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RELIGIOUS IDENTITY AND DISCRIMINATION IN THE PUBLIC REALM: THE CASE OF POLYGAMY IN WESTERN CANADA

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Western history is full of examples of religious majorities persecuting religious minorities because of minority practices which the majority considers strange, repulsive, or harmful. Majorities have implemented laws to prohibit some religions from being practiced, persecuted adherents to particular faiths and, in some instances, deepened societal discrimination against some religious minorities. With the rise of the secular state, the tendency to view some religious practices and beliefs as repulsive, and to persecute minorities for these practices, has not subsided completely. Today, for instance, religious practices which are considered sexist or harmful to children are often the targets of public outcry and legislative restriction and groups which engage in such practices are maligned. We might agree that restricting sexist and harmful practices is justified, but nonetheless disagree about what sort of practices count as sexist or harmful and therefore which practices ought to be restricted. In fact, such disagreements about what counts as sexist or harmful such that it needs to be restricted take place not only between minority and majority groups, but within each of these groups as well. The question addressed in this paper is how can public institutions within societies with historical legacies of religious discrimination and minority persecution fairly evaluate the claims of minorities to engage in controversial religious practices, including practices that have historically been considered to be sexist or harmful. This question engages issues about diversity as well as issues about legitimacy. How can the court be sensitive to religious and cultural differences while providing a reasonably justified and unbiased assessment of whether a religious practice, which has been broadly viewed as repulsive (sexist, homophobic, or harmful) by the majority, is indeed harmful and ought to be prohibited? If focus on the practice of polygamy in Canada which is both a practice that is considered repulsive by many Canadians and one that is sometimes described as no more sexist or harmful than many other practices which are not restricted.

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THE CASE OF POLYGAMY: HISTORICAL BACKGROUND

Polygamy is criminally prohibited in Canada, but many people, including some sizeable communities, openly engage in the practice either as a matter of lifestyle choice,[1] because the practice is culturally familiar and accepted,[2] or because it is religious mandated, as it is in the Fundamentalist Church of Jesus Christ of the Latter Day Saints (FLDS), who are also known as 'fundamentalist Mormons'. Historically, polygamy was also practiced by some Indigenous communities, most notably, the Plains Indians in Western Canada (Carter 2008). The 1890 legislation prohibiting the practice in Canada was directed, not at the Plains people, but at stopping Mormon immigrants who arrived to western Canada from the United States in the 1880s. At this time, the US Congress passed the Edmunds Act (1882) which disenfranchised all people who practiced polygamy and, through subsequent legislation, imposed heavy fines and imprisonment on those convicted of polygamy. Nearly 1,300 Mormons were jailed, their children were declared illegitimate, and their Church was driven into bankruptcy. As a result of this, the Mormon Church announced in 1887 that it renounced the practice of polygamy. Some Mormons continued to practice polygamy secretly in Utah, where the community had been based, while others emigrated to different regions of North America, including Western Canada, where a community settled in southern Alberta in 1887 on land adjacent to the Kainai Indian Reserve, whose members also practiced polygamy. The community's practice was considered scandalous and described as a 'moral ulcer' by members of the broader community.[3]

Soon after they arrived, a delegation from this group of immigrant Mormons travelled to Ottawa to ask the Prime Minister whether they could continue with their practice of polygamy, pleading their case in terms of their religious

[1] The Polyamory Advocacy Association of Canada (http://polyadvocacy.ca/) views section 293of Canada's criminal code, which prohibits polygamy, as unfairly targeting people who are in loving and non-exploitative relationships with multiple sexual partners.
[2] The practice of polygamy is accepted in many countries which are governed partly by Shari'a law (e.g. Jordan, Egypt, Morocco, Syria, India, Pakistan, Algeria) and is practiced by some (there is no estimate of how many) Muslims living Canada. Some believe that the practice is allowed by the Koran, though not religious mandated. The criminal prohibition on polygamy is not considered a denial of freedom of religion for Muslims.
[3] The reaction against the community's practice is documented by Carter, forthcoming.

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obligations under Mormonism and their desire not to abandon those they had already married. They were flatly refused. In the House of Commons, Prime Minister Macdonald argued that 'Her Majesty has a good many British subjects who are Mohammedans, and if they came here we would be obliged to receive them; but whether they are Mohammedans or Mormons, when they come here they must obey the laws of Canada." (House of Commons Debates 1890, cited in Carter forthcoming p. 6). The legislation which was passed in 1890 sought to convict men for cohabitating with more than one women as if they were married ('conjugal unions'). The intention behind this broad wording was to allow law enforcers to arrest those who lived in polygamist relationships while attempting to hide the practice. Today, section 293 of Canada's Criminal Code contains similar wording to the 1890 statute.[4]

Since the first legislation was enacted, rarely have polygamists in North America been charged with the offence and those who have been convicted tend to receive light penalties. However, starting in 2002, this situation changed. At that time, the FLDS community in North America gained national and international attention due to a conflict within the community between rival leaders, one of whom,Warren Jeffs, was convicted in Utah of rape as an accomplice for his role in arranging a marriage between a 14 year old girl and her 19 year old cousin.[5] Jeffs tried to excommunicate his rival Winston Blackmore from the Church, which led to a split in the Bountiful community in

[4] Section 293 of Canada's Criminal Code reads: (1) Everyone who
(*a*) practises or enters into or in any manner agrees or consents to practise or enter into
(i) any form of polygamy, or
(ii) any kind of conjugal union with more than one person at the same time,
whether or not it is by law recognized as a binding form of marriage, or
(*b*) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (*a*)(i) or (ii),
is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
(2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.
R.S., c. C-34, s. 257.

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

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British Columbia. Of the 1200 members in Canada today,[6] 700 follow Blackmore and 500 follow Jeffs's replacement. Two years after Jeffs' conviction in 2006, Texas officials raided an FLDS community in Eldorado Texas, apprehending 416 children, after purportedly receiving a call from a 16 year old girl claiming that she had been physically and sexually abused.[7] In 2009, 60 years since anyone was charged with the crime in Canada, Winston Blackmore was charged with polygamy. His case was initially dismissed because the judge ruled that the state had proceeded in a biased manner. Instead of appealing the case, the Government decided to ask the British Columbia Supreme Court to rule on the constitutional validity of the s.293 of the Criminal Code which prohibits polygamy.[8] By all accounts the law is out-dated and weakly crafted.[9]

THE PUBLIC DEBATE

Over the years, strong reasons have been given for both allowing and prohibiting polygamy in a North American context. On one hand, because countries like Canada and the United States are committed to the principles and values of multiculturalism and to the accommodation of diverse religious and cultural practices, one would think that, barring clear evidence of harm, polygamy would be tolerated. Prohibiting the practice seems to deny individuals the right to live according to practices that are tenets of their religious faith.[10] In

[6] There are approximately 10,000 FLDS members in North America.

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

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

[9] Canada's anti-polygamy law is so weakly crafted that it can be credibly interpreted as criminalizing adultery. The law was first passed passed in 1890 and revised in 1953. It pre-dates the entrenchment of the Canadian Charter of Rights and Freedoms (1982) which guarantees, amongst other things, freedom of religion as a constitutional right. The BC government hopes to convince the court that s.293 can be 'read down' in the sense that it is meant only to criminalize 'patriarchal polygyny that is intergenerationally-normalized and enforced through more or less coercive rules and norms of non-state social institutions'. See Attorney General British Columbia, *Statement of Position on the Constitutional Questions Referred and Preliminary Summary of Facts Asserted*, Vancouver Registry No. S-097767, Feb 24, 2010.

[10] It is likely that most if not all members of the Bountiful community sincerely believe that they are religiously required to accept if not practice polygamy. The sincerity with which a person

addition, the prosecution of polygamists may be discriminatory both in the sense that it singles out one particular practice that may be no more or less harmful than many other practices which are legally allowed, and because it seems to use a vulnerable and isolated community as a scapegoat to appease various public anxieties. Whereas enthusiasm to prosecute polygamists in Canada historically arose to discourage Mormon immigration (Baines 2009) and to protect a Christian definition of marriage, today, Mormon polygamists are being persecuted, according to some accounts, to appease public anxieties about Muslim immigrants some of whom practice polygamy. All of these concerns suggest that even if the criminal law prohibiting polygamy can withstand a constitutional challenge on the basis of freedom of religion, the decision to prosecute polygamists in Bountiful may deny this religious minority equal protection of the law.

At the same time, there is no denying that polygamy reinforces sexism and was historically motivated by sexist values which relegated women to reproductive and service roles while helping men to enjoy control over their families and communities. The initial North American legal cases against the practice in the late 19th Century [11] argued that the practice placed women under the control of men and thereby 'reinforced patriarchy'. The evidence continues to show that polygamy gives considerable power to men who use the threat that they will take on a new wife in order to discipline their current wife or wives (see Cook and Kelly 2006). This power imbalance defines polygamous relationships and is thought to lead to additional abuses, including coercion and underage marriage.[12] The practice is also associated with poverty and welfare fraud in North America and in Western Europe, the latter problem being the result of the financial strain placed on families, many of which live in overcrowded conditions with little personal space leading to resentment and even violence amongst

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

[11] *Reynolds v United States* 98 US 145(1878).

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

wives and towards each other's children.[13] For these reasons prohibiting the practice of polygamy seems to be justified.

RELIGIOUS IDENTITY AND WHY IT MATTERS

Many legal and political conflicts pose dilemmas for decision makers. But practices like polygamy pose a dilemma of particular interest here because polygamy engages questions about the religious identities of individuals and groups. With the advent of multiculturalism, minority groups have made an increasing number of claims before national and international decision makers for the protection of their practices on the basis that they are important to their cultural or religious identities. The protection of matters centrally important to the identities of minority groups is now considered an important part of how human rights are properly conceptualized and implemented in most national and international contexts.[14]

Courts and legislatures are often charged with the task of assessing these practices in light of legal mandates to protect cultural and religious rights. But

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

[14] The last 30 years has seen numerous states and international bodies amending their constitutions and adopting legal mandates in order to recognize a right to culture and other similar identity-based rights. Explicit mention of 'identity' or protections that direct address cultural rights or 'indigenous identity' can be found in the constitutions of Argentina, Belize, Bolivia, Brazil, Bulgaria, Canada, Croatia, Ecuador, Guatemala, Kosovo, Mexico, Nicaragua, Panama, Paraguay, Peru, Poland, Romania, Slovakia, Slovenia, Venezuela, as well as statutes passed by regions in Italy, Spain (Catalunya), and Germany (Lander). With few exceptions, these provisions have been entrenched in the last 30 years.

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how public decision makers translate vague principles and broad legal mandates to protect ‘diversity’ into actual public policy is not well understood despite the crucial role that such translation plays in formulating good multiculturalism policies and good relations with minority groups. It is one thing to say that democratic citizenship requires the recognition of the right to culture or the protection of religious diversity, and quite another thing to describe what the right to culture demands in specific cases, such as when a group wants to practice plural marriage, or segregate girls from boys in the classroom, or require female members that they wear a niqab.

A key concern, which often gets reflected in the scholarship critical of multiculturalism, is that few if any western democracies have established transparent and reasonably justified criteria which can be used by courts and legislatures to guide their assessments of claims made by cultural and religious groups for the accommodation of a practice important to their identity. This is surprising since that one of the most common concerns about how public institutions assess the religious and cultural practices of minorities is that decision makers are not objective but rather use their own personal biases or misinformation about minority groups to guide their decisions.[15] Evidence of such bias tends to be especially stark in cases that involve unpopular minorities or groups whose practices are considered repulsive (as are polygamists). For example, research in the United States shows that judges often accept highly dubious evidence where the disputed practices of new religious groups directly challenge mainstream values, such as when young adults drop out of school to join the Moonies, or people leave all their money to the Church of Scientology.[16] The research of feminist and critical race scholars show similar trends. According to Leti Volpp (2000), judges tend to believe that women from racialized cultures are more likely to be motivated (if not manipulated) by their

[15] See many of the examples discussed in Rentlen 2004 which shows how bias and the absence of information about minority cultural practices working together to produce unfair legal decisions.
[16] Judicial bias is especially strong where minorities are widely viewed as ‘cults’. Judges and juries willingly accept highly contentious and unfalsifiable psychological theories about ‘brainwashing’ or ‘repressed memory syndrome’ in such cases, which they use to justify extraordinary investigative techniques that often further bias the case against the accused, or measures, which are otherwise difficult to legally justify, to intervene in what appears to be voluntary activity (Dickson 1998 and 2000).

cultures when they engage in cultural practices (like polygamy, female genital cutting, or wearing a burka), while women from non-racialized cultures or those who do not fit the stereotype of women in their culture, appear to act out of choice (also see Phillips 2007, 27, 93-99). According to this research, women from cultural and religious minorities are not only more likely to be the victims of harmful practices within their communities, but they are also more likely to be denied equal treatment by mainstream courts which tend to see them as either dupes to their culture or in need of being rescued from it.

Countries which have weak or no multicultural policies seem to do worse in this respect because, in the absence of transparent guidelines, public decision makers have considerable discretion to use their personal biases to influence decisions. When conflicts arise in states with weak multicultural policies, the courts and legislatures of these states are less likely to have institutional memory about how minority practices were assessed and less likely to have publicized best practices or documented experiences to draw on. Consider, in this respect, the widely different experiences of France and Britain in managing religious diversity in prisons. In France, where laicité is the governing norm, inmate requests for religious accommodation have been denied or met inconsistently at the prison director's discretion. Whereas French law recognizes that prisoners have the right to practice their religion (subject to reservations about security) it has no criteria for deciding what counts as religion nor when accommodation is justified. These matters are left to the director. By contrast in Britain, which has a long history of chaplains operating in the prison system, the regulation of religion in prisons has a legacy of established practices and decision making rules. Prisoners in the British prison system have access to religious services by chaplains, rabbis and imams and are accommodated with respect to religious dietary restrictions amongst other things. According to Beckford, Joly and Khosrokhavar (2005), one contrasting result of these two different systems is that French prisons experience greater religious radicalism amongst Muslims prisoners today. This is hardly surprising given that, in the absence of access to regularized prayer sessions and imams from the external community, French prisoners are forced to practice their religions secretly, conduct services secretly, and choose religious leaders amongst themselves in the prison rather than using the services of a imam from

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the outside, as British prisoners do. Due to laicité, which discourages religious accommodation in the public sphere, there are no well established criteria in French prison regulations for what counts as a religious belief or for how to assess requests for accommodation from inmates who are believers (other than by denying these requests).

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

The question which follows from this is what kind of criteria might offer the best guidance for decision makers without constraining them unduly in their decision making? How can the court be sensitive to religious and cultural differences while providing a reasonably justified and unbiased assessment of whether a religious practice, which has been broadly viewed as repulsive (sexist, homophobic, or harmful) by the majority, is indeed harmful and ought to be prohibited?

HOW IS THE PRACTICE OF POLYGAMY PUBLICLY ASSESSED?

With these questions in mind, we can now turn to the polygamy debates in Western Canada to examine the criteria being used to assess the practice. Here I have drawn from the submissions to the courts from interested parties, including the Attorney General of British Columbia, from the scholarly debates about polygamy, and from the broader public debate (from both critics and supporters of polygamy) as reflected in the media, journalistic accounts, and

case briefs submitted by interested parties to the upcoming legal challenge. On the basis of the arguments from these sources, three broad issues emerge as dominating the discussion and guiding the assessment of the practice. The first issue is whether polygamy is a central tenet of a religious faith in the sense that a central aspect of the group's identity will be jeopardized if the practice is prohibited. The second issue is whether people within the community are coerced into engaging in the practice. And the third issue is whether the practice is harmful to those who practice it or others in the community. On the basis of these three issues, I propose below three conditions which together can be used to build a transparent and reasonably justified approach to assessing controversial religious and cultural practices.[17]

The jeopardy condition

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

[17] I develop these conditions further in Eisenberg 2009.

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the absence of the practice won't affect the well-being, integrity, or sustainability of the community's identity.

In the debate about polygamy in Canada, advocates and critics of polygamy have advanced arguments which attempt to establish the jeopardy condition or draw it into question. According to the advocates from the FLDS community, polygamy and plural marriage is a central article of faith for the FLDS community. To establish its centrality, the FLDS argue that polygamists in Bountiful are not merely people who 'feel like' marrying multiple sexual partners but individuals who are bound by a sacred vow to their faith. The community's evidence aims to establish the integral nature of the practice by showing that it is religiously mandated, systematic, binding in a manner akin to the institution of marriage, intergenerationally transmitted and therefore viewed by members as constituting a way of life worthy of continuing into the next generation, related to a distinctive view of family, and integral to the community's struggles for citizenship (Bountiful affidavit). This argument distinguishes the practice in FLDS communities from the practice amongst some Muslims – where it is broadly acknowledged that the practice is not religious mandated – and amongst 'polyamourists' who merely want to consensually marry more than one person. When courts assess the practice of polygamy, they will gauge the strength of the FLDS claim, in part, by examining the history and role of polygamy amongst the FLDS along these dimensions.

Many of the criticism of polygamy aim at undermining the strength of the jeopardy condition by arguing that nothing of real importance to the identity of the FLDS is jeopardized by prohibiting the practice. The critics make this argument by trying to show that polygamy is an optional practice amongst the FLDS because members of the community may choose not to engage in the practice. Some women living in the Bountiful community are not in polygamous relationships and some have claimed – in contradiction to the claims of others – that women may choose not to enter a polygamous marriage. In addition, some community members claim that, as a matter of principle (which they call the 'principle of Sarah') current wives must consent before additional wives are added to the family. Again the message is that polygamy is optional and more of a choice than a mandate.

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Another way in which critics weaken the jeopardy condition is by trying to show that the practice lacks authenticity as a religious practice, that Bountiful and the FLDS are just an excuse for polygamy and that nothing of value to the group's religious identity is jeopardized by prohibiting the community from engaging in the practice. Many critics of the FLDS suggest that polygamy in Bountiful is mandated by men who desire multiple and ever younger women, who want 'harems' of women to service them sexually, emotionally, domestically and economically. The chances that this argument will succeed are likely to be good if the court is convinced that the community's adherence to the practice is recent (which is unlikely in this case),[18] that nothing (or nothing much) in the religious dogma of the group mandates the practice (which is not true in this case since polygamy is a central tenet of faith), or that groups with similar religious dogmas (e.g. mainstream Mormons) reject the practice (which is also a difficult argument to make since the FLDS community exists because mainstream Mormons abandoned the practice of the polygamy). In addition, if the court can be convinced that power and exploitation, rather than identity-based beliefs, are the real motivation for the practice, then the authenticity of the religious practice will be successfully drawn into question. The jeopardy condition is weakened by evidence which shows that the practice is inauthentic in these senses.

The validation condition

The second condition, the validation condition, addresses the concern that individuals are sometimes coerced and indoctrinated by their communities to engage in practices they would not otherwise choose.[19] The validation condition rests on the requirement that identity practices must be validated by those who practice them. This condition takes its direction from scholarly arguments which emphasize the importance of individual choice within contexts of choice (Kymlicka 1995). According to this view, meaningful choices are made when

[18] The FLDS Church split from the mainstream Mormon (Latter Day Saints) at the turn of the century over the issue of polygamy.
[19] Internal community values regarding what constitutes a healthy individual identity will be brought into the analysis via the jeopardy condition. For example, in FLDS communities, the value of obedience to the prophet or one's father and a strong fidelity to family are commonly cited as important individual characteristics that have identity-related features and that obviously play an important role in perpetuating community stability.

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individuals have ‘critical distance’ from their commitments and can assess them from perspectives furnished by other and different contexts. Meaningful choice occurs as long as individuals have the means to critically assess their commitments from different vantages.

Like the jeopardy condition, something like the validation condition is already at play in most cases about controversial practices. The public debate today in North America about polygamy in the FLDS community is heavily focused on criteria relevant to the issue of validation. Evidence shows that FLDS children are poorly educated and pressured to marry before completing high school (Campbell 2009: 23).[20] The communities have been described as contexts which are theocratically governed and highly insular, making them perfect settings for indoctrinating young people into the belief that polygamy is a religious commandment that they must obey. Young girls are said to be removed from their homes, shipped across the border between Canada and the United States far away from their immediate family, where they are married to older men (see Bramham 2008 and Krakauer 2003). Much of the research conducted on the Bountiful community, including testimonies of those who have left the community, show that community members who are adults only choose to practice polygamy because they will be ostracized if they reject the practice. To a considerable degree, the public debate about the practice rests on the strength of this evidence.

Conversely, several scholarly accounts suggest that FLDS polygamy has been unfairly framed by the mainstream community to ‘exoticize’ or ‘other’ the practice. On the basis of numerous interviews conducted with women in the Bountiful community, Angela Campbell concludes that polygamous wives are “thoughtful, articulate, and alive to the distinctions and parallels between their lives and those of outsiders” (Campbell 2009: 227). Campbell suggests that the polygamous experience needs to be reframed so that residents ‘start to resemble ‘us’ in some important ways. When this happens, the criminalization

[20] The ongoing resistance of Bountiful community educators to use the provincially mandated curriculum in their lessons (which is required by law in Canada) is one reason why the British Columbia Teachers Federation has been granted intervenor status in the upcoming constitutional reference case.

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of the practice becomes more difficult to justify because mainstream objections constructed around presumptions about indoctrination or coercion begin appear to be bald attempts to 'other' polygamous communities in order to justify majority preferences for monogamous, heterosexual marriage, or to disguise mainstream racism and intolerance for difference (Campbell 2009: 190, also see Carter 2008, Drummond 2009 and Song 2007 chp 6).

Campbell's account raises the concern that majority assessments of minority practices are often biased and unfair in ways that help to justify majority power over minorities. But even if that were so, the presence or absence of meaningful choice cannot entirely depend on how circumstances are framed because if this were possible then any gesture of willingness could potentially count as meaningful validation. People exercise choice even under the most restrictive and oppressive circumstances. The fact that women in Bountiful claim they are making autonomous choices counts for something in assessing the strength of their validation. But it does not count for everything. The validation condition also requires evidence that communities have in place social and political institutions or processes in which individuals develop and exercise their critical capacities. The validation condition also depends on evidence about the character and quality of education that children receive,[21] whether children finish high school (the evidence is mixed on this point in the FLDS community), when they get married and have children (the evidence shows that many girls – although it's unclear how many - are married and have their first child before they are 18), how political leaders are chosen (leaders are not democratically elected and women are not allowed to take leadership roles), whether women and men choose who they marry (marriages are arranged; girls/women can refuse an arrangement), how many children they have (girls/women are mandated to have many children and have been likened to breeding animals by the critics of the community), or to what degree members are financially independent (property is owned by the church and controlled by the male elite; women control the household expenses and many work outside the home).

[21] See footnote22.

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

The safeguard condition

The final criterion, the safeguard condition, assesses the costs of mitigating the harms or risks of harm that result from a disputed religious practice. The safeguard condition does not impose an absolute restriction on harmful practices and, for this reason, is not a 'harm' condition. The concern addressed by the safeguard condition is how to address harm without unfairly imposing culturally unfamiliar and biased understandings of harm on all groups. This is

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not to suggest that all standards of harm ought to be treated as equally valid. But the safeguard condition aims to be sensitive to the ways in which standards of what counts as a serious harm differ amongst cultures and religions by focusing assessments of disputed practices on safeguards rather than harms. By emphasizing 'safeguards', the condition refocuses public decision making away from determining the presence or absence of harm and towards identifying safeguards which can diminish harms that may arise. The implicit suggestion of this condition is that both majority and minority practices can be harmful and that decision makers ought to take a broad view of all the different harms and risks that follow from various practices. The question is what can be done, given the social circumstances in which harms arise, to diminish these harms? Public decision makers need to be aware of all risks and harms, but their assessments of controversial practices should rest on determining what safeguards, if any, can effectively reduce the risks of harm and what costs are associated with these safeguards.

The harmfulness of polygamy is one of the key foci of the public and legal debates in Canada. But, despite some glaring allegations of abuse within FLDS communities, there is little evidence of women or children being harmed directly in a manner that can be attributed to polygamy. Evidence that girls are married and impregnated at very early ages has not been substantiated, at least not to a degree that distinguishes polygamists from monogamists. In the absence of better evidence of direct harm, critics of the practice argue instead that polygamy creates a context in which harm toward girls and women is difficult to control. In part this is because the community is insular and resists attempts by the state (through child welfare) to intervene. In part, the problem is exacerbated by the socialization of girls to be obedient and submissive, to marry at a young age and to bear as many children as possible. And in part, the problem exists because the community advocates sexual discrimination in every aspect of communal life. From governance structures to education curriculum, from family planning to economic decision making, girls and women are denied equality of opportunity, resources, and voice. The critics argue that inequalities of these sorts either constitute harm in themselves, or leave girls and women open to harms which are difficult to control.

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

CONCLUSION

How can public institutions within societies with historical legacies of discriminating and persecuting particular religious minorities fairly evaluate the claims of these minorities today to engage in controversial religious practices? Some scholars have argued that states which have been unjust to groups in the past lack the legitimacy to make decisions in the present about the rights of these groups. They argue that such decisions, instead, must be left up to communities to make for themselves hopefully using democratic decision making processes (Spinner-Halev 2001). But in communities, like Bountiful, this solution will not work partly because community decision making is far from democratic, and insisting that it be democratic (and egalitarian) would involve significant inference in the community, and partly because this community (like

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many others) deals with dissent by marginalizing and expelling dissenting members.[22]

In light of this, my analysis adopts a different line of argument which holds that decision making in multicultural societies requires transparent and reasonably justified criteria to guide decision makers in assessing the claims that groups make about what is important to their religious identities. This argument acknowledges that groups, such as the FLDS, have a history of persecution and struggles to be citizens in Canada while adhering to a practice of their religious faith which is criminally prohibited. In addition, the persecution of the FLDS community has likely been reinforced by public anxieties about the demise of Christian conceptions of marriage and about Muslim immigration. All of these factors raise the concern that public decision makers will use their own prejudicial biases, which after all they share with the broader Canadian public, to assess whether polygamy should be criminally prohibited or not, and their decisions will not be legitimate, at least not in the eyes of those within the minority community and probably many outside the community as well. These are precisely the circumstances in which a transparent and reasonably justified approach to assessing controversial minority claims is most needed.

The problem of how to address the personal biases and misinformation that sometimes guides decision making in diverse societies is complex and a guided procedure of the sort suggested here is unlikely to root out determined racists or sexists. But it will provide decision makers with a set of transparent and fair criteria by which to order their assessments of controversial minority claims and an opportunity to reflect on a complex set of factors related to jeopardy, validation and safeguards, that should inform fair decision making. These criteria are meant to narrow the personal discretion that decision makers use and help to establish a relatively consistent repertoire of best practices and institutional memory which can be used to allow decision makers to reflect on

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

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how previous decisions have been made about minority identities and how they be improved in the future.

BIBLIOGRAPHY

- Baines, Beverly. 2009. 'The Constitutional Challenge of Polygamy.' The Lawyer's Weekly. April 17th.
- Beckford, J. A., D. Joly & F. Khosrokhavar. 2005. Muslims in Prison: Challenge and Change in Britain and France. Basingstoke, Palgrave.
- Bramham, Daphne. 2008. The Secret Lives of Saints: Child Brides and Lost Boys in Canada's Polygamous Mormon Sect Toronto: Random House.
- Campbell, Angela. 2009. 'Bountiful Voices.' Osgoode Hall Law Journal 47: 183-234.
- Carter, Sarah. 2008. The Importance of Being Monogamous: Marriage and Nation-building in Western Canada to 1915 Edmonton, AB: University of Alberta Press.
- Carter, Sarah, forthcoming, "A Serious Moral and National Ulcer: Combating Polygamy in Southern Alberta to 1900" mss on file with author.
- Cook, Rebecca J. and Kelly, Lisa M. 2006. Polygyny and Canada's Obligations Under International Human Rights Law. Ottawa: Minister of Justice and Attorney General of Canada.
- Dickson, James. 1998. ''Brainwashing' Evidence in Light of *Daubert*' Law and Science Vol 1 265-88.
- ______________. 2000. 'Discretion and Discrimination in Legal Cases involving Controversial Religious Groups and Allegations of Ritual Abuse.' Law and Religion Aldershot: Ashgate.
- Drummond, Susan. 2009. 'A Marriage of Fear and Xenophobia.' The Globe and Mail April 6th.

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- Eisenberg, Avigail. 2009. Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims. Oxford UK: Oxford University Press.
- Kovach, Gretel C. 2008 'A Sect's Families Reunite and Start to Come Home' New York Times June 6th.
- Krakauer, Jon. 2003. Under the Banner of Heaven: A Story of Violent Faith.New York: Random House.
- Kymlicka, Will. 1995. Multicultural Citizenship Oxford UK: Oxford University Press.
- Palmer, Debbie and Perrin, David. 2004. Keep Sweet: Children of Polygamy Lister BC: Dave's Press.
- Phillips, Anne. 2007. Multiculturalism Without Culture. Princeton NJ: Princeton University Press.
- Song, Sarah. 2007. Justice, Gender and the Politics of Multiculturalism. Cambridge UK: Cambridge University Press.
- Spinner-Halev, Jeff. 2001. 'Feminism, Multiculturalism, Oppression and the State.' Ethics 112: 84-113.
- Volpp, Leti 2000. 'Blaming Culture for Bad Behavior.' Yale Journal of Law and the Humanities 12: 89-116.