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**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**IN THE MATTER OF:**

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1986, C. 68

**AND IN THE MATTER OF:**

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

**AND IN THE MATTER OF:**

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF S. 293 OF THE CRIMINAL CODE OF CANADA, R.S.C. 1985, C. C-46

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## TABLE OF CONTENTS

## I – OVERVIEW

1. Parliament has a legitimate interest in prohibiting polygamy, the marriage of one person to multiple spouses at the same time. Marriage is a public institution and a fundamental and foundational structure in society. A marriage, whether or not it is sanctioned by the state, has effects that extend well beyond the individual participants.

2. The evidence before the Court will demonstrate that polygamy tends to produce harms to the state, to society and its institutions, including the institution of monogamous marriage, and to individuals, especially women and children.

3. Polygamy's harms to the state and to society include a decrease in political rights and civil liberties. Indeed, the rise of democratic structures may be linked to the demise of polygamy.

4. The asymmetry inherent in polygamous marriages offends women's dignity and is premised on sex and sex role stereotypes that subordinate women, facilitating the unequal distribution of rights and obligations in marriage and in society.

5. Women in polygamous marriages suffer increased psychological, physical and sexual and reproductive health harms. They also face material harms including economic and educational deprivation.

6. Children of polygamous marriages experience lower levels of socio-economic status, reduced academic achievement, and psychological problems. The practice of polygamy exerts a downward pressure on the age at which young girls are married. Early marriage and pregnancy have a number of negative, serious, long-term consequences on girls.

7. Polygamy leaves some young men with no opportunities to marry or create a family. In polygamous communities and families, it is necessary to marginalize or remove "surplus" boys to ensure they do not compete for wives. On a larger scale, the

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sociological evidence demonstrates that cohorts of men without prospects of marriage can have a destabilizing effect on society.

8. In determining the constitutionality of a measure that seeks to deal with a complex social problem, the court does not need to be presented with conclusive social science evidence of the harm to which the measure is directed. Where the court is faced with inconclusive or competing social science evidence relating the harm to the legislature's measures, the court may rely on a reasonable apprehension of that harm.

9. The concepts of free choice and consent are irrelevant to the question of whether the polygamy prohibition is constitutional. The polygamous structure itself tends to generate all of the foregoing harms. Even if only practised by a minority, polygamy has a structuring effect on an entire society.

10. If Canada were to allow polygamy, it would be taking a step contrary to international obligations that explicitly recognize the individual and societal harms that are inherent in the practice of polygamy. Despite the assertion that polygamy has occurred across diverse cultures, religions and time periods, the trend around the world is to prohibit rather than to tolerate or encourage polygamous relationships. In particular, Canada's prohibition of polygamy is consistent with the practice of other countries with which Canada generally invites comparison: see the analysis in ***U.S.A. v. Burns***, [2001] 1 S.C.R. 283.

11. The Attorney General of Canada ("Canada") would answer the Reference questions in the following way:

Question: Is section 293 of the ***Criminal Code of Canada*** consistent with the ***Canadian Charter of Rights and Freedoms***? If not, in what particular or particulars and to what extent?

Answer: Yes, Section 293, properly interpreted, is consistent with the ***Canadian Charter of Rights and Freedoms.*** In particular, s. 293 is

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consistent with s. 2(a), 2(b), 2(d), 7 or 15 of the ***Charter***. If s. 293 is inconsistent with one or more of these ***Charter*** rights and freedoms, the breach is justified under s. 1.

Question: What are the necessary elements of the offence in section 293 of the ***Criminal Code of Canada***? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

Answer: Section 293 prohibits multiple marriages which are legally valid under foreign law and multiple marriage-like relationships which mimic the characteristics of lawful marriage. For greater clarity, s. 293 does not require that the polygamy or conjugal union in question involved a minor, or occurred in the context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence. While these elements are often present in polygamous unions, they are not necessary elements of the s. 293 offence.

## II - CANADA'S ANTICIPATED EVIDENCE

12. Canada intends to rely upon the extensive evidence filed by the other Parties to this Reference and the Interested Persons, in addition to the materials contained in the Brandeis Brief. Canada has also filed expert reports from three witnesses who will be testifying at the Reference:

(a) **Rebecca Cook** is a Professor of Law and Faculty Chair in International Human Rights Law at the Faculty of Law of the University of Toronto. In her report, Professor Cook considers Canada's obligations under international law regarding the practice of polygyny (one man married to more than one wife).

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(b) **Rose McDermott** is a Professor of Political Science at Brown University in Providence, Rhode Island. She has studied polygyny for ten years and she has helped to create a database on topics related to women and children containing data from over 172 countries including Canada and the United States. Professor McDermott has used this data to conduct a statistical analysis of the effects of polygyny.

(c) **John Witte, Jr.** is a Professor of Law and Director of the Center for the Study of Law and Religion Center at Emory University in Atlanta, Georgia. He is a specialist in legal history, marriage and family law, and religious liberty. In his report, Professor Witte traces the historical development and evolution of the prohibition on polygamy in the Western tradition through the watershed periods of the history of the West.

## III - INTERPRETATION OF SECTION 293 OF THE *CRIMINAL CODE*

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13. It is Canada's position that s. 293 prohibits both (a) multiple marriages which are legally valid under foreign law and (b) multiple marriage-like relationships which mimic the characteristics of lawful marriage. This is in contrast to the offence of bigamy (s. 290) which prohibits multiple marriages where at least one of the marriages occurred in Canada.

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14. This interpretation of s. 293 is consistent with general principles of statutory interpretation and with the language, history and purpose of s. 293.

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### A. GENERAL PRINCIPLES OF STATUTORY INTERPRETATION

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15. The first step in assessing the constitutionality of legislation, including provisions of the ***Criminal Code***, is to determine the nature and scope of the legislation in question. As stated by McLachlin C.J. in ***R.v. Sharpe***, [2001] 1 S.C.R. 45, 2001 SCC 2 at para. 32 "[u]ntil we know what the law catches, we cannot say whether it catches too much". McLachlin C.J. elaborated further:

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> [32]…It is not enough to accept the allegations of the parties as to what the law prohibits. The law must be construed, and interpretations that may minimize the alleged overbreadth must be explored: see *Keegstra, supra*, *Butler, supra*, and *Mills, supra*….The interpretation of the section is a necessary precondition to the determination of constitutionality…

16. The Court in ***Sharpe*** went on to set out the appropriate approach to statutory interpretation - namely, Driedger's modern approach - as follows:

> [33]…E. A. Driedger in *Construction of Statutes* (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."…

17. In addition, the Court in ***Sharpe*** emphasized that legislation should be interpreted, if possible, in a manner that is constitutional:

> [33]…Supplementing this approach is the presumption that Parliament intended to enact legislation in conformity with the *Charter*: see Sullivan, *Driedger on the Construction of Statutes*, *supra*, at pp. 322-27. If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted: see *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (S.C.C.), [1989] 1 S.C.R. 1038, at p. 1078; *R. v. Swain*, 1991 CanLII 104 (S.C.C.), [1991] 1 S.C.R. 933, at p. 1010; *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (S.C.C.), [1992] 2 S.C.R. 606, at p. 660; *R. v. Lucas*, 1998 CanLII 815 (S.C.C.), [1998] 1 S.C.R. 439, at para. 66.

## B. LANGUAGE OF SECTION 293

18. Section 293 reads as follows:

**(1)** 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

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**(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 upon 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.

19. Section 293 appears in the ***Criminal Code*** under "Offences Against Conjugal Rights". The polygamy provision has, from its outset, been focused on marriage and spousal relationships rather than informal or unformalized relationships.

20. Both "polygamy" and "conjugal union with more than one person" refer to marriage or marriage-like relationships. When the polygamy prohibition was first enacted, "polygamy" was defined in the Oxford English Dictionary as "marriage with several, or more than one, at once: plurality of spouses; usu. The practice or custom according to which one man has several wives". In turn, "conjugal" was defined as "of or pertaining to marriage or to husband and wife in their relation to each other; matrimonial."

21. While s. 293 explicitly criminalizes "polygamy", which includes "polygyny" – one man with multiple wives – and "polyandry" – one woman with multiple husbands, it is similarly clear that the provision was primarily aimed at polygyny. In Canada and globally, both historically and at present, polygamy manifests almost exclusively as polygyny.

## C. HISTORY OF SECTION 293

22. Marriage to more than one spouse has long been prohibited in England under the offence of bigamy, mentioned both by Blackstone in the First Book of his Commentaries on the Laws of England in 1765, and Coke's Institutes on the Laws of

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Given the wording of s. 293, it is clear that the polygamy prohibition has, from the outset, focussed on marriage or spousal relationships rather than informal or unformalized relationships. ¶

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England in 1797. These prohibitions applied in the British North American colonies by virtue of the rules of reception, and continued in force in Canada after confederation until they were replaced by the passage of the ***Criminal Code*** in 1892.

23. The predecessor of s. 293 was first enacted in 1890 as an addition to ***An Act respecting Offences relating to the Law of Marriage***. This was done to address the fact that bigamy did not capture non-legal marriages. In 1892, the polygamy offence became s. 278 of Canada's first comprehensive ***Criminal Code*****.**

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24. The legislative record indicates that the purpose of the offence of polygamy in Canada was to combat the practice of polygamy in general, rather than to stamp out the religion of Mormonism or Mormon polygamy. In fact, while some Members of Parliament expressed disapproval with Mormonism generally, the Prime Minister, Sir John A. MacDonald, expressly welcomed Mormons to Canadian soil and recognized that they may find refuge in Canada so long as they obeyed the laws of the land.

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25. The offence of polygamy in Canada was enacted in the context of relevant contemporary American legislation and case law on polygamy. However, the legislative record indicates that Parliament's focus was specifically on the practice of polygamy and ultimately not on any broader social and political concerns with Mormonism in Canadian society generally.

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26. The basis of the disapprobation of the practice of polygamy was clearly articulated in early American law. In particular, polygamy was stated to be subversive to the institution of marriage, abusive of women and not conducive to a free and democratic way of life (see, for example, ***Reynolds v. U.S***., 98 U.S. (Otto) 145, 12 L.Ed. 244 (1878) and ***Davis v. Beason***, 133 U.S. 333 (1890). Concluding that the offence of polygamy in Utah was not contrary to the guarantee of the free exercise of religion in the U.S. Constitution, the Supreme Court stated, at p. 250:

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> …Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations, a civil contract, regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations

and duties, with which government is required necessarily to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the Government of the People, to a greater or lesser extent, rests. Professor Leiber says: polygamy tends to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

## D. PURPOSE OF THE POLYGAMY PROVISION

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27. Legislative purpose is a function of the intent of those who drafted and enacted the legislation in question: ***R v. Big M Drug Mart Ltd.,*** [1985] 1 S.C.R. 295, at para. 91.

28. At the time it was enacted, the purpose of section 293 was the prevention of harms associated with the practice of polygamy both to participants in polygamous unions, to the state and to Canadian society as a whole and its institutions including the institution of monogamous marriage. These remain the central purposes of the provision today. In any event,, the Supreme Court has made it clear that legislative purpose may "shift in emphasis" over time: ***R. v. Butler***, [1992] 1 S.C.R. 452, at para. 493.

29. These harms are elucidated further in Canada's submissions on sections 1 of the ***Charter*** set out below.

## E. PROPOSED INTERPRETATION OF SECTION 293

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30. As stated earlier, s. 293 prohibits both multiple marriages which are legally valid under foreign law and multiple marriage-like relationships which mimic the characteristics of lawful marriage. In addition, s. 293 prohibits anyone from being a party to or facilitating the practice of polygamy or a conjugal union with more than one person.

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### *(1) Polygamy*

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31. Sub-paragraph 293(1)(a)(i) prohibits being in multiple marriages at the same time that are legally valid under the law where the marriages were celebrated. Accordingly, the offence is made out where a person:

i. is married to more than one person at the same time where the marriages are valid according to the law of the place where they are celebrated; or

ii. is married to a person, knowing that the person is legally married to a third person where the marriages are valid according to the law of the place where each marriage was celebrated.

### *(2) Conjugal Union With More Than One Person*

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32. Sub-paragraph 293(1)(a)(ii) prohibits being in multiple conjugal unions or marriage-like relationships at the same time. For the purposes of this sub-paragraph, conjugal union should be interpreted to mean a form of marriage-like relationship that is not legally valid, which is sanctioned by a rite, ceremony, contract or consent that purports to create a union between the parties.

33. A conjugal union necessarily incorporates an element of formality. A conjugal union comes into being only through a formal marriage-like ceremony and every formal marriage-like ceremony produces such a union: see ***R. v. Tolhurst, R. v. Wright*** (1937), 68 C.C.C. 319 (Ont. C.A.).

34. A conjugal union is created in a moment by the marriage-like ceremony. The marriage-like ceremony must both purport to create and purport to sanction the conjugal union, thereby binding the participants together.

35. A conjugal union can only be entered into by consent if that consent is specifically to enter into a conjugal union rather than mere consent to cohabit.

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**A conjugal union is a distinct legal concept from a conjugal relationship. A conjugal union is a long-standing legal concept used to describe a marriage whether valid under civil law, valid only in religious law, or existing only in the view of the parties and/or the communities to which they belong. A conjugal relationship, by contrast, is a relatively recent concept, which involves an unmarried couple that holds themselves out to family, friends and community as an unmarried couple. A conjugal relationship, unlike a conjugal union, develops over time and does not require a specific moment of creation, such as a marriage ceremony. DELETE? ¶**
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### *(3) Celebrating in a rite or ceremony that sanctions polygamy*

36. Section 293(1)(b) applies to individuals, whether they are part of a polygamous union or not, who facilitate in some respect those who enter into the practice of polygamy or a conjugal union with more than one person. In this respect, the provision mirrors the more general sections of the ***Criminal Code*** prohibiting aiding, abetting or counselling the commission of a crime (ss. 21 & 22).

## IV. SECTION 293 DOES NOT INFRINGE THE *CHARTER*

37. It is Canada's position that s. 293 of the ***Criminal Code of Canada*** does not infringe any provision of the ***Charter of Rights and Freedoms.*** In particular, s. 293 does not infringe any of the rights guaranteed under ss. 2(a), 2(b), 2(d), 7 or 15.

### A. Section 293 Does Not Violate Section 2 of the *Charter*

38. Section 2 of the ***Charter*** provides in relevant part:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> . . . and
>
> (d) freedom of association.

39. Many of the arguments attacking the validity of s. 293 of the ***Criminal Code*** as being in violation of the fundamental freedoms set out in s. 2 of the ***Charter*** rely on the fact is that the provision restricts the ability of individuals to manifest their religious beliefs through the formation of polygamous unions.

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40. The jurisprudence concerning freedom of religion has been carefully calibrated by the courts in order to take into account the particular conflicts and difficulties that arise when laws come into apparent conflict with the ability of individuals to hold, express and manifest their religious beliefs in a free and democratic society: see most recently ***Hutterian Brethern of Wilson Colony v. Alberta***, [2009] 2 S.C.R. 567.

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***(1) No Violation of Freedom of Religion***

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41. In order to trigger a possible freedom of religion claim, a claimant must establish:

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(a) he or she has a practice or belief with a nexus of religion, which requires a particular line of conduct;

(b) his or her belief is sincere; and

(c) the interference with religion must be substantial.

***Syndicat Northcrest v. Amselem***, [2004] 2 S.C.R. 551, at paras. 56 & 62

42. Freedom of religion is not absolute. It is inherently limited by the rights and freedoms of others: ***Trinity Western University v. College of Teachers***, [2001] 1 S.C.R. 772 at para. 29; ***Amselem*** at paras. 61-62; ***Multani v. Commission Scolaire Marguerite-Bourgeoys***, [2006] 1 S.C.R. 256 at paras. 26-30.

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43. The subjective nature of the religious freedom test does not make an individual a law unto themselves. A sincere belief that acts that constitute offences are required by one's religion does not automatically immunize those acts from criminalization.

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44. A person's freedom to act upon their religious beliefs is narrower than their freedom to hold those beliefs. Just as there are limits to the ambit of freedom of expression (e.g. s. 2(b) does not protect violent acts), so are there limits to the scope of s.2(a), especially so when this provision is called upon to protect activity that threatens the physical or psychological well-being of others – in other words, causes harm to

others: ***Trinity Western*** at para. 30, quoting the Supreme Court's earlier decision in ***B.(R.) v. Children's Aid Society of Metropolitan Toronto***, [1995] 1 S.C.R. 315.

45. In addition, freedom of religion may not extend to religious activity that interferes with the rights of other persons. Even if a claimant shows a non-trivial interference with a religious practice, claimant will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals.

46. Freedom of religion, like other rights, may be made subject to overriding societal concerns. Freedom of religion is subject to laws of general application established to protect public safety, order, health, morals or the fundamental rights and freedoms of others: ***Big M Drug Mart Ltd***., at para. 95.

47. Section 293 does not infringe s. 2(a) for the following reasons:

(a) The evidence will establish that there are harms inherent in and correlative with the practice of polygamy contrary to Canadian values.

(b) Freedom of religion does not guarantee a person freedom to act on their religious beliefs if their actions would cause harm to or interfere with the rights of others.

***(2) No Violation of Freedom of Expression***

48. Analysis under s. 2(b) proceeds in two steps – first, it must be determined whether the restricted activity falls within the sphere of s. 2(b)'s protection, and secondly, if the activity does fall within the ambit of s. 2(b), the second step is to determine whether the purpose or effect of the measure is to restrict freedom of expression: ***Irwin Toy Ltd. V. Quebec (Attorney General)***, [1989] 1 S.C.R. 927.

49. The formalization of particular legal relationships is not an expressive activity within the meaning of s. 2(b). Furthermore, even if the provision did have the effect of restricting an expressive activity, the act of forming polygamous unions would not be

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**Deleted:** <#>If, however, it is the effect of the measure that restricts an expressive activity, s. 2(b) is not brought into play unless it can be demonstrated by the party alleging the infringement that the activity supports rather than undermines the values upon which freedom of expression is based (i.e. participation in social and political decision making, the search for truth and individual self-fulfillment). ¶

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protected as it undermines rather than supports the values upon which the freedom is based. Most significantly, the empirical evidence demonstrates that polygamy diminishes participation in social and political decision making and curtails the self-fulfilment of many affected individuals.

### *(3) No Violation of Freedom of Association*

50. Section 2(d) of the ***Charter*** protects the freedom to establish, belong to and maintain an association for the pursuit of common collective goals. This provision is designed to promote social interaction and collective action of a public nature: ***Reference re Public Service Employees Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act***, [1987] 1 S.C.R. 313.

51. Section 2(d) does not protect the ability of individuals to form and freely participate intimate personal and familial relationships. As a result, the prohibition on polygamy in s. 293 of the ***Criminal Code*** does not engage the protection of s. 2(d) of the ***Charter: R. v. M.S.,*** [1996] B.C.J. No. 2302 (C.A.).

## B. Section 293 does not Violate the Rights to Life, Liberty And Security of The Person

52. Under the first stage of a s. 7 analysis, it must be established that life, liberty and security of the person interests are engaged by the impugned legislation. The second stage involves identifying and defining the relevant principles of fundamental justice that bear upon the analysis. Finally, it must be determined whether these constitutionally protected interests are infringed or denied in a manner that does not accord with the relevant principles: ***R. v. White*** (1999), 135 C.C.C. (3d) 257 (S.C.C.) at para. 38; ***R. v. Malmo-Levine*** (2003), 179 C.C.C. (3d) 417 at para. 83.

53. The principles of fundamental justice are the basic tenets of our legal system. Whether a particular concept may be said to be a principle of fundamental justice within the meaning of s. 7 will involve an analysis of the nature, source, rationale, and essential role of that concept within our legal system: ***Reference re s. 94(2) of the Motor Vehicle Act***[1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289 at pp. 300 & 309.



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***(1) Analytical Framework Under S. 7 Of The Charter***

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54. The principles of fundamental justice in s. 7 of the ***Charter*** are not a source of any rights, but rather a qualifier of the right not to be deprived of life, liberty or security of the person. These principles set out the parameters in which state action or legislation may legitimately affect or restrict life, liberty or security of the person interests: ***Reference Re s. 94(2) of the Motor Vehicle Act***, at pp. 300, 309-310.

### ***(1) Section 293 Is Not Unconstitutionally Vague***

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55. It is a principle of fundamental justice that individuals cannot be deprived of liberty under a law that is vague: see ***R. v. Nova Scotia Pharmaceutical Society***, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289 at 302; ***Ontario v. Canadian Pacific Ltd.***, [1995] 2 S.C.R. 1031 at para. 46.

56. The threshold for finding a law unconstitutionally vague is high. Indeed, only one provision in the ***Criminal Code*** has been found unconstitutional on the grounds of vagueness: ***R v. Spindloe***, (2001), 154 C.C.C. (3d) 8 (Sask. C.A.) at para 78 (see ***R. v. Morales***, [1992] 3 S.C.R. 711).

57. A law is only vague when the impugned provision is so unintelligible it fails to provide an adequate basis for legal debate or, in other words, when it is incapable of coherent judicial interpretation: ***Nova Scotia Pharmaceutical Society*** at 311; ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, [2004] 1 S.C.R. 76 at para. 15; ***Canadian Pacific*** at para. 79.

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58. A law is not vague simply because it does not predict with certainty the outcome of every conceivable fact situation. Certainty or absolute precision is not required; a law need only provide a framework delineating an area of risk, which is sufficient to provide general guidance, rather than direction: ***Winko v. British Columbia (Forensic Psychiatric Institute)*** (1999), 135 C.C.C. (3d) ; ***R. v. Hall*** (2002), 167 C.C.C. (3d) 448.

59. In determining whether a law gives sufficient guidance for legal debate, a court must first interpret it, not in the abstract, but within a larger interpretive context developed through an analysis of considerations such as the purpose, subject-matter and nature of the impugned provision, societal values, related legislative provisions and prior judicial interpretations of the provision: ***Canadian Pacific*** at para. 47.

60. Historically, the courts have proven capable of coherently interpreting and applying what is now s. 293: ***Tolhurst.*** Section 293 provides an adequate framework delineating the areas of risk, providing guidance for those who consider engaging in the practice of polygamy. Further, many who presently practice polygamy in Canada appear to appreciate that their actions are prohibited by s. 293.

***(2) Section 293 Is Not Overbroad***

61. Overbreadth and vagueness are distinct concepts. Overbreadth under s. 7 of the ***Charter*** is concerned with whether legislation is too sweeping for its objectives, catching more than necessary in its ambit. A law is overbroad if the means chosen are broader than necessary to achieve its objectives, in the sense that it limits the rights of the individual for no good reason: ***R. v. Heywood***, [1994] 3 S.C.R. 761 at p. 792.

62. In ***R. v. Malmo-Levine*** (2003), 179 C.C.C. (3d) 417 (S.C.C.), the Supreme Court rejected the argument that "the harm principle" is a principle of fundamental justice. The Court held nevertheless that the avoidance of harm is a "state interest" which may justify parliamentary action. Once it is demonstrated that the harm is more than insignificant or trivial, no claim for a breach of s. 7 can succeed as the legislative response to the harm is within the realm of Parliament (at paras. 130-131).

63. The objective of s. 293 is to prevent the harms of polygamous unions. No measure short of an absolute prohibition would achieve this objective. The available evidence overwhelmingly demonstrates that numerous harms result from polygamous unions. As such, there are good reasons to limit the right to engage in such conduct.



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### *(3) Section 293 is not Arbitrary*

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64. A deprivation of a right will be arbitrary and thus violate s. 7 if it bears no relation to, or is inconsistent with, the state interest that lies behind the legislation: ***Malmo-Levine***, at para. 135.

65. The prohibition of polygamy is not arbitrary but rather, it is rationally connected to a reasonable apprehension of the harms associated with the practice of polygamy.

### *(4) Section 293 is not Grossly Disproportionate*

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66. The standard for determining whether the means selected by the legislature are disproportionate to the state interest it seeks to protect is one of gross disproportionality: ***Malmo-Levine***, at para. 133. Courts must pay deference to the means selected by the legislature, and not interfere with legislation simply because they disagree with the policy choices made by Parliament.

67. Legislation will be "grossly disproportionate" under s. 7 where the claimant established that the effects of the measures on the s. 7-protected rights at stake are so extreme that they are per se disproportionate to any legitimate government interest.

68. Considering the extensive evidence of societal and individual harms engendered by the practice of polygamy, it cannot be said that its criminalization is so extreme as to be disproportionate, much less grossly disproportionate.

## C. Section 293 Does Not Violate Equality Rights

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69. Under s. 15(1), the focus is on preventing governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping: ***R. v. Kapp***, [2008] 2 S.C.R. 483, 2008 SCC 41, at para. 25.

70. Section 293 does not perpetuate group disadvantage or prejudice, nor does it impose disadvantage on the basis of stereotyping.

71. The polygamy prohibition is not based on stereotypes of particular religions or marriage structures; it is based on a reasonable apprehension of harm. The legislative history demonstrates that the provision was not enacted for a discriminatory purpose but instead was concerned with preventing a harmful practice. The polygamy prohibition was a rational policy choice made by Parliament based on preventing the generally harmful effects of polygamy. The prohibition corresponds to the circumstances of those who should be deterred from engaging in polygamous unions that may harm women and children.

72. Groups are not disadvantaged and do not suffer prejudice within the ambit of s. 15 simply because they have willingly engaged in an illegal activity, such as polygamy.

## V. IF SECTION 293 INFRINGES THE *CHARTER* , IT IS JUSTIFIABLE UNDER SECTION 1

73. Section 1 effects a balance between the rights of the individual and the interests of society by permitting limits to be placed on guaranteed rights and freedoms. Limits must be reasonable, prescribed by law, and demonstrably justifiable in a free and democratic society.

74. The Supreme Court has repeatedly and recently affirmed that the analysis set out by Dickson C.J. in ***R. v. Oakes,*** [1986] 1 S.C.R. 103, remains the basic template for s. 1. The person seeking to justify the limit bears the onus of proving, on a balance of probabilities, each of the following four elements:

1. the objectives of the law must be pressing and substantial;
2. there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective;
3. the impugned law must be minimally impairing;

4. there must be proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law.

75. The s. 1 analysis must be guided by the values underlying a free and democratic society. The Supreme Court has included among those values respect for the inherent dignity of the individual, a commitment to social justice and equality, and faith in institutions that enhance an individual's participation in society.

76. The specific factual and social context of a case plays a key role in justifying a limitation on a ***Charter*** right under s. 1. Deference is in order where the limit arises from complex policy decisions involving the assessment of competing interests, demands on resources, and the protection of vulnerable groups.

77. In determining whether a measure that seeks to deal with a complex social problem, the court need not be presented with conclusive social science evidence to demonstrate the presence of the harm to which the measure is directed. Where the court is faced with inconclusive or competing social science evidence relating the harm to the legislature's measures, the court may rely on a reasonable apprehension of that harm.

**A. The Objectives of Section 293 Are Pressing and Substantial**

78. The legislative and historical record demonstrates that the enactment of the polygamy provision was based on a concern about harm to the state, to society and its institutions, including the institution of monogamous marriage, and to individuals, especially women and children.

79. The historical record demonstrates that the polygamy prohibition was not directed at any particular religious, cultural or ethnic minority. Marriage to more than one person at the same time has long been prohibited in England. As noted earlier, although the impetus for the prohibition on polygamy in Canada may have been an

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**<#>The state has a legitimate interest in ensuring that the institution of marriage is regulated. Marriage, whether or not it is sanctioned by the state, has effects that extend beyond the individual participants. Changes to the institution of marriage can affect a range of public laws including for example, by increasing fiscal expenditures under statutes providing benefits or by affecting family class rules in immigration law and policy. DELETE?¶**
**The objectives of the provision include protecting the institution of monogamous marriage in Canada, thereby fostering a free and democratic society and protecting women and children. DELETE? ¶**

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increase in Mormon immigration to the Northwest Territories, the record demonstrates that the law was intended to apply to the practice of polygamy generally.

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80. In assessing whether the original objective remains pressing and substantial, the Court can and should draw upon the best evidence currently available. Current statistical data attests to the tangible and real harms of polygamy including harms to the state, harms to society and its institutions, harms to women in polygamous unions, harms to the children of polygamous unions and harms to men, women and children generally.

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81. The Supreme Court has emphasized the importance of looking to Canada's international human rights obligations when assessing whether the objectives are sufficient for s. 1 purposes: ***Slaight Communications Inc. v. Davidson***, [1989] 1 S.C.R. 1038.

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82. Trends in international law and Canada's international treaty obligations, especially under the ***Convention on the Elimination of Discrimination against Women*** **(CEDAW)** and the ***International Covenant on Civil and Political Rights*** **(ICCPR),** demonstrate that the historical objectives of the polygamy provision remain pressing and substantial in the modern context. Further, the practice in other states with which Canada would invite comparison generally criminalizes polygamy.

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## B. The Prohibition On Polygamy Is Proportionate

### *(1) Rational Connection*

83. The second step in the ***Oakes*** test is to determine whether the law is rationally connected to the objective of the law. The Supreme Court considers this part of the ***Oakes*** test to be not particularly onerous. Evidence based on reason or logic may be sufficient to establish a reasonable apprehension of harm.

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84. The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must demonstrate, on a balance of probabilities, a causal link between the impugned measure and the pressing and substantial objective. The government must show that it is reasonable to suppose that the limit may further the goal, but not that it will do so.

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85. Criminalizing polygamy is rationally connected to the objective of limiting the harms caused by the practice of polygamy. Criminalization makes the practice less attractive and serves to publicize society's disapprobation of patriarchal, unequal, and potentially abusive domestic situations. It is logical to assume that the criminal prohibition on polygamy is likely to reduce the incidence of the practice of polygamy if it is enforced.

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### *(2) Minimal Impairment*

86. This branch of the ***Oakes*** test insists that the limit on the ***Charter*** right be the minimum that is necessary to accomplish the desired objective. However, the government is not held to a standard of perfection and is not required to select the least drastic means of achieving its objective. Instead, a law will meet the requirements of this stage of the ***Oakes*** test if the legislation falls within a range of reasonable alternatives which could be used to pursue the objectives. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner.

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87. The open practice of polygamy, even in the face of the criminal prohibition, demonstrates that no lesser measures would be effective. Any measure short of criminal prohibition will almost certainly result in additional numbers of people entering into marriages which are not legally sanctioned, thereby leading to the harms identified in the evidence. In any event, Parliament may use various different measures, including criminal prohibitions, to address social harms and achieve legislative objectives.

88. There are significant harms inherent in the practice of polygamy itself – harms to women's dignity, sex and sex role stereotyping, sex ratio imbalances, and so forth – that are not captured and could not be captured by any other ***Criminal Code*** provisions. Nothing short of an outright prohibition on the practice of polygamy could prevent those harms as they originate in the structure of polygamous unions themselves.

### *(3) Proportionate In Effect*

89. The third and final step of the proportionality analysis is to determine proportionality of effects. This stage of the ***Oakes*** test allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation.

90. The beneficial effects of prohibiting polygamy outweigh any detrimental effects on those who wish to practice polygamy. Further, the prohibition of polygamy is consistent with the values of dignity, personal autonomy, equality and democracy that are inherent in the ***Charter*****.**

#### a. Preventing Societal Harms

91. Virtually all Western legal systems have recognized polygamy as a threat to good citizenship, social order, and political stability. Empirical evidence shows that individuals in polygamous societies tend to have fewer liberties than individuals in states that prohibit polygamy.

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Section 293 seeks to prevent the creation of polygamous communities, which tend to isolate themselves from the mainstream, thereby not fully participating in democracy.

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92. Polygamy undermines the institution of marriage and, more particularly, the dyadic/monogamous marriage structure. The state has a legitimate interest in ensuring that the institution of marriage is regulated. Changes to the institution of marriage could affect a broad range of public laws, such as for example by increasing fiscal expenditures under statutes providing benefits or by affecting the family class rules in immigration law and policy.

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93. Historically, and continuing to the present day, monogamous marriage provides a fundamental and foundational structure for society. Indeed, the rise of democratic structures may be linked to the demise of polygamous unions.

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94. Further, the inherent asymmetry in polygamous unions offends women's dignity and is premised on sex and sex role stereotypes that subordinate women, thus facilitating the unequal distribution of rights and obligations in marriage and in society more generally.

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95. Polygamy also increases the burden on the state to educate, socialize, house, feed and train the women who live in polygamous relationships and the children who result from these unions. The state bears similar burdens from those boys who are excised from polygamous communities.

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96. In prohibiting polygamy, Canada is maintaining its treaty obligations and remaining consistent with the international trend in free and democratic societies.

**b. Preventing Individual Harms**

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97. The evidence suggests that polygamous unions tend to negatively affect the physical, mental and social well-being of the wives and the children of these unions.

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98. Polygamy's effects on women include increased psychological, physical, sexual and reproductive health harms. For example, women in polygamous unions suffer

increased family stress, depression, jealousy, low self-esteem, feelings of disempowerment, and an increased risk of physical and mental abuse. Wives in polygamous relationships also often face significant economic deprivations.

99. Children of polygamous unions are at an enhanced risk of psychological and physical harms and psychological and physical abuse or neglect.

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100. The children of polygamous unions tend to have less education which restricts their upward mobility and economic independence. They also suffer material harms and deprivations that jeopardize their welfare.

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101. Polygamy leaves some young men with no opportunities to marry or create a family. In polygamous communities and families, it is necessary to marginalize or remove "surplus" boys to ensure they do not compete for wives. On a larger scale, the sociological evidence demonstrates that cohorts of men without prospects of marriage can have a destabilizing effect on society.

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102. There are limited deleterious effects of the prohibition on polygamy outside the polygamous communities themselves. These limitations are outweighed by the benefits of the prohibition to the participants and to society in general.

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## VI. CONCLUSION

103. For the foregoing reasons, s. 293 is consistent with s. 2(a), 2(b), 2(d), 7 or 15 of the ***Charter*****.** If s. 293 is inconsistent with one or more of these ***Charter*** rights, the breach is justified under s. 1.

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104. The necessary elements of the offence in s. 293 are set above. For greater clarity, s. 293 does not require that the polygamy or conjugal union in question involved a minor, or occurred in the context of dependence, exploitation, abuse of authority, a

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gross imbalance of power, or undue influence. While these elements are often present in polygamous unions, they are not necessary elements of the s. 293 offence.

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**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 9th day of November, 2010.

_____
Deborah J. Strachan
Counsel for the Attorney General of Canada

VANCOUVER
NOV - 5 2010
SUPREME COURT SCHEDULING

No. S-097767
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1986, c. 68

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF s. 293 OF THE *CRIMINAL CODE OF CANADA*, R.S.C. 1985, c. C-46

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# OPENING STATEMENT OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA

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# TABLE OF CONTENTS

# I. Introduction

## A. Overview of the Reference

1. On October 22, 2009, British Columbia's Lieutenant Governor in Council referred two questions to the B.C. Supreme Court for hearing and consideration pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, s. 1. Both questions concern s. 293 of the *Criminal Code*, the criminal prohibition against polygamy:

a. Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

b. What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

2. Section 293 reads:

> Polygamy
>
> **293.** (1) 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.
>
> Evidence in case of polygamy
>
> (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.

## B. The Attorney General's Position on the Reference Questions

3. The Attorney General of British Columbia would answer the Reference questions the following way:

> Question: Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?
>
> > Answer: Yes. Section 293 is consistent with the *Canadian Charter of Rights and Freedoms*. In particular, the ban does not offend ss. 2, 7 or 15 of the *Charter*, or, if it does infringe on those rights and freedoms, it is demonstrably justified as reasonable in a free and democratic society.
>
> Question: What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?
>
> > Answer: Section 293 does not require proof that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence. These may, of course, be factors in determining an appropriate sentence. A person who knowingly enters into or continues a criminally polygamous relationship (defined as formal or informal polygyny), or agrees or consents to do so, or who assists certain processes purporting to sanction such a relationship, is guilty of the offence.
> >
> > In the alternative, if the ban described above is not consistent with the *Charter*, then s. 293 may be read and construed so as to apply when the polygamy or conjugal union in question involves a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence.

## C. The Central Issues: Harm, Purpose, Interpretation

4. The participants arguing that s. 293 is unconstitutional (referred to in this Opening Statement as "the Challengers"[1]) urge the Court to make Canada the only Western nation to decriminalize polygamy.

5. The Amicus's argument is the most fully articulated, and it comes down to this: Section 293 "is based on presumed, stereotypical" views of polygamy as "barbarous";[2] it is an overbroad and clumsy law founded solely on puritanical Christian prejudices that were, at least in origin, punitive, racist,[3] and imperialist,[4] and a law that remains "demeaning" to the practitioners of polygamy. The Amicus lists a number of harms or hardships that he says are associated with criminalization (including "offending the dignity of women")[5]. However, none of the Challengers acknowledges that there are any harms caused by polygamy itself.

6. But that is the one question that overwhelms all others in this Reference, and it is simply put: is polygamy harmful? If it does not cause harm, then its prohibition is not justified and the Challengers must prevail.

7. Harm is relevant at the point of asking whether there is any *Charter* breach at all, because an activity that harms the fundamental rights of others may not fall within s. 2's religious protections. And when weighing arbitrariness, overbreadth or gross disproportionality in a s. 7 analysis, the Court will ask, 'How much harmful behaviour is captured by the law? How much harmless behaviour is caught?'

8. The *types* of harms here are also important: the Attorney General asserts that vulnerable groups are protected by s. 293, including women and girls. As such, s. 28 of

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[1] The Amicus and the Interested Persons Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS), the B.C. Civil Liberties Association (BCCLA), the Canadian Association for Free Expression (CAFE), and the Canadian Polyamory Advocacy Association (CPAA).
[2] Amicus's Opening Statement, para. 55.
[3] Ibid., para. 18.
[4] Ibid., paras. 23, 45, 60.
[5] Ibid., para. 29.

the *Charter* must weigh in the equation.[6] Under s. 28, no other provision of the *Charter*—including s. 15—can be used to advance a right where doing so discriminates against women.

9. And of course, if there is a breach found, harm is relevant to s. 1 and *Oakes*. That is to say, if there *is* harm, or the reasoned apprehension of harm, then there is a pressing and substantial concern under the first branch of the *Oakes* test. If the harm can be causally linked to polygamy, then there is a rational connection between the activity and its prohibition. And if there is sufficient harm shown from polygamy, then the salutary effects of the law will be seen to outweigh the deleterious, and proportionality is made out. What remains then is minimal impairment: can the harm of polygamy be addressed through less intrusive means, without prohibition, and if so, how?

10. The main task facing this Court will be assessing and weighing evidence respecting harm: the harm of polygamy versus the harm of prohibition.

11. But even if polygamy *is* proven harmful, and therefore even if s. 293 is, on balance, beneficial, the Court still must determine the provision's true objective, because if it was enacted predominantly for a religious or discriminatory purpose, as the Amicus asserts, then it is bad and should be struck down.

12. If the Court, having assessed the harms and approved the purpose, concludes that *some* criminal prohibition on polygamy is justified, then it must ask the further question: is this the *right* law? Is it tailored with sufficient care? Is it minimally impairing? Is it overbroad, arbitrary, disproportionate? These are all different ways of asking the same question in a particular context, and the context is this: how much deference is due Parliament? In *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General),* [1998] 1 S.C.R. 877 at para. 90, Bastarache J. held for the majority that, when weighing the deference that should be accorded to Parliament, the Court should consider:

---

[6] That section reads:"Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

> ...the vulnerability of the group which the legislator seeks to protect..., that group's own subjective fears and apprehension of harm..., and the inability to measure scientifically a particular harm in question, or the efficaciousness of a remedy[.]

13. There are of course other considerations at play in weighing the implications of declaring s. 293 invalid. Doing so would affect laws regarding marriage, divorce and immigration; it would have consequences for Canada's international obligations, by which this country is committed to promoting and supporting the international consensus *away* from polygamous practices.

14. But perhaps most significantly, the Court would be tampering with a fundamental pillar of the Canadian, indeed Western democratic, way of life. It is not enough in defending a law to simply say that it is deeply entrenched in our culture and sense of public and private obligations. But nor are these things irrelevant, and courts have recognized a particular deference due in that narrow class of cases dealing with matters of fundamental moral conduct. Age of sexual consent and marriage, incest and consanguinity laws are examples of issues that "go to the heart of a society's code of sexual morality and are...properly left for resolution to Parliament".[7]

## II. The Harms of Polygamy

### A. The Attorney's Expert Evidence

15. The Attorney's lead expert is Dr. Joseph Henrich from the University of British Columbia. Dr. Henrich holds the Tier-1 Canada Research Chair in Culture and Cognition. He is a world renowned anthropologist, and holds tenure in both Economics and Psychology.

16. Dr. Walter Scheidel is the Chair of the Classics Department at Stanford University. Dr. Scheidel traces the origins of what he calls socially-imposed universal monogamy (SIUM) from its roots in the early democracies of Ancient Greece through to modern times. Dr. Scheidel's work, like that of Dr. Henrich and Dr. Witte, a witness of the federal Attorney General, demonstrates that the imposition of monogamy has been

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[7] *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R. 906 at 930-31.

inextricably entwined with the growth and success of the Western democratic way of life and the development of a rights-based culture, to the point where some theorists suggest that one would not be possible without the other. Harvard evolutionary psychologist Stephen Pinker has observed that in recent centuries "egalitarianism and monogamy go together as naturally as despotism and polygyny".[8]

17. Thus the Amicus's narrative of the prevalence of polygamy historically and cross-culturally (at paras. 6-16 of his Opening Statement) is correct but unhelpful. It is true that the overwhelming majority of the hundreds of cultures documented in the anthropological record were polygamous (that is to say, were partially-polygynous, with some men having multiple wives and most men having one). The narrative is used by the Amicus to buttress his ensuing theme that (in the face of this prevalence) s. 293 must be viewed as simply an expression of anachronistic Christian prejudice. This entirely misses the point that the valuing of women's equality in society is as recent and localized a phenomenon as the practice of polygyny has been longstanding and widespread.

18. Dr. Henrich's work meticulously documents what might be apparent to anyone upon reflection. In a society with equal numbers of men and women, polygamy creates two obvious types of pressure: First, the need to recruit more women into the marriage market (as both polygamous and monogamous wives) drives down into adolescence the age at which girls are targeted for marriage (and increases the age disparity between husbands and wives). And a second, corresponding pressure is created to prevent some men from acquiring wives. If this cannot be accomplished through expulsion, warfare or other means, society is faced with a gender imbalance that becomes harmful in itself, confirmed by recent trends in India and China, where various forms of gender-selection have led to societies with more young men than young women. Reliable data from those countries show that even relatively small excesses in the proportion of men lead to striking increases in criminality and other social problems.

19. The competition of a polygynous society will also, in this theory, increase men's tendencies to control the reproductive capacity of women, leading to rigid, patriarchal

[8] Stephen Pinker, *How the Mind Works* (New York: W.W. Norton & Co., 1997) at 478.

social systems; similarly, the need to provide an ever-increasing supply of willing younger girls will require mechanisms of indoctrination and normalization.

20. If current scientific understanding of mating and marriage behaviour is correct, we would expect a society's degree of polygyny to correlate with youth of girls at first marriage and age disparity between husbands and brides (in both polygamous and monogamous marriages). It does. We would expect polygyny to correlate with social instability and crime. It does. We would expect it to negatively correlate with accepted measures of women's equality. Again, it does.

21. The only assumption necessarily underlying the demonstrable harms of polygamy is that it will manifest, more often than not, as polygyny rather than polyandry. And of course it overwhelmingly does. All of the established religious forms of polygamy are polygynous. Polyandry remains "vanishingly rare" and usually a temporary adaptation to environmental stresses or opportunities. Evolutionary psychology provides the obvious answer as to why: the genetic prospects of a man are increased by multiple partners in a way that those of a woman are simply not; our behavioral tendencies have evolved accordingly. Thus, throughout the anthropological record, partial polygyny is the rule, universal monogamy the exception, and polyandry the statistical aberration.

22. Can we take the leap from the experiences of foreign societies, and suppose that such harms might be visited here if polygamy were more widespread? We don't need to of course; the law requires only that the harm be *reasonably apprehended*, not proved.

23. The Amicus's own expert Professor Todd Shackelford concedes that "Professor Henrich has ably summarized various negative correlates and apparent consequences associated with polygamous... relationships".[9] Professor Shackelford can only offer in response that "negative correlates and apparent consequences can be seen in any kind of mating or marriage relationship." He then describes harms that befall women and children in monogamous marriages.

24. In his reply report addressed to Dr. Shackelford's assertions, Dr. Henrich uses the principles and data gathered by Dr. Shackelford from his research in monogamous

[9] Shackelford Affidavit #1, para. 5.

households (such as the observation that domestic violence is overwhelmingly more common among non-related cohabitants, and that male violence against women becomes worse as the age disparity between husbands and wives increases) and applies them comparatively in polygamous households. Dr. Henrich concludes that, on the Amicus's own evidence, intra-familial violence, abuse, child mortality, neglect, stress levels, and sexual jealousy will be at least as bad, and in fact almost certainly worse, in polygynous families and societies as contrasted with monogamously marrying families and societies. Professor Henrich then confirms these predictions with ethnographic observations from North American and other polygamous communities.

25. But in this Reference we need not rely on the "reasonably apprehended harm": we have proof in Bountiful and other fundamentalist Mormon communities. If the Attorney's theory of polygamy's social harms were correct, we would expect to see in those places a history of child brides and/or the trafficking of girls to satisfy polygamy's increased demand. We would expect some mechanism for dealing with the unmarriageable men. Either they will remain as an unstable and antisocial force, or they will be absent. We would expect to see systems of education and indoctrination, formal and informal, marked by demands for a rigid obedience to authority.

## B. Evidence Regarding Bountiful and the FLDS

26. A significant part of the evidence in this case originates from the fundamentalist Mormon communities of Bountiful and its American sister-towns. Although fundamentalist Mormons appear to number only a thousand in Canada (with only a subset of this population actively practicing polygamy) they, through the evidence of the FLDS and the Amicus as well as historically, have presented the most sustained and serious challenge to the polygamy law.

27. The FLDS is an insular, socially and geographically isolated group that practices polygamy. Its rules and norms are, by mainstream Canadian standards, inegalitarian and patriarchal.

28. Direct evidence from Bountiful, presented by the Attorney and also by the Amicus and the FLDS itself, presents a consistently worrisome narrative of child brides,[10] teen pregnancy, and men and boys who are, by accident or design, driven out of the community.[11] But the vexing question is whether, and to what extent, we can tease causation from correlation. If these harms, once proven, were simply coincident quirks of an isolated, singular little religious community, they could provide no support for criminalization of the practice across society.

29. But they are not. The harms documented at Bountiful are the perfectly predictable, indeed the inevitable, consequences of a polygamous society. In this sense, Bountiful and the greater FLDS are important metaphors for polygamy generally. So we need to look at Bountiful, not simply because it provides the proof of theory, but also because it shows the inadequacy of theory alone in assessing harms. It is one thing to hear an expert witness explain why polygyny tends to drive down the average age of marriage in societies from Africa to Asia. It is another to see it happening in the British Columbia interior. Bountiful gives us a glimpse of polygamy in practice.

30. The Court will hear from the Challengers that, if there are problems at Bountiful, they are problems arising from the insular, rigid, patriarchal, inegalitarian and isolated community. They will even suggest that criminalization itself causes, or at least exacerbates, these inclinations. They will say we don't need to worry about harmful polygamy taking root elsewhere in Canada because it only arises in this kind of environment, and how many Bountifuls can there be? But this misses the point.

31. As a matter of logic, science, and as a historical fact, one conclusion clearly emerges: Bountiful did not create polygamy, *polygamy created Bountiful.*

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[10] Angela Campbell, the law professor put forward as an expert witness by the Amicus, relates a conversation with a woman who reports that all but one of her 25 sisters was married before the age of 18. At least two of the FLDS's own witnesses were child brides, and it is expected that they will describe still more. Keep in mind that the average age of marriage in Canada for women is 29, and has been consistently high for all of our history. Indeed, in Western society as a whole it has never fallen below the low 20s, even in mediaeval times.

[11] The FLDS's own census at Bountiful shows the dearth of male teens and adults. Adult women outnumber men 104 to 79. Among 16- and 17-year-olds, girls outnumber boys by almost three to one. The FLDS denies that men and boys are "expelled". Where have they gone?

## C. Polygamy in Other Contexts

32. Numerically speaking, the threat presented by polygamy does not arise from the spread of fundamentalist Mormonism, but rather in immigrant populations, including immigrants from Muslim countries and African cultures where polygamy is either legally or culturally condoned.

33. There is before the Court considerable evidence regarding polygamy in Islam and its North American immigrant populations. The basic facts are sufficiently uncontroversial that no witnesses have been called by either side to give direct evidence or be cross-examined. The evidence indicates that the problems associated with polygamy persist within those communities too, compounded by the harsh social, linguistic, and economic barriers faced by immigrant populations.

34. The evidence also suggests that polygamy is beginning to take root in Canada's Muslim community, particularly among immigrants, aided by the uncertainty over the status of s. 293.

35. Yet the Challengers all urge the Court to make Canada the sole Western nation to decriminalize polygamy. The reasonably apprehended result would be an influx of polygamous families who are presently barred from the country in addition to the practice's domestic growth.

36. The lesson of France is instructive. That country introduced a family reunification policy permitting immigration by members of polygamous families in order to spur immigration in response to postwar labour shortages. A review of the literature reveals the catastrophic consequences as the numbers of polygamists in France swelled to hundreds of thousands. The research indicated that the situation for polygamist immigrants in France was dire indeed: often worse, in fact, than in their home countries. The French government reversed direction in 1993, but the damage was already done and the harms persist almost two decades later. The French example suggests that decriminalization of polygamy should be approached with great caution.

## III. The History and Purpose of Section 293

### A. The Attorney's Characterization of Purpose

37. Section 293's purpose is to deter and punish behavior that is seen as harmful to women and children of polygamous unions, harmful to others through the pressures it creates for the recruitment of girls and the exclusion of boys, denigrating to women's equality generally, and injurious to peace, order and good government.

38. Section 293 and its precedent provisions have also served a number of secondary purposes, such as: providing a basis for selective immigration (so as to avoid the harms alluded to above); avoiding difficulties associated with succession, divorce and remarriage, and benefit distribution in non-monogamous unions; and harmonizing with other nations Canada's approach toward polygamy's harms.

### B. Is the Purpose of Section 293 Religious?

#### (1) The "Religious Origin" Argument

39. The Amicus asserts that the law has not only an unconstitutional effect but also an unconstitutional purpose. He suggests that the law emanated from simple religious prejudice, further tainted with improper political and even racist ambitions. The Amicus traces the law to American roots, and in particular the legislation passed by Congress between 1862 and 1887 which he says "sought to demote Mormons from full civic membership to punish them for (1) political treason... and (2) race treason."[12] The Amicus writes:

> The criminal ban on polygamy was enacted in order to curtail a practice that was deemed to be offensive to a mainstream Christian definition of marriage. It was aimed at defending a Christian view of proper family life, and was employed in the state's cultural colonization of Aboriginal peoples. The ban was first imposed during a historical period when the imposition of Christian norms and values was deemed appropriate, but such an objective is no longer just and compelling in our free and democratic society.

40. The argument is appealing, not least because the original 1890 version of the law did explicitly refer to polygamy in terms of the Mormon practice. Rejecting s. 293 as a vestige of Victorian-era Puritanism is also tempting, as proof of society's progressive

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[12] Amicus's Opening Statement, paras. 17-18.

advancement since. This inclination is apparent in the work of the handful of avowedly progressive scholars who have become apologists for polygamy, such as the Amicus's principal expert, Professor Campbell. Nowhere in Professor Campbell's extensive writing on polygamy does she appear to acknowledge that there is *any* harm inherent in the practice; she appears to take it as a given that the law originated from irrational prejudice and should be judged on that basis.

41. But, as a matter of both history and law, that explanation is incorrect.

**(2) The Origins of Section 293**

42. As a historical question, the evidence will show that the U.S. Congress's ban on polygamy in Utah simply extended a prohibition that already existed in all the United States and other territories, a point emphasized in Professor Hamilton's reply affidavit to the expert legal opinion of Mr. Turley. While the American laws' passage and content (and that of the subsequent Canadian iteration) were given urgency by the particular challenges posed by Mormon polygamy, that is beside the constitutional point.

43. The expert historians in this case, Drs. Scheidel and Witte, demonstrate unequivocally that bars against polygamy trace their origins to ancient Greece and Rome. Socially-imposed universal monogamy, as Dr. Scheidel calls it, has been a common thread of Western societies since. No expert from the Challengers, and indeed nothing in the rich literature on the subject, has cast doubt on the essentials of this narrative. At times, of course, monogamy was enforced through ecclesiastical mechanisms; at others it has relied on the secular force of the state. Always it has been based on deep-seated cultural norms and rules of social conduct. But to fix its origin as an imposition of religious conformity—particularly Christian conformity—is to ignore the deeper history of the prohibition.

44. In the 18th century, Blackstone identified polygamy as a capital crime that was included in Britain's anti-bigamy legislation, dating from 1604. At the time, Blackstone recognized that the prohibition was inherited, not only from Roman law, but also from the custom of England's Saxon ancestors. It would appear that, although Canada had re-enacted an anti-bigamy law upon confederation that was almost identical to the English,

there remained some question whether it applied to the polygamy practiced by the incoming Mormons, and by Indians and Muslims. *An Act repecting offences relating to the Law of Marriage*, including what is now s. 293 of the *Criminal Code*, was Parliament's response.

45. It is also a mistaken view of the events surrounding the enactment of s. 293 to regard the provision as an outburst of Christian imperialism directed at the Mormon faith as such. The legislative record does not support that the law was "targeted" at Mormonism in the sense that Parliament was motivated by animus towards the Mormon religion or culture at large. While it is clear that the impetus for the 1890 legislation was the recent arrival of avowedly polygamist Mormons settlers in Alberta—along with recognition that the existing bigamy offence would be inadequate to capture the Mormon form of spiritual marriage—nevertheless the legislative record confirms that the majority of amendments were targeted at polygamy itself, whether practiced by "Indians", "Mohammedans", or Mormons. There was originally a separate provision that forbade "[w]hat among the persons commonly called Mormons is known as spiritual or plural marriage." But this provision was repealed in 1954, presumably because it was obvious that Mormon polygyny was already captured by the general prohibition against "polygamy" or "conjugal union with more than one person at the same time".

46. When the first iteration of the polygamy offence was introduced into the Senate in February 1890, the section included a proviso that it would not apply to "...any Indian belonging to a tribe or band among whom polygamy is not contrary to law, nor to any person not a subject of Her Majesty, and not resident in Canada." To this, one senator commented, "I think that is a very dangerous exception to make, because it may have the effect of exempting the very class to whom the Bill is intended to apply", prompting the bill's proponent to reply that the exception would be struck out.[13]

47. Two years before, a number of leaders of the Mormon immigrants had petitioned the Canadian government to permit polygamy, invoking as precedent the practice of Muslims elsewhere in the Empire. They argued:

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[13] Hon. Mr. Dickey and Hon. Mr. MacDonald (B.C.), *Debates of the Senate* (February 25, 1890) at 142

> The comparatively few who need to seek rest and peace in Canada would not be a drop in the bucket compared with the millions of people who are protected in their faith and practice plural marriage under the Government of Great Britain.[14]

48. The Mormons were "firmly but politely" told that they were welcome to come to Canada, but not to practice polygamy here. At the committee stage of the polygamy law's consideration, Sir John A. Macdonald recounted the episode, and explained the government's position, as follows:[15]

> Mr. Card and some others came to Ottawa. Some of them are British subjects by birth, one or two are Canadians by birth, and others were born in the United States. They said they wished to settle in Canada. They were informed what our law was, and they were told explicitly and distinctly that we were aware that the great cause of the antipathy towards them in the United States was the practice of polygamy, and they must understand that the people of Canada would be as firmly opposed to that practice as the people of the United States were. They said they were aware of that, but they wanted shelter from what they considered oppression. They were told—told by myself—that in any case where the practice was proved they would be prosecuted and punished with the utmost rigor of the law. They said they were quite willing to submit to the law. They attempted, of course, to argue their case, and they discussed the doctrines of Mormonism generally with me. I said to them: <u>You must understand that there must be no mistake about it; there will be no leniency, there will be no looking over this practice, but as regards your general belief, that is a matter between yourselves and your conscience. We are glad to have you in this country so long as you obey the laws, we are glad to have respectable people. Her Majesty has a good many 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.</u> I told them this, and they professed a sincere desire—I have no reason to doubt their sincerity—to submit themselves to the laws of Canada for the sake of the rest and equity that they thought they would get, instead of being surrounded by a turbulent crowd who were oppressing them in every way.
>
> [Emphasis added]

49. In the Senate, the leader of the house, Senator John Caldwell Abbott, indicated that the new provision was "...mainly devoted to the prevention of an evil which seems likely to encroach upon us, that of Mormon polygamy, and it is devoted largely to provisions against that practice."[16] Again, however, following this acknowledgement of the impetus for the new provision, Senator Abbott clarified that the purpose of the law was of broader reach, transcending the Mormon religion and culture:

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[14] Jessie L. Embry, "Exiles for the Principle: LDS Polygamy in Canada" (Fall 1985) 18:3 Dialogue: A Journal of Mormon Thought 108-116 at 109.
[15] *House of Commons Debates* (April 10, 1890) at 3180.
[16] Hon. Mr. Abbott, *Debates of the Senate* (April 25, 1890) at 583

> Of course the Bill is not directed against any particular religion or sect or Mormon more than anybody else; it is directed against polygamists. In so far as Mormons are polygamists of course it attaches to them.[17]
>
> [Emphasis added]

50. Members of both houses expressed their objection to polygamy in terms of strong moral condemnation, but it was directed at the *practice*, not the *religion*, describing polygamy as a "canker",[18] an "abominable practice... [engaged in] under the pretence of religion",[19] an "abuse,"[20] "what may become a serious moral and national ulcer",[21] a "pernicious habit",[22] an "abomination",[23] "evil",[24] and a "nefarious practice".[25]

51. Although there is no express reference to women's equality in the legislative record, broader consideration of historical context reveals that concern for the well-being of women and children was a strong component of anti-polygamy sentiment in the late 1800s.[26] Modern historians—including the Amicus's expert witnesses—have identified less palatable mores of the era as having contributed to the condemnation of polygamy: Puritanism, Victorian prudishness, racism, a monogamous ideal that was itself oppressive to women in imposing rigid gender stereotypes. This does not alter, however, that the historical record evidences a core preoccupation with polygamy as oppressive and harmful to women.

52. Indeed, even in the late 1800s, even when the protection of vulnerable persons was not a well-advanced area of law, the proponents of anti-polygamy codification invoked the harms of polygamy, including the threat it presented to the status of women, rather than relying on biblical or ecclesiastical authority. A contemporary American cartoon illustrates the criticism of polygamy as entailing the enslavement and denigration of plural wives:

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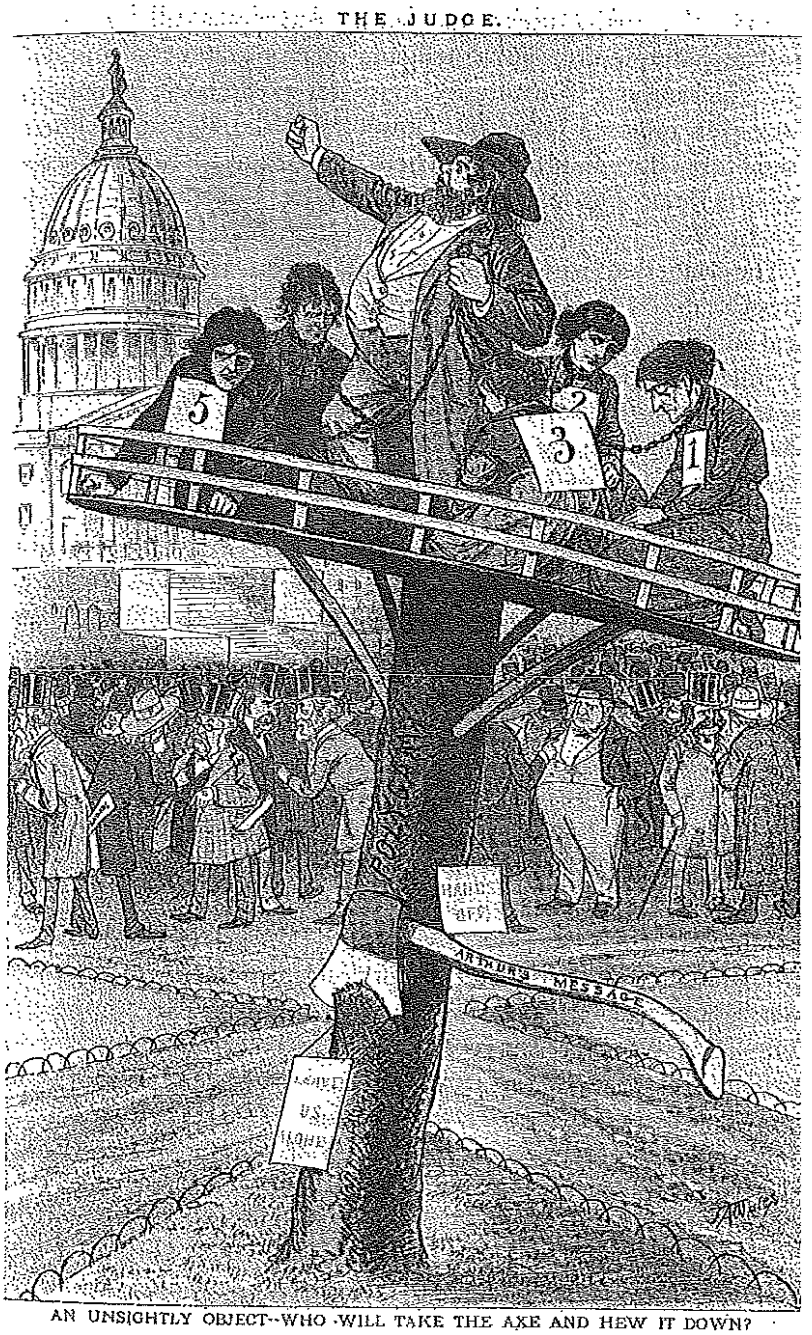
[17] Hon. Mr. Abbott, *Debates of the Senate* (April 25, 1890) at 585
[18] Hon. Mr. MacDonald (B.C.), *Debates of the Senate* (February 20, 1890) at 112
[19] Mr. Blake, *Debates of the House of Commons* (April 10, 1890) at 3175
[20] Mr. Blake, *Debates of the House of Commons* (April 10, 1890) at 3176
[21] Mr. Mulock, *Debates of the House of Commons* (April 10, 1890) at 3177
[22] Mr. McMullen, *Debates of the House of Commons* (April 10, 1890) at 3178
[23] Mr. McMullen, *Debates of the House of Commons* (April 10, 1890) at 3178
[24] Mr. Mulock, *Debates of the House of Commons* (April 10, 1890) at 3181; Hon. Mr. Abbott, *Debates of the Senate* (April 25, 1890) at 583
[25] Hon. Mr. Power, *Debates of the Senate* (April 25, 1890) at 584
[26] See Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002) and Sarah Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008)




AN UNSIGHTLY OBJECT--WHO WILL TAKE THE AXE AND HEW IT DOWN?

53. One of the most influential figures in the anti-polygamy movement in the United States was Brigham Young's estranged wife, Ann Eliza Young. A historian's account describes her impact:

> In the summer of 1873, one of Young's wives apostasized, sued him for divorce, and undertook one of the most spectacularly successful lecture tours of the nineteenth century. Ann Eliza Young, billed as 'The Rebel of the Harem,'

> described her courtship, marriage, and eventual separation from Young in excruciating detail. She also claimed that the superficial harmony of Young's households masked what was in fact a systematic torture of women, riven by jealousies, violence, and deception. The publicity surrounding the suit, and Ann Eliza Young's unflinching and personal attack on the president and prophet, attracted large audiences and press attention. In the spring of 1874, her tour took her to Washington, where President Grant and his wife as well as numerous congressmen went to hear her speak.[27]

54. In the final chapter of her broadly popular 1876 memoir, *Wife No. 19, or the Story of a Life in Bondage, Being a Complete Exposé of Mormonism, and Revealing the Sorrows, Sacrifices and Sufferings of Women in Polygamy*, Young described her moral objection to polygamy precisely in terms of equality of the sexes:

> All this while I was gaining knowledge of the domestic customs and relations of the "Gentiles." At nearly every place that I visited I was entertained in some private family, and my eyes were constantly being opened to the enormities of the wicked system from which I had escaped.
>
> I had felt its misery; I had known the abject wretchedness of the condition to which it reduced women, but I did not fully realize the extent of its depravity, the depths of the woes in which it plunged women, until I saw the contrasted lives of monogamic wives.
>
> I had seen women neglected, or, worse than that, cruelly wronged, every attribute of womanhood outraged and insulted. I now saw other women, holding the same relation, cared for tenderly, cherished, protected, loved, and honoured. I had been taught to believe that my sex was inferior to the other; that the curse pronounced upon the race in the Garden of Eden was woman's curse alone, and that it was to man that she must look for salvation. No road lay open for her to the throne of grace; no gate of eternal life swinging wide to the knockings of her weary hands; no loving Father listened to the wails of sorrow and supplication wrung by a worse than death-agony from her broken heart. Heaven was inaccessible to her, except as she might win it through some man's will. I found, to my surprise, that woman was made the companion and not the subject of man. She was the sharer alike of his joys and his sorrows. Morally, she was a free agent. Her husband's God was her God as well, and she could seek Him for herself, asking no mortal intercession. Motherhood took on a new sacredness, and the fatherly care and tenderness, brooding over a family, strengthening and defending it, seemed sadly sweet to me, used as I was to see children ignored by their fathers.

55. That is a brief introduction to the history of the prohibition. The Attorney has lingered in this part in more detail than elsewhere because the question of legislative purpose is a plainly pivotal factual issue in this case. But as a matter of law, even if the

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[27] Gordon, *supra*, at 112.

Amicus were correct, and s. 293 *had* been originally framed as partially or even mainly a religious imperative, its constitutionality would be unaffected.

### (3) The Legal Significance of Religious Origin

56. It is true that if a law had been enacted with no other purpose than to enforce religious practice, it is bad law.[28] But that principle does not extend to prohibit laws that have otherwise valid purposes, simply on the basis that they were earlier (or even originally) argued or articulated in religious terms.

57. An objection similar to the Amicus's "religious origin" argument was raised by the defendant to an incest prosecution in *R. v. M.S.*, [1996] B.C.J. No. 2302 (C.A.). The incest laws follow the same Anglo-Canadian history as the polygamy laws. Originally part of ecclesiastical law, the laws disappeared from the books between the 17th and 19th centuries, to re-emerge in Canada through codification in 1892 in more or less their present form.[29] Considering the implications of the asserted "religious origin" of the incest prohibition, Donald J.A. in *M.S.* said:

> 54 [The Appellant] notes that in England incest was a matter for the ecclesiastical courts until this century thereby confirming the religious nature of the offence. He cites the decision in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 as authority for the proposition that our courts are concerned with justice not morals. He puts the argument this way:
>
> > Canada is a multi-cultural society and does not hold any particular religious beliefs in special regard. The incest statute, being divine law, is an impermissible basis for state legislation.
>
> 55 I think this argument is utterly specious. The criminal law fundamentally deals with right and wrong. The Criminal Code gives expression to our society's moral principles. Section 155 seeks to prevent the harm to individuals and to the community caused by incest. The fact that the offence is rooted in a moral principle developed within a religious tradition cannot support a claim for interference with the freedom to believe or not to believe under the Charter.

58. The challenger in *M.S.* was not, of course, asserting that incest was a religious practice, but the religious freedom argument was the same. He was arguing, in effect,

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[28] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

[29] The history of the incest law is well canvassed by the Nova Scotia Court of Appeal in *R. v. F. (R.P.)* (1996), 105 C.C.C. (3d) 435, and by Southin J., concurring, in *M.S.*

that his own beliefs about incest differed from the state's, and if the state's position was a religious one, he had a right to be free from its imposition.

### C. Has the Purpose Impermissibly "Shifted"?

59. Canadian courts have rejected the "shifting purpose doctrine", and have held that a law's constitutionality must be judged with reference to its original objective, not any purpose that can be ascribed, *ex post*, to justify it.[30] However, in *R. v. Butler*, [1992] 1 S.C.R. 452 the Court confirmed that laws premised on ideas of morality and social harm could withstand scrutiny notwithstanding that the content of these notions had changed over time. Sopinka J. wrote at para. 85:

> I do not agree that to identify the objective of the impugned legislation as the prevention of harm to society, one must resort to the "shifting purpose" doctrine. First, the notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society. Second, and more importantly, I am of the view that with the enactment of s. 163, Parliament explicitly sought to address the harms which are linked to certain types of obscene materials. The prohibition of such materials was based on a belief that they had a detrimental impact on individuals exposed to them and consequently on society as a whole. Our understanding of the harms caused by these materials has developed considerably since that time; however this does not detract from the fact that the purpose of this legislation remains, as it was in 1959, the protection of society from harms caused by the exposure to obscene materials. ...

60. The Amicus's argument implies that the Attorney's support for s. 293, premised heavily, as it is, on the demonstrable harms associated with polygamy, reflects a "shifting purpose" from the original religious roots of the law. The Attorney contests such a characterization. The purpose of the law has always been to enforce a moral standard for "the protection of society from harms associated" with polygamy. It has always been expressly premised on the belief that polygamy, like obscenity in *Butler*, "had a detrimental impact" on persons involved, particularly women, and "on society as a whole." It is true that our understanding of the harms associated with polygamy have become more nuanced in recent years, and indeed in the course of developing the evidence presented in this Reference. It is also true that our understanding of the nature of women's rights and interests has evolved since 1890. We would expect such evolution in thought and understanding with respect to almost any law, including the

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[30] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

incest prohibition which originated centuries, perhaps millennia, before we understood the full genetic implications of intrafamily sexual relationships or the psychology of relationships of dependence.

## IV. The Interpretation of Section 293

### A. The Definition of Criminal Polygamy

61. The Attorney General says that "polygamy" in s. 293(1)(a)(i) of the *Criminal Code*, purposively and realistically interpreted, means:

> a polygynous marriage that purports to be (a) sanctioned by some authority and (b) binding on any of its participants.

62. Subsection 293(1)(a)(ii), which has since 1890 forbidden a "conjugual union" with more than one person, is a reiteration and expansion of the principal prohibition that was designed and serves as an anti-circumvention measure. It refers to a polygynous marriage-like union even if this union has not become formalized through recognized ceremony or celebration.

63. Subsection 293(1)(a)(ii) prevents *de facto* polygamy even when it lacks (or at least cannot be proven to have) the formal trappings of "officially" endorsed marriage that would have made it either a "form of polygamy" under s. 11(5)(a) (now s. 293(1)(a)(i)) or "what among the persons commonly called Mormons is known as spiritual or plural marriage" under then s. 11(5)(c). In the Parliamentary debate of 1890, it was noted:

> [I]t is right to observe that the difficulties which the United States has had to contend with in respect to the Mormons of Utah since the Brigham Young dispensation are serious and growing; and that from time to time earnest efforts have been made to overcome what seems to be an almost insuperable difficulty, owing to the extraordinary solidarity of these people and their determination to persist in and to conceal all legal evidence, at any rate, of their practices.[31]

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[31] Mr. Blake, *Debates of the House of Commons* (April 10, 1890) at 3174.

64. The Parliamentary debates evince a concern with the difficulty of capturing polygyny under then-existing law without proof of formalized marriage:

> Simple cohabitation, therefore, in conformity to the Mormon custom is one of the rules by which Mormon marriage shall be recognized.[32]

This is followed by the following statement:

> Sometimes they have witnesses, sometimes not; if they think any trouble may arise from a marriage, or that a woman is inclined to be a little perverse, they have no witnesses, neither do they give marriage certificates, and if occasion requires it, and it is to shield any of their polygamous brethren from being found out, they will positively swear that they did not perform any marriage at all, so that the women in this church have but a very poor outlook for being considered honorable wives.[33]

## B. "Polygamy" in Section 293 Means "Polygyny"

65. Some of the Challengers' overbreadth arguments are premised on an inflated interpretation of s. 293: they say that because polygamy, in a biological and anthropological sense, includes both polygyny and polyandry, and because today the ideas of a "conjugal union" and "marriage" apply also to same-sex couples, then the prohibition in s. 293 of "any form of polygamy" sweeps in relationships that are completely unrelated to any harms that might be associated with polygyny.

66. The Attorney's position is that neither s. 293(1)(a)(i) nor s. 293(1)(a)(ii) of the *Criminal Code* prohibition applies to polyandry or same-sex multipartner unions.

67. The familiar rule of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

68. In its ordinary sense, "polygamy" is used to mean only "polygyny".[34] In the present Reference, it is instructive that virtually every witness, including every expert

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[32] Ibid.
[33] Ibid.
[34] It is not the only instance of common—and even legislative—usage diverging from precise meaning. Provincial legislation permits the euthanization of an "animal in distress" without

who is not explicitly also discussing polyandry (and therefore must be careful of too general a term), uses "polygamy" to mean "polygyny" exclusively. The words "any form of" do not add polyandry or same sex conjugal unions into the definition, but rather ensure that all *forms* of polygamous marriage with which the legislators were explicitly concerned (explicitly if not exclusively Mormon, "Mohammedan", and "Indian" forms of marriage) were captured.

69. Interpreting "polygamy" as "polygyny" is in harmony with the context, scheme, object and intentions underlying s. 293. All indications from the legislative record and surrounding historical context are that the term "polygamy" in 1890 was understood and discussed purely with reference to polygyny; the latter sub-term was never used,[35] and the term "polyandry" had apparently been coined for use by biologists only a few years before. Indeed, if there was a record or account of even a single polyandrous relationship in late 1800s Canada, the Attorney is unaware of it. Nor is there any reason to believe that the expansion of the prohibition in s. 293(1)(a)(ii) was ever intended to embrace anything but polygynous conjugality that was not explicitly linked to a form of marriage. The scheme and purpose of the Act were clearly limited to addressing harms attributed to polygyny, consistent with the evidence of harm presented to the Court in the Reference.

70. It is arguable that Parliament could not criminalize polyandry and same-sex multi-partner conjugality even if it wished to. Polyandry does carry some risk of harms that might be associated with it, but evidence for these is speculative and weak.[36] It is, without doubt, unrelated to the most serious harms asserted by the Attorney General in

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specifying (unlike federal legislation) that "animal" should be read to exclude human beings: *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372.

[35] The Attorney has searched through the legislative and historical record for any indication that any nineteenth-century lawmaker ever used the term "polygamy" to mean anything but "polygyny", or that the prohibitions in s. 293 were ever intended to apply to polyandrous or other non-polygynous relationships. None of the Challengers asserting its inclusion in furtherance of their "overbreadth" argument have pointed to a single letter, speech, article or other piece of evidence to indicate that polyandry or same-sex groupings were of the least concern to lawmakers in 1890. No expert has opined otherwise.

[36] Dr. Shackelford, the Amicus's expert, reports accurately that domestic violence is most prevalent among persons who live together but are unrelated, and that men, particularly sexually jealous men, are the most violent members of the household. This suggests that polyandrous relationships would be more violence prone than either monogamous or, perhaps, even polygynous relationships. But this is simply speculation and likely, given the rarity of polyandrous relationships, not susceptible to study or proof.

connection with polygyny. Moreover, all accounts indicate that polyandry is "vanishingly rare" and usually a temporary response to particular environmental or economic conditions.[37] There is nothing in the record indicating the prevalence of same-sex multipartner groupings, but these too are related to any harms of polygamy only in the most tenuous way. But for present purposes, these distinctions are irrelevant, because as a matter of interpretation, s. 293 does not capture non-polygynous marriage or conjugality.

71. Although unusual in the modern era, gender-referential crimes are not unknown. In *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R. 906, there was a claim that the *Criminal Code* discriminated against men who would have sexual intercourse with girls under 14 because women are not prohibited from having sexual intercourse with boys under 14. Wilson J. (for the majority) rejected this argument, stating at 930-31:

> ...In my view, it is not this Court's role under s. 15(1) of the Charter to decide whether a female who chooses to have intercourse with a boy under fourteen merits the same societal disapprobation as a male who has intercourse with a girl under fourteen. These issues go to the heart of a society's code of sexual morality and are, in my view, properly left for resolution to Parliament.
>
> The appellants also submit that s. 146(1) of the Code discriminates against males because males under the age of fourteen are denied the same protection as s. 146(1) affords to females under the age of fourteen. Only a young female can obtain the conviction of her seducer under this provision. Once again, however, I think it important to bear in mind that the legislature has chosen to punish a male who engages in a form of penetration to which only a male and a female can be parties. The legislature has concluded that sodomy or buggery are forms of penetration that should be dealt with separately: see, for example, s. 155 of the Code. Once again we are faced with distinctions aimed at biologically different acts that go to the heart of society's morality and involve considerations of policy. They are, in my view, best left to the legislature. [Emphasis added]

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[37] The CPAA's survey evidence, however unscientific, supports the expectations of evolutionary psychology in that polyandry is outnumbered by polygyny almost three to one, even among the survey participants who are avowedly committed to egalitarian principles. As for its temporary nature, the Attorney observes that none of the relationships in the CPAA's evidence has endured for longer than three years, an interesting if obviously inconclusive fact that is also consistent with the experts' expectations.

## V. The Attorney's Position on the Asserted Breaches

### A. Section 2(a): Freedom of Conscience and Religion

72. It is trite that religiosity of a practice does not automatically render it immune from prosecution. There are very few crimes that have not, at one time or another, been excused on religious bases, from petty fraud to genocide. Some clearly criminal activities, such as female genital mutilation, 'honour killings', ritual animal sacrifice and cannibalism may be closely connected with deep religious or cultural beliefs. The religious origin or nature of a prohibited activity, in other words, is not the end of the analysis, but the beginning.

73. In *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, Iacobucci J. wrote (for the majority) at para. 56:

> ...[A]t the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) 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. Only then will freedom of religion be triggered.

74. The evidence indicates that it is possible to observe any religion in which polygamy is accepted or encouraged without actually practicing polygamy, although some, including some fundamentalist Mormons, do appear to believe that there are advantages in the afterlife to those who practice, as opposed to simply espousing, the principle. The Attorney therefore accepts that some people practice polygamy in accord with deeply-held religious views.[38]

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[38] The nature of the religious challenge presented by the CPAA is not quite clear. On the one hand the group seems to suggest that "conjugal polyamory" is a deeply held matter of conscience and therefore deserving of s. 2(a) protection as such. In other passages, the group suggests that it is a desire to formalize polyamorous relationships through religious ceremony that permits its members to invoke freedom of religion. Even assuming both to be true, the arguments would add no further dimension to the s. 2(a) arguments advanced by the other Challengers.

75. But there are two other stages to the analysis: the first asks whether the infringement is trivial or insubstantial (which, again, the Attorney General does not dispute for present purposes); the second requires the religious freedom to be balanced against other rights and interests. Iacobucci J. wrote further in *Amselem*, at para. 62:

> ...[O]ur jurisprudence does not allow individuals to do absolutely anything in the name of that freedom. Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.
>
> [Emphasis added]

76. This is consistent with the Court's s. 2(a) jurisprudence from *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 onwards, confirming that "religious freedoms were nonetheless subject to limitations when they disproportionately collided with other significant public rights and interests" and that other jurisdictions too have generally recognized that "the invocation of freedom of religion does not, by itself, grant immunity from the need to weigh the assertion against competing values or harm."[39]

77. Where the "competing values" are themselves protected *Charter* rights, it is appropriate to weigh them in the balance at the s. 2(a), rather than the s. 1 stage.[40] This is especially so in light of the overriding presence of s. 28. So even where polygamy can be said to rise to the level of a fundamental tenet for *Charter* purposes, and assuming that the infringement is non-trivial, the Attorney does not concede a breach of s. 2(a) because the practice is inherently harmful and infringes on the fundamental rights of others.

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[39] *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, 2007 SCC 54 at paras. 72-73; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6, at para. 26.
[40] *Multani*, *supra*, at paras. 28-29.

78. However, the Attorney says that whichever analytical route is taken, in this case the outcome must be that religious freedom should yield to the more substantial interests at stake.

## B. Section 2(b): Freedom of Expression

79. Only the CPAA argues freedom of expression under the *Charter*. The group suggests that "conjugal polyamory" is a protected expressive activity.

80. The assertion is difficult to comprehend. Any non-secret breach in the face of a law is, on some level, an expressive act, at least it is an expression of defiance to the law. This does not elevate every flagrant crime to the level of protected speech. If s. 293 is otherwise valid law, freedom of expression could not be used to permit its breach. As such, the invocation of s. 2(b) cannot add anything to the freedom of conscience and religion arguments advanced under s. 2(a).

## C. Section 2(d): Freedom of Association

81. The question of freedom of choice in sexual partners as a protected form of association was an argument considered and rejected by the B.C. Court of Appeal in the "adult consensual incest" case of *R. v. M.S., supra*. In that case, the Court invoked the Ontario Court of Appeal's decision in *Catholic Children's Aid Society of Metropolitan Toronto v. S.(T.)* (1989), 69 O.R. (2d) 189 for the proposition that the protection in s. 2(d) was clearly designed to protect association with persons beyond the primary family unit.

82. Here, the Amicus's argument is somewhat different. He says that the law permits multi-partner sexual activity, but not "polygamous groupings" and so violates the freedom of association. Other of the Challengers appear to take similar positions.

83. Naturally extended, on this argument Parliament would be permitted to criminalize sexual intercourse between a man and a 12-year-old girl, but it could not prevent him from marrying her. Incest laws would not violate s. 2(d), but consanguinity laws would. These analogies are not an aside: a reason that the polygamy law focuses

on marriage and conjugality even if the underlying problem is sexual conjugality is that, without the cooperation of the victim, sex usually cannot be proven.

84. But there is an important observation to be made about the freedom of association argument here. The Amicus's concession that the polygamy law does not capture, for instance, group sex seems to undermine his argument that it is representative of irrational fear and Christian prejudices. If it were simple prudishness motivating the ban, then why should it not include orgies, which would have been no less an affront to Victorian sensibilities? In the Attorney's view it is because there are harms associated with polygynous *marriage* that simply do not arise from non-conjugal (simultaneous or serial) multi-partner *sex*. It is, in other words, the conjugality, the nature of the establishment of simultaneous multiple pair bonds, acknowledged internally and presented to the community as a committed marriage-like arrangement, that is the heart of the problem.

85. So it is true (and, given the nature of the harm, perfectly legitimate) to define the crime in s. 293 in terms of a *relationship* instead of in terms of an *act*. But this fact alone surely does not trigger s. 2(d). To hold otherwise would be to stretch the protections for association far beyond anything possibly conceived by the framers of the *Charter*.

## D. Section 7: Fundamental Justice

### (1) The Role of Harm in Analysis of Fundamental Justice

86. The Attorney accepts that s. 293 engages s. 7 of the *Charter* because it permits imprisonment.[41] The question then turns to fundamental justice, and, most particularly, to the questions of arbitrariness, overbreadth, and disproportionality. The determination of this question, while not identical, will rely on the same harm arguments as those advanced under s. 1.

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[41] The BCCLA posits a broader s. 7 right that is not conditional on the availability of imprisonment. However, because of the penal nature of s. 293, the issue is moot: there is no dispute here that s. 7 is implicated by the polygamy prohibition. Whether it would still be implicated if there were no imprisonment available is an interesting but presently irrelevant consideration.

87. The gist of the Challengers' s. 7 argument appears to be that, even if it were permissible to ban polygamy involving children or coercion, it is a violation of the principles of fundamental justice to criminalize consensual, adult polygamy where there is no harm in the relationship itself.

88. The appellate courts have upheld incest laws in the face of s. 7 attack in the context of consensual, adult incest without proof even of a power imbalance. In both *R. v. M.S.*, *supra* and *R. v. F. (R.P.)* (1996), 105 C.C.C. (3d) 435 (N.S.C.A.), the Courts found that the harm of incest generally justified its prohibition in every case.

89. Similarly, the Supreme Court of Canada, in *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, rejected the idea that fundamental justice necessarily requires an element of harm to be present, either in an individual case or in society generally. However, it is clear that no claim for breach of fundamental justice could succeed where harm from the prohibited activity *is* demonstrated beyond *de minimis*, as it is here. Gonthier and Binnie JJ. wrote for the majority at para. 133:

> We do not agree with Prowse J.A. that harm must be shown to the court's satisfaction to be "serious" and "substantial" before Parliament can impose a prohibition. Once it is demonstrated, as it has been here, that the harm is not *de minimis*, or in the words of Braidwood J.A., the harm is "not [in]significant or trivial", the precise weighing and calculation of the nature and extent of the harm is Parliament's job. ... The relevant constitutional control is not micromanagement but the general principle that the parliamentary response must not be grossly disproportionate to the state interest sought to be protected[.] [Emphasis added].

**(2) Arbitrariness**

90. All of the arguments of the Challengers advanced with respect to arbitrariness are simply re-articulations of his assertions that polygamy, *per se*, causes no harm, or at least that it does not "universally" do so. The Attorney reiterates that he need not demonstrate that harmless polygamy cannot occur. If this Court finds that controlling polygamy does indeed reduce harms (social harms and harms to some participants) or the risks of such harms, the arbitrariness argument must fail.

**(3) Overbreadth – The Challenge of the Polyamorists**

91. As with incest and obscenity, many of the harms associated with polygyny exist whether or not any particular polygynous relationship is directly harmful to the participants, and irrespective of the degree of consent in any particular relationship. The Attorney General accepts that such consensual, non-harmful, polygynous polyamorous relationships can be presumed to exist. Nevertheless, it is open to the Court to find that the harms at large, without aggravating circumstances in a particular case, are sufficient to support a blanket ban on polygyny.

92. In the first place, all polygynous relationships contribute to the 'marketplace' harms described by Dr. Henrich. In addition, each carries with it, if not realized harm, at least an increased risk of harm to the participants and children inherent in the family form.

93. But the most significant problem with "hiving off" or excluding "polyamory" from the *Criminal Code*'s prohibition of "polygamy" is that the distinction is not capable of definition for identification and enforcement purposes. There have been many defining distinctions suggested between the two terms: the degree of consent, the "loving nature" of polyamorous relationships, the "honesty" of the participants, their assertedly "egalitarian" design or absence of patriarchal trappings. But how is an immigration officer, for instance, to assess an application by a polygynous family on such bases? Similarly, if the Court were to recognize a "good" polygamy versus a "bad" polygamy based on a checklist of factors, it could not be long before practitioners of "bad" polygamy learned to adopt the trappings of the "good".

94. Consider the idea of polyamory urged by the CPAA at para. 13 of its Opening Statement, where the defining characteristic is said to be that "all members of the group formally or informally adopt" principles of equality between genders and among sexual orientations. If the criminal law can legitimately address polygamy at all, how could its application truly depend on an assessment of the degree to which participants have "adopted" certain laudable "principles"? Could a "polyamorous" relationship become

criminal polygamy simply because one member of such a grouping decides that he or she no longer believes in principles of equality? Could a criminally-polygamous individual escape s. 293 simply by "formally adopting" a commitment to such principles?

95. The Amicus's witnesses from the "Principle Voices" movement in the United States further illustrate the definitional problem. In many ways they resemble polyamorists as the CPAA defines the term; in other features, such as their strong invocation of religious authority and varying degrees of patriarchal inegalitarianism, they might more closely resemble the FLDS model. It is not unreasonable to think that any proposed characteristic supposedly separating "polygamy" from "polyamory" might come or go over time in such a relationship. The criminal law should not leave persons in doubt as to the status of their behaviour, particularly if the application of the law might affect the purely innocent children brought into such relationships.

96. A useful analogy might be drawn with longstanding laws defining an age of consent to sexual intercourse or marriage. Parliament may conclude that most 16-year-olds are capable of meaningful consent, and most 15-year-olds are not. The resulting law criminalizes relationships with 15-year-olds who might be, in fact, capable of consent, and it legitimizes some relationships with 16-year-olds who might not be. The criminal law must sometimes draw lines that are, overall, rational and reducing harm, even though their application in a particular case might be more less distant from the greater objectives being served. Resulting problems of proportionality in individual cases will be dealt with when assessing what is the appropriate *penalty*, a separate process with its own constitutional component.

97. If the Attorney General is wrong, and the law *cannot* constitutionally address itself to anything but the "core" polygamy described in s. 293(1)(a)(i), the solution is to declare only 293(1)(a)(ii) invalid and leave the balance of the provision intact.

### (4) Overbreadth – The Issue of Gender Neutrality

98. If polygamy is interpreted to include only polygyny, and if it is justified, at least in part, on the basis that its objective is to protect women, can it still sanction prosecution of both husbands and wives? Several of the Challengers point to the law's application to

all participants in a polygamous relationship as proof of clumsy over-reach. Could a law designed at least in part to protect the wives in polygamous marriages legitimately criminalize their own participation?

99. The answer must be yes. The Challengers' objection is based on the false premise that the sole objective of s. 293 is the protection of the wives themselves, and the assumption that, in every case, their only role is that of victim. The Attorney says that the risks and harms caused by polygamy, to the participants, to children, and to society at large, occur regardless of the individual circumstances of the participants. While in many, perhaps most, cases, the wives themselves will suffer harm, this harm is not the sole source of, or justification for, the prohibition. Again, this reasoning is paralleled in the incest laws, which although intended to protect children against, *inter alia*, exploitation by parents, criminalizes both parties to an incestuous union.

**(5) Disproportionality**

100. Much of the anticipated argument against s. 293, however it is characterized in terms of legal analysis, may be reduced to this: jailing harmless polygamists is a disproportional response to any problems associated with some polygamy, and will cause more harm than good.

101. So a distinction must be drawn between the justification of *criminalization* and the justification of *imprisonment*. This Reference is solely about the former. Because there is no minimum sentence for polygamy, any question of unconstitutional disproportionality must be addressed through *Charter*-compliant sentencing in a particular case. In *Malmo-Levine*, the Supreme Court rejected the idea that marijuana laws were unconstitutional because a maximum of seven years' imprisonment was an impossibly harsh response to harmless possession and use of marijuana. The majority stated at paras. 164-65:

> The requirement of proportionality in sentencing undermines rather than advances the appellants' argument. There is no need to turn to the *Charter* for relief against an unfit sentence. If imprisonment is not a fit sentence in a particular case it will not be imposed, and if imposed, it will be reversed on appeal.

> There is no plausible threat, express or implied, to imprison accused persons — including vulnerable ones — for whom imprisonment is not a fit sentence.
>
> [Emphasis added]

102. Similarly here, there is no plausible threat of imprisonment for "simple" polygamy—that is, polygamy without some direct harm to the participants or others, such as children; such a sentence would be unfit and indeed unconstitutionally disproportionate. Experience and logic both suggest that a polygamy investigation could never even result in charges without some serious aggravating factors.[42]

103. So the Attorney General need not defend s. 293 in its harshest possible application to the most innocent conceivably-captured behaviour. It need only defend the proportionality of the law in its mildest application. That is, is it unconstitutional for the least-harmful types of criminal polygamy to result in a conviction and criminal record? The Attorney says that, in light of the demonstrable harms of polygamy at large, the answer is yes.

## E. Section 15(1): Equality

### (1) Religious Discrimination

104. The Amicus's religious discrimination argument is found in two paragraphs; the first alleges a discriminatory *effect* of s. 293; the second also describes a discriminatory effect, but appears to go further and reiterate a discriminatory *purpose*:

> 54. Section 293 breaches section 15(1) for many of the same reasons as it breaches section 2(a). The provision draws a distinction between religious practices which the state deems to be acceptable (monogamous marriage) and those that are subject to criminal sanction (polygamous marriage). Even if not prosecuted, religious practitioners of polygamy are stigmatized by the law and treated as less worth of respect and concern.

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[42] There is no account in the history of Canada of a person being imprisoned for simply entering into or continuing a polygamous relationship. In the only modern example of a prosecution, Messrs. Blackmore and Oler were charged after having allegedly engaged in a pattern of taking vulnerable and dependent members of their congregation, including children, as "celestial brides". The women involved were not charged, and nor were any other persons who participated in arranging or solemnizing the "marriages" even though their actions would have fallen within the purview of s. 293.

> 55. Section 293 is based on an assumption that polygamy is a practice uniformly associated with harm; essentially, that it is "barbarous". The law is based entirely on presumed, stereotypical characteristics, is not responsive to the actual characteristics of the particular polygamous relationships, and has the effect of demeaning the dignity of practitioners of polygamy.

105. A person alleging a discriminatory effect must first identify the group with which they wish to be compared, and show some disadvantage in the comparison. Only then can it be measured whether there is a discriminatory effect. Nowhere in its opening statement on *Charter* breach does the Amicus identify such a comparator group. Instead, the discrimination alleged is solely defined with respect to a religious *practice* (not a religion as such). It is of course true that the state recognizes, and in various ways encourages, monogamous marriages across society, but without regard to religion. It is also true that the state outlaws polygamy, also regardless of whether it is founded on religious tradition, cultural beliefs or simple preference of the participants.

106. So s. 293 is not discriminatory in the sense required by s. 15(1). Contrary to the Amicus's assertions, it does not reflect either prejudice against, or the stereotyping of, those who practice polygamy for religious reasons. It is based on the conviction that polygamy constitutes a profound assault on the equality of male and female persons, and is associated with significant risks of harm to the participants, to children within polygamous families, and to society at large.

107. The Amicus says that because the state has criminalized a practice that, for some, is religious, and because it does not criminalize a practice (monogamous marriage) that is, for some others, also religious, it is engaging in religious discrimination. As such the s. 15 argument adds absolutely nothing to the s. 2(a) argument, and the question of infringement of religious belief must be analyzed through that section. "Practitioners of polygamy", in other words, is not an analogous ground for s. 15 purposes.

108. Any religious-based differential treatment that results from s. 293 corresponds to very real differences between those who practice polygamy and those who practice monogamy. In *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, McLachlin C.J. held (for the majority), at para. 108:

> Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(*a*). There is no breach of s. 15(1).

109. And finally on this point, it must be reiterated that the religious traditions of polygamy are themselves discriminatory. Those who practice polygamy for religious reasons engage in a practice in which the inequality of the participants inheres in the very nature of their relationship; that is, they embrace only polygyny, institutionalizing the very kind of distinction (determining, based on religious notions, whom one may marry) that the Amicus elsewhere attributes to Parliament and decries as unfair. There is little policy reason for protecting such inherently discriminatory practices within the *Charter*, and as noted earlier s. 28 of the *Charter* should operate to bar the invocation of equality or religious rights in a way that discriminates against women.

### (2) Discrimination on the Basis of Marital Status

110. Section 293 cannot be said to violate s. 15(1) on the basis of marital status either. The Supreme Court of Canada may have accepted that marital status is an analogous ground for the purposes of s. 15. However, it has not provided an exhaustive definition of marital status for such purposes, and the Attorney General will argue that the term should not be understood to include marital arrangements that are (otherwise legitimately) prohibited by the *Criminal Code*.

111. To interpret marital status as embracing any decision regarding whom to marry would mean that virtually all laws to do with marriage—age-of-consent, consanguinity, bigamy, and so on—would *prima facie* violate the *Charter*. With respect to polygamy, the argument would require that the government not only permit polygamous marriage, but give its practitioners fully equal status to monogamous couples in all areas of law where it could not justify discrimination under *Oakes*.

112. This returns us to the point that being a "practitioner of polygamy" cannot be an analogous ground for s. 15 purposes, even if such persons suffer discrimination as a result of their behaviour. If it were, then perpetrators of *any* crime could claim to be a discrete and insular minority for equality purposes, an obviously absurd result. In the end, like religious equality, the marital status argument adds nothing to the s. 7 and s. 2(a) arguments elsewhere advanced. If s. 293 is not arbitrary, overbroad, or unconstitutionally disproportionate, if it is not an unjustified infringement of conscience or religion, then its enforcement cannot be discriminatory simply because it punishes only those who are breaking the law.[43]

## VI. Justification Under Section 1

### A. Overview

113. Section 1 of the *Charter* provides that the rights and freedoms it describes are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

### B. "Prescribed by Law"

114. Section 293 is a limit "prescribed by law"; it is a piece of legislation passed by Parliament in accordance with the federal constitutional authority. The Challengers do not say that the law is unconstitutionally vague under s. 7, so they likely will concede that it is prescribed by law both formally and sufficiently for the purposes of s. 1. The question therefore turns to whether it can be demonstrably justified, using the *Oakes* test.

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[43] The CPAA's s. 15 argument is not developed beyond that made by the Amicus and amounts to the same thing: that, at least in the case of *polygynous* polyamory, the law is discriminating against polyamorists on the basis that they practice polygamy. But, for the reasons articulated here, such is not an enumerated or analogous ground. The fact that some types of polyamory, such as polyandry and multiple-partner same-sex unions, fall clearly outside the scope of s. 293 is demonstration that the distinction is based on the harm of polygyny, and is emphatically not a prejudice toward non-monogamous conjugality *per se*.

## C. The Application of *Oakes*

### (1) Pressing and Substantial Concern and Rational Connection

115. These first two aspects of the *Oakes* test are infused with the weighing of harm. That is to say, if there *is* harm from polygamy, or the reasoned apprehension of harm, then there is a pressing and substantial concern under the first branch. Because the measure in question is a criminal prohibition, it follows virtually automatically that, once the harm of polygamy is demonstrated, measures to prevent the harm are rationally connected for *Charter* purposes.

116. Harm has a particularly important role in the context of the criminal law. To justify criminalization, the Attorney General must show the "reasonable apprehension" of a harm that is "not insignificant or trivial", and once that is done, "the precise weighing and calculation of the nature and extent of the harm is Parliament's job."[44] In the case of polygamy, this requirement is met and far exceeded.

### (2) Polygamy's Harm in the Context of *Oakes*

117. The evidence in this reference is that there are four categories of harm that arise from polygamy, which, taken together, are significant and substantial: harms to the moral fabric and democratic essence of society: harms to the value of equality and to the vital interests of vulnerable groups; harms to society generally through polygamy's impact on the sexualization of young girls and the increased incidence of antisocial behaviour and crime; and harms to many of the participants in polygamous relationships and their children.

***Harm to Moral Values***

118. The Supreme Court has said that "morality" is a proper subject for the criminal law. It is open to Parliament 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".[45] The Court in *Malmo-Levine* noted that this does not justify

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[44] *Malmo-Levine* at para. 133.
[45] *Malmo-Levine* at para. 116, citing *R. v. Butler*, [1992] 1 S.C.R. 452 at 498

codification of "mere 'conventional standards of propriety' but must be understood as referring to *societal values beyond the simply prurient or prudish* [emphasis added]".[46]

119. The Attorney accepts that, if harm to "conventional standards of propriety" were all that supporters of s. 293 could invoke, justification for the polygamy ban would be tenuous. The Challengers' arguments seem largely premised on the belief that the prohibition against polygamy is, as a societal value, "simply prurient and prudish". The evidence in this case demonstrates that this is not the case. But even so, the fact that socially-imposed monogamy is so deeply imbedded in the moral fabric of our society cannot be dismissed lightly. The courts' deference to Parliament on matters of morality, while certainly not absolute, reflects an understanding that strong moral codes may evolve for an important reason, even if it is imperfectly understood at any given time.

***Harms to the Value of Equality and the Protection of Vulnerable Groups***

120. Equality has been found to be one of the fundamental values of Canadian society,[47] it is enshrined in ss. 15 and 28 of the *Charter*, and its protection is beyond "simply prurient or prudish" concern. The more important the institution, the more important it is that we honour the right to equality within that institution. Marriage is an institution sufficiently fundamental to Canadian life that it was the subject of careful constitutional assignment in 1867. It is certainly true that our ideas of what marriage is and should be has changed over time, but the centrality of the dyadic human pair bond remains a defining characteristic of Canadian culture.

121. Section 293 protects women and children from commodification and consequential exploitation. A criminal law may be justified without proving direct harm if it protects vulnerable groups, such as racial minorities,[48] women[49] or children[50]. This law

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[46] *Malmo-Levine* at para. 77, citing *R. v. Butler*, [1992] 1 S.C.R. 452 at 498; *R. v. Murdock* (2003), 11 C.R. (6th) 43 (Ont. C.A.) at para. 32.
[47] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.
[48] *R. v. Keegstra*, [1995] 2 S.C.R. 381, the Supreme Court upheld the hate speech provision in the *Criminal Code* under s. 1 because of the potential that it could increase attacks on minorities.
[49] In *R. v. Butler*, [1992] 1 S.C.R. 452 the Court wrote at p. 497 that "legislation proscribing obscenity is a valid objective which justifies some encroachment on the right to freedom of expression" because of the impact of the exploitation of women and children, depicted in publications and films, which can in certain circumstances, lead to "abject and servile victimization".

protects women, children, and in particular vulnerable female members of immigrant populations and discrete and insular religious sects.

122. More broadly, to the extent that polygyny is inherently unequal and conceptually degrading to women and girls, the prohibition serves to advance their equality throughout society. Equality within the family unit is especially worthy of legal reinforcement. Children experience societal norms first and most importantly within those units, and that is probably especially true within closed or insular minority groups. And while it is true that gender inequality can exist within monogamous marriages, it is not a defining feature of such marriages, as it is of polygynous ones.

123. This last point is worthy of some weight, because an important role of the criminal law is public denunciation; it is an expression of society's deepest values, including, in this case, the value it attributes to women's equality.

***Social Harm from "Externalities" of Polygamy***

124. The mathematics of polygamy indicate (and a wealth of social science evidence demonstrates) that an increase in the degree of polygyny in society will result in an increase in the earlier sexualization of young girls or the antisocial behaviour of boys and men, or both. This is because polygyny *ipso facto* requires an increased supply of women (from a younger cohort) and/or a creation of a pool of surplus, unmarriageable males, in direct proportion to the number of "plural wives" in the same community. In this way polygyny "externalizes" (to use an economics term) its harm throughout society.

125. These externalities are important because they have been until now completely ignored in the legal analysis. Apologists for decriminalization of polygamy typically base their views on the harms associated with criminalization weighed only against the harms to polygamist families themselves, and suggest, not without some logic, that criminalization is only justifiable in harmful polygamous relationships (and by extension that only the harm should be criminalized, not the relationship itself). This argument collapses completely if it is accepted that polygamy, like marijuana use in *Malmo-Levine*,

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[50] In *R. v. Sharpe*, [2001] 1 S.C.R. 45, the Court upheld the prohibition on the possession of child pornography (even where the possession of the material was not directly related to any quantifiable harm), noting that the prevention of harm by reducing the market for child pornography justified the limit on freedom of expression.

carries with it social harms regardless of its immediate effect on the participants and their families.

***Direct Harms to the Participants***

126. Polygamy is associated with a number of harms to members of polygamous families, such as exploitation and oppression of wives and girls, negative mental health outcomes for wives, reduced educational attainment for children, reduced opportunities for adolescent boys, and so forth. Polygamous marriages may also create significant problems for support of children both during a polygamous marriage and upon its dissolution.

127. A number of expert witnesses have provided evidence of the harms suffered by the participants in polygamous relationships and their children. Dr. Henrich briefly canvasses some of the literature on this point in his original report. Dr. Beall, a Utah clinical psychologist who has spent decades working with victims of polygamous societies in the United States provides the benefit of his experience treating persons who have left polygamous Mormon communities in the United States, whom he refers to as "polygamy survivors". Dena Hassouneh, an expert on trauma in marginalized populations, summarizes the literature and her study on the impacts of polygamy in Muslim populations. Dr. Susan Stickevers, an expert put forward by Stop Polygamy in Canada, speaks to her experience treating women of Muslim polygamous relationships in New York.

128. Of course, the Challengers assert that there may be some *advantages* inherent to the polygamous form of family. Accounts of cooperative childcare are a frequent feature of the affidavits, and there is the thread of an argument that simultaneous multi-marriage may be preferential to serial divorce and remarriage, particularly for children. But each time these claims are examined, they appear less lustrous. Perhaps surprisingly, polygamous marriages are less stable than monogamous ones, and divorce is more frequent, not less. The Amicus's expert Dr. Shackelford asserts that the potential for intrafamily violence is increased in stepfamilies (because we are biologically more inclined to look after our genetic relatives), without acknowledging the implications of this in polygamy, where almost every family contains genetically-unrelated (and thus more vulnerable) children.

129. Then, of course, there are the personal experiences of those who have lived in polygamous relationships. The Attorney has gathered affidavits from a number of former members of fundamentalist Mormon communities as exemplary of the problems that can be associated with the practice.

130. The FLDS puts forward firsthand accounts of persons who report happier experiences in these same communities and, while the completeness of some of this testimony might, in the circumstances, be questioned, the Attorney accepts that some or even most residents of these communities may judge their own lives to be equal to, or even superior to, others'. Similarly, the Amicus presents a number of affiants who practice polygamy as a religious precept but outside the communal settings of the FLDS or similar groups. These persons too report that polygamy is, on balance, a positive element of their lives.

131. The Attorney's argument does not rely on proof that the negative experiences of wives and children of polygamy are present in every case, and the Attorney concedes there can be purely consensual, adult polygamy that involves no discernible harm to the participants (and presumably confers some advantages upon them). But the harms do exist, and the possibility that the vulnerable persons will suffer harm from an activity even if many or most do not is sufficient to permit Parliament to invoke the criminal law power.

132. This point must be emphasized, because it goes to the heart of the case advanced by the Amicus and also those of the BCCLA, CPAA, and CAFE: The absence of harm in any particular case is not in any way determinative of the constitutional question. The Supreme Court has already ruled that the criminal law can legitimately prohibit consensual conduct that is harmless to the participants themselves (and may even be beneficial), on the basis of broader social harm. The Court in *Malmo-Levine* cited dueling and incest laws as examples. Indeed, the dissenting justices in *R. v. Labaye*, [2005] 3 S.C.R. 728 would have gone further, and listed "child pornography,

incest, polygamy and bestiality" as activities that are legitimately prohibited even "regardless of whether or not they cause social harm."[51]

### (3) Minimal Impairment

133. In the Attorney's submission, the evidence of harm in this case is more than sufficient to demonstrate that *some* prohibition is justified. The question is therefore: is s. 293 the *right* prohibition, or at least one that falls within the range of reasonable alternative measures?

134. For a law to be justified under *Oakes*, it must be carefully tailored to achieve its objective and minimally impairing of the rights at issue, given the harm being addressed.

135. This leads the challengers of s. 293 to say "if the problem is the youth of brides, or exploitation, or trafficking, or erosion of women and children's rights, then why not rely on laws against those activities instead of the polygamy prohibition? Or why not modify and extend them?"

136. There are straightforward answers to this argument. First, it is analogous to that advanced in *R. v. Sharpe*, [2001] 1 S.C.R. 45 with respect to simple possession of child pornography. The accused said, if the problem is the exploitation of children in the manufacturing of child pornography, then it is addressed through laws against that activity, and the 'market reduction' targeted by the law against simple possession was unnecessary. McLachlin J. rejected the idea, writing at para. 93:

> ...[A]n effective measure should not be discounted simply because Parliament already has other measures in place. It may provide additional protection or reinforce existing protections. Parliament may combat an evil by enacting a number of different and complementary measures directed to different aspects of the targeted problem: see, e.g., *R. v. Whyte*, [1988] 2 S.C.R. 3. Here the evidence amply establishes that criminalizing the possession of child pornography not only provides additional protection against child exploitation -- exploitation associated with the production of child pornography for the market generated by possession and the availability of material for arousal, attitudinal change and grooming -- but also reinforces the laws criminalizing the production and distribution of child pornography.

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[51] *R. v. Labaye*, [2005] 3 S.C.R. 728 at para. 109.

137. But more important is the point that implementing stricter child-exploitation or trafficking laws, or effecting the more vigorous enforcement of those in place, is only an answer to the extent that such crimes are reported, investigated, and prosecuted. This is obviously not the case, and in fact the crimes upon which the FLDS and Amicus would rely as alternatives (sexual exploitation of a child, sexual assault, trafficking in persons, and so forth) are both under-reported and difficult to investigate and prosecute, and this is particularly true with respect to insular populations of vulnerable immigrant groups or closed religious communities where polygamy is mostly likely to prosper.

138. The Bishop of the FLDS, James Oler, declares in his affidavit that in all "instances where members of the community have been suspected of criminal offences... reports have been made to the police."[52] To the contrary, the Attorney expects the evidence of both experts and lay witnesses to establish that, at Bountiful as elsewhere (and perhaps even to a greater degree), crimes against women and children are under-reported, uninvestigated, and almost never prosecuted.

139. Thus, permitting an activity (polygamy) that will increase harm (including criminal harm) against children or women cannot be supported on the basis that the harm can be adequately addressed through enforcement of other laws. It simply cannot.

## VII. Conclusion

140. The academic nature of much of the evidence and argument in this case might tend to be disarming. The Attorney has introduced some evidence to give visceral availability to the harms that can be suffered by participants in polygamous relationships, but it is impossible to see or touch the much greater social harms. No firsthand testimony of the impact on women's equality or children's wellbeing could be gathered, except through the microcosmic example of Bountiful and the FLDS. Similarly, if it is true that a more polygamous society will lead to an increase in criminal activity, it is impossible for the Attorney to bring forward the victims that s. 293's repeal might cause.

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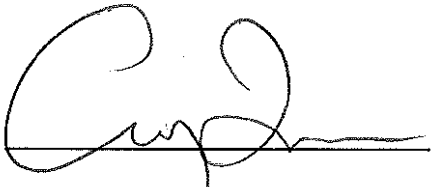
[52] James Oler Affidavit #3, para. 14.

141. So it is important to be alert, as the evidence in this case unfolds, to the fact that real lives will be impacted, directly and indirectly, by the decision of this Court in this Reference. But this case will not have its greatest impact on the relatively privileged lives most Canadians enjoy. If s. 293 is declared invalid, and particularly if no law could constitutionally address the harms of polygamy, the weight of the decision will be borne disproportionately by members of some of the most vulnerable groups in our society: immigrants, women, and, most especially, children.

142. If it is upheld, then this Court will confirm our right, as a people through our elected representatives, to impose some fundamental codes of moral behaviour for the protection of the vulnerable, and to promote and advance our highest aspirations of equality and social justice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of November, 2010.



CRAIG E. JONES
Counsel for the Attorney General of British Columbia

VANCOUVER
JUL 15 2010
SUPREME COURT SCHEDULING

Affidavit #1 of Joseph Henrich
Sworn July 15th, 2010

No. S-097767
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1996, C.68

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF S. 293 OF THE CRIMINAL CODE OF CANADA, R.S.C. 1985, c. C-46

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# AFFIDAVIT

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CRAIG JONES
Barrister and Solicitor

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# AFFIDAVIT

I, Joseph Henrich of Vancouver, British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I hold a Tier 1 Canada Research Chair in Culture, Cognition and Evolution at the University of British Columbia, where I am co-director of the Centre for Human Evolution, Culture, and Cognition. I am a member of the departments of Economics and Psychology, and was also awarded tenure in Anthropology. I have published in leading journals in all three fields, as well as in biology.

2. Prior to my arrival at UBC in 2006 I was a faculty member at Emory University in the Department of Anthropology and in the University of Michigan's Department of Organizational Behavior. I was also a fellow at the Institute for Advance Study (*Wissenshaftskolleg*) in Berlin during 2001-2002.

3. My areas of specialization and interest include the study of the coevolution of human behaviour with cultural norms and social organization. I have received a number of awards for my interdisciplinary work, including from UBC (Killam, 2010), the Human Behavior and Evolution Society (Distinguished Scientific Contribution, 2009) and the President of the United States (Award for Early Career Scientists and Engineers, 2004).

4. My educational background includes two Bachelors' degrees from Notre Dame (B.A. in Anthropology and B.S. in Aerospace Engineering, both with high honors), and a Master's and Ph.D. in Anthropology from UCLA. My full CV is attached as **Exhibit "A"** to this Affidavit.

5. I was contacted in March of 2010 by Craig Jones of the British Columbia Ministry of Attorney General. Mr. Jones described the Reference case to me and asked if I would be interested in studying the question of polygamy and its purported harms and preparing a report. Mr. Jones emphasized to me, and I understand, that my duty in preparing the report and, if called upon, in testifying, is to assist the Court and not be an advocate for any party. Mr. Jones emphasized that I should follow the evidence where it leads and draw those conclusions I consider merited. He asked that if there were issues upon which scientific opinion diverged, I should note the dissenting views.

6. I have prepared a Report which is attached as **Exhibit "B"** to this Affidavit. It is based on extensive review of the available literature in science and the social sciences, conducted over a period of four months by myself and my research

assistant. I am solely responsible for its content.

7. Although the questions I address in my Report fit very well within my professional interdisciplinary expertise, I have never before written or published on polygamy. To the extent that I have formed any views on the social policy questions involved in this case, this has occurred as a consequence of the study and thought I have given to the matter since taking on this project in March.

**SWORN BEFORE ME** at the City of Vancouver, in the Province of British Columbia, this 15th day of July, 2010.

A Commissioner for taking Affidavits for British Columbia

Craig E Jones
Print Commissioner's name

Barrister & Solicitor
Title

(604) 660-5476
Phone Number

**JOSEPH HENRICH**

This is Exhibit " A " referred to in the
affidavit of JOSEPH HENRICH
sworn before me at VANCOUVER
in the Province of British Columbia this
15th day of JULY 20 10

A Commissioner for taking Affidavits
within the Province of British Columbia

June 2010

# Joseph Henrich

Canada Research Chair in
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## University Education

Ph.D. Anthropology, University of California at Los Angeles, 1999

MA. Anthropology, University of California, Los Angeles, 1995

BS. Aerospace Engineering, University of Notre Dame, 1991 (high honors)

BA. Anthropology, University of Notre Dame, 1991 (high honors)

## Major Awards and Fellowships

2010 UBC Killam Research Prize

2009 Early Career Award for Distinguished Scientific Contributions bestowed by the *Human Behavior and Evolution* Society

2007 Canada Research Chair in *Culture, Cognition and Evolution* (Tier 1)

2007 Senior Early Career Scholar Peter Wall Institute

2006 Canada Research Chair in *Culture, Cognition and Evolution* (Tier 2)

2004 Presidential Early Career Award for Scientists and Engineers (United States)

2001 Fellow at the Institute for Advanced Study, Berlin (Wissenschaftskolleg), in the research group on *Social Norms and Economic Behavior* (convened by Ernst Fehr)

1999 Society of Scholars Fellow at the University of Michigan

1997 William J. Fulbright Scholarship

1996 Harold K. Schneider Prize for best paper in Economic Anthropology, graduate division, Society for Economic Anthropology

## Major Grants (≥ 10K)

2010 Hampton Grant, UBC, Teaching in Cross-cultural Perspective (2 year, 30K). PI.

2009 National Institutes of Health (NIH), Measuring Cultural Variation (2 years, 633K). PI and co-PI are Robert Boyd and Joseph Henrich

2007 Peter Wall Institute for Advanced Studies, University of British Columbia, Exploratory Workshop Grant for *Integrating Science and the Humanities* ($25,000; w/ C$27,000 matching funds from numerous Departments. PI and co-PI are Edward Slingerland and Joseph Henrich.

2007 Senior Early Career Scholar Peter Wall Institute

2007 Social Science Research Council (SSHRC), Folksociology: A cross-cultural and developmental investigation of how groups influence thinking about individuals (3 years, 118K)

2007 Hampton Research Grant, Ciguatera Toxin & the Evolution of Cultural Practices (2 years, 39K)

2006 Canada Foundation for Innovation (CFI: 312K for laboratory development)

2004 John D. and Catherine T. MacArthur Foundation Grant through the "Preferences Network": *Origins of Prosocial Sentiments*, with Silk (PI) and Povenilli (3 years, 279K)

2003 Early Career Development Grant from the National Science Foundation (CASE): *Building an Interdisciplinary Program in Culture and Cognition* (5 years, 420K)

2002 National Science Foundation Grant (NSF) from Anthropology, Economics & Decision Science: *The Roots of Human Sociality: An Ethno-Experimental inquiry in 16 small-scale societies*. PI and co-PI are Jean Ensminger and Joseph Henrich (3 years, 475K)

1997 National Science Foundation (NSF) Dissertation Improvement Grant (12K)

1997 Organization of American States Fellowship (10K)

1997 International Studies and Overseas Program Graduate Dissertation Fellowship (10K)

1994 National Science Foundation (NSF) Graduate Fellowship (3 year award)

## Positions Held and Work Experience

2006- Pres. **Associate Professor (tenure) in the Departments of Psychology and Economics at the University of British Columbia**

- Teaching and advising graduate and undergraduates
- Committees: Search (Psychology & Economics), Awards (Psychology), Tenure Review (Psychology), Peer evaluation (Economics)
- Co-director of the Centre for Human Evolution, Culture, and Cognition

2002-2007 **Assistant & Associate (tenure) Professor of Anthropology at Emory University**

- Teaching and advising graduate and undergraduates
- Committee work, including graduate admissions, senior faculty search, honors committee and departmental speakers series.
- Founded and co-administer the Evolution and Human Behavior Seminar Series
- Designing a curriculum for Culture and Cognition at Emory

2001-2002 **Fellow at the Institute for Advanced Study (*Wissenschaftskolleg*)**, Berlin
An interdisciplinary Research Group on Social Norms and Economic Decision-making convened by Ernst Fehr

1999-2002 **Visiting Assistant Professor and Post Doctoral Research Fellow**
University of Michigan Business School, Department of Organizational Behavior

- Teaching graduate seminars in the Culture & Cognition Program, an interdisciplinary program between psychology and anthropology.
- Participating faculty member in the Undergraduate Research Opportunity Program

1999 **University Teaching Fellow**
Department of Anthropology, University of California at Los Angeles
- Designed interdisciplinary undergraduate seminar
- Lectured and led discussions; designed examination questions

1996 **Reader** for the ***Evolution of Human Societies*** (taught by Allen Johnson)
Department of Anthropology, University of California at Los Angeles
- Graded essays, prepared examination questions, guest Lectures

1995-96 **Teaching Assistant** for ***Human Evolution*** (taught by Silk and Manson)
Department of Anthropology, University of California at Los Angeles
- Prepared and delivered review lectures and led discussions
- Designed examination questions and tutored students and assigned grades

1991-93 **Test and Evaluation Systems Engineer**
General Electric Aerospace/ Martin Marietta, Springfield, VA
- Performed real time command, control and analysis of all ground and on-orbit assets.
- Performed operations using large scale hardware and software systems in an IBM MVS/XA environment.
- Executed contingency responses dictated by system anomalies on either ground or vehicle components.

## Publications and Forthcoming Contributions[1]

### Edited Volume

Henrich, J., R. Boyd, S. Bowles, H. Gintis E. Fehr, C. Camerer (editors) (2004) *Foundations of Human Sociality: Ethnography and Experiments in 15 small-scale societies.* Oxford University Press.

### Book

Henrich, N. and J. Henrich (2007) *Why Humans Cooperate: A cultural and evolutionary explanation.* Oxford University Press.

### Forthcoming Journal Articles

1) Henrich, J.and Henrich, N. (forthcoming) The Evolution of Cultural Adaptations: Fijian taboos during pregnancy and lactation protect against marine toxins. *Proceedings of the Royal Society: Biological Sciences.*

1) Cheng, J. J. Tracy and J. Henrich (forthcoming) Pride, Personality, and the Evolutionary Foundations of Human Social Status. *Evolution and Human Behavior*

2) Gervias, Will and J. Henrich (forthcoming) The Zeus Problem. *Journal of Cognition and Culture.*

[1] Underlined names were students or post-doc working with me at the time of the research.

3) Shariff, A.F., Tracy, J.L, Cheng, J.T. & Henrich, J. (forthcoming). Further thoughts on the evolution of pride's two facets: A response to Clark. Emotion Review. (author response to commentaries)

4) Broesch, T., T. Callaghan, J. Henrich, and P. Rochat (forthcoming) Cultural Variations in Children's Mirror Self-Recognition. *Journal of Cross-Cultural Psychology.*

**Published Journal Articles**

5) Henrich, J., S. Heine and A Norenzayan (2010) Most People are not WEIRD. *Nature*, 446: 29.

6) Henrich, J., S. Heine and A. Norenzayan (2010) The Weirdest People in the World. *Behavioral and Brain Sciences* [Target Article], 33, 1-23.

7) Henrich, J., S. Heine and A. Norenzayan (2010) Beyond WEIRD: Towards a Broad-based Behavioral Sciences *Behavioral and Brain Sciences* [Reply], 33: 51-75.

8) Atran, S. and J. Henrich (2010) The Evolution of Religion. *Biological Theory: Integrating Development, Evolution and Cognition,* 5(1): 18-30.

9) Richerson, P. J., R. Boyd, and J. Henrich (2010) Gene-Culture Coevolution in the Age of Genomics. *Proceedings of the National Academy of Science of the United States*, 107, 8985-8992.

10) Henrich, J., J. Ensminger, R. McElreath, A. Barr, H. C. Barrett, A. Bolyanatz, J. Camilo Cardenas, M. Gurven, E. Gwako, N. Henrich, C. Lesorogol, F.W. Marlowe, D. Tracer, J. Ziker (2010) Markets, religion, community size and the evolution of fairness and punishment, *Science,* 327: 1480-1484..

11) Henrich, J. (2009) The evolution of costly displays, cooperation, and religion. *Evolution and Human Behavior* 30, 244-260.

12) Brosnan, S., J. Silk, J. Henrich, et. al. (2009) Chimpanzees (*Pan troglodytes*) do not develop contingent reciprocity in an experimental task. *Animal Cognition* 12, 317-322.

13) Henrich, J. and R. Boyd (2008) Division of Labor, Economic Specialization, and the Evolution of Social Stratification. *Current Anthropology*, 49 (4): 715-724.

14) O'Gorman, R., J. Henrich and M. Van Vugt (2008) Constraining free riding in public good games: designated solitary punishers can sustain human cooperation. *Proceedings of the Royal Society—Biological Sciences*, 1-7.

15) Gintis, H., J. Henrich, S. Bowles, R. Boyd, & E. Fehr (2008) Strong reciprocity and the roots of human morality. *Social Justice Research,* 21(2): 241-253.

16) Henrich, J., R. Boyd, and P. Richerson (2008) Five Misunderstandings about Cultural Evolution, *Human Nature*, 19:119-137.

17) Heine, S., T. Takemoto, S. Moskalenko, J. Lasaleta, and J. Henrich (2008) Mirrors in the head: Cultural variation in objective self-awareness. *Personality* and *Social Psychology Bulletin* 34:879-887.

18) Vonk, J., S. F. Brosnan, J. B. Silk, J. Henrich, A. Richardson, S.P. Lambeth, S. Schapiro, D. J. Povinelli (2008) Chimpanzees do not take advantage of very low cost opportunities to deliver food to unrelated group members. *Animal Behavior* 75: 1757-1770.

19) Marlowe, F. W., J. C. Berbesque, A. Barr, J. Ensimger, H. C. Barrett, A. Bolyanatz, J. C. Cardenas, M. Gurven, E. Gwako, J. Henrich, N. Henrich, C. Lesorogol, D. Tracer (2008) More 'altruistic' punishment in larger societies, *Proceedings of the Royal Society—Biology*, 275, 587-590.

20) Henrich, J. (2007) Behavioral Data, Cultural Group Selection, and Genetics, *Psychological Inquiry*, 18 (1): 36-37.

21) Henrich, J., R. McElreath, A. Barr, J. Ensimger, H. C. Barrett, A. Bolyanatz, J. Camilo Cardenas, M. Gurven, E. Gwako, N. Henrich, C. Lesorogol, F.W. Marlowe, D. Tracer, J. Ziker (2006) Costly Punishment Across Human Societies, *Science*, 312: 1767- 1770.

22) Henrich, J. and N. Henrich (2006) Culture, Evolution, and the Puzzle of Human Cooperation. *Cognitive Systems Research*, 7: 220-245.

23) Henrich, J. (2006) The Evolution of Cooperative Institutions: Tacking the Problem of Equilibrium Selection, *Science* [Perspectives], 312: 60-61.

24) Silk, J.., S.F. Brosnan, J. Vonk, J. Henrich, D.J. Povinelli, S. Shapiro, A. Richardson, S.P. Lambeth & J. Mascaro (2006) Chimpanzee choice and prosociality (reply). *Nature, 440.*

25) Hrushka, D. and J. Henrich (2006). Friendship, cliquishness, and the emergence of cooperation. *Journal of Theoretical Biology*, 239 (1): 1-15.

26) Henrich, J. (2006) Understanding Cultural Evolutionary Models: A Reply to Read's Critique. *American Antiquity*, 71 (4).

27) McCauley, R. and J. Henrich (2006). Susceptibility to the Muller-Lyer Illusion, Theory-Neutral Observation, and the Diachronic Penetrability of the Visual Input System. *Philosophical Psychology*, 19 (1): 1-23.

28) Henrich, J., R. Boyd, S. Bowles, H. Gintis, E. Fehr, C. Camerer, R. McElreath, M. Gurven, K. Hill, A. Barr, J. Ensminger, D. Tracer, F. Marlow, J. Patton, M. Alvard, F. Gil-White and N. Smith (2005) "Economic Man" in cross-cultural perspective: Behavioral experiments from 15 small-scale societies. *Behavioral and Brain Sciences*, 28: 795-815 (Target Article includes 23 commentaries).

29) Henrich, J., R. Boyd, S. Bowles, H. Gintis, E. Fehr, C. Camerer, R. McElreath, M. Gurven, K. Hill, A. Barr, J. Ensminger, D. Tracer, F. Marlow, J. Patton, M. Alvard, F. Gil-White and N. Smith (2005) Models of decision-making and the evolution of social preferences (Authors' Response). *Behavioral and Brain Sciences*, 28: 838-855.

30) Silk, J. B., S. F. Brosnan, J. Vonk, J. Henrich, D. J. Povinelli, A. Richardson, S. P. Lambeth, J. Mascaro, & S. Shapiro (2005) Chimpanzees are indifferent to the welfare of unrelated group members. *Nature*, 437, 1357-1359.

31) Henrich, J. (2004) Demography and Cultural Evolution: Why adaptive cultural processes produced maladaptive losses in Tasmania. *American Antiquity*, 69 (2): 197-214.

32) Henrich, J. (2004) Cultural Group Selection, coevolutionary processes and large-scale cooperation. At target article in *Journal of Economic Behavior and Organization*, 53: 3-35.

33) Henrich, J. (2004) Reply. *Journal of Economic Behavior and Organization*, 53: 127-143.

34) Henrich, J. (2004) Inequity Aversion in Capuchins? *Nature,* 42:139.

35) Henrich, J. & R. McElreath (2003) The Evolutionary Foundations of Cultural Evolution. *Evolutionary Anthropology,* 12(3): 123-135.

36) Henrich, J. & R. Boyd (2002) On Modeling Cognition and Culture: Why replicators are not necessary for cultural evolution. *Journal of Cognition and Culture*, 2(2): 87-112.

37) Henrich, J. & R. McElreath (2002). Reply to Kuznar's comment on our "Are Peasants Risk Averse Decision-Makers. *Current Anthropology*, 43 (5): 788-789.

38) Henrich, J. & R. McElreath (2002) Are Peasants Risk Averse Decision-Makers. *Current Anthropology*. 43(1): 172-181.

39) Henrich, J. (2001) Cultural Transmission and the Diffusion of Innovations: Adoption dynamics indicate that biased cultural transmission is the predominate force in behavioral change and much of sociocultural evolution. *American Anthropologist,* 103: 992-1013.

40) Henrich, J., R. Boyd, S. Bowles, C. Camerer, H. Gintis, R. McElreath and E. Fehr (2001) In search of Homo economicus: Experiments in 15 Small-Scale Societies. *American Economic Review*, 91(2), 73-79.

41) Henrich, J. and R. Boyd (2001) Why people punish defectors: conformist transmission stabilizes costly enforcement of norms in cooperative dilemmas. *Journal of Theoretical Biology,* 208, 79-89.

42) Henrich, J. (2001) On Risk Preferences and Curvilinear Utility Curves: A comment on Kuznar's piece, *Current Anthropology,* 42(5): 711.

43) Henrich, J. & F. Gil-White (2001) The Evolution of Prestige: freely conferred status as a mechanism for enhancing the benefits of cultural transmission. *Evolution and Human Behavior*, 22, 1-32.

44) Henrich, J. (2001) Challenges for everyone: real people, deception, one-shot games, social learning, and computers. Commentary on Hertwig and Ortmann for *Behavioral and Brain Sciences*, 24 (3).

45) Henrich, J. (2000). Does culture matter in economic behavior? Ultimatum game bargaining among the Machiguenga. *American Economic Review*, 90(4): 973-979.

46) Henrich, J. and R. Boyd (1998). The evolution of conformist transmission and between-group differences. *Evolution and Human Behavior,* 19: 215-242.

47) Henrich, J. (1997). Market Incorporation, Agricultural Change and Sustainability among the Machiguenga Indians of the Peruvian Amazon. *Human Ecology*, 25(2): 319-351.

**Republications of earlier journal articles**

48) Henrich, J., R. Boyd, S. Bowles, H. Gintis, E. Fehr, C. Camerer, R. McElreath, M. Gurven, K. Hill, A. Barr, J. Ensminger, D. Tracer, F. Marlowe, J. Patton, M. Alvard, F. Gil-White and N. Smith (forthcoming) "Economic Man" in cross-cultural perspective: Behavioral experiments from 15 small-scale societies. Republished in *Data Collection.* Edited by W. Paul Vogt as part of the SAGE Benchmarks in Social Research Methods series. (Previous published in *Behavioral and Brain Sciences*, 28: 795-815).

49) Henrich, Joseph and Robert Boyd (forthcoming August 2010) On modeling cognition and culture: Why cultural evolution does not require replication of representations. *The Evolution of Culture*. Edited by Stefan Linquist. The International Library of Essays on Evolutionary Thought. (Previously published in the *Journal of Cognition and Culture* 2:87-112).

50) Henrich, Joseph and Francisco Gil-White (forthcoming August 2010), The evolution of prestige: freely conferred deference as a mechanism for enhancing the benefits of cultural transmission. *The Evolution of Culture*. Edited by Stefan Linquist. The International Library of Essays on Evolutionary Thought. (Previously published in *Evolution and Human Behavior*, Volume 22(3): 165 – 196).

51) Figure 1 from Henrich, J. (2000) Does culture matter in economic behavior? Ultimatum Game Bargaining among the Machiguenga of the Peruvian Amazon. *American Economic Review* 90 (4), 2000: 973-979. In Ackert (2009) Behavioral Finance: Psychology, Decision-Making, and Markets, Cengage Learning

52) Henrich, J. (2009) Cultural Group Selection, coevolutionary processes and large-scale cooperation. *Darwinism and Economics*. Edited by Geoffrey M. Hodgson. The International Library of Critical Writings in Economics. (Previously published in the *Journal of Economic Behavior and Organization*, 53: 3-35).

53) Henrich, J., R. Boyd, S. Bowles, C. Camerer, H. Gintis, R. McElreath and E. Fehr (2009) In search of Homo economicus: Experiments in 15 Small-Scale Societies. *Darwinism and Economics*. Edited by G. M. Hodgson. The International Library of Critical Writings in Economics. (Previously published in *American Economic Review*, 91(2), 73-79).

54) Henrich, J., R. Boyd, S. Bowles, H. Gintis, E. Fehr, C. Camerer, R. McElreath, M. Gurven, K. Hill, A. Barr, J. Ensminger, D. Tracer, F. Marlowe, J. Patton, M. Alvard, F. Gil-White and N. Smith (2009). "Economic Man" in cross-cultural perspective: Behavioral experiments from 15 small-scale societies. *Judgment and Decision-making*. Edited by Nick Chater. Sage Publications. (Previously published in *Behavioral and Brain Sciences*, 28: 795-815).

55) Henrich, J., R. Boyd, S. Bowles, H. Gintis, E. Fehr, C. Camerer, R. McElreath, M. Gurven, K. Hill, A. Barr, J. Ensminger, D. Tracer, F. Marlowe, J. Patton, M. Alvard, F. Gil-White and N. Smith (2007). "Economic Man" in cross-cultural perspective: Behavioral experiments from 15 small-scale societies. *Recent Developments in Behavioral Economics*. Edited by Shlomo Maital. International Library of Writings in Economics. (Previously published in *Behavioral and Brain Sciences*, 28: 795-815).

56) Henrich, J., R. Boyd, S. Bowles, C. Camerer, H. Gintis, R. McElreath and E. Fehr (2007) In search of Homo economicus: Experiments in 15 Small-Scale Societies. *New Developments in Experimental Economics*. Edited by Enrica Carbone and Chris Starmer. The International Library of Critical Writings in Economics. Edward Elgar Publishers. (Previously published in *American Economic Review*, 91(2), 73-79)

57) Henrich, J., R. Boyd, S. Bowles, C. Camerer, H. Gintis, R. McElreath and E. Fehr (2008) In search of Homo economicus: Experiments in 15 Small-Scale Societies. *Selecting*

*Research Methods*. Sage Publications. (Previously published in *American Economic Review*, 91(2), 73-79).

**Book Chapters**

1) Shariff, A.F., A. Norenzayan, J. Henrich (2009). The Birth of High Gods: How the cultural evolution of supernatural policing agents influenced the emergence of complex, cooperative human societies, paving the way for civilization. In Evolution, culture and the human mind, edited by M. Schaller, A. Norenzayan, S. Heine, T. Yamagishi, & T. Kameda. Lawrence Erlbaum Associates.
2) Henrich, J. (2009) The Evolution of Innovation-Enhancing Institutions. In Innovation in Cultural Systems: Contributions from Evolutionary Anthropology, edited by Michael O'Brien and Stephen Shennan. MIT Press.
3) Henrich, J. (2008) A Cultural Species. In Explaining Culture Scientifically, edited by Melissa Brown. University of Washington Press.
4) Henrich, J. and R. McElreath (2007) Dual Inheritance Theory: The Evolution of Human Cultural Capacities and Cultural Evolution. In Oxford Handbook of Evolutionary Psychology, edited by Robin Dunbar and Louise Barrett. Oxford University Press.
5) McElreath, R. and J. Henrich (2007) Modeling Cultural Evolution. In Oxford Handbook of Evolutionary Psychology, edited by Robin Dunbar and Louise Barrett. Oxford University Press.
6) Henrich, J., R. Boyd, S. Bowles, C. Camerer, E. Fehr, H. Gintis and R. McElreath (2004) Introduction and Guide to the Volume (pp. 1-7). In Foundations of Human Sociality: Ethnography and Experiments in 15 small-scale societies, edited by J. Henrich, R. Boyd, S. Bowles, H. Gintis, E. Fehr and C. Camerer. Oxford University Press.
7) Henrich, J., R. Boyd, S. Bowles, C. Camerer, E. Fehr, H. Gintis and R. McEleath (2004) Overview and Synthesis (pp. 8-54). In Foundations of Human Sociality: Ethnography and Experiments in 15 small-scale societies, edited by J. Henrich, R. Boyd, S. Bowles, H. Gintis, E. Fehr and C. Camerer. Oxford University Press.
8) Henrich, J. & N. Smith (2004) Comparative experimental evidence from Machiguenga, Mapuche, Huinca & American populations shows substantial variation among social groups in bargaining and public goods behavior (pp. 125-167). In Foundations of Human Sociality: Ethnography and Experiments in 15 small-scale societies, edited by J. Henrich, R. Boyd, S. Bowles, H. Gintis, E. Fehr and C. Camerer. Oxford University Press.
9) Henrich, J., P. Young, E. Smith, S. Bowles, P. Richerson, A. Hopfensitz, K. Sigmund and F. Weissing (2003) The Culture and Genetic Origins of Human Cooperation. In Genetic and Culture Evolution of Cooperation, edited by Peter Hammerstein. MIT Press.
10) Richerson, P., Boyd R., and J. Henrich (2003) The Cultural Evolution of Cooperation. In Genetic and Culture Evolution of Cooperation, edited by Peter Hammerstein. MIT Press.
11) Fehr, E. and J. Henrich (2003) Is Strong Reciprocity a Maladaptation. In Genetic and Culture Evolution of Cooperation, edited by Peter Hammerstein. MIT Press.

12) Henrich, J. (2002). Decision-making, cultural transmission and adaptation in economic anthropology. In Theory in Economic Anthropology edited by J. Ensminger. AltaMira Press, 251-295.

13) Henrich, J., W. Albers, R. Boyd, G. Gigerenzer, K. McCabe, A. Ockenfels, H. P. Young (2001). What is the Role of Culture in Bounded Rationality? In Bounded Rationality: The Adaptive Toolbox, edited by G. Gigerenzer and R. Selten. MIT Press.

## Student's Presentations and Posters

1) Cheng, J. T., Tracy, J. L., & Henrich, J. (2010, January). Are dominance and prestige distinct strategies for attaining social status? Poster presented at the annual meeting of the Society for Personality and Social Psychology. Las Vegas, Nevada.

2) Cheng, J. T., Tracy, J. L., & Henrich, J. (2010, January). Are dominance and prestige distinct strategies for attaining social status? Poster presented at the Society for Personality and Social Psychology Pre-Conference on Evolutionary Psychology. Las Vegas, Nevada.

3) Chudek, M., Heller, S. Birch, S. & Henrich, J. (2009, February). The fidelity of gossip - A cross-cultural universal? Poster presented at the Society for Personality and Social Psychology Pre-Conference on Cultural Psychology. Tampa, Florida.

4) Chudek, M., Mesoudi, A. & Henrich, J. (2009, February). Prestige bias - Evidence of adaptation for culture. Poster presented at the Society for Personality and Social Psychology Pre-Conference on Evolutionary Psychology. Tampa, Florida.

5) Cheng, J. T., Tracy, J. L., & Henrich, J. (2009, February). Pride as an evolutionary adaptation to status attainment. Poster presented at the Society for Personality and Social Psychology Pre-Conference on Evolutionary Psychology. Tampa, Florida.

6) Cheng, J. T., Tracy, J. L., & Henrich, J. (2009, February). Pride as an evolutionary adaptation to status attainment. Poster presented at the Society for Personality and Social Psychology Pre-Conference on Evolutionary Psychology. Tampa, Florida.

7) Broesch, Tanya, James Broesch, Joseph Henrich, Ann Bigelow, Philippe Rochat (2008, March). Contingency and Affective Mirroring in Fijian and Canadian mother-infant dyads. Poster presented at the International Infant Studies Conference, Vancouver, B.C.

8) Cheng, J. T., Tracy, J. L., & Henrich, J. (2008, May). Why are you so proud? Pride as an evolutionary adaptation to status attainment. Poster presented at the Society for Interpersonal Theory and Research's 11th Annual Convention. Tempe, Arizona.

## Series Editor for these books at UC Press

- Hruschka, D. J. (in press) *Friendship: Development, Ecology and Evolution of a Social Relationship*. In the Origins of Human Behavior and Culture Series. Series editors Monique Borgerhoff Mulder and Joseph Henrich. University of California Press.

- Marlowe, F. W. (2010) *The Hadza Hunter-Gatherers of Tanzania*. In the Origins of Human Behavior and Culture Series. Series editors Monique Borgerhoff Mulder and Joseph Henrich. University of California Press.

- Shennan, Stephen (2009) *Pattern and Process in Cultural Evolution.* In Origins of Human Behavioral and Culture Series. Series editors Monique Borgerhoff Mulder and Joseph Henrich. University of California Press.
- Kennett, Douglas and Bruce Winterhalder (2006) *Behavioral Ecology and the Transition to Agriculture.* In the Origins of Human Behavior and Culture Series. Series Editors Monique Borgerhoff Mulder and Joseph Henrich. University of California Press.

## Draft Manuscripts[2]

### Edited Volume

Henrich, J. and Jean Ensminger. *Fairness and Punishment in Cross-Cultural Perspective.* Under consideration at Russell Sage Press.

### For Journals

1) Boyd, R, J.P. Richerson, J. Henrich. Rapid cultural adaptation can facilitate the evolution of large-scale cooperation (under review)
2) Henrich, J. and N. Henrich. The evolution of cultural adaptations and how it created pregnancy and lactation food taboos that protect against marine toxins.
3) Barr, A., C. Wallace, J. Ensminger, J. Henrich, H. C. Barrett, A. Bolyanatz, J. C. Cardenas, M. Gurven, E. Gwako, C. Lesorogol, F. W., R. McElreath, D. Tracer, and J. Ziker. Homo Æqualis: A Cross-Society Experimental Analysis of Three Bargaining Games.
4) Chudek, M., S. Heller, S. Birch, and J. Henrich Prestige Biased Transmission in Children: Attention from others as a cue for social learning.
5) Richerson, P. and J. Henrich Tribal Social Instincts and the Cultural Evolution of Institutions to Solve Collective Action Problems.

### Book Chapters

1) Henrich, J. and N. Henrich. Fairness without Punishment: Behavioral Experiments in the Yasawa Islands, Fiji. In Fairness and Punishment in Cross-Cultural Perspective. Edited by J. Henrich and J. Ensminger.
2) Henrich, J. and J. Ensminger. Chapter 2: Theoretical Foundations—The Coevolution of Social Norms, Intrinsic Motivation, Markets, and the Institutions of Complex Societies. In Fairness and Punishment in Cross-Cultural Perspective. Edited by J. Henrich and J. Ensminger.
3) Ensminger, J. and J. Henrich. Chapter 3: Cross-Cultural Experimental Methods, Sites, and Variables. In Fairness and Punishment in Cross-Cultural Perspective. Edited by J. Henrich and J. Ensminger.
4) Henrich, J. and J. Ensminger. Chapter 4: Empirical Results—Markets, Community Size, Religion and the Nature of Human Sociality, In Fairness and Punishment in Cross-Cultural Perspective. Edited by J. Henrich and J. Ensminger.

[2] Most draft manuscripts are available at http://www.psych.ubc.ca/~henrich/home.html#papers.

## Invited Lectures

Keynotes, Plenaries, and Invitations with Honoraria

1) On the Origins of a Cultural Species: How social learning shapes human evolution. *The Evolution of Brain, Mind and Culture*. Center for Mind, Brain and Culture. Emory University. November 13, 2009.

2) Why Humans Cooperate. Invited lecture in the *Human Uniqueness Series*. Arizona State University. Tempe, AZ. September 24, 2009

3) The Evolution of Cultural Adaptations. Keynote at *Cognition 2009: Cultures and Cognition in Evolution*. Institute of Cognitive Science. UQAM. Montreal, Canada. June 4, 2009.

4) Culture-Gene Coevolution and the Origins of Human Sociality. Plenary at the *Human Behavior and Evolution Conference*. Fullerton, CA. May 28, 2009

5) The Evolution of Norms and Institutions (including cooperative ones): ethnographic and experimental evidence from Fiji. Invited speaker series at the *IPEM Seminar Series* in the IGERT Program in Evolutionary Modeling. University of Washington. February 21, 2008.

6) On the Nature of Human Sociality: Behavioral Experiment and Ethnography in 15 small-scale societies. *Foundations of Human Social Behavior.* University of Zurich. June 20, 2008

7) The Evolution of Cultural Adaptations: Fijian food taboos prevent fish poisoning during pregnancy and lactation. *Cultural Evolution and Health Series*. Northwestern University. January 29, 2007.

8) Culture and the Nature of Human Sociality. Plenary address at the *American Accounting Association Annual Meeting (Imagined Frontiers in Accounting)*. Chicago. August 6, 2007.

9) Cultural Learning, Sociality and the Coevolution of human institutions. Invited lecture at the *Cultural and Adaptive Bases of Human Sociality*. International House of Japan, Tokyo. September 9-10, 2006.

10) The Coevolutionary Origins of Human Sociality. Keynote address at the *Conference on Collective Intentionality*, Siena, Italy. October 14, 2004.

11) Cross-Cultural Variations in Economic Decision-Making. Invited lecture at the *AFOSR (Air Force) Workshop: Culture and Personality in Models of Adversarial Decision-Making*. Tysons Corner, VA. November 13, 2003.

12) The Cultural Origins of Social Preferences. Invited presentation at *Field Experiment in Economics*, Middlebury College's 24th Annual Economics Conference. April 26, 2003.

13) The Nature and Origin of Social Preference. Invited lecture at the World Bank, Washington D.C. March 5, 2003.

Invited Lectures away from my Home University

14) Theorizing and Studying Culture: A culture-gene coevolutionary perspective. Culture Preconference to the Society of Personality and Social Psychology Meetings. Las Vegas, January 28, 2010.

15) A Culture-Gene Coevolutionary Perspective on Emotions. Emotion Preconference to the Society of Personality and Social Psychology Meetings. Las Vegas, January 28, 2010.

16) Tribal Social Instincts and the Cultural Evolution of Institutions to Solve Collective Action Problems. *Context and the Evolution of Mechanisms for Solving Collective Action Problems*. Workshop in Political Theory and Policy Analysis, Bloomington, IN. May 2, 2009.

17) The Evolution of Cultural Adaptations: Fijian food taboos protect against dangerous marine toxins. Invited lecture for the *Behavior, Evolution and Culture (BEC) Series*, UCLA. April 6, 2009.

18) The Evolution of Norms. Invited lecture at the Max Planck Institute for Evolutionary Anthropology, Leipzig, Germany. March 12, 2009.

19) The evolution of cultural adaptations in Fiji. Invited lecture in the Seminar Series in Ecology and Evolution, University of California Davis. Feb 12, 2009.

20) Norms, Institutions, and the Coevolution of Human Sociality. Invited lecture at the Wenner-Gren Foundation's *International Symposium on Human Evolution*, Stockholm. November 6, 2008.

21) Culture and the Coevolutionary Origins of Human Behavior. Invited lecture in the *Institute of Social and Cultural Anthropology Lecture Series*. Oxford University. October 20, 2006.

22) The Evolution of Moral Norms: Evidence from Fiji. Invited Speaker at the *Norms and Moral Psychology Workshop in Culture and Mind Project*. University of Sheffield, Sheffield, England. October 20, 2007.

23) Why societies vary in their rates of innovation: The Evolution of Innovation-Enhancing Institutions. Invited lecture at *Innovation in Cultural Systems: Contributions from Evolutionary Anthropology*. Altenberg Workshops in Theoretical Biology, Konrad Lorenz Institute, Altenberg, Austria. September 15, 2007.

24) The Cultural Origins of Human Sociality. Invited in the *Cognition and Culture, and Evolution and Human Adaptation Program*. University of Michigan. February 10, 2006.

25) Why Big Men are generous. Invited lecture at *Pattern and Process in Cultural Evolution*. Centre for the Evolutionary Analysis of Cultural Behavior (University College London), London. September 14-16, 2005.

26) Cultural Group Selection and Human Sociality. *Foundations of Accounting Conference*. Goizueta Business School. Emory University. March 23, 2005.

27) Culture and the Evolution of Human Altruism. Invited lecture at the *Society of Cross-Cultural Research* (invited by SETI). February 26, 2005.

28) On the Nature of Human Sociality. Department of Economics. University of British Columbia. February 4, 2005.

29) The Evolution of Culture and Human Sociality. Department of Psychology. University of Toronto. January 26, 2005.

30) Prosociality in Cross-Cultural Perspective. Invited presentation at the *LUCE Conference*, Pennsylvania State University. April 13, 2003.

31) Understanding a Cultural Species. Invited presentation at the *Innateness Workshop*, University of Maryland, Washington, D.C. March 8, 2003.

32) The Nature of Human Sociality. Invited lecture at the National Science Foundation, Alexandria, VA. March 6, 2003.

33) A Cultural Species. Invited presentation at *Towards a Scientific Concept of Culture*, Stanford University, Palo Alto. January 25, 2003.

34) Rapporteur Summary for the "Cooperation in Human Societies" Group at the Dahlem Conference on the Genetic and Culture Evolution of Cooperation, Berlin, Germany. March 2002.

35) Ethnography and Experiments in 15 small-scale societies. Invited presentation at the Max Planck Institute for Human Development (ABC group), Berlin, Germany. February 23, 2002.

36) Modeling Cultural Evolution. Invited presentation at the *Innateness Workshop*, Sheffield University, Sheffield, England. November 7, 2002

37) Cultural Differences in Risk Preferences (with R. McElreath). Invited paper at the *Human Behavior & Evolution Society Conference*. Salt Lake City, Utah. June 4 1999.

38) Cultural Differences in Risk Preferences (with R. McElreath). Invited paper at the Risk Initiative in Salt Lake City. June 2, 1999.

39) Rapporteur Summary for the "Bounded Rationality and Cultural Change" Group at the Dahlem Conference on Bounded Rationality, Berlin, Germany. March 1999.

40) Cross-Cultural Differences in Risk Preferences. Invited paper at the MacArthur Foundation's Preferences Network Conference, Chicago. December 1998.

41) The problem of culture and decision-making in economic anthropology. Invited paper at the *Society of Economic Anthropology*, Guadalajara, Mexico. April 1997.

Invited Lectures at Home University

42) The Cultural Brain Hypothesis: Implications for learning and development. *Workshop in Development Psychology*, University of British Columbia. April 8, 2009.

43) On the Origins of Faith. *Panel Discussion on Religion.* Green College, University of British Columbia. March 30, 2009.

44) Culture, Social Norms and the Nature of Human Sociality (Or, Why Ethnographers Need Experiments, Game Theory, and Evolution). *Green College Principal's Series*. February 24, 2009.

45) Dual Inheritance Theory: The Evolution of Human Cultural Capacities and Cultural Evolution. *UBC Institute of Mental Health Colloquium*. February 5, 2009.

46) On the Nature of Human Sociality: Behavioral Experiments and Ethnography from 15 Small-scale Societies. *UBC/SFU Distinguished Speaker Series,* OBHR Division, University of British Columbia. February 1, 2008

47) The evolution of cultural adaptations in Fiji. *Culture in Evolutionary Perspective*. Green College at the University British Columbia. April 14, 2007

48) Prestige and Cultural Learning. Invited presentation at the *Cognition and Development Seminar*, Department of Psychology, Emory University. November 4, 2003.

49) Foundations of Human Social Preferences. Department of Economics, Emory University. May 2003.

50) The Origins of Human Prosociality. Invited presentation at the *Evolution and Human Adaptation Program Lecture Series*. February 23, 20001.

51) Cross-cultural Experimental Economics. Invited presentation at in the *Hosmer Series* at the University of Michigan Business School. February 15, 2000.

52) The Evolution of Prestige. Invited paper at the *Culture & Cognition Colloquium* series at the University of Michigan. December 10, 1999.

53) Cross-cultural Experimental Economics. Invited paper at the MacArthur Foundation's *Preferences Network* Conference, Los Angeles. December 4, 1999.

54) Ultimatum and Public Goods Games among the Mapuche and Machiguenga. Invited paper at the MacArthur Foundation's *Cross-Cultural Initiative* Conference, Los Angeles. November 1999.

55) Ultimatum Game Bargaining and the Machiguenga. Invited paper at the MacArthur Foundation's *Preferences Network* Conference, Los Angeles. January 1997.

## Other Fellowships, Grants, Honors & Awards (those not listed above under 'Major')

### Fellowships and Awards

1998 Graduate Division Fellowship at the University of California, Los Angeles (1 year)
1998 Collegium of University Teaching Fellows at the University of California, Los Angeles
1994 Teaching Assistantship in the Dept. of Anthropology, UCLA, for the 1994-95 year.
1993 Government Award for Outstanding Achievement in support of Mission Activities.
1993 Martin Marietta Peer Recognition Award for Outstanding Performance as voted by fellow team members.
1992 General Electric Peer Recognition Award for Outstanding Performance as voted by fellow team members
1991 Raymond W. Murray Award for the Outstanding Senior in the Department of Anthropology, Notre Dame, IN
1991 John J. Reilly Scholarship for excellence in the Arts & Letters/Engineering Double Degree Honors Program at the University of Notre Dame

**Research Grants (less than 10K), Minor Fellowships and Awards**

2008 HSS Symposium Grant: Integrating science and the humanities ($5K)
2002 Committee for Teaching Initiative Fund: Building an Indexed Database for Teaching Resources in Anthropology ($800).
1994 Center for International Business Education grant to study social development and cultural capital among Mapuche and non-Mapuche in Chile ($7K)
1994 Risk Initiative Grant for studying risk among the Mapuche ($5K)
1999 Preferences Network Grant for Common-Pool Resources experiments among UCLA and University of Michigan undergraduates ($2.4K)
1999 Preference Network Grant for risk control experiments among UCLA undergraduates ($1.2K)
1998 MacArthur Foundation Grant for Experimental Economics Research with Mapuche ($6.4K)
1996 MacArthur Foundation Grant for Ultimatum Game Research at UCLA ($3K)
1996 Ford Foundation-ISOP Interdisciplinary Program for Developing Areas Grant ($1.3K)
1996 Latin American Center Small Grants Award ($2.5K)
1994 National Science Foundation Master's Improvement Research Grant (through UCLA, $2.3K)
1994 Tinker Foundation for Latin American Studies Research Grant ($1.5K)
1994 Teaching Assistantship in the Department of Anthropology, UCLA, for the 1994-95 year.
1993 Government Award for Outstanding Achievement in support of Mission Activities.
1993 Martin Marietta Peer Recognition Award for Outstanding Performance as voted by fellow team members.
1992 General Electric Peer Recognition Award for Outstanding Performance as voted by fellow team members

## Classes Taught

**Undergraduate**

- Introduction to Anthropology (Anthro 101, Emory)
- Psychological Anthropology (Anthro 260, Emory)
- Cultural Change: An Interdisciplinary Approach (Anthro 385, Emory)
- Culture, Cognition and Evolution (Psychology 205, UBC)
- Evolutionary Psychology (Psychology 358, UBC)
- Wealth and Poverty of Nations (Economics 234, UBC)
- Understanding Humans (ASTU 204a, UBC)

**Graduate**

- Field and Analytical Methods in Anthropology (Anthro 585, Emory)
- Biocultural Seminar (Anthro 520R, Emory)
- Culture and Mind (Anthro 508, Emory)
- Culture and Cognition (Anthro and Psych, Michigan)
- Decision-making, rationality, and the nature of human morality and social behavior (Econ 590 and Psych 529, UBC)
- Modeling the Evolution of Social Behavior (Economics 590 and Psych 529, UBC)

- Understanding Humans: Integrating the Sciences and Humanities (ASTU 204, UBC)

## Honor Societies

- Phi Beta Kappa
- Tau Beta Pi –National Engineering Honor Society
- Sigma Gamma Tau –National Aerospace Engineering Honor Society
- Lambda Alpha- National Anthropology Honor Society

## Service Highlights

- Advisory Board for AHRC Culture and the Mind Project. PI Stephen Laurence.
- Series co-editor for *Origins of Human Behavior and Culture* at the University of California Press.
- Panelist for the National Science Foundation's *Human Social Dynamics* Review (2004).

## Field Work Experience

2009 Yasawa Island, Fiji. Moral Intuitions and Reproductive History (1 month, June-July)

2007 Yasawa Island, Fiji. Folksociology and Poison Fish (1 month, Nov)

2006 Yasawa Island, Fiji. Ontogeny of Cultural Knowledge (3 months)

2005 Yasawa Island, Fiji. Ontogeny of Cultural Knowledge (1 month)

2004 Yasawa Island, Fiji, Ontogeny of Cultural Knowledge (1 month)

2003 Yasawa Island, Fiji, Behavioral Experiments and Cultural Knowledge (3 months)

2000 Mapuche, Southern Chile, Risk Economic Behavior (1 month)

1997 Mapuche, Southern Chile, Economic Decision-making (9 months)

1997 Machiguenga, Peruvian Amazon, Agricultural Change and Decision-making (1 month).

1996 Machiguenga, Peruvian Amazon, Agricultural Change and Decision-making (2 months).

1995 Machiguenga, Peruvian Amazon, Agricultural Change and Decision-making (1 month).

1994 Machiguenga, Peruvian Amazon, Agricultural Change and Decision-making (2.5 months).

## Reviewer for these Journals, Institutions and Presses

**National Science Foundation (U.S.)**

- Cultural Anthropology
- Archaeology
- Social Dynamics

**General Science Journals**

- Nature
- Science

- Proceedings of the National Academy of Science
- Proceedings of the Royal Academy: Biology
- Philosophical Transactions of the Royal Society B
- Behavioral and Brain Sciences
- Current Zoology

**Anthropology, Archaeology and Evolution Journals**

- Current Anthropology
- American Antiquity
- Human Nature
- Evolutionary Anthropology
- Behavioral Ecology and Sociobiology
- Journal of Theoretical Biology
- Evolution and Human Behavior
- Human Biology

**Economics and Business Journals**

- American Economic Review
- Econometrica
- Economic Journal
- Journal of Economic and Organizational Behavior
- Experimental Economics
- Academy of Management Journal
- American Economics Journal: Applied Economics

**Psychology Journals**

- Cognition
- Developmental Science
- Psychological Science
- Trends in Cognitive Science
- Evolution of Communication

**Sociology and Philosophy Journals**

- Rationality and Society
- European Review of Philosophy

**Presses**

- University of California
- University of Chicago Press
- University of Michigan Press

This is Exhibit " B " referred to in the
affidavit of JOSEPH HENRICH
sworn before me at VANCOUVER
in the Province of British Columbia this
15th day of JULY 2010

A Commissioner for taking Affidavits
within the Province of British Columbia

# Polygyny in Cross-Cultural Perspective: Theory and Implications

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**Contents**

## I. Introduction and Summary

### A. Content and Structure

The goals of this Report are both to provide background information on the nature of polygyny and to examine the implications of its increased practice in a modern Western society. I do this by developing a theoretical framework using principles drawn from evolutionary biology, and by reviewing evidence regarding mating and marriage from psychology, anthropology, sociology, and economics, as well as material from other disciplines. Summarizing, these diverse lines of evidence indicate that:

- A non-trivial increase in the incidence of polygyny, which is quite plausible if polygyny were legalized given what we know about both male and female mating preferences, would result in increased crime and antisocial behaviour by the pool of unmarried males it would create.
- Greater degrees of polygyny drive down the age of first marriage for (all) females on average, and increase the age gap between husbands and wives. This generally leads to females marrying before age 18, or being "promised" in marriage prior to age 18.
- Greater degrees of polygyny are associated with increased inequality between the sexes, and the relationship may be causal as men seek more control over women when women become scarce.
- Polygynous men invest less in their offspring both because they have more offspring and because they continue to invest in seeking additional wives. This implies that, on average, children in a more polygynous society will receive less parental investment.
- Greater degrees of polygynous marriage may reduce national wealth (GDP) per capita both because of the manner in which male efforts are shifted to obtaining more wives and because of the increase in female fertility.

This Report is structured as follows: First, I distinguish mating psychology and mating systems from marriage norms and marriage systems. Humans, like other animals, have an evolved mating psychology that gives rise to species-level patterns in mating. However, unlike other animals, humans also acquire and enforce (formally and informally) culturally-transmitted social norms that motivate and regulate social behaviour. Here I give some background on what culturally-evolved norms are, and discuss how they influence our evolved psychology for decision-making.

Second, drawing on work from primatology, psychology and anthropology, I present a brief synthesis of what we know about both human mating psychology and male parental investment. As part of this, human marriage patterns are presented in a broad anthropological perspective. Key implications are that both males and females possess evolved mating psychologies that favour polygynous marriage and mating systems (except under situations of economic equality among males) in which males will limit parental investment in offspring in favour of obtaining more mates/wives. Historical material is then summarized showing that the emergence of modern monogamous marriage systems (rooted in systems

of norms and laws), which are now widespread, is principally the product of the particular cultural evolutionary trajectory of Western societies.

Third, I review the available evidence that tests for the predicted associations between polygyny and various social outcomes, including increases in criminal and antisocial behaviour, the targeting of progressively younger females as brides, increased efforts to control women by men (resulting in greater male-female inequality), and negative consequences associated with reduced male parental investment in children.

Finally, I speculate that the spread of monogamous marriage, which represents a kind of sexual egalitarianism, may have created the conditions for the emergence of democracy and political equality, including women's equality.

**B. Summary**

Two sets of theoretical ideas from evolutionary biology underpin the empirical evidence presented here. First, like other animals, human males and females have different mating strategies rooted in the nature of primate sexual reproduction. Females are limited in their direct reproduction to the number of offspring they can rear to maturity in their lifetimes, and are necessarily committed to high levels of investment, at least in the form of providing the egg, gestation, and lactation. In contrast, with little investment (sperm and a small effort), males can potentially have thousands of offspring that they can decide to invest in, or not, based on the costs of obtaining additional mates vs. the impact of additional investment for their offspring. Because human offspring benefit from the investment of both parents (at least in ancestral human societies) females seek to form pair-bonds with those males who are best able to invest in their offspring (males possessing high social status, wealth, and valued skills). A female does not generally benefit from establishing simultaneous pair-bonds with multiple males because (1) she can only have one pregnancy at a time (so lots of sex with different males does not increase her reproductive success), (2) this brings males into conflict (sexual jealousy) and (3) this creates confusion regarding male paternity (and greater paternity confidence increases paternal investment). In contrast, males benefit both from pursuing additional pair-bonds with different females at the same time, and from additional extra-pair copulations (short-term sexual relationships).

Second, while these different evolved mating strategies influence human mating patterns, humans also acquire and enforce (formally and informally) culturally-transmitted social norms (which are sometimes codified into laws) that motivate and regulate social behaviour. In this instance, human societies have culturally evolved marriage systems that consist of sets of social norms that aim to regulate and motivate certain kinds of behaviour (while suppressing other kinds of behaviour). Norms make human marriages different from primate pair-bonds because in marriages uninvolved third parties (other community members) care about whether a married pair is obeying the local norms (about inheritance, residence, dowries, child rearing, sexual exclusivity, etc.). Because third parties may take action when norms are violated, humans worry about their reputation for adhering to local norms and this affects both their behaviour and their motivations.

Many forces shape the cultural evolution of systems of social norms, including our evolved psychology, but one important force is inter-group competition. Societies possessing norms that more effectively shape, harness, re-enforce, and suppress aspects of our evolved psychology in ways that benefit the group as a whole in competition with other societies spread at the expense of societies possessing fewer group-beneficial norms. Over centuries, this leads to the spread, often without anyone's conscious awareness of the underlying causal process, of social norms (including laws and institutions) that create societal-level benefits that favour success in competition with other groups.

The anthropological record of marriage systems, as well as the record of mating patterns in non-human primates, reflects the basic differences in female and male mating strategies.

- Marriage systems in most human societies permit polygynous marriage to some degree (85%). Nearly all foraging societies, for example, permit successful, high-status males to take multiple wives.
- In polygynous societies, taking additional wives is always associated with skill, status, wealth, or nobility.
- In the smallest scale human societies that dominated most of our evolutionary history, polygyny was necessarily mild, as few males could ever generate sufficient resources to attract more than one wife.
- But, as human societies grew in size and complexity (and especially in male inequality), levels of polygyny intensified, reaching extremes in despotic empires in which rulers controlled harems of hundreds of women and girls.
- Other forms of marriage aside from monogamy and polygyny are rare. Only 1% of societies have ever been considered "polyandrous",[1] and even this is deceptive as in most (but not all) of those societies, polyandry co-occurs with both monogamy and polygyny. Indeed, researchers have long argued that polyandry is a response to a specific set of economic circumstances involving quite limited resources and certain constraints. Group marriage is rarer still, and in the anthropological record it is safe to say that nearly all human polygamous marriages have been (and continue to be) polygynous.

Given our evolved mating psychology, the puzzle is not why societies are polygynous; it's why any society is monogamous, especially one in which males are highly unequal (like ours). Many of the reported monogamous marriage systems in the smallest-scale societies are probably "ecologically monogamous," which means they are monogamous because resources are scarce and relatively equally divided among men. Thus, what is puzzling is the emergence of monogamy in the most successful and competitive of ancient civilizations. One possibility (detailed below) is that—perhaps by chance, whim, or insight—some ancient societies began to impose monogamy, and they consequently began to prosper and spread because of the group-beneficial effects of monogamy (evinced below).

[1] Polyandrous marriage involves one female marrying multiple males.

Modern monogamy,[2] which arrived recently in places like China, Japan, and Turkey, can be traced back to the Greek city states, where Athens and Sparta instituted early versions of monogamy laws to galvanize internal solidarity and compete more effectively with other city states. This tradition passed into Rome, where Augustus and other Emperors further sought to fortify monogamous marriage, with the notion that this would strengthen Rome. From Rome, monogamy infused into Christianity, where it was mixed with Greek stoicism by the early church fathers (note that monogamy is not preached in the gospels, and the Old Testament implicitly endorses polygyny). Over a long period, the Church gradually managed to compel the European aristocracy, who were initially polygynous, to adopt monogamous marriage. This system spread to the rest of the world during the European expansion after 1500 AD, and continues to spread to this day.

To understand the success of societies that adopted monogamy, it is useful to consider how allowing polygyny vs. imposing monogamy affects male mating psychology. If permitted to obtain as many wives as possible, males will deploy their efforts and resources toward this end. Even if women are completely free to choose their husbands, the high-status, wealthy males will obtain a disproportionate share of the available women. This has a number of predictable effects:

1) It will increase the pool of unmarried men psychologically primed to take risks and compete fiercely with other males to obtain reproductive opportunities (this increases crime and risky behaviour);
2) The increased competition for female mating partners places a pressure on the recruitment of younger and younger 'brides' into the marriage market;
3) Intense competition for females in a scarce 'marriage market' causes males (as fathers, husbands, and brothers) to seek to exercise more control over the choices of women (in sex, dating, dress, etc.), increasing male-female inequality and undermining women's autonomy and rights. This is further exacerbated by the fact that the age gap between husbands and wives increases in both polygamous and monogamous relationships in polygynous societies.
4) Men will reduce investment in wives and offspring as they both spread more thinly across larger (in many cases several times larger) families, and increasingly channel these resources into obtaining more wives.

Later in this document I explore the available evidence for each of these effects, including economic models showing how this diversion of male efforts and resources can explain the low saving rates, high fertility, and low GDP per capita of highly polygynous countries.

Now consider how imposing monogamy affects the same outcomes. Even wealthy males can only have one wife, so instead of investing heavily in seeking more wives, more investment goes into each wife and offspring. At the other end of the economic spectrum, because high-status males are limited to a single wife, low status men will be able to obtain a wife and invest in offspring, instead of being part of a

[2] By "modern monogamy" I refer to the complex of norms and institutions surrounding monogamy as it developed in the Western tradition. Not all "imposed monogamy" is the same. For example, as noted, Greek monogamy was imposed but permitted men to keep (foreign) concubines.

pool of unmarried men engaging in risky behaviour. This is good both for these men, and for society, since a pool of unmarried men will increase the rate of murder, rape, and property crime. Of course, males—and especially high status males—will often still engage in all manner of extramarital sexual activity, and serial monogamy. But this activity does not create the ill effects of polygynous marriage because the same number of women is still available to other males. Monogamy may have spread, and continue to spread, because monogamous societies are more competitive: monogamy seems to re-direct male motivations in ways that generate lower crime rates, greater wealth (GDP) per capita, and better outcomes for children.

Finally, I speculate that the spread of monogamous marriage, which represents a kind of sexual egalitarianism, may have created the conditions for the emergence of democracy and political equality, including women's equality. Within the anthropological record there is a strong statistical linkage between democratic institutions and monogamy, though monogamy precedes the development of democracy and notions of female equality in Europe. Monogamy may foster the emergence of democratic governance and female equality by:

- Imposing the same rules on the king and peasant (each can only have one wife), which established a first foothold on the principles of equality among men.
- Reducing the competition for females, which decreases the tendency for males to tightly control their wives and daughters—that is, imposing monogamy (on males and females) reduces patriarchal motivations in males by reducing the competition for females, which may in turn permit more egalitarianism in the household.
- Dissipating the pool of unmarried males that were previously harnessed by rulers in wars of aggression.

In this sense, the anthropologically peculiar institutions of imposed monogamous marriage may be one of the foundations of Western civilization, and may explain why democratic ideals and notions of human rights first emerged as a Western phenomenon.

## II. Human Mating Strategies and Marriage Systems

### A. Distinguishing Marriage from Mating Systems

Central to understanding marriage norms is recognizing the difference between these and our evolved mating psychology which, uninfluenced by culturally evolved marriage norms, would give rise directly to a human mating system. Humans, like all primates (with which I will draw occasional comparisons), possess an evolved psychology (preferences, motivations, biases) that influences our choices regarding mates, mating, reproduction, and parental investment. For well-established evolutionary reasons, male and female mating psychologies differ in important ways. As in other primates, these mating psychologies yield a mating system, as individuals cooperate and compete under different kinds of ecological and economic circumstances. Non-human primates are characterized by distinct mating systems (see below).

Marriage systems[3] are distinct from mating systems. Humans, unlike other species, are heavily reliant on cultural learning for acquiring all manner of behaviours and practices, including social behaviour. Because humans also acquire the standards by which we judge and evaluate others as part of this process, cultural evolution gives rise to social norms (Henrich and Henrich 2007). Social norms are shared standards of behaviour. Failure to meet minimal standards results in reputation damage, loss of status, and both formal and informal sanctions. Some norms also incentivize excess performance by providing reputational benefits and perhaps rewards for actions that are above and beyond the normative standard (Henrich 2004). As we will see, in some societies having more wives is both a signal and a source of status and prestige for males. It is only in cases of marriage systems based on normative (imposed) monogamy that adding wives beyond the first is viewed negatively (this is true even in systems in which polyandry is common).

Marriage systems represent collections of social norms that interact with our evolved psychology for forming long-term pair-bonds (see below). Marriage norms, for example, govern such arenas as (1) who one can marry (e.g., exogamy, incest taboos), (2) who pays for the marriage ritual, (3) who gets paid for the marriage (dowry or brideprice[4]), (4) whether or not the groom has to perform a service for the bride's family, (5) who gets the children in the event of the groom's (or bride's) death, (4) the economic responsibilities of the bride, groom, and their kinfolk, (5) inheritance rights by specifying who is a "legitimate" heir, and (6) where the new couple will reside (patrilocal, matrilocal, avunculocal, neolocal).

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[3] Here I use the anthropological meaning of "marriage." A marriage is long-term pair-bond between two people that is recognized and sanctioned by the couple's community. Being married comes with economic, social, and sexual expectations, prescriptions, and prohibitions (norms) for both parties, who are accordingly judged—formally or informally—by the community. Marriage may or may not be sanctioned by formal laws, and marriage certainly existed long before formal laws or even writing. Public rituals usually mark the commencement of a marriage. "Cohabitation," a term I use later and distinguish from marriage, does not carry the set of shared expectations, prohibitions, and prescriptions, as judged by *a community*, that marriage does. The key to understanding marriage is recognizing the role of a community in defining, sanctioning, and enforcing it.

[4] A dowry is a payment from the bride's family to the groom and/or his family. A brideprice is a payment from the groom's family to the bride's family. Payments can be in the form of cash, jewellery, animals (e.g., cows, chickens), or other items that have value within the culture.

For our purposes, marriage norms also specify rules about partner number, and arrangement of partners (e.g., no group marriages). A *marriage system* is the collection of marriage norms in a society.

Marriage norms are certainly not independent of our mating psychology, nor can they entirely replace or subvert our mating psychology. They can, however, strongly influence behavioural patterns in two ways. First, humans readily internalize social norms, at least partially. This means a social norm can internalize itself such that adhering to the norm is intrinsically rewarding. Recent work in neuroscience has shown both how adhering to local norms and punishing norm violators activates the brain's reward circuitry (Fehr and Camerer 2007). Second, the fact that other people acquire and internalize norms means that they are willing to punish norm violators, even at a cost to themselves. This means that independent of any internalization, norms impose real costs on norm violators. An underappreciated difference between marriage systems and mating systems is that in marriages many people are concerned that the norms are followed, not only the mating pair and their families. This third-party concern is unknown in other primates—other primates have monogamous mating and cohabitation, but not marriage.

Perhaps it goes without saying, but the marriage system (sets of norms) and the actual mating patterns in human societies never quite match up. Consider that some societies possess marriage norms specifying that each man and woman shall marry once in their lifetime, to only one person. After this marriage they shall never seek any sexual or romantic relationship with anyone else, ever, and all material resources must be devoted to the good of the household. These social rules capture some of the marriage norms for some societies. Of course, this never quite works out, as our evolved mating psychology gives rise to broad societal level patterns of infidelity, lack of paternity, divorce, prostitution, etc. But there is little doubt that marriage systems shape and influence the resultant mating patterns, as well as patterns of parental investment.

### B. Human Mating Psychology

The first step in understanding human *mating* psychology, and in particular the differences between male and female mating psychology, is to recognize the quite different evolutionary pressures on males versus females. The mating psychologies of men and women reveal the tradeoffs inherent in the different strategies that will maximize their reproductive success. An essential difference in male and female mating psychology arises from basic facts about primate (and mammalian) physiology: (1) females invest heavily in the egg compared to the paltry investment that males make in the sperm, and this asymmetric investment only increases as females subsequently must invest in gestation, lactation, and parenting if their offspring is to survive, and (2) females are limited in their lifetime reproductive output (their direct fitness) to the number of babies they themselves can carry to term and rear to adulthood. Meanwhile, males can potentially father thousands of offspring and invest nothing other than sperm. This difference spawns another pattern that will be relevant below: the variance in reproductive success is much lower for females compared to males. Females will have typically at most 18 offspring,[5] and this number was much lower for most of our evolutionary history, probably more like

[5] There are a variety of aberrant cases that dramatically exceed this numerical guideline. The highest recorded number of children born to one woman is 69 (in Russia between 1725 and 1765). This involved 27 pregnancies

8. For males, offspring production can range from zero to thousands (Daly and Wilson 1983; Barrett et al. 2002; Buss 2007). At the top end, some males (e.g., Genghis Khan) had so many reproductively successful offspring that their impact is measurable in the human genome (Cochran and Harpending 2009). At the bottom end, low-status males have often been routinely shut out from successful reproduction.

The same logic predicts a difference in "choosiness" with regard to mates (differences in willingness to have sex). Because females can produce only a limited number of offspring, and each requires substantial investment of time and energy, female mating psychology favours selectively mating with high quality mates based on genetic quality and access to resources (for rearing the offspring). Any sexual encounter could result in two decades of intense investment. Males, who can potentially invest very little, should be less choosy, and focus mostly on the fertility and genetic quality of potential mates. This means, at the low end of reproductive success, almost any female can manage to get pregnant because some males are always willing to make the minimal investment necessary. In contrast, males that are both low-status and low genetic quality could easily end up leaving no offspring since females are choosy about whom they mate with. Substantial empirical evidence from diverse societies supports these differences in mating preferences (Buss 1989; Kenrick and Keefe 1992; Kenrick and Keefe 1992; Barrett et al. 2002). For our purpose, these data show specifically that women prefer males with more resources and greater social status (Cashdan 1996), while men prefer younger, more attractive, women[6] (more on mating strategies below).

This makes males the "risky" sex, and predicts they have a corresponding psychology. A male who finds himself without access to females should be dramatically more likely to take substantial risks aimed at increasing his opportunities for sex (e.g., theft, murder, etc.). Ample empirical evidence indicates that males have a much greater propensity for taking risks of all kinds, especially when status is at stake (Daly and Wilson 1983; Daly and Wilson 1988; Daly and Wilson 1990; Buss 2007). This means that social factors that severely limit or restrict the reproductive options for low-status males will shift them into this risk-taking mode.

Evolutionary logic also leads to predictions about male and female parental investment (Barrett et al. 2002). Females, including most mammals and all primates, must invest in their offspring for the offspring to survive, though they may preferentially invest in some more than others. Offspring of females who do not invest generally don't survive at all in most species, and certainly do not do well in humans. Male parental investment is much more variable, since males can invest either in their children or in gaining additional matings. From a fitness point of view, the fitness maximizing situation is to have

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resulting in 16 pairs of twins, 7 sets of triplets, and 4 sets of quadruplets. Some have questioned the veracity of this claim. The important point is that even this extreme case does not compare to Genghis Khan, who was so prolific that he seems to have left an imprint on the human genome.

[6] There is much important cross-cultural variation in the relative strength of these preferences. Interestingly, consistent with evolutionary predictions, some of the variation in the importance of attractiveness (relative to other attributes) is predicted by the prevalence of pathogens and parasites in the environment. When pathogens and parasites are more dangerous, genetic quality (as indicated by attractiveness) is relatively more important because this predicts a resistance to pathogens and parasites (Gangestad and Buss 1993).

many matings and have other males invest heavily in rearing their offspring (cuckold other males). However, since low-status males of low genetic quality will have limited mating prospects, they should shift toward long-term pair-bonding and parental investment. Higher-status males should shift the balance toward parental investment as their mating prospects diminish or become too costly. Social factors that (1) make mates available to low status males (who would otherwise not have them) and (2) increase the costs for higher status males of obtaining additional mates (either long or short-term mates) will increase overall parental investment by males.

To get a sense of mating systems in broad perspective, Table 1 summarizes data on primate mating systems. Under the column "Mating System," in "Multi-male polygyny" groups of males defend access to groups of females. Here there are no long-term mating-related associations between males and females (no pair-bonds). Within these groups, males still compete for access to females when females become sexually receptive (that is, when they can get pregnant). Females typically signal their entry into this period with changes in colouration, or by presenting their hind quarters to males. Competitions and consequent social rank determine the frequency of mating with receptive females, although within-group males of lower rank are still given some access. A receptive female chimpanzee, for example, may end up mating at least once with most adult males in a group. Such multi-male groups contrasts with "Single-male polygyny," which means that some individual males successfully associate with, and limit access to, groups of females. Other males have no access to these females. Gorillas, for example, live scattered in small groups with one dominant male who defends (or guards) several adult females, and their offspring. Bands of subordinate "bachelors" also roam these forests, occasionally challenging dominant males. Beginning with humans, the first column orders these categories according to their phylogenetic distance from humans. Humans are a type of Great Ape, and most closely related to chimpanzees, then gorillas and orangutans. Gibbons are a type of Lesser Ape which share a common ancestor with all the Great Apes. All apes are equally distant from Old World Monkeys.

| Table 1: Primate Mating Systems | | | |
|---|---|---|---|
| # | Primate | Phylogenetic category | Mating system |
| 0 | Humans | Great Ape | see below |
| 1 | Common chimpanzee | Great Apes | Multi-male polygyny (no pair-bonds) |
| 2 | Gorilla | Great Apes | Single-male polygyny (pair-bonds) |
| 3 | Orangutan | Great Apes | Single-male polygyny (pair-bonds) |
| 4 | Gibbons | Lesser Apes | Monogamous (pair-bonds) |
| 5 | Colobines (from multiple genera) | Old World Monkeys | Single-male polygyny (pair-bonds) |
| 5 | Old world monkeys (from multiple genera) | Old World Monkeys | Multi-male (no pair-bonds) |
| 5 | Hamadryas and gelada baboons | Old World Monkeys | Single male polygyny (pair-bonds) |
| 6 | New world monkeys (from multiple genera) | New World Monkeys | Multi-male polygyny |
| 6 | New world monkeys | New World Monkeys | Monogamous (pair-bonds) |
| 6 | Marmoset/tamarin | Callitrichidae (New World Monkeys) | Monogamous and sometimes polyandrous (pair-bonds) |

Putting the complicated question of humans aside, there are no Great Apes that mate monogamously or polyandrously (Boyd and Silk 1997; Chapais 2008). Gibbons, a Lesser Ape, do pair-bond monogamously, and together defend territories with their mates. Otherwise, only a few groups of New World Monkeys pair-bond monogamously. Saddleback tamarins are highly variable, and include groups that are monogamous and polyandrous, with some that are even multi-male. While active parental investment by males in offspring is extremely rare in primates, when it does occur it is always closely associated with monogamous mating systems. Monogamous male primate species invest in their offspring, unlike all other primates. Similar patterns hold in birds (Barash and Lipton 2009).

Central to understanding human mating and mating psychology is to recognize that humans, like some primates, form lasting pair-bonds. Gorillas, for example, form lasting pair-bonds in which males "mate guard" to both prevent other males from gaining sexual access to their partners, and protect their offspring—which they know are "theirs" if they have done a good job of mate guarding previously. However, unlike gorillas, human males in pair-bonds care—to varying degrees—for the offspring of their partners. This has been observed even in the smallest scale human societies, especially among foraging

populations (Hewlett 2000). Human males, much more than all other primates, invest in at least some of their offspring for many years.[7]

Efforts to reconstruct the pre-cultural (pre-marriage norms) mating systems of human ancestors are necessarily speculative. The most recent and comprehensive effort (Chapais 2008) suggests that the common ancestor to chimpanzees and humans probably had a single-male mating system, like gorillas (who happen to share a common ancestor with humans and chimpanzees). In different ecological conditions, males will be limited in the number of females that they can defend access to. If resources are widely scattered and scarce, single-male mating systems can turn into a mixture of groups, some involving monogamous pair-bonds and others involving one male and multiple females. Pair-bonding initially started out as mate guarding but as our lineage's brains began to expand, paternal contributions to subsistence and cultural transmission became increasingly crucial. The idea is that now human males possess psychological mechanisms both for mate guarding (to ensure paternity) and for regulating investment in offspring while considering both their paternity certainty and the cost of additional mating opportunities (Marlowe 2003; 2007).

For human males this creates two different kinds of reproductive strategies, one based on developing long-term pair-bonds and one based on seeking short-term (very short, usually) mating opportunities (extra-pair copulations). The selection pressures for the two strategies are somewhat different. For short-term mating, males should focus principally on females showing cues of fertility (ovulation) and health. For selecting long-term mates, to mother the offspring that the male will invest in, males should desire females who are young, healthy, fertile, emotionally stable, motherly, hard-working, and of suitable and compatible personal characteristics. Since a male's desire to invest in offspring is strongly related to his beliefs about his paternity, males in long-term pair-bonds should be concerned with the sexual fidelity of their females—but they should be most concerned when intra-sexual competition is fierce and some males have quite limited reproductive opportunities. Both strategies can be operative at the same time, although the decision to invest in offspring and in pair-bonding necessarily shifts attention, resources, and affective commitments (including hormonal shifts) away from seeking short-term mates. Substantial evidence from psychological experiments supports these predictions (Thornhill et al. 2003; Marlowe 2004; Gangestad et al. 2006; Rucas et al. 2006; Buss 2007). It is important to realize that all marriage systems tend to reinforce the long-term pair-bonding strategy, though there is nothing about the long-term strategy that limits a male to a single long-term partner. Societies like the Na in China, who traditionally lacked a marriage system, do without paternal investment entirely (Hua 2001).

Female mating psychology also has two strategies, but they are different from males' strategies in crucial ways. Successful reproduction, at least in ancestral human societies, required pair-bonding with a male, establishing his beliefs about paternity, and obtaining as much of his investment in her and her

[7] Note, the term "pair-bond" does NOT mean monogamy. A male gorilla can pair-bond with multiple females, especially if he invests less in each offspring. Each of these is an independent durable relationship that facilitates the safe rearing of offspring.

offspring as possible.[8] In long-term mates, females look for a combination of the ability to invest in the form of resources and skills/abilities, a willingness to invest, physical size, and high genetic quality. Extra-pair copulations do not improve a female's fitness in the same dramatic way they do a male's fitness. As noted, females have a limited number of times they can be pregnant in their lives, and they "want" (from a fitness perspective) to make each one count (get a high quality offspring). Once pair-bonded, it is more important for a female to appear chaste, since hints of sexual infidelity will reduce a male's paternity certainty and his investment in offspring.

Human females' other mating strategy comes into play when extra-pair copulations provide an opportunity to obtain higher quality genetic material (i.e., sperm), or other direct investment, while still obtaining investment from their current partner. Much recent evidence supports this by showing how women's mate preferences shift during ovulation. Around the time of ovulation women's relative preferences for high genetic quality increases and their interest in resources decreases, and they are also more interested in sex with men besides their long-term partner (Haselton and Gangestad 2006; Haselton and Miller 2006; Pillsworth and Haselton 2006).

Points relevant to the issue at hand:

- Within the context of marriage systems, which reinforce long-term bonds, male mating psychology strongly favours long-term pair-bonds with multiple partners. Males, like many primates, should seek to pair-bond with as many females as they can attract and support. Their ability to attract long-term partners will depend on many factors, but a major factor will be their resources and social status.
- Male psychology is generally highly averse to sexually sharing a female with another male. The evolutionary reasons for this involve paternity uncertainty. Males want to invest in their own offspring, not those of another male. Female ovulation is generally concealed from males, so males have no independent way to figure out which offspring are theirs—except by policing the fidelity of their mates (putting aside the recent development of paternity testing, which is irrelevant to evolved behaviours).
- It is also the case that males should respond to a shortage of females by more fiercely guarding their mates, and controlling their behaviour through force. This is especially true for resource-rich males because women pair-bonded with such men will still be drawn to the so-called "good-genes guys" to obtain better genetic material, to combine with the resources and investment from their pair-bonded mate. Of course, as noted, it is generally to the females' advantage to keep a male's paternity certainty high, otherwise he will likely invest less.
- Females are not particularly advantaged by pair-bonding with multiple males, unless resources are extremely tight, or there is some economic or ecological reasons why males cannot remain home regularly. I will describe the marriage and mating patterns surrounding the rare cases of polyandry (one female, multiple males) below.

[8] If males lack confidence in their paternity of offspring, they tend to invest less (Daly and Wilson 1988; Daly and Wilson 1999).

## C. Nature and Variation in Norms Regarding Spousal Number

To examine the nature and variation in patterns of human mating, and particularly in marriage patterns, we will need to examine the anthropological record of extant and historically known societies. The most extensive database of such information across diverse human societies is the *Ethnographic Atlas*[9], which currently includes information on marriage for 1231 societies. These data, summarized in Table 2, show that exclusive monogamy occurs in about 15.1% of the sample, polygyny in 84.6% of these societies, and polyandry in less than 1%.

The problem with using all these data straight from the *Ethnographic Atlas* is that the data points are non-independent. That is, many of these societies are probably related historically and have splintered off over centuries from older societies. This leads to the worry that certain traits might be common because certain societies happened to spread. To mitigate this problem, cross-cultural researchers use the Standard Cross-Cultural Sample (Murdock and White 1969). This is a sample of 186 preindustrial societies from across the globe that have been selected both to avoid these historical connections (which create non-independence) and because of the rich quality of material available for them. Table 3 shows that using this sample we find that the frequency of monogamous, polygynous, and polyandrous societies is 34%, 65%, and 1%, respectively.

Table 2. Marriage Systems in Cross-cultural Perspective

| Type | Ethnographic Atlas<br>N = 1231 societies (Gray 1998) |
|---|---|
| Monogamous | 15% (186) |
| Occasional polygyny | 37% (453) |
| Frequent polygyny | 48% (588) |
| Polyandry | 0.3% (4) |

| Table 3. Marriage Systems in the Standard Cross Cultural Sample[10] | Count (%)<br>N = 176 |
|---|---|
| Polyandry | 2 (1.1%) |
| Monogamy | 27 (15%) |
| Monogamy with occasional polygyny | 33 (19%) |
| Polygyny preferred (but <20% of male engage) | 54 (31%) |
| Polygyny preferred (> 20% of males engage) | 60 (34%) |

For our purposes, one problem with these data is that they represent merely ethnographic observations about how marriage systems actually operate on the

[9] The *Ethnographic Atlas* was first published by Yale anthropologist George Peter Murdock in a series of installments beginning in 1962 and ending in 1980 (published as the *Atlas of World Cultures* in 1980). It represents the single largest coded anthropological database of world cultures. The codes were derived from collections of ethnographic and historical materials on each culture. In 1998, Patrick Gray produced an updated and corrected version (Gray 1998). The *Standard Cross Cultural Sample*, developed by both Doug White and Murdock, is a subsample of the best known cultures, selected so as to maximize historical independence of the cultures contained in it.

[10] Data is drawn from White (1988). This work cross-checks and verifies earlier coding efforts.

ground. For monogamy, they do not separate *normative or imposed monogamy* from *ecological monogamy*.[11] By normative or imposed monogamy I mean groups that possess marriage norms that prescribe monogamy and punish violations. Ecological monogamy describes situations in which there are no prohibitions against having different marital arrangements, but the economic or ecological circumstances are such that males are not sufficiently different from one another to attract more than a single wife. Some small-scale societies have strong sharing norms that demand the equitable division of economic surpluses across the group. Such levelling will sometimes reduce polygyny to just monogamy, at least during periods of scarcity. Alexander et. al. (1979) argued that many small-scale societies described as monogamous are really only ecologically monogamous.

| Table 4. Cultural Norms | Count (%)<br>N = 183 |
|---|---|
| Monogamy prescribed (offspring of non-wives do not inherit) | 27 (15%) |
| Monogamy preferred but some polygyny | 32 (17%) |
| Polygyny for exceptional males (leadership, skills) | 45 (25%) |
| Polygyny for men of wealth, nobility, etc. | 33 (18%) |
| Polygyny preferred for most men. Most older men should have 2+ wives. | 46 (25%) |

In a detailed study of polygyny, White (1988) tried to distinguish the cultural rules of a society from their practices by re-coding the Standard Cross-Cultural Sample looking to distinguish cultural norms from the marriage-mating system. He distinguished cases of (1) norm-prescribed monogamy, (2) monogamy preferred but some polygyny, and (3) various degrees of polygyny—see Table 4. The coding for prescribed monogamy is strict in the sense of focusing on the existence of penalties for extra-marital offspring. Monogamy is prescribed in 15% of these societies, and preferred in another 17%. Where monogamy is only "preferred", polygyny inevitably creeps in.

| Table 5: Household Arrangements | |
|---|---|
| Marriage Arrangements | Ethnographic Atlas %<br>(N = 1267) |
| Independent nuclear, monogamous | 14.6% (186) |
| Independent nuclear, polygyny | 35.7% (453) |
| Preferentially sororal, cowives in same dwelling | 5.4% (69) |
| Preferentially sororal, cowives in separate dwellings | 1.4% (18) |
| Non-sororal, cowives in separate dwellings | 27% (344) |
| Non-sororal, cowives in same dwellings | 12.4% (157) |
| Independent polyandrous families | 0.32% (4) |
| Missing data | 2.8% (36) |

[11] Alexander et. al. (1979) distinguishes "Socially Imposed Monogamy" from "Ecologically Imposed Monogamy". Several authors have picked up and supported or expanded on this distinction.

Polygynous marriage systems are composed of many parts and much variation exists within the category. White's comprehensive statistical analysis empirically distinguishes two major kinds, or clusters, and one minor category. The major clusters distinguish sororal polygyny from general polygyny. In sororal polygyny there is substantial normative pressure for a male to marry real or classificatory sisters (who are typically some kind of cousin). This partially solves a major problem with polygynous households: conflict among co-wives over access to the husband and his resources. When co-wives are relatives they can more easily cooperate (humans have an evolved psychology for helping blood relatives), and tend to live in the same house. See Table 5.

Under general polygyny (meaning non-sororal), the other major type, wives are rarely sisters and may be quite different in age. Because of conflict among co-wives, each wife often maintains a separate household, or at least a separate hearth. It is under general polygyny that differences in the numbers of wives for each man can get extreme. Globally, sororal polygyny tends to occur in the New World (the Americas) while general polygyny tends to occur in the Old World, and remains common in Africa.

The minor cluster involves societies with sharp social stratification (classes or castes) in which only members of the high class can marry polygynously (monogamy is enforced in the lower classes by the upper classes). Realize also that ascription or assignment to the nobility or high caste is often by birth and blood, not by wealth. This means that rich traders who are of low birth status are limited to one official wife. This actually points to a coding challenge in the *Ethnographic Atlas* in which some highly stratified ancient societies like Egypt and Babylon were coded as "monogamous" although they actually practiced this class-based polygyny (Scheidel 2009).

In all polygynous societies, a man's social status, prestige, hunting skill, nobility, and wealth lead to more wives (Heath and Hadley 1998). Betzig (1982; 1993) puts a fine point on this observation by analyzing what the autocratic leaders of chiefdoms, empires, and early states did regarding wives and concubines. She reveals a strong pattern that, given the wherewithal to do so (no internalized social norms or laws to impede them), powerful men consistently assemble immense harems with 100 or more women. This ranges from High Chiefs in Tonga and Fiji to emperors in China and the Andes. Harems get bigger and bigger as the societies get larger and more complex.

As is clear from the data presented above, polyandrous marriages are quite rare. However, four other patterns are important: polyandry is (1) usually fraternal polyandry, meaning brothers marry the same woman, (2) typically found intermixed with other marriage types in the same society, including both monogamy and polygyny, (3) considered to be somewhat unstable with the youngest husbands leaving the marriage, or taking additional wives themselves (giving rise to polygynandry), and (4) principally confined to the Himalayan and, to a lesser degree, Indian regions of Eurasia, though it has been observed elsewhere, including in the Americas (Levine and Silk 1997). Many researchers have argued that polyandry emerges when sustaining a household requires the input of multiple males (Levine and Silk 1997). For example, in some places economic circumstances make it necessary for a male to travel long distances from the household while the presence of bandits requires a man to guard his family.

One sees reports of other forms of marriage in humans, such as group marriage, besides the broad categories outlined above. Many of these reports are of dubious quality. Sometimes they track to the observations of single travelers who noted a particular family arrangement (that is, one family), often with insufficient detail to judge just how well the observer had investigated. Or, non-anthropological observers have confused marriage with the custom of wife sharing or loaning, which was common in both aboriginal North America and Australia. In these societies, which were numerous (and usually polygynous), husbands controlled sexual access to their wives, and it is considered polite and honourable for them to give those "services" to close friends or honoured guests for a night or period of time. Since these other men are also often married, it might appear to a casual observer as if some kind of complicated marital arrangement exists.

Nevertheless, there may be a few societies that have some degree of group marriage, which exists alongside polyandry (Westermarck 1894). In particular, the case of the Todas in India was extensively documented by the psychologist and anthropologist W.H.R Rivers (1905). In this case, two brothers (usually) have married a single woman. When the family's economic prospects improve, a second woman is brought into the marriage, often a sister of the first wife. This suggests that some cases of group marriage exist, but nowhere do they form a stable societal pattern prescribed by social norms. After reviewing the evidence, Murdock (1949: 24) claims that group marriage has never been normative in any human society.

One feature of marriage norms is worth highlighting. As noted, marriage norms prescribe and prohibit roles and responsibilities related to economics, subsistence, child rearing, sex, and inheritance. But only 23.3% of societies in the Standard Cross-Cultural Sample (including monogamous and polygynous ones) have marriage norms that strongly condemn extra-marital sexual activity by males (Broude and Greene 1976). Meanwhile 89% of societies condemn all extra-marital sex by wives, though there are interesting exceptions in societies that believe in partible paternity (Beckerman and Valentine 2002).

## III. The Emergence of Modern Monogamy

Historians and anthropologists trace the origins of modern monogamy,[12] which spread across the world with the global expansion of Europe after 1500, back through Rome to the Greek city states (e.g., Athens and Sparta), and possibly back to the root of the Indo-European expansion (Macdonald 1990; Macdonald 1995; Fortunato et al. 2006; Scheidel 2009). Under European and at times specifically Christian missionary influence, monogamy spread throughout the Americas, Australia, and Oceania, and eventually into Asia. Legal monogamy was adopted rather recently in many places: 1880 in Japan, 1955 in India, 1963 in Nepal, 1953 in China (Scheidel 2009).

[12] Here I use "modern monogamy" to refer specifically to the cultural evolutionary trajectory that produced the Western notion of monogamy that all readers will be familiar with. This means that "modern monogamy" is a subset of societies with normative or imposed monogamy.

Greek city states first legally instituted monogamy as part of many different reforms, including elements of democratic governance, which were meant to build egalitarian social solidarity among their citizenries. Prior to this, all accounts suggest polygyny was common, at least among the nobility, and monogamy was a strange "Greek idea" (instituted legally in the early sixth century BCE in Athens). While Greek monogamy limited each male citizen to a single wife, it was considered acceptable to import sex slaves, which wealthy men did. This approach is interesting because it addresses one of the fundamental social dilemmas posed by polygynous marriage systems, by keeping local women available to poor men for marriage (avoiding the problems created by poor unmarried males, see below), while at the same time allowing rich men broad sexual access to "imported" women.

It is not entirely clear, but the Romans likely inherited and further developed the monogamy of the Greeks (as they did with many Greek ideas), though Etruscan marriage norms and relative sexual equality likely had some influence. Rome outlawed polygamy and regulated this with laws about sexual behaviour, birth legitimacy, and inheritance. Bigamists could be prosecuted for adultery, and married women had to be accompanied in public (Herlihy 1995; Macdonald 1995).

Later, Augustus felt Roman morality was declining and weakening his empire, so he instituted a series of reforms in an effort to get every man from age 25 to 60 to be married. Augustus evidently believed that making sure most men were monogamously married would strengthen Rome. Legal changes included: (a) restricting married men from having extra-marital sexual relationships with women who were not registered prostitutes, (b) limiting the size of the inheritance that unmarried men could receive, (c) making divorce a formal legal process (to discourage serial monogamy), and (d) eliminating concubinage for married men and making the offspring of concubines unable to inherit wealth. A series of Roman emperors after Augustus, including Tiberius, Claudius, Hadrian and Severii, continued to reinforce these legal principles and adapt the law.[13] The evolution of this aspect of the Roman legal system is intimately intertwined with the emergence of greater sexual equality under the law (Macdonald 1990; Herlihy 1995; Scheidel 2009).

Early Christian ideas about monogamy and sexual purity are a combination of the evolving Roman ideals and notions drawn from Greek stoicism. Christian ideals solidified and eventually spread throughout Europe (which was highly polygynous in the pre-Christian era and during the early days of Christianity). These ideas do not come from Judaism (which permitted polygynous marriage until at least the 11th century), or the Christian Gospels. At best, the New Testament offers some vague recommendations for monogamy among church leaders in the Pastoral Letters (Scheidel 2009). In the Old Testament, the prophets and kings are all polygynous.

European aristocracies, which derived from clan-based tribal societies, were highly polygynous in the 5th century. However, all sought alliances with the Catholic Church, which worked vigorously to impose monogamous marriage on the aristocracy. As European kings gradually converted to Christianity, sometimes out of true belief and sometimes for political expediency, the Church increasingly controlled

[13] While supporting laws strengthening monogamous marriage (believing it was for the good of the Empire), most Roman Emperors (not all) voraciously pursued immense sexual variety in their personal lives (Betzig 1992). They were monogamously married, but mated polygynously in extravagant fashion.

their marriages, and thus their legitimate heirs (that is, they controlled who had rights to political power). Since the lower strata of these societies, who were rapidly adopting Christianity, were economically limited to monogamous marriage anyway, the main line of resistance came from the nobility. Once the nobility began to accept monogamous marriage (without the harems of their peers elsewhere in the world), general monogamy and associated laws followed (Macdonald 1995). The medieval Church continued to adjust and spread the doctrines that reinforced monogamous marriage.

Historians have argued that this was one of the great achievements of the middle ages (Herlihy 1995), to put the peasants and the nobility on the same footing with regard to marriage, and it may have been a key step in the development of modern notions of equality—both of the equality among men, and of male-female equality. Realize that norms prescribing monogamous marriage temporally preceded all of the West's eventual development of human rights, women's liberation, etc.

As noted above, modern monogamy spread out from Europe because these societies were so successful, militarily, economically, and politically (Macdonald 1990; Herlihy 1995; Macdonald 1995; Scheidel 2009). Monogamy has even now been made law in some Islamic countries (Scheidel 2009), including Turkey (1926) and Tunisia (1956). The possibility that normative (often imposed) monogamous marriage was causal in the successful global expansion of European (and European-descent) societies is something that becomes increasingly plausible when we examine the societal-level effects of monogamy.

Key points of this section are:

- Most human societies in the anthropological record permitted polygynous marriage. In all cases, additional wives are taken by wealthy or prestigious males, or by nobility.
- Much of the monogamy observed in the cross-cultural record results from the relative economic equality among men.
- Polyandry is quite rare, and fairly concentrated in particular regions and economic circumstances. It often coexists with polygynous marriage.
- Modern monogamy is a peculiar set of institutions that emerged in some Greek city states (in particular in Athens and Sparta) to galvanize polity solidarity and sustain notions of equality. It was subsequently developed in Rome to increase the percentage of married citizens, and from there infused into Christianity, where it spread into Europe and eventually to much of the world.

These patterns are consistent with evolutionary approaches to human mating psychology, though they also illustrate the potency of social norms (and laws, etc.) in shaping behavioural patterns.

## IV. The Consequences of Increased Polygyny

### A. The Expected Effects of Polygyny

The prevalence and impact of polygyny changes dramatically as societies increase in both wealth and absolute inequality. In relatively egalitarian small-scale societies, including most foraging populations, the social implications of polygynous marriages are minor. Few men in these societies achieve sufficient

status to attract additional wives and if they do, this is typically limited to one additional wife (Marlowe 2003). In rare cases, very successful men might obtain three or at most four wives (Nielsen 2004). Among tropical African foragers, for example, the rate of polygyny ranges from 3% to 20% (Hewlett 1996). Often, because of the relatively greater dangers faced by males in hunting and violent conflict, the ratio of males to female drops below one, and polygyny partially absorbs the extra women into marriages.

However, as a society's wealth and inequality increase (exacerbated by inherited wealth and property rights), the degree of polygyny among the richest and most powerful men increases dramatically (Betzig 1982; Nielsen 2004). These increases in the degree of polygynous marriage can be expected to —*ceteris paribus*—have several consequences where, as in most modern societies, the numbers of men and women reaching marriage age are approximately equal:

- A pool of low-status men is created who will remain unmarried for all or most of their lives as all their potential marriage partners go to high status, wealthy men. Evidence outlined below suggests that such unmarried men will aggregate and engage in crime, social disruption, and personal abuses at higher rates.
- Competition for mates and access to sex created by the pool of unmarried men increases kidnapping of women (as sex slaves), rape, and prostitution. Data and proper analyses for kidnapping and prostitution are not available, but observed patterns are consistent with this prediction. Greater polygyny is strongly associated with higher rates of rape.
- Competition leads to females being married off, or promised in marriage, at younger ages. This results in increasing the age gap between wives and husbands. This reduces the equality of the marriage and leads to inexperienced and uninformed choices by young women and adolescents. Several lines of evidence converge to support this prediction.
- Because of the competition for mates, males will seek to control women (their wives, sisters, and daughters) more tightly, exacerbating female inequality, domestic violence, abuse, and possibly increased female suicides. The evidence supports several of these predictions.

Relative to monogamy, polygyny also impacts male parental investment by (1) eliminating opportunities for low-status males to establish pair-bonds (and invest in offspring), (2) diluting the per-child investment in larger and larger families, and (3) shifting investment by high status males from offspring into obtaining more long-term mates. While allowing the resources of richer men to be distributed among more children, the net effect of polygyny on male parental investment will often be to reduce the average per-child investment. This effect should be most potent in more patriarchal societies, and may result in poorer outcomes (on average) for the children of polygynous marriages compared to monogamous unions. The evidence is consistent with this prediction.

Note that it is possible to avoid creating the pool of unmarried males if population growth rates are particularly high, along with male mortality, and men marry much younger females (girls). In a rapidly growing population the size of the next generation can be double or triple the previous generation such that if young women are marrying mostly older men, most men can obtain two or more young wives

(Tertilt 2005; Tertilt 2006). Of course, these countries all have rates of population growth that are unsustainable in the long-run and high rates of girls marrying before age 18.

Below, I discuss these points in greater depth.

## B. Polygyny, Crime and Social Disorder

### (1) Polygyny's Creation of a Pool of Unmarried Low-Status Men

In this section I first lay out the mathematics that illustrate how polygynous marriages can increase the size of the pool of unmarried men. Then, I review the evidence that, for males, getting married (monogamously) is prophylactic against engaging in crime, social disruption, and other socially undesirable activities. Finally, at a societal level, I discuss evidence illustrating how this pool of unmarried men can impact crime rates, including murder, rape, and property crime.

This illustration reveals the underlying arithmetic that can result in a pool of low-status unmarried men. Imagine a society of 40 adults, 20 males and 20 females (actual sex ratios at birth favour males but put that aside). Suppose these 20 males vary from the unemployed high-school drop outs to CEOs, or billionaires (there are 425 billionaires in North America). Let's assume that the twelve men with the highest status marry 12 of the 20 women in monogamous marriages. Then, the top five men (25% of the population) all take a second wife, and the top two (10%) take a third wife. Finally, the top guy takes a fourth wife. This means that of all marriages, 58% are monogamous. Only men in the top 10% of status or wealth married more than two women. The most wives anyone has is four.

This degree of polygynous marriage is not extreme in cross-cultural perspective (White et al. 1988; Marlowe 2003), but it creates a pool of unmarried men equal to 40% of the male population who are incentivized to take substantial risks so they can eventually participate in the mating and marriage market. This pattern is consistent with what we would expect from an evolutionary approach to humans, and with what is known empirically about male strategies. The evidence outlined below shows that the creation of this pool will likely have a number of outcomes.

To explore the effect of this pool of unmarried men I discuss three lines of research. First, I present evidence showing the impact of marriage on males' likelihood of committing crimes or engaging in personally dangerous behaviour. The evidence indicates that unmarried men gather in groups, engage in personally risky behaviour (gambling, illegal drugs, alcohol abuse), and commit more serious crimes than married men, including rape, murder, theft, property crimes, and assault. Second, to address the issue of whether these individual effects scale-up to create societal level impacts, I examine how polygyny impacts crime rates using three different approaches.

### (2) The Effect of Monogamous Marriage on Crime

There is ample research on the relationship between monogamous marriage and crime. Cross-sectional data, which is the most plentiful, show that unmarried men are more likely than married men to commit murder (Daly and Wilson 1990), robbery, and rape (Thornhill and Thornhill 1983; Daly and Wilson 1988). Moreover, unmarried men are more likely than married men to gamble, and abuse drugs/alcohol (Daly and Wilson 1988). These relationships hold controlling for socioeconomic status, age, and ethnicity.

One problem with these analyses is that they are cross-sectional. This makes it hard to argue for causality, since individuals who are less likely to commit crimes, or abuse substances, might be more marriageable or more likely to choose to get married. Recent work partially addresses this by using a variety of longitudinal datasets combined with sophisticated statistical methods that allowed the researchers to follow the same individuals over time to see how marriage impacted their behaviour relative to their own pre-marital behaviour. Sampson et. al. (2006) used detailed longitudinal data tracking boys from a Massachusetts reform school from age 17 to 70.[14] Most subjects were married multiple times, which allows the researchers to compare their likelihood of committing a crime during married vs. unmarried periods of their lives. In this case, each individual is his own control. Across all crimes, marriage reduces a person's likelihood of committing a crime by 35%. For property and violent crimes, marriage cuts the probability of committing a crime by half. When men divorce or are widowed, their crime rates go up. Supplementary analyses show that "good marriages" are even more prophylactic than average marriages, and that marrying a criminal wife has the opposite effect—of increasing a man's likelihood of committing a crime (this is consistent with prior work by Sampson and Laub (1993)).

Applying a different statistical methodology to a different dataset, Horney et. al. (1995) also demonstrate how marriage (living with a *wife*) reduces a man's likelihood of committing various crimes. They used recall data from inmates in Nebraska to examine how entering school, getting a job, moving in with a wife, moving in with a girlfriend, and using drugs (including alcohol) impact criminal activities. Controlling for all of these other factors statistically, moving in with a wife reduces the probability of a man committing a crime by roughly half. This effect is strongest for assault and weakest for property crimes, but is significant for both of these as well as drug crimes. The size of this marriage effect is similar to entering school and much stronger than being on parole or probation. Interestingly, cohabitating with a girlfriend (as opposed to a wife) either *increases* or does not impact individuals' crime rates. Having a job had mixed effects, none of which were particularly large. The positive effect on crime of living with a wife is even larger than the negative effect created by heavy drinking.

By far, taking drugs had the biggest effect on increasing individuals' crime rates, as shown by Horney et. al. (1995). This suggests that Horney et. al.'s analysis may underestimate the total impact of marriage because marriage also reduces binge drinking and marijuana use (Duncan et al. 2006). Cohabitation, as opposed to marriage, has weaker positive effects on such abuses.

In another prospective longitudinal study in London, Farrington and West (1995) found that offenders and non-offenders were equally likely to get married (i.e., the marriage effect is not a selection effect), but that getting married decreased offending compared to being single, but only if men *resided* with their wives.

There are several hypotheses about what the causal relationship is between marriage and crime. I can only sketch them here. These hypotheses are not mutually exclusive and the strength of evidence varies substantially between them.

[14] From poor backgrounds and with less than a high school education (with a mean IQ of 92); this is precisely the kind of group who won't end up marrying at all in a polygynous society.

1. Marriage changes routine activities, especially with regard to deviant peer groups. Unstructured activities with peers increase the frequency of deviant behaviours among those ages 18 to 26. The same person, when married, will spend less time with same-sex peers than when not married (or before marriage). There is supporting empirical evidence for this hypothesis in the finding that the transition to marriage is followed by a decline in time spent with friends and exposure to delinquent peer groups, controlling for age (Warr 1998). This idea is related to Waite and Gallagher's (2000: 24) argument that marriage constrains people from certain kinds of behaviour (i.e., staying up all night drinking beer) that do not pay off in the long run (in health, happiness, or income).
2. Parenting responsibilities can lead to changes in routine activities because more time is spent in family-centred activities than in unstructured time with peers.
3. A change in criminal behaviour may occur in response to the attachment or social bond that forms as a result of marriage. Social bonding: the social ties of marriage create interdependent systems of obligation, mutual support, and restraint that impose significant costs for translating criminal propensities into action (Sampson and Laub 1993).
4. For some, getting married connotes "getting serious"; in other words, becoming an adult. Marriage means having someone to care for and having someone to take care of you, and these perceived responsibilities and obligations strengthen when children enter the family. Marriage norms mean being married changes expectations of one's proper behaviour (Sampson et al. 2006).

## (3) Polygyny and Crime

### *(a) Methods of Analysis*

While the evidence that marriage reduces an individual man's chances of committing crimes is substantial, an important question is whether these individual-level effects will aggregate up to impact crime rates, and thus society in general. It might be that these effects are limited to a certain small subset of males, or that they also somehow create countervailing effects on crime that affect overall rates (e.g., perhaps monogamously married women commit *more* crimes) such that there is limited or little overall societal-level impact.

In this section I examine what we can say about the relationship between polygyny and crime at the societal level. Since monogamous marriage has spread so successfully across much of the world, and some of the polygyny included in our measure occurs despite national laws, I will employ three different approaches: one examining the relationship between the degree of polygyny across countries and crime, a second using the percentage of unmarried males as a proxy in cross-national analyses, and a third using sex ratio as a proxy to look *within* countries (which avoids the statistical issues of comparing countries). The reason for this three-pronged approach is that the seemingly straightforward statistical analysis of the linkage between polygyny and crime conceals the non-random nature of those contemporary societies that still practice polygyny to substantial levels (e.g., polygynous societies happen to all have low GDPs), and the necessarily crude measure of polygyny used. The first prong of this analytical approach addresses this problem by using a wide range of control variables (GDP, inequality, democracy, being in Africa, etc.). But, since one may still worry that something is left uncontrolled for, the second prong picks out a link in our causal argument by using the percentage of unmarried men over age 15 as a proxy. This addresses several concerns (see below). Our third prong

uses a proxy (sex ratio) to predict crime rates *within* countries. This tackles the remaining challenges of comparing countries at the aggregate level, and affords more sophisticated econometric analyses.

***(b) First Prong: Greater polygyny is associated with higher rates of rape and murder***

Kanazawa and Still (2000; unpublished) looked at the relationship between the degree of polygyny in countries and their rates of major felonies. Their data on crime were taken from Interpol statistics. For polygyny, they coded all of the cultures in the *Encyclopedia of World Cultures* on a four point scale (from 0 = monogamy is the rule and is widespread, to 3 = polygyny is the rule and is widespread), and then developed a country-level value by aggregating all of the cultures within a country, and multiplying each scale value for each culture by the fraction of the country's population represented by that culture.

The authors estimated a series of regression models using degree of polygyny to predict rates of murder, rape, assault, and robbery, cross-nationally. As control variables, they included Economic Development (GDP per capita), Economic Inequality (Gini coefficients), Population Density, and Democracy (degree of), as well as dummy variables for Africa (equals 1 if country is in Africa, zero otherwise) and Asia. Their analyses show that greater polygyny is associated with higher rates of murder, rape, assault, and robbery, although only the rates of rape and murder are significant at conventional levels of statistical significance. It bears emphasis that this occurs even when GDP per capita and being an African country is controlled for. The greater the degree of polygyny in a country, the higher the rates of murder and rape (on average).

***(c) Second Prong: A higher percentage of unmarried men is associated with high rates of murder, rape, and robbery***

Kanazawa and Still (2000; unpublished) then replace their polygyny measure with the percentage of unmarried men age 15 and up for each country. This is a good proxy for polygyny for three reasons. First, our theory above argues that polygyny causes an increase in the percentage of unmarried men, so if true, we should find a relationship *at least as strong* between crime and this proxy. Second, both polygyny and other factors influence the percentage of unmarried men, so this allows us to examine a much broader range of cross-country variation, thereby avoiding the selective nature of those countries with high rates of polygyny. Finally, using this proxy avoids the (necessarily) crudely-constructed polygyny variable (a 4 point scale) used in the preceding analyses.

The authors again estimated a series of regression models, now using the percentage of unmarried males to predict rates of murder, rape, assault, and robbery, cross-nationally. As control variables, they again included Economic Development (GDP per capita), Economic Inequality (Gini coefficients), Population Density, and Democracy (degree of), as well as dummy variables for Africa and Asia. This analysis shows that the percentage of unmarried males (15+) is positively associated with rates of murder, rape, assault, and robbery, but only statistically significantly associated with murder, rape, and robbery. The higher the percentage of unmarried men in a country, the higher the rates of murder, rape, and robbery.

*(d) Third Prong: Within countries male biased sex ratio is associated with more crime*

To avoid the challenges associated with cross-national comparisons, we can examine data on the linkage between a male-biased sex ratio (which implies a pool of unmarried men) and crime. Such situations have arisen in a variety of circumstances, specifically in modern India and China, where parental preferences for sons have shifted the sex ratio in favour of males (Hudson and den Boer 2004), and on frontiers, such as in the American West during the expansion of the United States. The patterns of data from such diverse cases all tell the same story (Courtwright 1996; Hudson and den Boer 2004): unmarried men form bachelor-bands that compete ferociously and engage in aggressive, violent, and anti-social activities. As I'll describe, the cases of India and China are particularly informative, since the quality of data is sufficient for detailed econometric analyses aiming at assessing causal relationships.

In China, sex ratios (males to females) rose markedly from 1.053 to 1.095 between 1988 and 2004, nearly doubling the unmarried or "surplus" men (Edlund et al. 2007). At the same time, crime rates nearly doubled—90% of which were committed by men. The increase in sex ratio was created by the gradual implementation of China's one-child policy. Each province implemented the policy at different times for idiosyncratic reasons (unrelated to crime rates or sex ratios), and this provides an excellent opportunity for statistical analyses of the impacts of the policy and the alterations in sex ratio it created. This is because the date of implementation provides an exogenous variable that can be used to established directions of causality (more on this below). Moreover, this statistically fortuitous setup is also ideal for examining how the numbers of surplus males affect crime rates for two reasons. First, limiting child number through potent family planning led to preferences for male children. It would follow that where male children are exceptionally valued, they would benefit from heavy parental investment, and one should expect, if anything, that such children would be less likely to commit crimes than the boys of previous generations. Second, limiting family size means the population began to shrink, a demographic shift that opens up opportunities in the labour market and ought to decrease people's likelihood of committing crimes. So it is significant that, despite these pressures, crime actually went up.

Focusing on property and violent crimes across different provinces in China (Edlund et al. 2007), research employing a battery of sophisticated statistical analyses using many demographic and economic control variables shows that a 0.01 increase in sex ratio is associated with a 3% increase in property and violent crimes. These analyses also indicate that the effect arises from an increase in the size of the pool of unmarried men, and not from an increase in men in general. Inequality, unemployment, and urbanization also show positive effects on crime rates, but the effect of sex ratio is independent of these effects. Since it is possible that sex ratios may be measured with an error that is (somehow?) correlated with crime rates, the authors also show that the year of implementation of the one-child policy predicts crime rates in the same manner as sex ratio. This is important evidence that increasing sex ratio *causes* crime to increase.

To challenge their own hypothesis that the effect is driven by an increase in the surplus of unmarried men, the authors also examine crimes usually committed by white-collar criminals, such as corruption. These high status men are still marriageable, and thus insulated from the hypothesized effect. These

analyses show that sex ratio does not impact corruption rates. Thus, the increase in crime driven by a surplus of unmarried men is found in property (larceny) and violent crimes.

It is also worth noting (contrary to expectations) that increases in rape do not appear to be an important component of this increase in violent crimes, although rates of rape may have been offset by a dramatic increase in prostitution (from 25,000 to between four and six million prostitutes in China) during the same period of economic growth.[15] Analyses from several studies support the linkage between higher prostitution rates and a greater excess of males. Times and places include the American frontier, urban Africa, and medieval Europe (Courtwright 1996; Edlund and Korn 2002).[16]

Murder rates in India, which have been increasing since 1970, tell a similar story. Dreze and Khera (2000) show that murder rates across districts are likely influenced by sex ratio differences across districts (319 districts in India account for 90% of the population). The authors used murder rates because they worried about under- or biased reporting of other crimes—but deaths are hard to avoid reporting. Controlling for many other factors and across diverse specifications of these statistical models, districts with more males relative to females have much higher murder rates than would be predicted purely by an increase in the number of "average males"—that is, there seems to be an effect of the imbalance of males and females on the tendency of males to commit murder. The effect is large: going from a male to female ratio (in Uttar Pradesh) of 1.12 to one (in Kerala) of 0.97 cuts the murder rate in half. The authors also broke the sex ratio down into effects created by differences in sex ratio at birth and that created by migration of males in, or out. Both had significant effects, as expected. Literacy is also an important independent predictor of murder rates across districts, though poverty and urbanization are not.

Using historical data sources, Courtwright in his book, *Violent Land*, indicates that pools of unmarried men have created similar effects (high crime, violence, drug abuse, etc.) in a variety of circumstances. Courtwright examines a range of data to argue that the violent character of the American West arose principally from the large pool of unmarried men who migrated there. Variation in crime rates, including murders, in America corresponds to the spatial distribution of sex ratios in the 19th century. And, temporally, as sex ratios move toward 1 in regions, crime rates drop. Courtwright suggests a similar case can be made for New South Wales in Australia in the late 1700s and the Argentinean Pampas in the gaucho era (Courtwright 1996). Courtwright's historical data is not suitable to the kind of econometric analyses used for India and China above, but its consistency with these analyses broadens the applicability of the case they make.

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[15] Another potential implication of widespread polygyny is an increase in sexually transmitted diseases, such as AIDS. More unmarried males—primed to take risks—means more prostitution. Tucker and colleagues (2005) argue that the surplus unmarried men will have a profound effect on the spread of HIV in China.

[16] While it is the case that in China prostitution is most abundant in areas with the *least* skewed sex ratios, and trafficking of women is more common in parts of Africa and Europe which have sex ratios closer to 1 compared to China (United Nations Office on Drugs and Crime 2006), it is clear that many factors influence prostitution rates besides sex ratio (Edlund and Korn 2002), so this tells us little. More conclusive findings await a proper statistical analysis.

Finally, I note that there is one cross-national study (Barber 2000) showing that sex ratio is *negatively* (not positively) related to crime (murder, rapes, and assaults). Overall there are two reasons not to worry about conclusions drawn by this study. First, these are cross-national analyses, which mean many different factors vary across nations (unlike the within-country analyses above) that might be causing these effects. That is, truly causal variables not included in the analyses may correlate with the few variables included in the analyses to create these effects. Normally, econometricians would include many control variables to address this (like the Gini coefficient used in the Kanazawa and Still work), but Barber's study controlled only for infant mortality. Second, the sex ratios in many of these nations are very far from 1.05 (the birth value), which means that most of the sex ratio differences are driven by migration, or death of males due to organized violence. What these findings might be telling us is that males leave unstable and violent countries with more crime to move to peaceful and stable countries with less crime. Or, societies with more crime may tend also to have more war and organized violence, which disproportionately remove males (they get killed). This could be sorted out with the analysis of longitudinal (time series) data, such as was used for China above, but this analysis has not been done.

As an interesting aside to this study, I note that the author does find that *polygyny* is associated with more assaults (and marginally more murders), independent of sex ratio.

**(4) Polygyny and Crime Rates in the Anthropological Record**

The findings from modern societies are broadly consistent with studies of the anthropological database. In many pre-industrialized societies, including many small-scale societies, young unmarried men formed groups of marauders and later armies that went on raids to steal wealth and wives, while raping and pillaging. Polygynous societies engage in more warfare (White and Burton 1988), and this has often been to capture and enslave women to bring home as concubines or "wives" (White et al. 1988). This creates a self-perpetuating cycle in which bands of young males perform raids to obtain women each generation. The anthropological database also suggests that small-scale polygynous societies also have more crime relative to monogamous societies (Bacon et al. 1963)

The leaders of past societies have often harnessed pools of "surplus men" by sending them out to conquer new lands, or peoples. Such low status males, with highly restricted reproductive opportunities, seem to participate enthusiastically. It is therefore not surprising that the impact of sex ratio on organized violence is an ongoing and serious concern for political scientists and policy makers thinking about China and India (Hudson and den Boer 2004).

**C. Polygyny's Effects on Male Parental Investment**

In laying out the evolutionary theory I explained that males should shift between parental investment in offspring and investment in obtaining more mates depending on their situation. Low-status males with limited mating options, should pair-bond if possible (ensuring their paternity) and invest heavily in offspring. High status males with access to more mates (both long-term pair-bonds and short-term) should invest in obtaining more mating opportunities, but shift toward more parental investment if or when further mating opportunities become limited or costly. Theoretically, this implies that the effect of monogamous marriage systems, relative to polygynous ones, should be to shift male investment from obtaining more mates toward investing in their offspring. This applies to both low and high status males.

Most low status males will be able to find a long-term mate in monogamous marriage systems, and this will give them a chance to invest in offspring (which they otherwise would not have). High status males will face high costs for establishing additional mating, especially long-term pair-bonds. This will cause high-status males to shift investment away from obtaining more mates and toward their offspring.

I will first present findings from 19th century census data from Mormon polygynous communities in Utah, and then consider contemporary studies of African societies. Heath and Hadley (1998) analyze and compare the family composition and child survival data from 90 households consisting of 45 headed by wealthy men (top 2% of wealth in that community) and 45 headed by poor, but still married, men (from the bottom 16%). The first thing these data show is that wealthy males had on average 3.2 wives compared to 1.4 among the poor. All but five of the wealthy men had more than one wife. One rich man had 11 wives. Overall, the wealthy men controlled 120 women while the poor men controlled 63. This means that 90 husbands had 183 wives, which implies roughly 93 missing men had no wives (ergo, the pool of unmarried men).

In terms of parental investment, while wealthy men had more total offspring and longer reproductive careers (33 years for wealthy men compared to 22 years for poor men), the children of poor men had better survival rates to age 15. For poor men, 6.9 of their offspring survived on average to age 15, while for wealthy men only 5.5 of their offspring survived to age 15. This is amazing, given that the poor men had less than 10% of the wealth of the rich men, and the rich men had significantly more total offspring (including those that did not make it to 15). These data are consistent with the prediction that in polygynous systems poor, but married, men will have no choice but to invest in their offspring while rich, high-status men will invest in getting more wives.

Perhaps even more telling is a comparison of the poor men with one or two wives with the rich men with one or two wives. Among men with one or two wives, poor men's children out survived rich men's children 6.9 to 5.7 (mean number of offspring surviving to age 15 per wife). This supports the idea that poor men with limited resources for another wife tend to invest more in their existing offspring while rich men with the same number of wives invest less in offspring because they are busy seeking additional wives.

Realize that from the male evolutionary perspective, both rich and poor men were behaving in a manner consistent with maximizing their reproductive success. Rich men produced many more total surviving offspring (past age 15) then poor men; it is merely that their survival rates were lower. Having additional wives more than compensated, reproductively speaking, for the lower survival rates. Poor men could not add wives without decreasing the survival rates of their children: adding wives for poor men decreased child survival, but for rich men this had no impact.

These historical patterns are similar to those observed in recent studies of contemporary polygynous African societies. Children from polygynous families have an increased risk of diminished nutritional status, poor health outcomes, and mortality. These effects are consistent with diminished male parental investment. Ethnographic accounts suggest, for example, that fathers in highly polygynous households may not even know all of their children's names (Zeitzen 2008). Converging with the ethnography,

quantitative studies in Tanzania and Chad found that children in polygynous households had poorer nutritional status than their counterparts in monogamous households, as indicated by the children's height and weight measurements (Begin et al. 1999; Sellen 1999; Hadley 2005). In Hadley's (2005) Tanzanian study, the women had freedom of mate choice and a general abundance of food with little seasonal food insecurity. Despite these favourable conditions, the children of polygynously married mothers were more likely to be underweight, and were relatively shorter and gained less weight and height during the duration of the study than children of monogamously married mothers. These differences are more pronounced during periods of scarcity. The study started in the dry season, when food is more abundant, and at that time no significant differences in weight were detected between children in monogamous and polygynous households. At the second measurement period, during the wet season when food is scarcer, 24% of children in polygynous households were underweight compared to 8% in monogamous households. No differences were detected in wealth scores between monogamously and polygynously married women and monogamously married mothers reported running out of food early during the wet season more often than polygynously married mothers. Wealth differentials do not appear to explain the difference in nutritional status. The analyses controlled for children's age and sex, and household wealth. In Sellen's (1999) Tanzanian study, children of polygynous mothers had lower weight for age scores (WAZ) and height for age scores (HAZ) than children of monogamous mothers. Children's growth and fatness were correlated with both mothers' marital status and household wealth, with wealth having a greater effect than marital status. There was no significant interaction between marital status and household wealth. The analyses controlled for wealth and child and maternal characteristics.

Children in polygynous families are also at an elevated risk of mortality compared to children in monogamous families (e.g.,Defo 1996; Strassmann 1997; Amey 2002; Omariba and Boyle 2007). A study using data from 22 sub-Saharan African countries found that polygyny is a significant risk factor for child mortality (Omariba and Boyle 2007). Children in polygynous families were 24.4% more likely to die compared to children in monogamous families. The degree to which polygyny elevated mortality risk varied by the GDP of the child's country, with polygyny posing a smaller risk to mortality in wealthier countries. Family characteristics (maternal education, socioeconomic status, and urban versus rural residency) also reduced the effect of polygyny on child mortality by approximately a third. Similarly, a study of six West African countries found that infants in polygynous families had a 60-70% greater risk of dying compared to children in monogamous families (Amey 2002). This study did not control for household wealth but did control for other socioeconomic variables such as maternal and paternal education and rural versus urban residency.

Finally,,among the Dogon of Mali (Strassmann 1997), children (under age 10) in polygynous households were 7-11 times more likely to die than their counterparts in monogamous households. Strassmann tested to see if resources are diluted in polygynous households (thus offsetting the benefits of being in a household with relatively high total wealth) and found that on a per capita basis, resources were comparable between polygynous and monogamous households. As in the Tanzanian studies (Sellen 1999; Hadley 2005), wealth was comparable between the polygynous and monogamous households and hence does not appear to be the reason for the elevated risk of mortality. Although the evidence

indicating an increased risk of mortality for children of polygynously married mothers is robust, the reason why polygyny elevates risk is unclear, though we speculate that it may arise from decreased paternal investment.

## D. Polygyny, Age of Marriage, the Age Gap and Gender Equality

### (1) Measuring Equality-Related Effects

The theory presented above proposes that the possibility of polygynous marriage ignites a competitive process for wives among men that increases males' efforts to control females (wives, sisters, and daughters) and drives down the age of first marriage for females while increasing the age gap between husbands and wives. Seeking out the only available (unmarried) females for both first and subsequent wives, men of all ages pursue younger and younger females. Competition drives men to use whatever connections, advantages, and alliances they have in order to obtain wives, including striking financial and reciprocal bargains with the fathers of daughters (this is the very common practice of brideprice). Once girls and young women become wives, older husbands (and brothers) will strive to "protect" their young wives from other males (to guarantee paternity of any offspring), and in the process dampen women's freedoms and exacerbate inequality.

The challenge of testing these ideas against evidence arises from the fact that most highly polygynous countries in the world today are in Africa, and are among the least developed nations. Several countries in the Middle East allow limited polygyny (often based on Islamic prescriptions), but only low percentages of rich men actually have more than a single wife. This uneven distribution of polygynous societies means that it is difficult to tease apart the effects of polygyny vs. the effects of all the other variables that might influence Africa's situation. Here, I will use a five-pronged attack to deal with these issues. First, I will examine macro level (country level) data, comparing highly polygynous countries with (a) less polygynous countries in Africa, and (2) monogamously marrying countries from between 20 degree south latitude and 20 degrees north latitude (i.e., tropical non-African nations). Second, I discuss an economic model of marriage that was calibrated to the data from highly polygynous societies (to which it provides a good fit), and then used to address the hypothetical question: what would happen if monogamous marriage were imposed? Third, I examine four case studies and compare the age of first marriage for women and age gap between married people in polygynous and monogamous marriages. Fourth, I use sex ratio as a proxy for the effects of polygyny on women. And finally, I return the relationship between rape and polygyny.

All these analytical efforts converge to the same conclusions: polygyny (1) drives the age of females' first marriage down into adolescence, and (2) increases the age gap between husbands and wives. The evidence is also consistent with the idea that imposing monogamy decreases fertility (offspring per woman) and causes men to shift their investment away from seeking additional wives in a manner that increases GDP per capita.

### (2) Macro-level Data

Table 6 presents data compiled by Tertilt that compares (1) Highly Polygynous Countries in which more than 10% of married men have two or more wives, (2) Less Polygynous African Countries in which less

than 10% of married men have two or more wives, (3) Comparable Monogamous Countries (not in Africa) that lie between 20 degrees north and south latitudes (developing countries), and (4) North America and Western Europe (which provides only a familiar reference point). The row variables are mostly self explanatory, though I note that the Age Gap row gives the difference between the mean age of the husband or wife at their respective *first* marriages. In a polygynous society, the gap would further increase if the mean age for males included all subsequent wives (Tertilt 2005; Tertilt 2006).

**Table 6. Comparison Data from Highly Polygynous, Less Polygynous and Comparable Monogamous Countries**

| Variables | Highly Polygynous (>10% married men) | Less Polygynous | Comp. Monogamous Countries | North America/Western Europe |
|---|---|---|---|---|
| # Countries | 28 | 20 | 58 | 24 |
| Female age at first marriage | 19.9 | 22.7*** | 25.0*** | 29.6*** |
| Age gap (with first wife only) | 6.4 | 3.9*** | 2.8*** | 2.4*** |
| Total fertility | 6.78 | 5.97** | 4.62*** | 1.84*** |
| Child mortality rate, 1980 | 19.4% | 18.3% | 11.6%** | 1.4%*** |
| Infant mortality rate, 1980 | 12.2% | 11.5% | 6.9%** | 1.2%*** |
| GDP per capita, 1985 | $975 | $1574* | $2798*** | $11,950*** |

Highly Polygynous countries in the world today have the lowest age of first marriage for women at 19.9 years, and the largest age gap between husbands and their first (or only) wife. The age of 19.9 years is significantly lower than in less polygynous countries in Africa (at 22.7 years) and much lower than poor monogamous countries in the tropics, where the mean age is 25. The asterisks indicate the degree of statistical significance compared to Highly Polygynous Countries.[17] In Highly Polygynous Countries, on average, 36.7% of women are married between the ages of 15 and 19. The age gap increases from 2.8 years in comparable monogamous countries to 6.4 years in the highly polygynous societies. In the most polygynous countries the average gap goes as high as 9 years.

The data on infant and child mortality are also consistent with the theoretical predictions regarding parental investment. In both highly and less polygynous societies married men are probably investing in obtaining additional wives, and not in their children. In poor, but monogamous, countries, males lack the option of adding wives, so they invest in their offspring. Infant and child mortality rates in comparable monogamous countries are nearly half of those in highly polygynous countries.

Tertilt (2005) asserts that you obtain the same pattern if you create your comparable sample of monogamous countries by matching on GDP instead of latitude. She did not do this because, as I discuss below, she argues (based on her economic model) that when males cannot invest in obtaining more

[17] * indicates $p < 0.05$, ** indicates $p < 0.01$, and *** indicates $p < 0.001$.

wives (because of imposed monogamy) they invest and save in a way that generates both reduced population growth and more rapid economic expansion (increasing GDP per capita). Thus she suggests that the nearly threefold increase in GPD per capita between Comparable Monogamous Countries and Highly Polygynous Countries is partially caused by legally imposed monogamy.

The available cross-country evidence also supports the idea that permitting polygyny increases males' drive to control women, an effect created by competition among males for access to women. Table 7 uses the same partitioning of countries used above. The UNDP's Gender Empowerment Measure aggregates a variety of measures of female empowerment into a single index (ranging from 0 to 1). It includes male-female income ratios and female representation in high status jobs. In 2009, Canada was ranked 4th in the world on this, with a score of 0.83 (Norway is currently 1st at 0.91). Highly Polygynous countries score at 0.22, while poor monogamous countries score at 0.50. The ratio of adult female to male literacy tells the same story.

**Table 7: Female Equity Comparison**

| Variable | Highly Polygynous | Comparable Monogamous |
|---|---|---|
| Gender Empowerment Measure (GEM), 2003 | 0.22 | 0.50 |
| Ratio of adult female to male literacy rates, 2005 | 0.66 | 0.95 |

### (3) A "What If" Economic Model of Imposing Monogamy

Tertilt developed an economic decision-making model using standard modeling tools from economics to examine what gives rise to polygyny, how it affects an economy, and what impact, if any, imposed monogamy has (Tertilt 2005). Her model assumes men and women care about both having children and "consuming," but that men can continue to reproduce their entire lives while women are limited to only a portion of their lives (she also assumes that men tend to prefer younger women). She shows that her model produces polygynous mating patterns under a wide range of conditions, and that it can produce results that match real-world patterns related to age-gaps, fertility, and saving rates for polygynous countries.

She then calibrates the model to the Highly Polygynous data shown above (and other related data) and then asks the question of what happens when she imposes monogamy on everyone (in the model). The result is that the fertility rate goes down, the age gap goes down, saving rates go up, bride prices disappear, and GDP per capita goes way up. This occurs because men (in the model) can't invest in obtaining wives or selling daughters (which they do massively, otherwise), and instead they save and invest in production and consumption.

In a follow-up paper, Tertilt (2006) uses the same model to compare the effects of imposing monogamy legally, which has proven quite challenging in Africa, to the effect of increasing the power of women (the strategy adopted by the UN). To incorporate this, Tertilt alters her model to shift reproductive decision-making from men to women, but leaves polygyny legal. In this female-choice model, the number of wives per husband declines a little bit, as does fertility. GDP per capita also goes up some, and savings

rates go up substantially. Overall, however, empowering women does not have nearly the impact on GDP per capita and fertility that imposing monogamy does in this model. This underlines the point made above that giving women free choice does not necessarily yield monogamy, though it does yield less intensive polygyny.

## (4) Micro-level Case Studies

### *(a) The Value of Intracultural Observations*

The problem with the above cross-country data is that most Highly Polygynous countries are in Africa, and being highly polygynous is thus strongly correlated with a great many factors. Aspects of demography, colonial history, specific economic policies, etc. could influence both polygyny and our other variables of interest without polygyny being causal. Normally, analysts would try to address this statistically by controlling for many other variables, to assess the independent relationship of high levels of polygyny with the variables of interest. However, in this case, there is just not enough global variation in high levels of polygyny (e.g., no monogamous countries in sub-Saharan Africa). To address this problem, I zoom in on specific case studies comparing monogamously married people to polygynously married people *in the same societies*. Since the people analyzed in these all live in the same social group, any differences we observe cannot be traced to observed country-level differences (e.g., in freedom of the press).

It is important to realize that our theoretical approach is focused principally on how polygyny will create differences *among societies* in factors like the age gap between husbands and wives and the power of women in society. However, if men recognize early in their reproductive careers that they are likely to be either monogamously married (at best) or polygynous, we may be able to detect individual-level differences (as opposed to societal-level differences) based on the strategies men deploy going into marriage—just as we saw differences in the survival of children in 19th century Mormon communities. Men who are either highly polygynous or on the road to high levels of polygyny might prefer young wives, perhaps because they are easier to control. The higher status of polygynous men, or of men likely to be polygynous in the future, should permit them to more effectively get what they want. Yet, in societies in which men are more equal or upwardly mobile, strategic shifts in preferences for younger wives might not emerge early enough to create observable within society differences. Thus, it will be impressive if we find any differences in the predicted directions.

This case material suggests two findings. First, a polygamous man will marry a younger first wife than a monogamous man (although the difference in age is not always statistically significant, it is always in the predicted direction). Second, the age difference between husbands and wives is greater in polygynous marriages than in monogamous marriages. To illustrate these patterns, I provide data from four disparate societies in Africa, the Middle East, and Australia.

### *(b) Bedouin Arabs, Israel*

A study of Bedouin Arab women living in Israel's Negev (Al-Krenawi and Graham 2006) found that the average age of first marriage for polygynous women and monogamous women was 19.2 and 19.5 respectively. These are not statistically significantly different, but do go in the predicted direction.

Polygynous men tend to be older at first marriage than their monogamous counterparts (27 vs. 23, respectively; p<0.001). This difference in men's age at marriage creates a greater age gap between husbands and wives in polygynous marriages (7.83 years) compared to monogamous marriages (3.49 years). See Table 8. All of the Bedouins are Muslim and 50% live in villages recognized by the state of Israel and the other 50% live in unrecognized villages. Culturally, they are characterized by their shared attributes of patriarchy, collectivism, and authoritarianism (Al-Krenawi and Graham 2006).

Table 8. Age at first marriage among Bedouin Arabs

| | Women | | Men | |
|---|---|---|---|---|
| Variable | Monogamous marriage | Polygynous marriage | Monogamous marriage | Polygynous marriage |
| Avg. age at 1st marriage | 19.46 | 19.16 | 22.95 | 26.99* |
| Avg. # of years younger than husband | 3.49 | 7.83* | -- | -- |

* p<0.001

*(c) Rural Turkey*

Polygyny is illegal in Turkey. Nonetheless, polygyny is common in rural villages in south-eastern Turkey and it is estimated that 2% of all marriages in Turkey are polygynous. Senior wives are the first women to whom a man got married. A junior wife is the most recent wife joining the marriage. Senior wives are higher status than junior wives, and junior wives have no legal rights on the husband's heritage. Prior to 2004, children of junior wives were registered as belonging to senior wives but this practice changed when laws were passed to recognize the legitimacy of children born in extramarital affairs (Ozkan et al. 2006). The percentage of girls marrying under age 15 is significantly different across marriage types—see Table 9. Thirty percent of polygynous senior wives marry under age 15 versus only 10% of monogamous wives (Ozkan et al. 2006). The average age of first marriage for senior polygynous wives is 15, compared to 17 years of age for monogamously married wives. This difference is not statistically significant, though it goes in the predicted direction.

Table 9. Age at first marriage in a municipality in south eastern Turkey

| | Monogamous wives | Polygynous-senior wives | Polygynous-junior wives | Statistical significance |
|---|---|---|---|---|
| Avg. age at 1st marriage | 17 | 15 | 18 | Not significantly different |
| % of women married under age 15 | 10 | 30 | 13 | p=0.01 |

*(d) Arsi Oromo of southern Ethiopia*

The Arsi Oromo of southern Ethiopia are agro-pastoralists. A third of women are in polygynous marriages, and approximately 29% of men have two wives and 11% have three or more wives. It often takes many years for a man to accrue enough wealth to take an additional wife and the average number of years between marriages is 12.6. Among the Arsi Oromo, the average age of marriage for senior wives in polygynous marriages is 15.3 compared to 17.3 for wives in monogamous marriages. Average age at first marriage for junior wives is older than that of monogamous wives. The difference in age of

first marriage is statistically significant between each group of women (Gibson and Mace 2007). See Table 10.

| Table 10. Age at first marriage among the Arsi Oromo of Ethiopia | | | | |
|---|---|---|---|---|
| | | Polygynous wives* | | |
| | Monogamous wives* | Senior wives | Second wives | Third and higher wives |
| Avg. age at first marriage | 17.25 | 15.32 | 18.73 | 20.1 |

*All ages are statistically significantly different from each other.

*(e) Arnhem Land, Australia*

The Aboriginal community in south-east Arnhem Land, Australia was traditionally polygynous foragers. In the 1950s, the community was established as a mission settlement and polygyny was prohibited. Although polygynous marriages continued over the next 30 years, the number of new polygynous marriages declined and by the late 1980s they were almost entirely eliminated. However, women who had previously been married in polygynous unions continued to live in the community. As of 1981, 65% of the women in the community were currently, or at some point in their life had been, in a polygynous marriage. Based on record reviews, census data and interviews, a reproductive history of women from the community was created (Chisholm and Burbank 1991). The findings revealed that there was a large age difference between husbands and wives in polygynous marriages; a gap that was much greater than that in monogamous marriages (see Table 11). Women in polygynous marriages were younger at the birth of their first child than monogamously married women, although this difference is not statistically significant. Reflecting the age difference between spouses, men in polygynous marriages were significantly older at the birth of their first child compared to men in monogamous marriages.

| Table 11. Ages at first birth and age difference between spouses among Aboriginals in Arnhem Land, Australia | | | |
|---|---|---|---|
| | Monogamous marriages | Polygynous marriages | Statistical significance |
| Avg. age difference between husbands and wives | 7 | 17.1 | p=0.0001 |
| Avg. mother's age at 1st birth | 19.32 | 19.19 | not statistically different |
| Avg. father's age at 1st birth | 28.71 | 36.27 | p=0.004 |

*(f) Summary of Data from Case Studies*

Overall, the findings from these case studies converge with the cross-country evidence reviewed above. Polygyny reduces the age of first marriage for women, and increases the age gap between husbands and wives. However, these intracultural studies on marriage age also are interesting because they *suggest* that, in addition to driving down marriage age for females across the board (that is, in both monogamous and polygamous unions), there is a further effect specific to polygynous marriages: that is, polygynously marrying seem to select younger girls as wives (even as first wives) compared to monogamists, both in absolute but especially in relative terms. One plausible explanation for this is that

selection of a younger (and especially a relatively younger) bride increases a man's ability to exert control over her.

It is particularly interesting that the average ages of these first wives of men who will later be polygynous are as low as 15 years. Work in evolutionary psychology suggests that females hit their maximum mate value (based on their expected future number of offspring) between ages 18 and 20 (Barrett et al. 2002), which explains in evolutionary terms why adult males (say, ages 20+) are typically most sexually attracted to younger women while adolescent males are most sexually attracted to older females (that is, to the 18 to 20 year olds). In light of this, the comparison of polygynously marrying to monogamously marrying males in the above studies suggests that polygynously marrying men are trading off the (excessive) youth of their wives against some other factor, while monogamously marrying males are not. This other factor may relate to the need for polygynously marrying men to have wives they can more easily control.

If we accept that a smaller disparity in age is an indicator of male-female equality (and it is quite striking how marriage-age disparity is lower in societies with greater male-female equality), and if we accept that a young girl (young in absolute and relative terms) may be more compliant than a woman closer to the husband's own age, then the data suggest that polygynous marriages will, on average, involve a degree of inequality above and beyond the background social levels even in societies that are heavily patriarchal and generally oppressive to women.

### (5) Sex Ratios and Female Equality

#### *(a) Sex Ratio as a Proxy to Determine the Effects of Polygyny on Women*

While highly polygynous marriage systems are confined principally to Africa, sex ratios vary much more widely across the globe. Here we assume that sex ratios favouring males will create effects that mirror those of polygynous marriage by increasing the competition among men for access to women. If true, sex ratio ought to have the same effects on female power and well-being that polygyny has, *for the same reasons*. Men will tighten their control over wives, sisters and daughters. This may appear counterintuitive, as one might expect women to gain power given that they are the "limiting resource." However, empirical evidence indicates that this is not the case. As women become scarce they tend to be viewed as commodities and, along with the greater control exerted over them, fertility rates increase and divorce rates decline (South and Trent 1988).[18] An analysis of 117 countries found that in countries with a high ratio of males to females, females married younger (South and Trent 1988). Currently, the declining sex ratio in China has caused rich families to acquire infant girls to guarantee their sons have wives (Hudson and den Boer 2004). Similarly, in some regions of India (the world's largest democracy) more than half of females in some regions are married before age 15 (Burns 1998). As well, in the

[18] Both fertility rates and divorce rates are considered reliable proxies of women's empowerment by those who study human development (South and Trent 1988). When women have more power in the household and more education they have fewer children and divorce more frequently. Additional children are generally a greater cost for women compared to men. Each additional child costs women in terms of labour, health, and ability to attract additional mates. For divorce rates, suppose that 10% of the time only the husband wants a divorce, 10% of the time only the wife wants a divorce, and 10% of the time both want a divorce. If women have no power, the divorce rate is 20%. If women have power, it's 30%.

American frontier where females were in short supply, brides were reported as young as 12 and 13 (Courtwright 1996). This converges with our findings above, indicating that competition for scarce females drives the age of first marriage down.

To explore the relationship between female empowerment and sex ratio, South and Trent also analyzed data on numerous variables related to women's roles and status in relation to the country's sex ratio. The authors analyzed data from 117 countries around the world. The sample included countries from the full spectrum of development, but with a bias towards more developed countries (as the lesser developed countries were less likely to have the needed data available). The sex ratios for each country were based on data available for the number of males and females between the ages of 15 and 49 from any year between 1973 and 1982. Variability in the sex ratio could be due to differences in the sex ratio at birth, migration, or mortality. The authors speculate that in countries with high mortality rates, such as in East Africa, mortality accounts for most of the skewing of the sex ratio (with mortality impacting males between 15-49 more than females). Analyses controlled for the reliability of the sex ratio data for each country, and the socioeconomic development of each country (an indicator composed of variables including GDP, infant mortality, percentage of population living in urban areas, and life expectancy). In these analyses, higher sex ratios (i.e., more males than females) predict lower participation of women in the labour force, lower illegitimacy rates, and lower divorce rates (all illustrating male control).

In more developed countries, they found that the sex ratio had a *greater* effect on indicators of women's roles than in less developed countries, with the exception of participation in the labour force. In more developed countries, higher sex ratios predict for women a lower age at first marriage, higher fertility rate, and lower literacy.[19]

Some of South and Trent's analyses suggest that living in a society with a highly skewed sex ratio may contribute to diminished well-being for women, as evinced by the high female suicide rate relative to that of males in countries with a high sex ratio. However, data on female and male suicide rates were only available for 51 countries and were not considered highly reliable. These findings, while weak on their own, are consistent with suicide rates in China (World Health Organization (WHO)2003), which has the world's highest female suicide rate (14.8 per 100,000). As a point of comparison, Canada's female suicide rate is 5.1 per 100,000. China does not have a high suicide rate for males (13 per 100,000 compared to Canada's male suicide rate of 19.5 per 100,000) (WHO, 2003), indicating that the high female suicide rate is not a reflection of a generalized sense of diminished well-being in China but rather a problem specifically affecting females. The trend of increased female suicide rates in low female sex ratio countries suggests that something about being a woman in a country with a relative scarcity of

[19] These cross-national analyses could suffer problems similar to those discussed for Barber (2000) above. However, two reasons suggest these issues might be less pertinent in this case. First, South and Trent used an accepted measure of socioeconomic development as a control (instead of only infant mortality), a larger sample, and also included a control for data quality (which Barber did not). The use of the socioeconomic index of development as a control is crucial for their findings. Second, it is more difficult in this case to see how biased migration patterns could have skewed these results. Males would have to be disproportionately moving from countries in which women are more equal into countries in which they are less equal.

females creates an environment that is deleterious to the well-being of women.[20] The relevance of these particular findings for understanding the effects of polygyny depends on the assumption that the competition for females created by an imbalanced sex ratio is similar to that created by polygyny.

Overall, while it's possible that the causal pathways for some of these effects are different from, and specific only to, sex ratio, the convergence with both our macro-level comparisons of countries with differing degrees of polygyny and our micro-level case studies of monogamous and polygynous marriages in the same societies is striking. Increased competition for females, whether due to polygyny or to unbalanced sex ratios, seems to depress the age of marriage for females, increase the age gap between husbands and wives, and increase male efforts to control females. This seems to apply in developed societies as well as underdeveloped and developing societies.

***(b) Polygyny, Sex Ratio, Rape and Sexual Exploitation***

Evolutionary researchers have suggested that rape is likely to be a greater risk for women living in societies with a scarcity of available females. An evolutionary analysis examining why males commit rape and the conditions under which they do so suggests that males may use a rape strategy for reproduction when the chance of reproducing using other mating strategies is extremely low. It is not the case that males are consciously calculating the odds of reproduction and then rationally selecting rape in order to increase their reproductive fitness. Rather, some evolutionary theorists suggest that males have genes that provide a flexible repertoire of mating strategies and that the strategies employed can vary over an individual's life depending on the context (Thornhill and Thornhill 1983; Pedersen 1991; McKibbin et al. 2008). If a male has no options for reproducing using socially acceptable strategies, such as in a marital union, then he may try to reproduce using rape. Although the odds of impregnating a rape victim are low, it is higher than the alternative if there are no other mating opportunities available. Following this theory, and combined with the general increase in criminality (including violence) of men and the indicators of increased male control and lack of female equality in female-scarce populations, it is expected that sexual assaults will be more prevalent in polygynous societies.

At the macro-level, the available evidence is presented above in my discussion of the relationship between crime and polygyny. In cross-national analyses, greater polygyny is robustly associated with higher incidence of rape, even when controlling for economic differences and including continental control variables. This same relationship is found when the percentage of unmarried men is used instead of polygyny: more unmarried men, more rape.

At a micro-level, evidence for a positive relationship between degree of polygyny in a society and rape rates comes from the Gusii of Kenya (LeVine 1959). This polygynous society has a bride price that is paid from the groom's father to the bride's father in the form of cattle. Historically, the size of the brideprice continually escalated until the government periodically intervened and forced the price to be lowered. The lowered rates held temporarily and then the escalations began again. The size of the brideprice impacted how many males were able to get wives because many males were unable to afford the

[20] However, a country's socioeconomic development has a greater effect on the female suicide rate than the sex ratio (South and Trent 1988).

brideprice, especially if they did not have a sister who had gotten married (because the cattle the family receives for the sister can be used to pay the brideprice for her brother). Many fathers tried to arrange marriages for their daughters with older, wealthy men so with higher brideprices, more males were excluded from marriage and the degree of polygyny increased. In 1936-1937, brideprices were at their highest levels in nearly 50 years and many young men who could not afford brides turned to cattle raiding and rape. As brideprice increased rape rates also increased. In one reported incident, a group of young men captured a group of females at the market and raped them, precipitating a decrease in brideprice. The lower rates held until 1950, during which time rape rates were lower. When brideprices began to escalate again in 1950, outbreaks of rape and the existence of rape gangs again occurred.

The evidence from the Gusii suggests that men rape when they are unable to access females in socially legitimate ways and refrain from rape when women are available to them. Consequently, polygynous societies may face an increased risk of rape as access to females is denied to a subset of males in the population. As noted above, in addition to rape, the sexual needs of an increasing pool of unmarried men are met by expanding sex industries. In San Francisco's Chinatown in the mid-1800s, a time and place with a low female to male ratio, the 1850 census indicates that 71% of the area's females were prostitutes (Cheng and Bonacich 1984) and when Australia was populated by male European convicts but few European women, it is believed that prostitution was widespread (Alford 1984).

### *E.* Interpersonal and Psycho-Social Impacts on Wives in Polygynous Marriages

Women in polygynous marriages may experience both benefits and costs associated with their marital arrangement. The identified benefits stem from the relationship with co-wives, who may provide assistance in household work, childcare, and companionship. Women in polygynous marriages may experience greater autonomy than women in monogamous marriages because the assistance from co-wives makes time available to pursue other endeavours (Anderson 2000). Moreover, as is the case in households of Bedouin-Arabs, when relationships among co-wives improve, the benefits ripple through the family to improve other relationships, including those among siblings, between wives and husbands, and between children and fathers (Al-Krenawi 1998).

Despite the potential advantages stemming from harmonious or helpful co-wife relationships, there are studies indicating detrimental consequences associated with being a woman in a polygynous marriage *in some societies* (but not all, see below). Studies among Arabs in Israel (Al-Krenawi and Graham 2006) and in Turkey (Ozkan et al. 2006) found significantly higher rates of psychological distress and disorders among polygynously married women compared to their monogamously married counterparts. Among the disorders/distress experienced at significantly elevated rates by polygynously married women in the Arabic sample are depression, obsession-compulsion, hostility, anxiety, phobia, psychoticism, and paranoid ideation (Al-Krenawi and Graham 2006). Women in polygynous marriages also reported significantly more problems in family functioning and marital relationships and less satisfaction in life than monogamously married women in their societies (Al-Krenawi and Graham 2006). In the sample from Turkey, the increased likelihood of having a psychological disorder among senior wives compared to monogamous wives was 1.6 times for conversion disorder and 2.4 times for somatization disorder. The other disorders were not significantly different in prevalence between monogamous and polygamous wives.

The rates of the aforementioned problems vary with the women's co-wife ranking (based on when they married in). However, the impact of wife-order differs cross-culturally. In some societies, senior wives experience higher rates of emotional and psychological distress, presumably because the wives perceive that they are being supplanted by younger wives, or because they believe they have failed to meet the standards of a "good wife" (Al-Krenawi and Graham 2006)--thus leading their husbands to add another wife. In other societies, the junior wives experience greater rates of emotional and psychological distress because they are subordinate to the senior wives, and/or their husbands favour the senior wife.

Contrary to the findings on emotional and psychological well-being among the Arabs and Turks, a study among East Africans did not find any difference in rates of anxiety or depression between women in polygynous versus monogamous marriages (Patil and Hadley 2008). However, the authors suggest that this may be due to the fact that the study was conducted during the dry season when food is generally abundant and workloads are low. Emotional distress may be more likely to manifest itself during 'hunger seasons.' Alternatively, the authors raise the possibility that the psychological measures were culturally inappropriate. Of course, it may also be that negative consequences associated with polygyny do not emerge in all cultural contexts (such as that in East Africa), or that there may also be benefits that offset the costs—thus, women do not experience a net decrease in emotional/psychological well-being from polygynous marriages. Since women in East Africa are economically productive, households with multiple wives could be generally wealthier than monogamous households, which could offset the downsides of polygyny. Although Patil and Hadley did not control for wealth, they did control for food insecurity in the three months preceding the study (which could be a proxy for wealth) and found this to be a consistent correlate of psychological distress. This suggests that there could be an offsetting wealth effect occurring.

## V. Conclusion

The evidence presented above suggests that the institutions of monogamous marriage influence human mating and parental investment efforts in such a way to generate beneficial societal-level outcomes. By partially levelling differences in male reproductive success and reducing competition among males within a society, imposed monogamy reduces crime rates, including rates of murder, rape, and robbery, reduces substance abuse, increases male parental investment in offspring, and increases male-female equality. Economic models further indicate that these changes will aggregate to increase saving rates, decrease fertility rates, and create economic growth.

If this combination of theory and evidence is correct, legalizing all forms of polygamy will principally result in an increase in polygynous marriages by wealthy, prestigious men. Instead of costly divorces, some wealthy men will prefer to add wives, while keeping their children and their money in their own households. Nothing of what we know about our species' evolved psychology or from anthropological diversity indicates that either polyandry or forms of group marriage will spread beyond trivial frequencies. Serial monogamy (like philandering) can create some problems in societies with social norms and laws favouring monogamy, but it does not create the large pool of unmarried men because

males have to give up one woman before they can marry another. The question of polygamy is a question of polygyny.

The historically and cross-culturally unusual package of norms and institutions that constitute modern monogamous marriage systems may have spread so successfully across the globe because of its positive impact on the societies that adopt such practices. Moreover, it is worth speculating that the spread of normative or imposed monogamy, which represents sexual egalitarianism (Macdonald 1990), may have helped create the conditions for the emergence of democracy and political equality at all levels of government. Within the anthropological record there is a strong statistical linkage between democratic institutions and monogamy (Korotayev and Bondarenko 2000). These authors, and others (Herlihy 1995), suggest that monogamy may impact the emergence of democratic governance at all levels by (1) dissipating the pool of unmarried males that were previously harnessed by despots in wars of aggression, and (2) focusing males, especially high status males, on investing in their offspring and their current wife (in lieu of pursuing additional wives). Historically, we know that universal monogamous marriage preceded the emergence of democratic institutions in Europe, and the rise of notions of equality between the sexes. In Ancient Greece, we do not know which came first but we do know that Athens, for example, had both monogamous marriage and elements of democracy. In this sense, the peculiar institutions of monogamous marriage may be part of the foundations of Western civilization, and may explain why democratic ideals and notions of human rights first emerged as a Western phenomenon.

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**Affidavit #1 of Joseph Henrich**
**Sworn July 15th, 2010**

**No. S-097767**
**Vancouver Registry**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**IN THE MATTER OF:**

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1996, C.68

**AND IN THE MATTER OF:**

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

**AND IN THE MATTER OF:**

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF S. 293 OF THE CRIMINAL CODE OF CANADA, R.S.C. 1985, c. C-46

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**OPENING STATEMENT BY THE AMICUS ADDRESSING SECTION 1**

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# INDEX

## PART 1 - REPLY POINTS

1. Below, in Part 2 of this opening statement, the Amicus will address whether the breaches of the *Charter* occasioned by s. 293 of the *Criminal Code* are justified in a free and democratic society under s. 1 of the *Charter*. The Amicus will show that they are not.

2. Before turning to that issue, however, this opening statement replies to points raised by the Attorneys General and allied interested persons concerning the elements of s. 293 and the related *Charter* breaches.

### A. The Elements of the Polygamy Offence

3. There is widespread disagreement among the Defenders[1] as to the elements of s. 293.

4. The AGBC has elected to read "polygamy" as being confined to "polygyny" only, and excluding any other form of polygamy, such as polyandry or same-sex polygamy. Further, he appears to find in the words "any kind of conjugal union with more than one person at the same time" the same Parliamentary intention to somehow exclude polyandry and same-sex multiple conjugal unions. It appears from his opening statement that the AGBC reads s. 293(1)(a)(ii) as extending to include mere cohabitation, and does not require that there be any kind of ceremony connected with the conjugal unions.

5. The AGC reads s. 293 very differently from the AGBC. According to the AGC, s. 293(1)(a)(i) refers to formal polygamy, and is not limited to polygyny only. Similarly, he says s. 293(1)(a)(ii) is not limited to multiple polygynous conjugal unions. The AGC, however, does read in a limitation in that subsection. Notwithstanding s. 293(2) (which states that "no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented is necessary in the indictment or upon the trial of the accused"), and notwithstanding how ordinary, monogamous "conjugal unions"

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[1] To adapt the AGBC's lexicon, and referring to the Attorneys General and their allied interested persons.

generally come into being, the AGC confines s. 293(1)(a)(ii) to situations where the conjugal union is created "through a formal marriage-like ceremony".

6. West Coast LEAF would read down s. 293 to apply to "exploitative relationships" only, thereby excluding polyamory. West Coast LEAF does not set out what are and are not "exploitative relationships".

7. The Canadian Coalition for the Rights of Children and the David Asper Centre for Constitutional Rights acknowledge that "polygamy" may have a wider definition, but they "focus on the sustained practice and inculcation of polygamy (primarily practised as polygyny in Canada) in a community setting."

8. Real Women Canada and Beyond Borders do not read s. 293 as being limited in any of these ways. The BC Teachers' Federation does not address the elements of s. 293 in its opening statement. Stop Polygamy in Canada also does not specifically address the elements of the offence, but it does state that it agrees with the positions taken by the AGBC in his opening statement, which may extend to the AGBC's position on the elements of the offence.

9. Reading the opening statements of the AGC (the representative, as it were, of the "framers" of the law) and the AGBC (the "enforcer" of the law) respectively, a person concerned to know what the law prohibits in respect of polygamy quickly arrives at some difficult questions. Does the law only criminalize situations of a man with multiple women, or does it extend to arrangements involving a woman with multiple men? What about homosexual polygamy? And what about two men and two women? The two Attorneys General could not provide consistent answers to these questions. Nor could they agree on whether the law prohibits a man and two women living together and forming the agreement together – in the informal way by which "common law" monogamous couples often proceed – that they will be committed and interdependent in a manner akin to marriage. The AGBC would say that such is prohibited (although not if the gender ratio were reversed), but the AGC would apparently answer that such a relationship would only be criminal if the trio had some kind of celebration to mark their commitment.

10. If the language of s. 293 truly supported the Attorneys General's differing readings, then further issues of the law's arbitrariness would obviously be raised – such as by the AGBC's suggested reading that the law forbids a woman from consenting to a polygynous relationship but permits her to consent to a polyandrous relationship. There would also be concerns about the vagueness of the law. In the Amicus' submission, however, the language of s. 293 does not provide any basis for the conflicting limitations the Attorneys General seek to read into it. The language of s. 293 is clear in this respect: the prohibition extends to any form of polygamous relationship, be it of one man with multiple women, one woman with multiple men, three or more persons of the same gender, or groupings where there are at least two men and two women. To put it simply, s. 293 prohibits all marriages or conjugal unions that are *not monogamous*. Further, it prohibits multiple conjugal unions regardless of whether they are marked by a commitment ceremony or not; as s. 293(2) makes clear, the method by which the alleged relationship was entered into is irrelevant.

## B. Breach of the Charter

11. The Amicus disagrees with much of what the Defenders say when they assert that the *Charter* is not breached, and he will address those disagreements in final argument. Here, by way of reply to the Defenders' opening statements, the Amicus submits as follows simply to ensure his position is clearly understood.

### (1) Section 2(a) – Freedom of Religion

12. The AGBC, and others, suggest that s. 293 does not breach s. 2(a) of the *Charter* because, they say, polygamy conflicts with other *Charter* values and these values preclude constitutional protection for polygamy under freedom of religion. They say that these alleged conflicts between *Charter* values must be considered at the breach stage, instead of under s. 1.

13. There are some comments in the case law that suggest that such balancing of rights and interests could occur at the breach stage of the analysis, and there are other comments that suggest that balancing must be conducted under s. 1. The Amicus' position is that s. 293 unjustifiably breaches s. 2(a) no matter the sequence of analysis,

and in that sense the debate over the sequence is not significant. Nonetheless, the better view of the case law is that any balancing should occur under s. 1, and that is the approach the Amicus intends to take in argument.

**(2) Section 2(d) – Freedom of Association**

14. In his first opening statement, the Amicus stated his position that s. 293 breaches s. 2(d) because it permits polygamous activities, but criminalizes polygamous groupings. In his opening statement, the AGBC addresses that position in part as follows:

> Naturally extended, on this argument Parliament would be permitted to criminalize sexual intercourse between a man and a 12-year-old girl, but it could not prevent him from marrying her. Incest laws would not violate s. 2(d), but consanguinity laws would.

15. That is not the Amicus' position. The Amicus does not take the position that s. 2(d) is violated when a law prohibits a group from performing an act that is illegal if performed by individuals, which is the case with the AGBC's examples. To the contrary, freedom of association is infringed when it is illegal for a group to perform what is legal for individuals to perform. To put it another way, a law must not criminalize an act only when, and because, it is performed by a group. Such a law is truly targeted at the associational aspect of an activity; that is what the guarantee in s. 2(d) restrains.

16. The Amicus will submit that s. 293 is targeted at exactly this associational aspect of marriages and conjugal unions, and therefore infringes s. 2(d). The polygamy prohibition effectively says: you may enter a marriage-like relationship with one other person, but not with two or more other people. It is this regulation of how many people one may associate with in a marriage-like relationship at the same time that the Amicus says infringes freedom of association.

**(3) Section 7 – Liberty**

17. Again, the Amicus does not intend to reply in this opening statement to the arguments the Defenders raise in their opening statements, except where it is necessary to give fair notice of the positions the Amicus intends to take. The Amicus addresses one issue under s. 7 in this context, as follows.

18. The AGBC says that the polygamy offence is targeted not only at male participants in polygamy, but also at the female participants. Indeed, the Amicus says that is the only possible interpretation that can be made of s. 293 given its wording, including the inclusion of the words "[e]very one". In paragraph 102 of his opening statement, however, the AGBC says that imprisonment would not be available in a case of "simple" polygamy, which he describes as "polygamy without some direct harm to the participants or others, such as children". He then states: "Experience and logic both suggest that a polygamy investigation could never even result in charges without some serious aggravating factors." The AGBC then notes in a footnote that no women were charged along with Messrs. Blackmore and Oler. Indeed, the evidence tendered in this Reference will show that, when the police charged Messrs. Blackmore and Oler, they advised women in the households that they would not be charged.

19. It may be true that the current AGBC would not approve charges against women for "simple" polygamy. With respect, however, such prosecutorial discretion does not in any way lessen the concerns with the overbreadth and disproportionality of s. 293. To the contrary, the AGBC's statements raise significant concerns about arbitrary enforcement by placing too much discretion in the hands of enforcement officials. McLachlin C.J. described s. 7's concern with such discretion in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 at para 177:

> A vague law violates the principles of fundamental justice as it offends two values that are fundamental to the legal system. First, vague laws do not provide "fair warning" to individuals as to the legality of their actions, making it more difficult to comply with the law. Second, vague laws increase the amount of discretion given to law enforcement officials in their application of the law, which may lead to arbitrary enforcement.

20. Section 293 is overbroad and disproportionate. That overbreadth and disproportionality is not cured by relying upon enforcement officials to selectively enforce the law. The *Charter* requires the rule of law, not the rule of prosecutors.

### (4) Section 15 – Equality

21. As set out in his first opening statement, the Amicus will submit that s. 293 violates the equality provision by drawing a discriminatory distinction on two prohibited grounds: religion and marital status.

22. With respect to the ground of religion, the AGBC says in his opening statement that the Amicus has not identified a comparator group against which the impact of s. 293 may be assessed. The appropriate comparator group comprises mainstream Christians. The matrimonial law of England, and then of Canada, was explicitly framed according to a mainstream Christian definition, and s. 293 is part of Canada's attempt to protect and defend the authority of that mainstream Christian institution. Until the passage of the *Civil Marriage Act*, S.C. 2005, c. 33, capacity to marry was governed by the judgment in *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130, in which the court refused to recognize a Mormon marriage on the ground that Mormonism allowed for polygamy. Lord Penzance stated: "it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy."

23. The equality claim on the ground of religion overlaps considerably with the s. 2(a) claim. It is essentially that s. 293 was intended to buttress a mainstream Christian definition of marriage and was aimed at undermining the forms of marriage practised by some Mormons and Aboriginals (and now some Muslims), based on discriminatory stereotypes that such marriage arrangements are barbarous and unchristian.

24. In respect of the marital status claim, the AGBC takes the position that this analogous ground should be understood as excluding marital arrangements that are (otherwise legitimately) prohibited by the *Criminal Code*. The Amicus disagrees. The considerations McLachlin J. (writing for herself and three others in the central reasons in the case) set out in *Miron v. Trudel*, [1995] 2 S.C.R. 418 when finding marital status to be an analogous ground are fully apposite here. Just as the exclusion of unmarried partners from the accident benefits available to spouses demeaned their dignity in *Miron v. Trudel*, s. 293 demeans the dignity of persons in polygamous relationships, except

that it does so to a much greater extent. Regardless of how beneficial their polygamous relationships are to them, or how freely they chose that relationship, s. 293 treats such persons' choice of a polygamous relationship as wholly invalid. Worse, it criminalizes that choice and singles it out for condemnation. Further, s. 293 makes no other attempt to distinguish good polygamous relationships from bad ones; it assumes that they are all bad. For these reasons, the Amicus will submit that s. 293 is obvious and grave discrimination on the ground of marital status.

## PART 2 - SECTION 1

### A. Overview

25. If s. 293 breaches one or more sections of the *Charter*, as the Amicus submits it does, then it may only be upheld if the Defenders can prove that it is demonstrably justified in a free and democratic society under s. 1 of the *Charter*. The *Oakes* test for s. 1 is well-known. The Defenders must show that s. 293 (1) has a pressing and substantial objective and (2) is proportional in its effects. In terms of the latter inquiry, the Defenders must show that the law (1) is rationally connected to its objective(s), (2) impairs the infringed *Charter* rights as little as possible in achieving its objective(s), and (3) has benefits that outweigh its detriments.

26. The Amicus says that the grave breaches of the *Charter* occasioned by s. 293 are not justified under s. 1. Put briefly, s. 293 is an enormously intrusive and paternalistic law that is not at all targeted at the real harms that can arise in polygamous and other relationships. Some of the evidence the Amicus will rely upon in this regard is summarized below under heading "B".

27. The Amicus also sets out below, under heading "C", commentary addressing how this court ought to respond if it finds s. 293 to be unconstitutional.

### B. The Oakes Test

#### (1) Pressing and Substantial Objective and Rational Connection

28. The questions of whether s. 293 has one or more valid objectives, and whether the law is rationally connected to those objectives, are best addressed in tandem.

29. The Amicus will submit that the true objective of s. 293 is to defend a mainstream Christian definition of marriage and to compel Mormons and Aboriginals into adopting that definition. Such an objective is contrary to *Charter* values and is not one that is pressing and substantial in a free and democratic society.

30. The Amicus submits that is the true objective of s. 293, given its legislative history. The objectives stated by the Defenders are neither made out on the evidence, nor rationally connected to s. 293. The AGC says that "the enactment of the polygamy provision was based on a concern about harm to the state, to society and its institutions, including the institution of monogamous marriage, and to individuals, especially women and children." These harms appear to largely overlap with the four harms the AGBC says are s. 293's targets, which this opening statement addresses in the following paragraphs.

31. The AGBC lists as the first "harm" targeted by s. 293 "harms to the moral fabric and democratic essence of society". While it is certainly true, as he says, that Parliament may employ the criminal law to enforce morality, the fact that "socially-imposed monogamy is so deeply imbedded in the moral fabric of our society" is not an explanation for why the law must continue to enforce that norm to the exclusion of all others. The heterosexual nature of marriage was also "deeply imbedded" in our society, but nonetheless the law's enforcement of that exclusive definition of marriage was discriminatory (see *Halpern et al. v. Attorney General of Canada* (2002), 60 O.R. (3d) 321, aff'd (2003), 65 O.R. (3d) 161 (C.A.)). Furthermore, the favouring of monogamy over polygamy demeans the dignity of polygamous persons and so is contrary to the values of a free and democratic society and cannot be considered to be a pressing and substantial objective.

32. The second objective stated by the AGBC is to protect against harms to the value of equality and the protection of vulnerable groups. While such an objective would be pressing and substantial, it is not one at which s. 293 is aimed. Section 293 is not aimed at protecting women and children from commodification and consequential exploitation, as the AGBC alleges. To the contrary, s. 293 renders criminal *all* participants in polygamy, be they male or female. Nor is there any requirement within

the provision that a minor be party to the relationship to render it illegal, or that there be offspring of the relationship (indeed, s. 293(2) explicitly states that no proof of sexual relations is required). Nor does s. 293 reveal any concern on the part of Parliament for the side effects of criminalizing polygamous relationships: of the consequential insularity of communities in which it is practised, and of the burden placed on the family if the male breadwinner is imprisoned. Moreover, while the AGBC says that the gender inequality inherent in polygynous relationships is not found in monogamous relationships, that statement is utterly inconsistent with the reality of many monogamous marriages when s. 293 was first enacted. In any event, s. 293 criminalizes more than just polygyny, and is aimed at all polygamous relationships, no matter the gender relations within them.

33. The third harm the AGBC lists is social harm from the "externalities" of polygamy, by which he means an increase in the earlier "sexualization" of girls and the creation of a pool of unmarried men. He says that these "externalities" have until now been completely ignored in the legal analysis. That is so, the Amicus submits, because these alleged externalities were simply not one of Parliament's objectives when it enacted s. 293. Nowhere in the legislative or historical record is there an emphasis on this alleged threat of a pool of unmarried men. As for avoiding the early sexualization of girls, s. 293 discloses no concern at all for the age at which women marry into polygamy. Section 293 is not addressed at situations of coercion or undue influence or some other impairment of true consent; rather, the true aim of s. 293 is to prohibit consent to polygamy itself. The AGBC's concern for the alleged "externalities" of polygamy is one that has been devised for this Reference.

34. "Direct harms to the participants" in polygamous relationships are the fourth and final kind of harm the AGBC says s. 293 addresses. Again, these are not harms at which s. 293 is aimed, nor to which the provision is rationally connected. Section 293 is not concerned with targeting "bad" polygamous relationships, but rather outlaws all polygamous relationships, no matter how beneficial they are to the participants. Even in respect of any polygamous relationship that does harm one or more of its participants, s. 293 criminalizes the victims along with the wrongdoers.

35. The only objective to which s. 293 is rationally connected is a broad defence of monogamy as the only valid marital arrangement. That objective, however, is not of pressing and substantial importance in a free and democratic society, particularly in light of its mainstream Christian bias.

**(2) Minimal Impairment**

36. To justify a law that infringes a right guaranteed under the *Charter*, the government must show that it infringes that right as little as possible to achieve the law's objectives. That plainly is not the case with s. 293.

37. As stated above, it is undoubtedly the case that harms arise in polygamy, and indeed the evidence tendered in this Reference describes some of them. It is also the case that harms arise in monogamy, and again there is evidence in this Reference to prove that point, which is in any event obvious from human experience. In any kind of relationship there will be harms that arise and bad experiences that occur.

38. The criminal law already has a suite of provisions that target harms that arise in intimate and other relationships. There are criminal provisions against underage sex, including where a person is in a position of trust and authority, against sexual assault more generally, and against trafficking of persons. Where these occur, they ought to be prosecuted. The Amicus also suggests that Parliament could consider a law against arranged marriages or conjugal unions, regardless of whether they occur in polygamous or monogamous contexts. Of course, such a law may often be difficult to enforce, but even if only enforced in some situations it could be a useful tool to emphasize that free choice is essential on a matter as personal and important as marriage.

39. The AGBC says that the polygamy ban is necessary because it complements other relevant criminal provisions, in the same way that the ban on possession of child pornography complements the ban on the making of it, as found and upheld by the Supreme Court in *R. v. Sharpe*, [2001] 1 S.C.R. 45. That analogy is inapt for a number of reasons, two of which the Amicus will mention here. First, the child pornography possession law was nuanced in the sense that it exempted non-harmful situations, such as a photo of a baby in a bath. Section 293, in contrast, is a total ban, devoid of any

nuance whatsoever. No matter how consensual, equal, supportive and beneficial a polygamous relationship may be, the law deems it to be criminal. Second, the ban on the possession of child pornography did not, of course, render the *children* who were exploited in the making of that pornography to be criminals. Obviously, it would be absurd to criminalize the alleged victims. But that is precisely what s. 293 does. The polygamy ban does not simply target those who might exploit others for their own interests; rather, it criminalizes all participants, alleged victims and alleged wrongdoers alike. It is hard to conceive of a law more flagrantly overbroad in its effects.

40. The second reason the AGBC says that s. 293 is needed is that, he alleges, violations of those laws are underreported and difficult to investigate and prosecute. With great respect to the AGBC, this is disingenuous, for at least three reasons. First, challenges with underreporting of sexual abuse and similar activities arise in monogamous relationships as well, but Parliament has never responded in that context in such a blunt and heavy-handed manner. Second, as the evidence will show, the criminalization of polygamy has the perverse effect of making communities in which it is practised more insular, with the result that there is less interaction with the authorities. That is, the criminalization of polygamy renders real harms that might arise in those relationships more difficult to target and prosecute. Third, the notion that s. 293 provides a more effective mechanism for prosecuting wrongdoers is utterly belied by its history. There have been exactly two convictions under the polygamy ban in its entire 120 year history. Prior to the AGBC's failed attempt to prosecute Messrs. Blackmore and Oler, the last prosecution occurred in 1937.

41. The Attorneys General insist that the criminal prohibition on polygamy is necessary to keep polygamy in check. It is not polygamy that needs to be kept in check, however. It is rather the actual harms that can arise in polygamy, monogamy, adultery and casual sexual relations that need to be restrained. The ban on polygamy – aimed, as it is, at removing any kind of committed polygamous relationship as an option for Canadians – goes far beyond what is necessary. Moreover, the contention that, as the AGC puts it, "[a]ny measure short of criminal prohibition will almost certainly result in additional numbers of people entering into marriages which are not legally sanctioned,

thereby leading to the harms identified in the evidence" is not supported by the evidence. Despite the almost complete absence of enforcement of the law, the number of practitioners of polygamy in Canada is minute. It is simply not a practice that appeals to the vast majority of Canadians. What is more, those who are inclined to practise polygamy are very likely to do so regardless of whether it is banned or not.

**(3) Proportionality of Effects**

42. The last step of the *Oakes* test considers whether the law's benefits outweigh its detriments, in terms of the degree to which it infringes an individual's *Charter* rights and causes other negative impacts. The Amicus will submit that s. 293 also fails this stage of the *Oakes* test and fails by a wide margin.

43. The salutary benefits of s. 293 are tenuous at best. Those benefits might be described in two ways.

44. First, there is the enforcement value of s. 293. This argument asserts that s. 293 provides a further avenue by which the authorities may prosecute persons who do bad things in polygamous relationships. But as an enforcement mechanism, s. 293 has been a non-event. As set out above, there have been only two convictions under the law in its entire history. Since the advent of the *Charter*, the authorities may have been reluctant to prosecute under the law given the understandable fear that it would be struck down, but even prior to 1982, the use of s. 293 was also hardly ever used. Despite being enacted to combat Mormon polygamy, it has never been successfully employed to obtain a conviction in that context. It simply has not been an effective law.

45. Second, there is the symbolic value of s. 293. It is theoretically plausible that some people are not engaging in polygamy because of the risk of prosecution under s. 293, but the evidence in this Reference suggests that s. 293 has little effect on the degree of polygamy in Canada. Again, those who are inclined toward polygamy are likely to practise it regardless of its legality, and lifting the ban is unlikely to lead to any significant increase in its incidence. The "pool of unmarried men" that the AGBC warns polygamy would create has no basis in reality. Within the Canadian population, polygamy is statistically almost non-existent. The pool of unmarried men that already

exists in Canada is many times greater than the populations of all the polygamous communities in Canada combined. Any "pool of unmarried men" that might realistically be created through polygamy is statistically meaningless. In any event, it does not assist the justification of the *Charter* breaches in this case that the government wishes to employ the criminal law to ensure that women are available to men to marry. A social policy that aims to socialize men through the allocation of women in this way is deeply offensive to the autonomy and dignity of women and is contrary to the values of the *Charter*.

46. The Amicus will also emphasize that there is no benefit to society at all in suppressing "good" polygamous relationships. One of the central facts that will be shown on the evidence in this Reference is that there are many polygamous relationships that are entirely consensual, loving and supportive, both in "polyamorist" and religious contexts. Many people – including women; indeed, including Mormon women – validly and truly choose to live in polygamy. They deem those relationships to be beneficial to them, and it would be devastating to them were those relationships effectively denied to them. The suppression of polygamous relationships such as these has no benefit whatever to society; to the contrary, such would only be to society's detriment.

47. There may be some symbolic value in a state norm against patriarchal polygyny, where only men have the right to take multiple partners. But the value of such a norm must not be exaggerated. Our society remains rife with patriarchy, and we do not generally respond against it with criminalization. Many Canadians live in households where there are strong gender-defined roles that place men at the head. At the extreme, religious communities such as the Hutterites, Amish and Doukhobors have cultural norms that define the opportunities in life available to each gender with relatively bright lines. Indeed, our society has long accepted and tolerated patriarchy within religious contexts. For instance, it remains the case in the Catholic Church (the largest religious group in Canada) that only men may be priests. Secular Canadians may find this distasteful, but no one would consider it should be criminal. To the contrary, Canadians accept that religious cultural norms need some accommodation. For

instance, when the Federal government finally relented to the litigation brought against it over same-sex marriage and enacted the *Civil Marriage Act*, s. 3 of the Act explicitly "recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs."

48. Against these tenuous benefits must be weighed s. 293's detriments, which, in the Amicus' submission, are grave and numerous. The violations of *Charter* rights that s. 293 occasions are serious. For some persons, s. 293 prohibits core religious beliefs and practices. The law was enacte d in order to buttress a mainstream Christian conception of marriage and the family and is entirely contrary to our nation's contemporary commitment to multiculturalism and religious freedom. For anyone who wishes to practice polygamy, s. 293 restricts their liberty in respect of a profoundly and inherently personal choice, and demeans their dignity by treating that choice as being worthy of condemnation.

49. Beyond these *Charter* violations are also a host of other ill effects, as the evidence will reveal. Among these are the fact that criminalization *increases* the vulnerability of some persons in polygamous communities and renders the prosecution of true harms within these communities *more* difficult. The effect of a sweeping ban on polygamy is that polygamous communities become more insular and secretive. That in turn means that people are less willing to access services from the government, such as medical care. Similarly, where abuse occurs, members of the community are disincentivized to report the abuse because of fear that it will lead the authorities to seek to prosecute polygamy, rather than only abuse. The criminalization of polygamy tends to motivate polygamous communities to detach and isolate themselves from mainstream society.

50. Based on these and related points, the Amicus will submit that the detriments of s. 293 far exceed its benefits and that s. 293 cannot withstand *Charter* scrutiny.

### C. The Issue of Remedy

51. This court is not empowered, of course, to make any remedy if it find s. 293 to be unconstitutional. Its judgment is to be advisory only. However, it appears likely that the

court will hear submissions (such as from West Coast LEAF) that s. 293 should be read down and thereby saved.

52. The Amicus will take the position that s. 293 cannot be saved in this way. Unlike child pornography (the subject of the *Sharpe* case), there is nothing inherently wrong with polygamy at all. Harms only arise within polygamy (and, indeed, in monogamy) in particular relationships. Parliament's intention in enacting s. 293 was not to target only "bad" polygamous relationships; rather, it sought to ban every form of marriage-like relationship that is not monogamous. Section 293 is not amenable to nuance and limitation, and any attempt to read it down to target particular harmful relationships would constitute a judicial appropriation of the legislative role.

53. The Amicus will also ask the court to reflect on the following perspective. If the concern is to prevent harmful relationships involving minors, or dependence, or exploitation, or abuse of authority, or a gross imbalance of power, or undue influence, then why limit this concern to polygamy? If someone is coerced into a marriage, why is it worse that it is in respect of a polygamous relationship, as opposed to a monogamous one? It isn't. Coercion is bad in either of these contexts and the law must address that harm in its particular context without prejudice or bias. If a particular cultural context presents challenges to the enforcement of those laws, then the response the *Charter* demands is for law enforcement authorities to engage with that community in order to address the problem, rather than to criminalize that community as a whole. As a tool for targeting those who exploit and abuse the vulnerable, the sweeping criminalization of a cultural practice and personal choice like polygamy has no lawful place in contemporary, post-*Charter* Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Amicus Curiae

Dated: November 15, 2010

No. S-097767
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1986, c. 68

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF S. 293 OF THE *CRIMINAL CODE OF CANADA,* R.S.C. 1985, c. C-46

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**OPENING STATEMENT BY THE AMICUS ADDRESSING BREACH**

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## INDEX

## PART 1 - OVERVIEW

1. British Columbia's Lieutenant Governor in Council referred the following two questions to the British Columbia Supreme Court for hearing and consideration pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, section 1:

> a) Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent? ("**Question 1**")
>
> b) What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence? ("**Question 2**")

2. Section 293 provides:

> **Polygamy**
>
> **293.** (1) 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.

**Evidence in case of polygamy**

(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.

3. The Amicus was appointed by the Court to:

a) advance any argument he considers appropriate in support of the answer "no" to Question 1; and

b) advance any argument he considers appropriate regarding Question 2, particularly any argument in opposition to, or distinct from, the Attorney General of British Columbia ("**AGBC**") or the Attorney General of Canada ("**AGC**").

4. In this opening statement, the Amicus sets out an overview of his answer to Question 2, as well as an overview to that portion of Question 1 that concerns whether section 293 breaches any provision of the *Charter*. The Amicus will later provide an opening statement responding to the statements of the AGBC and the AGC, and their allied interested persons, on the issue of justification under section 1 of the *Charter*.

5. The opening statement that follows sets out, under Part 2, an overview of the facts the Amicus expects the evidence to show in respect of the issues this statement addresses. Part 3 broadly summarizes the sources of evidence, and introduces the witnesses whose testimony is proffered by the Amicus and his allied interested persons. Part 4 summarizes the Amicus' positions on Question 2 and the "breach" portion of Question 1. On that issue of breach, the Amicus says section 293 infringes sections 2(a) (freedom of religion), 2(d) (freedom of association), 7 (liberty) and 15 (equality) of the *Charter*.

## PART 2 - OVERVIEW OF THE FACTS

### A. Polygamy in Human History

6. Polygamy was widely practised over the course of human history including, historically, among some of the Aboriginal peoples of North America. Polygamy was found in virtually every culture at one time. Even its detractors note that it served useful social functions in certain agrarian or hunting-based societies.

7. Polygamy is still practised in a number of countries. It is legal in parts of the Middle East, Asia and Africa. Unquestionably there are women living in polygamy in North America who vigorously support plural marriage, find happiness and satisfaction within their marriages and family structures, and articulate clear reasons as to why this form of marriage is logical and beneficial for them.

8. In *Polygamy: A Cross-Cultural Analysis* (Oxford: Berg, 2008), one of the books that form part of the AGBC's Brandeis Brief (Isbister Ex. "C"(11)), Miriam Koktvedgaard Zeitzen provides the following summary at page 4:

> ...[P]olygamy is not an exotic non-Western custom, practised by people who have not yet entered the modern world. Polygamy is worldwide, cross-cultural in its scope, it is found on all continents and among adherents of all world religions. Its practitioners range from modern feminists to traditional patriarchs, illustrating the great versatility of polygamy as a kinship system. An overview of the many peoples practising polygamy, in contemporary as in past societies, illustrates that a majority of the world's cultures and religions have condoned some form of polygamy. For many of the societies described here, polygamy used to be an integral part of their kinship systems, but modern times have brought a streamlining of marriage patterns to all societies around the world. The spread of Christianity and European-based legal codes through colonialism, and the imposition of state laws on aboriginal peoples living within the borders of modern nation-states, have spelt the end of polygamy for many people. The Arctic Inuit (Eskimo), for example, practised polygamy in the recent past, as described in older ethnographic literature; if still practised, it may be in clandestine or irregular ways. This is the case for numerous populations that used to practise polygamy, but have now become integrated in the global community where monogamy dominates.

## B. Polygamy and Religion

9. Polygamy as a religious practice exists across a number of religious traditions, and for some who practise it, polygamy is integrally linked to their religious beliefs. For those who practise polygamy for religious reasons, polygamy can (a) bring them closer to or foster a connection with their god; (b) model the lives of important religious figures or prophets; (c) signal the degree of their commitment to their faith; and/or (d) have a direct impact on the nature of their afterlife.

### (1) Fundamentalist Mormonism

10. Marriage is the most central social and religious institution within Mormonism. It is viewed in this faith as essential to realizing the promise of resurrection after death, and of exaltation, or becoming close to, or like, God.

11. People who specifically participate in plural marriage from the Mormon tradition do so as a matter of deeply held religious belief, rooted in eternal principle, and with eternal significance. Plural marriage was instated by Mormonism's founder, Joseph Smith, pursuant to revelations from God that he claims to have experienced, and its practice follows in Smith's footsteps, as well as providing opportunities for a demonstration of a godly life. The tradition was continued by fundamentalist believers who shared the view that plural marriage remained essential to Mormon theology and were critical of former leaders who, they believed, had succumbed to political pressure to abandon the practice. Polygamy remains central within the fundamentalist faith.

12. Members of the Fundamentalist Church of Jesus Christ of Latter Day Saints ("**FLDS**") community in Bountiful, British Columbia (which is addressed in part in the affidavit of the FLDS' expert, William John Walsh), are primarily descended from Canadian Mormons who migrated from Alberta shortly after World War II, who were themselves primarily descended from polygamist Mormons who immigrated to Canada from territories of the United States in the late 1800s. The FLDS is the largest polygamist group in the United States. Other significant polygamist groups in the United States include the Apostolic United Brethren and the Kingston clan, or Latter Day

Church of Christ. There are also hundreds of smaller, independent, polygamous clans, which exist through many parts of the United States, Canada and Mexico.

13. Almost all FLDS members are from families which have continuously practised their version of Mormonism since the 1830s. As strong religious fundamentalists, the FLDS are very hesitant to alter founding Mormon beliefs and practices. The FLDS' expert William John Walsh attests, at para. 14 of his affidavit:

> Celestial marriage [plural marriage] is an essential FLDS religious principle and not simply a domestic concern. It is viewed as God's commandment. Unless the faithful participate in it, they cannot enter into the fullness of glory in the kingdom of heaven in the afterlife. Thus, for believers in the principle, plural marriage is essential to personal and family salvation.

### (2) Other Religions

14. Other religions also incorporate polygamy. For example, some First Nations people historically practised polygamy which can be linked to their religions. For some Muslims, polygamy fits within the Qur'an and thus links them to God and their religious tradition. Under the Qur'an, men have a conditional licence to marry up to four wives. Many Muslims believe that polygamy, and specifically polygyny, is an important part of their faith. Wicca (a modern and feminist-influenced religion, based on occultist ideas and founded in the mid-1940s) views all forms of consensual sexual and emotional ties that adults freely enter into as sacred or, at a minimum, as possible routes to an encounter with the sacred; this includes relationships that involve more than two adults.

## C. Polygamy and Culture

15. Polygamous associations may also be based on long standing cultural norms that include ceremonies, traditions and rites that structure members' lives and families. Polygamous families are often part of clearly defined and sometimes segregated communities with a heritage that can extend back in some cases for thousands of years.

## D. Polyamory

16. Polyamory is a lifestyle which, one author notes, "is embraced by a minority of individuals who exhibit a wide variety of relationship models and who articulate an ethical vision...encompass[ing] five main principles: self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions and activities such as jealousy". Polyamory is also defined as "many loves", and polyamorists often say their multiple relationships are a form of "responsible nonmonogamy".

## E. History of American Criminal Bans of Polygamy

17. Between 1862 and 1887, the US Congress passed four statutes criminalizing plural marriage but also taking broader steps against the Mormon Church, indicating that Congress's target was much larger than polygamy itself (the 1862 *Morrill Act for the Suppression of Polygamy*, the 1874 *Poland Act*, the 1882 *Edmunds Anti-Polygamy Act*, and the 1887 *Edmunds-Tucker Act*). The 1882 statute, for example, barred people who practised or believed in these unions from jury service, and barred actual polygamists from holding public office and voting. The 1887 statute took away voting rights from all Utah women, directed the seizure of property of the Mormon Church, and revoked its corporate charter.

18. The evidence adduced by the Amicus includes that the civil disabilities imposed by the 1882 and 1887 statutes, in particular, sought to demote Mormons from full civic membership to punish them for (1) political treason, in the form of Mormons' establishment of a separatist theocracy in the Territory of Utah and consequent raising of arms against the US government in 1857-1858, and (2) "race treason", as polygamy was considered natural for people of colour but unnatural for white Americans.

## F. History of Canada's Criminal Ban of Polygamy

19. In light of the American assault on the Mormon Church and political structure, members of the Fundamentalist Church fled to Canada and settled in southern Alberta

in 1887. In 1888, they sought permission from Parliament to bring their multiple wives with them and were denied the right to do so.

20. In 1890, Canada passed its first anti-polygamy legislation, which explicitly addressed and targeted Mormon polygamy: "Everyone who practises...[w]hat among the persons commonly called Mormons is known as spiritual or plural marriage...[i]s guilty of a misdemeanour, and liable to imprisonment for five years and to a fine of five hundred dollars". The language of the original polygamy section was drafted with the vagaries of the American polygamy statutes targeting Mormons squarely in mind: as one scholar notes, Canadian legislators examined US legislation, where obtaining convictions had proven difficult, and "aimed at convicting on the basis of cohabitation, attacking the Mormons' private ceremonies".

21. Reference to Mormons and a subparagraph on "[c]ohabitation in conjugal union" were omitted in 1954 revisions to the *Criminal Code*, but there is nothing in the legislative record to suggest that these changes were intended to be substantive (Section 293 Legislative History Brief submitted by the AGBC and AGC at paras. 12-13).

## G. History of Prosecutions of Polygamy in Canada

22. Until the charges brought against two fundamentalist Mormons in Bountiful in 2009, the last prosecution under the polygamy section of the *Criminal Code* had occurred in 1937. In that case (*R. v. Tolhurst & Wright*), both of the accused, who were acquitted, were married to other parties at the time that they were cohabiting with each other.

23. Apart from John Harris (a man who cohabited for six months with a married woman, apparently believing her to have secured a divorce) in 1906, the only other person convicted under the polygamy section since it was promulgated in 1890 was an Aboriginal man from Western Canada (*R. v. Bear's Shin Bone*). The original bill containing the criminal prohibition on polygamy provided that "this section shall not apply to any Indian belonging to a tribe or band among whom polygamy is not contrary

to law, nor to any person not a subject of her Majesty, and not resident in Canada", but this exclusion was not adopted. One senator explained in a Senate debate on the issue: "I think that is a very dangerous exception to make, because it may have the effect of excepting the very class to whom the Bill is intended to apply". In that time period, missionaries throughout the British Empire were dedicating themselves to eradicating polygamy as a family structure. In Canada, missionary efforts to convert Aboriginal people to Christianity, in particular, were part of a larger project to "civilize" Aboriginal populations, including through residential schools.

24. There have been only two charges laid under section 118 (trafficking in persons) of the *Immigration and Refugee Protection Act*. The first charge was laid in 2005 and the accused was found guilty of smuggling and prostitution related charges but not of trafficking. The other charge is currently before the courts. Neither case relates to polygamy.

## H. Canada's Changing Legal Landscape in Respect of Intimate Relationships

25. The prevailing assumption that the "traditional" family consists simply of a married heterosexual couple and their biological children is unrepresentative of the enormous social variation in conjugal unions and families. That prevailing assumption excludes many Canadians.

26. Canada's legal landscape has changed in recognition of some of these realities. For example, in 1969, Parliament decriminalized homosexual activity. In the 1970s, Parliament removed homosexuals from the list of classes of persons prohibited from being admitted to Canada. In 1995, the Supreme Court of Canada held that "sexual orientation" is an analogous ground of discrimination under section 15 of the *Charter*, and in 2002 and 2003, the Ontario and BC Courts of Appeal held that the common law definition of marriage as a union between one man and one woman violates section 15(1) of the *Charter*. In 2005, Parliament extended the legal capacity for marriage for civil purposes to same-sex couples, and made consequential amendments to various statutes to ensure equal access for same-sex couples to the civil effects of marriage and divorce.

27. Increasing recognition and protection have also been extended to common law spouses. For example, in 1997 British Columbia amended the definition of "spouse" for certain purposes in the *Family Relations Act* to include persons (including of the same gender) who had lived in a "marriage-like relationship" for a period of at least two years.

28. Adultery has never been a criminal offence in Canada, with the exception of a pre-Confederation statute in New Brunswick that evidently survived until 1953-1954. Swinging is also not a criminal offence in Canada. It appears that the law condones casual group sex, but criminalizes committed group relationships.

## I. Impacts of the Criminalization of Polygamy

29. The criminalization of polygamy has a range of profoundly negative consequences. Among them are:

a) offending the dignity of women who choose polygamous lifestyles;

b) impeding the open expression of religious identities and values, or lifestyle choices;

c) harmful and unnecessary stress from the impediment to open expression and the fear of prosecution;

d) stigmatizing members of polygamous relationships and communities;

e) justifying abuse toward polygamous communities and their members;

f) causing or heightening insularity for polygamous communities, making their members less likely to access (or know about) outside social and police services, and potentially making them more vulnerable to abuse;

g) jeopardizing the incomes and support structures of polygamous families whose members could be fined or incarcerated; and

h) diverting energy and funds from improving polygamous communities and the lives of their members to legal proceedings.

30. At the same time, research in Bountiful suggests that criminalization is not an effective deterrent to the practice of polygamy.

## PART 3 - SOURCES OF EVIDENCE

31. The Amicus has filed the affidavits of the following witnesses, some of whom will be testifying at the hearing:

a) **Lori Beaman**, Professor of Religious Studies in the Department of Classics and Religious Studies at the University of Ottawa, and Canada Research Chair in the Contextualization of Religion in a Diverse Canada. Professor Beaman teaches in the areas of religion and law, identity construction, and theory and methods in the scientific study of religion. Part of Professor Beaman's program of research is understanding polygamy as it is practised in relation to religious expression. Professor Beaman has sworn two affidavits in this proceeding, the first addressing polygamy across religious traditions and the notion of a lived religion (whereby people of faith integrate belief and practice in their daily lives), and the second addressing stereotyping of religious minorities, harm as socially construed, recognition of women's choices, and research into polygamous relationships.

b) **Angela Campbell**, Professor of Law and Director of the Institute of Comparative Law at the Faculty of Law at McGill University. Professor Campbell teaches in the areas of family law, criminal law and health law. Professor Campbell has studied polygamy extensively as part of her research work, including through extensive interviews with women from Bountiful. Her academic work in this regard is exceptional in dealing with the implications of polygamy specifically for women in Canada. Professor Campbell has sworn two affidavits in this proceeding, in the first providing an overview of her research, marriage in FLDS theology and marriage practices in Bountiful, and the second addressing in more detail her findings in Bountiful on such matters as the level of choice that residents exercise with respect to marriage and reproduction; Professor Campbell's second affidavit also sets out findings rooted in

interdisciplinary doctrinal research regarding the social, economic and health implications for women in polygamy in a more global context, and comments on the report of Professor Cook filed by the AGC.

c) **Matthew Davies**, an experienced psychologist in the State of Utah who maintains a therapy practice focusing on children, adolescents and families. Dr. Davies' work includes working with children and adolescents who have been physically, sexually and emotionally abused. Dr. Davies has worked as well with members of the FLDS, and responds to the AGBC's witness, Larry Beall.

d) **Susan Drummond**, Associate Professor of Law at Osgoode Hall Law School. Professor Drummond specializes in legal anthropology, comparative law, civil law and family law. In her affidavit, Professor Drummond sets out English and Canadian legal history on issues relevant to an analysis of the constitutionality of section 293, including the age of marriage, the use of the section and its predecessors, and patriarchy within the monogamous family.

e) **Anver Emon**, Associate Professor of Law at the University of Toronto, who has published widely on issues pertaining to Islamic law and history. Professor Emon has sworn an affidavit providing his views on the place of polygamy in Islamic law and in a contemporary Islamic context.

f) **Martha Ertman**, Professor of Law at the University of Maryland, who has for the last 15 years studied the legal regulation of intimate relationships, including marriage, co-habitation, parenthood and affiliations among more than two adults. For the past five years Professor Ertman has focused on the legal regulation of 19$^{th}$ century Mormon polygamy, the topic addressed in her affidavit.

g) **Todd Shackelford**, the Chair of the Department of Psychology at Oakland University, who has provided an affidavit addressing spousal and child abuse as it arises in monogamous relationships.

h) **Jonathan Turley**, Shapiro Chair in Public Interest Law at George Washington University Law School. Professor Turley's areas of expertise include constitutional and international law, and his affidavit addresses reports

filed by the AGC (Rebecca Cook) and Stop Polygamy in Canada (Marci Hamilton), in addition to dealing more generally with the American and international context in which plural unions are criminalized.

i) **Zheng Wu**, Chair of the Department of Sociology at the University of Victoria. Professor Wu has research interests across numerous socio-demographic topics, including longstanding expertise in family demography, and he has sworn two affidavits in this proceeding. Professor Wu's first affidavit addresses the changing patterns of conjugal life in Canada, and in the second he provides statistics on such matters as the rates of spousal and child abuse in Canada, the numbers of single adults in Canada, and divorce rates and serial marriages in Canada.

j) several witnesses who address their personal experiences with polygamy and/or the intersection of their religions with polygamy: **Mary Batchelor**, **Anne Wilde** and **Marianne Watson**, all of whom are independent Fundamentalist Mormons and are or have been polygamists; and **Samuel Wagar**, a Wiccan priest. Counsel for the FLDS has also filed affidavits from a variety of witnesses who are or have been involved in polygamous communities, in addition to the expert affidavit of **William John Walsh**, a specialist and scholar in the field of Mormon Studies. In addition, the Canadian Polyamory Advocacy Association ("**CPAA**") has filed affidavits regarding both personal experience and research into polyamorist lifestyles.

k) **Leticia Shamim** and **Brianna Luca**, two employees of Farris who attach various materials to their affidavits. Ms. Shamim's affidavit attaches responses of the AGC to certain interrogatories delivered by Amicus. Ms. Luca's affidavit is the Amicus' **Brandeis Brief**, which includes a range of articles, papers and other works supplementing that filed by the AGBC, on subjects such as polygamy itself, the sociology of religion and consent, and the effects of non-criminalized practices such as divorce and adultery. A further Brandeis Brief has been filed as well by the CPAA, as part of the second affidavit of **Carol Jean Cosco**.

## PART 4 - STATEMENT OF POSITION ON THE REFERENCE QUESTIONS

32. In this part, the Amicus sets out his position on the Reference questions, beginning with the elements of the offence, pursuant to Question 2, followed by the issue of breach of the *Charter*, pursuant to Question 1.

### A. Question 2 – The Elements of the Offence

33. Question 2 asks: What are the necessary elements of the offence in section 293 of the Criminal Code of Canada? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

34. Section 293 purports to make it a criminal offence to agree or consent to or practice, any form of polygamy, or 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. No proof of the method by which the alleged relationship was entered into is necessary to make out the offence. Nor is it an element of the offence that the parties to the relationship have had, intended to have or intend in the future to have, sexual intercourse.

35. Section 293 also purports to impose criminal liability on anyone who celebrates, assists or is party to a rite, ceremony, contract or consent that purports to sanction either of the kinds of relationship set out in section 293(1)(a).

36. "Polygamy" is not defined in the *Criminal Code*. Polygamy is generally understood to be an umbrella term that encompasses polygyny (one husband with multiple wives), polyandry (one wife with multiple husbands) and what is referred to as group marriage or polyamory (more than two people of whatever gender). By the inclusion of the words "Every one" and "any form of" in relation to polygamy, and "any kind of" in relation to conjugal unions, Parliament purported to prohibit all of these forms of polygamy.

37. The usual definition of "polygamy" is something like "the condition or practice of having more than one spouse at the same time". The reference here to "spouse" reflects the usual understanding that polygamy is a form of *marriage*: that is, that the relationship is composed of multiple marriages. With section 293, however, it appears that Parliament's intention was not to restrict the prohibition of polygamy to cases where the relationship is actually composed of multiple *marriages*. Rather, Parliament's intention appears to be to also capture *de facto* polygamy, meaning where a person is in multiple marriage-*like* relationships. The first version of section 293 (*An Act further to amend the Criminal Law*, S.C. 1890, c. 37, section 11 (the "**1890 Act**")) expressly stated that it is a crime to enter into any form of polygamy, "whether in a manner recognized by law as a binding form of marriage or not". Subsequent amendments to the polygamy offence limited this language only to section 293(1)(a)(ii) (multiple conjugal unions), but there is no evidence that such amendment was intended to substantively change the law.

38. The language of section 293 as presently drafted does not articulate whether it is aimed solely at a person who him- or herself has multiple marriage-like relationships, or whether it also captures the other parties to those relationships, whether or not they are themselves in multiple marriage-like relationships. Reference to the 1890 Act reveals that Parliament intended the latter also to be covered. Section 11 of the 1890 Act, at subparagraph (d), included within the scope of the prohibition everyone "Who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union". Again, there is no evidence in the legislative record to suggest that the change to the present wording was intended to be substantive, and the language of section 293 in its present form appears to cover both categories.

39. As for the second part of Question 2, the elements of the offence of polygamy do not include the involvement of a minor or a context of dependence, exploitation, abuse of authority, a gross imbalance of power or undue influence. Had Parliament intended to limit the offence to relationships involving any of those elements, it could and would

have stated as much. Indeed, the language of section 293 suggests that Parliament was not concerned with targeting relationships where participants did not give their free consent (such as by being underage, or being dependent upon or unduly influenced by the spouse or some other relevant person). To the contrary, Parliament's concern appears to be to prohibit *consenting to* polygamy: section 293 imposes criminal liability on "[e]very one who ... practises or enters into or in any manner agrees or consents to practise or enter into" polygamous relationships (emphasis added).

40. The Amicus disagrees with the AGBC's stated position that the elements set out in Question 2 could be read in to section 293, if the section as it is actually written is unconstitutional. Such a remedy would radically intrude upon the legislative function and would be contrary to Parliament's intention, and would, in any event, not cure the unconstitutionality.

## B. Question 1 – Breach of the *Charter*

41. Question 1 asks: Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

42. The Amicus respectfully submits that section 293 breaches sections 2(a) (freedom of religion), 2(d) (freedom of association), 7 (liberty) and 15 (equality, in terms of religion and marital status) of the *Charter*. A brief overview on each of these grounds is set out below.

### (1) Freedom of Religion

43. Section 2(a) of the *Charter* states that "[e]veryone has the following fundamental freedoms ... (a) freedom of conscience and religion".

44. Section 293 is contrary to freedom of religion in both purpose and effect.

45. The 1890 Act was passed with the plain intention of prohibiting a practice central to the Mormon faith and of buttressing and defending a mainstream Christian view of marriage. The criminal ban on polygamy was further used as part of Canada's colonial

campaign against Aboriginal cultures, specifically by seeking to force them to discontinue traditional marriage practices and take up Christian marriage. The *purpose* of section 293 therefore infringes freedom of religion.

46. The prohibition in section 293(1)(b) against the *celebration* of polygamous marriage is likewise aimed at restricting religious practices. In his Statement of Position (at para. 22), the AGBC characterizes this subsection as addressing "the reality that the harms associated with polygamy are in part based on, and in part exacerbated by, their religious and cultural reinforcement through supposedly binding ceremony and cultural celebration".

47. Section 293 also infringes freedom of religion in its *effects.* Belief in, and the practice of, polygamy has a nexus with a number of religions, most obviously Fundamentalist Mormonism and Islam. Polygamy also has a spiritual basis in Wicca.

48. For Fundamentalist Mormons, the sanctity of polygamy and the importance of polygamy in achieving the highest level of heaven is a central and defining religious belief. For Muslims and Wiccans, polygamy is a less common and prominent practice, but for believers who do engage in it the importance of it is deep, given that it defines their family and intimate connections.

49. A criminal ban on polygamy is the greatest possible interference with these religious beliefs and practices. Section 293 strikes at the core of freedom of religion.

**(2) Freedom of Association**

50. Section 2(d) of the Charter states that "[e]veryone has the following fundamental freedoms ... (d) freedom of association."

51. The law does not criminalize adultery or group sex. The law also allows for no-fault divorce and subsequent remarriage, with the result that it is not rare for a minor to have a number of "parents" in the form of biological parents and stepparents. Through section 293, however, the law criminalizes the formation of committed polygamous relationships.

52. The result is that the law permits many of the activities that underlie polygamy – such as having multiple sexual partners or raising a child with more than one other parent – but does not allow for the more formal creation of groups to engage in those activities. The law permits polygamous *activities*, but forbids polygamous *groupings*. That prohibition of polygamous groupings, contained in section 293, violates freedom of association.

**(3) Equality (Religion)**

53. Section 15(1) of the *Charter* states that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

54. Section 293 breaches section 15(1) for many of the same reasons as it breaches section 2(a). The provision draws a distinction between religious practices which the state deems to be acceptable (monogamous marriage) and those that are subject to criminal sanction (polygamous marriage). Even if not prosecuted, religious practitioners of polygamy are stigmatized by the law and treated as less worthy of respect and concern.

55. Section 293 is based on an assumption that polygamy is a practice uniformly associated with harm; essentially, that it is "barbarous". The law is based entirely on presumed, stereotypical characteristics, is not responsive to the actual characteristics of the particular polygamous relationships, and has the effect of demeaning the dignity of practitioners of polygamy.

**(4) Equality (Marital Status)**

56. Section 293 also breaches section 15 of the *Charter* because it discriminates on the basis of marital status, which is a ground that has been found to be analogous to those enumerated within section 15: *Miron v. Trudel*, [1995] 2 S.C.R. 418 and *Nova Scotia v. Walsh*, [2002] 4 S.C.R. 325. The law draws a distinction between monogamous marriage (which is permitted and indeed defended) and polygamy (which is criminalized). Those who choose a polygamous form of marriage-like relationship are

subject to criminal sanction, based upon an assumption that only monogamy is an acceptable and socially-productive form of relationship. That broad, stereotypical assumption is not at all supported by the evidence.

**(5) Liberty**

57. Section 7 of the Charter states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

58. Section 293 deprives practitioners and celebrants of polygamy by posing a threat of imprisonment. Furthermore, by banning polygamy, section 293 deprives them of the freedom to make fundamentally and inherently personal choices with respect to their intimate relationships, and so implicates basic choices going to the core of what it means to enjoy individual dignity and independence. Both the threat of imprisonment and the curtailment of a fundamentally personal choice constitute deprivations of liberty for the purposes of section 7: *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571.

59. These deprivations of liberty are not in accordance with the principles of fundamental justice, in that they were enacted in pursuit of an unjust objective and are arbitrary, overbroad and grossly disproportionate.

60. Unjust objective. The criminal ban on polygamy was enacted in order to curtail a practice that was deemed to be offensive to a mainstream Christian definition of marriage. It was aimed at defending a Christian view of proper family life, and was employed in the state's cultural colonization of Aboriginal peoples. The ban was first imposed during a historical period when the imposition of Christian norms and values was deemed appropriate, but such an objective is no longer just and compelling in our free and democratic society. Such an objective conflicts with our basic commitment to freedom of religion and opinion, as well as to the protection of our multicultural heritage.

61. In his Statement of Position (at para. 20), the AGBC characterizes the objective of section 293 this way:

> Section 293's purpose is to denounce, deter, and punish behavior that is immoral and is (or is reasonably apprehended to be) harmful to women and children of polygamous unions, denigrating to women's equality and children's rights generally, and injurious to social harmony and order, and to the authority of the secular state.

62. The alleged objectives of punishing *immorality* and defending the authority of the *secular* state appear to be associated with the polygamy ban's religious objectives, and in this way are not fundamentally just objectives in contemporary Canadian society.

63. The Amicus disputes that section 293 was enacted for the other purposes alleged by the AGBC – the protection of women (and women's equality), the protection of children, and the maintenance of social harmony and order. The remainder of this outline of the section 7 analysis, however, addresses those objectives in the alternative.

64. Arbitrariness. The AGBC's characterization of the objectives of section 293 is based on stereotypical assumptions that are not supported by the evidence. Section 293 imposes arbitrary deprivations of liberty. There is no clear connection in theory or fact between section 293 and those stated objectives, for the following broad reasons:

a) Protection of women. Section 293 is not aimed at protecting women in polygamous relationships. Rather, section 293 criminalizes "every one" who is in such relationships, including wives in a polygynous relationship. Section 293 criminalizes all polygamous relationships, irrespective of the consent of the women who participate in them. To the contrary, section 293 criminalizes *free consent* to such relationships.

b) Protection of children. Polygamy is not inherently harmful to children. As with any family form (such as two-parent, single-parent or split families), bad things will sometimes happen in polygamous families. Section 293 is not confined simply to those harms, or relationships involving underage brides. Instead, section 293 criminalizes *all* polygamous relationships, regardless of whether a particular relationship causes harm to children or not.

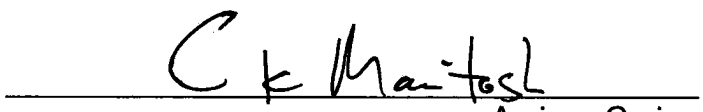
c) Social harmony. There is no evidence that polygamy is inherently associated with social disorder, although the evidence suggests that the

*criminalization* of polygamy tends to cause polygamous communities to become more insular. The AGBC's contention that polygamy creates a "pool of unmarried men" that is more prone to anti-social behaviour and that polygamy must therefore be criminalized is utterly disconnected from the reality in Canada. Moreover, such a rationale treats women as a resource to be allocated to men so as to pacify them and thereby maintain social order. Such an objective is deeply offensive to women's autonomy and fundamental justice.

65. Overbreadth. Section 293 is vast in its sweep, capturing far more than merely relationships that are characterized by the harms the AGBC alleges are associated with polygamy. Section 293 criminalizes all polygamous relationships, including those where the participants freely consent and where children are raised in a loving and supportive environment. An array of criminal laws exists to target true harms that will at times arise in polygamous relationships, just as they arise in any other family form. The criminalization of polygamy itself goes far beyond any objective that is the proper subject of the criminal law, and is therefore overbroad.

66. Gross Disproportionality. The criminalization of profoundly personal choices, and of a system of family formation that characterizes whole communities, constitutes a grave deprivation of liberty. Moreover, the criminal ban causes polygamous individuals and communities to become more insular and closed, which in turn causes a suite of detrimental effects. Section 293 is aimed at an objective that is offensive to deeply held Canadian values, and in any event the section adds nothing to the protection of the vulnerable in our society. The vast sweep of criminalization effected by section 293 is extreme and is based upon unsupported stereotypes and assumptions as to the nature of polygamous relationships. The deprivations of liberty it imposes are grossly disproportionate to any legitimate objective it might be thought to have.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Amicus Curiae

Dated: November 1, 2010

No S-097767
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF

THE CONSTITUTIONAL QUESTION ACT, R.S.B.C. 1986, C. 68

AND IN THE MATTER OF

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF S. 293 OF THE CRIMINAL CODE OF CANADA R.S.C. 1985, C. C-46

# OPENING STATEMENT OF REAL WOMEN OF CANADA

**Counsel for Real Women of Canada**

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1 Section 2(a) of the Canadian *Charter of Rights and Freedoms* states that "[e]veryone has the following fundamental freedoms…(a) *freedom of conscience and religion*". It is anticipated that this issue will be the most sensitive in this matter and Real Women of Canada will focus its submission on this aspect of the reference. Real Women of Canada submits that section 293 of the *Criminal Code of Canada* is consistent with the *Charter of Rights and Freedoms* and that in any given case the Charter may not be engaged at all if the belief of the accused person, relating to the practice of polygamy can not properly be characterized as a religious belief.

**Polygamy**

> *293. (1) Every one who*
>
> *(a) practices or enters into or in any manner agrees or consents to practice or enter into*
>
> *(i) any form of polygamy, or*
>
> *(ii) any kind of conjugal union with more than one person at the same time,*
>
> *whether or not it is by law recognized as a binding form of marriage, or*
>
> *(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in sub paragraph (a)(i) or (ii),*
>
> *is guilty of an indictable offense and liable to imprisonment for a term not exceeding five years.*

**Evidence in case of polygamy**

> (*2) Where an accused is charged with an offense 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.*

## Question 1: is section 293 of the Criminal Code of Canada consistent with the *Canadian Charter of Rights and Freedoms*?

2. Whether the *Charter of Rights and Freedoms* (in particular ss. 2(a), (b) or (d) or ss. 7 or 15) is engaged so as to enable an accused person to assert a constitutional defence, will depend in part upon doctrinal differences between various religions upon which the accused relies to assert the defence. The question that always must be asked at the outset is, "When is a religious belief religious? Is the accused's practice of polygamy based on religious belief?

3. If an accused asserted the defence, for example, that as a Muslim, the practice of polygamy springs from his religious beliefs, the answer is this: There is ample evidence that polygamy is dealt with under Muslim law but that it is not *religious* law. Professor Muhammad Fadel (Canada Research Chair in the Law and Economics of Islamic Law at the University of Toronto's Faculty of Law) in his expert report explains the distinction in Islam between religious *belief* and religious *law*. Traditional Islamic law is divided into two broad categories, -ritual law and transactional law. The former is distinguished from the latter primarily by the fact that the validity of any ritual act requires a religious intention while the validity of transactions does not. (par27)

4. Marriage is regulated under Islam's transactional law, not its ritual law, even though marriage is subject to numerous religious beliefs. (par. 28) Marriage is structured as a contract with minimal legal formalities. ( par. 55) As a matter of religious doctrine, Sunni as well as Shi'ite Muslims agree that polygyny is not morally forbidden. (par. 33) It is however, morally disfavoured, for a man to marry more than one woman simultaneously. (par. 37) It is not considered religiously meritorious and may in fact be religiously blameworthy, even if it is not sinful. (par. 38)

5. The vast majority of nation states that apply Islamic family law either do not permit or do not recognize the marriages of minors. (par. 56 ) A religious

figure or Imam will preside over the marriage contract but his role is only to confirm that all the legal formalities have been satisfied. (par. 63)

6. The legal systems of religious cultures may have been derived from ancient religious beliefs but the law is not necessarily faith based. For example while monogamy is part of Christian tradition its practice is not religious. Stanford Professor Walter Sheidel in an article appended to his Affidavit cites Saint Augustine. In a treatise entitled "*On the Good of Marriage*" composed in the early fifth century, he expressly identifies the prohibition of polygamy as a "Roman *custom*" rather than a *religious* prohibition.

> *"And yet it [ i.e. remarriage after divorce] is not allowed; and now indeed in our times , and according to Roman custom, neither to marry in addition, so as to have more than one wife living."***Again, Jacob the son of Isaac is charged with having committed a great crime because he had four wives. But here there is no ground for a criminal accusation: for a plurality of wives. But here there is no ground for criminal accusation: for a plurality of wives was no crime when it was the custom; and it is a crime now, because it is no longer the custom*" (pp. 47-48)

**7.** Prof Scheidel notes that monogamy is merely presented as a preferred option, in keeping with the example set by Adam and Eve. In contrast to earlier writers Augustine does not present monogamy as a divine ordinance but explains its earlier existence and later rejection in pragmatic terms, with reference to custom and indeed, even to Roman custom."(Aff. Prof William Scheidel (Stanford University)*Report on Monogamy and Polygamy)*

**The FLDS**

8. When the constitutional defence of religious freedom is raised by an accused member of the FLDS the question in all cases would be whether the belief of the accused in polygamy is in fact a "*religious belief*." When the accused is female there would be an initial evidentiary issue of whether the motivation for the marriage was to achieve eternal celestial bliss, or whether it was simply a matter of social pressure from the community.

9. On the other hand, where the accused has the position of Church President and Prophet (The one who claims to receive marital and sexual

directions from some Vaguely Gaseous Vertebrate) it would be up to the court to determine whether the accused was motivated to impregnate 13 year old children because he honestly believed that sexual predators are Gods chosen people. If the Court accepts this evidence then the Constitutional rights pertaining to religion would be engaged. On the other hand if the Court concluded that the Prophet, in this case Mr. Jeffs, made the following statement without the benefit of a hot line to the Almighty, the Charter defence would not be engaged:

*The Lord is showing me the young girls of this community, those who are pure and righteous will be taken care of at a younger age. As the government finds out about this it will bring such a great pressure upon us, upon the families of these girls, who are placed in marriage....And I will teach the young people that there is no such thing as an underage priesthood marriage but that it is a protection for them if they will look at it right and seek unto the Lord for a testimony. The Lord will have me do this, get more young girls married, not only as a test to the parents, but also to test this people to see if they will give the Prophet up.*
(Affidavit Roger H. Hoole)

10. Simply put, the *Charter of Rights and Freedoms* would not be engaged upon a finding that Polygamy as practiced by the FLDS is simply a perverse, cruel cult in which the Prophet is motivated by his own self interest.

11. The public interest in stopping polygamy whether religiously motivated or not is compelling. Prohibiting the exercise of religion is not the object of s. 293, but merely the incidental effect. Polygamy presents a clear and present danger of harm to women, children and society that justifies its suppression. The infringement is reasonable, proportional to the objective in question and can be demonstrably justified in a free and democratic society.

12. Section 293 can be upheld without referring to whether or not the practitioner has any religious beliefs relating to it at all. As long as there is evidence that the practice has serious adverse social impacts the Legislature can prohibit it without an analysis of the system of belief of an accused.

13. The legalization of polygamy would promote inequality and impose costs on Canadian society as it has elsewhere. Polygamy exploits women, harms children, and its practice is contrary to fundamental Canadian values. If polygamy is allowed it would open the floodgates of immigration by polygamous families.

European countries, which allowed such immigration by polygamous families experienced significant social and economic costs as a result. Polygamy offends the principle of gender equality Whether or not the prohibition is contrary to the religious beliefs of a small group of Fundamentalist Mormons, it is a constitutionally justified restriction intended to prevent harm to women and children. A finding that this provision is unconstitutional would be inconsistent with the values and opinions of an overwhelming majority of Canadians.

**14.** **.**The covenant of the FLDS supposedly handed down by God and justifying polygamy does not recognize the evils and abuses that occur in polygamous relationships. Codes of law based on fairness and equity of remedy including forms and procedures for the efficient conduct of the societies, are entitled to respect. The FLDS is an anti democratic abomination that promotes and depends upon inequality, harm to women and the abuse of children.

**Question 2 : What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?**

15. The necessary elements are clearly set out in section 293. It is not necessary to imply additional elements. Dependence, exploitation, abuse of authority and a gross imbalance of power, or undue influence all represent the grotesque side of a culture that practices polygamy. The evidence is overwhelming that the institution today is almost universally condemned because it promotes these things. As a result the section does not need to be read down.

DATED THIS 8th DAY OF NOVEMBER, 2010

JONATHAN BAKER
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No S-097767
Vancouver Registry

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## OPENING STATEMENT OF WEST COAST LEAF

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## PART I OVERVIEW

1. West Coast Women's Education and Action Fund ("West Coast LEAF") sought leave to intervene in this case to ensure that the constitutionality of the polygamy provision (s.293) of the *Criminal Code of Canada* is firmly situated in the context of constitutional equality rights for women and girls. Equality is an underlying value to all *Charter* rights. Our argument is twofold. First, polygamy is a practice that tends in its practice towards the exploitation of women and girls, and second, that where exploitation is present, polygamy is properly subject to criminal sanction.

2. Pursuant to the *Constitutional Question Act*, two questions are referred to the B.C. Supreme Court for hearing and consideration:

    a) Is section 293 of the *Criminal Code of Canada* ("the *Criminal Code*") consistent with the *Canadian Charter of Rights and Freedoms* ("the *Charter*")? If not, in what particular or particulars and to what extent?

    b) What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

3. In this opening statement, West Coast LEAF will provide an overview and an anticipated evidentiary basis for its position that:

    a) Question 1: Section 293 is consistent with the *Charter*. In the alternative, any breach of *Charter* rights is justified under s. 1 of the *Charter*.

    b) Question 2: Section 293 must be read down such that the prohibition applies to polygamists who exploit women or girls.

4. West Coast LEAF expects the evidence to show that polygamy, as practiced in communities like Bountiful BC and elsewhere, has been directly connected with the abuse and exploitation of women and girls. Thus, the practice of polygamy violates the fundamental rights to autonomy and equality of women and girls. West Coast LEAF will argue that there is a sufficient connection between the practice of polygamy and these harms to justify the legislative prohibition of polygamy where that exploitation is present.

5. In this constitutional reference, West Coast LEAF will assist the Court in determining how to balance the equality rights of women and girls with competing *Charter* interests. West Coast LEAF will address sections 2(a) (religion), 7 (liberty and security of the person), and 15 (equality). West Coast LEAF will not address s. 2(d) (association) at this time, but reserves the right to do so at a later time. West Coast LEAF will also make submissions on section 1, arguing that any breach would be justified under section 1.

6. Specifically, West Coast LEAF will argue that:

   a) The scope of freedom of religion, as protected by section 2(a), is not without limits. It must incorporate the equality protections of women and girls, including women and girls of faith. The equality and autonomy protections for women and girls, pursuant to sections 7, 15 and 28 of the *Charter,* must infuse the s. 2(a) analysis.

   b) The harms caused by polygamy violate the security of the person by infringing women's personal autonomy. When examining the protections offered by section 7 to the rights of persons in polygamous relationships, then the Court must necessarily examine the different ways in which the section 7 rights of a husband and his wives may be engaged.

   c) Section 15 protects the substantive equality rights of women and girls, even in the context of other competing *Charter* rights. The state has a positive obligation to protect equality rights, and therefore s. 293 is required by law under the *Charter*. The equality analysis is also relevant to the harm caused by polygamy. As with the obscenity provisions of the *Criminal Code* [section 163(8)], the law must now move away from a justification of the criminal law based on morality, towards a justification based on harm. The analysis of harm is made objective in part by being grounded in *Charter* values.

7. Alternatively, if this Honourable Court finds a breach of *Charter* rights, West Coast LEAF submits that the legislative prohibition on polygamy can be justified under section 1 of the *Charter*. Parliament is entitled to legislate to affirmatively protect the constitutional interests of vulnerable groups. Section 293 must be read down to prevent the practice of polygamy where such practice is exploitative of the women and children involved, and the section is justifiable to the extent that it prohibits unacceptably harmful conduct.

## PART II SECTION 293 and CONSTITUTIONAL VALIDITY

### A. "Reading Down" Section 293 to Apply to Exploitative Relationships

8. West Coast LEAF submits that section 293 is consistent with the *Charter* insofar as it is read down to apply to exploitative relationships only.

9. Section 52(1) of the *Constitution Act* of 1982 provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

10. Where the constitutionality of a law is impugned, the Court is permitted to "read down" the provision. Reading down reflects judicial restraint; it is an appropriate judicial mechanism. It does not intrude into the legislative sphere.[1]

11. In fact, the principle of constitutionality requires the Court to interpret a statute to avoid constitutional inconsistency where the statutory provision is capable of such an interpretation[2]. By reading down section 293 to apply to exploitative relationships only, this Court limits the circumstances to which the offence applies. Thus, it ensures consistency with the *Charter* and avoids constitutional inconsistencies.

12. When s. 293 is read down, polyamory is not captured by the prohibition on polygamy. Polyamory, as it is defined at paras. 13 and 14 of the "Opening Statement on Breach" by the Canadian Polyamory Advocacy Association ("CPAA"), concerns relationships based on a practice of equality and self-realization.[3] The law does not prohibit having multiple spouses *per se*; rather, it prohibits the exploitative practice of polygamy.

13. Prohibition of the practice of polygamy is analogous to prohibitions on undue exploitation that are contained in other *Criminal Code* provisions, such as the obscenity provision. The

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[1] As described by Peter Hogg in Constitutional Law of Canada, 1998. Scarborough: Carswell Thomson Professional Publishing, 1998, at section 37.1(b) wherein Hogg states:

> Reading down is the appropriate remedy when a statute will bear two interpretations, one of which would offend the *Charter of Rights* and the other of which would not. In that case, a court will hold that the latter interpretation, which is normally the narrower one (hence reading *down*), is the correct one. When a statute is read down to avoid a breach of the Charter, there is no holding of invalidity. The vindication of the Charter right is accomplished solely by interpretation. Reading down is another doctrine of judicial restraint, because it minimizes the impact of a successful Charter attack on a law.
>
> Reading down should not be confused with reading in . . . Reading in involves the insertion into a statute of words that Parliament never enacted. It is not a technique of interpretation but rather a technique of judicial amendment, altering the statute to make it conform to the Constitution. Reading in usually has the effect of extending the scope of the statute. Reading down, on the other hand, involves giving a statute a narrow interpretation in order to avoid a constitutional problem that would arise if the statute were given a broad interpretation.

[2] *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at para.25 and *R. v. Ruzic*, [2001] 1 S.C.R. 687 at para.26

[3] CPAA "Opening Statement on Breach", paras. 13 and 14:

> Para. 13 "Polyamory" is the practice of having emotionally intimate, sexual relationships within groups of three or more people, where at least one person in the group has more than one emotionally intimate, sexual relationship at a time and where all members of the group formally or informally adopt these principles:
>
> a) men and women have equal rights in establishing the configurations of the groups; no gender has privileges with respect to intimate relationships that the other gender lacks; and
>
> b) no sexual orientation is regarded as superior to any other.
>
> Para. 14 Conjugal polyamory refers to polyamorous relationships where three or more of the parties in the relationship live in the same household.

prohibition on the practice of polygamy and the prohibition on obscenity both concern activities that are not inherently harmful but are harmful when practiced in an exploitative manner. Both activities contain a spectrum spanning from healthy human sexuality to exploitative power relationships. The criminal law plays an important role in prohibiting the exploitative forms of what might otherwise be an acceptable activity.

## B. The Exploitation of Women and Girls

14. Relevant to the analysis of the Charter provisions is a consideration of the harms that have an actual nexus with polygamy including, but not limited to, the following:

a) The available evidence shows that polygamy in Canada and globally is overwhelmingly practiced as polygyny (a man with multiple wives). Polyandry (a woman with multiple husbands) is extremely rare. Therefore, the common form of polygamy is inherently unequal in that it allows husbands to take multiple wives, but not wives to take multiple husbands.

Cook Affidavit, paras.13, 20, 26
Henrich Affidavit, Exh. A, p. 35
Deignan Affidavit, Exhs. B & C

b) A society in which men have multiple wives results in a shortage of wives. Therefore, some men will be pushed out the community and the age of marriageable women will vary widely in order to increase the number of potential wives. This will lead to wide age differences between a husband and at least some of his wives.

Dunfield Affidavit, Exhibit B at page 3
Nichols Affidavit
Henrich Affidavit, Exh. A, p. 39, 49

c) These age differences increase the power differential between a husband and a wife, increase the potential for exploitation, and impact her ability to consent to marriage and sex.

Nichols Affidavit
Cook Affidavit, paras. 20-21, citing the UN Human Rights Commission
McDermott Affidavit, paras. 121-122
Henrich Affidavit, Exh. A, p. 55, 57

d) In addition, this means that very young women, including children, are considered 'marriageable'. Children's vulnerability is clearly recognized under the law.

Children under 16 are not able to consent to sex except with their peers, and are not able to consent to marriage at all. The law regarding the age of consent recognizes the increased vulnerability that children and young people face when confronted with having sex with a significantly older person.

Sections 150.1, 151, 153 of the *Criminal Code*
McDermott Affidavit, para. 96
Kendall Affidavit, paras. 7-8
Nicols Affidavit

e) Polygamous marriage structures tend to concentrate the power in the household in the central male figure for decision making, sexual control and economic power.

Bala Affidavit, Exhibit A, para 41.
Cook Affidavit, at para. 22, citing the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
McDermott Affidavit, para. 137-146
Deignan Affidavit, Exhs. D & F
Bennion, Janet, "*Abbas Raptus: Exploring Factors that Contribute to the Sexual Abuse of Females in Rural Mormon Fundamentalist Communities*", in The Forum on Public Policy (2006) at pps. 5-9, 14

f) Polygamy is connected to a mandatory requirement for women to have intercourse and produce children for their husband. In these circumstances, women's autonomy and reproductive freedom is curtailed, contrary to women's section 7 rights to security of the person.

Cook Affidavit, paras.14, 33, 34 , 35, 53-55
McDermott Affidavit, para. 98, 101
*R v. Morgentaler* [1988] 1 S.C.R. 30 at para. 24
Deignan Affidavit, Exh. O
Life in Bountiful report p.4258 of Brandeis Brief
Interviews of Howard Mackert, Jorjina Broadbent and Mary Mackert

g) Women in polygamous relationships are often pitted against each other in a competition for love, attention and sustenance which are controlled by the male head of household. Where women are valued solely for their reproductive role, this attention becomes a matter of self-worth and societal worth.

Cook Affidavit, at paras.43-45, 56, 59

Mackert Interview
Hassouneh Affidavit

h) Women's economic vulnerability is heightened, because they are often reliant on a singular male income, or if they are income earners themselves, their money is still often controlled by their husbands.

Cook Affidavit, paras. 56-60

## PART 3 THE CHARTER PROVISIONS

### A. Section 2(a): Freedom of Religion

15. The essence of the concept of freedom of religion is: a) the right to entertain such religious beliefs as a person chooses; b) the right to declare religious beliefs openly and without fear of hindrance or reprisal; and, c) the right to manifest religious belief by worship and practice or by teaching and dissemination.[4] However, not every legislative effect on religious beliefs or practices is offensive to the guarantee provided by section 2(a).[5]

16. West Coast LEAF will argue that polygamy is a practice and not necessarily a belief. In *British Columbia College of Teachers v. Trinity Western University et al.*[6], Justices Iacobucci and Bastarache, writing for the majority, drew a distinction between practice and belief: "The freedom to hold beliefs is broader than the freedom to act on them."

17. West Coast LEAF will argue that section 293 prohibits the practice of exploitative polygamy and thus may not be protected by section 2(a). In the Cook Affidavit (para.101 ), the affiant refers to *Reynolds v. United States*, 98 US 145 (1879). The US Supreme Court held that while laws "cannot interfere with mere religious belief and opinions, they may with practices."

18. Even if polygamy is found to be a belief in some cases, West Coast LEAF will submit that sincerity of belief does not immunize that belief from examination. It does not automatically veil that belief with the protection of s.2(a) where exploitation of another person occurs.

19. More importantly, a belief may not be genuine where it is formed in an exploitative environment. The sincerity of that belief may be insufficient to warrant constitutional protection where the objective circumstances show that the rights bearer was subject to

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[4] *R v. Big M Drug Mart Ltd.*, [1985] 713
[5] *R v. Jones* [1986] 2 S.C.R. 284
[6] [2001] 1 S.C.R. 772 at para. 36

exploitation. It is anticipated that the evidence will demonstrate that polygamy lends itself to exploitation.

Bala Affidavit, Exhibit A, para. 41

**Section 7: Life, Liberty and Security of the Person**

20. Section 7 of the *Charter* provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

21. In stage one of the section 7 analysis, this Court must ask whether a state deprivation has breached an individual's right to life, liberty or security of the person. The availability of imprisonment for a section 293 conviction is sufficient to trigger section 7 scrutiny.[7]

22. The Amicus argues that s. 293 deprives polygamists of the "freedom to make fundamentally and inherently personal choices with respect to their intimate relationships, and so implicates basic choices going to the core of what it means to enjoy individual dignity and independence." West Coast LEAF disagrees. Section 7 does not protect the "freedom" to exploit another person, regardless if that exploitation occurs in the context of an intimate relationship. Therefore, when section 293 is read down to apply to exploitative relationships, polygamists are not deprived of any constitutionally protected freedom to make fundamentally and inherently personal choices with respect to their intimate relationships.

23. On the contrary, section 7 should be interpreted to protect the substantive rights of women. In that regard, the harms caused by polygamy violate the security of the person by infringing "personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress."[8] In light of section 28 of the *Charter*, section 7 cannot be interpreted as protecting the rights of people in polygamous relationships without looking at the very different ways in which the section 7 rights of a husband and his wives may be engaged.

24. If the Court finds a breach of life, liberty or security of the person, it must then ask whether any infringement was in accordance with the principles of fundamental justice. To be in accordance with the principles of fundamental justice, the provision cannot be arbitrary or overly broad: "they must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result."[9]

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[7] *R v. Malmo-Levine; R v. Caine* [2003] 3 S.C.R. 571 at para. 89 wherein Justices Gonthier and Binnie, writing for the majority, stated that the risk of being sent to jail engages the appellants' liberty interests.
[8] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at para.136
[9] *Rodriguez* at para.141

25. The Amicus argues that s.293 deprivations of liberty are not in accordance with the principles of fundamental justice, because they were enacted in pursuit of an unjust objective and are arbitrary, overbroad and grossly disproportionate. However, that argument relates only to a definition of polygamy within section 293 that is related to morality and not harm. West Coast LEAF says that when exploitation is understood as a required element of this section, the section is neither arbitrary nor overly broad.

26. West Coast LEAF says the evidence will show that polygamy lends itself to exploitation and that it exacerbates sex inequality. Read down to include an element of exploitation, section 293 targets the harms caused by polygamy to women and girls. Amongst other harms, the provision recognizes that the practice of polygamy deprives women and girls of the ability to freely chose when to engage in sexual activity, when to get married, when to leave marriages and when to have children.

27. With respect to the Amicus' alternative section 7 argument ("arbitrariness"), West Coast LEAF will argue that there is a clear connection between section 293 and its objective to "denounce, deter and punish behaviour that is [reasonably apprehended to be] harmful to women and children of polygamous unions, denigrating to women's equality and children's rights generally and injurious to social harmony and order, and to the authority of the secular state." The Amicus' argument that, "section 293 criminalizes *free consent* to such relationships" presupposes that polygamous communities such as Bountiful, B.C., permit women and girls to exercise "free consent".

    Dunfield Affidavit, Exhibit B, page 4

28. When read down to apply to exploitative relationships, section 293 is not overly broad. A prohibition on exploitative polygamous relationships that causes harm to the rights of women and children is sufficiently precise to be in accordance with the principles of fundamental justice.

**Section 15: Equality**

29. The current test for s.15 is:

    a). Can the claimant show that the law creates a distinction based on an enumerated or analogous ground?[10]

    b) If so, can the government show that the impugned law, program or activity is ameliorative and, thus, constitutional? A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (i) the program has an ameliorative

[10] *R. v. Kapp*, 2008 SCC 41 at para.17

or remedial purpose; and (ii) the program targets a disadvantaged group identified by the enumerated or analogous grounds.[11]

c) If the government cannot satisfy step 2, can the claimant show that the distinction creates a disadvantage by perpetuating prejudice or stereotyping?[12]

30. West Coast LEAF will argue that section 15 equality rights apply to the constitutional analysis of s.293 in a number of ways:

a). First, that section 15 protects substantive equality rights of women and girls, which should be balanced against the right to freedom of religion under s.2(a), the right to liberty and security of the person under s. 7, non-discrimination on the basis of religion under s.15 and the justification stage at s.1.

b). Second, the state has a positive obligation to protect equality rights, and therefore section 293 fulfills the Crown's obligations to consider the equality rights of women and girls of faith in polygamous communities and ensure that they are not exploited. In addition, the government is required not to revoke legislation that is necessary to protect equality rights. The revocation of legislation may constitute government action, and therefore attract Charter scrutiny. According to *Vriend v. Alberta,* [1998] 1 S.C.R. 493 at para.61, a legislative omission in the form of under-inclusive legislation can be subject to a section 15 analysis; by analogy a revocation is also subject to the Charter.

c). Third, the equality analysis is also relevant to the harm caused by polygamy. The constitutional analysis of harm in the criminal law was developed in the context of the obscenity provisions of the *Criminal Code*, where the Court moved away from a justification of the criminal law based on morality, towards a justification based on harm. The analysis of harm is made objective in part by being grounded in *Charter* values, in particular the underlying value of equality.

31. The two steps of the harm test are: a) whether the Crown has established a harm or significant risk of harm that is grounded in constitutional norms or other fundamental legal standards, and b) whether the degree of harm is incompatible with the proper functioning of society. While this test necessarily requires value judgments, *Charter* values and other constitutional standards play an important role in anchoring such judgments to objectively knowable standards. As stated in *Labaye* at para.33:

> The requirement of formal societal recognition makes the test objective. The inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its fundamental laws, has recognized as essential. Views about

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[11] *R. v. Kapp* at paras.40-41
[12] *R. v. Kapp* at para.17

> the harm that the sexual conduct at issue may produce, however widely held, do not suffice to ground a conviction. This is not to say that social values no longer have a role to play. On the contrary, to ground a finding that acts are indecent, the harm must be shown to be related to a fundamental value reflected in our society's Constitution or similar fundamental laws, like bills of rights, which constitutes society's formal recognition that harm of the sort envisaged may be incompatible with its proper functioning. Unlike the community standard of tolerance test, the requirement of formal recognition inspires confidence that the values upheld by judges and jurors are truly those of Canadian society. Autonomy, liberty, equality and human dignity are among these values.

32. *Charter* guarantees of sex equality, as contained in ss.15 and 28, play a key role in negotiating the line between unconstitutional 'legal moralism' and constitutional prohibitions on harmful activity. The state is justified in limiting an activity (such as obscenity or polygamy) where it harms the equality interests of those involved or affected to the extent that such harm is incompatible with the proper functioning of Canadian democratic society. Equality concerns justify state imposed limitations on freedom.

**<u>Section 1:</u> Any Breach of a Polygamous Husband's Rights to Practice Polygamy in an Exploitative Context is Justified by Section 1**

33. Section 1 of the Charter reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

34. West Coast LEAF will argue that the harm test as developed in *Butler* and *Labaye*[13] comes into play in the section 1 analysis. This means that where the impugned provision is effectively designed to prevent harm, despite infringing rights, the provision may be justified. The harm analysis is one means for the Court to understand the competing values at play within the s.1 stage.

35. In *Ross v. New Brunswick School District No. 15*[14], the SCC elaborated upon the weighing of values at the section 1 stage, and the importance of the underlying values of the Charter:

> In Oakes, supra, at p. 136, Dickson C.J. stated that in determining whether Charter rights and freedoms should be limited,
>
> > [t]he Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group

[13] *R. v. Labaye*, [2005] 3 S.C.R. 728 at paras.28-30.
[14] [1996] 1 S.C.R. 825 at para 77

> identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.
>
> Ultimately, any attempt to determine whether the order is a justifiable infringement of the respondent's freedom of expression and of religion must involve a weighing of these essential values and principles, namely the accommodation of a wide variety of beliefs on the one hand and respect for cultural and group identity, and faith in social institutions that enhance the participation of individuals and respect for the inherent dignity of the human person on the other.

36. At the s.1 stage, conflicting constitutional values must be understood in their factual and social context[15]. The underlying values of the Charter, and the defining values of s.1, are the principles of a free and democratic society, the fundamental basis of which is the inherent dignity and equality of each individual. While equality must underwrite the analysis of every Charter right, s.1 provides the opportunity for the Court to return to first principles, and analyze any breaches from the perspective of these underlying values.

37. The s.1 stage may well prove to be the most significant step in the analysis of the constitutionality of s.293 because it is here that the Court will be faced most directly with the balancing of the competing rights claims at stake. In determining whether the Crown has shown that s.293 is a reasonable limit demonstrably justified in a free and democratic society, the Court will be required to examine the equality and autonomy interests of women and girls discussed above under ss.7 and 15 of the Charter, and balance these important rights against any breaches of the rights of those captured by the impugned provision. West Coast LEAF will rely on its analysis of the ss.7 and 15 rights of women and girls in the balancing of rights at the s.1 stage.

38. The evidence will show that polygamy is frequently practiced in a context of extreme gender inequality and that, as a practice, it feeds and exacerbates that inequality and becomes a practice of exploitation of women and girls. Any limitations on freedom of religion, religious or marital equality, or the rights to liberty and security of the person can be justified because the state is entitled to legislate to prevent the exploitation of women and children.

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[15] *RJR MacDonald Inc. V. Canada (Attorney General)*, 1995 3 S.C.R. 199 at para.71.

Action No. S097767
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1996, C.68

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL, SET OUT IN ORDER IN COUNCIL NO. 553, DATED OCTOBER 22, 2009, CONCERNING THE CONSTITUTIONALITY OF S. 293 OF THE *CRIMINAL CODE OF CANADA*, R.S.C., 1985, c. C-46

# Statement of Position of the Canadian Coalition for the Rights of Children and the David Asper Centre for Constitutional Rights

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# STATEMENT OF POSITION OF THE CANADIAN COALITION FOR THE RIGHTS OF CHILDREN & DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

## I. Reference Questions

1. Section 293 of the *Criminal Code of Canada* provides as follows:

*Polygamy*
**293.** (1) 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.

*Evidence in case of polygamy*
(2) Where an accused is charged with an offence under this section, no averment or proof of the

*Polygamie*
**293.** (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans quiconque, selon le cas :
*a*) pratique ou contracte, ou d'une façon quelconque accepte ou convient de pratiquer ou de contracter :
(i) soit la polygamie sous une forme quelconque,
(ii) soit une sorte d'union conjugale avec plus d'une personne à la fois,
qu'elle soit ou non reconnue par la loi comme une formalité de mariage qui lie;
*b*) célèbre un rite, une cérémonie, un contrat ou un consentement tendant à sanctionner un lien mentionné aux sous-alinéas *a*)(i) ou (ii), ou y aide ou participe.

*Preuve en cas de polygamie*
(2) Lorsqu'un prévenu est inculpé d'une infraction visée au présent article, il n'est pas nécessaire

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.

d'affirmer ou de prouver, dans l'acte d'accusation ou lors du procès du prévenu, le mode par lequel le lien présumé a été contracté, accepté ou convenu. Il n'est pas nécessaire non plus, au procès, de prouver que les personnes qui auraient contracté le lien ont eu, ou avaient l'intention d'avoir, des rapports sexuels.

2. The questions referred to this Honourable Court by Order-in-Council are:

1. Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

2. What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

## II. Summary of Position

3. The Canadian Coalition on the Rights of Children (the "CCRC") and the David Asper Centre for Constitutional Rights (the "Asper Centre") say that the prohibition on polygamy under section 293 is constitutionally supportable under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). They say, in particular:

(a) the practice of polygamy, as defined herein, occasions harm to children;

(b) the prohibition in section 293 is consistent with, and mandated by, Canada's obligations to protect children;

(c) practices that are exploitative of or otherwise harmful to children are not consistent with the values enunciated under the *Charter* or the *Convention on the Rights of the Child* (the "*Convention*"), which Canada has ratified, and fall outside the protection of the *Charter*; and

(d) the prohibition is, in any event, justified under section 1 of the *Charter* as a reasonable limit that is demonstrably justified in a free and democratic society.

## III. Particulars of Position: Definition of Polygamy

4. Although they acknowledge that "polygamy" may have a wider definition, the CCRC and Asper Centre focus on the sustained practice and inculcation of polygamy (primarily practised as polygyny in Canada) in a community setting.

## IV. Further Particulars of Position

5. Under the *Charter* and the *Convention*, children possess the rights of freedom of religion, of security of the person and equality. They additionally have fundamental rights under these instruments including:

(a) the right to have their best interests used as the primary consideration in all actions concerning them;

(b) the right to such protection and care as is necessary for their well-being;

(c) the right to be free from all forms of exploitation; and

(d) the right to recognition of their evolving capacity as persons developing into fully responsible adults.

6. The *amicus curiae* and Interested Persons claiming an entitlement to engage in polygamy have variously raised: the "fundamental freedoms" of religion, expression and association; liberty and security of the person; and the equality guarantee under the *Charter* in this proceeding.

7. The CCRC and Asper Centre say that those rights do not and cannot encompass the right to engage in practices that are harmful to children. Practices that are exploitative of or otherwise harmful to children are not consistent with the values enunciated under the *Charter* or the *Convention*, and do not engage protection under sections 2, 7 or 15 of the *Charter*. These Interested Persons rely on section 26 of the *Charter*, and international human rights instruments, including:

(a) the *Convention*, *supra*;

(b) the *Convention on the Elimination of All Forms of Discrimination against Women*; and

(c) other international human rights instruments.

8. In the event that this Honourable Court finds that section 293 gives rise to *prima facie* breaches of the *Charter*, then the justification analysis under section 1 must take into account children's rights under the *Charter* and the international instruments above. In the final analysis, section 293 is a reasonable limit that is demonstrably justified in a free and democratic society.

9. With respect to the necessary elements of the offence, the CCRC and Asper Centre say that no person 18 years or under should be criminally liable for the offence of polygamy. The *Convention* requires that the protection, care and best interests of the child be prioritised. For that reason, any child who has been, or has 'agreed' to be, polygamously married is entitled to the fullest protection of the law – not criminal prosecution.

10. In addition, any person under 18 who has suffered harmful consequences from the practice of polygamy is entitled to the fullest protection of the law. All children are entitled to the enforcement of the federal and provincial laws that mitigate the harmful consequences arising for children from the practice of polygamy

## V. Evidence of Harm

11. Internationally, United Nations special rapporteurs have identified polygamy as a practice that impairs girls' and women's right to equal status and dignity – and harmful for that reason. Special rapporteurs have also noted the connection between the practice of polygamy and early marriage (marriage before 18), forced marriage, and the trafficking of teenaged girls for polygamous marriage across the Canadian and USA border.

12. In the United Nations human rights context early marriage has been identified as entailing the following risks of harm for children:

(a) girls' significant and heightened risk of physical, sexual and psychological violence at the hands of their husbands and spouses' family;

(b) girls' lack of access to information and healthcare – including sexual, reproductive and family planning healthcare, and general impediments to mobility;

(c) girls' assumed consent to sexual relations with the husband leading to early pregnancy and birth, higher consequent rates of problems in childbirth and maternal mortality, and girls' lower life expectancy generally;

(d) higher infant mortality rates, and incidence of prematurity, and poor mental and physical growth;

(e) girls' cessation of formal education with resulting social isolation, and limited access to employment opportunities; and

(f) intergenerational cycles of girl child abuse.

13. In the United Nations human rights context, forced marriage has been identified as entailing the following risks of harm for girls:

(a) vulnerability to physical, sexual and psychological abuse by their husbands and relatives of their spouse;

(b) vulnerability to abuse, ostracism or even lethal violence if they resist or attempt to flee a marriage – including from members of their own family; and

(c) susceptibility to domestic and sexual servitude.

14. Polygamous communities, in order to sustain themselves, inculcate practices that create unacceptable risk to children's rights and well-being.

15. In North America, polygamy is practised in its most open form in the fundamentalist Mormon context. This Reference is not about the tenets of the fundamentalist Mormon faith. However, the open practice of polygamy in fundamentalist Mormon communities provides an illustration of the breaches of children's rights that flow from the practice of polygamy.

16. Within the fundamentalist Mormon context, the church hierarchy plays a controlling role in determining who a person will marry and when, and whether a woman will be assigned to a man as a second or subsequent wife. Girls as young as 15 – 17 are assigned in marriage to adult men, and do not have a significant ability to decline the marriage. These girls are expected promptly to commence having children, and do not have ready access to contraceptive services or possibly sex education. They may be expected to look after the children of a sister-wife, and

do not have a significant opportunity to resume their education, or any or adequate control over ending their marriage.

17. Boys within the fundamentalist Mormon communities frequently cease their schooling before graduation to work in a community or family business for a small or no allowance. The value of their labour is then used to support the community or family. Church hierarchy obtains the benefit of the boys' continued labour by assurances that the boys will one day be permitted to marry a girl or woman chosen for them by the church leadership. Boys are otherwise enjoined from interacting with girls to prevent the formation of relationships that would interfere with the church hierarchy's assignment of girls in initial or plural marriage.

18. Boys and girls who do not adhere to the foregoing constraints may be identified as disobedient or a harmful influence, and asked to leave or be sent from their communities. Children or girls may be re-assigned to different families or husbands for reasons relating to church control over marriage and family relationships, and not the best interests of the child.

19. The practice of polygamy therefore gives rise to significant harms and risks of harm, including:

(a) the constraining of girls' and boys' sexual identities and knowledge;

(b) the exploitative use of girls' sexual and reproductive capacities and labour;

(c) the exploitative use of boys' labour;

(d) the prioritising of other interests over children's education;

(e) inadequate child protection mechanisms and an unreasonable risk of child abuse;

(f) inadequate protection of children's rights to freedoms of thought and self-expression, and their right to be heard;

(g) the failure to prioritise children's best interests; and

(h) the impairment of a child's right to be cared for by his or her family, except when competent authorities subject to judicial review determine that separation is in the best interests of the child.

20. These harms command attention from the governments of Canada and British Columbia. It is the state's responsibility to prioritise and ensure the adequate protection of children from sexual and all other forms of exploitation and harm, through means including labour, immigration and child protection laws. The state is also responsible for ensuring the adequate education of children. The prohibition against polygamy as defined herein is consistent with, although insufficient to discharge, these obligations.

## VI. Sources of Evidence

21. The CCRC and Asper Centre have tendered the affidavit of Ms. Katherine Vandergrift. Ms. Vandergrift attaches studies prepared for United Nations human rights organizations by successive Special Rapporteurs on Freedom of Religion and Belief. These reports address the use of religious precept, cultural norms and the right to privacy as a justification for the practice of polygamy. The special rapporteurs conclude that polygamy harms girls' and women's rights, and they call on state actors and religious leaders to intervene to protect girls and women.

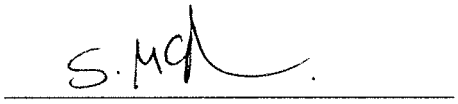
22. Ms. Vandergrift's report also attaches a report by the Special Rapporteur on Trafficking in persons, especially women and children. This report identifies the trafficking of girls across the Canadian / USA border for polygamy as a form of forced marriage.

23. Ms. Vandergrift's affidavit also attaches Chapter 3 of a report entitled "*World Report on Violence Against Children*, prepared by the Independent Expert for the United Nations Secretary General's Study on Violence Against Children. Ms. Vandergrift's affidavit also attaches a report on child and early marriage prepared for UNICEF. These reports consider the impacts for children of early marriage.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF NOVEMBER, 2010.

Hunter Litigation Chambers
Solicitors for these Interested Persons

per Brent Olthuis



per Stephanie McHugh

THIS STATEMENT OF POSITION is prepared and delivered by Hunter Litigation Chambers, whose place of business and address for service is 2100 – 1040 West Georgia Street, Vancouver, British Columbia, V6E 4H1. Telephone: (604) 891-2400, Facsimile: (604) 647-4554.

No. S-097767
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

IN THE MATTER OF:

THE CONSTITUTIONAL QUESTION ACT, R.S.B.C. 1986, C.68

AND IN THE MATTER OF:

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF S. 293 OF THE *CRIMINAL CODE OF CANADA*, R.S.C. 1985, C. C-46

## OPENING STATEMENT

1. Polygamy has over the centuries been accepted as lawful in a number of communities and across several geographic and religious divisions.

2. In Canada, however, polygamy has never been lawful. Like virtually all western democracies, Canada has criminalized polygamous activity.

3. In 1982, Canada adopted the *Canadian Charter of Rights and Freedoms*, which subjects Canada's criminal laws to the scrutiny of the Courts. The mandate given to the Courts was to require the Government to substantively justify any laws restricting the Fundamental Freedoms guaranteed to Canadians. Of course, any law passed before 1982 is presumed to be constitutional and the onus is on the challenger to show why a law is in violation of a *Charter* right or freedom before the government is placed under a duty to demonstrably justify any alleged violation.

4. The evidence to be presented in this Reference by the Governments of Canada and British Columbia, together with supporting interveners, will demonstrate that any restriction on a *Charter* right or freedom found in section 293 of the *Criminal Code* is justified in a free and democratic society.

5. This Court will hear four kinds of evidence that will justify the *Criminal Code* prohibition of polygamy:

   (a) Polygamy is abusive of women, in that it treats them unequally and limits their exercise of free will;

   (b) Polygamy is abusive of children, in that it deprives them of a stable and secure home and often results in delinquency and suicide on the part of children;

(c) Polygamy is socially and economically harmful to women and children and to society as a whole; and

(d) Polygamy amounts to a fraud upon the public, as the public is deprived of the social and economic certainty associated with the current social and economic realities related to the definition of marriage as a conjugal union of two persons.

6. While this Court will hear clear and convincing evidence that the Government of Canada is correct when it criminalizes polygamy, this Court need not come to that conclusion in any formal manner.

7. Instead, the Court should simply answer the question of whether there is evidence that could lead the Parliament of Canada to conclude that polygamy is harmful to one or more Canadians. If the Court is satisfied that there is such evidence, then the Court must defer to Parliament the ultimate social policy decision of whether polygamy should be a crime.

8. This deference to Parliament does not ignore the *Charter*; rather, it recognizes the important roles assigned to the legislatures and the Courts under the *Constitution Act, 1867*. Any other approach to the *Criminal Code* would in effect amount to a repeal of the *Criminal Cod*e and the replacement of that *Code* with a new set of common law crimes based upon a judicial common law interpretation of the provisions of the *Charter*.

9. Under Supreme Court of Canada jurisprudence, Parliament's policy setting role is to be preserved after 1982 through the recognition of a margin of appreciation to be respected by the Courts. See *The Queen v. Malmo-Levine*, [2003] 3 S.C.R. 571 at p. 657 (as recently cited in *Bedford v. Canada (Attorney General)*, [2010] O.J. No. 4057 at para. 383) ("This Court has exercised caution in accepting arguments about the alleged ineffectiveness of legal measures: see *Reference re Firearms Act (Can.)*, *supra*, where the Court held that '[t]he efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis' (para. 57). While somewhat different considerations come into play under a Charter analysis, it remains important that some deference be accorded to Parliament in assessing the utility of its chosen responses to perceived social ills").

10. This approach does not prevent the Court from intervening in circumstances where an individual or group of individuals are able to establish that their *Charter* rights have been violated in a manner that cannot be justified in a free and democratic society. It does, however, prevent a Court from disallowing a provision of the *Criminal Code* simply because the social, political, religious, ideological or economic opinions of a judge differ from elected members of Parliament.

11. In order to conclude that there is a facial violation of the *Charter* by a *Criminal Code* provision, this Court must be satisfied that there is no circumstance under which Parliament could reasonably conclude that polygamous activity is harmful to one or more Canadians.

12. At the time of legal argument, we will address other important issues that may arise in this case, including:

(a) The appropriate limits on a Government inquiry into the religious beliefs and practices of an individual; and

(b) The appropriate test for the Government to meet before it is allowed to breach the privacy wall that surrounds each family.

13. While the Government in this Reference has met the *Charter* tests for such inquiry into religion and such interference with the family, it is nevertheless important for this Court to expressly emphasize that any Government inquiry or examination of a religious belief may only be undertaken for only two purposes:

(a) First, to determine the good faith of the person asserting a *Charter* right; or

(b) Second, to determine whether there is actual or imminent harm to a child or third party.

14. Furthermore, interference with the family under the *Charter* may only be embarked upon by Government where Government first establishes actual or imminent harm. Simple differences of opinion regarding what is best for a child is not enough to justify Government invasion of the family castle.

15. In this Reference, the Court will hear compelling evidence that will demonstrate that the Government has acted properly to protect children and their parents from the harm of polygamous activities.

16. Section 293 of the *Criminal Code* prohibits polygamy for the reasons that have caused free and democratic societies around the world to conclude that polygamy is inconsistent with principles of democracy and equality.

17. Far from restricting Fundamental Freedoms, section 293 of the *Criminal Code*:

(a) Promotes the freedom to associate under section 2 of the *Charter*;

(b) Protects the right to life, liberty and security of the person under section 7 of the *Charter*; and

(c) Preserves the guarantee of equality found in section 15 of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

MILLER THOMSON LLP

Per: 

Gerald D. Chipeur, Q.C.
Counsel for Christian Legal Fellowship

DATED NOVEMBER 8, 2010