what is good for them...a fundamental part of what it means for them to be authors of their own lives, a role that I take to be central to the well-being of every person. This is so even when they are mistaken in their assessment of what is good for them, as they often are.”⁶¹ Paternalistic regulation of prostitution also ignores the variety in sex work, essentially baldly asserting that being forcibly removed from the occupation is always in an individual’s best interests. This ignores the rational goals which some attach to sex work:

[Sex work] might...be a way to earn both ‘big money’ (that is, large sums) and ‘easy’ money (that is, obtained rapidly or relatively simply). This money might be used for meeting basic survival needs or for narcotics. It might also be relied on to pursue mainstream or mundane financial goals, such as offsetting debt, preparing for the cost of a new baby, planning for the expenses of Christmas, financing tuition fees and supporting dependents.⁶²

Another comment of Hart’s, while not determinative, at least illustrates the troubling nature of subjective imposition of morality frustrating human liberty:

The unimpeded exercise by individuals of free choice may be held a value in itself with which it is *prima facie* wrong to interfere; or it may be thought valuable because it enables individuals to experiment---even with living---and to discover things valuable both to themselves and to others. But interference with individual liberty may be thought an evil requiring justification for simpler, utilitarian reasons; for it is itself the infliction of a special kind of suffering---often very acute---on those whose desires are frustrated by the fear of punishment.⁶³

Secondly, paternalism is always the question of whose subjective definitions of “harm,” “degradation,” or even “violence” is used, as by its very nature it is unconcerned with the views

⁵⁹ Donald J West & Buz de Villiers, *Male Prostitution* (New York: Harrington Park Press, 1993) at 325.

⁶⁰ Hart, *supra* note 8 at 22.

⁶¹ Macklem, *supra* note 38 at 78-79.

⁶² Campbell, *supra* note 4 at 148.

⁶³ Hart, *supra* note 8 at 21-22.

of those it governs. De Marneffe attempts to argue that calling homosexuality a “degradation” is simply “a bad reason to prohibit homosexuality simply because homosexuality is not in fact degrading in this sense. In making this argument one would rely on a more general and less controversial principle: that the government is not justified in limiting individual liberty by false propositions.”⁶⁴ The falsity of the statement is, however, a matter of perception: while it is something that (thankfully) is now commonly agreed upon, the fact that some groups still consider homosexuality degrading shows that legal paternalism represents a subjective assertion of values, which is a troubling matter for an objective approach to law. While it is true that “denouncing systems of injustice is different from reviling people within that system,”⁶⁵ sitting in paternalistic judgment of other people and their sexual practices cannot be practiced without inherent judgment and therefore would seem to inexorably lead to “reviling” of some group, a component of the “unjust” system.

Finally, while paternalism and religio-moral influence are separate entities, they are not mutually exclusive, nor is there any guarantee that paternalist legislation will be devoid of other harmful influences. On the West coast of Canada at the turn of the 19th century, Backhouse describes a “hopelessly racist backdrop” where reformers targeted ethnic Chinese women (including sex workers) for special opprobrium: “Chinese prostitutes were thought to be jeopardizing the morals and health of the white community, and the services of Chinese prostitutes were said to be so cheap that even the youngest boys had ready access to them.”⁶⁶ Since paternalistic laws are by nature made regardless of the feelings of those they govern, such

⁶⁴ de Marneffe, *supra* note 17 at 52.

⁶⁵ Thompson, *supra* note 3 at 319.

⁶⁶ Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women’s Press, 1991) at 226.

legislative poisoning (also seen with the racism which historically informed anti-polygamy law) is particularly dangerous with respect to such coercion.

Criminalization

From public health to public morality rationales, prostitution has been criminalized to discipline rather than to improve the situation of sex work. Criminalization represents an imprecise and heavy-handed attempt to govern and does not guarantee personal autonomy or safety. British commentators note that for some legislators, “if there is a problem, an instant panacea is to [be] found by criminalizing the conduct in question.”⁶⁷ This instinct can be seen in the criminalization of prostitution, which has the potential to “[widen and harden] the periphery of undesirable organizers.”⁶⁸ Lawmakers must move away from such reflexive movements towards a thorough study of the issue. Arguments for the criminalization of prostitution must therefore rest on more than the bare assertion that the majority has the right to enforce moral or social conformity: “[t]he idea that we may punish offenders against a moral code, not to prevent harm or suffering or even the repetition of the offence but simply as a means of venting or emphatically expressing moral condemnation, is uncomfortably close to human sacrifice as an expression of religious worship.”⁶⁹ Criminalization of prostitution does imply sacrifice, since it does

cultivate reticence within the sex worker community in regard to resorting to public sources of support and security. Such reluctance to seek state assistance is logical. Rather than safety and security, sex workers’ encounters with police, social workers, lawyers or judges often result either in passivity and inaction in the face of sex workers’ concerns and interests, or in the infliction of physical, emotional or economic harms.⁷⁰

⁶⁷ CMV Clarkson & HM Keating, *Criminal Law: Text and Materials* (London: Sweet and Maxwell, 2003) at 3.

⁶⁸ Jean Hall Graham, “The Prostitute and the Law” (1959) 9:3 *British J Delinquency* 174 at 181.

⁶⁹ Hart, *supra* note 8 at 65-66.

⁷⁰ Campbell, *supra* note 4 at 195.

The cold logic of criminalization also has a significant element of the pious distancing of prostitution from “respectable” society, as evidenced by the 1990 Supreme Court of Canada judgment upholding criminalization of public soliciting:

The *Criminal Code* provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses, and the residents of urban neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. In my opinion, the eradication of the nuisance-related problems caused by street solicitation is a pressing and substantial concern.⁷¹

The lack of empathy (and in fact universal negative characterization) for people engaged in the practice is palpable.

Criminalization of prostitution represents a limitation on the ability of people to (non-harmfully) privately order their sexual lives, and should thus be seen as a denial of broader conceptions of justice: “[u]ntil a human being can exercise all the incidents of legal personality, neither general human rights guarantees nor constitutional guarantees have much genuine impact on ‘ordinary life.’”⁷² Yet as Campbell demonstrates with respect to the Anglo-centric Common Law jurisdictions of the United Kingdom, Canada, and Australia, the narrative of criminalization continues unimpeded: “state law and policy rubrics develop an essentialized representation of sex workers. Sex workers are invariably women who are motivated by economic desperation, often as a result of substance dependence.”⁷³ That this narrative is not borne out by empirical study or rational analysis is apparently of no consequence.

While some advocates argue that prostitution represents violence against women, this not only ignores the phenomenon of male and lesbian prostitution (both of which indicate that prostitution must at least represent something further than mere misogyny), but also needs

⁷¹ Reference *Re ss193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123 at 1135.

⁷² Kathleen A Lahey, *Are We ‘Persons’ Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 115.

⁷³ Campbell, *supra* note 4 at 191.

qualification: “[o]bviously...exchanging sex for money *need not* involve violence as this is ordinarily understood, and in fact usually does not. Moreover, there is no reason to suppose that every single exchange of sex for money has the negative psychological effects associated with sexual abuse or that every sex worker is negatively affected in these ways.”⁷⁴ However, with the strength of an undisprovable (but equally unverifiable) thesis, theorists continue to argue that prostitution must be criminalized, presumably normally as an end in itself. Such thinking is reminiscent of other factual nexuses, and an example of “patrolling the borders of sexual privacy, articulating the trope of potential sexual chaos.”⁷⁵

Proponents of criminalization of prostitution struggle with two major counterarguments, one theoretical, one practical. Theoretically, as raised by George Carlin (quoted in the last chapter), it is unclear why the law should dictate the private sexual behaviour of ostensibly-consenting individuals, since “[f]rom the civil libertarian view, [laws criminalizing prostitution] can seem to be nothing more than an illegitimate imposition by the government of the majority’s prejudices about improper sexual conduct”⁷⁶ (especially as the State generally encourages, and derives taxation from, business transactions similar to prostitution contracts). Secondly, criminalization does not seem to work in modern legal enforcement: prostitution continues to be practiced despite its criminalization. Effective deterrence is only one factor in whether an activity should be criminalized, but criminalizing an ongoing and sometimes victimless practice creates cynicism that the system is not even intended to curtail prostitution: “[prostitutes] are no threat, but the law keeps picking them up. They have relationships with the cops, and the judges know them too; the whole system bleeds them sexually and economically...Public decorum is satisfied

⁷⁴ de Marneffe, *supra* note 17 at 46.

⁷⁵ Cossman, *supra* note 53 at 36.

⁷⁶ de Marneffe, *supra* note 17 at 155.

because whores are arrested.”⁷⁷ The system of hypocrisy is easy to criticize, and as social mores loosen with respect to sexual ordering, may be easier to resist:

[S]ociety, while needing such a service, surrounds it with secrecy, shame and condemnation, uses the prostitute and yet casts her out, seeks her services and yet imprisons her... That the prostitute is society's scapegoat is an inevitable conclusion to draw from these attitudes, but while a scapegoat may, looked at anthropologically, be said to be necessary for the health of a society, prostitutes are beginning to refuse such a role...⁷⁸

The use of the term “need” in this context is an important one. Whether one accepts at a theoretical level that society “needs” sex work, prostitution has been ubiquitous in recorded human society: “[t]he historical record of Western society shows the impossibility of eradicating prostitution. Every attempt to do so, whether by absolutist monarchies, moral vigilantes or police states, has met with failure.”⁷⁹ This popularity may extend from tangible benefits to customers who are unable to find sexual partners without prostitution or, despite the ability to seek non-commercial sexual partners, feel a need to purchase sex. One glaring example of where sex work, and its depersonalized and confidential nature could be beneficial is for closeted sexual minorities, who are unable by virtue of societal discrimination to outwardly participate in preferred sexual behaviour. But this example is just the tip of the iceberg, as commercial sex could benefit people with disabilities, physical or otherwise, as well as those who cannot enjoy sex in any other context: “[t]he psychological health of these men may not be ideal, but if these individuals are genuinely benefited by sexual services, we must give some weight to their interests in having the legal freedom to purchase them”⁸⁰ (of course, not all purchasers are men). Without a definite empirical argument against sex work, and if not viewed as “immoral” or “amoral,” there is no reason to discriminate against individuals who prefer ordering their lives in

⁷⁷ “L,” quoted in Millett, *supra* note 16 at 149.

⁷⁸ Roberta Perkins & Gary Bennett, *Being a Prostitute* (Boston: George Allen & Unwin, 1985) at 237.

⁷⁹ Roberts, *supra* note 10 at 353.

⁸⁰ de Marneffe, *supra* note 17 at 120.

this manner any more than any other idiosyncratic choice afforded to individuals in their daily lives.

While little sympathy is accorded to sexual purchasers in most discourse, as individuals their needs should not necessarily be disregarded because they appear repugnant to others: “[s]uppose...that some men really do need the services of prostitutes in order to feel good about themselves and about their lives...there is a good case to be made that impermissive abolitionist policies...violate the rights of some clients.”⁸¹ There is little to add to de Marneffe’s conclusion that, since beneficial relationships between sex professionals and customers is possible (as demonstrated in fiction by *The Sessions*), “[i]f political support for prostitution laws is based on indifference to the interests of customers and this indifference is based on a moral judgment that fails to warrant giving these interests so little weight, political support for prostitution laws is objectionably moralistic on this ground.”⁸²

A final way that sex work may be beneficial is in how it is experienced by sex workers themselves: “the possibility of sex work as personally gratifying surfaces in some corners of empirical study and merits acknowledgement...this dimension of sex work stresses the relevance of social connections that some women find in sex work, which can infuse the practice with value in addition to meaning.”⁸³ Such responses will be personal and contingent, but must not be ignored in a discussion of the benefits commercial sex can bring. Furthermore, such responses raise sex work’s parallels with socially respected forms of sexual ordering, which can now also be more fully discussed. In “queering marriage,” the lines between economic conjugal choice and marriage become blurred: while decrying the need for anyone to sacrifice their preferred

⁸¹ *Ibid* at 121-122.

⁸² *Ibid* at 121.

⁸³ Campbell, *supra* note 4 at 151.

conjugal status for security, this problematization at least casts doubt on the social othering of prostitutes and questions what goal criminalization achieves.

Criminalization of prostitution can be “full” (that is, where all aspects of the sexual transaction for value are made criminal) or partial, such as the “Nordic Model,” in which the sale of sexual services is legal, but it is illegal to buy them. As discussed below, “decriminalization” differs from such partial criminalization because to threaten any part of the system with legal punishment essentially colours the entire system with criminality and indirectly raises the level of risk to the “legal” aspects of the practice. Such a system is best thought of as *de facto* criminalization (similar to Canada, where despite prostitution’s legality, laws regulating it were found to be severe enough to infringe on sex workers’ rights to life, liberty and the security of the person⁸⁴). These laws had ample precedent, in ways which underscore their now muted societal othering:

The [Canadian] criminal law had [in the late 19th century] long permitted the arrest of prostitutes solely because of their occupation, without further proof of criminal activity. Classifying prostitutes as “vagrants,” various provincial legislatures had enacted statutes specifically authoring their detention: Nova Scotia in 1759, Lower Canada in 1839, and Canada West in 1858. The legal authorities considered prostitution a “lifestyle” crime, which threatened to undermine morality.⁸⁵

The fact that criminal laws do not eliminate prostitution is not a complete answer against those laws. Human behaviour cannot be completely controlled by legislation, no matter how rigorous, and the fact that some actions (such as murder and sexual assault) are not always deterred by being illegal is not an argument against their criminalization. However, in the absence of clearly harmful results (such as with rape and murder), the inefficacy of the system becomes more persuasive. In Iceland, for example, a “Nordic Model” country,

[p]rostitution has proved harder [than strip joints] to police and stamp out. Few prostitutes solicit on street corners. Many advertise through dating websites. The sites insist they remove suspicious profiles but one former Icelandic prostitute says you can still find them by searching for adverts that

⁸⁴ See *Canada (Attorney General) v Bedford*, *supra* note 14.

⁸⁵ Backhouse, *supra* note 66 at 234.

use dollar signs...Eva (not her real name) says that sex workers also trade clients by word of mouth.⁸⁶

This leads to the oft-repeated maxim that insanity is repeating the same mistakes and expecting different results. While criminalization may at least superficially reduce prostitution, it is illuminating to inquire as to the cost of such reduction.

Criminalization also increases the risk of violence by divorcing what prostitutes do from legal protection or the ability to seek legal redress, in effect turning sex workers into modern-day outlaws. Califia phrases the issue with sardonic humour: law criminalizing sex work

combines equal parts sexual prudery, capitalism, and backwoods Christianity. Any vice cop will tell you that arresting prostitutes will not make people stop buying and selling sex. But arresting prostitutes does make them vulnerable to the more squalid aspects of the industry, especially drug addiction and exploitation, as any social worker or mayor knows.⁸⁷

This stigmatization and association of prostitution by law with danger is in part a self-fulfilling prophecy: “hazards are not purely inherent to sex work. The state’s response to sex workers consigns them to spaces marked by obscurity and danger, prompting empirical narratives that circulate heavily around risk-navigation.”⁸⁸

In the provocatively-titled “Murder Made Easy,” Kinnell outlines the repercussions of criminalization: “[s]ociety’s abhorrence of commercial sex, even when voiced by those who regard all sex workers as victims, has resulted in laws and law enforcement strategies that prevent neither violence, nor exploitation, nor even public nuisance.”⁸⁹ The legal regime, Kinnell continues, “makes all forms of sex work more dangerous, and proposals for making sex work safer are rejected lest they ‘encourage prostitution’, indicating that many view violence against sex workers as an important deterrent to discourage the sale of sex, and a punishment for those

⁸⁶ “Naked Ambition”, *The Economist* 407:8832 (20 April 2013) 63 at 63.

⁸⁷ Pat Califia, *Public Sex: The Culture of Radical Sex*, 2nd ed (San Francisco, CA: Cleis Press, 2000) at 133.

⁸⁸ Campbell, *supra* note 4 at 195.

⁸⁹ Hilary Kinnell, “Murder made easy: the final solution to prostitution?” in Rosie Campbell & Maggie O’Neill, eds, *Sex Work Now* (Portland, OR: Willan, 2006) 141 at 164.

who do.”⁹⁰ One particularly macabre example which illustrates the violence prostitutes face and simultaneously shows how legal stigma can translate into systemic apathy was described in

Bedford:

An RCMP officer described Project KARE, an operation established in 2003 in response to a growing number of missing persons and unsolved homicide cases in Alberta...Project KARE’s Pro Active Team focused on the missing prostitutes; one “proactive” strategy they used was to collect identifying information and DNA samples from women currently working as street prostitutes, in order to provide the team with information and assistance in identifying remains, if necessary.⁹¹

This is self-evidently unacceptable and must be changed on any legitimate propositions undergirding the legal regulation of prostitution, even if these aims are prohibitionist in nature.

The “Nordic Model” (also known as the “Swedish model,” although it is in place in Sweden, Norway, Finland,⁹² and Iceland), which asymmetrically criminalizes commercial sex by attacking the purchase, but not sale, of sex, is a problematic form of criminalization. It is true that prostitutes are able to report crimes against themselves and have full rights to police protection under this system. However, the sexual act of commercial sex remains criminalized, essentially placing sex work again outside of the law, since sex workers have the choice of leaving the occupation, or joining the remaining criminal parties in attempting to evade the law. Such evasion leaves the prostitute right back at the initial position of criminalization, in attempting to avoid the law (and thereby exposing herself or himself to risk): the model “uses shaming tactics against sellers and forces transactions into more remote, poorly lit areas.”⁹³ Such a model would also logically decrease the use of the relatively safe form of brothels (which police could then stake out at their leisure), as well as proper record-keeping (since presumably

⁹⁰ *Ibid.*

⁹¹ *Bedford v Canada (Attorney General)*, 2010 ONSC 4294 at para 92.

⁹² Jacqueline Lewis & Frances M Shaver, “The Regulation of Adult Sex Work and Its Impact on the Safety, Security, and Well-Being of People Working in the Sex Industry in Canada” in Rochelle L Dalla et al, eds, *Global Perspectives on Prostitution and Sex Trafficking: Europe, Latin America, North America, and Global* (Toronto: Lexington Books, 2011) 237 at 244.

⁹³ Bouclin, *supra* note 5 at 387.

records of this one-sided criminal activity could be subpoenaed). The theory of the Nordic Model is also suspect:

PWSI [People Working in the Sex Industry] are seen as victims of exploitation on the one hand and sex work is thought to be a morally repugnant but inevitable activity on the other. Each in its own way makes it difficult to ensure that the sex industry operates under the same health and safety rules as other businesses and to guarantee that PWSI have rights, protection, and respect.⁹⁴

Finally, the model makes no effort to address the individual choices of purchasers, who may receive tangible benefits and purchase sex only where the sale is consensual: “the increased punitiveness towards (some) purchasers represents no more than the shifting of the ‘whore stigma’ to a new deviant group. Responsibility becomes increasingly narrowed to client motives and individual sexual ethics, which are pathologized.”⁹⁵

As mentioned above, the State would normally encourage the greater earning of wealth, which increases living standard, economic integrity, and most relevant to the State, taxation revenues. While it is not true that “legalization gives the state the right, even the prerogative, to own and sell women and to collect revenue for such transactions,”⁹⁶ the State does stand to gain from greater economic activity. Criminalization ignores that sex work can be a rational and subjectively-appealing choice in Western society (especially if legal protection is offered to the prostitute):

From any point of view, in a society which worships money and material achievements to the extent that ours does, becoming a prostitute is a rational decision for a woman to make...To condemn women for becoming prostitutes, or continually to divert attention from their demands to the small minority who are forced into the life, is to ignore whores’ courage and add to their burden.⁹⁷

This burden makes no economic sense, in addition to constraining fundamental liberty of sexual ordering.

⁹⁴ Lewis & Shaver, *supra* note 92 at 245.

⁹⁵ Scoular, *supra* note 7 at 33.

⁹⁶ Millett, *supra* note 16 at 10.

⁹⁷ Roberts, *supra* note 10 at 331-332.

The criminalization of prostitution is conceptually related to other non-pecuniary limitations on private sexual ordering, such as adultery and pre-marital sex (fornication), both of which are not criminalized under contemporary Western national law. In both those cases, the private individual (regardless of context) would be barred from actions which presumably generally touch upon no public parties, and which may have only tangential impacts on social compacts such as marriage contracts. Bentham illustrates this unconcern with marriage *per se* by proposing public punishment for adulterous husbands and wives but only ‘privately [admonishing]’ an unmarried man committing adultery with a married prostitute.⁹⁸ Yet bafflingly, the criminal law does not impose on this conduct, even if it becomes (as conceivably could happen) harmful. This feeds into Roberts’s commentary that “the whore-stigma is above all a means of policing the sexuality of all women, and is constantly being used as such.”⁹⁹ This statement can be expanded to cover all of the deviant sexual actors who engage (for any reason) in commercial sex: above all, it can be seen as a way of policing sexuality and attempting to enforce conformity.

Decriminalization and Legalization

Decriminalization can represent a positive step away from harmful criminal regimes and their attendant problems. Positions on prostitution are necessarily context and situation-dependent, as well as contingent: “these terms [prohibitionist, regulationist, and abolitionist] describe general political and social aspirations regarding how best to regulate commercial sex...considerable gaps inevitably exist between these objectives and the modes of intervention utilized to implement them,” rendering the positions “always provisional [and] often

⁹⁸ Mary Sokol, *Bentham, Law and Marriage: A Utilitarian Code of Law in Historical Contexts* (New York: Continuum, 2011) at 115.

⁹⁹ Roberts, *supra* note 10 at 355.

contradictory.”¹⁰⁰ This line of argument precludes a blanket reliance on criminalization and indeed suggests normalization of prostitution has numerous and important societal benefits:

Many problems that are currently associated with the sex trade would start to diminish once whores were no longer criminal outcasts. Since they would be able to work from their own homes, this should reduce the numbers operating on the streets, with the attendant risks of male violence. Violence against women in general would also be reduced once the rape and murder of one particularly vulnerable group of women is no longer socially sanctioned.¹⁰¹

Decriminalization reaps benefits not only at the time of legalization, but also for future development: “[l]egal status ensures that legal avenues are available for protection and redress. Moreover, it facilitates research into how best to protect sex workers, including the good design of brothels and the introduction of ‘safe house brothels’ [private, short-term rental spaces].”¹⁰² Moreover, the ability to engage in prostitution openly can lead to beneficial support networks: “[s]upport and friendship can reduce the stress and anxiety often associated with this work, and may found professional and social alliances. Women’s narratives stress the relevance of such relationships most prominently when discussing safety strategies.”¹⁰³ While these anticipated benefits are reasonable predictions, decriminalization, like criminalization, is not monolithic, and thus includes optimal and non-optimal varieties. Some useful criteria in evaluating regimes are how they safeguard the

right to be free from the risk of violence created by stigma and discrimination based on sexuality, the right to be free from punishment, violence, abuse or harassment based on (real or imputed) practices of sex work, and the right to safe working conditions, access to health services, and the support and protection necessary to be able to insist upon safer sex practices with all partners and clients.¹⁰⁴

The decriminalization of prostitution can take several forms. Although there is some divergence in terminology, non-criminal regulation essentially divides into a system where prostitution is permitted in some forms but banned in others, and those in which prostitution is

¹⁰⁰ Scoular, *supra* note 7 at 13.

¹⁰¹ Roberts, *supra* note 10 at 356.

¹⁰² Crofts & Prior, *supra* note 41 at 272.

¹⁰³ Campbell, *supra* note 4 at 154.

¹⁰⁴ Vanwesenbeeck, *supra* note 9 at 6-7.

allowed in all forms. Additionally, legal permissive systems can again be divided into those which forcibly monitor the health of prostitutes (mostly for ostensibly public health reasons), and those which have less oversight of the occupation. This is the terminological approach of Lewis and Shaver, who argue that legalization “regulates sex work and sex work-related activities through the use of criminal law...[L]egalization practices include licensing of workers, compulsory medical check-ups for workers, registration and size limitations on bawdy-houses, maintenance of procuring and pimping criminal laws, and limitations on street prostitution.”¹⁰⁵ By contrast, Shaver and Lewis continue, “[w]hen sex work is seen as a private matter between consenting adults, *decriminalization* is the preferred method.”¹⁰⁶ I would argue that legalization need not entail all of (or any of) the coercive structures the above statement imputes to it. In this work, I will refer to legalization as any system which legally sanctions prostitution, while decriminalization is simply a shift to, or creation of, a system with no *de jure* or *de facto* penalties (in this case, for the practice of prostitution).

Decriminalization represents a good first step on the road to a greater respect for individual autonomy and a value-neutral legal regime. Millett makes a strong argument for decriminalization as a positive: “decriminalization simply removes prostitution from the criminal code and puts it back into the sphere of private life where it belongs...decriminalization is the quickest way to alleviate the ills of the prostitute’s life: the fear, the arrest, the fine, the jail, the court, the shakedown---perhaps the pimp, and his buddy the lawyer, as well.”¹⁰⁷ After using case studies of Antwerp, Frankfurt and Amsterdam, Weitzer argues that “legalization can be judged superior to criminalization but...much depends on the specific regulations underpinning any given legal order. The regulations shape the extent of the state’s involvement, the beneficiaries,

¹⁰⁵ Lewis & Shaver, *supra* note 92 at 244.

¹⁰⁶ *Ibid* at 245 [emphasis in original].

¹⁰⁷ Millett, *supra* note 16 at 10-11.

the community impact, and the degree to which the problems associated with blanket criminalization are reduced.”¹⁰⁸ In short, decriminalization, rather than ending the discussion of which type of legal regulation over this instance of sexual ordering is best, only re-starts the debate from a rational point.

Alexander is persuasive in writing that “[i]f we want to make life safer for women who work as prostitutes, we must make sex work amenable to the same kinds of regulations that have reduced the harm to workers in coal mines...and other sometimes hazardous work sites.”¹⁰⁹ This can of course be extended to all prostitution, regardless of gender. Brooks-Gordon provides an answer to what type of decriminalized structure would be preferable:

[w]hat would good law on sex work look like? Legislation which respects the rights of sex workers, with the long-term aim of winning public recognition that respect for human rights of all is integral to a healthy society. Admissive statutes would offer guidance to organisations and institutions seeking to achieve equitable, non-discriminatory policy and practice.¹¹⁰

Amongst many other recommendations, Brooks-Gordon has the following positive criteria for a modern law regulating sex work:

- 1 The right to engage in sex work without coercion, and thus enable enforcement against coercion.
- 2 Provision to be made against harassment, fear, force or fraud.
- 3 Decriminalisation of all aspects of sex work involving consenting adults. One of the most important routes out of sex work is decriminalization...
- 4 Acknowledgement of the range of paid sexual acts and, in order to provide labour rights, sex work simply has to be classed as a ‘special type of work’. This means incorporating a sex work discourse to ensure that the issues of labour rights, freedoms and working conditions do not slip off the agenda again in [the United Kingdom].
- 5 Entitlement to sick pay and parental leave for those working in the sex industry.
- 6 The right to work on the same basis as other independent contractors and employers and to receive the same benefits as other self-employed or contracted workers.
- 7 Legal support for sex workers who want to sue those who exploit their labour.
- 8 Clean and safe places to work.
- 9 The right to choose whether to work alone or co-operatively with other sex workers, and to pay tax.
- 10 Duty on public authorities to ensure fair working practices for those in sex industries.
- 11 Access for sex workers of social insurance that gives access to unemployment and sickness benefits, pensions and health care.¹¹¹

¹⁰⁸ Weitzer, *supra* note 15 at 196.

¹⁰⁹ Priscilla Alexander, “Feminism, Sex Workers, and Human Rights” in Jill Nagle, ed, *Whores and Other Feminists* (New York: Routledge, 1997) 83 at 93.

¹¹⁰ Belinda Brooks-Gordon, *The Price of Sex: Prostitution, policy and society* (Portland, OR: Willan, 2006) at 264.

¹¹¹ *Ibid* at 265-266.

Many, if not all, of these changes would be welcome to a regime which forces sex work into the shadows where prostitutes are exploited and exposed to violence.

Moreover, apart from increased governmental cost (which would be at least partially offset by the taxation revenue and re-allocation of resources currently devoted to battling prostitution), there is no real negative to Brooks-Gordon's outline. Drawing on the New Zealand model, however, a potential downside with a system which requires regulated behaviour is how those who do not follow such regulations are treated: a legalization system must avoid a system which "enforces strict penalties for people working in the illegal and unregulated sector,"¹¹² both to avoid doubly victimizing such workers as well as to remain committed to allowing individuals meaningful choices in their private sexual ordering. Unless one strays into religio-moral territory, the only possible argument is paternalistic: and in that case, one arguing that the system creates more harm than it causes bears the (so far unmet) burden of proof. While important caveats of any legalized system is that it must allow for exit from the occupation and must ensure that behaviour is undertaken voluntarily, legalization is philosophically the best alternative for interacting with prostitution.

The Path to Legal Change

As Weitzer notes (as quoted in the last chapter), in the American context, "[I]n legislators fear being branded as 'condoning' prostitution."¹¹³ A frustrating example is the recent (pre-*Bedford*) history of prostitution law in Canada:

[D]ebate over prostitution law reform...culminated in 2006 with a parliamentary review that saw all four federal political parties agreeing that Canada's prostitution laws are "unacceptable", but unable to agree about how to change them...Not one of [several committees recently studying prostitution in Canada] has proposed that we keep the current system of "unacceptable" law, and yet the *status quo*

¹¹² Bouclin, *supra* note 5 at 387.

¹¹³ Weitzer, *supra* note 15 at 52.

prevails. Meanwhile, women involved in street-level prostitution continue to be murdered and disappear.¹¹⁴

This hesitation, even in the face of “unacceptable” law, has resulted in a situation where in Canada “[p]rostitution could easily join abortion on the too-politically-difficult pile”¹¹⁵ and American “legislators will not---perhaps cannot, because of their own conservatism and that of their constituents---decriminalize prostitution...our best chance lies in the courts.”¹¹⁶ This is tempered by advice from an advocate for social change about the limits of legal power: “social change and legal change do not always walk hand-in-hand. One does not always stimulate the other. Attempts to reform the law may succeed as a formal matter but have only modest effects on the larger cultural context into which they fit.”¹¹⁷ It is true that while “a yoke of disreputability”¹¹⁸ hangs on prostitution, legal decisions will face uphill battles both at the stage of legislation and enforcement of positive legislation. Yet legal action can yield surprisingly good results, even in the face of governmental or societal disapprobation.

There is no doubt that a dramatic shift in societal attitudes towards prostitution, coupled with concomitant legal change, would be the best solution. A shift in public attitudes is generally preferable to other types of societal change, since it can trigger change at other levels. Ericsson calls for such a change: “*in order to improve prostitution, we must first and foremost improve our attitudes toward it.*”¹¹⁹ It is obviously important to combat “the abject status of the ‘prostitute’, the fact that she/he is Other, the end stop in discourses on normative concepts of

¹¹⁴ John Lowman, “Deadly Inertia: A History of Constitutional Challenges to Canada’s Criminal Code Sections on Prostitution” (2011) 2 Beijing L Rev 33 at 34 and 45.

¹¹⁵ Philip Slayton, “A trial in error?”, *Maclean’s* (24 December 2009) online: Maclean’s.ca <<http://www2.macleans.ca/2009/12/24/a-trial-in-error/>>.

¹¹⁶ Millett, *supra* note 16 at 11.

¹¹⁷ Thomas B Stoddard, “Bleeding Heart: Reflections on Using the Law to Make Social Change” (1997) NYUL Rev 967 at 972.

¹¹⁸ Weitzer, *supra* note 15 at 205.

¹¹⁹ Lars O Ericsson, “Charges Against Prostitution: An Attempt at a Philosophical Assessment” (1980) 90:3 Ethics 335 at 366 [emphasis in original].

womanhood/manhood.”¹²⁰ However, this shift is not the only way towards legal reform. When societal change does not occur, change can be legally effected through litigation drawing upon basic rights guarantees:

Constitutional interpretation is both more restricted and more powerful than legislation. It is restricted in that constitutional issues are limited to the judicial branch for their interpretation and to state action for their scope...However, the highly rationalized texts that emerge from such adjudications, as contrasted with the often contorted structure of legislative codes, give the courts' decisions far more rhetorical power and symbolic punch.¹²¹

Litigation, while not always sufficient to entrench long-term change, provides a superstructure for further discussion and socio-legal breakthroughs:

Courts may not always be the most effective dispute resolution forums, but they are often the most accessible; they are open as of right and can force more economically or politically powerful parties to the bargaining table...litigation can build public awareness, help frame problems as injustices, and reinforce a sense of collective identity, all of which can build a political base for reform.¹²²

While it is important to remember that law must interact daily with social and lived realities, and that legal decisions represent only one plank of a comprehensive human rights reform with respect to prostitution, litigation (such as *Bedford*) represents a strong possibility for shielding prostitutes from the whims of the moralistic majority.

Legal challenges can focus on rights guarantees, as well as the lack of efficacy and hypocrisy of most criminalizing laws, as discussed above. Even when prostitution is technically legal and only *de facto* criminalized, an astute judiciary presented with evidence of how the law operates in practice may ameliorate the situation. This was the case in Canada, where a unanimous Supreme Court upheld the argument of the Court of Appeal for Ontario that

the bawdy-house prohibition [on brothels] is overbroad because it captures conduct that is unlikely to

¹²⁰ Maggie O'Neill, "Cultural Criminology and Sex Work: Resisting Regulation through Radical Democracy and Participatory Action Research" in Jane Scoular & Teela Sanders, eds, *Regulating Sex/Work: From Crime Control to Neo-liberalism?* (Chichester, UK: Wiley-Blackwell, 2010) 210 at 217.

¹²¹ Nan D Hunter, "Lawyering for Social Justice" (1997) 72 NYUL Rev 1009 at 1015.

¹²² Scott L Cummings & Deborah L Rhode, "Public Interest Litigation: Insights from Theory and Practice" (2009) 36:4 Fordham Urb LJ 603 at 648.

lead to the problems Parliament seeks to curtail. In particular, the provisions prohibit a single prostitute operating discreetly by herself, in her own premises. We also agree with the application judge that the impact of the bawdy-house prohibition is grossly disproportionate to the legislative objective, because the record is clear that the safest way to sell sex is for a prostitute to work indoors, in a location under her control. It follows that the prohibition cannot be justified as a reasonable limit.¹²³

As Epp states, “rights are not gifts: they are won through concerted collective action arising from both a vibrant civil society and public subsidy.”¹²⁴ With that in mind, “rights are conditioned on the extent of a support structure for legal mobilization. Under conditions in which the support structure is deep and vibrant, judicial attention to rights may be sustained and vigorous...[and] constitutional rights have proven to be remarkably variable over time.”¹²⁵ The two types of resistance to prostitution laws which incorporate reliance on religio-moral considerations, namely mobilization and litigation, operate well in tandem: “[l]iberation movements usually have two components: a public education component that is designed to help the public understand why the group in question is oppressed and deserves its rights, and a legal component...These two components often work side by side.”¹²⁶ Together, a dual-pronged approach can reap more rewards than either could separately, and this strength should be used to further a humane and permissive legal approach to commercial sex.

Conclusion

The role of the State in regulating private sexual ordering is particularly strained in application to prostitution, a practice with many different varieties. Prostitution, as may be expected for behaviour with such a fundamental linkage to human sexuality, has throughout history been intertwined with morality and religion. The idea that “[w]hatever is *contra bonos mores et decorum* the principles of the law prohibit and the King’s Court as the general censor

¹²³ *Canada (Attorney General) v Bedford*, 2012 ONCA 186 at paragraph 172.

¹²⁴ Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago, IL: University of Chicago Press, 1998) at 197.

¹²⁵ *Ibid* at 198.

¹²⁶ Boston, *supra* note 36 at 25.

and guardian of the public morals is bound to restrain and punish”¹²⁷ is outdated and is neither a desirable nor an efficient means of regulating prostitution. A stronger, but still flawed, argument is that “[m]orality in sexual relations, when it is free from superstition, consists essentially of respect for the other person, and unwillingness to use that person solely as a means of personal gratification, without regard to his or her desires.”¹²⁸ However, this critique fails to acknowledge that the other actor may also derive value or satisfaction from the engagement which can thus represent a sought-after good for both parties. Rather, the law must recognize the many differing situations in prostitution and limit its ambit to the prosecution of uncontroversially harmful examples:

An honest evaluation of prostitution laws...must...acknowledge that individuals have important claims to liberty, including sexual freedom; that prostitution laws limit sexual freedom; and that some prostitution laws intrude into the lives of prostitutes and clients in ways that make their lives worse. Certainly we must pay close attention to the ways in which prostitution is harmful to those who do it, but we must also take seriously the legitimate claims of individuals to personal freedom and dignity, including the claims of prostitutes and their clients.¹²⁹

This chapter explored the various choices open to law, which range from a morality-based system which imposes its view on all (or part) of society, to a permissive system, as well as hybrid legal regimes in between. The criminalization of prostitution was rejected as being unable to eliminate the practice (or to articulate why elimination was desirable) while contributing to an unsafe work environment for prostitutes and related professions, resulting in a situation where “prostitutes are subject to arrest at any moment, stigmatized in any area of employment by a record and fingerprints, and offered no protection against the assaults of pimps or police.”¹³⁰ Partial decriminalization was also dismissed as theoretically unsound, especially in that it neither reduced the stigma associated with commercialized sex nor made the sale of sex safer, while

¹²⁷ *Jones v Randall* (1774), Lofft’s King Bench Reports at 385, quoted in Hart, *supra* note 8 at 7.

¹²⁸ Russell, *supra* note 39 at 103.

¹²⁹ de Marneffe, *supra* note 17 at 10.

¹³⁰ Millett, *supra* note 16 at 107.

simultaneously continuing to constrain the liberty of both the seller and purchaser of sex without added, and thus with inadequate, justification.

While important caveats were made respecting the legalization of prostitution, ultimately (as with polygamy), criminalization of prostitution is counter-productive, especially compared to a contextual approach which allows a broad discretion for mature individual choice, and provides resources for individuals who no longer want to engage in the practice to leave the occupation. While the issue of prostitution defies blanket pronouncements, it seems clear that prohibition-based regimes result in more negative outcomes both for society and the individuals such laws supposedly “protect.” While law should not abdicate its responsibility “to protect those who are most vulnerable”¹³¹ and to ensure the safety and security of society’s members, especially the most vulnerable, neither should it arbitrarily override the free will of those individuals, nor promote a subjective vision of the “good life.” Thoreau “pleased himself” in imagining a State which respected plurality, “which can afford to be just to all men, and to treat the individual with respect as a neighbor; which even would not think it inconsistent with its own repose if a few were to live aloof from it, not meddling with it, nor embraced by it, who fulfilled all the duties of neighbors and fellowmen.”¹³² In allowing commercial sex to remain “aloof” from predominant morality, the law of private sexual ordering would achieve a significant advance. Having discussed prostitution, I now turn to this dissertation’s most wide-ranging issue: the use of law to discipline female sexuality.

¹³¹ Conseil du statut de la femme, *Prostitution: Time to Take Action* (Quebec, PQ: Conseil du statut de la femme, 2012) at 9.

¹³² Thoreau, *supra* note 52 at 286.

CHAPTER VIII

Towards Deeper Structures

Polygamy and prostitution are two prominent ways in which the law regulates sexual citizens, and engages with private sexual ordering. But despite the historical ubiquity of polygamy and ongoing prevalence of prostitution as human sexual behaviours, the laws regulating them, affecting both sexes and all genders, do not directly regulate those who do not engage, or wish to engage, in those practices. This chapter turns to a more widespread, involuntary form of the legal regulation of private sexual ordering, to expand upon those two issues related to this phenomenon: the law's differential impact on the sexual ordering of women. The role of the feminine is a golden thread¹ throughout the discourse of private sexual ordering, not always prominent nor the focus of the discussion, but omnipresent.

This underlying narrative has been previously identified: “[a] study of women’s experiences in polygamy, surrogacy and sex work further establishes the dilemma of absolutist approaches to choice. Outright exclusion of the possibility of choice neglects the dignity and capacities of women who muster agency and resolve in the face of adversity.”² Yet for some reason the law is blind to this exercise of female agency, and attempts to restrict feminine sexuality. This is restriction of feminine sexuality in favour of the masculine is unsurprising in the greater societal context, where patriarchal forms persist despite attempts (particularly by law) to remove their privilege.

The setting aside, and often exclusion, of the feminine is part of a larger human impulse identified by Simone de Beauvoir: “[a] man is in the right in being a man; it is the woman who is in the wrong. It amounts to this: just as for the ancients there was an absolute vertical with reference to which the oblique was defined, so there is an absolute human type, the masculine.

¹ This metaphor appeared in a different context in *Woolmington v DPP* [1935] AC 462 (HL).

² Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Burlington, VT: Ashgate Publishing, 2013) at 195.

Woman has ovaries, a uterus; these peculiarities imprison her in her subjectivity.”³ Yet reaction to patriarchy need not be uniform or one-dimensional: “[i]n its analyses of Western societies, feminism, or rather the many feminisms that there now are, has moved far beyond the somewhat simplistic approach of deploring and denouncing.”⁴ The fact that there are many perspectives aids not only the subtle critiques described in the above quotation but also nuanced solutions to law’s regulation of female private sexual ordering. All issues in this chapter illustrate the idea that members of the same gender must be treated (and more importantly, must act) in the same way.

A symbolic event occurred in the Northwest Territories in the early 1990s. Women seeking abortions were forced by medical practitioners to undergo the procedure without anaesthesia or pain relief, and in some of the at least 85 alleged instances subjected to verbal abuse such as “let that be a lesson to you before you get yourself in this situation again.”⁵ Situations such as this highlight Roxane Gay’s insight that reproductive rights of women are “alienable rights:”⁶ “[r]eproductive freedom is a *talking point*. Reproductive freedom is a *campaign issue*. Reproductive freedom can be repealed or restricted. Reproductive freedom is not a right even though it should be.”⁷ This right is directly connected to the larger issue of female private sexual ordering: “[l]aws restricting birth control and abortion can also be interpreted as contributing to the suppression of female sexuality, because birth control and abortion make it easier for women to engage in sex without the risk of life-altering pregnancy each time...it does seem likely that

³ Simone de Beauvoir, *The Second Sex*, translated and edited by HM Parshley (New York: Bantam Books, 1961) at xv.

⁴ Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, CT: Yale University Press, 1992) at 247.

⁵ Mary Williams Walsh, “Abortion Horror Stories Spur Inquiry: Canada: Questions raised after women allege hospital denied them anesthesia as punishment” *New York Times* (3 April 1992) <http://articles.latimes.com/1992-04-03/news/mn-273_1_abortion-procedures>.

⁶ Roxane Gay, “The Alienable Rights of Women,” in Roxane Gay, *Bad Feminist: Essays* (New York: Harper Perennial, 2014) 267-279.

⁷ *Ibid* at 273 [emphasis in original].

such effects...would tend to restrain female sexuality.”⁸ The law also has unique capacities to restrict women’s sexual and reproductive freedom according to, or against, social mores, as can be seen from cases around the world: the U.S. state of Mississippi, where a legislator boasted “[w]e stopped abortion in the state of Mississippi,”⁹ instantiates a legal strategy whereby legislators aim

to shut down abortion clinics by piling on regulations. Abortion-rights activists call such provisions ‘TRAP (targeted regulation of abortion providers) laws’, and argue that they have little to do with health or safety—it is difficult to see how having wider hallways in Virginia’s clinics would decrease complications, for instance—but instead aim to make running an abortion clinic impossible in practice. According to the Guttmacher Institute, an abortion-rights advocacy group, in 2011 state legislatures enacted 92 provisions restricting access to abortion services—nearly three times the previous record of 34, in 2005. That trend has continued [in 2012].¹⁰

More recently, in Ireland, hazy abortion laws came under fire in 2012 when a dentist died during a miscarriage after being refused permission for an abortion, and in summer 2014 a foreign migrant allegedly raped in her native country was forced to give birth via caesarean section despite attempting suicide and requesting an abortion.¹¹ In another case involving abortion, this time again in the American context, a member of the federal House of Representatives from Missouri who had served for over a decade was castigated for his comment that “[i]f it’s a legitimate rape, the female body has ways to try to shut that whole thing [pregnancy] down...I think there should be some punishment, but the punishment ought to be of

⁸ Roy F Baumeister & Jean M Twenge, “Cultural Suppression of Female Sexuality” (2002) 6:2 Rev General Psychology 166 at 192.

⁹ “And then there was one: Having failed to ban abortion, activists are trying to regulate it out of existence”, *The Economist* (8 September 2012), online: <<http://www.economist.com/node/21562215>>.

¹⁰ *Ibid.*

¹¹ “Flaring up: Renewed criticism of Ireland’s abortion law may still not lead to change”, *The Economist* (23 August 2014), online: <<http://www.economist.com/news/europe/21613307-renewed-criticism-irelands-abortion-law-may-still-not-lead-change-flaring-up>>.

the rapist, and not attacking the child.”¹² The politician made no mention of the rape victim carrying the “child.”

The issue of the legal regulation of reproductive rights is a major, but not the sole, issue involved in how law regulates the private sexual ordering of the feminine. These issues include sexual activity, reproduction, and even usually-distinct issues such as clothing and medical health. Throughout all of these issues, law’s impact on the private sexual ordering of the feminine stands out as hypocritical (when compared to its regulation of male sexual ordering), coercive, and anachronistic. Law can operate, in the words of an artistic commentary on the *Hobby Lobby*¹³ decision (which limited requirements to offer female contraceptives under health insurance) as a powerful symbolic tool: “they’re insuring for Viagra and vasectomy/and you say that’s a double standard/and that sounds correct to me...we’re not the Warren Court, we’re the Court that’s waging war’n women.”¹⁴ Ultimately, law can re/construct female sexuality in harmful ways: “[i]n the process of regulating the female body, the law legislates its shape, lineaments, and its boundaries,”¹⁵ allowing “insistence by law and legal discourse on an omnipresent female body that ‘we’ all know, understand, and agree upon.”¹⁶ Since sexuality is “a core dimension of being human,”¹⁷ “[s]uppression and control of women’s sexuality...is accordingly demeaning to women in denying an aspect of their humanity.”¹⁸

¹² John Eligon and Michael Schwartz, “Senate Candidate Provokes Ire With ‘Legitimate Rape’ Comment” (19 August 2012) *New York Times* online: <http://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html?_r=0>.

¹³ *Burwell v Hobby Lobby*, 134 Sup Ct 2751 (US), a case which ruled that the corporate Defendant had the right under the Religious Freedom Restoration Act to refuse to fund insurance plans which provide female contraception.

¹⁴ <<https://www.youtube.com/watch?v=IDMdSJJKzk>>.

¹⁵ Isabel Karpin, “Legislating the Female Body: Reproductive Technology and the Reconstructed Woman” (1992) 3 *Colum J Gender & L* 325 at 325.

¹⁶ *Ibid.*

¹⁷ Pan American Health Organization/World Health Organization, *Promotion of Sexual Health: Recommendations for Action* (Washington, DC: PAHO, 2000) at 12.

¹⁸ RJ Cook, BM Dickens, & MF Fathalla, “Female genital cutting (mutilation/circumcision): ethical and legal dimensions” (2002) 79:3 *International J Gynecology & Obstetrics* 281 at 286.

This chapter will explore and discuss the varied ways in which law legislates and thereby controls female sexuality, focussing on the areas of reproductive issues (contraception and abortion), the law's role in the idealization of certain types of female sexuality (the channeling of female sexual desire into "appropriate" status and activity), most explicitly through a focus on the practice of female genital cutting, also known as female genital mutilation, and ancillary issues touching upon law's regulation of female private sexual ordering such as restrictions of women's sexual health and legal "modesty" enforcement. While a comprehensive discussion of any single issue enumerated here is beyond the scope of this chapter, a common theme runs through each of these aspects of the issue of law and female sexuality: "[t]o the extent that women live in society, they reflect its engendered aspects---the particular history, traditions, activities, and differences of being women in society. No woman can ever be completely outside the engendered context of her sex."¹⁹ Law relating to female sexuality reflects a systematic legal exclusion of the female from traditional Western society: "women's generalized lack of capacity had become so entrenched that it was widely believed by jurists that women could not participate in public life in any way."²⁰

While I will discuss recommendations for reform in the following chapter, it is important to acknowledge from the outset that modern developed national law must recognize and reinforce the insight that "women's rights, sexual rights, and reproductive rights are central human rights issues...Recognition of sexual and reproductive health providers as [human rights defenders] also reflects the crucial role they play in ensuring the right to health and allowing

¹⁹ Zillah R Eisenstein, *The Female Body and the Law* (Berkeley, CA: University of California Press, 1988) at 149.

²⁰ Kathleen A Lahey, *Are We 'Persons' Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 112.

women and men to realize their reproductive and sexual autonomy.”²¹ As such, no description can be undertaken without the knowledge that women’s rights are vital to a just society, and I will accordingly describe threats to these rights and preview ways of meeting these threats.

Philosophical and Religious Interplays with Female Sexual Repression

Legal patriarchy and male chauvinism are features of many philosophical and religious systems, despite exceptions. Plato’s *Republic* controversially (for its time) advocates for the education of women with men, and the participation of women in the traditionally male activity of the gymnasium.²² *The Republic*’s sexual activities (especially those leading to procreation) are also merit-based, with a prototypical eugenics being substituted for the traditional sexual hierarchies.²³ Despite Plato’s foresight, philosophical and religious traditions have seldom accorded female sexuality equal dignity, respect or even acknowledgement to male sexuality. Plato himself relegates women to a passive role, writing in *The Laws* that “when a man of twenty-five...is confident that he has found a family offering someone to his taste who would make a suitable partner for the procreation of children, he should get married.”²⁴

In the Judaeo-Christian tradition, women were considered to be sexually unclean: men engaging in sexual relations with women made both parties unclean, while menstruating women were unclean with rituals commanding the cleansing of the impurity.²⁵ This religious suspicion of female sexuality is part of a larger exclusion: with respect to Jewish religious teaching, “only three of the 613 religious injunctions laid out in the Torah (religious guidance or law) applied to

²¹ Cynthia Soohoo & Diana Hortsch, “Who Is a Human Rights Defender?: An Essay on Sexual and Reproductive Rights Defenders” (2011) 65 U Miami L Rev 981 at 998.

²² Plato, *The Republic*, 2nd ed, translated by Desmond Lee (New York: Penguin Books, 2007) at Book V, ln 452a (p 161).

²³ *Ibid* at Book V, lines 457-462 (pp168-173).

²⁴ Plato, *The Laws* (New York: Penguin Books, 1975) Trevor J Saunders, trans, at Book V, line 772 (page 251).

²⁵ See Tanakh, Leviticus 15.

women.”²⁶ The roots of Christianity are also suspicious of female sexuality: “[p]olitically dominant Christianity brought with it...the patriarchal ideas of its originary Judaism, and with these the religious sanction of women’s social subordination and the endorsement of their essential secondariness.”²⁷ This was reflected in the church’s attitude towards women and sexuality:

The church’s [negative] attitude on abortion and contraception, however, formed part of a broader negative ethos concerning the body and sexuality---a sense of these as sinful and shameful and of sexuality as legitimate only for procreation. The consequences for women were especially opprobrious, in that they were evidently perceived as innately more implicated in physicality and sexuality than man.²⁸

With respect to the Islamic tradition, female sexuality was also curtailed: “[i]n transferring rights to women’s sexuality and their offspring from the woman and her tribe to men and then basing the new definition of marriage on that proprietary male right, Islam placed relations between the sexes on a new footing. Implicit in this new order was the male right to control women.”²⁹ Yet there is also room for a theoretical re-appraisal based on the contested teachings of the Abrahamic religions: “even as Islam instituted, in the initiatory society, a hierarchical structure as the basis of relations between men and women, it also preached, in its ethical voice (and this is the case with Christianity and Judaism as well), the moral and spiritual equality of all human beings.”³⁰ Today, with religious diversity and opinions shaped by many factors, no religious tradition can be unquestionably tarred as misogynist. Nevertheless, interpretations of all major faiths which incorporate misogyny, or at least misogynistic difference, continue to exist.

²⁶ Denise L Carmody, “Today’s Jewish Women” in Arvind Sharma, ed, *Today’s Woman in World Religions* (Albany, NY: State University of New York Press, 1994) 245 at 247.

²⁷ Ahmed, *supra* note 4 at 34.

²⁸ *Ibid* at 35.

²⁹ *Ibid* at 62.

³⁰ *Ibid* at 238.

Historical Legal Repression of Female Sexuality

The roots of Western law's coercion of female private sexual ordering are firmly entrenched in historical precedent. Of course, there are many historical traditions, some more or less patriarchal, and it is dangerous to generalize to a large extent over cultures, geographic spaces, or even historical periods. However, a major theme can be discerned from the history of law: that across specific circumstances, law was often used to essentialize women and control them within a societal frame. Thus, female sexuality can be an example for Hunt's persuasive argument that "moral regulation movements form an interconnected web of discourses, symbols and practices exhibiting persistent continuities that stretch across time and place. The deep anxieties that are roused and stirred in moral politics involve the condensation of a number of different discourses, different fears, within a single image."³¹ Here, the fear (and the creation of the web of discourses) has proven to have significant longevity. It is no coincidence that Glenn uses the order he does in writing "[t]here is a law of persons, or the family, which reflects Roman family life, with the paterfamilias, the wife and children, and the slaves."³² In the European tradition, a brief synopsis is instructive in the nature of patriarchal society's view of the feminine:

[T]he twelfth century began to see a change. Woman, who for so long had been a cipher, was transformed...into the 'Lady,' pure, unattainable, virtuous, admirable. It was a change only in image, but it was to prove revolutionary, especially when reinforced by the sixteenth-century Reformed churches' emphasis on the family, and the seventeenth-century scientific discovery that man's semen was not, as had been thought since the days of Aristotle, the crucial element in procreation. Woman became not an incubator, but a mother. The nineteenth century was to blend morality and motherliness into a new image of 'the angel of the house'-with surprising political results.³³

Constance Backhouse traces the legal history of the subjection of women in 19th Century Canada. One glaring example of such subjugation was dismissive legal procedures surrounding

³¹ Alan Hunt, *Governing Morals: A Social History of Moral Regulation* (New York: Cambridge University Press, 1999) at 9.

³² H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 4th ed (New York: Oxford University Press, 2010) at 137.

³³ Reay Tannahill, *Sex in History*, rev ed (Scarborough House, 1992) at 255.

rape (where “[s]ceptical lawyers, judges, and jurors pored over every detail of [female rape victims] background and actions, striving to ensure that only the most ‘deserving’ women were granted protection”³⁴). But others highlighted by Backhouse include the permission to marry, (where “few women would have dared to consider marrying without obtaining formal parental permission[...]. Parental control was so important that the laws stood ready to bolster it by shoring up the rights of parents”³⁵) and child custody, where even though maternal care was recognized as important, women were trapped into a rigorous and constraining stereotype to retain power over their family. Such subjugation was almost universal: “[t]he growing glorification of the ‘cult of motherhood’ was tied to a very circumscribed sphere of proper maternal activity[...]. From the pulpit, from the lectern, even from the song books and sheet music popular in the late nineteenth century, came an increasingly narrow and confining image of motherhood.”³⁶

Backhouse’s conclusion is relevant to the issue of the legal governing of female sexuality:

[W]omen found almost every stage of their lives touched by the long reach of the law, from courtship through marriage, from consensual sexual encounters to forcible ones, throughout all aspects of fertility and reproduction, through marital breakdown, separation, divorce, and child custody...Sexuality proved to be one of the broadest webs for nineteenth-century legal entanglement. When, where, and with whom women were permitted to engage sexually came under intense legal scrutiny.³⁷

The law controlled every aspect of female private sexual ordering, placing this supposedly dangerous but necessary area into the hands of the patriarchal governance system. In doing so, the law was merely repeating historical legal, religious, and philosophical precedents to endorse only “permitted” behaviour. This legal repression was no different in the larger jurisdiction of the United States of America: in purity movements, instead of “the quest for some new

³⁴ Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women’s Press for the Osgoode Society, 1991) at 111. In a legal system which enforces standards of “modesty” and conduct that are preconditions to legal protection, “rape functions not as a violation but as an enforcement of the social order.” Gregory M Matoesian, *Reproducing Rape: Domination Through Talk in the Courtroom* (Chicago, IL: University of Chicago Press, 1993) at 226.

³⁵ Backhouse, *ibid* at 39.

³⁶ *Ibid* at 213.

³⁷ *Ibid* at 327.

egalitarian standard” removing gender discrimination, the result “was to impose the restricted standard required of women upon men.”³⁸ Greater female empowerment in the realm of conjugal and family freedom was never contemplated, much less implemented, by the socially-repressive law.

The repression continued into the 20th Century. Contradicting an assertion of a Calgary newspaper in 1913, Carter writes that “in 1913 the ‘last best west’ was not a land of freedom from conventional restraint, and it was hardly the ‘women’s west’; a great deal of work had been done to ensure that it was in fact a white ‘manly space.’”³⁹ This was achieved through legal regulation of marriage and a continuation of spirit of the unequal treatment documented by Backhouse. One largely economic analysis finds that the interwar period of the 20th Century “preserve[d] familial economic responsibility as a necessary concomitant to social patriarchy” and thus “marks a transition towards a growing acceptance of state subsidization of the reproductive unit within clearly defined boundaries, and family law serves to define those boundaries.”⁴⁰ By reinforcing patriarchal norms of reproduction, family law was complicit in the suppression of female autonomy within private sexual ordering. As a final example, as Friedman notes, “[t]he Comstock Act...absolutely banned the mailing or importing of articles ‘intended for preventing conception’; nothing in the statute even hinted at exceptions.”⁴¹ Far into the 20th Century, reproductive activities and control were firmly entrenched with a patriarchal legal system attempting to stop women from controlling their own sexual activities. Contraception was

³⁸ Hunt, *supra* note 31 at 124.

³⁹ Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada in 1915* (Edmonton: University of Alberta Press and Athabasca University Press, 2008) at 281.

⁴⁰ Jane Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women’s Press, 1992) at 145.

⁴¹ Lawrence M Friedman, *Private Lives: Families, Individuals, and the Law* (Cambridge, MA: Harvard University Press, 2004) at 166.

subject to legal control, family form was subject to legal discipline, and female sexuality was harshly critiqued by society with legal complicity.

The Western historical framework of women's essential inferiority (including in sexual matters) was eloquently described by Russell: "[t]he women of the Victorian age were, and a great many women still are, in a mental prison. This prison was not obvious to consciousness, since it consisted of subconscious inhibitions."⁴² In an age of the "decay of inhibitions" (which he believed he was witnessing), Russell confidently predicted "a very revolutionary effect upon sexual morality, not only in one country or in one class, but in all civilized countries and in all classes."⁴³ The motive, of course, was patriarchal domination:

Victorian man created the new Madonna- the pure, sexless creature of his own fantasy. With female sexuality banished from existence, the middle-class male could concentrate on his own, which was of course alive and kicking [as demonstrated by Lord Acton], now secure in his assumption that all sexual desire was by definition male."⁴⁴

With a matter of such unquestioned societal import, law's participation was, and remains, inevitable.

Yet it would be a mistake to essentialize women to any one point of view on private sexual ordering. One historical example is the legal disenfranchisement imposed upon Utah women, who were granted the franchise by the Territorial government but robbed of the right to vote when they voted according to the Mormon church's advice.⁴⁵ Another is the liberal Spanish Republic of the 1930s, which granted women suffrage. Despite this, the majority of women did not appear to share the liberals' reforming tendencies:

The confessional Right was...able to mobilize women. Indeed, many accounts of the demise of Azana's socialist government are quick to attribute a good measure of the resounding electoral defeat to women...The women's vote is often construed as monolithically conservative and pro-

⁴² Bertrand Russell, *Marriage and Morals* (New York: Bantam Books, 1963) at 56.

⁴³ *Ibid.*

⁴⁴ Nickie Roberts, *Whores in History: Prostitution in Western Society* (New York: HarperCollins, 1992) at 223.

⁴⁵ Nancy F Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2002) at 112 and 119.

clerical...Republican reforms to family law would have overturned a very familiar social world for women.⁴⁶

These examples do not show that women are inherently conservative, of course, but simply that their views cannot be assumed, nor taken for granted, nor reduced to a single narrative.

Moreover, it provides a warning for legal reform which does not take into account the underlying discourse and the wishes of the people subject to the law: “[i]n Spain in the 1930s, Montesquieu’s remarks about the cultural, political, religious, and popular hazards of successful legal transplantation seem apt...Agency and environment are variably and complexly linked.”⁴⁷

The legal control of female sexuality has proven to be historically enduring. One example is the oddly tenacious rules on marital rape in the United States of America, wherein

[o]f all the features of coverture, this right of the husband to his wife’s body was the longest lasting. Through the 1970s sweep of legal sex discriminations from the law, it was not moved. Not until 1984, after at least a decade of feminist arguments, did a New York appellate court overturn that state’s marital rape exemption---then other states followed. As in the Eisenstadt case allowing birth control to single persons, the force of an equal protection argument turned the tide: if the man in an *unmarried* cohabiting couple could be prosecuted for rape but a husband could not, the two couples were not experiencing equal protection of the laws.⁴⁸

This is obviously an odious way to remove an even more odious provision. Nevertheless, even the staying power of a man’s control over his wife’s body shows the nature of the law’s complicity in denying women the right to engage in sexual activity of their choice.

Reproductive Rights

Pearl S. Buck’s discussion of Chinese polygyny has already been mentioned. In another portion of *The Good Earth*, the author describes the heartbreaking choice made by O-lan when another child is born to the family: she chooses to strangle the infant as there are no resources to feed it.⁴⁹ This fictional horror is an example of problems that arise when women are unable to control their own reproductive choices. Perhaps no other legal area excites so much emotion, comment, and moral dispute as abortion: it is “commonly identified as one of the most

⁴⁶ Susan G Drummond, *Mapping Marriage Law in Spanish Gitano Communities* (Toronto: UBC Press, 2006) at 44-45.

⁴⁷ *Ibid* at 45.

⁴⁸ Cott, *supra* note 45 at 211.

⁴⁹ Pearl S Buck, *The Good Earth* (New York: Washington Square Press, 2005) at 86-87.

compelling moral issues of our time.”⁵⁰ It appears that the issue is strictly of the ethics of terminating the fetus, since “fetal perception of pain is unlikely before the third trimester.”⁵¹ The timing of the legalization of non-therapeutic abortion in the United States was symbolic: “[o]n the half-century anniversary of woman suffrage, the [feminist] movement imagined equal citizenship for women as requiring transformation in the conditions in which women conceive and rear children.”⁵² The issue of reproductive freedom is thus intimately related to the question of female sexuality and private ordering, and linked to the law’s regulation of not only sex but the feminine.

Since the landmark American cases of *Griswold v. Connecticut*⁵³ and *Eisenstadt v. Baird*,⁵⁴ which legalized the provision of birth control, and especially *Roe v. Wade*,⁵⁵ which decriminalized abortion with some restrictions, the law of reproduction in the American context has captured the larger discussion throughout the world. Yet abortion law throughout the world remains much more confused and shadowy. While most Western nations permit abortion, at least up to a point, many other jurisdictions legally prohibit abortions and restrict female access to birth control. Internationally, the statistics reveal a conflicted legal patchwork: as of 2011, while 97% of developing nations and 96% of developed nations permit abortion to save a woman’s life, the percentage drops dramatically for any other reason, with only 71% of developed nations and 16% of developing nations permitting abortion on request. Between these two extreme numbers, the percentages are in the 80% range for developed nations and between 61-20% percent for developing nations for any other reasons, such as “[t]o preserve physical health”

⁵⁰ Caitlin E Borgmann, “Untying the Moral Knot of Abortion” (2014) 71:2 Wash & Lee L Rev 1299 at 1299.

⁵¹ Susan J Lee et al, “Fetal Pain: A Systemic Multidisciplinary Review of the Evidence” (2005) 294:8 J American Medical Association 947 at 947.

⁵² Reva B Siegel, “Abortion and the ‘Woman Question’: Forty Years of Debate” (2014) 89:4 Ind LJ 1365 at 1369.

⁵³ 381 US 479 (1965).

⁵⁴ 405 US 438 (1972).

⁵⁵ 410 US 113 (1973).

(61% of developing nations) and “[f]or economic or social reasons” (20% of developing nations).⁵⁶

Characterizing “legal regulation related to women’s reproductive health” as placing women in a “quintessential double bind,”⁵⁷ Burkstrand-Reid notes that the issue contains complex problems:

Neither wholesale acceptance of State intervention in women’s health nor the wholesale rejection of State intervention in women’s bodies comes without a cost. Calling on the State to protect women means that laws and jurisprudence will contain language that allows them to do so, and...language that ‘protects’ women’s health can be used by the state to intervene in their ability to make autonomous health decisions.⁵⁸

This complexity is bolstered by the plethora of considerations that legislation on reproduction, particularly contraception and abortion, brings into play: “[a]lthough abortion policy is a form of social policy, it also involves social and moral regulation. At different times and in different places, abortion has been ‘about’ population control, the value of life, the regulation of sexuality, the place of women in society, and parental authority, to name just a few dimensions.”⁵⁹

While the “correct” approach to the abortion debate is a matter of conscience and resists any rational elucidation, it seems reasonable to accept Dworkin’s argument that allowing the pregnant woman to make her own choice “is not only consistent but is in keeping with a great tradition of freedom of conscience in modern pluralistic democracies,”⁶⁰ a view shared by Borgmann, who recognizes the law’s impact on female private sexual ordering by stating that “the moral aspect of abortion that we should see codified in law is a woman’s dignity and

⁵⁶ United Nations Department of Economic and Social Affairs Population Division, *World Abortion Policies 2013* (March 2013), online: <http://www.un.org/en/development/desa/population/publications/pdf/policy/WorldAbortionPolicies2013/WorldAbortionPolicies2013_WallChart.pdf>.

⁵⁷ Beth A Burkstrand-Reid, “From Sex for Pleasure to Sex for Parenthood: How the Law Manufactures Mothers” (2013) 65 *Hastings LJ* 211 at 256.

⁵⁸ *Ibid* at 257.

⁵⁹ Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago, IL: University of Chicago Press, 2011) at 7.

⁶⁰ Ronald Dworkin, *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A Knopf, 1993) at 15.

autonomy in making her own decision about the fate of her pregnancy and, thereby, her life.”⁶¹

This is somewhat restrained comment compared to Gordon’s description of the practice, which leaves no doubt as to her position:

[Abortion’s] appeals are strong: it liberates a woman not only from child-raising, but also from months of uncomfortable, tiring, and sometimes painful pregnancy, and from the pain and danger of childbirth. One of the arguments that antiabortionists have used to justify the prohibition on abortion and to frighten women is that abortion violates some age-old and God-given “natural law.” One look at history dissolves that illusion.⁶²

While no consensus can be reached on a philosophical level, drawing on Dworkin’s first principles of human autonomy and control over private sexual ordering suggests that law can be viewed, and operate on the neutral ground of rights: “[c]onsidering the diverse and abstract values involved in [the][sic] abortion dilemma, the ‘rights approach’ is indispensable. The approach provides legal scholars, courts, and other concerned bodies with a framework upon which they can systematically draw their analyses.”⁶³ While a rights-based critique is not the only analysis which may prove useful in discussing abortion, it can at least shed light on the various stakeholders to be addressed in analyzing the subject. Undoubtedly, one of the most, if not the most, important stakeholder is the pregnant mother: Teklehaimanot argues that the mother’s international law rights are engaged, and that consequently “the right to life [applies] to deaths arising from unsafe abortion practices. States have a duty to remove all factors, including legal barriers, leading women to resort to unsafe abortion.”⁶⁴

This is echoed by another commentator, this time studying Nigeria, where “criminal jurisprudence prohibits abortion in all instances except when necessary to save the life of a woman... This restrictive statutory formula has driven many pregnant women and girls to non-

⁶¹ Borgmann, *supra* note 50 at 1300.

⁶² Linda Gordon, *Woman’s Body, Woman’s Right: A Social History of Birth Control in America* (New York: Penguin Book, 1976) at 35.

⁶³ Kibrom Isaak Teklehaimanot, *Tragedies of Unsafe Abortion in International Law: The Case of Eritrea* (LLM Thesis, University of Toronto Faculty of Law, 2001) [unpublished] at 107.

⁶⁴ *Ibid* at 109.

physician providers in a bid to avoid reluctant parenthood by accessing secretly illegal and septic abortions.”⁶⁵ Opara’s solution is to expand the availability of abortion and encourage the judiciary to “[flex]...judicial creative muscles,” but in any analysis, widespread death due to unsafe abortions should be unacceptable to the law, which thus imposes misery on women without any redeeming results. There are also varying types of abortion, one of which, abortion by the medication mifepristone, was found to be sometimes perceived as “more natural...more private and respectful of the woman’s dignity and as generating a more egalitarian clinical interaction.”⁶⁶ However, in an echo of other resistance, since its medical implementation in 1988, Canada still refuses to allow its use.⁶⁷ In doing so, this may contravene international human rights guarantees.⁶⁸

One of the issues raised concurrently with abortion is the control of successful reproduction, which is obviously separate yet interconnected with a woman’s control over her private sexual ordering. The laws of surrogacy, which pertain to women who choose to carry “another’s” baby to term for them, are often hazy or repressive:

Part of state law’s inability to regulate surrogacy according to its own intentions and foundational premises can be traced to its acceptance of a binary model of choice affecting genderized social practices fraught with controversy. Legislative and policy discussions on surrogacy are built on an understanding of women as either victimized or empowered...such conversations reflect negligibly on state law’s own contribution to heightening women’s vulnerability and to limiting their options.⁶⁹

⁶⁵ Victor Nnamdi Opara, “Re-Characterizing Abortion in Nigeria: An Appraisal of the Necessity Test” (2004) 11 ILSA J Intl & Comp L 143 at 144. Although Opara’s work was written in 2004, this is still the law, and up to 34,000 women still die annually in Nigeria as a result of unsafe abortions: see Allyn Gaestel, “Abortions in Nigeria are legally restricted, unsafe-and common”, *Al-Jazeera* (10 December 2013), online: <<http://america.aljazeera.com/articles/2013/12/10/abortions-in-nigeriaareillegalunsafeandcommon.html>>.

⁶⁶ Joanna N Erdman, Amy Grenon, & Leigh Harrison-Wilson, “Medication Abortion in Canada: A Right-to-Health Perspective” (2008) 98:10 *American J Public Health* 1764 at 1766.

⁶⁷ Laura Payton, “Abortion drug decision pushed back by Health Canada” (13 January 2015), online: CBC.ca <<http://www.cbc.ca/news/politics/abortion-drug-decision-pushed-back-by-health-canada-1.2899723>>. Although a decision was reached in late July 2015 to allow doctors to prescribe the abortion drug RU-486, which incorporates mifepristone, the fact that the drug had been available in France since 1988 and the federal Health Minister disavowed responsibility for the decision means that the issue, while hopefully settled, is still capable of fluctuation. See CBC News, “RU-486 abortion pill approved by Health Canada” (30 July 2015), *CBC News*, online: <<http://www.cbc.ca/news/health/ru-486-abortion-pill-approved-by-health-canada-1.3173515>>.

⁶⁸ Erdman, Grenon & Harrison-Wilson, *supra* note 66 at 1768.

⁶⁹ Campbell, *supra* note 2 at 141.

The argument can be made that “[t]he very existence of surrogacy statutes... assumes that marriage and procreation through sexual intercourse do not necessarily come hand in hand. Essentially, family creation through surrogacy has nothing to do with sex.”⁷⁰ I disagree, since even though reproduction may not be intrinsically sexual, non-conjugal reproduction exists on a spectrum where it forms an alternative to sexual activity, and reflects the sexual choices and sexual behaviour of the parents. Another link between sex and surrogacy is also persuasive: “[w]hile... surrogacy statutes cannot be used to channel sexual activity, they most certainly can play a role in channeling procreation into particular familial units.”⁷¹ This renders all law regarding surrogacy, assisted reproductive technologies (ARTs), and even adoption implicitly relevant and connected to private sexual ordering. After all, parenthood may be achieved without a sexual act, but not without replicating a sexual act.

Arguments against surrogacy exist, such as concerns alleging “the inability to give informed consent, the inherently exploitative nature of the arrangements and the dangers of commodification.”⁷² Such arguments are similar, to debates on the agency of sex workers.⁷³ But such arguments fail before empirical evidence reviewed by Busby and Vun:

The empirical research focussing on surrogate mothers in Britain and the United States does not support concerns that they are being exploited by these arrangements, that they cannot give meaningful consent to participating, or that the arrangements commodify women or children. Money is a motivator for some participants, but for most, the decision to participate comes out of a desire to help a childless couple, to do something unusual or to make a unique contribution.⁷⁴

Moreover, in keeping with the discussion of legal interference with female sexuality, Ainsworth critiques restrictions on surrogacy with the persuasive statement: “Feminists should be gravely

⁷⁰ Andrea B Carroll, “Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy” (2013) 88 Ind LJ 1187 at 1200.

⁷¹ Kimberly M Mutcherson, “How Parents Are Made: A Response to *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*” (2013) 88:4 Ind LJ 1207 at 1214.

⁷² Karen Busby & Delaney Vun, “Revisiting *The Handmaid’s Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers” (2010) Can J Fam L 13 at 21.

⁷³ I am indebted to Professor Vanessa Gruben for this insight.

⁷⁴ Busby & Vun, *supra* note 72 at 80.

concerned when a legal restriction is based on stereotypes of women...suggesting that some women have vacuous, trivial, or wrong-headed reasons for their procreative decisions.”⁷⁵ And if surrogacy as a practice survives scrutiny, remunerative contractual surrogacy can survive as a parallel between romantic and commercial sex.

Yet concerns about assisted reproduction are perhaps responding to the transformative potential such practices have for conjugal and reproductive behaviour. Appleton identifies the centrality of private ordering, and the quagmire created by ARTs, arguing perhaps ironically that “[w]e can probably eliminate the last vestiges of illegitimacy---the law’s failure to acknowledge the reality of a particular child’s lived experience no matter how unique---only by dismantling parentage altogether.”⁷⁶ The call to reshape parentage, recognizing the “salient differences between different modes of conception,”⁷⁷ and even recognizing interpersonal relationships through the destruction of “parent” if necessary, should not go unheeded. Since there is yet no alternative to a motherhood which physically delivers a child, Appleton’s “illegitimacy” of certain types of birth will always disparately impact female sexual ordering, no matter who else may assume a parenting role. Motherhood, and parenthood, can be problematized and expanded beyond dichotomous notions of sexuality. Starting from the truth that “[a] declaration of parentage provides practical and symbolic recognition of the parent-child relationship,”⁷⁸ and thus is central to both reality and perception of a citizen’s role in this familial relationship, the Court of Appeal for Ontario demonstrated the transformative nature of surrogacy, and the importance of recognizing the realities of ARTs by declaring a child conceived in a surrogacy

⁷⁵ Sara L Ainsworth, “Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States” (2014) *Wash L Rev* 1077 at 1116.

⁷⁶ Susan Frelich Appleton, “Illegitimacy and Sex, Old and New: (2012) 20:3 *Am UJ Soc Pol’y & L* 347 at 385.

⁷⁷ Wanda Wiegers, “Assisted Conception and Equality of Familial Status in Parentage Law” (2012) 28:2 *Can J Fam L* 147 at 171.

⁷⁸ *AA v BB*, 2007 ONCA 2 at para 15, quoting the “MDR Intervenors” of the case, “Melissa Drake Rutherford et al.”

relationship could have three parents.⁷⁹ In describing the new realities (and the implicit transformation of society that the law of private sexual ordering could create with regard to surrogacy and parenthood), Rosenberg JA stated:

Advances in reproductive technology require re-examination of the most basic questions of who is a biological mother. Present social conditions and attitudes have changed [from the previous *status quo*]. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the...legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents.⁸⁰

The insightful comments and *ratio decidendi* of *AA v BB* demonstrate the importance of surrogacy, ARTs, and parenthood to the modern law of private sexual ordering. This transformative importance is bolstered by Cornell: "it is not only important...to recognize the significance of sentimental unions and ritualized bonds in human life...but also to move away from a family policy that makes the nuclear family...the only state-legitimated form of family. Love, in the end, demands that we stretch our imagination to see new possibilities for kinship."⁸¹ Ironically, surrogacy can be inhibited by a traditionalist approach which nevertheless idealizes and ostensibly affirms female sexuality: "[l]egislative disquiet over surrogacy's commodification potential is often expressed with reference to concepts of maternity, depicted in policy discussions as having immeasurable, sometimes nearly spiritual or sacred, value."⁸² However, the "spiritual or sacred" value militates in favour of granting women wide licence over their reproductive processes, particularly in the area of surrogacy. A strong argument can be made that rather than restricting surrogacy and ART arrangements, law can better serve the interests of the individuals involved by protecting the rights of all stakeholders using legal principles of moral neutrality and (freely consenting) personal autonomy:

⁷⁹ *Ibid* at para 41.

⁸⁰ *Ibid* at paras 33-35.

⁸¹ Drucilla Cornell, "The Public Supports of Love" in Joshua Cohen & Deborah Chasman, eds, *Just Marriage* (New York: Oxford University Press, 2004) 81 at 85.

⁸² Campbell, *supra* note 2 at 131.

Intentional parenthood and contractual ordering conform to liberal notions of human agency and procreative rights. Thus, intentional parenthood in the context of ARTs conforms to modern principles of equality and would permit a larger number of people to serve as legal parents. Moreover, if parties delineated their rights and obligations and established in advance who would be a parent's child, it would reduce the possibility of future acrimony and litigation...a greater reliance on freedom of contract in this arena furthers various societal interests, such as increasing individual autonomy, fostering personal responsibility, encouraging feelings of self-fulfillment, and promoting responsible and purposeful parenting.⁸³

Surrogacy, which can be expected to become more widespread as technology develops, thus represents an opportunity to remake society using legal tolerance.

The Law's Cage: Legal Treatment of Female Sexual Desire and Behaviour: Female Genital Cutting and Early Marriage

Female genital cutting, also known as “female genital mutilation” or “female circumcision” falls under legal treatment of female desire and sexual health (the second of which is discussed below). Its origins are unclear: Abusharaf points out that “[g]enerations of supporters of these contested practices espouse a wide range of ideas about why female circumcision constitutes an important part of their cosmology and worldview...Most of the terms translate as ritual purification.”⁸⁴ Indisputably, the practice represents a central, and deeply troubling, area where law disproportionately impacts women in the name of regulating their sexual behaviour.

Non-consensual or childhood female genital cutting has been criticized for its denial of individual autonomy: “women and children in FGM-practicing societies do not have a meaningful choice. They are faced with being socially ostracized or violating their own bodily integrity---neither of which are choices.”⁸⁵ While this curtailment of autonomy is concerning (particularly if social ostracism rises to societal interference), it must remain in perspective and is

⁸³ Yehezkel Margalit, Orrie Levy, & John Loike, “The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood” (2014) 37 Harv JL & Gender 107 at 138-139.

⁸⁴ Rogaia Mustafa Abusharaf, “Introduction: The Custom in Question” in Rogaia Mustafa Abusharaf, ed, *Female Circumcision: Multicultural Perspectives* (Philadelphia, PA: University of Pennsylvania Press, 2006) 1 at 2.

⁸⁵ Preston D Mitchum, “Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance, and Health as a Human Rights Framework” (2013) 19:3 Wm & Mary J Women & L 585 at 607.

not determinative to the debate, as demonstrated by Gilman's insightful comparison of the historical discourse against male circumcision to the contemporary debate on female genital cutting: "[o]nly intact genitalia can give pleasure. But is it possible that the projection of Western, bourgeois notions of pleasure onto other people's bodies is not the best basis for anybody's judgment?"⁸⁶

Female genital cutting and related procedures remain, similar to prostitution and polygamy statistically prevalent in some modern societies:

The World Health Organization... estimates that between 100 and 140 million women have undergone the procedure, out of which 91.5 million are in Africa. Of these 91.5 million girls and women, more than half are in three countries ranking amongst the highest in prevalence rates: Egypt, Ethiopia, and northern Sudan...prevalence rates vary dramatically amongst practicing nations, from as high as 96% in Egypt to as low as 0.6% in Uganda. Globally, around two million girls are at risk of undergoing the procedure annually.⁸⁷

Using contested terminology partly because of the conflicting perspectives on the practice, Cook, Dickens and Fathalla raise an important consideration, drawing on a previous feminist commentator, when they consider "a question of the ethics of employing a condemnatory description in light of a 'wholly legitimate concern about the undesirable effects of imposing the views of some women, especially women who are most advantaged, on other women who are differently and often less well placed.' A less judgmental description may be appropriate."⁸⁸ The issue is understandably controversial and highly-emotional. Hitchens provides a layperson's account of cutting and the related practice of infibulation, which involves narrowing the vagina: "[a]cross a wide swath of animist and Muslim Africa, young girls are subjected to the hell of circumcision and infibulation, which involves the slicing off of the labia and clitoris, often with a sharp stone, and then the stitching up of the vaginal opening, not to be removed until it is broken

⁸⁶ Sander L Gilman, "'Barbaric' Rituals?" in Joshua Cohen, Matthew Howard, and Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 53 at 56.

⁸⁷ Obiajulu Nnamuchi, "'Circumcision' or 'Mutilation'? Voluntary or Forced Excision?: Extricating the Ethical and Legal Issues in Female Genital Ritual" (2012) 25 *JL & Health* 85 at 86.

⁸⁸ Cook, Dickens & Fathalla, *supra* note 18 at 282.

by male force on the wedding night.”⁸⁹ A more academic description is more graphic but no less concerning:

Three versions of [female genital ritual] are commonly practiced. In type I (a clitoridectomy), the clitoris and/or clitoral hood is partially or totally removed. Type II (excision) involves the partial or total removal of the clitoris and the labia minora, with or without the removal of the labia majora. Type III (infibulation or pharaonic circumcision) involves cutting the labia minora and/or the labia majora, with or without the removal of the clitoris, followed by stitching and narrowing of the vaginal orifice.⁹⁰

Of course, there is the danger that religion or culture will be essentialized to a monolithic position on these issues, which ignores the potential for internal change and diversity of opinion within these cultures and religions, and can be a potent tool for “othering” groups such as animists or Muslims, where describing either without qualification is vulnerable to “the critique of selectivity, partiality, and incompleteness” especially, in the case of Islam, “given the vast corpus of Islamic intellectual debates over centuries, ranging across the fields of philosophy, theology, law, and ethics.”⁹¹ In addition, “[I]nking female circumcision to Islamic philosophy and instruction has proven quite dubious. If Islam is indeed the foundation of female circumcision, how can we explain the persistence of the tradition among non-Muslim peoples who embrace it with equal ardor and enthusiasm?”⁹²

International and national law can help restore not only agency to women and societies, but can balance between parental, cultural, and religious beliefs with “universal” standards of human rights. As seen in other areas of private sexual ordering, purely coercive law, or law whose basic premises are not accepted, will face significant and potentially fatal obstacles to enforcement: “outsiders’ attempts to reconceptualise the practice [of cutting] as unnecessary, unjustifiable, or harmful have proved largely unfruitful. Even in countries that have been successfully goaded

⁸⁹ Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (Toronto: Emblem, 2008) at 50.

⁹⁰ Nnamuchi, *supra* note 87 at 91.

⁹¹ Anver Emon, “Islamic Theology and Moral Agency: Beyond the Pre- and Post-Modern” in Natasha Bakht, ed, *Belonging and Banishment: Being Muslim in Canada* (Toronto: TSAR Books, 2008) 51 at 52.

⁹² Abusharaf, *supra* note 84 at 2.

into criminalizing the procedure, often by external forces, compliance has not matched expectation.”⁹³ This is coupled with an ability to accuse international law of cultural hypocrisy:

Many cultures, including the West, condone practices that are painful, medically unnecessary, and create health risks to girls and women. For example, human rights activists and scholars are not attempting to prevent women from ‘going under the knife,’ bleaching skin, and tanning, yet these procedures have led to severe medical complications, including death.⁹⁴

Yet international law clearly has statements on female genital cutting, which if its propositions that cutting is unjustifiably harmful are accepted, prohibit the practice: “the Universal Declaration of Human Rights protects the right to good health...clearly infringed by the severe health implications of FGM...the Convention on the Rights of the Child...protects the right to good health and the right to freedom from physical violence and maltreatment, torture and inhuman or degrading treatment.”⁹⁵ Moreover, the practice assuredly falls foul of multiple sections of the *Convention on the Elimination of All Forms of Discrimination Against Women*,⁹⁶ particularly Article 5(a), which commits State parties to eliminate “practices which are based on the idea of the inferiority...of either of the sexes or on stereotyped roles for men and women.”⁹⁷ If the harm alleged is accepted, it is almost impossible to argue against Long’s conclusion that “FGM should not be allowed under an universal human rights analysis.”⁹⁸

Yet, as demonstrated by international rights documents’ confused and ideological stances on polygamy and prostitution, there are good reasons to be sceptical of any blanket pronouncements made by the international community, especially where its “common sense” approach to matters is imposed on dissenting societies, cultures, or minorities. While this scepticism should not be determinative, the concept of harm invoked to justify bans on

⁹³ Nnamuchi, *supra* note 87 at 86-87.

⁹⁴ Mitchum, *supra* note 85 at 606.

⁹⁵ Sarah Long, “Multiculturalism and Female Genital Mutilation” (2004) 2004 UCL Jurisprudence Rev 169 and 176.

⁹⁶ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [CEDAW].

⁹⁷ *Ibid* at Article 5(a).

⁹⁸ Long, *supra* note 95 at 176.

supposedly discriminatory practices such as cutting is permanently chimerical: while cutting is perhaps less controversial than other examples of private sexual ordering, it must be remembered that “among communities and cultures in which mothers seek circumcision of their daughters, the practice is seen to signify purification.”⁹⁹

An appropriate balance must be sought between the legal conceptions of “universal” human rights and a recognition that “the fact that the practice is alien to Westerners does not *ipso facto* make it morally wrong.”¹⁰⁰ Some guidelines for an appropriate balance could come from Bhabha’s emphasis on a system where “the best possible efforts are made to understand practices from the perspective of the person and group at issue.”¹⁰¹ This bolsters the conclusion that “[a]n absolute ban may...be deemed too blunt an instrument to guard against the identified harms of female genital cutting,”¹⁰² but any concrete policy choices will fail unless they affirm the agency of all stakeholders in the debate. Macklin persuasively argues for the importance of a solution that “will promote and enhance the dignity of individuals and of the community as a whole.”¹⁰³ In the case of FGM, this likely means recognizing an individual’s autonomy unless there are compelling reasons (such as age) not to do so, while at the same time “female circumcision should be critiqued on the basis of the associated health risks and human rights violations”¹⁰⁴ that may occur.

The physical harm created by cutting is important, but is not necessarily determinative: “[r]itual circumcision [of men], tattooing, ear-piercing and violent sports including boxing are

⁹⁹ Cook, Dickens & Fathalla, *supra* note 18 at 282.

¹⁰⁰ Nnamuchi, *supra* note 87 at 96.

¹⁰¹ Faisal Bhabha, “Between Exclusion and Assimilation: Experimentalizing Multiculturalism” (2009) 54 McGill LJ 45 at 72.

¹⁰² *Ibid* at 73.

¹⁰³ Audrey Macklin, “The Double-Edged Sword: Using the Criminal Law Against Female Genital Mutilation in Canada” in Rogaia Mustafa Abusharaf, ed, *Female Circumcision: Multicultural Perspectives* (Philadelphia, PA: University of Pennsylvania Press, 2006) 207 at 223.

¹⁰⁴ Mary Nyangweso Wangila, *Female Circumcision: The Interplay of Religion, Culture, and Gender in Kenya* (Maryknoll, NY: Orbis Books, 2007) at 67.

lawful activities.”¹⁰⁵ The analogy is apt so far as both practices represent potential “mutilation” to the body and may be undertaken with society’s approval or at least tacit consent. Regarding circumcision of men, the practice performed upon a child is not consented to, raising the problematic question of how these “approved” activities differ from the “disapproved” one of cutting. The law must be wary of contributing to a situation wherein the attempted solution perpetuates “the four basic arguments that have been used to justify... ‘interventions’ by the ‘civilized’ in the modern world into ‘noncivilized’ zones---the barbarity of the others, ending practices that violate universal values, the defense of innocents against the cruel others, and making it possible to spread the universal values.”¹⁰⁶

Another way law allows the regulation of female sexuality into “acceptable” forms is by sanctioning, or allowing, the practice of early marriage. This practice is, as with female genital cutting, widespread internationally:

In the Indian state of Rajasthan...a 1993 survey of 5,000 women revealed that 56 per cent had married before age 15...[a] 1998 survey in Madhya Pradesh found that nearly 14 per cent of girls were married between the ages of 10 and 14. In Ethiopia and in parts of West Africa, marriage at seven or eight is not uncommon... Virtually everywhere, poor women in rural areas tend to marry younger than those in urban areas, and educational levels also play a critical role. An examination of the timing of marriage and the level of education...shows consistently higher percentages of women with at least seven years of schooling marrying at age 20 or above.¹⁰⁷

Whether the marriages are sexual at initiation or not is immaterial: the practice represents an attempt to keep women from exploring or experiencing any unapproved-of sexual activity, depersonifies the girls and women affected, and understandably inspires *CEDAW*’s Article 16(2), which provides that “[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and

¹⁰⁵ *R v Brown*, [1993] All ER 75 (HL) at 79.

¹⁰⁶ Immanuel Wallerstein, *European Universalism: The Rhetoric of Power* (New York: The New Press, 2006) at 6.

¹⁰⁷ United Nations Children’s Fund Innocenti Research Centre, *Early Marriage: Child Spouses* (Florence, Italy: March 2001), online: <<http://www.unicef-irc.org/publications/pdf/digest7e.pdf>> at 4-5.

to make the registration of marriages in an official registry compulsory.”¹⁰⁸ However, laws regulating practices must proceed with caution to ensure effectiveness, for as Bunting notes, “[a] low level of socio-economic development appears to be the strongest indicator of early age at first marriage. Thus, as I have argued, while there are varying cultural dynamics concerning marriage age around the globe, these variations can often be tied to economic dynamics.¹⁰⁹ Legal regulation will need to address the economic incentives for early marriage in addition to enumerating its perceived harms.

Since early marriage threatens a woman’s autonomy and her reproductive rights, it seemingly represents a check against full equality between women and men. Nonetheless, as with all other areas of private sexual ordering, one should not immediately proceed to conclusions against practices, cultures, or religions, without an examination of context and agency. Bunting outlines the problem persuasively in arguing that, “it is essential to challenge simplistic portrayals of ‘child brides’ and ‘child marriage,’”¹¹⁰ so that the issue may be tackled with sensitivity, a lack of cultural chauvinism, and with acceptable outcomes for all stakeholders.

Legislating Female Sexual Health

So far, this chapter has discussed discrete issues: contraception and abortion, ARTs, female genital cutting, and early marriage. I now turn to the somewhat more amorphous topic of women’s health. This includes all aspects of a woman’s health specifically linked to a woman’s unique reproductive capacity: that is, medical issues linked to female sexuality which do not arise for men. As a result of this uniqueness, such issues are often ignored or downgraded. Law can provide an ally in the fight against discrimination or an accomplice to it. The legal regulation of female private sexual ordering also touches upon the area of women’s sexual and reproductive

¹⁰⁸ CEDAW, *supra* note 96 at Art 16(2).

¹⁰⁹ Annie Bunting, “Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue” (2005) 14 Soc & Leg Stud 17 at 34.

¹¹⁰ *Ibid.*

health, which ranges from pregnancy (contraception, and abortion) to sexually transmitted infections. The law in this area has been influenced by not only the medical profession but also society, allowing discrimination such as this:

Until the early twentieth century, a dominant perception among health professionals was that women were child-like in emotional quality and intellectual capacity. Doctors and lay reformers agreed that knowledge about such matters as venereal disease and sexuality was deemed to be unsuitable for women, as it was for children. Physicians and other experts held that the typical woman was too 'virtuous' to discuss questions of sex and sexuality, and hence needed to be spared the experience of being exposed to such 'salacious' topics. Many claimed that knowledge of this kind was likely to put a woman in danger, as too much knowledge would corrupt her innocence and entice her into a life of promiscuity, vice, and disease.¹¹¹

While ideally law should not interfere with medicine, the need to ensure that processes which relate only to women's sexuality are treated on an equal footing with men's sexual health mean that medical care is unavoidably gendered. This has the potential for deleterious effects, as Gruben illustrates in a discussion of problems (such as lack of informed consent and follow-up care) with the human ovum-donation laws of Canada: "one cannot overlook the fact that egg production is a gendered practice. As such, the concerns raised in this article are unique to women and thus may receive short shrift because they do not affect men."¹¹² Cook builds on this: "[g]ender is a social determinant of health[,] as are restrictive laws and policies. Research shows that the burden of restrictive sexual and reproductive health laws is borne disproportionately by different subgroups of women, for example by adolescents, by rural residents, or racial groups."¹¹³ The commonality is the female sex, with other disadvantages predicated upon that first status. However, such gender-specific discrimination can be combatted by law. This is illustrated by recently promulgated anti-violence laws in the nations of Mexico, Guatemala, Costa Rica, Colombia, Argentina, and Venezuela designed to specifically protect women, which

¹¹¹ Renisa Mawani, "Regulating the 'Respectable' Classes: Venereal Disease, Gender, and Public Health Initiatives in Canada, 1914-35" in John McLaren, Robert Menzies, & Dorothy E Chunn, eds, *Regulating Lives: Historical Essays on the State, Society, the Individual, and the Law* (Toronto: UBC Press, 2002) 170 at 184.

¹¹² Vanessa Gruben, "Women as Patients, Not Spare Parts: Examining the Relationship between the Physician and Women Egg Providers" (2013) 25:2 CJWL 249 at 254.

¹¹³ Rebecca J Cook, "Modern Day Inquisitions" (2011) 65:3 U Miami L Rev 767 at 789-790.

specifically address and outlaw “obstetric violence” while guaranteeing “reproductive freedom”¹¹⁴ for women. By recognizing the connection between gendered medical treatment, force, and patriarchal dominance, law has the ability to rectify the situation.

Unfortunately, law on sexual health can also be used to maintain disparate impacts of health based on gender. This can be seen in the regulation of pregnancy-related issues, where rights of “children” can overcome rights of a pregnant woman: “[t]he highest courts in Argentina, Chile, and, for example, Ecuador have prohibited the use of [emergency contraception] because of its alleged action after the union of the sperm and the egg, thus offending the right to life as beginning from conception.”¹¹⁵ In addition to shifting the focus from a woman’s reproductive health to her status as pregnant or ability to become pregnant, law can protect the desires of medical professionals to act against their medical expertise in matters of “conscience.”

The right of conscience is being invoked in the reproductive and sexual health field by pharmacists not to fill prescriptions for contraception, by doctors not to treat ectopic pregnancies until the tube ruptures[,] not to perform abortions in emergencies, not to perform lawful abortions, and by anesthesiologists not to provide anesthesia, leaving pregnant women to endure the pain of undergoing lawful abortions, or early induction of labor of an anencephalic fetus, without the benefit of anesthesia.¹¹⁶

Despite the issue of the freedom of conscience of professionals as a complex and multifactorial issue, Cook disagrees with the position that conscientious objection should trump reproductive assistance: “this refusal infringes the rights of women to receive lawful services. Health care providers are professionals and have professional and ethical duties to consider first the well-being of the patient. Why is it that firefighters are not allowed to choose the burning houses they rescue, while health care providers may choose the patients they treat?”¹¹⁷

¹¹⁴ Susana Chiarotti Boero, “Women’s Citizen Security” (2011) 65:3 U Miami L Rev 797 at 811-812.

¹¹⁵ Cook, *supra* note 113 at 780-781.

¹¹⁶ *Ibid* at 777-778.

¹¹⁷ *Ibid* at 778.

Ancillary Issues in the Legal Regulation of Female Sexuality

The term “ancillary” is deliberately chosen: the etymology of ancillary is the Latin term *ancilla*, translating to “slave girl.” The inferiority and secondary nature of the feminine is thus even implicitly embedded into discourse. This section will explore three specific issues: the issue of feminine “modesty,” which incorporates legal repression of female bodies, both in society and through depictions, the economic issues incorporated into a (still sexed) conception of family, and finally, the discussion of the interplay between two disadvantaged groups in society: the LGBTQI community and women. Throughout all of these issues of private sexual ordering, the “golden thread” of legal misogyny appears, controlling and repressing the feminine in issues which touch upon sexual ordering.

The regulation of women’s clothing is nothing new, as discussed by Ahmed in the context of Christianity:

The shamefulness of sex was focused most intensely on the shamefulness of the female body, which had to be totally concealed (the Syrian reliefs showing a woman so heavily swathed that no part of her, not even hands or face, is uncovered date from the early Christian era). Such ideas also meant that men had to avoid contact with women, even flee from them. Merely seeing a woman represented a danger-- and therefore the veil, concealing clothing, and strict segregation became increasingly emphasized.¹¹⁸

Where modesty laws occur, as they do in every modern jurisdiction to at least a certain extent, they are gendered and reproduce the othering of the feminine: “[s]exual modesty...is aggressively enforced through coercive laws...It happens that in many societies the requirements of sexual modesty differ for men and women. Acts that would be immodest for women would not be immodest for men.”¹¹⁹ While restrictions on women’s dress occur worldwide and represent a troubling imposition on the ability of women to display their body as they choose, it should be remembered when decrying the imposition of modesty that these laws are truly universal: Allen uses the example of a major American breach of modesty: “[i]t was considered

¹¹⁸ Ahmed, *supra* note 4 at 35.

¹¹⁹ Anita L Allen, “Disrobed: The Constitution of Modesty” (2006) 51:4 Vill L Rev 841 at 845.

indecent by many Americans for pop star Justin Timberlake to rip performer Janet Jackson's shirt, exposing one of her breasts to millions of Super Bowl football fans. But it would have been no big deal had Janet ripped Justin's shirt to reveal his chest, even if he had had a flabby set of male breasts."¹²⁰ While recommendations will be made in the next chapter, here I would simply comment that each society has some sort of dress code: while some privilege the male over female form, or attempt to hide female sexuality behind clothing, law may justifiably protect anyone from being forced to wear clothing: it should not necessarily stop people who choose to wear clothing others wish them to wear.

However, the repression of female sexuality with respect to clothing is characterized by a double-standard: law forces women at once to cover up and disrobe. The choice is removed from women who wish to wear veiled clothing, denying them the ability to make personal decisions as to how to dress. This phenomenon has been documented by Bakht, who persuasively critiques law's underlying belief that "imperilled Muslim women are victims of a gender oppressive religion. They are in need of protection from 'dangerous Muslim men' and 'civilized Europeans' are the ideal group to rescue these passive women and girls who are unable to help themselves"¹²¹ by taking off their clothing of choice.

This repression of how women wish to portray themselves in public by using the law to literally strip them has been employed in several recent cases. First, European jurisdictions have successfully banned full face-covering in the Islamic dress of the burqa and niqab: "France and Belgium passed general bans against covering the face in public in 2010 and 2011,

¹²⁰ *Ibid.*

¹²¹ Natasha Bakht, "Victim or Aggressor? Typecasting Muslim Women for their Attire" in Natasha Bakht, ed, *Belonging and Banishment: Being Muslim in Canada* (Toronto: TSAR Books, 2008) 105 at 112.

respectively”¹²² and other jurisdictions are sympathetic to this goal, “The Netherlands, Norway, Spain, and several states of Australia have all introduced measures imposing fines or other penalties for wearing face-veils in any public space.”¹²³ Secondly, a recent attempt by the province of Quebec to ban “conspicuous” religious symbols (which would theoretically be applied to all people, but which would disproportionately impact women wearing hijabs and niqabs, the major group compelled to wear distinctive clothing and the clear target of the law¹²⁴) failed only when the government was defeated in an election, likely on other grounds.¹²⁵ Finally, three common law jurisdictions have recently demonstrated antipathy to the equal participation of women who dress in a certain manner. American courts have refused the ability for women to testify while wearing face coverings,¹²⁶ and in one case refused admission to the courtroom to a woman wearing a hijab¹²⁷ (which does not even cover the face). In *R v NS*,¹²⁸ the Supreme Court of Canada denied the request of a niqabi woman to testify about her alleged sexual assault while

¹²² Evan Darwin Winet, “Face-Veil Bans and Anti-Mask Laws: State Interests and the Right to Cover the Face” (2012) 35 *Hastings Intl & Comp L Rev* 217 at 217-218.

¹²³ *Ibid* at 218.

¹²⁴ See, for example, Don Murray, “Quebec charter of values plan could take a few pages from France” *CBC News* (12 September 2013), online: <<http://www.cbc.ca/news/canada/quebec-charter-of-values-plan-could-take-a-few-pages-from-france-don-murray-1.1701681>>.

¹²⁵ See, for example, Joseph Brean, “PQ campaign derailed when star candidate Péladeau made Quebec’s election about sovereignty” *National Post* (7 April 2014), online: <<http://news.nationalpost.com/2014/04/07/pq-campaign-derailed-when-star-candidate-peladeau-made-quebecs-election-about-sovereignty/>>.

¹²⁶ *Muhammad v Enterprise Rent-A-Car*, Docket No 06-41896-GC (Mich 31st Dist Ct, 11 October 2006).

¹²⁷ Daniel Nasaw, “Georgia judge jails Muslim woman for wearing headscarf to court” *The Guardian* (17 December 2008), online: <<http://www.theguardian.com/world/2008/dec/17/georgia-headscarf-courtroom-rolls>>. This also occurred in 2015, when a woman wearing a hijab was denied entry to a courtroom in Quebec for a routine matter. See Steve Rukavina, “Quebec judge wouldn’t hear case of woman wearing hijab” (26 February 2015), Canadian Broadcasting Corporation, online: <http://www.cbc.ca/news/canada/montreal/quebec-judge-wouldn-t-hear-case-of-woman-wearing-hijab-1.2974282>>. On the political front, Canadian Prime Minister Stephen Harper has called a woman desiring to wear a niqab while being sworn in as a Canadian citizen “offensive” and contrasting the practice with “[t]his is a society that is transparent, open, and where people are equal” (Morgan Lowrie, “Harper says Ottawa will appeal ruling allowing veiling during citizenship oath” (12 February 2015) *The Canadian Press*, online: <http://www.globeandmail.com/news/national/harper-says-ottawa-will-appeal-ruling-allowing-veil-during-citizenship-oath/article22979142/>>) and Australian Prime Minister Tony Abbott has called wearing the burqa “a fairly confronting form of attire” and stated “I wish it was not worn” (Emma Griffiths, “Prime Minister Tony Abbott reveals he wishes the burka ‘was not worn’ in Australia” (1 October 2014) *Australian Broadcasting Corporation*, online: <<http://www.abc.net.au/news/2014-10-01/abbott-says-he-wishes-the-burka-was-not-worn-in-australia/5782008>>).

¹²⁸ 2012 SCC 72. Judgments were delivered by McLachlin CJC (writing for the majority), LeBel J (a concurrence), and Abella J (dissenting).

wearing the veil. The majority phrased the denial of NS's ability to testify as a balancing test and remitted the matter to a lower court judge to re-adjudicate, but unsurprisingly, permission was denied.¹²⁹ Finally, citing *NS*, a 2013 British Case, *The Queen v D(R)*,¹³⁰ denied an accused woman the ability to testify while wearing the niqab: that woman, Rebekah Dawson, later pleaded guilty¹³¹ (possibly the result of the denial of her ability to testify as desired).

These cases may seem to have little in common with the law of private sexual ordering. However, the presentation of the feminine is inextricably caught up with the law, in these cases, determining what women can and cannot wear. Just as law plays a role in covering the female body, in these cases the law has denied the right to women to participate in the legal process, forcing them to remove their clothing over their objections regarding what they feel appropriate to wear. Narain notes the

importance of placing women at the centre of analysis and [the questioning of culture which] seeks to recover women's agency. Such questioning allows the possibility of viewing the wearing of the veil or *niqab* as a mode of female resistance and agency. It may be seen as an assertion of women's identity and autonomy and their resistance and challenge within the wider political context.¹³²

Even if a woman's choice of clothing has nothing to do with dialogue, resistance, and political issues, it is nevertheless an ontological choice which reflects beliefs about sexuality and the way in which a woman wants to engage with the world. By denying women the right to portray themselves in the way they want, the law is essentially forcing them to be "free," a dangerous choice mirrored in the legal treatments of polygamy and prostitution.

The law's intrusion into female private sexual ordering is also seen in the issue of economic disadvantages placed onto women. Interesting work has been done on the

¹²⁹ *NS v R*, 2013 ONSC 7019.

¹³⁰ [2013] Blackfriar's Crown Court (16 September 2013), per Murphy J.

¹³¹ Mary Dejevsky, "Beyond the veil: What happened after Rebekah Dawson refused to take off her niqab in court" (7 April 2014) *The Independent*, online: < <http://www.independent.co.uk/news/uk/home-news/beyond-the-veil-what-happened-after-rebekah-dawson-refused-to-take-her-niqab-off-in-court-9244409.html>>.

¹³² Vrinda Narain, "Taking 'Culture' out of Multiculturalism" (2014) 26 *CJWL* 116 at 151.

“feminization of poverty,” whereby women who separate from men experience economic disadvantage disproportionate to the disadvantage (or even advantage) subsequently enjoyed by the man.¹³³ Additionally, division of economic power and responsibility during a relationship can be shaped by law into an unfair system which impacts on female sexual ordering: “the difference in wage-earning capacity between men and women gives men more resources with which to deal with the world, and this in turn affects dynamics within the family.”¹³⁴ Moreover, “[b]ecause uninterrupted time in the work force increases one’s potential earning power, wives who stay out of the paid labor force for a number of years fall behind. This diminishes their decision-making authority within marriage and their ability to leave an unsatisfactory union.”¹³⁵ There are abilities to counteract this problem, such as Ertman’s suggestions regarding “Premarital Security Agreements,” which have the potential to “subvert compulsory heterosexuality by making many women in marriage more economically powerful (and thus expanding female exit options).”¹³⁶ As with issues about female clothing and society, this may seem to be tangential to the issue of private sexual ordering, but upon closer inspection, the ability of women to choose how and when to enter relationships (and resisting not only “compulsory heterosexuality” but also compulsory coupling or compulsory reproduction) is intimately tied to female sexual ordering. As long as society and law remain complacent towards a sexual division of labour and a wage gap between men and women, let alone the feminization of poverty, the law will be complicit in a repression of female private sexual ordering.

¹³³ For an overview of research on the topic see Mary Jane Mossman, *Families and the Law: Cases and Commentary*, 1st Captus edition (Concord, ON: Captus Press, 2012) at 336 and following, especially the discussion at 337 of a study which concluded that “there was a small rise in men’s economic well-being, while women experienced a 40 percent drop in theirs” (citing Ross Finnie, “Women, Men, and the Economic Consequences of Divorce: Evidence from the Canadian Longitudinal Data” (1993) 30:2 *Can Rev Sociology & Anthropology* 205).

¹³⁴ Mary Lyndon Shanley, “Just Marriage: On the Public Importance of Private Unions” in Joshua Cohen & Deborah Chasman, eds, *Just Marriage* (New York: Oxford University Press, 2004) 3 at 21.

¹³⁵ *Ibid* at 21-22.

¹³⁶ Martha M Ertman, “Reconstructing Marriage: An InterSEXional Approach” (1998) 75:4 *Denv UL Rev* 1215 at 1229.

Finally, interesting intersectional opportunities exist between legal issues affecting the LGBTQI community and issues affecting women. Both groups are viewed with suspicion by law, and both are engaged in ontological struggles against a patriarchal and heteronormative system. The connection between the two groups is illustrated by Fowler: “numerous scholars agree that marriage law in general has been a site for the production of normative citizenship and a key mechanism by which Western governments can produce a heterosexual, gendered, and racialized citizenry.”¹³⁷ In other words, law is used to shape compliant citizens, and both feminist and queer theory critiques share the need to destabilize this creation. Both groups support increased ability to privately order and increased options open to individuals regarding sexual ordering:

Since living together outside of marriage is a socially acceptable arrangement today for so many couples---heterosexual as well as lesbian and gay---the regime of marriage offers a package that can be taken as a whole or rejected in favor of the alternative state of unmarried coupledness, with its different, less pervasive set of rules. The case I have tried to make for gay and lesbian couples is that they need these opportunities and choices to much the same degree that heterosexual couples do.¹³⁸

The argument here is not that marriage is a perfect institution, but that both groups have the goal of expanding marriage and its opportunities, as well as providing maximum flexibility to those entering the institution.

Moreover, women’s rights intersect with a doubly-disadvantaged group: lesbian women, who bear the historical legal stigma of misogyny and homophobia. In Lahey’s experience, “[i]ssues of race, class, gender, and sexuality tended to isolate lesbian women who became involved in either feminist or gay(/lesbian) groups, leaving lesbian feminists with the choice of struggling against (non-lesbian) feminist hegemony to gain feminist support for lesbian issues, or

¹³⁷ Erin Fowler, “A Queer Critique on the Polygamy Debate in Canada: Law, Culture, and Diversity” (2012) 21 Dal J Leg Stud 93 at 105.

¹³⁸ David L Chambers, “What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples” (1996) 95:2 Mich L Rev 447 at 486.

struggling for gay support for lesbian issues.”¹³⁹ While this experience is historical and most likely does not reflect the situation today, the experience emphasizes that groups may not share complete agendas and in fact may have competing interests or views. By highlighting the shared interests and aspirations of sexual minorities and women, this intersectionality is strengthened and a place is provided for all women, not simply those who fit specific characteristics. The shared issues between the communities include the need for fluidity and flexibility, and both can help to destabilize hierarchies of power and celebrate contingencies and differences within society: “variation is a fundamental property of all life, from the simplest biological organisms to the most complex human social formations. Yet sexuality is supposed to conform to a single standard. One of the most tenacious ideas about sex is that there is one best way to do it, and that everyone should do it that way.”¹⁴⁰ By problematizing patriarchy and heteronormativity, issues relating to each separate strand of ontology, namely the feminist and LGBTQI movements, are useful parallels to the other.

Conclusion

Female sexual behaviour is tied up with concurrent “social circumstances” which include “the domination of men over the public sphere[,] the double standard[,] the associated schism of women into pure (marriageable) and impure (prostitutes, harlots, concubines, witches)[,] the understanding of sexual difference as given by God, nature or biology[,] the problematizing of women as opaque or irrational in their desires or actions[, and] the sexual division of labour.”¹⁴¹ This survey of means in which law regulates female sexuality, both overtly and covertly, leads to the conclusion that no one-size-fits-all characterization exists in how law governs the female

¹³⁹ Lahey, *supra* note 20 at 36.

¹⁴⁰ Gayle S Rubin, “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality” in Carole Vance, ed *Pleasure and Danger: Exploring Female Sexuality* (London: Routledge and Keegan Paul, 1984) 143 at 153-154.

¹⁴¹ Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford, CA: Stanford University Press, 1992) at 11.

sexual citizen. Rather, the governance is at the systemic level, and imposes a sometimes philosophical, sometimes religious patriarchy onto all instances of female sexuality:

[M]odern day inquisitions are attempts to secure the supremacy of fundamentalist religions and their hierarchies in matters of gender, sexuality, and reproduction. The modern day inquisitions jeopardize academic freedoms of researchers, such as those whose scholarship focuses on reproductive health law and ethics, and use hostile stereotypes and social condemnation, among other mechanisms, to control sexuality and reproduction and to privilege male dominance.¹⁴²

Similarly to an attempt to impose religio-moral considerations on the issue of female sexuality, female sexuality plays a sometimes silent part in legal regulation of debates on reproductive freedom: “much opposition to abortion seems rooted in a belief that abortion encourages or excuses women’s sexual irresponsibility. [This view sees a]bortion [as] an easy way out for licentious or rash behavior.”¹⁴³

Cook’s “inquisitions” have been shown in this chapter to operate in diverse areas, influencing, from their historical, religious, and philosophical roots, the regulation of female sexual desire, female sexual health, and the multiple varieties of ways in which female sexuality is buried beneath “modesty” and “permitted” interaction with power. From overt female sexuality to reproductive rights to other issues touching on female sexual “modesty,” law treats women’s private sexual ordering differently from men’s, in a way which validates Eisenstein’s comment that law divides into two cases: where “women have to be seen as like men in order to be treated as equal to them,” or where “sex/gender-specific law regards woman as the special case, man as the general case.”¹⁴⁴

The obvious follow-up question is how to engage with these ongoing discourses, and whether solutions exist to either inoculate the law from patriarchy, or whether law is needed in these areas at all. From a feminist perspective, the “twin focus on freedom and equality means

¹⁴² Cook, *supra* note 113 at 768.

¹⁴³ Borgmann, *supra* note 50 at 1308-1309.

¹⁴⁴ Eisenstein, *supra* note 19 at 205.

that no one legal stance--- interventionist or non-interventionist---can ever be presumptively correct without careful analysis of the power relationships at play in a particular regulatory context.”¹⁴⁵ A pattern can be seen from an examination of law’s role in regulating female private sexual ordering, a pattern of delegitimization and in some cases, depersonification. Law is required to protect against societal influences which may outlast legal patriarchy. Yet it appears obvious that “the removal of the sexual double standard provides predominantly women...with the empowerment to experience sexual life beyond the accepted norm portrayed by popular media.”¹⁴⁶ This provides a goal for law, in removing barriers to the full expression of female sexuality, whatever the source of these barriers. I will now turn to discuss recommendations for potential courses of legal action in the area of female private sexual ordering.

¹⁴⁵ Martha Chamallas, “Consent, Equality, and the Legal Control of Sexual Conduct” (1988) 61:4 S Cal L Rev 777 at 862.

¹⁴⁶ Dee McDonald, “Swinging: Pushing the Boundaries of Monogamy?” in Meg Barker & Darren Langdrige, eds, *Understanding Non-Monogamies* (New York: Routledge, 2012) 70 at 79.

CHAPTER IX

The “Other” Part of Humanity

Law’s regulation of the female sexual body transcends specific issues and goes to the root of the female body/bodies themselves. Judith Butler asked whether there is

a political shape to “women,” as it were, that precedes and prefigures the political elaboration of their interests and epistemic point of view? How is that identity shaped, and is it a political shaping that takes the very morphology and boundary of the sexed body as the ground, surface, or site of cultural inscription? What circumscribes that site as the “female body”? Is “the body” or “the sexed body” the firm foundation on which gender and systems of compulsory sexuality operate? Or is “the body” itself shaped by political forces with strategic interests in keeping that body bounded and constituted by the markers of sex?¹

The study of the legal regulation of private sexual ordering suggests answers to these questions and in those answers provides bases for reform. Female sexuality is an identity shaped by legal and societal factors, designed to engender “systems of compulsory sexuality.” Like any other type of repression, law can provide a powerful tool to guarantee individual and collective freedom, at the same time as removing itself as a tool binding and constituting the female body by the “markers of sex,” historically predicated upon the illusion of “the fickleness of spirit and indiscretions of our women.”² But in responding to and resisting legal patriarchy, all female voices must be respected, so as to avoid the dangerous idea that “[n]o one could really want to undertake such rituals or have them done to their offspring, and therefore it is clear that women who might advocate them are ‘brainwashed.’ And in this state they require someone else to speak for them.”³ Women’s rights cannot be achieved by denying dissenting women rights.

The issues enumerated in the previous chapter, polygamy and sex work, resist any easy legal solution. As with those issues, solutions for legal overregulation of female sexuality are necessarily contextual as problems appear in multiple contexts. However, the present situation,

¹ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999) at 164.

² Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, translated by Anne M Cohler, Basia Carolyn Miller, & Harold Samuel Stone, eds (New York: Cambridge University Press, 1997) at 270.

³ Sander L Gilman, “‘Barbaric’ Rituals?” in Joshua Cohen, Matthew Howard, and Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 53 at 54. Gilman, who is specifically discussing female genital cutting, is speaking satirically here.

where law can relegate women to second-class citizenship in terms of making choices about private sexual ordering, is unsatisfactory. While acknowledging the relativism inherent in securing equality, law must not shy away from “the impossibility of considering human rights without evaluating and critiquing cultural norms, be it religious, moral, or psychosexual.”⁴ De Beauvoir’s identification of the roots of female disempowerment in the Christian religion are still applicable to gendered legal discrimination: “[s]ince woman never stopped being Other, of course, male and female are never reciprocally considered flesh: the flesh for the Christian male is the enemy Other and is not distinguished from woman. The temptations of the earth, sex, and the devil are incarnated in her.”⁵ Since it is only minor overstatement to argue “[s]exual and reproductive well-being is the wellspring for all dimensions of our lives-physical, material and psychological,”⁶ the issue of women’s private sexual ordering becomes an issue of women’s cumulative well-being and commensurately increases in importance.

Reforms must be undertaken across national law, as well as in international legal structures, to ensure that all people, regardless of sex and gender, can enjoy the same rights and abilities to determine their conjugal situations. This is particularly important when law ensures free choice and opportunity for women: “[f]eminism construed as a politics of difference...argues that real equality and freedom for women entail attending to both embodied, socialized, and institutional sex and gender differences in order to ensure that women...do not bear unfair costs of institutional assumptions about what women...are or ought to be doing.”⁷

⁴ Preston D Mitchum, “Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance, and Health as a Human Rights Framework” (2013) 19:3 *Wm & Mary J Women & L* 585 at 607.

⁵ Simone de Beauvoir, *The Second Sex*, translated by Constance Borde & Sheila Malovany-Chevallier (New York: Vintage Books, 2011) at 186.

⁶ Andrea Cornwall and Alice Welbourn, “Introduction: Realizing Rights: Transforming Approaches to Sexual and Reproductive Well-being” in Andrea Cornwall & Alice Welbourn, eds, *Realizing Rights: Transforming Approaches to Sexual and Reproductive Well-being* (New York: Zed Press, 2002) 1 at 2.

⁷ Iris Marion Young, “Structural injustice and the politics of difference” in Anthony Simon Laden & David Owen, eds, *Multiculturalism and Political Theory* (New York: Cambridge University Press, 2007) 60 at 73.

Where implicated in coercion against women, this legal reform needs to focus on issues such as enforced modesty, access to sexual healthcare, and a principled discussion of reproductive rights. Wallerstein identifies the modern era as representing an “era of transition, [where] the importance of fundamental choice has become more acute even as the meaningfulness of individual contributions to that collective choice has grown immeasurably.”⁸ Law can contribute to this transition’s application to female private sexual ordering, while resisting “a singleminded, unidirectional programme of reform where the Self appropriates the power to instruct Others.”⁹

No less important is a discussion in nations which have developed new reproductive technologies. Such technologies can be conceptually tied to the buttressing of social advances legalizing abortion and contraception, and as such the technologies can problematize the role law plays in sexual double-standards applied to women. The threat of legal gains being taken away, of “a renewed assault on abortion rights, widely available contraception and sexual health programmes, a revived sexual puritanism and a return to the notion of the ‘dignity’ of marriage as the only vehicle for childrearing,”¹⁰ is potent and can never be extinguished no matter how strong the legal protection. This ability to alter law (arguably a fundamental requisite for a democratic polity) means that rights to female sexual autonomy must be zealously guarded, and if possible, enshrined in inalienable rights guarantees. This approach results in benefits to both individual women and the social system: “[o]nly through respect for reproductive autonomy can

⁸ Immanuel Wallerstein, *European Universalism: The Rhetoric of Power* (New York: The New Press, 2006) at 81.

⁹ LHM Ling, “Hegemonic Liberalism: Martha Nussbaum, Jorg Haider, and the Struggle for Late Modernity,” paper delivered at the International Studies Association 41st annual convention, Los Angeles, 14-18 March 2000, quoted in Sherene H Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008) at 132 (Razack’s cited weblink no longer works).

¹⁰ Melissa Benn, *What Should We Tell Our Daughters?: The Pressures and Pleasures of Growing Up Female* (London: Hodder & Stoughton, 2013) at 295.

women become full participants in social and civic life, and the ability of all persons to participate as full citizens is ultimately of benefit not just to individuals but to the State itself.”¹¹

Law must remain vigilant against allowing discrimination and violation of inherent human rights to equality and dignity, since “[i]nstitutionalising the principle of autonomy means specifying rights and obligations, which have to be substantive, not just formal. Rights specify the privileges which come with membership of the polity...Rights are essentially forms of empowerment; they are enabling devices.”¹² Law must guarantee women rights over their sexuality even as it recognizes that the legislator is not “the classical giant who almost invariably turns up at revolutionary moments to be given authority to lay the foundations of the free society.”¹³ Free societies have many foundations.

Yet at the same time, law’s use of coercion must recognize not only the relativity inherent in discussions of the “oppression” of women (whether it be through issues such as clothing, modesty, and issues such as female genital cutting or through “harmful” practices such as prostitution and polygamy), but also the contingent and changeable discourses of choice within women’s decisions. This point is made persuasively by Beaman:

Following the recognition of the complex ways in which religion is lived, examining women’s agency in the context of conservative religious traditions requires more than a summary dismissal of them as brainwashed, having false consciousness, or as being doormats. Social scientific research has consistently shown that women in conservative religious groups have a complex understanding of gender roles, women’s oppression and religious demands.¹⁴

Indeed, a reluctance to dismiss any female voice as “brainwashed” or possessing “false consciousness” would seem to be necessary to a humane theory of freedom of religion, thought, and conscience.

¹¹ Erin Nelson, *Law, Policy and Reproductive Autonomy* (Portland, OR: Hart Publishing, 2013) at 73.

¹² Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford, CA: Stanford University Press, 1992) at 187.

¹³ Louis Hartz, *The Liberal Tradition in America* (New York: Thomson Learning, 1991) at 46.

¹⁴ Lori G Beaman, “Overdressed and Underexposed or Underdressed and Overexposed?” (2013) 19:6 *Social Identities* 723 at 731.

As important as human rights are, articulations of them are only “a shared vocabulary from which our arguments can begin, and the bare human minimum from which differing ideas of human flourishing can take root.”¹⁵ Without such a shared vocabulary, the legal imposition of subjective human rights is of little utility. No law which respects religious and conscientious freedom as well as cultural diversity could ignore the voices of those it presumes to protect. Moreover, female sexuality, like the feminine itself, is not monolithic: in terms of universal human rights law, “the UN must first rationalise ‘woman’ before they can develop her.”¹⁶ With respect to female circumcision, “in considering the privileging of one human right over another, we must recall that assumptions about the ‘violence’ of female genital mutilation are made possible through the exclusion of the speech of the communities in the first place.”¹⁷ In the context of legal regulation of the feminine, to claim that “feminism” represents a tangible perspective is highly problematic, as multiple female-positive principles and conclusions are possible, reflecting the diversity of women and societal structure:

[t]he most significant problem with [an] essential feminism is how it doesn’t allow for the complexities of human experience or individuality. There seems to be little room for multiple or discordant points of view. Essential feminism has, for example, led to the rise of the phrase ‘sex-positive feminism,’ which creates a clear distinction between feminists who are positive about sex and feminists who aren’t--- which, in turn, creates a self-fulfilling essentialist prophecy.¹⁸

Internal contestations of what feminism is, and how it should critique sexual law, are compounded by non-feminist, or even anti-feminist, encroachments upon principles of female autonomy. Attacks are common in discourses such as abortion, for example, the premise that “restrict[ing] access to abortion of viable fetuses capable of living independent of the mother” is

¹⁵ Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001) at 95.

¹⁶ Gayatri Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA: Harvard University Press, 1999) at 243.

¹⁷ Juliet Rogers, *Law’s Cut on the Body of Human Rights: Female circumcision, torture and sacred flesh* (Abingdon, UK: Routledge, 2013) at 113.

¹⁸ Roxane Gay, *Bad Feminist* (New York: Harper Perennial, 2014) at 305.

“a relatively modest goal,”¹⁹ or the argument attempting to force legal late abortions to be conducted in hospitals to include actors with “fewer incentives to violate the law or cover up violations by others,”²⁰ which would eliminate medical independence at abortion clinics and create problems in obtaining access to hospital-sited abortion. Arguments with either an ulterior motive (that is, the restriction of abortion) or ignorance of collateral damage to women are a clumsy way for law to regulate sexual behaviour. It is dangerous to impose rights on any group for their “own good,” and law, even with the best of intentions, must simultaneously respect the dynamism within the discourse of women’s rights and reject thinly-veiled attempts to indirectly curtail those rights.

A complete discussion of all instances of the legal regulation of feminine sexuality and the ideal reformation towards principles of female equality and autonomy is beyond the scope of this chapter. However, general principles for the regulation of female sexuality and private ordering may be established through several examples. This chapter will begin by exploring the greater context within which the law seeks a remedy for religio-moral incursions on the ability of women to structure their sexual lives as they wish. I will next address the issues canvassed in the previous chapter, ranging from explicit legal impositions such as contraception and reproductive rights, to matters touching upon female sexuality, from health to the portrayal of the female body. This discussion cannot hope to be comprehensive with respect to all of the legal disabilities and impediments placed upon female sexuality, but it is hoped that, as with the related issues of polygamy and prostitution, a principled method of legal interaction with female sexuality, in the developed, developing, and international legal contexts, can be articulated and

¹⁹ Randy Beck, “Overcoming Barriers to the Protection of Viable Fetuses” (2014) 71:2 Wash & Lee L Rev 1263 at 1295-1296.

²⁰ *Ibid* at 1295.

outlined with a view to tackling further instances of legal sexual misogyny from a solid philosophical basis.

How Should Law Interact with Feminine Sexuality?

The question posed by this title is deceptively simple. A legitimate law must recognize the right of women “on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field,”²¹ and commit itself specifically to ensuring “*the value of women as ends in themselves, independent of reproductive worth.*”²² However, these are goals, or perhaps goalposts, to orient intentions: they do not dictate what, in any specific contexts, to do. Context will be important, as law must initiate beneficial results, not simply proper rhetoric, and must avoid easy characterizations: “[n]o one today is purely *one* thing. Labels like Indian, or woman, or Muslim, or American are not more than starting-points, which if followed into actual experience for only a moment are quickly left behind.”²³ Identities as fluid and shifting allow for contingency in not only “woman” and “sexuality,” but also in law interacting with these mutable ideas. Moreover, the law of human rights, to achieve its stated goal of female equality and autonomy, must exist rhizomically throughout society:

Ideas---religious, moral, practical, aesthetic---must, as Max Weber, among others, never tired of insisting, be carried by powerful social groups to have powerful social effects; someone must revere them, celebrate them, defend them, impose them. They have to be institutionalized in order to find not just an intellectual existence in society, but, so to speak, a material one as well.²⁴

Unlike groups addressed earlier in this dissertation such as polygamists and sex workers, women as a group are not alleged (by any but the most unreasonable) to labour under an

²¹ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 art 1 (entered into force 3 September 1981) [CEDAW].

²² Janice G Raymond, *Women as Wombs: Reproductive Technologies and the Battle Over Women’s Freedom* (New York: HarperCollins, 1993) at 203 [emphasis in original].

²³ Edward W Said, *Culture and Imperialism* (New York: Vintage Books, 1994) at 336.

²⁴ Clifford Geertz, “The Politics of Meaning” in Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 2000) 311 at 314.

irrevocable inability to engage in their own valid sexual ordering. Nonetheless, women are like those two groups in having experienced a long period of religiously and morally inspired legal discrimination, which envelops the majority of legal traditions and practice. With respect to sexuality, issues range from those indirectly relating to sexual expression to female sexuality in the context of reproduction. Legal interference with the latter can have especially deleterious effects: “when the state uses women’s capacity to become pregnant as a lever to subordinate women, assign them a second class status in society, or deny them full and equal enjoyment of their rights of citizenship, it violates the equal citizenship principle.”²⁵ This is not a denial that should be encouraged by law, and it should not be condoned. But again, the question remains how to most effectively purge misogyny from the law of private sexual ordering. In analyzing this question, the role of autonomy and “choice” is key:

Choice might be viewed as fostering women’s empowerment and opportunities. This viewpoint, which is often associated with abortion debates, presumes the chooser’s autonomy and the ability to control or govern one’s physical and moral self. It also presumes agency, a concept understood here as incorporating autonomy “plus options” to allow for viable choices. These empowering images stand in contrast to a more skeptical view of choice. For many feminists, the concept invites intense scrutiny, especially in circumstances that seem constraining or coercive, or when outcomes appear hostile to the chooser’s interests.²⁶

Law cannot usurp choice in any but the clearest and most compelling circumstances. As such, while it is important to remain skeptical of so-called autonomous choices, it does not serve to foster empowerment or to provide opportunities for female sexuality to outlaw or legally discourage what are subjectively viewed as poor choices. Any other position reduces women to a subordinate status to the law, conceived of as overpowering “truth” to overrule the “ability to control or govern one’s physical and moral self.”

²⁵ Jack M Balkin, “Abortion and Original Meaning” (2007) 24:2 Const Commentary 291 at 322-323.

²⁶ Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Burlington, VT: Ashgate, 2013) at 11.

In addressing female sexual rights, law must recognize the idea that “modernity” and “rights” are subjective ideations, which, even if accepted, are a construct of the, by definition, dominant power. This does not invalidate a rights-based approach, but it does not validate it, either. Legal actors must recognize that values are neither neutral nor self-evident: “[m]odernity is a project-or rather, a series of interlinked projects-that certain people in power seek to achieve. The project aims at institutionalizing a number of (sometimes conflicting, often evolving) principles: constitutionalism, moral autonomy, democracy, human rights, civil equality...”²⁷ The possibilities of a harmful and potentially oppressive discourse of modernity are unintentionally highlighted by Atoyan, who writes that

[a]pplication of cultural, religious, and traditional laws cannot coexist with contemporary notions of human rights in the modern world. There are some acts that should be categorically outlawed because they are inherently wrong, regardless of the nationality, culture, traditions, and customs of the wrongdoer. In the twenty-first century the world should not give great deference to a country’s culture, religion, and customs when they merely protect the barbaric traditions that those countries proudly implement.²⁸

While Atoyan’s passion for human rights is laudable, and the practices she enumerates (such as dowry murders and public stonings) are rightly regarded as harmful, this discourse overreaches in labelling all culturally-different practices as somehow “Other” (and possibly “barbaric”), and also misguidedly calls for external imposition of “modern” (and therefore supposedly right) norms. Extreme cases are easy to discuss, but the danger is that Atoyan’s argument leads to a simplistic engagement with differing viewpoints. Atoyan’s rejection deprives us of important voices in the discourse, as identified by Shweder: “the conceptions held by others are available to us, in the sense that when we truly understand their conception of things we come to recognize

²⁷ Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003) at 13.

²⁸ Nona Atoyan, “The Ineffective Protections and Guarantees of Human Rights Conventions of Women and Children” (2012) 12 *Whittier J Child & Family Advocacy* 105 at 105-106.

possibilities latent within our own rationality...those ways of conceiving of things become salient for us for the first time, or once again...We are multiple from the start.”²⁹

Acknowledging harmful discourses such as Atoyan’s is not to denounce all attempts to create dialogue or advance human rights but merely to note that in buying into this project, law must remain value neutral, striving to guarantee female sexual agency and autonomy, but able to incorporate a diversity of views on the correct ambit of female sexuality (so as to give all religio-moral positions a stake in the legal regime). Otherwise, law may indirectly perpetuate patterns of control at the expense of autonomy and self-determination, even as it follows a supposedly enlightened feminist path:

We are in a historical moment in which feminism can be easily annexed to the project of empire. As I and others have shown, it is often through the language of human rights and gender equality that empire is accomplished today. The West is understood as culturally committed to the values of the Enlightenment, while the non-West remains incompletely modern at best, or hostile to modernity at worst. Within this conceptual framework, one often described as a clash of civilizations, it is the duty of modern peoples to bring pre-modern peoples in line. When the occupation of Afghanistan by American forces can be justified as necessary in order to save Afghan women from the Taliban, feminists must necessarily pay attention to how their demands serve the interests of imperialism and white supremacy.³⁰

Two layers of law are now available: domestic law and international regimes. Practically speaking, domestic law is better able to address problems in a direct and timely manner. As Ngwena states in discussing abortion: “[i]t would be cold comfort to women who are denied abortion under domestic law to know that they can vindicate their rights under international law, but long after they have been compelled to become mothers...or victims of unsafe abortion.”³¹ At the same time, with many stakeholders and various levels of interpretation and enforcement, international law also represents a much slower method of achieving legislative change, and with broader lacunae (such as, in the context of international law on the rights of women, *CEDAW*’s

²⁹ Richard A Shweder, *Thinking Through Cultures: Expeditions in Cultural Psychology* (Cambridge, MA: Harvard University Press, 1991) at 5.

³⁰ Razack, *supra* note 9 at 148-149.

³¹ Charles G Ngwena, “Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa” (2010) 32:4 Hum Rts Q 783 at 864.

ambiguous statement on prostitution).³² An unsympathetic government can block the implementation of international law, as seen with the phenomenon of *CEDAW*, where “[s]ome countries, such as Saudi Arabia, seem to have become parties to *CEDAW* in name only.”³³ Finally, an argument can be made that international norms, once established, begin to seep into national law, and can therefore be maintained as norms without legislation: “[a]s they consider cases with transnational aspects or implications, some theorists argue, national judges become part of an epistemic community that not only enforces international law but also recognises an underlying normative commitment to protect human rights and ensure accountability.”³⁴ While this effect seems unlikely to take hold in the face of determined domestic governmental action (such as explicit legislation), it at least provides pressure on governments wholly unrelated to the potentially vague enunciations of international law.

International law can have direct benefits as well: “the international legal order is increasingly receiving feminists into its power elites and...feminist law reform is emerging there as a formidable source of legal ideas...we think it has real bite in recent changes.”³⁵ In addition to greater uniformity and collective action, international law properly devised can apply universal (more accurately, near-universal) standards to protect fundamental rights in every jurisdiction, even those where either a lack of interest or antipathy towards human rights such as female sexuality impede domestic legislative protection of these rights. International law can even, where applicable, demand governance shifts in how resources are allocated or domestic laws are enforced. By guaranteeing fundamental, uncontroversial rights such as the right to life

³² *CEDAW*, *supra* note 21 at Art 6.

³³ Linda M Keller, “The Convention on the Elimination of Discrimination against Women: Evolution and (Non)Implementation Worldwide” (2004) 27 *Thomas Jefferson L Rev* 35 at 39-40.

³⁴ Ingrid Wueth, “International Law in Domestic Courts and the *Jurisdictional Immunities of the State Case*” (2012) 13:2 *Melbourne J Int’l L* 819 at 829.

³⁵ Janet Halley et al, “From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism” (2006) 29:2 *Harv JL & Gender* 335 at 419.

and the right to personal integrity, international law provides benefits even where more nuanced rights (such as autonomy, or even, a poorly defined right to “equality”) become problematic issues of contention.

The ultimate goal for law should be to create a positive space for female sexuality, emphatically not value-less but at the same time value-neutral. Such a system would draw on feminist thought to allow women freedom to identify and seek their sexual and conjugal goals without harassment from law. To fully respect autonomy, the system must incorporate Ahmed’s system for cultural sensitivity:

Perhaps feminism could formulate...[a] set of criteria for exploring issues of women in other cultures...criteria that would undercut even inadvertent complicity in serving Western interests but that, at the same time, would neither set limits on the freedom to question and explore nor in any way compromise feminism’s passionate commitment to the realization of societies that enable women to pursue without impediment the full development of their capacities and to contribute to their societies in all domains.³⁶

In allowing sexual freedom, the law would take a step towards creating a regime where women could pursue the full development of their personalities and would remove limits on women’s rights to “question and explore.”

Law and Female Reproductive Rights

To respect women’s sexual autonomy, laws which impede a woman’s freedom to make conjugal and sexual choices, especially reproductive choices, should be minimized. Gordon is blunt: “reproductive freedom cannot be separated from the totality of women’s freedom.”³⁷

Whether this argument is accepted, the fact remains that the legal regulation of female reproduction provides a central and crucial example of law’s ability to shape societal situations for good or ill. At its core, anti-contraceptive and anti-abortion legislation “is to pressure or

³⁶ Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, CT: Yale University Press, 1992) at 248.

³⁷ Linda Gordon, *Woman’s Body, Woman’s Right: A Social History of Birth Control in America* (New York: Penguin, 1976) at 418.

compel women to carry a pregnancy to term which they would otherwise terminate.”³⁸ But this is not the only impact: by intensifying the “harm” of unwanted pregnancy, law (especially when restricting contraception) is also indirectly altering and inhibiting the exercise of female sexual activity. The utility of using reproductive rights as a far-reaching example of legal misogyny is obvious: “[i]t is not just that abortion is medically safe. Devices like the pill and even condoms spread a message: babies are a matter of free choice. Abortion is a less desirable, more drastic way of exercising this choice. But it is part of the same continuum.”³⁹ This is reinforced by an excellently written decision of the Supreme Court of the United States of America, recognizing the societal impact of forced pregnancy:

Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society. It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception.⁴⁰

By equating abortion with contraception (that is, a decision made by a woman solely affecting her body), and by recognizing the suffering that failure to afford autonomy in making this choice can entail, the court identifies the crux of the matter: laws restricting abortion restrict female choice, regardless of context, to impose a “dominant vision” upon her.

Law is often implicated in the coercion of female sexuality through restriction of reproductive rights. Such coercion can occur either coincidentally to, or as a result of, the idea that “sexuality, once separated from reproduction, is freed-in principle-from the rule of the phallus and the sexual control of women” resulting in “a decline in male control.”⁴¹ The relation

³⁸ Reva Siegel, “Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection” (1992) 44:2 Stan L Rev 261 at 358.

³⁹ Lawrence M Friedman, *Private Lives: Families, Individuals, and the Law* (Cambridge, MA: Harvard University Press, 2004) at 179.

⁴⁰ *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992) at 852.

⁴¹ Alan Hunt, *Governing Morals: A Social History of Moral Regulation* (New York: Cambridge University Press, 2009) at 210.

between sex and contraception/abortion is made explicit in Califia's description of adolescent sexuality: "[i]f a thirteen-year-old can get pregnant or impregnate somebody else, common sense dictates that this young person should know about reproduction, contraception, abortion, and prevention of sexually-transmitted diseases."⁴² Since restricting access to needed information (especially to youth) has the potential for deleterious reproductive results, this point illustrates the necessity of individuals having control over all stages of their own reproductive process (both through education and ability to make autonomous choices). This leads to the conclusion that law must contribute to the best of its power in a societal project to create and sustain, for women of all ages, "the emergence of a broad-based recognition, grounded in human rights principles, that women are entitled to control their own bodies. Despite its limitations, human rights discourse has tremendous normative influence that could and should be brought to bear on the promotion and protection of women's sexual autonomy."⁴³ Although the autonomy and freedom argument seems strong enough to be determinative, it can be supplemented by the link between healthcare and abortion. Identifying abortion as a type of healthcare provides more bases for legal guarantees for reproductive rights: "[r]eclaiming the right [to abortion] as healthcare and not simply as 'choice' has the potential to offer greater protection for access to abortion-related healthcare and casts the right in a gender-neutral context," while identifying the procedure as healthcare demonstrates that "'choice' requires options and therefore must be anchored to meaningful access to affordable healthcare."⁴⁴

Law can help facilitate female reproductive control, but in the abortion context, the law often serves as a kind of moral censor, ensuring that certain sexual decisions such as when to

⁴² Pat Califia, *Public Sex: The Culture of Radical Sex*, 2nd ed (San Francisco, CA: CLEIS Press, 2000) at 84.

⁴³ Sarah Y Lai & Regan E Ralph, "Female Sexual Autonomy and Human Rights" (1995) 8 Harv Hum Rts J 201 at 225.

⁴⁴ Yvonne Lindgren, "The Rhetoric of Choice: Restoring Healthcare to the Abortion Right" (2012-2013) 64:2 Hastings LJ 385 at 421.

engage in sexual activity, what kind of sexual activity to engage in, and planning to reproduce are foreclosed. Gains against this practice are vulnerable to the combined effect of social discourse and legal encroachment: “[r]estrictive abortion legislation, in whatever form it takes, is a rather transparent ploy. If these politicians can’t prevent women from having abortions, they are certainly going to punish them. They are going to punish these women severely, cruelly, unusually for daring to make choices about motherhood, their bodies, and their futures.”⁴⁵ These legally-imposed tactics include, in the United States of America, “[w]aiting periods, counseling, ultrasounds, sonogram storytelling---all of these legislative moves are invasive, insulting, and condescending because they are deeply misguided attempts to pressure women into changing their minds, to pressure women into not terminating their pregnancies.”⁴⁶

One recommendation would be for law to explicitly address the issues with targeted legislation:

[W]omen need an International Convention against medical exploitation developed by governmental and non-governmental organizations...that would declare women’s right to bodily integrity, support women’s established right to human dignity and physical well-being, and work to prohibit the expansionism of contractual and technological reproduction. Perhaps set in a larger context of medical violations of women’s human rights, addressing its role in promoting an international reproductive traffic in women, and making clear that it constitutes a severe form of sexual and reproductive exploitation.⁴⁷

Legislation provides a strong impetus to foster societal change, allowing women control (or more fulsome control) over their reproductive process. Yet legislation does not provide a comprehensive solution: even with progressive legal language, the possibility exists that “[l]egislation can often be subverted for male-dominant purposes.”⁴⁸ This is especially troubling in highly-contested discourses where multiple legal imperatives exist, and advocacy groups are able to lobby for their preferred legal approach to legal innovation. It is logical to predict that

⁴⁵ Gay, *supra* note 18 at 271.

⁴⁶ *Ibid* at 272.

⁴⁷ Raymond, *supra* note 22 at 209.

⁴⁸ *Ibid*.

“health-care policies, electoral and party systems, and policy venues” will continue to “strongly [influence] the understandings and actions of medical interest groups, political parties, and social movements”⁴⁹ so that legislation, either international or national, cannot wholly protect autonomy in female private sexual ordering of reproduction.

Notwithstanding this qualification, law can have beneficial results in activating female choice with respect to contraception and abortion. With respect to abortion, Africa provides a good example of how law can either help or hinder access to female reproductive autonomy. An estimated 29 000 women die annually in Africa due to unsafe abortions, 62% of the global total, and “[t]he critical role that abortion law plays is underscored by evidence showing that the historical criminalization of abortion has served as a major incentive for unsafe, illegal abortions.”⁵⁰ However, law can improve the situation: “the experiences of Tunisia and South Africa adequately demonstrate that when abortion law is liberalized, implemented, and accompanied by equitable access to abortion services, the incentives for unsafe, illegal abortion and the attendant consequences are dramatically curtailed.”⁵¹ While these two nations are not representative of most African nations, their examples bolster the idea that a principled and enforced law enabling access to abortion will provide not only greater freedom, but also greater security to female reproductive choices, which could serve as a legal model throughout the world.

In providing freedom to choose abortion, the varying and contingent roles women are called upon to play in society must be taken into account, as “status” can too easily ignore the shifting and various realities women seeking birth control face and embody:

⁴⁹ Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago, IL: The University of Chicago Press, 2011) at 203.

⁵⁰ Charles G Ngwena, “State obligations to implement African abortion laws: Employing human rights in a changing legal landscape” (2012) 119:2 Int’l J Gynecology and Obstetrics 198 at 198.

⁵¹ *Ibid.*

[I]t is not low status or lack of autonomy alone but a whole range of relationships and factors that come into contemplation [of curtailing reproduction] and its logical culmination...The idea of the social optimum [rate of fertility] can be seen in association with that of the threshold, both individual and social. The concept, “unwanted fertility” adds another dimension to the complexity at hand. Fertility needs to be situated.⁵²

The idea that women’s fertility is a monolith, or statistically predictable, is, as the above quotation demonstrates, an oversimplification. Only by allowing free choice at every stage of reproductive choice will law truly guarantee female rights to private sexual ordering. This right is of course tied up with issues such as the ability of law to constrain domestic violence and male domination (which can bear on female choice), but a valid starting-point is the explicit law on reproduction.

An interesting issue surrounding birth control and abortion is the idea that the freedom of conscience of medical practitioners must be respected, insofar as physicians and surgeons have (or should have) no requirement to perform treatment which conflicts with their personal morality. Initially persuasive, this argument is at least partially meretricious. First, it can be used as a way for medical practitioners to avoid work they merely find useless or unpleasant:

[At an Elite hospital], [a]lthough numerous first- and second-trimester abortions were performed by attendings on private clients, they were not available to the residents’ institutional patients. When questioned about the lack of an abortion service for institutional patients, the hospital staff reported that, for religious and moral reasons, residents could not be required to perform them. On questioning residents, though, I found that with few exceptions all of them planned to offer abortion as a service to their patients in private practice...When I probed further, residents finally told me, “We don’t learn anything from abortions. All you do is insert a drug and wait. Residents want to do things they learn from.”⁵³

While this practice may or may not be widespread, it at least illustrates that religious and moral concerns can obscure real motivations for patient care. Secondly, the rejection of care by a medical practitioner and such rejection’s legality is a strong implicit statement to a patient, whether or not that patient is subsequently able to obtain their requested treatment from another

⁵² Tulsi Patel, “Women in Fertility Studies and *In Situ*” in Maya Unnithan-Kumar, ed, *Reproductive Agency, Medicine and the State: Cultural Transformations in Childbearing* (New York: Berghahn Books, 2006) 203 at 215.

⁵³ Diana Scully, *Men Who Control Women’s Health: The Miseducation of Obstetrician-Gynecologists* (Boston, MA: Houghton Mifflin, 1980) at 229-230.

practitioner. While context is important and no bright line rules can be drawn with respect to the requirement of physicians and surgeons to provide abortions, allowing for a conscientious-objection override on medically-established procedures raises the question of whether medicine is a private occupation or a public service. If it is the latter, strong objections can be made to individual standards trumping care, or at least requiring (in non-emergent situations) the objecting physician providing a realistic referral to a medical practitioner who will treat the patient.

Birth control is a frontier for women's sexual freedom, but also a battleground: "the story of the breaking away from Victorian sexual repression over the last century has a double aspect: one of liberation and another of the reimposition of new forms of social control over the human capacity for free and inventive sexual expression."⁵⁴ Law should ensure that affordable contraception is available freely to women who wish to use it, a goal which has several ways of fulfillment, most notably through legal encouragement (or least agnosticism) on the publicization of contraception, its sale, and use. Law can also enshrine rights to education about contraception and in some cases, the right to access contraception. Abortion "remains a fiery political issue, and a fiery legal issue as well,"⁵⁵ an area where religion and morality collide with law, which is called upon to provide a principled response to pluralism and simultaneously ensure that female reproductive autonomy is guaranteed. In the case of abortion, the voluntary adoption of jurisdictions in Africa that accord rights protection to reproductive decisions need not be reminiscent of legal colonialism: "[e]mbracing the emerging jurisprudence...should not be seen as deference to foreign values of little import to the African region but, rather, as an opportune appropriation of important juridical adjuncts to the achievement of sexual and reproductive

⁵⁴ Gordon, *supra* note 37 at 411.

⁵⁵ Friedman, *supra* note 39 at 170.

objectives.” In achieving human rights, Law should avoid the need for extra-legal spaces, where, as Roxane Gay imagines, reproductive rights may need to be obtained:

We could stockpile various methods of birth control and information about where women might go for safe, ethical reproductive health care in every state---contraception, abortion, education, all of it. We could create a network of reproductive health care providers and abortionists who would treat women humanely because the government does not and we could make sure that every woman who needed to make a choice had all the help she needed. I spend hours thinking about this underground network and what it would take to make sure women don't ever have to revert to a time when they put themselves at serious risk to terminate a pregnancy.⁵⁶

The lack of such a system (and without the law's assistance in obtaining reproductive healthcare) results in women seizing reproductive autonomy themselves, with disastrous results: “[a]lmost any implement you can imagine had been and was used to start an abortion — darning needles, crochet hooks, cut-glass salt shakers, soda bottles, sometimes intact, sometimes with the top broken off.”⁵⁷

Tensions understandably run high, but a law which respects human autonomy must remain true to the principle of choice so as to ensure that basic standards are followed. In doing so, legal pluralism, instantiated by multiculturalism, can contribute to a flourishing public discourse which allows for greater diversity of opinion and contextualization of potentially rigid theories: “[w]hen allowed to flourish under the minimally necessary moral constraints, multiculturalism is likely to generate radically novel ways of conceptualizing and structuring intergender relations that cannot but deepen and broaden... feminist sensibility.”⁵⁸ Propagating contraception and abortion as fundamental, inalienable rights protects against the reality that

[g]iven its moral controversy, abortion presents courts with the same temptation [of using a judicial compass, molded out of populist opinion, that is heavily laden with historical and social biases, to the detriment of the equality rights and aspirations of political minorities such as...women]. Using a

⁵⁶ Gay, *supra* note 18 at 278.

⁵⁷ Waldo L Fielding, “Repairing the Damage, Before Roe” (3 June 2008), *New York Times*, online: NYTimes.com, <http://www.nytimes.com/2008/06/03/health/views/03essa.html?_r=0>.

⁵⁸ Bhikhu Parekh, “A Varied Moral World” in Joshua Cohen, Matthew Howard & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 69 at 75.

majoritarian compass to determine abortion guarantees surrendering women's rights to populist censure.⁵⁹

Control over reproductive processes can persuasively be labelled a fundamental human right, and as such, access to contraception and abortion, where necessary, must be legally protected, preferably by both State and International legal regimes. The goal of encouraging female sexual autonomy is not tied to an override of cultural, religious, and moral mores but rather focusses on the potential disbenefit to women who are not informed of the medically safe treatments which are available, essentially a case of law forcing women to modify their reproductive behaviour based on coercion. In the worst case scenario, this can result in a *de facto* forced pregnancy, and the irrevocable effects this has on a woman. Within the discourse of female private sexual ordering, law should strive for the ability to encourage dialogue and innovation between cultures, traditions, and religio-moral positions. Law can and should help create and sustain this framework and innovation.

Law and Direct Societal Impositions on Female Sexuality

Law has the ability to directly impose itself on the female sexual citizen, at best attempting to channel her autonomy, at worst, to constrain or eliminate it. Examples from the developing world include penalties against adultery (which is still criminalized in a significant minority of American states), and the countenance of early marriage practices which guarantee societal respectability at the cost of the human rights of female children. Such legal regimes are more offensive when they are gendered: as Russell notes in the Western European context, “[i]f men are allowed prenuptial intercourse (as in fact they are), women must be allowed it also.”⁶⁰

One of the most dramatic impositions on female sexuality is the practice of female genital cutting, outlined in the last chapter. The practice is associated with the orientalist other, but while

⁵⁹ Ngwena, “Inscribing Abortion as a Human Right,” *supra* note 31 at 861.

⁶⁰ Bertrand Russell, *Marriage and Morals* (New York: Bantam, 1963) at 59-60.

statistically most prevalent outside Western developed countries, it is by no means unique to developing societies, and in the West has its basis in fear of female sexuality: “[n]ineteenth-century surgeons were also perplexed by woman’s sexuality. Nymphomania and related types of so-called insanity were believed to be caused by masturbation. Some physicians recommended castration; others discovered that removal of the clitoris...eliminated the problem.”⁶¹ Even more recently, “[t]he practice of female circumcision is not unknown in the West. Clitoridectomy was performed in the 1940s to treat masturbation, insanity, epilepsy, and hysteria. In the United States, physicians have also incised the clitoral prepuce to treat frigidity, and perform aesthetic vaginal labioplasties to reduce the size of the clitoris and labia.”⁶²

Pragmatically, law must heed the warning of Horowitz and Jackson that coercive legal measures will fail as opposed to legally-supported, but not oriented, discourse:

The strategy of medicalizing ritual genital surgery and then trying to eradicate it as if it were a disease, without recognizing the larger sociocultural context of which it is but one part, will be unsuccessful. It will continue until societies that practice it decide the practice is damaging to the welfare of women. Only efforts to improve the social and economic status of women, and education from within communities, can alter this practice.⁶³

While law can and must have a role in shaping the practice and guaranteeing autonomous choices, the approach of education and understanding, rather than coercive othering, is highly persuasive.

An example of a developed country’s approach to cutting is interesting and fertile ground for debate, as is its summary by Adelman:

In Canada the Criminal Code prohibits the genital mutilation or circumcision of females...but not of males when their foreskins are removed. Female circumcision is a cultural practice and rite of passage that has been applied to well over a hundred million women; the failure to undergo circumcision is regarded by many women from those cultures as a matter of deep cultural humiliation-their social well-being, an integral component of health, could suffer. However, the Ontario College of Physicians and Surgeons has banned the practice, though an adult woman is free to undergo the procedure if her

⁶¹ Scully, *supra* note 53 at 52.

⁶² Carol R Horowitz & J Carey Jackson, “Female ‘Circumcision’: African Women Confront American Medicine” (1997) 12:8 J General Internal Medicine 491 at 492.

⁶³ *Ibid* at 498.

decision is voluntary and the woman understands the implications. No physician is forced to undertake the procedure. But physicians are obligated to refuse if the procedure is to be undertaken on a child not yet the age of consent...Canadian cultural values as well as the law run counter to the cultural practice of a foreign community. Unequivocally, Canadian law and norms trump. But these are issues that affect the rights of the individual.⁶⁴

The passage is interesting not only for its championing of the individual right to autonomy (doctors and those undergoing cutting are both free, within certain constraints, to make their own choices) as well as reasonable limits on actions which irrevocably affect children (although parenting requires impositions which often irreversibly shape children, for example through religious education). However, an automatic default to a position where majority-crafted “law and norms trump” not only uncritically coerces those who wish to (or as a result of their faith, are compelled to) resist majority norms, but also provides little incentive for the majority to foster meaningful discourse or concessions to religious or societal diversity. As described in Beaman’s concept of “deep equality,” something more meaningful, and more pragmatic, than simple formal equality is sought:

[D]eep equality would look different from situation to situation or from case to case. This is in part a basic premise of substantive equality--that equality does not mean sameness of treatment but that it can, in fact, employ creative and innovative solutions depending on needs. Moreover, in acknowledging or welcoming the “other,” deep equality seeks to begin from a position of shared humanity and insists on casting into doubt “certainties” about difference. This position requires both humility, or what William Connolly calls “relational modesty,” and a willingness to search beyond usual solutions.⁶⁵

Willingness to seek contextual and respectful equilibria in the manner outlined by Beaman is needed in the discourse of female genital cutting, as opposed to doctrinaire reasoning. The opposite of deep equality is a dangerous grounding for law, one that is familiar from its imposition on the sexual minorities of polygamists and sex workers.

⁶⁴ Howard Adelman, “Conclusion: Religion, Culture, and the State” in Howard Adelman & Pierre Anctil, eds, *Religion, Culture, and the State: Reflections on the Bouchard-Taylor Report* (Toronto: University of Toronto Press, 2011) 100 at 112.

⁶⁵ Lori G Beaman, “‘It was all slightly unreal’: What’s Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?” (2011) 23:2 CJWL 442 at 452.

In dealing with female genital cutting, law must tread a careful path between either allowing the elimination of female agency with respect to fundamental private sexual ordering, and replacing such coercive measures with other, different coercive measures which completely ignore a woman's ability to choose by outlawing her choice. The practice of "female circumcision" is justifiably repugnant to certain traditions and groups which see it as a traditional religio-moral mutilation, a claim that the female body is inferior and needs to be controlled. Groups taking this view understandably attempt to eliminate the practice. But as has been noted, no culture will be complicit in its own eradication. Law must establish a dialogue with groups who desire the practice of female genital cutting, and establish protections for free and fully informed choices to be made by adults. Regarding children, legal neutrality would generally militate in favour of respecting parental choice: however, in this case, the irrevocability and violent aspect to the procedure suggests that it should not be conducted on children.

This suggestion leaves only the argument, as previously demonstrated against polygamy and prostitution, that the "choice" of consenting adults (in this case, exclusively women) to engage in the practice is no real choice at all, and that such practitioners must be protected by law from a form of internalized coercion. This argument is tied to the perspicacious observation in *Paradise Lost* that "[t]he mind is its own place, and in itself can make a heaven of hell,/ a hell of heaven."⁶⁶ However, this subjective harm-prevention argument creates women who are "relegated children, non-agents, non-subjects."⁶⁷ Law must ensure that all uses of agency are respected without belittling any viewpoints even if they are not mainstream or ultimately accepted by law. The law is not necessarily a blunt instrument: it can seek to protect in other ways than mere punishment: "judgementalism is not the same as judgement, and it should be

⁶⁶ John Milton, *Paradise Lost*, "Book I" in *The Norton Anthology of English Literature*, 7th ed, vol A (New York: WW Norton & Co, 2001) 724 at 730, ln 255.

⁶⁷ Rogers, *supra* note 17 at 152.

possible to avoid the kind of moralising that tells others what they ought to think and do without thereby losing the capacity to challenge structures of domination and power.”⁶⁸

Moreover, the coercive argument is unconvincing because it not only infantilizes those attempting to exercise their autonomy, but ignores the fact that all individuals are constructed through exposure to greater societal narratives (in this case, prescribing cutting as a beneficial practice). Agency is by no means uniform: it “lies in the multiplicity of the self, a complex web of identities that is multi-faceted, shifting, and ephemeral,”⁶⁹ not the objectively verifiable phenomenon which would yield easy answers about “free choice.” While law must protect individual choice from coercion (non-consensual cutting is an assault of the deepest gravity), there is no need in this case for the law to impose a majority norm upon a dissenting minority, no matter how “misguided” that minority is perceived to be.

Law inevitably regulates private sexual ordering: a legal regime which completely ignored the sexual lives of its citizens would be as dangerous to freedom and autonomy as one which over-regulated such practices in the name of religio-moral goals, harm reduction, or pure paternalism. Yet in affecting private sexual ordering, law must remain neutral as to values, aspirations, and goals. Ultimately, law which touches directly upon female private sexual ordering should in almost all cases be altered to bring it into accord with respect for female agency and autonomy, and to (as much as possible) guarantee that female sexuality is not superstitiously feared to the detriment of all women in society.

Another major issue for the direct regulation of female sexuality is legal regulation (or lack of it) with respect to marriage. Marriage has been characterized by Cott as the process of

⁶⁸ Sumi Madhok, Anne Phillips, & Kalpana Wilson, “Introduction” in Sumi Madhok, Anne Phillips, & Kalpana Wilson, eds, *Gender, Agency, and Coercion* (New York: Palgrave Macmillan, 2013) 1 at 12.

⁶⁹ Lori G Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Toronto: UBC Press, 2008) at 152.

“[c]reating families and kinship networks and handing down private property...design[ing] the architecture of private life [...] It influences individual identity and determines circles of intimacy.”⁷⁰ Marriage has the ability to either empower or trap socially or legally vulnerable individuals such as women, and law can influence how the institution is experienced. A major problem in developing nations is arranged marriage at an early age, which, in the words of a United Nations organization monitoring the phenomenon,

impairs the realization and enjoyment of virtually every one of their rights. The imposition of a marriage partner on children or adolescents who are in no way ready for married life, and whose marriage will deprive them of freedom, opportunity for personal development, and other rights including health and well-being, education, and participation in civic life, nullifies the meaning of the [Convention on the Rights of the Child]’s core protections.⁷¹

The phenomenon of early marriage is inextricably tied to conceptions of female sexuality and the need to control it: “[s]ocially, in many countries, people value virginity and frown upon pre-marital sexual relations...A girl’s virginity reflects the family’s honor; thus, parents quickly arrange marriages not only to ‘protect’ their child from sexual immorality, but also to protect themselves from gossip and slander.”⁷² This suggests that the problem of child or early marriage will not be able to be eradicated merely by a top-down, criminalizing tendency. This could be done in part by attacking social realities prizing women only as wives (and virgins). Additionally, dialogue with religious and cultural traditions, with an attempt to achieve a compromise that respects the ability of women and girls to make their own marital choices, may have a better chance of success than a campaign of legal repression against religion and culture.

⁷⁰ Nancy F Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2002) at 1.

⁷¹ United Nations Children’s Fund Innocenti Research Centre, *Early Marriage: Child Spouses* (Florence, Italy: March 2001), online: <<http://www.unicef-irc.org/publications/pdf/digest7e.pdf>> at 17.

⁷² Laura Davids, “Female Subordination Starts at Home: Consequences of Young Marriage and Proposed Solutions” (2007) 5:2 Regent J Int’l L 299 at 304.

It is hard to argue with the legal protection extended by *CEDAW* to women to “freely... choose a spouse and to enter into marriage only with their free and full consent”⁷³ and the Convention’s further statement that “[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage,”⁷⁴ but these minimum standards must be enforced. It is an easy case when marriage results in the denial of education, or coercion, to women, but law must acknowledge that the Western romantic ideal of marriage is not only historically dubious but inappropriate to impose universally. While societal pressure (especially that generated by close friends or relatives) may be highly stressful, law cannot do more than guarantee an exit and autonomy: it cannot make matrimonial choices for its citizens. Thus, while arranged marriage and marriage at an age deemed too young by Western traditions should be discouraged in a respectful dialogue that takes into account the legitimate motives and benefits of such practices, it is improper (and likely to be counterproductive) for international law to attempt to forcibly end the practices. Greater clarity is also needed in the definition of early marriage, as reporting can be imprecise. A statistic such as “an estimated one-third of women in the developing world marry before the age of eighteen” is woefully imprecise (and noxious in its implications). Furthermore, describing a “wedding ceremony of an eleven month old baby girl to a six-year-old boy in India”⁷⁵ seems to ignore the context and difference between this ceremony and other types of matrimony (with different practices and responsibilities). Guaranteeing female sexual autonomy and choice in marriage is important, but it does not justify turning a blind eye to cultural differences and then denouncing them according to subjective standards.

⁷³ *CEDAW*, *supra* note 21 at Art 16(1)(b).

⁷⁴ *Ibid* at Art 16(2).

⁷⁵ Davids, *supra* note 72 at 299-300.

Indirect Legal Impositions on Female Sexuality

Law can contribute to a discourse where female sexual behaviour is either coercively normalized, repressed, or eliminated completely. This can be done in many ways, using tactics which

return to a very ancient view that specific acts can be classified as innately right or wrong. These discourses imply that women share a single sexual nature. As such not only does this misrepresent female sexuality, but it displays a hostility to sexual diversity that amounts to an insistence that ‘good girls don’t’ (watch sex videos, wear high heels, dress sexily, etc.). The rhetoric of degradation is significant in that it operates to create a climate of sexual shame.⁷⁶

Multiple lines of legal regulation can be deployed to create this climate of sexual shame, including attacking sexual representations of women, something achieved by anti-pornography activists in both Minneapolis in 1983 (where the anti-pornography law was vetoed by the mayor) and Indianapolis.⁷⁷ In principle, however, a culturally contingent emphasis on propriety can be seen in restrictions on female sexual activity and dress.

One major issue where the law regulates issues relating to sexuality and conjugality is new assisted reproductive technologies (ARTs) which are, as with any reproductive issue, necessarily disparate in their impact on genders. As discussed in the previous chapter, concerns over the use of ARTs to widen the family form (as with same-sex three-parent households) or concerns about the agency of participants (such as surrogates) are in many ways illegitimate objections. One form of assisted reproductive technology, ova donation, is particularly asymmetrical in gender experiences:

[F]rom the perspective of women’s health, the process of egg donation is significantly more onerous and dangerous than sperm donation...ova retrieval is a difficult and painful medical procedure which carries with it serious side effects. The egg donor must undergo hormone treatments and the ova must be surgically removed from her ovaries. There are significant risks associated with both the hormone stimulation and the retrieval, the most serious being ovarian hyperstimulation syndrome.⁷⁸

⁷⁶ Hunt, *supra* note 41 at 207.

⁷⁷ *Ibid* at 207-208.

⁷⁸ Angela Cameron, Vanessa Gruben, & Fiona Kelly, “De-Anonymising Sperm Donors in Canada: Some Doubts and Directions” (2010) 26 Can J Fam L 95 at 99, n 5.

In addition to the medical risks, the practice of (to give just one example) egg donation opens up a quagmire of moral, philosophical, and legal quandaries, such as whether to require anonymity of donors, to allow for custody and/or visitation rights of donors, and, most pertinently for this chapter, the impacts of such regulations on “the integrity of the social family unit whether it is a single-mother by choice, lesbian-led, or heterosexual family.”⁷⁹ This is only one implication of assisted reproductive technologies, which are able to remake conceptions of gender and conjugality. Other issues touched upon by the new technologies with gendered results include surrogacy, where women provide biological reproductive capabilities to another family and which law struggles to deal with, partly because of its “acceptance of a binary model of choice affecting genderized social practices...built on an understanding of women as either victimized or empowered,”⁸⁰ and the status of children born to women as a result of ARTs (what Appleton calls the “new illegitimacy,” a place where “parentage has been and remains a legal construction, a social and political choice, not a biological inevitability. The state is inextricably involved, determining the criteria that make one a parent”⁸¹), with repercussions both for children and “parents.”

Reproductive technologies raise many implications for law and sexual equality, and to suggest a rigid legal approach to the various issues would be premature and potentially dangerous for innovation (legal and otherwise) and freedom of choice. ARTs are often invoked in the service of other sexual minorities, such as same-sex or transgendered couples. Thus, legal restriction of reproduction based on concerns over agency would not only override the benefits women may experience from contributing to ARTs (such as “control over reproduction and

⁷⁹ *Ibid* at 143.

⁸⁰ Campbell, *supra* note 26 at 141.

⁸¹ Susan Frelich Appleton, “Illegitimacy and Sex, Old and New” (2012) 20:3 Am UJ Gender Soc Pol’y & L 347 at 382.

maternity, the development of a sense of social contribution and citizenship, and social connections formed with intending parents”⁸²), but also impede sexual minorities’ access to parenting, especially in jurisdictions which remain suspicious of, or hostile to, adoption of children by non-traditional families. Absent any potential harm to third parties (excluding children: the law would be discriminatory if it imposed any restrictions on ARTs as a function of reproduction, since these restrictions do not bind traditional reproduction), the law should allow and facilitate reproductive technologies and party choice, whether that choice is to remain anonymous or to attempt to share custody. A principle of openness, rather than restriction, will allow for open discourse on new technologies, spur innovation in the technologies themselves, and remove stigma from alternative ways in which women choose to bear children. Surrogacy in particular should not be restricted to “altruistic” cases, so as to allow a woman freedom to consent to bear a child in, for example, a contractual model.

As discussed in the previous chapter, clothing and modesty rules remain one major way in which female sexuality is controlled by a (if not patriarchal at least) paternalistic legal regime. This issue is unconnected to the requirements enforced: allowing women to choose what clothing they wear is empowering, whatever their choice, and “shows an empowerment held by women to choose their attire, and to not have to follow what society deems as acceptable for equality.”⁸³ Such rules negate the power of women to portray themselves sexually, creating a situation which suggests, in Okin’s words, “[female] sexuality is of value only in marriage, in the service of men, and for reproductive ends.”⁸⁴

⁸² Campbell, *supra* note 26 at 104.

⁸³ Natalie Lynn Montoya & Christopher Peter Montoya, “The Niqab in Canada: Is it a Charter Right?” (2010) 7:3 US-China L Rev 130 at 141.

⁸⁴ Susan Moller Okin, Is Multiculturalism Bad for Women?” in Joshua Cohen, Matthew Howard & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 9 at 17.

With respect to unimposed female clothing, such as recent controversies over the niqab, burqa, and hijab such as those discussed in the previous chapter, the answer is comparatively clear. Law should not be symbolically stripping women of their clothing as a perceived step to equality: it is neither equal nor just. Law must steer clear of the coercion inherent in outlawing certain types of dress, whether they be Sikh turbans, the habits of Catholic nuns, or Islamic dress. All clothing sends a societal signal (and is intended to), but this message is akin to freedom of speech: while theoretically not unlimited, it cannot be interfered with absent an extremely compelling reason. Reasons to paternalistically interfere with religious female clothing freely chosen have been linked to religious favouritism and xenophobia, as seen in the French context, where “[a]fter twenty-two years of anti-Muslim hysteria, prohibitionist fever, and legal paternalism in France, there is little evidence that the republican causes of female emancipation, social integration, and inter-cultural understanding have been in any way promoted or furthered.”⁸⁵ Moreover, agentic use of clothing can represent resistance to dominant norms, whether they be internal to a society, or, as in one historical instance of the ontological clothing of Islam, resistance against external pressures:

The veil came to symbolize in the resistance narrative, not the inferiority of the culture and the need to cast aside its customs in favor of those in the West, but, on the contrary, the dignity and validity of all native customs, and in particular those customs coming under fiercest colonial attack--the customs relating to women---and the need to tenaciously affirm them as a means of resistance to Western domination.⁸⁶

In terms of clothing forcibly imposed on women, law can and should stimulate a dialogue with an ultimate aim of removing socio-legal coercion from clothing. Similarly to all private ordering, individuals appropriate and resist impositions (in this case, of dress) but robing or disrobing people against their will is repugnant. However, law should remain cognizant of the most effective methods of reform: it is unlikely that legal regimes backed by cultures and religions

⁸⁵ Cécile Laborde, “State paternalism and legal dress code” (2012) 10:2 Int’l J Constitutional L 398 at 410.

⁸⁶ Ahmed, *supra* note 36 at 164.

restricting women will be able to be changed overnight. Stressing human rights in a non-oppressive manner is probably the most that can be hoped for in the short term. Of course, international law must truly be international, and not a vehicle for one subjective viewpoint: as Wallerstein notes, “[t]here exist well-known competing claims to any particular definition of universal values...And there are multiple versions of natural law that are quite regularly at direct odds with each other.”⁸⁷

The effects of legal regimes radiate through society, encompassing female sexuality even where the ostensible impact of the legislation is not sexual in nature. Thus, no laws are merely for the regulation (or perverse freedom within a legislative vacuum) of matrimony or the proper identification of the subject (who is then forcibly disrobed and subject to laws “[advancing] a chimerical vision of Western society”⁸⁸ or coercively forced to wear clothing) without impacting on the subject’s sexual choices. In tackling the legal coercion inherent in law’s indirect control on female private sexual ordering, law must establish a dialogue between competing imperatives with the goal of achieving a balance between female autonomy (which should be considered paramount) and the expectations and beliefs of the community wishing to curtail it. While balance may not always be achieved, human rights to autonomy and to participate in society as an individual wishes should not be lightly abrogated, and in fact should almost never be restrained. To do otherwise risks paying lip service to autonomy while achieving repression.

Legal Reform and Female Sexual Health

Legal reform is needed with respect to medical issues which relate solely to, or mainly, women, especially those medical decisions which engage a woman’s sexual ordering. Legal discourses can solidify assumptions, or even encourage “aversion, ridicule, or denial” of

⁸⁷ Wallerstein, *supra* note 8 at 45.

⁸⁸ Evan Darwin Winet, “Face-Veil Bans and Anti-Mask Laws: State Interests and the Right to Cover the Face” (2012) 35 *Hastings Intl & Comp L Rev* 217 at 251.

“female-specific conditions” related to feminine conjugality such as “the needs of menstruating, pregnant, and breastfeeding women.”⁸⁹ As Cook highlights, in a discussion on maternal mortality, “when governments fail to provide health care that only women need, such as maternity care, that failure is a form of discrimination against women that governments are obligated to prevent and remedy.”⁹⁰ At the same time, law must create “soft power” abilities to control not only statements of rights, but benchmarks to ensure that rights and policies are put into place. This cannot be done without a dialogue between the law and the women law seeks to help, as demonstrated by guidelines for health discourse: “[b]y telling people what they *ought* to know or do, public health messages and biomedical explanations often miss the mark. They...offer prescriptions that scarcely acknowledge the interpersonal, cultural and societal dimensions of sexuality and reproduction.”⁹¹ This is amplified by the fact that female reproduction is a potentially life-threatening endeavour, and that, in addition to the pain of childbirth, many female-specific medical issues result in “normal” pain:

In contrast to men, women experience pain under physiological conditions during normal reproductive life, especially in the form of dysmenorrhea and pain during childbirth. Certain painful conditions of the reproductive system are specific to women, such as dyspareunia, pelvic pain and endometriosis. The interrelationships between women’s experience of painful conditions of the reproductive system, the sociocultural setting and medical models of physiology and pathology represent a fruitful area for research.⁹²

Medical care which touches upon female sexual ordering exists both together with, and outside of, the reproductive health debate. Some medical procedures related to sexual health allow for or facilitate sexual behaviour, while others do not. Still others, such as abortion, can also be

⁸⁹ Young, *supra* note 7 at 72.

⁹⁰ Rebecca J Cook, “Human Rights and Maternal Health: Exploring the Effectiveness of the *Alyne* Decision” (2013) 41 *JL Med & Ethics* 103 at 105.

⁹¹ Cornwall & Welbourn, *supra* note 6 at 10.

⁹² William Stones, “Women, Doctors and Pain” in Maya Unnithan-Kumar, ed, *Reproductive Agency, Medicine and the State: Cultural Transformations in Childbearing* (New York: Berghahn Books, 2006) 103 at 107.

conceived of as a healthcare right, which, when so conceived, provides a blueprint for how all medical treatments relating to female sexuality should be moulded by law:

A restored right of abortion that recognizes healthcare as integral to these rights would reclaim the importance of the consumer-provider relationship...the decisional right requires that women have access to unbiased healthcare advice from their abortion provider, free of state interference and political manipulation. Decisional autonomy is thereby dependent on a relationship between a pregnant woman and her provider. Doctors must give neutral medical advice free of values as to the outcome of the woman's deliberation; the abortion choice must be recognized as exclusively the woman's. Medical advice is an integral aspect of a pregnant woman's exercise of decisional autonomy in the abortion decision.⁹³

With some modifications, this patient-doctor relationship with total professionalism and female autonomy (while at the same time emphasizing the healthcare component of care and the need to provide access to treatment) is ideal as a goal for what law should provide to all female citizens, especially in a contested area such as female sexual ordering.

Law should arguably have no role in the medical aspect of female sexuality, but unfortunately this ideal cannot be realized at present: “[j]udicialization of health, whether through domestic courts or international treaty bodies, is symptomatic of the failures of societies through their health systems adequately to address health inequalities, whether measured by inequality in health coverage or inequalities in health status among population subgroups.”⁹⁴ By revealing the discriminatory impact of health systems on groups such as women, law has the power to ameliorate the discrimination and compel the rebalancing of treatment of female sexual health to a more just regime. The *Alyne* decision,⁹⁵ in which Brazil was found liable for neglecting the deceased plaintiff pregnant woman in childbirth, demonstrates the power law has to change discriminatory health systems:

The use of the courts by default to address health inequalities has facilitated the development of equality norms. The *Alyne* decision highlighted the dimensions of distributive injustice of her death, and in doing so generated broad understanding about how societies too frequently and easily neglect poor pregnant

⁹³ Lindgren, *supra* note 44 at 419.

⁹⁴ Cook, *supra* note 90 at 116-117.

⁹⁵ *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*, CEDAW/ C/49/D/17/ 2008, August 10, 2011, online: <http://www.worldcourts.com/cedaw/eng/decisions/2011.07.25_da_Silva_Pimentel_v_Brazil.pdf>.

women, and what health systems need to do to prevent their deaths by remedying defective maternal health care. This decision has empowered pregnant women and their families to move beyond a fatalistic acceptance of maternal death, to recognize the role of injustice, including gender, racial and economic injustice, as an overarching explanatory factor.⁹⁶

Law has the ability to tackle the collective action problem articulated by Scully: “there are no satisfactory individual solutions to collective problems. The control and authority of physicians is reinforced by the lack of unity among patients and medical consumers. Without unity, medical consumers are unable to compare notes and work together for change.”⁹⁷ Law can fill gaps in individual knowledge, and international law, properly created and applied, can overcome local jurisdictional impediments to full access to medical treatment for issues touching upon women’s sexual health and conjugal ordering. Issues such as proper information, access to treatment, and principled dialogue between religious, moral, and societal norms and human rights, will be able to be described and laid bare by law. No other form of advocacy can achieve results as potent and far-reaching.

Conclusion

Law has been complicit in the regulation of female sexuality for millennia, and such control can be traced to patriarchy and its desire to control feminine sexuality: “[i]n the patriarchal regime, man became woman’s master; and the same characteristics that are frightening in animals or untamed elements become precious qualities for the owner who knows how to subdue them.”⁹⁸ Unlike the contested factual battlegrounds of polygamy and prostitution, there are no allegedly compelling reasons for restricting female sexuality *qua* female sexuality. Discrimination in the past has drawn on contingent religious, moral, and societal justifications for its fear and repression of female sexuality, both directly and indirectly. It is crucial that law

⁹⁶ Cook, *supra* note 90 at 117.

⁹⁷ Scully, *supra* note 53 at 256.

⁹⁸ De Beauvoir, *supra* note 5 at 173.

respond to this history by ensuring that women have autonomy over their sexual lives, which includes their reproductive and conjugal choices.

Rights discourse is a powerful, and probably the prevailing, method which should be used to obtain such legal protection. Human rights' "goal and their rhetoric lays claim to a definitive method for bringing all of humanity into the protection of humanity's law."⁹⁹ At the same time, law's acceptance of differing practices with relation to female private sexual ordering must be secured: like respect for all "others," this "also means not trying to rule others, not trying to classify them or put them in hierarchies, above all, not constantly reiterating how 'our' culture or country is number one."¹⁰⁰ As Giddens writes, "the principle of autonomy encourages difference-although it insists that difference should not be penalised."¹⁰¹ The underlying "paradox" of ensuring safety and autonomy for female private sexual ordering and simultaneously reconciling this autonomy with both the ability of its seeming abnegation and respect for other traditions is in reality not paradoxical, but merely represents two competing imperatives for a principled system of law.

Law can provide assistance in social change towards a greater acceptance of diversity and autonomy in female sexual ordering, but cannot be a panacea: "[w]hile law can provide a framework for equality, and some remedy for egregious violations of rights and respect, the state and law cannot and should not reach into every capillary of everyday life."¹⁰² This is reinforced by the idea that law cannot regulate all aspects of society: "[t]he political processes of all nations are wider and deeper than the formal institutions designed to regulate them; some of the most critical decisions concerning the direction of public life are not made in parliaments and

⁹⁹ Rogers, *supra* note 17 at 107.

¹⁰⁰ Said, *supra* note 23 at 336.

¹⁰¹ Giddens, *supra* note 12 at 188.

¹⁰² Young, *supra* note 7 at 85.

presidiums; they are made in the unformalized realms of what Durkheim called ‘the collective conscience.’”¹⁰³ Law is simply one facet of society, and since numerous societal particulars and perspectives exist throughout the world, it does not seem that any legal solution to the global problem of misogyny will be enough without fundamental societal change. Yet law represents a powerful tool for change, and one which can both inspire and reflect other fundamental reforms. While every “capillary” need not be monitored and disciplined by law, the fundamental tension between legal protection and legal coercion can surely, at least in almost all cases, reach a balance which achieves both protection and autonomous choices, and can help achieve societal change as one aspect of a greater shift.

This chapter has explored several legal paths forward in this process, from legal empowerment of women in developing nations, to a continuation of positive (but by no means complete) steps in the developed world. Issues such as modesty enforcement, reproductive rights, and control over the female body vary in particulars from the developed world to the developing world, but the disturbing trend of misogyny is almost universal. It is only by strengthening both the law and its underlying precepts that such issues can be drained of subjective religio-moral viewpoints and replaced with an equitable and principled stand towards the sexual rights of women.

¹⁰³ Geertz, *supra* note 24 at 316.

CHAPTER X

Private Sexual Ordering: Protean Law

The law of private sexual ordering represents an important front in the effort to remove subjective moral principles from the law and simultaneously ensure minority visions of the good life are respected. Over a half-century ago, Lester Pearson predicted that humanity was entering “an age when different civilizations will have to learn to live side by side in peaceful interchange, learning from each other, studying each other’s history and ideals and art and culture, mutually enriching each others’ lives. The alternative, in this overcrowded little world, is misunderstanding, tension, clash, and catastrophe.”¹ This advice is bolstered by the assertion that “[i]n a multicivilizational world, the constructive course is to renounce universalism.”² These arguments directly apply to all three topics covered in this dissertation. Coercive law must yield to respect for autonomy, allowing cultures, religions, and perspectives to “mutually enrich” each other. Arguments against the legal imposition of “one, historically specific, system of family life”³ do not inevitably lead to the catastrophes predicted by supporters of continued repression.

Legal debates are revolutionizing private sexual ordering globally, but many further contentions loom. This is understandable and predictable, given the societal importance of conjugal ordering: “domestic arrangements...provide a major focus of most contemporary cultures.”⁴ Some of the greatest recent gains for sexual autonomy have occurred in Western nations, in issues such as same-sex marriage (given tacit approval by the Supreme Court of the

¹ Lester B Pearson, *Democracy in World Politics* (Princeton, NJ: Princeton University Press, 1955) at 83-84.

² Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Touchstone Books, 1998) at 318.

³ Judith Stacey, *In the Name of the Family: Rethinking Family Values in the Postmodern Age* (Boston, MA: Beacon Press, 1996) at 82.

⁴ Susan Moller Okin, “Is Multiculturalism Bad for Women?” in Joshua Cohen, Matthew Howard, & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 9 at 13.

United States⁵), the striking down of polygamy legislation,⁶ and value-neutral analysis of prostitution laws (as seen in European sex work laws and *Canada (Attorney General) v Bedford*,⁷ which struck down the *de facto* criminalization of sex work). Such gains augur well for the ability of future generations to shape their conjugal situation without undue interference from law. George Washington wrote of a time when “no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights” when government “gives to bigotry no sanction, to persecution no assistance.”⁸ The above legal judgments are a step toward bringing this vision to the law of private sexual ordering.

However, the debate is far from over, and legal retrenchment along subjective lines can always occur, as approved “choices” offered to individuals remain shifting: “[c]hoice...does not mean a lack of conflict. Conflict is everywhere, in every society. Only the terms and conditions of conflicts change over time and space.”⁹ Legal gains have only partially enhanced the rights of sexual minorities such as polygamists and sex workers to live unmolested by predominant societal views: both activities remain widely stigmatized and illegal. However, law can overcome and disprove the idea that “all organization is and must be grounded on the idea of exclusion and prohibition, just as two objects cannot occupy the same space.”¹⁰ To paraphrase

⁵ See Lawrence Hurley, “Supreme Court dodges gay marriage, allowing weddings in five more states” (6 October 2014) *Reuters*, online: <<http://www.reuters.com/article/2014/10/06/us-usa-court-gaymarriage-idUSKCN0HV19020141006>>.

⁶ *Brown v Buhman*, 947 F Supp 2d 1170 (D Utah Dec 13, 2013).

⁷ 2013 SCC 72.

⁸ Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (18 August 1790), online: National Archives <<http://founders.archives.gov/documents/Washington/05-06-02-0135>>.

⁹ Lawrence M Friedman, *Private Lives: Families, Individuals, and the Law* (Cambridge, MA: Harvard University Press, 2004) at 10.

¹⁰ Arthur Miller, *The Crucible* (New York: Penguin, 2003) at 6.

Miller, the time has come to recognize that “the repressions of order” are “heavier than seem[s] warranted by the dangers against which the order [is] organized.”¹¹

The Importance of Private Sexual Ordering

The issue of the legal regulation of private sexual ordering raises many larger questions. These include the proper role for the State in relation to individual autonomy, the legitimate scope of law’s enforcement in society (how far the law extends into ostensibly extra-legal societal action), and whether religious and moral considerations have any place in a pluralistic legal structure. These issues remain fluid, contingent, and developing: “societies are not static. They are living organisms subjected to a continuous interaction of competing moral and cultural forces.”¹² Even the Roman Catholic Church, which has provided longstanding answers to the questions posed above, recently discussed the proper approach to sexuality, discussions which included “everything from polygamy to divorce.”¹³ Questions of legal philosophy resist easy answers, but this text has pinpointed areas which need legal (and theoretical) improvement.

The ultimate question this work has asked is how law can best interact with the sexual citizen, especially “disobedient” ones. Illegal methods of ordering private sexuality include polygamy, prostitution, and a wide range of behaviours associated solely with feminine sexuality, from reproductive rights, to sexual health, to sexual issues related to the female body. Yet the question defies one single transcendent answer. This work has attempted to demonstrate the contingent and shifting nature of any specific remedies for law’s overreach (or commensurate abdication) relating to private sexual ordering, which resists uniform or repeatable examples because it concerns “self-reflective, feedback-generating, information-exchanging entities, by

¹¹ *Ibid.*

¹² Howard Adelman, “Conclusion: Religion, Culture, and the State” in Howard Adelman & Pierre Anctil, eds, *Religion, Culture, and the State* (Toronto: University of Toronto Press, 2011) 100 at 116.

¹³ Elizabeth Dias, “Vatican Strikes New Tone---and Only a Tone---on Homosexuality” *Time* (27 October 2014) 184:16 at 10.

which I mean *people*”¹⁴ who are “molecules, as it were, with minds of their own.”¹⁵ The best that can be done with such contingent possibilities is for law to take an approach which simultaneously respects the rights of individuals and groups to sexual autonomy and does not ignore the potential for abuses of that autonomy (which can be combatted most usefully by allowing for exit from sexual minority groups and a robust family law). In the context of sexual ordering, criminal law becomes literal overkill: by forcing sexual minorities, especially sex workers, into hiding, the law allows or even encourages violence and abuse which go unpunished because its victims are seen as criminals. The current dangers associated with sex work should give proponents of abolition pause, especially from the claim that the paternalistic law is in place to “protect” sex workers against those individuals’ wishes. As stated by Weitzer, “[t]here is nothing inherent in prostitution that prevents it from being structured like other service occupations, aside from the stigma associated with it (the stigma attached to pornography and stripping does not prevent them from operating as quasi-conventional businesses).”¹⁶ As in other areas discussed, law discriminates against prostitution by inconsistently recognizing agency in some areas but completely denying it to sex workers and trapping them in a “deviant frame.”¹⁷

Another group that is not necessarily vulnerable is individuals in polygamous relationships. The criminalization of polygamy in international law and nations adopting international law norms tars all forms of polygamy (from polyamory, to female-empowering polyandry, to voluntarily-chosen polygyny) with the brush of abusive polygyny. In reality, “as each society and (sub)culture in which polygamy is practised is following its own trajectory, the future of

¹⁴ John Lewis Gaddis, *The Landscape of History: How Historians Map the Past* (New York: Oxford University Press, 2002) at 111 [emphasis in original].

¹⁵ *Ibid* at 113.

¹⁶ Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York: New York University Press, 2012) at 205.

¹⁷ Michael Goodyear & Cheryl Auger, “Regulating Women’s Sexuality: Social Movements and Internal Exclusion” in Emily van der Meulen, Elya M Durisin, & Victoria Love, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Toronto: UBC Press, 2013) 211 at 217.

polygamy appears as diverse as the institution itself,”¹⁸ a reality obscured by blanket legal prohibition. Criminalizing polygamy based on the (contested, alleged) actions of small groups of practitioners is similar to banning automobiles because they can be used to perpetrate vehicular homicide (or because they are the cause of death in impaired driving homicides).

As Campbell notes, the problem is one of choice: “[a]ll choices, even those that spark social and juridical objection and those that seem self-injurious, take place against the backdrop of state and non-state law. Moreover, such choices flow from an evaluation of diverse norms and the relative value, to the individual chooser, of internalizing and abiding by these norms.”¹⁹ This observation is as true of the law itself as those individuals the law governs. Should law allow citizens to undertake actions which the law (and the majority of society) regard as harmful or repulsive? This is a philosophical question which cannot be answered to complete satisfaction, but the words of Mill in defence of autonomy from State and society (separately or in concert) are powerful: “[t]here is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs as protection against political despotism.”²⁰

The discussion of “choice” factors differently into the third area this work has discussed, namely, the legal regulation of female private sexual ordering. Women’s legal disabilities include restrictions on sexual behaviour through legally imposed (or legally ignored) discrimination with respect to female sexual health, an interference with the ability of women to regulate their own bodies with respect to contraception, abortion, and surrogacy/assisted reproductive technologies, and (perhaps most importantly from an ontological perspective) an

¹⁸ Miriam Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* (New York: Berg, 2008) at 184.

¹⁹ Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Burlington, VT: Ashgate, 2013) at 193.

²⁰ John Stuart Mill, *On Liberty*, Elizabeth Rapoport, ed (Indianapolis, IN: Hackett Publishing, 1978) at 5.

inability to control how or why her body is portrayed by her in society. At first seemingly distant from the first two examples of this work, the regulation of the feminine is in fact key to unlocking the nature of law's regulation of sexual ordering: it provides an obvious example of impermissible (and unscientific) impulses which the law has given way to in legislating against human rights. An approach which respects human rights thus calls for the equality of women's sexual rights, and sexual autonomy, even while such freedom must be created with recognition that coercive law will likely be resisted.

I will begin by recapitulating my findings on the specific subject areas of polygamy, prostitution, and the legal regulation of female sexuality. This will transition into a brief summary of the proper role to be accorded to religious and cultural beliefs which seemingly conflict with the mainstream norms that contemporary law attempts to impose on sexual ordering,²¹ and the tension between a guarantee of basic rights for all people and the need to allow for divergence of opinion, practice, and belief. A true balance between freedom of religion and a comprehensive legal regime for society does not privilege one regime (legal or religious) over another: “[i]f we start from the premise that the inside law of the church is always subservient to the outside law of the state, rather than being another legitimate legal system with jurisdictional claims on its own members, we are not going to have much meaningful freedom of religion.”²² Principles of respect for autonomy and recognition of the danger of Othering militate against adopting a colonializing mindset towards other groups and other practices, part of a process in which “we shore up our own sense of moral integrity by projecting evil onto some

²¹ Of course, law, religion, and sexuality are not always in an antagonistic relationship. As Shipley notes, “[w]itnessed repeatedly, voices in opposition to sexual diversity are voices of religious oppression. And yet what is lost in the media coverage and portrayal of the debates are the voices of the religiously identified who support gendered and sexual diversities [and] those who in fact claim both religious and sexually ‘other’ identities.” Heather Shipley, “Conclusion,” in Heather Shipley, ed, *Globalized Religion and Sexual Identity: Contexts, Contestations, Voices* (Boston, MA: Brill, 2014) 313 at 316.

²² Alvin Esau, “Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Toronto: UBC Press, 2008) 110 at 111.

Other.”²³ All too often in private sexual ordering that “Other” is someone with a different idea of ideal sexual ordering: “[o]nly the correct decision is judged to engage agency.”²⁴

This text has rejected the philosophical and religious justifications for imposed subjective norms in private sexual ordering, and while the propriety of law bending to religion or moral code is subjective, the distancing of subjective positions on “the good life” from law appears warranted, as long as religious and moral freedom is protected. A final synthesis will canvass the goals and findings of this study. Many questions remain open, and this text will hopefully serve as the basis for a continued re/evaluation of the law’s role in private sexual ordering.

Polygamy

Polygamy includes multiple practices, some of which are demonstrably questionable, such as practices which advocate or compel incest,²⁵ are entered into by family members being traded from a family with no other economic choice, or encourage criminal behaviour such as theft.²⁶ However, other practices, which demonstrate an evolved form of the basic human choice whereby “consenting adults will be free to define love and marriage without fear of government intervention,”²⁷ ought not to be prohibited. Polygamy thus represents an ability for “different experiments in living,” creating an opportunity so that “the worth of different modes of life should be proved practically, when anyone thinks fit to try them.”²⁸ This is especially the case in circumstances where plural marriage can overturn heteronormativity or a gender imbalance in marriage, such as in homosexual (or bisexual) polygamy and in respectful polyandry, such as was practiced by the Shoshone: “polyandry among the Native American Shoshone is related to a

²³ Charles Taylor, *A Secular Age* (Cambridge, MA: Bellknap Press, 2007) at 692.

²⁴ Lori G Beaman, “Overdressed and Underexposed or Underdressed and Overexposed?” (2013) 19:6 *Social Identities* 723 at 731.

²⁵ Janet Bennion, *Polygamy in Primetime: Media, Gender, and Politics in Mormon Fundamentalism* (Waltham, MA: Brandeis University Press, 2012) at 214-216.

²⁶ See, for example, Janet Bennion, *Women of Principle: Female Networking in Contemporary Mormon Polygyny* (New York: Oxford University Press, 1998) at 76.

²⁷ Bennion, *Polygamy in Primetime*, *supra* note 25 at 258.

²⁸ Mill, *supra* note 20 at 54.

high status assigned to females.”²⁹ Colonization’s forced monogamy resulted in “plural and complex” indigenous family practices transformed by “forceful restructuring of First Nations kinship structures”³⁰ which simultaneously denied autonomy, promoted cultural chauvinism, and may have decreased female agency.

Polygamy can have an ontological significance for colonized peoples, as seen in the Canadian example, where the law saw the marital culture of indigenous people “suddenly and dramatically narrowed; previous generations could be monogamous, or they could separate, divorce, re-marry, form new families, or join a polygamous household.”³¹ It is no coincidence that the first Canadian polygamy trial was against an indigenous man.³² From the context of a tradition “[w]here indigenous customs violated the central beliefs of Christian, Euro-Canadian society,”³³ the ability to resist this imposition of Euro-Canadian cultural hegemony and regain cultural freedom is a persuasive narrative to which post-colonialist discourses should be sympathetic. This ontological value is similar to that which could attach to Islamic polygamy, which despite being banned in most non-Muslim countries is for some a potent symbol of commitment to faith and tradition. Recognizing polygamy would also allow for a reintegration of the religious individual into civic participation:

The modern conception of citizenship as merely a status held under the authority of a state has been contested and broadened to include various political and social struggles of recognition and redistribution as instances of claim-making, and hence, by extension, of citizenship. As a result, various struggles based upon identity and difference (whether sexual, “racial”, “ethnic”, diasporic, ecological, technological, or cosmopolitan) have found new ways of articulating their claims as claims to citizenship understood not merely as a legal status but as political and social recognition.³⁴

²⁹ Zeitzen, *supra* note 18 at 132.

³⁰ Susan Drummond, “Polygamy’s Inscrutable Criminal Mischief” (2009) 47:2 Osgoode Hall LJ 317 at 332.

³¹ Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: The University of Alberta Press, 2008) at 285.

³² *R v Bear’s Shin Bone*, (1899), 3 CCC 329 (NWT SC).

³³ Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women’s Press, 1991) at 26.

³⁴ Anver M Emon, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law* (New York: Oxford University Press, 2012) at 274.

Legally recognizing polygamy could partially answer imposing “the importance of being monogamous” on resisting populations, thus correcting degradation of their cultural, religious, or conscientious identity.

The potential benefits of polygamy are thus greater than the achievement of traditionally-considered gains such as, in fundamentalist Mormon communities, advancement of “the rights of women who actually prefer polygamy to monogamy, who are in plural marriages that function well and enjoy the benefits of a women’s network, assistance with childcare and housework, and intimate relationships that meet their psychological, spiritual, and emotional needs.”³⁵ Greater legal recognition of polygamy would go beyond the benefit of bridging disparate cultures now divided over philosophical (but not empirical) positions wherein “immigrants’ polygamist lifestyles collide head on with the legal and cultural basis of their host countries, [such that] it has led to a politicization of polygamy.”³⁶ Such politicization has more than a hint of the conception that “polygamy is a backward African or Asiatic institution that violates the standards of civilized society...[and is a threat] to civilization.”³⁷

In addition to avoiding this conflict, contesting the definition of marriage as monogamous and subsequently complicating the mainstream understanding of polygamy as heterosexual has the ability to “[free] us to imagine new ways of living and loving, and new ways to imagine community, society and ‘the good.’”³⁸ The legal acceptance of non-monogamous marital or cohabitation arrangements is a greater project than simply a privileging of personal autonomy: it allows the individual to “aim to transform the political and legal structures that regulate our

³⁵ Bennion, *Polygamy in Primetime*, *supra* note 25 at 289.

³⁶ Zeitzen, *supra* note 18 at 168.

³⁷ Arland Thornton, “The International Fight Against Barbarism: Historical and Comparative Perspectives on Marriage Timing, Consent, and Polygamy” in Cardell K Jacobson & Lara Burton, eds, *Modern Polygamy in the United States: Historical, Cultural, and Legal Issues* (New York: Oxford University Press, 2011) 259 at 288.

³⁸ Eleanor Wilkinson, “What’s Queer about Non-Monogamy Now?” in Meg Barker & Darren Langdridge, eds, *Understanding Non-Monogamies* (New York: Routledge, 2012) 243 at 251.

intimacies, relationships and imaginaries, in the hope of producing a better world for all.”³⁹ This problematization of the current realities of social marriage can perhaps better reflect that

[h]uman beings are endowed with widely diverse biological, psychological, and spiritual dispositions that predispose them toward different relationship styles: celibacy, monogamy, serial monogamy, or polyamory. In other words, many equally valid psychospiritual trajectories may call individuals to engage in one or another relationship style either for life or at specific junctures in their paths.⁴⁰

Polygamy has great transformative potential, as much, if not more so, than same-sex marriage. It can be practiced without implicating, and in fact fulfilling, human rights such as the right “freely to choose a spouse and to enter into marriage only with their free and full consent.”⁴¹

Yet the transformative potential of legal polygamy has been aggressively rejected not only by most national legal systems, but by an international legal regime which claims polygamy “contravenes a woman’s right to equality with men...and ought to be discouraged and prohibited.”⁴² The same international rights body that makes this *ex cathedra* statement goes on to, in the same document, blithely (and incongruously) assert that “[a] woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being....a woman’s right to choose when, if, and whom she will marry must be protected and enforced at law.”⁴³ The key to understanding the fundamental mistake that advocates interpreting *CEDAW* make when they argue for the elimination of polygamy is in their characterization of the practice as one of a set of “[h]armful traditional practices.”⁴⁴ There need be nothing traditional nor harmful about the practice of polygamy.

³⁹ *Ibid* at 253.

⁴⁰ Jorge N Ferrer, “Jealousy in Non-Monogamous Relationships Can Be Overcome” in Ronnie D Lankford, ed, *At Issue: Polygamy* (Detroit, MI: Greenhaven, 2009) 33 at 41.

⁴¹ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 art 16(1)(b) (entered into force 3 September 1981) [*CEDAW*].

⁴² Committee on the Elimination of Discrimination Against Women, *General Recommendation No 21* (13th Session, 1994), online: <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>> at para 14.

⁴³ *Ibid* at para 16.

⁴⁴ Committee on the Elimination of Discrimination Against Women, *General Recommendation No 24* (20th Session, 1999), online: <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>> at para 18.

Even where polygamy can be “harmful,” this does not automatically negate the possibility or validity of participants freely accepting the risk of harm. In a model which privileges autonomy, women (and men) can make fundamental decisions about their sexual ordering consonant with their conceptions of the “good life.” Prohibiting polygamy limits human autonomy—the very harm international rights norms seek to prevent. Prohibition is also potentially contradictory with international documents such as the *Universal Declaration of Human Rights*, which declares that adults “have the right to marry and to found a family”⁴⁵ and the *International Covenant on Civil and Political Rights (ICCPR)*, which grants individuals “freedom, either individually or in community with others and in public or private, to manifest his religion or belief in...practice,”⁴⁶ a clause relevant when polygamy is religiously, morally, or culturally based. Yet these potential paradoxes are ignored in favour of a strong denunciation by international law against polygamy.

International law is largely mirrored in national law, where “[m]onogamy is now the rule in Eastern and Western Europe, North America, South America, Central America, Australia, New Zealand, and large parts of Asia.”⁴⁷ With the exception of some Islamic-influenced legal systems (but not all: for example, Tunisia has prominently outlawed polygamy, a law which remains valid despite a change of government) and legal systems which incorporate respect for religious or cultural marital practices (such as the Republic of South Africa), polygamy is “discouraged and prohibited” by national law.

In a rejection of human freedom, even manifesting *de facto* polygamy can be criminalized: laws against cohabitation with multiple spouses are (while under challenge) still contained within

⁴⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art 16(1).

⁴⁶ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 18(1) (entered into force 23 March 1976) [ICCPR].

⁴⁷ Martha Bailey & Amy J Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara, CA: Praeger, 2010) at 7.

Utah’s criminal law, while Canadian law criminalizes “any form of polygamy [and]...any kind of conjugal union with more than one person at the same time.”⁴⁸ Criminal law is not the only method deployed against polygamists: immigration to Western countries is impossible, a provision often justified by xenophobic references to France, where a comparatively large polygynous community is the centre of social strife: “[t]he essence of...French identity is often equated with public secularism. Visible Muslims who may have their own interpretations of gender- particularly African-born immigrants who live in polygamous arrangements- are deemed non-normative and as threatening to accepted social norms.”⁴⁹ Even polygamy within Islamic contexts allows only a monochromatic form of a very diverse institution: only polygyny is accepted, and it is within the acceptable norms as interpreted to be permitted by the Qu’ran: while this system is “polygamous,” it still denies the ability to engage in same-sex polygamy, polyamory, polyandry or marriage to more than four wives.

This text’s findings join the chorus of social science research which urges review and reform of current national and international law on polygamy. Almost no advocates urge a blanket withdrawal from all aspects of marital ordering, but the issue remains that “for both empirical and normative reasons, the liberal state is ill suited to serve as an ethical authority.”⁵⁰ While suppression of uncontroversial crimes such as sexual assault, abduction or forcible confinement, and non-consensual or underage marriage can and should be prosecuted, the already-cited quotation of the British Columbia Civil Liberties Association speaks directly to the additional criminalization of all polygamy, regardless of form:

[A]ll of the other alleged abusive and exploitative acts (child and spousal abuse) are clearly prohibited by existing, ordinary criminal provisions--provisions which the BCCLA believes should be vigorously

⁴⁸ *Criminal Code*, RSC 1985 c C46, s 293(1)(a)(i) and (ii).

⁴⁹ Jennifer A Selby, “Polygamy in the Parisian Banlieues” in Gillian Calder & Lori G Beaman, eds, *Polygamy’s Rights and Wrongs: Perspectives on Harm, Family, and Law* (Toronto: UBC Press, 2014) 120 at 134.

⁵⁰ Tamara Metz, “Why We Should Disestablish Marriage” in Joshua Cohen & Deborah Chasman, eds, *Just Marriage* (New York: Oxford, 2004) 99 at 101.

applied, whether the relevant relationships are monogamous, bigamous, or polygamous. Mounting a fresh and additional attack on polygamous relationships per se adds nothing to this equation beyond creating additional impediments to important human freedoms of association, conscience, expression, and religion.⁵¹

Anecdotal horror stories (the veracity of which this work did not dispute) commingle with social science evidence which describes polygyny as commonly practiced as often voluntary, and, while perhaps illiberal, freely chosen on account of religious beliefs, such as Campbell's interviews with polygynous wives, which concluded: "[r]eflections shared by participants in this project suggest that they enjoy considerable autonomy and happiness, and this stands in contrast to the common portrayal of the polygamous wife by politicians and the media."⁵² Horror stories, such as those of Carolyn Jessop,⁵³ Elissa Wall,⁵⁴ Brent Jeffs,⁵⁵ and others,⁵⁶ represent crimes which go far beyond a prohibited private sexual ordering, into issues of sexual assault, assault, fraud, and other criminality. While these narratives are helpful and must be addressed, the solution is not as simple as banning polygamy. Often, the issue is not simply polygamy, but specific practices within polygamous communities which receive widespread attention. Issues such as the "Lost Boys" (where rampant polygyny amongst an older generation leads to the expulsion of competitors for mates, usually young males), income inequality or poverty have roots in unchecked polygyny (one man marrying hundreds of wives) and fertility: while these practices are related to polygamy, this practice has little to do with, for example, Islamic polygyny or modern polyamory, and it is questionable how formalizing the situation (a form or matrimony or cohabitation) makes the situation worse.

⁵¹ British Columbia Civil Liberties Association, quoted in Bailey & Kaufman, *supra* note 47 at 156.

⁵² Angela Campbell, "Bountiful Voices" (2009) 47:2 Osgoode Hall LJ 183 at 191.

⁵³ Carolyn Jessop & Laura Palmer, *Escape* (New York: Broadway Books, 2008) and Carolyn Jessop and Laura Palmer, *Triumph: Life After the Cult--A Survivor's Lessons* (New York: Three Rivers Press, 2010).

⁵⁴ Elissa Wall & Lisa Pulitzer, *Stolen Innocence: My story of growing up in a polygamous sect, becoming a teenage bride, and breaking free* (New York: HarperElement, 2008).

⁵⁵ Brent Jeffs & Maia Szalavitz, *Lost Boy* (New York: Broadway Books, 2009).

⁵⁶ For a Canadian first-person "horror story," see Debbie Palmer & Dave Perrin, *Keep Sweet: Children of Polygamy* (Creston, BC: Dave's Press, Third Printing 2012).

Lastly, it is necessary to discuss paternalistic law protecting polygamous individuals against themselves. The crux of this argument assumes that polygamy is harmful, either physically or mentally: does the individual, then, have the “liberty of self-degradation?”⁵⁷ This common theme in the law of private sexual ordering should, absent extreme circumstances, be answered in the affirmative. Empirical evidence (albeit contested, possibly invalid, and almost certainly inapplicable to any other societal context than the Israeli-Bedou people it was conducted with)⁵⁸ has demonstrated that polygamy may be objectively more stressful for participants than other forms of sexual ordering. But is this determinative? Society allows individuals to make less than optimal choices in many other respects, and even accords this ability to make deleterious choices with respect to private sexual ordering (through choice of spouse, for example). Even assuming (ignoring other studies which demonstrate the societal benefits of polygamy as opposed to divorce) that polygamy was definitively harmful, would this give law a right to intervene to annul the choices made by freely consenting individuals? The most compelling answer is no.

The issue may be more complicated if any society or legal system had demonstrated an ability to impartially adjudicate harm. Even assuming this is possible, it has never occurred: Western society has seen an evolution in concepts of degradation and propriety, ranging from female rights (from suffrage to birth control to the surprisingly recent American prohibition of marital rape)⁵⁹ to acceptance of diversity in society, to the current battles fought over homosexuality. In this instance, law and society should do no more than protect basic human

⁵⁷ Kate Field, quoted in Sarah Barringer Gordon, “‘The Liberty of Self-Degradation’: Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America” (1996) 83:3 *J American History* 815 at 815.

⁵⁸ Alean Al-Krenawi & John R Graham, “A Comparison of Family Functioning, Life and Marital Satisfaction, and Mental Health of Women in Polygamous and Monogamous Marriages” (2006) 52 *Int’l J Social Psychiatry* 5.

⁵⁹ It was only prohibited in the United States of America, starting with New York state, in 1984. See Nancy F Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2002) at 211.

rights and “make sure that there are constitutional and legal ways for women to exercise their free will and to leave a group easily if they wish to do so.”⁶⁰ In the face of such historical failure and law’s ongoing “failure to grapple and engage with sister wives’ lived experiences,”⁶¹ law should not de-personalize individuals freely ordering their private sexual lives using polygamy.

Prostitution

Prostitution is defined and acted upon by societal perception, rather than a transcendent reality: “[p]rostitution has long been treated as a deviant activity. Nonetheless, our views of who and what are deviant are socially constructed and subject to change.”⁶² Predominant discourse on prostitution is as troubling as that which essentializes polygamy and limits its meanings to exoticism, Orientalism, or harmful deviation. The need for a feminist critique of the patriarchal system which reified the subjection of women in numerous facets of sexual behaviour was (and still is) acutely felt, but while this discourse has beneficial results such as female empowerment and criticism of the patriarchy, it also has the potential to stultify the debate on sex work by limiting the practice to the study of women in prostitution (ignoring same-sex prostitution) and by overriding or discrediting voices urging the legitimacy of sex work. Millett describes this divide between theory and practice at an early conference between sex workers and activists:

[A] handful of women were there who were still in the life, rather than members of the movement who had turned a trick or nearly turned a trick under the pressures and exigencies of a past life. And these few came on like gang-busters. They had a great deal to say about the presumption of straight [that is, not in prostitution] women who fancied they could debate, decide or even discuss what was their situation and not ours. The first thing they could tell us---the message coming through a burst of understandable indignation---was that we were judgmental, meddling and ignorant.⁶³

This is not to say that theory (or the ideas of those who have not engaged in sex work) has no place in the study of prostitution, merely that law should avoid infantilizing voices from the

⁶⁰ Bennion, *Polygamy in Primetime*, *supra* note 25 at 281.

⁶¹ Campbell, *Sister Wives, Sex Workers and Surrogates*, *supra* note 19 at 95.

⁶² Frances M Shaver, “The Regulation of Prostitution: Setting the Morality Trap” in Bernard Schissel & Linda Mahood, eds, *Social Control in Canada: Issues in the Social Construction of Deviance* (Toronto: Oxford University Press, 1996) 203 at 219.

⁶³ Kate Millett, *The Prostitution Papers* (New York: Ballantine Books, 1976) at 32.

practice itself, since those who have participated in the practice “are the authoritative voices of women in prostitution”⁶⁴ with regard to its lived realities. Clearly, in discussing sex work, attention must be paid to its myriad realities: dismissing all aspects of sex work as “a systematic gendercide of tragic proportion where many of the world’s women are missing in multiple ways [physically, psychologically, and economically] in plain view,”⁶⁵ is neither academically rigorous nor productive. Potential abuses of prostitution cannot be ignored either. Prostitution can best be understood, like polygamy, as the potentially-empowering rubric under which specific contexts produce either beneficial or deleterious results, depending on the context and social realities: “fictions are only reinforced by writers who define prostitution monolithically---reducing it to patriarchal exploitation and violence or, by contrast, highlighting empowerment and therapeutic recreation. This essentialist quest is misguided. To define prostitution in such reductionist ways is to reify constructs that are best treated as *variables*, not constants.”⁶⁶

As with polygamy, religion, morality, and the majoritarian viewpoint have combined to produce law which is at best repressive and at worst, harmful to individuals engaging in private sexual ordering, especially those it purports to protect. For example, recently-developed international law is simultaneously strident and non-committal: “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”⁶⁷ The text implies links between prostitution and the uncontroversially repugnant violation of human rights via human trafficking, in its statement that “[e]xploitation shall include, at a minimum, the exploitation of the

⁶⁴ Janice G Raymond, *Not a Choice, Not a Job: Exposing the Myths about Prostitution and the Global Sex Trade* (Washington, DC: Potomac Press, 2013) at 183.

⁶⁵ *Ibid* at 192.

⁶⁶ Weitzer, *supra* note 16 at 204.

⁶⁷ CEDAW, *supra* note 41 at Art 6.

prostitution of others or other forms of sexual exploitation.”⁶⁸ While a clearer definition of what constitutes “exploitation of prostitution” would be welcome, it would risk falling into the characterization of older international documents, such as the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, whose preamble dramatically states that “prostitution...[is] incompatible with the dignity and worth of the human person and endanger[s] the welfare of the individual, the family and the community.”⁶⁹ As such, international law conflates two separate phenomena, human trafficking and prostitution, and attacks both indiscriminately.

Indiscriminate attacks are perhaps less common amongst national law, but this does not imply acceptance of sex work. National sex work laws are a patchwork from relative acceptance (in South America) and legalization in parts of northern Europe, such as Germany and The Netherlands, to ambiguity in Scandinavia and Canada and outright prohibition in most other parts of the world. Arguments for the criminalization of prostitution can be advanced in two main ways: appeals to religio-moral considerations which state that sex should not, based on an overarching reality, be sold, or empirical claims that selling sex is harmful to a group usually composed of sex workers themselves and the community at large. Both of these claims are problematic, especially given the multiplicity of types of prostitution which they attempt to condemn.

A claim that prostitution should be forbidden because it is incompatible with a good life (from the perspective of the seller or the buyer) may be an appropriate theological question, but by determining (with the threat of legal sanctions) a contested point of morality, law is

⁶⁸ UN General Assembly, UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, GA Res 55/25, annex II, UN GAOR, 55th Sess, Supp No 49, UN Doc A/45/49 (vol 1) (2001) 60 at Art 3(a).

⁶⁹ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, preamble A/RES/317 (entry into force 25 July 1951) (not ratified in Canada).

impermissibly treading upon the neutrality necessary for a pluralistic society, in violation of “the principle that the government should be as neutral as possible toward different conceptions of a good life.”⁷⁰ While subjective morality may condemn prostitution as harshly as its codes demand, this cannot necessitate the imposition of that morality *qua* morality upon those who do not share it. This means that if prostitution should be outlawed, the reasons for such legal action should be based on empirical (and inherent to the practice) calculations of harm.

However, such claims of harm, while loudly and aggressively made, often fall victim to close scrutiny or comparison to other, less-restrictive, systems. Narratives of harm include the danger of sexually-transmitted disease, of involuntary prostitution, and psychological harm suffered by even willing participants. As discussed before in this text, such claims are often unconvincingly made, as demonstrated by Weitzer: “largely or wholly drawn from non-random, unrepresentative, and small samples of the street-based population. In other words, we cannot even say that these generalizations apply to street prostitution, let alone the various types of indoor prostitution. The claims are based on doubly skewed samples.”⁷¹ After conducting a literature review, Weitzer concludes that “[t]he key point is one of variation across studies in the proportion of prostitutes who began working while underage, who use drugs, who have been victimized while working, and so forth. The large research literature on sex work shows that the grand generalizations of oppression theorists are simply fallacies.”⁷² This is reflected in the personal narrative of a young, indigenous, former sex worker: “[p]eople who do work from the saviour mode are perpetuating a form of colonization. Society has given us a few other options, but it’s also important to realize that some people might be ok with where they are at and there

⁷⁰ Peter de Marneffe, *Liberalism and Prostitution* (New York: Oxford University Press, 2010) at 133.

⁷¹ Weitzer, *supra* note 16 at 13-14.

⁷² *Ibid* at 14.

may be some of us who don't want to change."⁷³ Weitzer wraps up this systematic rebuttal of any "grand generalizations" by illustrating an unintentionally amusing example of non-academic work by an oppression theorist:

In Farley's study of six countries, she found substantial support for legalization of prostitution: a majority (54 percent) of the prostitutes interviewed across the countries (and 56 percent in Colombia, 74 percent in Canada, and 85 percent in Mexico) said legalizing prostitution would make it safer. These inconvenient figures are presented in a table but are not discussed in the text (Farley simply says that 46 percent of the total did not believe legalization would make prostitution safer)...As should be abundantly clear by now, the oppression paradigm is first and foremost a prescientific ideology. Its central tenets are not derived from carefully conducted research, which would contradict or radically qualify those very tenets. In short, the oppression paradigm pays little heed to the canons of scientific objectivity, and this is due to its advocates' overriding commitment to abolishing sex work.⁷⁴

Indeed, Melissa Farley is among the expert witnesses whose conclusions were expressly not adopted by Justice Himel in *Bedford v Canada (Attorney General)*,⁷⁵ on the grounds that she had become an advocate rather than an expert.⁷⁶

Objective law cannot overlook the benefits that the legal sale of sex has generated in the example of Nevada, which permits brothels under strict conditions, and which has contributed to "[t]he integration of brothels into their communities, a state tradition that permits the sale of sexual services, the profitability of the brothels for savvy owners and the cities or counties in which they operate...and the promise of potentially lucrative employment options for women who choose to prostitute"⁷⁷ and which represent "powerful forces supporting the continued existence of legal prostitution."⁷⁸ In addition to the economic gain and the gain experienced by individuals who prefer commercial purchase of sex to non-commercial intimate relationships, such legality also allows for greater ability for sex workers to insist upon safer sex practices, and

⁷³ "Ivo," quoted in JJ, "We Speak for Ourselves: Anti-Colonial and Self-Determined Responses to Young People Involved in the Sex Trade" in Emily van der Meulen, Elya M Durisin, & Victoria Love, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Toronto: UBC Press, 2013) 74 at 77.

⁷⁴ Weitzer, *supra* note 16 at 15.

⁷⁵ 2010 ONSC 4264.

⁷⁶ *Ibid* at paras 352-356.

⁷⁷ Kathryn Hausbeck & Barbara G Brents, "Nevada's Legal Brothels" in Ronald Weitzer, ed, *Sex for Sale: Prostitution, Pornography, and the Sex Industry*, 2nd ed (New York: Routledge, 2010) 255 at 278.

⁷⁸ *Ibid*.

while depersonalizing, allows for greater State oversight of the risk of sexually transmitted infections. Unless the complete eradication of prostitution was possible and achievable in the short term (which is obviously not the case), legalization appears to be the policy with the potential for the greatest positive impact on public health, as prostitutes are no longer faced with arrest during access to medical or prophylactic care. There is one further objection to the attempted abolition of prostitution, namely, that such attempts can potentially increase the allure of the now-forbidden activity: “[t]he sex industry has relied on and profited from its transgressive status...the demand for sexual commerce is in many ways based on its marginalized and stigmatized status – an irony that is lost to those pushing prohibitionist policies in Europe and the United States.”⁷⁹

This text argued that criminalization of prostitution was counter-productive, and at worst a cynical imposition of subjective religio-moral stigma upon people who do not necessarily agree with the mainstream mores of society. This decriminalization of prostitution would decrease the vulnerability of sex workers and would thus solve many of the objective problems faced by prostitutes when they cannot gain access to social assistance such as law enforcement and health services:

Many problems that are currently associated with the sex trade would start to diminish once whores were no longer criminal outcasts. Since they would be able to work from their own homes, this should reduce the number operating on the streets, with the attendant risks of male violence. Violence against women in general would also be reduced once the rape and murder of one particularly vulnerable group of women is no longer socially sanctioned. There may be problems of integration; neighbours, for instance, may object to prostitutes working from their own homes. In the past, any dispute arising between a whore and her neighbour would invariably be ‘solved’ by the intervention of the vice squad – with predictable results for the whore. When this kind of violation is no longer feasible, people will have to work things out between themselves instead of relying on the heavy hand of the state. Neighbours will have to confront prostitutes in person, learn who they are, relate to them as human beings – and accept that they have the same rights as others.⁸⁰

⁷⁹ Barbara G Brents & Teela Sanders, “Mainstreaming the Sex Industry: Economic Inclusion and Social Ambivalence” in Jane Scoular and Teela Sanders, eds, *Regulating Sex/Work: From Crime Control to Neo-liberalism?* (Malden, MA: Wiley-Blackwell, 2010) 40 at 59.

⁸⁰ Nickie Roberts, *Whores in History: Prostitution in Western Society* (New York: HarperCollins, 1992) at 356-357.

This potential gain for human autonomy and private sexual ordering does raise the question of how best to regulate prostitution if it is no longer criminalized. Some jurisdictions have adopted the so-called “Nordic Model,” wherein the sale of sex is legal but it is illegal to purchase sexual services. This text expressed serious concern with any asymmetrical legal regime regulating prostitution, despite the apparent good intentions of such a system, namely, to protect the rights and safety of sex workers while fighting what is perceived as exploitation. The first major problem with such a system is that while acknowledging and privileging the rights of sex workers, the system is designed to ignore or disparage the goals of those who would purchase sex, regardless of the reason for their decision. In unilaterally determining that this group, which may benefit from the interaction, should be completely shunned, the law is discriminating against individual autonomy by denying these individuals the right to pursue their chosen sexual ordering, and is doing so without any balancing between the interests of sex workers and their customers. As Hart notes, a law touching upon sexual impulses is “something which affects the development or balance of the individual’s emotional life, happiness, and personality.”⁸¹

Secondly, even if the argument is accepted that customers do not deserve legal consideration (or, not impossibly, that an asymmetrical model has balanced between the benefits of customers and the benefits of legally disempowering them), the system contains disbenefits associated with the impossibility of overseeing the practice as a legitimate business. The customers of prostitutes are still liable to prosecution, and thus cannot purchase sex openly, which forces any prostitute who wishes to remain in business back into the dangerous, extra-legal shadows where much of the violence against the sex trade has been shown to take place. Records (which could be seized or subpoenaed) cannot easily be kept, and the criminalization of one-half of the industry poisons the other half. Prostitutes must still risk their security to obtain

⁸¹ HLA Hart, *Law, Liberty, and Morality* (New York: Vintage Books, 1963) at 22.

customers, and the retention of illegality inhibits the benefits outlined in *Bedford*, namely, the ability to operate openly and take the time to screen clients (who will remain in a hurry).⁸² The essential criminality of the transaction will also provide little incentive for organized criminal groups to forgo involvement.

Finally, and perhaps most persuasively, the asymmetrical criminalization of prostitution does not address Weitzer's main point that prostitution is not monolithic and thus should not be treated in only one way. Laws that target abuses which can occur in situations related to the sex trade, such as sexual assault, robbery, violence, and human trafficking, should be prosecuted to the full extent of the law, but cannot be uncritically conflated with sex work itself. Arguments about prostitution made without qualification, especially in linking sex work to other illegal actions, are dangerous, and "obscure the nature and source of the exploitation. They also serve to hide the extent to which all women in our society, not just female prostitutes, are vulnerable to male violence."⁸³ While asymmetrical legal regimes which decriminalize sex workers (of all genders and orientations) are a welcome change from legal persecution and will be discussed further in this chapter when discussing suggested reforms, they may not represent the best possible solution, and may in fact retrench, rather than reform, the status quo.

Female Sexuality

Simone de Beauvoir opined that "woman is a complete individual, and equal to the male, only if she too is a sexed human being. Renouncing her femininity means renouncing part of her humanity."⁸⁴ In this way, a rejection or repression of female sexuality (as one instance of this "sex") is an attack on a woman's identity and being. The legal regulation of female sexuality based on moral and religious beliefs in the inherent difference, and often inferiority, of the

⁸² *Bedford* (ONSC) *supra* note 75 at, for example, para 361.

⁸³ Shaver, *supra* note 62 at 218.

⁸⁴ Simone de Beauvoir, *The Second Sex*, translated by Constance Borde & Sheila Malovany-Chevallier (New York: Vintage Books, 2011) at 723.

feminine has unfortunately survived into the 21st Century. This was demonstrated in this text through an examination of the role of law in suppressing access to female reproductive rights (such as contraception, abortion, and assisted reproductive technologies), the continued scepticism of law as it relates to female health in general (which stymies attempts for maternal care, for example), the phenomenon of the curtailment of female sexuality through female genital cutting and arranged or coercive marriage, and finally (drawing on the recent controversies in Western Europe and North America) attempts to control the portrayal of the female form through clothing or modesty laws. Throughout the analysis, the sources indicate that women's private sexual ordering operates under a strict scheme of legal regulation, one which is discriminatory and impedes sexual choice.

This can best be seen in human reproduction, of which Gay writes, “[p]regnancy is at once a private and public experience. Pregnancy is private because it is so very personal. It happens within the body. In a perfect world, pregnancy would be an intimate experience shared by a woman and her partner alone, but for various reasons that is not possible.”⁸⁵ It is likely, given the need for medical treatment and the State's record keeping responsibilities, to say nothing of the sociological importance of birth, that the process will never be truly private. However, State control over reproduction often goes too far, disempowering women from options regarding their own bodies:

[Control over their reproductive lives] can help [women] protect their livelihoods, their health, their relationships, and their dreams---for themselves and for their loved ones. Moreover, because women bear children and still provide most of the care for them, many see reproductive control as a prerequisite for full and equal participation in society, in other words, for citizenship.⁸⁶

This attempt to gain full citizenship is rooted in individual autonomy, but goes far beyond the simplistic conception of lack of interference from the State, to the idea of State neutrality: “[i]t is

⁸⁵ Roxane Gay, *Bad Feminist: Essays* (New York: HarperPerennial, 2014) at 269.

⁸⁶ Drew Halfmann, *Doctors and Demonstrators: How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago, IL: The University of Chicago Press, 2011) at 1.

a bit paradoxical that so many modern controversies---over sex life, abortion, and contraception---are defined legally as issues of privacy. ‘Privacy’ in the sense of free choice of lifestyle seems miles away from ‘privacy’ in the sense of secrecy, or ‘privacy’ as a screen shutting off the world from a person’s intimate life.”⁸⁷ Furthermore, the idea of “privacy” is in some cases dangerously different from autonomy: “[t]he doctrine of domestic privacy, allowing the home to be curtained off from public scrutiny, could work just like the old assumption of marital unity to maintain superior power in the hands of an abusive husband.”⁸⁸ Reproduction is tied to power: “[e]ven the most libertarian reforms, such as legalized abortion, are but tools. Women can use them to build better lives, but those with power can also pick them up and attack women with them.”⁸⁹

Advocacy for principled legal conduct towards pregnancy must therefore argue for female control of what is essentially a female process, rather than simply government non-intervention which may leave women at the mercy of other related actors or religio-moral regimes supplanting law. While abortion and contraception are morally difficult issues, often coming into conflict with religious or moral objections, this in itself is not a reason for law to restrict or eliminate their ability to be practiced. This text engaged with Cook’s characterization of legal regimes which inhibit reproductive rights as “modern day inquisitions,”⁹⁰ and argued that women should have the right to legally control their reproductive processes. In addition to the strong human-rights aspects to such a position, failure to legislate in this manner sees no change in demand, but gross changes in the harmful effects of those seeking abortion, where in Africa, for example, approximately 30 000 African women die per year as a result of seeking unsafe

⁸⁷ Friedman, *supra* note 9 at 180.

⁸⁸ Cott, *supra* note 59 at 210.

⁸⁹ Linda Gordon, *Woman’s Body, Woman’s Right: A Social History of Birth Control in America* (New York: Penguin Books, 1977) at 415.

⁹⁰ Rebecca J Cook, “Modern Day Inquisitions” (2011) 65:3 U Miami L Rev 767.

abortions.⁹¹ This situation is clearly unacceptable and law must act to alleviate, rather than exacerbate, the problem of women seeking this instance of private sexual ordering.

Similarly, assisted reproductive technologies (ARTs) present huge potential for the circumventing of traditional medical impediments to fertility. Issues such as sperm donation, ovum donation, and surrogacy present wonderful possibilities for people who cannot conceive children through a mutual biological process (a group including same-sex couples and individuals). While legal steps forward in this area such as *AA v BB*,⁹² which ruled that a child may legally have more than two parents, are a cause for optimism, law can also inhibit or distort the potential of ARTs. This can result from confusion regarding parental and child status in families created through ARTs, which Appleton, in comparing the problems faced by both parents and children, terms a new illegitimacy of sex.⁹³ This illegitimacy arises wherever law “fail[s] to acknowledge the reality of a particular child’s lived existence, no matter how unique.”⁹⁴ In imposing this illegitimacy, law imposes a corresponding impact on all parties involved as well as on society, in which the laws “not only shape our understanding of family by acknowledging some connections and dismissing others; in doing so, these choices also construct the identities of the affected individuals, adults and children alike.”⁹⁵

This text argued that law must take an expansive approach to the new realities of private sexual ordering that are demonstrated through ARTs, by recognizing the underlying realities of the situation at the same time as protecting women’s rights (especially in complex medical procedures such as ovum donation) and closely monitoring the performance of such

⁹¹ Charles G Ngwena, “Protocol to the African Charter on the Rights of Women: Implications for access to abortion at the regional level” (2010) 110:2 Int’l J Gynecology & Obstetrics 163 at 164.

⁹² 2007 ONCA 2.

⁹³ Susan Frelich Appleton, “Illegitimacy and Sex, Old and New” (2012) 20:3 Am U J Gender Soc Pol’y & L 347.

⁹⁴ *Ibid* at 385.

⁹⁵ *Ibid*.

technologies. This is also the case with establishing legal parentage. As Cameron, Gruben, and Kelly note, “[w]ithout clear parentage laws in place for families who conceive using ARTs, it is not obvious who the child’s legal parents might be. Families are justifiably concerned that, without the protection of the law, donors might intervene in their established relationships and pose a threat to their family security.”⁹⁶ This issue is not exclusive to female sexuality, but as it involves the State’s regulation of the female birth cycle and what it means to be a parent, the legal protection which the above quotation calls for, and which will provide security for childbearing women, must be provided, at both the national and international levels, to ensure proper respect for female sexual ordering and human rights.

A similar issue arises with respect to the legal aspect of the provision of female sexual health. The issue is relatively clear: law must not only ensure that women are protected from discrimination in the provision of medical services, but must also ensure that societies are compelled to take proactive steps to ensure that medical treatment for women’s sexual health is provided. Encouraging use of the courts to achieve such aims has been documented by Shaw and Cook, who describe a case in which the High Court of Delhi (India), faced with the case of a woman who had died in childbirth without a skilled attendant, “recogniz[ed] reproductive rights of pregnant women as inalienable survival rights, [and] ordered compensation to her family for the violation of her rights, receipt of benefits to which they are entitled to by government schemes, and a maternal death audit.”⁹⁷ While obviously not ideal, this case demonstrates that law can be used to hold violations of female sexuality accountable and can be used to compensate and reform systematic ignorance or discrimination against female sexual health. This

⁹⁶ Angela Cameron, Vanessa Gruben, & Fiona Kelly, “De-Anonymising Sperm Donors in Canada: Some Doubts and Directions” (2010) 26 Can J Fam L 95 at 108.

⁹⁷ Dorothy Shaw & Rebecca J Cook, “Applying human rights to improve access to reproductive health services” (2012) 119 Int’l J Gynecology and Obstetrics S55 at S56. The case, one of several similar cases discussed, is cited by the article as *Laxmi Mandal v Deen Dayal Harinagar Hospital*, Ors WP.

text documented instances of health discrimination in both developed and developing nations: the solution must be for law to act as both sword and shield in ensuring that women's health (in this context sexual health) is given the same priority and attention as male health.

This text also explored the realities of female genital cutting, also known as female genital mutilation, in which female genital organs are surgically removed or incised so as to dull female sexual pleasure. At the highest levels of seriousness regarding cutting, the practice of infibulation, where the labia is sewn shut, represents a health risk as well as a vast change in bodily structure and integrity. Yet, despite international law's resistance to the practice, it still flourishes in parts of the world (mainly African nations) where it has traditionally been practiced. Some commentators see the practice as "a cut on the body of human rights,"⁹⁸ "[r]elying on liberal notions of autonomy and individuality" to paint female genital cutting "as a form of castration that removes the woman's organ of sexual pleasure and in so doing violates their fundamental rights."⁹⁹ Others point out that female genital cutting is a cultural and religious process which on the principle of moral relativism should not be immediately condemned: "[i]t is our obligation here to read and to see and to hear 'female genital mutilation' as a series of complex social practices and signifiers which circulate in many other practices and signifiers to produce mutable and mutating mutual social texts."¹⁰⁰

In such an emotive and complex debate, the usual first step (as with polygamy, prostitution, and female sexuality) is to recognize the multiplicity inherent in the singular term. While unsafe procedures, or those that are undertaken without consent, or without meaningful

⁹⁸ Juliet Rogers, *Law's Cut on the Body of Human Rights: Female Circumcision, Torture, and Sacred Flesh* (New York: Routledge, 2013).

⁹⁹ Rogaia Mustafa Abusharaf, "Introduction: The Custom in Question" in Rogaia Mustafa Abusharaf, ed, *Female Circumcision* (Philadelphia, PA: University of Pennsylvania Press, 2006) 1 at 11.

¹⁰⁰ David Fraser, "The First Cut Is (Not) The Deepest: Deconstructing 'Female Genital Mutilation' and the Criminalization of the Other" (1995) 18:2 Dal LJ 310 at 338.

consent, should be discouraged by law, individuals above the age of majority who seek to alter their bodies should be (and in most jurisdictions, are) allowed to take decisions according to their personal beliefs, especially if such actions are made at the instance of religious or conscientious principles. Moreover, law must be careful to foster positive change, rather than attempt to coerce individuals, which ultimately may lead to retrenchment and greater resentment of the law: “[i]n order to be effective, strategies should be designed to generate social change rather than merely influence individuals, and they must offer social support for families to carry their new ideas through [*sic*] action.”¹⁰¹ Law cannot ignore the ontological issue of female genital cutting as a response to either suppression or dilution of traditional cultural practices, a variable which Yount found to influence the practice in an Egyptian community, where Islamic tradition seems to have influenced the practice: “the findings of this study are consistent with the idea that variation in the prevalence of customary practices like female genital cutting in Egypt may be understood in the context of historically unequal relations of religious groups to the state and their strategic use of competing gender symbols in national and transnational discourses on development.”¹⁰² Female genital cutting remains a complex issue, but law’s concern for autonomy and human rights should equally shield vulnerable individuals who may not consent to the procedure and vulnerable individuals who may be prevented by law from pursuing their chosen sexual ordering.

Finally, the issue of the legal imposition of modesty on the female form was addressed, and its corresponding backlash (such as attempts to limit female choice of clothing from the “wrong” choice of the niqab, burqa, or hijab). Narratives of choice and freedom are thus used to disempower women choosing to order and portray their bodies as they wish, as Bakht writes

¹⁰¹ Nafissatou J Diop & Ian Askew, “Strategies for Encouraging the Abandonment of Female Genital Cutting: Experiences from Senegal, Burkina Faso, and Mali” Rogaia Mustafa Abusharaf, ed, *Female Circumcision* (Philadelphia, PA: University of Pennsylvania Press, 2006) 125 at 141.

¹⁰² Kathryn M Yount, “Symbolic Gender Politics, Religious Group Identity, and the Decline in Female Genital Cutting in Minya, Egypt” (2004) 82:3 *Social Forces* 1063 at 1084.

about the fallacious and untrue discourse surrounding the interference with the autonomy of Islamic women:

the fact that messages deployed about Muslim women are entirely contradictory seems to heighten the veracity of such claims. The veiled woman is both threat and threatened. Niqab-wearing women are a threatened group in need of rescuing from their male oppressors that force the veil upon them. They are threatening in the attire that they wear publicly to hide their identity, engage in electoral fraud, avoid security measures, and prevent open communication. In a courtroom, a niqab-wearing sexual assault complainant threatens the fair trial rights of the accused and the value of open communication in courts, but when she is the accused she threatens the rights of others with little concern for the threat of a wrongful conviction.¹⁰³

Any type of interference with female attire on the grounds that it is either disempowering or conversely too empowering runs afoul of the problematic discourse earlier identified with respect to polygamy and sex work, namely, that it erases the agency of its practitioners in favour of an externally-imposed, patriarchal control mechanism. This dissertation has argued strongly for the privileging of agency and autonomy where no competing imperatives exist, and decisions about clothing the female form, especially when it relates to female sexuality, should be left alone by the law to be determined by the women affected themselves.

Religious Influence on Law, and Law's Influence on Religion

Religious and moral influences on the law are perceived in a multitude of ways, from the questionable assertion that law must contain subjective religious principles in order to align itself with transcendent truth, to other commentators who decry any subjectivity based on creed in law. This debate is particularly important with respect to the law of private sexual ordering, as clear conflict arises between uniform law and those who would dissent from its principles, who are then either tacitly punished by being coerced into a certain way of life they would not choose, or alternately punished under another's subjective code: "where there is no victim but only a transgression of a moral rule, the view that punishment is still called for as a proper return for the

¹⁰³ Natasha Bakht, "In Your Face: Piercing the Veil of Ignorance About Niqab-Wearing Women" (26 October 2014) Social and Legal Studies, online: <<http://sls.sagepub.com/content/early/2014/10/24/0964663914552214.full.pdf?ijkey=G1X0XWhGfmxUMLY&keytype=ref>> at 16.

immorality...seems to rest on nothing but the implausible claim that...the evil of suffering added to the evil of immorality as its punishment makes a moral good.”¹⁰⁴ Moreover, the religious liberty of those who would order their sexuality in ways repugnant (as either too liberal or too conservative) to the mainstream create another dispute: “[c]onflicts between sex equality and religious institutions create severe tensions in a liberal social order. They raise the obvious question: What is the appropriate domain of secular law insofar as government seeks to control discriminatory behavior by or within religious institutions?”¹⁰⁵

This dissertation found that the religious influences on law in the areas of polygamy, prostitution, and the regulation of the feminine are, for the most part, alive and well, if perhaps now obscured by narratives of harm and lack of agency rather than suppression of vice or a practice which was forbidden by mainstream Christianity. These narratives are a simple mutation, as Gordon describes: “[w]hat had been sin became physically injurious. In an earlier chapter we commented on the concept of vice as including sin but also carrying the connotation of destructiveness. We can now see that concept as a transitional one, between a purely metaphysical morality and a purely ‘empirical’ commitment to science.”¹⁰⁶ While traditionally religious beliefs were able to creep into legal thought via a “society of shared social values where marriage and religion were thought to be inseparable,”¹⁰⁷ now law is called upon to justify traditionally-imposed (and religiously-motivated) restrictions on private sexual ordering with reasons justifiable in a pluralist and diverse society. This text repeated the call for the window-dressing of traditionally religio-moral legislation, namely flimsy or limited narratives of harm, to

¹⁰⁴ Hart, *supra* note 81 at 60.

¹⁰⁵ Cass R Sunstein, “Should Sex Equality Law Apply to Religious Institutions?” in Joshua Cohen, Matthew Howard, & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 85 at 85.

¹⁰⁶ Gordon, *supra* note 89 at 171.

¹⁰⁷ *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22.

be torn down, along with the underlying subjective rules. While there is nothing inherently wrong with religiously-based law, law solely justifiable by religious or cultural preference should no longer hold sway. Whether based on Islamic, Christian (both codes which exert and have exerted global influence) or another religion or morality's practice, laws must be articulated so as to be generally applicable. Any law failing to meet new and rigorous standards should be reformed.

The next discussion this text undertook was how, and when, law should be flexible to the needs of religion. Wherever possible, law should be sympathetic to the varied practices of religion (freedom of which is guaranteed by, amongst other documents, the *ICCPR*¹⁰⁸) and while the threat of “every citizen to become a law unto himself”¹⁰⁹ as a result of religious accommodation is a potent image, it is ultimately a rhetorical paper tiger designed to bleed support away from uncontroversial accommodation. In reality, when “religion is too readily and quickly seen as a threat to equality or security” then “*all* religious freedoms become vulnerable to being too lightly overridden.”¹¹⁰ Of the three issues this text has described, the practice with the most obvious connection to religious belief is polygamy (although religiously-inspired or mandated prostitution has been known to occur in human history).¹¹¹ The rights of religious minorities should be respected as far as possible, and this extends to the three areas under discussion. While there is obvious concern that religious principles may be abused in order to cause harm to adherents, especially children, such concerns should be no less prevalent with mainstream beliefs (such as Catholicism's rejection of homosexuality as sinful), and in these

¹⁰⁸ *Supra* note 46 at Art 18.

¹⁰⁹ *Reynolds v United States*, 98 US 145 (1879) at 167.

¹¹⁰ Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Toronto: UBC Press, 2008) 87 at 107.

¹¹¹ See Roberts, *supra* note 80 at 44-47 and for historical religious prostitution in India, 354-355.

areas, religion should trump law absent some overriding legal duty. Subjective “harm,” or self-degradation in the name of religion, is not a sufficient cause.

Synthesis and Discussion

When discussing issues so well-trodden as those I have studied in this dissertation, the question can be asked, what does this text contribute to such well-studied phenomena? An immediate, if unsatisfactory, answer is scope: this text explores the whole myriad of instantiations of polygamy, sex work, and the feminine, and does so using both the nascent field of international law and the more-established national paradigms. A second answer is that most social science discussions of the topic pay little, if any, heed to the religious and moral aspect of the regulation of these practices. While it is common to indicate that, for example, polygamy is often religiously-inspired, this text has gone further, exploring not only the religio-moral framework of law’s interaction with private sexual ordering but inverting the analysis to show how the philosophical ideals of freedom of conscience and religion can be synthesized with minority sexual practices, not least among them sex work. But the main contribution of this work has been a form of synthesis: this work has endeavoured to show that far from being unconnected phenomena of sexual behaviour, the examples studied are actually part of a larger framework, a connected (if not uniform) method by which law regulates all sexual citizens, particularly the female and marginalized sexual citizens. The polygamist forced into monogamy shares many traits with the sex worker (or that worker’s customer) who is forced from their preferred view of sexual activity, and forced from their preferred outlet of sexual behaviour. Women as a group also feel this legal discrimination in terms of their conjugal rights and abilities.

This dissertation has attempted to go farther than simply juxtaposing these aspects of human sexuality and their legal restraint. Religion and morality stand at both ends of this text: on

the one hand, I have examined the role which religion, especially the predominant Abrahamic religions, have played in the regulation of private sexual ordering across the globe. This analysis leads to insights regarding the proper role of religious belief in the fabric of the law, and whether, in the “modern” world, religion should shrink away from pluralistic discussions, alter its focus, or increase its demands for recognition (if not necessarily despotic enforcement). Is the proper legal discourse to be adopted Hitchens’s emphatic request that he will respect religious belief but asks for “the polite reciprocal condition---which is *that they in turn leave me alone?*”¹¹² Is it Beaman’s recognition of the value of belief, even in the public sphere, and the dangers of a situation where “some behaviours and beliefs are construed as excessive and...some choices are constructed as the result of brainwashing rather than agency”¹¹³ without solid evidence to back these characterizations? This is the first step of the inquiry which this work has undertaken. At the other end of the analysis, once the proper scope and aim of the law has been established, is its impact on minorities. Of course, the overriding area of study for this text has been sexual minorities, but an intriguing subset of the analysis is how law impacts religious minorities (and their conjugal arrangements), and what changes in legal policy are required, and should be required, to ameliorate or lessen the impact of these policies, as the law grapples with the problem that “religious institutions are sometimes a source of discriminatory practices, and hence respect for the autonomy of religious institutions may undermine the goal of sex equality.”¹¹⁴ This is an interesting (and wholly different) analysis, usually made independently of the area of private sexual ordering.

¹¹² Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (Toronto: Emblem, 2008) at 13 [emphasis in original].

¹¹³ Lori G Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Toronto: UBC Press, 2008) at 152.

¹¹⁴ Sunstein, *supra* note 105 at 85.

These issues do not lend themselves to easy answers, or in some cases to answers at all. However, in this regard, with basic intentions or guidelines set out (such as respect for the freedom of religion and respect for, where possible, human autonomy which does not infringe on another's autonomy), appropriate legal reforms may be made and adjusted with consideration of the "issue" of religion and morality, both on its influence within the law and the law's impact on believers. Okin complicates the nature of group autonomy by opining that

Discrimination against and control of the freedom of females are practiced, to a greater or lesser extent, by virtually all cultures, past and present, but especially by religious ones and those that look to the past---to ancient texts or revered traditions---for guidelines or rules about how to live in the contemporary world. Sometimes more patriarchal minority cultures exist in the midst of less patriarchal majority cultures; sometimes the reverse is true. In either case, the degree to which each culture is patriarchal and its willingness to become less so should be crucial factors in judgments about the justifications of group rights.¹¹⁵

With respect, that is not the ideal approach suggested by the research embodied in this text. To dangle autonomy above groups, surrendering it to only those cultures or religions which have "earned it," fundamentally misinterprets the principles of autonomy and de-personalizes others who do not hold the same beliefs (no matter how repugnant the "Other" beliefs are, in this case regarding sexual ordering). Law must protect against abuse such as child molestation and sexual assault, and should attempt to be a mediating force against patriarchal domination, but to remove agentic capacity is a step too far. Bennion's research on a polygynous community in Montana concluded that "[w]hile the presence of female bonding and association may intrigue many modern feminists, the uniqueness of female ascendance in a blatantly 'patriarchal' arrangement, despite the privations and difficulties, may appall many traditional feminists."¹¹⁶ It may indeed be looked upon by almost all people as "appalling," but this is beside the point: with the consent of those engaged in the practice, and without the compelling claim that the practice impinges on a right which the State must coercively guarantee to all citizens (such as life and physical

¹¹⁵ Okin, *supra* note 4 at 21.

¹¹⁶ Bennion, *Women of Principle*, *supra* note 26 at 155.

integrity), the rights of the group to self-determination militate against the imposition of outside legal rules.

This is another commonality between the three examples of private sexual ordering with which this dissertation has engaged. Autonomy of sex workers, polygamists (it can be ironically observed that these groups have little else in common and are generally mutually antagonistic), and dissenting and resisting women should not need legal “permission” to engage in their own experiments regarding their lives and their bodies. It is true, as mentioned in the section on polygamy, above, that law must guarantee basic rights and ensure the ease of exit for individuals or groups who no longer wish to engage in a particular sexual ordering, but this justification for legal interference extends no further.

Conclusion

“Life in a secular age,” writes Charles Taylor, is “uneasy and cross-pressured, and doesn’t lend itself easily to a comfortable resting place.”¹¹⁷ This tension can be seen not only in secular societies, but those in which religious and moral-based systems of law interact with private sexual ordering, creating discourses of both obedience and resistance. The issue of sexuality is common to all of humanity, and thus the proper scope of the study of the law of private sexual ordering encompasses both international law and the law of nations, whether secular or religious, developed or developing. Through the study of the examples of polygamy, prostitution and female sexuality, greater truths can be enumerated, touching upon the proper role of morality and religion in law, the proper scope of the criminal law, and the importance of human autonomy. This work has argued that in the face of myriad differing contexts, law must demonstrate respect for human dignity and human autonomy. While the viewpoint that human dignity must be preserved even in the face of its holder’s attempt to release it is superficially tempting, law

¹¹⁷ Taylor, *supra* note 23 at 676.

should ultimately respect a fully-informed and freely-consenting adult's choice, even if the choice, which is likely not made according to a coldly rational temporal calculus, seems self-harmful or otherwise deleterious. Law cannot, and should not attempt to, tyrannically substitute its own animus for those whom it supposedly "protects." This chapter first repeated and summarized the findings on the three subject areas of its study: polygamy, sex work, and the regulation of female sexual behaviour. Repression based on predominant religio-moral codes was a pervasive factor, as was the influence (and sometimes inspiration) of those codes on the criminal law. This text has unequivocally called for criminal law to be used only as a last resort, and not against those whom the social majority finds, without empirical basis, to be repugnant.

This was followed by a discussion of the proper balance to be maintained between law in a plural and diverse society and the need for uniform protections for citizens engaged in private sexual ordering. It seems impossible (even if it were desirable) to eliminate faith and subjective morality from the law completely. However, this truth requires that minority opinions (whether invoked against the majority or as a debate within what Esau calls an "illiberal"¹¹⁸ minority) be protected, and those who practice minority or deviant sexualities be permitted to pursue their own idea of the good life independently of laws not made to prevent some empirically-verifiable, demonstrably necessary harm. In contexts where these practices involve harm or potentially non-consensual activities, law must not abrogate its duties to protect its citizens, but this observation does not validate careless equation of non-harmful or consensual activities with other harmful examples. Law need not completely adopt the suggestion of Hitchens that "the divorce between the sexual life and fear, and the sexual life and disease, and the sexual life and tyranny, can now

¹¹⁸ Esau, *supra* note 22.

at last be attempted, on the sole condition that we banish all religions from the discourse,”¹¹⁹ although law must attempt Hitchens’s results if not his methods.

The next step was to discuss specific reforms. Those reforms, in favour of greater individual autonomy, will, it was argued, eliminate some of the legal abuses currently associated with law’s impact on sexual ordering. Such recommendations are to a point subjective (based on the widely-held conception of human rights and the need to respect freedom of belief and conscience). Moreover, various methods of their implementation can be conceived, so that these reforms are less “blueprints” for a new legal order than principles which should inform such an order. These reforms first require clarity in law (especially in international law, which seems to have been drafted so as to retain ambiguity and overbreadth within its texts). Secondly, reforms need an enforced legal equality where necessary (such as in the protection of the formal equality of women), and finally, must ameliorate laws stigmatizing sexual minorities who freely consent to their lifestyle (such as groups within sex workers and polygamists). In many cases, these reforms will indirectly benefit not only those individuals currently targeted by repressive laws but also the State itself, by allowing for greater oversight and engagement with sexual minorities. The reforms also allow for greater dialogue and an enhanced ability to target abuse within the community, rather than laws which lead to “the aggravation of risks.”¹²⁰

Undoubtedly, a copious amount of reform is still required to improve the law and remove deleterious religio-moral influences, and this amount of reform is itself dwarfed by the amount of research which remains to be done. The discussion of when, why, and how law should regulate the sexual citizen is just beginning: how laws and constitutional challenges will impact on the ability of persons to live deviant sexuality has yet to be fully established. It is my hope that this

¹¹⁹ Hitchens, *supra* note 112 at 283.

¹²⁰ Campbell, *Sister Wives, Sex Workers, and Surrogates*, *supra* note 19 at 187.

dissertation will contribute to this ongoing discussion, as law aligns with principles of human dignity, autonomy, and respect for freedom of religion and conscience.

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