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Erin Fowler

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## **A Queer Critique on the Polygamy Debate in Canada: Law, Culture, and Diversity**

Erin Fowler\*

### **Introduction**

On November 22, 2010, after years of growing concern and controversy, the Supreme Court of British Columbia opened the debate on the constitutional validity of the *Criminal Code* prohibition against polygamy. The reference case, arising out of the failed prosecution of two prominent members of the Fundamentalist Mormon sect in Bountiful, British Columbia, has sparked a heated debate between academics, experts, and legal authorities on whether the prohibition should be struck down due to constitutional infringement or upheld because of the belief that polygamy is associated with gender inequality and the exploitation of women and children. Despite the large number of government officials, interveners, and experts weighing in on the issue of polygamy in Canada, overwhelmingly the focus in the case, and in academic literature generally, has been on religious and cultural forms of polygyny: the formal or informal marriage of a man with two or more wives. However, what is often ignored is that multi-partner conjugality comes in radically different forms, each with different personal and social effects.

Polygamy is a general term that subsumes more specific forms and practices, such as polyandry, polygyny, and polyamory. Within the Canadian context, available evidence indicates that polygyny is the predominant form of polygamy practiced.<sup>1</sup> In addition to emerging anecdotal evidence of its presence among some Canadian Muslim and Aboriginal groups, polygyny is well documented among

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\* Erin Fowler holds a J.D. from the Schulich School of Law at Dalhousie University. She is currently articling at McInnes Cooper in Halifax, Nova Scotia. She will be pursuing her Masters in Law at the University of Toronto starting in September of 2012. She wishes to thank Professor Elaine Craig for her helpful comments and valuable assistance in writing this paper.

<sup>1</sup> Lisa M Kelly, "Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy" (2007) 65 UT Fac L Rev 1 at para 8 (QL).

fundamentalist Mormons in British Columbia, and has become the focal point in the Supreme Court reference case. In Canada, there is little evidence of polyandry, where one woman has more than one husband.<sup>2</sup> In the past few decades, however, evidence has gathered as to the growing number of polyamorous relationships that diverge from the traditional multiple partnerships of polygyny or polyandry.<sup>3</sup> Polyamorous arrangements “vary as to the number of people involved, the sexes of those involved, the sexualities of those involved, the level of commitment of those involved, and the kinds of relationships pursued.”<sup>4</sup> The variance of these relationships both in terms of structure and egalitarian founding principles distinguishes them from the patriarchal norms traditionally associated with polygyny. In light of this distinction, scholars argue polyamory merits close attention in re-thinking monogamous paradigms, particularly in terms of coercive criminal polygamy laws and marriage law more generally.<sup>5</sup> Despite the fact that polygyny continues to be the predominant form of multiple-partner unions in Canada, the traditional normative manner of viewing polygamy as gender-discriminatory and patriarchal ignores minority conceptions of sexual identity and intimate relationships.

In Canada, non-monogamous patterns of intimacy continue to be ascribed the status of the “other”—of deviation and pathology—and in need of explanation, or alternatively are ignored, hidden, avoided and marginalized. This “mono-normative” perspective tends to universalize the exclusive, dyadic structure of the couple and elevates monogamy as the hegemonic norm.<sup>6</sup> Marianne Pieper, who coined the term “mono-normativity”, argues that:

the mono-normative matrix is a complex power relation, which (re)produces hierarchically arranged patterns of intimate relationships and devalues, marginalizes, excludes and ‘others’ those patterns of intimacy which do not correspond to the normative apparatus of the

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<sup>2</sup> *Ibid* at para 9.

<sup>3</sup> *Ibid*.

<sup>4</sup> Maura Strassberg, “The Challenge of Post-Modern Polygamy: Considering Polyamory” (2003) 31 Cap U L Rev 439 at 440.

<sup>5</sup> Kelly, *supra* note 1 at para 9.

<sup>6</sup> Meg Barker & Darren Langridge, eds, *Understanding Non-Monogamies* (New York: Routledge, 2010) at 145 [Barker, “Understanding Non-Monogamies”].

monogamous model. Mono-normativity is based on the taken for granted allegation that monogamy and couple-shaped arranged relationships are the principle of social relationships per se, an essential foundation of human existence and the elementary, almost natural pattern of living together.<sup>7</sup>

Laws which make it a criminal offence to practice polygamy,<sup>8</sup> and which limit marriage to two individuals, reinforce certain hegemonic beliefs about sexual identity, intimate relationships, and the ideal family structure. Rooted in queer theory, this paper seeks to question the boundaries of monogamy and polygamy in Canada. By deconstructing monogamy, I will contest the belief that it is a natural, universal norm, and demonstrate that it is instead a socially constructed institution rooted in cultural supremacist, classist and sexist ideals. In rejecting the categorization of intimate relationships, this paper will highlight that marriage and intimate relationships can encompass a zone of positive and socially acceptable possibilities. Re-thinking and deconstructing monogamous paradigms may reveal polygamy as a legitimate way for individuals to exercise their autonomy, sexual preference, and expressions of love.

This paper is divided into four parts. In Part I, I discuss how polygamy is regarded in Canada by reviewing the history and current treatment of polygamous unions both under criminal law and the law of marriage. By distinguishing between the various forms of non-monogamies, I will reveal that it is a fallacy to automatically conclude that polygamy leads to sufficient social and personal harms to merit criminal sanction. In Part II, I attempt to deconstruct the institution of monogamous marriage and reveal its true socially constructed evolution. Despite marriage's predominantly Christian and racist history, I will argue that formal marriage recognition remains symbolically significant in Canada and that, if the prohibition against polygamy is struck down, expanding the definition of marriage to include more than two people would be in accord with Canada's recognition of diverse family forms and equality protections. In Part III, I propose a different way to look at

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<sup>7</sup> *Ibid.*

<sup>8</sup> The term "polygamy" will be used throughout the paper to refer all forms of plural marriage or conjugal unions.

the monogamy versus polygamy debate through the lens of queer legal theory. Through queer theory, I will question the categorization of intimate relationships and reveal the difficulties of pursuing change through the *Charter*. Finally, in Part IV, I will make suggestions as to how the law can move towards a more pluralistic conception of personal relationships.

## **Part I: Polygamy In Canada**

### **1. The Current Debate Over the Constitutionality of Section 293 of the *Criminal Code***

Contrary to common Western assumptions, the majority of societies worldwide – about 83 percent – practice polygamy.<sup>9</sup> In Canada and the US alone, it is estimated that approximately 30,000 to 100,000 people are involved in some form of plural marriage.<sup>10</sup> In recent decades, concerns over polygamy have grown for a number of reasons that reflect developments in other countries, as well as some developments that are more uniquely Canadian. The most publicized concern is the practice of polygamy by Fundamentalist Mormons in the area of Bountiful, British Columbia. While this group has been openly practicing polygamy in Canada for over 50 years, the issue has received attention only over the past two decades with former members of the community raising concerns about both the practice of polygamy and abuse within the community.<sup>11</sup> Until recently, however, uncertainty about the constitutional validity of Canada's laws prohibiting polygamy, and concerns about how to enforce the law have made authorities in British Columbia reluctant to act.<sup>12</sup>

Finally, after long-standing allegations of abuse and corruption, in January 2009, Fundamentalist Church of Jesus Christ of Latter-Day Saints<sup>13</sup> (FLDS) bishops, Winston Blackmore and James Oler, were

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<sup>9</sup> Robert Leckey & Kim Brooks, eds, *Queer Theory: Law, Culture, Empire* (New York: Routledge, 2010) at 141.

<sup>10</sup> *Ibid.*

<sup>11</sup> Canada, Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research* (Ottawa: Status of Women Canada, 2005) at 3.

<sup>12</sup> *Ibid.* at 1.

<sup>13</sup> The Fundamentalist Church of Jesus Christ of Latter-Day Saints is one of the largest Mormon fundamentalist denominations.

each charged with one count of polygamy.<sup>14</sup> Those charges were subsequently dismissed on procedural grounds.<sup>15</sup> Rather than appealing the decision, the Attorney General of British Columbia decided to bring a reference case in the Supreme Court of British Columbia.<sup>16</sup> The Court is being asked to determine if section 293 of the *Criminal Code*<sup>17</sup>—the provision prohibiting polygamy—is consistent with the *Canadian Charter of Rights and Freedoms*, and to clarify how it should be interpreted.

By and large, the anti-polygamy argument being brought by both federal and provincial attorney generals has presented polygamy as a patriarchal practice with inherent individual and social harms. This narrative includes stories of child brides, teen pregnancy, and expelled boys, and it relies heavily on evidence collected from the FLDS community in Bountiful, BC.<sup>18</sup> The pro-polygamy argument, on the other hand, has relied on the fact that the enactment of the anti-polygamy law in 1892 was aimed at defending a Christian view of proper family life and was employed in the state's cultural colonization of Aboriginal peoples.<sup>19</sup> In constitutional terms, the *amicus curiae* has argued that the prohibition breaches the *Charter* guarantees of freedom of religion, association, equality (in terms of both religion and marital status) and liberty.<sup>20</sup>

In his opening statement before the BC Supreme Court, the *amicus curiae*, George Macintosh, argued that 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

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<sup>14</sup> *Blackmore v British Columbia*, 2009 BCSC 1299, [2010] 4 WWR 546.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Reference re: Criminal Code of Canada (B.C.)*, 2011 BCSC 1588, [2011] BCJ No 2211.

<sup>17</sup> *Criminal Code*, RSC 1985, c C-46, s 293(1).

<sup>18</sup> *Reference Re Criminal Code, s 293* (1 November 2010) Vancouver S-097767 (BC SC) (Opening Statement on Breach, Amicus Curiae) [Amicus Curiae].

<sup>19</sup> *Reference Re Criminal Code, s 293* (1 November 2010) Vancouver S-097767 (BC SC) (Opening Statement on Breach, Canadian Polyamory Advocacy Association) [CPAA].

<sup>20</sup> Amicus Curiae, *supra* note 18.

polygamous relationships, and has the effect of demeaning the dignity of practitioners of polygamy.<sup>21</sup>

Allied with Macintosh on this sentiment is the Canadian Polyamory Advocacy Association (CPAA)—one of many interveners in the case. The gist of the CPAA’s argument is that the broad prohibition in section 293 captures all types of marriage or marriage-like relationships involving more than two people, encompassing the egalitarian multi-partner union known as conjugal polyamory.

In its Opening Statement on Breach, the CPAA points out that our society’s bias towards monogamy is merely the result of social traditions that are passed on from generation to generation.<sup>22</sup> It should not be mistakenly assumed that the nineteenth century position on polygamy was about gender equality. Instead, the racialized and politicized roots of the polygamy doctrine in both the United States and Canada give pause to assertions that the law is both valid and important in protecting individual freedoms and democracy.

## **2. History of the Treatment of Polygamy in Canada Under the Law**

Polygamy has been illegal in Canada since 1892. The original polygamy prohibition was enacted as part of the first *Criminal Code*<sup>23</sup>, with the intent of discouraging immigration by polygamous American Mormon families, who at that time were being actively prosecuted by the United States government.<sup>24</sup> The law’s politicized roots are revealed in the wording of the original statute, which included a specific reference and prohibition on “Mormon” polygamous marriages, as well as other polygamous relationships. The target clause was not removed from the *Criminal Code* until 1954.<sup>25</sup> The present provision in the *Criminal Code*, section 293, prohibits not only participation in a polygamous marriage ceremony,

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<sup>21</sup> *Ibid.*

<sup>22</sup> CPAA, *supra* note 19.

<sup>23</sup> *Criminal Code*, SC 1892, c 29, ss 278, 706.

<sup>24</sup> Nicholas Bala, “Why Canada’s Prohibition of Polygamy is Constitutionally Valid and Sound Social Policy” (2009) 25 Can J Fam L 165 at para 26 (QL) [Bala, “Constitutionally Valid”].

<sup>25</sup> *Criminal Code*, SC 1953-54, c 51, s 243.

but also makes it an offence to enter into “any form of polygamy” or live in “any kind of conjugal union with more than one person at the same time.”

Since 1892, there have only been a handful of prosecutions under the *Code*'s polygamy sections, most of which involved Aboriginal men.<sup>26</sup> One of the most notable of these was *R v Bear's Shin Bone*, the 1899 case of a Blood Indian from the North West Territories, Bear's Shin Bone, who was convicted under the polygamy section for entering into simultaneous conjugal unions with two women.<sup>27</sup> Susan G. Drummond asserts that the use of the law to forcefully restructure Aboriginal families suggests that, in addition to its racialized and politicized American roots, it was also implemented as an instrument of colonization.<sup>28</sup> Prior to the recent Bountiful prosecution, the last reported attempt at using this provision was in 1937, when it was held by the Ontario Court of Appeal that a man who left his wife and was living in an adulterous relationship was not committing the offence of polygamy.<sup>29</sup>

Similar to the treatment of polygamy under the criminal law, Canada's family law restriction of marriage to two people can also be traced back to the nineteenth century. The definition of marriage accepted by the courts until the *Marriage Reference*<sup>30</sup> was adopted from an English decision in 1866. *Hyde v Hyde and Woodmansee* involved a potentially polygamous marriage in which an Englishman had married a Mormon woman in Utah.<sup>31</sup> Lord Penzance, striving to exclude such a marriage from receiving the same treatment as a traditional monogamous one, stated: “marriage, as understood in Christendom, may for this purpose be defined as the voluntary union ... of one man and one woman, to the exclusion of all others.”<sup>32</sup> This explicitly Christian definition of marriage prevailed in Canada from 1866 to 2005, wherein the *Civil Marriage Act* changed the definition

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<sup>26</sup> Bala, “Constitutionally Valid”, *supra* note 24 at para 27.

<sup>27</sup> *R v Bear's Shin Bone* (1899), 4 Terr LR 173, 3 CCC 329 (NWT CA).

<sup>28</sup> Susan G Drummond, “Polygamy's Inscrutable Criminal Mischief” (2009) 47 Osgoode Hall LJ 317 at para 31 (QL).

<sup>29</sup> *R v Tolhurst and Wright*, [1937] 3 DLR 808, 68 CCC 319 (Ont CA) [*Tolhurst*].

<sup>30</sup> *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 [*Marriage Reference*].

<sup>31</sup> *Hyde v Hyde and Woodmansee* (1866), LR 1 P & D 130 (Prob & Div).

<sup>32</sup> *Ibid* at 133.



to “the lawful union of two persons to the exclusion of all others,” while continuing to prohibit plural unions from civil marriages.<sup>33</sup>

### **3. Distinguishing Between the Various Forms of Non-Monogamies**

In order to fully understand the draconian nature of the criminal law’s treatment towards polygamy, it is important to distinguish between the various forms of non-monogamous relationships and to question their moral and criminal status within Canada. To limit the distinction in this paper to “monogamy” and “polygamy” would be to oversimplify the diverse range of both monogamous and non-monogamous relationships. Indeed, the range of labels and categories Western societies impose on the variety of intimate relationships makes one question whether the distinction between monogamy and non-monogamy is even useful or meaningful.

The traditional conception of monogamy refers to a form of marriage in which an individual has only one spouse at any one time. Monogamy may also refer to the more general state of having one mate at any one time to the exclusion of all others. Despite this generally accepted ideal, current research within the fields of sociology and psychology has shown that these so-called relationships are generally monogamous in name rather than deed, with non-consensual non-monogamy being a more common mode of relating.<sup>34</sup> Even within truly exclusive relationships, there is a variation between life-long relationships and serial monogamy. With our staggering rates of divorce and our culture’s high valuation on choice and individuality, life-time commitments are increasingly seen as a thing of the past with serial monogamy—characterized by a series of long- or short-term, exclusive sexual relationships—taking its place as the “norm”.

In addition to non-consensual non-monogamy (generally referred to as adultery or infidelity), there is a range of consensual non-monogamous relationships: open relationships, swinging, and

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<sup>33</sup> *Civil Marriage Act*, SC 2005, c 33, s 2.

<sup>34</sup> Meg Barker & Darren Langridge, “Whatever happened to non-monogamies? Critical reflections on recent research and theory” (2010) 13 *Sexualities* 748 at 753 [Barker, “Critical Reflections”].

polyamory being the forms most studied to date.<sup>35</sup> Broadly speaking, polyamory involves having multiple relationships which may be emotionally close and/or sexual in nature, whereas “swinging” (spouse-swapping) and open relationships involve couples openly having sexual (but generally not emotionally close) relationships with other people—either separately or as a couple.<sup>36</sup> Even within polyamory, there is a diverse range of relationship structures and networks with varying sexual orientations, genders and numbers involved.

Due to the broad wording of section 293, conjugal polyamory—where three or more parties in a polyamorous relationship all live in the same household—falls squarely within the polygamy prohibition under the *Criminal Code*. Despite the argument that this egalitarian, emotionally grounded relationship structure is considered a criminal offence, short of constituting “acts of indecency”, other forms of consensual and non-consensual non-monogamous relationships are perfectly legal. The *Criminal Code* does not make adultery an offence, and as was laid down in *R v Tolhurst and Wright*, sex with one partner while being married to another, whether or not consensual, does not constitute polygamy.<sup>37</sup>

Further, recent case law has held that swinging practices, short of causing harm, are not indecent acts for the purpose of the *Criminal Code*. In the 1982 case of *R v Mason*, an Ontario court held that swinging parties, in a private non-commercial setting, do not constitute indecent acts.<sup>38</sup> Husbands and wives (common law and civilly married) can freely invite other sexual partners into their homes for the pleasure of casual sex. In addition to swinging in private homes, according to the Supreme Court of Canada, swinging and group sex are also acceptable in bars. In the 2005 case of *R v Labaye*, the accused operated a club in Montreal that permitted couples (both married and not) and single people to meet each other for group sex.<sup>39</sup> Labaye was charged with keeping a common bawdy-house under section 210(1) of the *Criminal Code*. In acquitting the accused, the majority of the Court made it clear that the Crown had

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<sup>35</sup> *Ibid* at 750.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Tolhurst*, *supra* note 17.

<sup>38</sup> *R v Mason* (1981), 6 WCB 112, 59 CCC (2d) 461 (Ont Prov Ct (Crim Div)).

<sup>39</sup> *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728 [*Labaye*].

failed to establish that any harm had been committed. The threshold to establish harm was set by determining whether the conduct confronts the public with behaviour that interferes with their autonomy and liberty, pre-disposes others to anti-social behaviour, or physically or psychologically harms the people involved in the conduct.<sup>40</sup> The harm also needs to be incompatible with the proper functioning of society. In the case of swinging, in so far as the activity was taking place in a private setting, the threshold of harm was not met.

Clearly, neither the Canadian courts nor Parliament have problems with adults privately engaging in adultery, swinging or group sex. Indeed, with the importance Canada places on liberty, autonomy and diversity, it is no wonder that Canada would be slow to restrict private sexual activity. Rather, it appears to be the point at which the relationship with each sexual partner becomes spouse-like that the criminal law steps in. It is the identification of “conjugal unions” in section 293 that captures marriage-like polygamous relationships within the section. While casual sex within or outside of a marriage is freely permitted, our law takes issue with concurrent multiple relationships that appear marriage-like in nature. Considering this seemingly arbitrary approach, one must ask, what is so special about marriage to justify criminal sanction against these polygamous unions?

## **Part II: The Institution of Monogamous Marriage**

In Canada, marriage is an exclusive and categorically fixed institution. If we are to expand the notion of marriage through queer theory, an important first step is to question and deconstruct this dominant norm. Therefore, this next section will question the importance of the institution of marriage itself and ask why it is limited to two individuals in Western culture.

### **1. Why is Marriage Limited to Monogamous Couples?**

Political, popular and psychological discourses tend to present monogamous coupledness as the only natural and/or morally correct form of human relating. Contrary to the dominant assumption of

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<sup>40</sup> *Ibid.*

monogamous marriage as a natural institution, numerous scholars have demonstrated the historical and culturally situated nature of monogamy. The monogamy bias (or mono-normativity) perpetuates the idea that the maximum number of sexual relationships that is acceptable for any person to engage in at the same time is one.<sup>41</sup> Critiques of this mono-normative view have taken various forms. Some simply focus on the socially constructed history of monogamy, whereas others point to monogamy's religious, political and racialized roots. In general, as was stated by the CPAA in its opening statement, "[t]he monogamy bias, like the heterosexual and racial bias, is the result of social traditions that are passed on from generation to generation and have nothing but the weight of the past to support them."<sup>42</sup>

First, much literature emphasizing the diversity of relationship forms counters evolutionary and biological essentialist arguments of "natural monogamy" by using statistics on the rarity of pair-bonding amongst animals (only a few dozen out of four thousand mammal species), and within human cultures.<sup>43</sup> George Murdock's famous cross-cultural analysis, *Ethnographic Atlas*, revealed that 195 of 250 societies preferred plural forms of marriage, though monogamy was universally practiced due to gender ratios and economic barriers.<sup>44</sup> Moreover, reducing monogamy to an innate or natural practice can be viewed as another in a long line of similar arguments, all now discredited, by which anti-democratic law makers have tried to block social change. Consider that for over one hundred years homosexual conduct was criminalized in Canada, and for years after those laws were repealed homosexuals were denied rights that heterosexuals enjoyed. A commonly given reason for such discrimination was that homosexuality is contrary to nature.<sup>45</sup>

More explicitly, social constructionist authors have written about recent transformations in Western identities and intimacies, which have greatly altered the ways in which people understand and

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<sup>41</sup> Barker, "Understanding Non-Monogamies", *supra* note 6.

<sup>42</sup> CPAA, *supra* note 19 at para 25.

<sup>43</sup> Barker, "Critical Reflections", *supra* note 34 at 752.

<sup>44</sup> Jamie R Wood, "Moving Beyond the Bedrooms of our Nation: Redefining Canadian Families From the Perspective of Non-Conjugal Caregiving" (2008) 13 Appeal 7 at para 13 (QL).

<sup>45</sup> CPAA, *supra* note 19 at paras 56-60.

experience their relationships.<sup>46</sup> The social constructionist approach to sexuality is grounded in the belief that our identity, desires, relationships and emotions are shaped by the culture in which we live.<sup>47</sup> As perpetuated through media representations, the dominant version of relationships available in Western culture is of life-long or serial monogamy with “the one” perfect partner. Mainstream media are saturated with depictions of such romantic love relationships: people finding “Mr/Miss Right” and staying “together forever”. In contrast, polygamous relationships are represented in the media through shows such as *Big Love*<sup>48</sup> and the media frenzy surrounding Bountiful, BC, as patriarchal, gender discriminatory, and “cult-like”. These representations serve social functions, maintaining monogamy in a position of hegemonic dominance.<sup>49</sup>

The ability of our culture to shape and perpetuate the monogamy bias is by no means a natural social evolution. Rather, many scholars argue that it is a consequence of calculated state objectives rooted in cultural supremacist, classist and sexist ideals.<sup>50</sup> Sarah Carter, in her recent book, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915*, argues that Canadian land settlement policies in the late nineteenth and early twentieth centuries constructed an ideal of marriage that was used as a vehicle for the domestication of Western Canada by white Christian families. This nuptial model was one characterized as monogamous, heterosexual, intra-racial, male dominated and self-sufficient.<sup>51</sup> Land policies were designed to marginalize and exclude communities who did not adhere to this spousal idea. What mattered most was the peaceful and prosperous settlement of the West, and any distractions from this (whether from the fluid, indulgent and cavalier nature of

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<sup>46</sup> Ani Ritchie & Meg Barker, “‘There Aren’t Words for What We Do or How We Feel So We Have To Make Them Up’: Constructing Polyamorous Languages in a Culture of Compulsory Monogamy” (2006) 9:5 *Sexualities* 584 [Ritchie, “Constructing Polyamorous Languages”].

<sup>47</sup> *Ibid* at 585.

<sup>48</sup> *Big Love*, 2006, Television Show: (New York, NY: HBO, 2006).

<sup>49</sup> Ritchie, “Constructing Polyamorous Languages”, *supra* note 46 at 588.

<sup>50</sup> Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008).

<sup>51</sup> *Ibid*.

customary aboriginal marriage or other) were to be muted or eliminated.<sup>52</sup>

Like Sarah Carter's analysis of Canadian settlement policies, other political critiques of mono-normativity follow from the ways in which it can be located in a specific cultural and historical moment. Indeed, compulsory monogamy has been tied to contemporary consumer capitalism and notions of ownership, patriarchal religion, race and class, and gender and compulsory heterosexuality.<sup>53</sup> Victoria Robinson sums up the key political arguments in her statement that monogamy, "privileges the interests of both men and capitalism, operating as it does through the mechanisms of exclusivity, possessiveness and jealousy, all filtered through the rose-tinted lens of romance."<sup>54</sup> Others argue that current forms of monogamy came into being historically because of the need for women to care for the current and future workforce without being paid.<sup>55</sup> Nancy Cott, in her history of public regulation of marriage, asserts that marriage has been a tool of "cultural regulation" and is the vehicle by which the state transforms the public order into a "gendered order."<sup>56</sup> Moreover, numerous scholars agree that marriage law in general has been a site for the production of normative citizenship and a key mechanism by which Western governments can produce a heterosexual, gendered, and racialized citizenry.<sup>57</sup>

The racial and religious hierarchies of white supremacy and Christian hegemony are thought to have been fundamental to the processes of distinction that mark polygamy's social and political intolerance.<sup>58</sup> Margaret Denike argues that,

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<sup>52</sup> *Ibid.*

<sup>53</sup> Barker, "Understanding Non-Monogamies", *supra* note 6 at 257.

<sup>54</sup> Victoria Robinson, "My Baby Just Cares for Me: Feminism, heterosexuality and non-monogamy" (1997) 6:4 *Journal of Gender Studies* 143 at 144.

<sup>55</sup> M Munson & JP Stelboum, *The Lesbian Polyamory Reader: Open Relationships, Non-Monogamy, and Casual Sex* (New York: Haworth Press, 1999).

<sup>56</sup> Nancy F Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass: Harvard University Press, 2000).

<sup>57</sup> Jaime M Gher, "Polygamy and Same-Sex Marriage – Allies or Adversaries Within the Same-Sex Marriage Movement" (2008) 14 *Wm & Mary J Women & L* 559 at 565.

<sup>58</sup> Margaret Denike, "The Racialization of White Man's Polygamy" (2010) 25:4 *Hypatia* 852 at 857.

the preoccupation with polygamy in the late nineteenth century was both fuelled and exacerbated by the ‘racial Anglo-Saxonism’ of the emergent nation in the face of racial and cultural heterogeneity, at a time of post civil-war anxiety about the naturalness of America’s racial and political destiny as a white Christian nation.<sup>59</sup>

She describes how genealogical analyses reveal the deep fears and profound sensitivities around the origins, allegiances, and distinctions of blood during this era.<sup>60</sup> Moreover, the efforts by the dominant class to legitimize, institutionalize, and naturalize a Christian sexual morality of (white) heterosexual monogamy, and to delegitimize any other familial or intimate relational configuration, especially when associated with a different religious doctrine, further stigmatized individuals engaged in polygamous relationships.<sup>61</sup>

As can be surmised from the discussion above, most critiques of mono-normativity point to the explicitly Christian foundation of monogamous marriage. In most ancient societies, rules and laws about marriage were intertwined with religious texts, beliefs, and practices.<sup>62</sup> For example, the legal prohibitions in the English common law on marriage to blood relatives and in-laws (rules about consanguinity and affinity) were based on the Old Testament of the Bible.<sup>63</sup> While the Old Testament accepts polygamy without critical comment, the New Testament, on the other hand, recognizes the special nature of marriage and the importance of marital love.<sup>64</sup> Although polygamy is not condemned in the New Testament, major Christian faiths determined that marriage is to be monogamous.<sup>65</sup> Indeed, as was stated above, the common law definition of marriage as the “voluntary union for life of one man and one woman, to the exclusion of all others” accepted in Canada until 2005, was

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<sup>59</sup> *Ibid* at 855.

<sup>60</sup> *Ibid* at 853.

<sup>61</sup> *Ibid*.

<sup>62</sup> Bala, “Constitutionally Valid”, *supra* note 24 at para 7.

<sup>63</sup> Leviticus 18 and 20, as interpreted in Roman Catholic canonical law at the Council of Trent (1563) and Archbishop Parker’s Table in Church of England’s Book of Common Prayer.

<sup>64</sup> Bala, “Constitutionally Valid”, *supra* note 24 at para 9.

<sup>65</sup> *Ibid* at paras 8-9.

unapologetically based on a religious, and explicitly Christian, view of marriage.<sup>66</sup>

It would be difficult and erroneous to point to one particular reason why marriage in Canada is limited to two people. Whatever the cultural and political reasons were for separating monogamy and polygamy under the law, it is clear that along the way a dichotomy was created in which “monogamy” was seen as good (Christian, gender-equal, law abiding, family oriented) and “polygamy” as bad (dangerous, promiscuous, non-white, hedonistic, unchristian). Marriage itself has been viewed by some as simply an archaic institution used to perpetuate the dominant hegemonic ideals. However, regardless of marriage’s predominantly Christian and politically charged past, the next section will explain why formal marriage recognition remains symbolically significant in Canada and how the expansion of marriage to include polygamy would be in accord with Canada’s increasing acceptance of a diverse range of relationships.

## 2. Why is Marriage Important? Why Expand It At All?

“Marriage is one of the great mediators of individuality and community, revelation and reason, tradition and modernity. Marriage is at once a harbor of the self and a harbinger of the community, a symbol of divine love and a structure of reasoned consent, an enduring ancient mystery and a constantly modern invention.”<sup>67</sup>

John Witte Jr.

Leading up to the lengthy campaigns for same-sex marriage, many may be surprised to learn that many gays and lesbians actually opposed the fight for same-sex marriage.<sup>68</sup> Opponents expressed concerns over the dangers of assimilation, of losing both a unique

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<sup>66</sup> *Ibid* at para 10.

<sup>67</sup> John Witte Jr, “An Apt and Cheerful Conversation on Marriage” in Steven M Tipton & John Witte Jr, eds, *The Family Transformed: Religion, Values and the Family in Modern America* (Washington, DC: Georgetown University Press, 2006) at 1.

<sup>68</sup> Christine Davies, “Canadian Same-Sex Marriage Litigation: Individual Rights, Community Strategy” (2008) 66:2 UT Fac L Rev 101 at para 4 (QL).



culture and the sense of solidarity and identity that came with membership in that community.<sup>69</sup> While organizations like the Coalition for Gay and Lesbian Rights in Ontario argued that same-sex couples should receive the same legal recognition and incur the same obligations as heterosexual couples, others argued that same-sex relationships are fundamentally different from heterosexual relationships.<sup>70</sup> After years of strategy and progress with other rights, the LGBT (“Lesbian, Gay, Bisexual, and Transgender”) community perspective eventually came to be that while not everyone desired marriage, some did, and the community would rally behind and support their freedom.<sup>71</sup> Laurie Arron, the National Coordinator of Canadians for Equal Marriage, noted that opponents had, over the years, stepped up a pre-emptive fight against gay rights and in particular, gay marriage, which they saw as the ultimate threat.<sup>72</sup> The casting of marriage as a threat by conservative opponents, Arron argued, drew the LGBT community together, and they came to see marriage as symbolic of their larger struggle.<sup>73</sup> The marriage fight thus became symbolic of dignity, freedom, equality and full participation for a diverse coalition of LGBT people.<sup>74</sup>

Although the fight towards formal polygamous marriage recognition may still be a ways away, in order to understand the full manner in which the law in Canada has ostracized polygamous relationships, it is important to address the significance of marriage within our culture. In addition to the treatment of these relationships under the criminal law, denying polygamous relationships the right to enter into legal marriage only further marginalizes these groups and perpetuates the mono-normative idea that monogamy and couple-shaped arrangements are the only valid and acceptable relationship form. Indeed, the language of marriage continues to hold great

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<sup>69</sup> *Ibid.*

<sup>70</sup> Ontario Law Reform Commission, Report on the Rights and Responsibilities of Cohabitants under the Family Law Act (Toronto: Ontario Law Reform Commission, 1993) at 46.

<sup>71</sup> Davies, *supra* note 68 at para 9.

<sup>72</sup> Laurie Arron, Cynthia Petersen & Brenda Cossman, “A Panel Discussion on the Political and Legal Fight for Same-Sex Marriage: A Discussion of Strategy, Methods, Successes, Challenges and Lessons” (University of Toronto, Faculty of Law, 26 September 2006) [unpublished].

<sup>73</sup> *Ibid.*

<sup>74</sup> Davies, *supra* note 68 at para 9.

symbolic and institutional meaning in Canada.<sup>75</sup> As the same-sex marriage campaign illustrates, beyond its functional implications in ascribing immediate benefits and obligations, marriage recognition plays a significant culturally constitutive role.

During the lengthy legal battle towards same-sex marriage recognition, several courts commented at numerous times on the importance of the right to marry. In *Halpern v Canada (Attorney General)* the Court of Appeal for Ontario noted:

Marriage is ... one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.<sup>76</sup>

As the court noted in *Halpern*, marriage recognition involves much more than an argument for equal access to "economic benefits."<sup>77</sup> Both inside and outside the courts, many have noted the symbolic importance that the language of marriage provides. For example, Evan Wolfson argues that "language defines possibility and place, and marriage is part of the vocabulary of commitment and family. We have to use the same language so that everyone else will understand."<sup>78</sup> This idea of the messaging or expressive function of law speaks to the idea of law playing a greater role than simply ordering society and solving disputes.<sup>79</sup> For James Boyd White, "law

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<sup>75</sup> Kelly, *supra* note 1 at 50.

<sup>76</sup> *Halpern v Canada (Attorney General)* (2003), 65 OR (3d) 161, 225 DLR (4th) 529 at paras 5-8 (CA).

<sup>77</sup> *Ibid* at para 94.

<sup>78</sup> Kelly, *supra* note 1 at para 50.

<sup>79</sup> *Ibid* at para 47.

acts rhetorically in establishing, maintaining, and transforming community and culture,” something he refers to as “constitutive rhetoric.”<sup>80</sup>

If one views the law through the constitutive lens that White urges us to, giving marriage rights to non-monogamous relationships may help break the mono-normative hold. With the enactment in 1982 of the *Canadian Charter of Rights and Freedoms* and the inclusion of same-sex couples in the definition of marriage under the *Civil Marriage Act*, Canada is increasingly moving towards greater recognition of diverse family forms. At one time there was a broad social and legal consensus about who was a “spouse”, what was “marriage”, and what was a “family”, but these concepts have increasingly been subject to social, legal and political challenge.<sup>81</sup> The law no longer defines the family exclusively in terms of heterosexual marriage, but now corresponds more closely to the functional and pluralistic reality of intimate adult relationships in Canada. Thus, a future move towards formal recognition of polygamous marriage would not only help break the monogamy bias but also would be a natural next step in Canada’s move towards recognizing diversity and providing equality, autonomy and liberty for all.

Of course, it may be argued by some that entry into a traditionally heterosexual, couple-based institution would risk assimilation and the loss of unique polygamous cultures. However, as was seen in the LGBT fight for equal rights, the freedom to choose has the symbolic power to elevate the status of polygamy in society as a legitimate, socially acceptable form of expressing one’s love. Further, as will be discussed below, if marriage law in Canada is able to move away from a categorical, exclusion based approach and more towards a pluralistic conception of marriage, where entry would no longer be limited to particular identity categories, individuals would be able to choose for themselves what form their marriage will take and how their needs for sexual and emotional intimacy, material support, reproduction and childrearing are to be met.

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<sup>80</sup> James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" (1985) 52 U Chicago L Rev 684 at 684.

<sup>81</sup> Nicholas Bala, "Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships" (2003) 29 Queen’s LJ 41 at para 1 (QL).

### Part III: A Queer Critique on the Polygamy Debate

#### 1. A Queer Conception of Intimate Relationships

The academic discourse known as queer theory emerged during the 1980s and 1990s as a critique of both feminist and gay and lesbian theories at that time.<sup>82</sup> In response to the constellation of issues around sexuality and discrimination, gay and lesbian politics tended to naturalize binary sexual identities and adopted a formal equality model that sought to equate the moral value and political status of homosexuality and heterosexuality.<sup>83</sup> It is in this context that queer theorists developed their skepticism of the identity-based nature of feminist and gay legal theories. Eve Kosofsky Sedgwick applied this criticism in terms of the hetero/homo divide. She developed her queer theory based on the rejection of the constrained binary of heterosexual/homosexual and sought to understand sexuality as more fluid. She recognized a multiplicity of sexual possibilities rather than a hierarchy in which the heterosexual presides over the homosexual.<sup>84</sup> Like Sedgwick, many queer theorists blur the rigid line typically drawn between heterosexual and homosexual and seek to radically pluralize sexed and gendered practices.<sup>85</sup>

The exact parameters of queer theory are difficult to determine. Central to the project though is the contestation of boundaries and categories, not only of sexual identity, but more widely to include the boundaries of normalcy itself.<sup>86</sup> If it has a core, queer theory is about resisting categorization: it has been described as a “zone of possibilities in which the embodiment of the subject might be experienced otherwise.”<sup>87</sup> Moreover, queer theorists constantly seek to reflect upon the contingency and ambiguity of all sexual categories. Rather than constituting an identity category itself, queer

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<sup>82</sup> Martha Fineman, “Introduction: Feminist and Queer Legal Theory” in Martha Fineman, Jack E Jackson & Adam P Romero, eds *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Burlington: Ashgate Publishing, 2009).

<sup>83</sup> *Ibid* at 4.

<sup>84</sup> *Ibid* at 5.

<sup>85</sup> *Ibid*.

<sup>86</sup> Carl F Stychin, “Essential Right and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada” (1995) 8 Can JL & Jur 49 at para 23 (QL).

<sup>87</sup> Kelly, *supra* note 1 at para 38.

theory highlights the contingency of all boundaries of social practice and identity, including its own.<sup>88</sup>

It is in this context that this paper seeks to question the boundaries and identity categories of intimate relationships—monogamy and polygamy in particular. This section develops a queer analytic for the study of personal relationships in the twenty-first century, which is grounded in an appreciation of the variety of ways in which people live their lives outside of the mono-norm. The mono-normative perspective, developed through political, racial, and religious ideals and perpetuated through cultural representations, has valorized the relatively narrow, categorical approach to marriage and intimate relationships. As was articulated above, monogamy as a hegemonic norm is based on the assumption that couple-shaped relationships are the only valid, morally acceptable form of conjugal union. From this perspective, non-monogamies continue to be demonized, avoided, and denied the legal rights available to monogamous couples.

If we are able to step away from the idea that monogamy is the only valid way of relating, we can begin to appreciate the plurality of sexual practices and identities. In viewing the monogamy/polygamy divide through a queer lens, we must be cautious to not describe our goal as the attainment of formal equality. By ascribing polygamy the status of a sexual minority, we would merely be perpetuating the idea that relationships are hierarchical, with monogamy retaining its status as the ideal. This approach would continue to situate monogamy as the corner stone of marriage, while other relationships would merely be provided the opportunity to achieve the same status. Instead of limiting intimate relationships to monogamy versus polygamy, by looking at relationships and sexual practices along a continuum of variation, we might be able to develop a discourse wherein all types of intimacies are respected and treated as equal.

Gayle Rubin in her article, “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality”, commented on how most systems of thought about sex attempt to conform sexuality to a single standard.<sup>89</sup> She argues:

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<sup>88</sup> Stychin, *supra* note 86 at para 23.

<sup>89</sup> Gayle Rubin, “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality” in Carol Vance, ed, *Pleasure and Danger: Exploring Female Sexuality* (London: Pandora Press, 1989).

variation is a fundamental property of all life, from the simplest biological organisms to the most complex human social formations. Yet sexuality is supposed to conform to a single standard. One of the most tenacious ideas about sex is that there is one best way to do it, and that everyone should do it that way.<sup>90</sup>

It would be quite objectionable to insist that everyone be heterosexual, married, or conventional. So why do we believe that all relationships should be monogamous?

In collapsing the boundaries of sexuality, exposing relationships as fluid, and in pluralizing sexed and gendered practices, the queering of the monogamy/polygamy divide can encompass a greater range of constituents and open up a legitimate range of sexual, gendered, and relational possibilities. The idea that sexual and relational categories are stable and mutually exclusive has been identified as a specifically modern Western phenomenon.<sup>91</sup> Exposing the constructedness of the monogamy/polygamy boundary will hopefully provide opportunities for further resistance of mono-normativity.

## 2. The Queer Resistance of Marriage

Despite the arguments laid out above—namely, that marriage is an important institution that, if expanded, can provide a vehicle in which non-monogamous forms of intimate relationships can achieve respect and recognition—some queer scholars argue that, by seeking marriage rights, sexual minorities misguidedly try to legitimize their sexualities through an oppressively monogamous, proprietary, shame-based institution that forbids constructions of freer sexuality.<sup>92</sup> Michael Warner, in his book *Trouble with Normal*, argues, “even though people think that marriage gives them validation, legitimacy, and recognition, they somehow think that it does so without invalidating, delegitimizing, or stigmatizing other relations, needs, and desires.”<sup>93</sup> Indeed, if we are to deconstruct the

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<sup>90</sup> *Ibid* at 283.

<sup>91</sup> Lise Gotell, “On Law’s Categories” 17:1 *CJLS* 89 at 109.

<sup>92</sup> Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York: The Free Press, 1999).

<sup>93</sup> *Ibid* at 99.

monogamy/polygamy divide through the lens of queer theory and argue for the expansion of marriage, it is important to address the inherent normativity of marriage itself.

A conception of activism as enlarging the life options of individuals in all relationship forms has manifest appeal. However, this way of thinking says nothing about whether pursuing legal marriage is a good political strategy, about the ethical questions of what marrying does, about state regulation, or about the normativity of marriage. Warner sums up the queer arguments against the pursuit of marriage by describing it as a social system of both permission and restriction:

Marriage sanctifies some couples at the expense of others. It is selective legitimacy. This is a necessary implication of the institution ... To a couple that gets married, marriage just looks ennobling ... Stand outside it for a second and you see the implication: if you don't have it, you and your relations are less worthy. Without this corollary effect, marriage would not be able to endow anybody's life with significance. The ennobling and the demeaning go together. Marriage does one only by virtue of the other. Marriage, in short, discriminates.<sup>94</sup>

In addition to the exclusionary effect of marriage, in the modern era, marriage has become the central legitimating institution by which the state regulates and permeates people's most intimate lives.<sup>95</sup> The consequences of marriage are tied to privileges and prohibitions, incentives and disincentives, as well as the state regulation of sexuality. According to queer theory, each of these should be challenged, not celebrated, as a condition of the right to marry.<sup>96</sup> According to Warner, as long as people marry, the state will continue to regulate the sexual lives of those who do not marry:

[The state] will continue to refuse to recognize our intimate relations—including cohabiting partnerships—as having the same rights or validity as a married couple. It will criminalize

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<sup>94</sup> *Ibid* at 82.

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid* at 108.

our consensual sex. It will stipulate at what age and in what kind of space we can have sex.<sup>97</sup>

In sum, as long as there is marriage, the state will continue to accord legitimacy to some kinds of consensual sex but not to others, or to confer respectability on some people's sexuality but not on others. It is within this normalizing effect that queer theorists have rejected the strategy of pursuing legal marriage.

Despite these arguments against the pursuit of legal marriage, it is important to keep in mind the symbolic effect of legal marriage and the status conferred informally by marriage. It must be made clear that in arguing for the retention of marriage, this paper is not intending to make the case for marriage. Indeed, marriage's discriminatory and exclusionary effects cannot be ignored. Instead, this paper is simply calling for the questioning of the conception and boundaries of marriage. In expanding marriage to include a variety of relationship forms, it could be seen as one step towards a larger goal, in which the legitimacy of state regulation over people's intimate lives and the categorization of relationships could be confronted and challenged rather than simply ignored.

### **3. The Categorical Foundation of the Common Law**

Although examining the polygamy/monogamy divide through queer theory has the potential to empower the oppressed and disrupt the hegemonic hold over monogamy, it is important to address salient arguments against the pursuit of change through this discourse. Namely, it is important to consider that protections and benefits can only be achieved through categorization and that categorical thought is the foundation of the common law method of analysis, which makes it impossible to conceive of a legal process to address relationships without assigning categories. Although broader arguments have been made against the legalization of polygamy, including its associated individual and social harms, this section will only deal with arguments that could be made against the liberation of relationships through a queer analysis.

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<sup>97</sup> *Ibid* at 96.



First, some may adopt the view provided by Tim Edwards in his critique of queer theory and politics and argue that the celebration of diversity would only lead to individualism and fragmentation.<sup>98</sup> Edwards argues that marginalized groups should stick together rather than focusing on differences.<sup>99</sup> Although the success of minority movements in advancing equality cannot be ignored, in a plural country, where individual identities cannot be reduced to notions of only gender or sexuality, limiting political action to categorical groups has the effect of excluding individuals who either cannot fit their identity into a particular group or who consider their identity to include complex or varying dimensions. Limiting a political movement to polyamory, for example, while excluding other forms of non-monogamies would be similar to limiting the queer movement to homosexuals, while excluding others who might more accurately identify themselves as bisexual, transgendered, or transsexual. Not only would this exclude a diversity of sexual or gender identities from social, political, and legal recognition, but would propagate the notion that some sexual identities are superior to others. Therefore, in speaking about non-monogamies, it is imperative that we resist the categorization or “normalization” of intimate relationships when moving towards political action and legal change.

Further, some might wonder how it would be possible to bring such language and politics to bear in legal discourse, when legal discourse is built upon categories. Some queer theorists, such as Carl Stychin, suggest that legal strategies might ultimately demand some sort of essentialism or use of identity categories, given that categorical thought is the foundation of the common law method of analysis.<sup>100</sup> Strategic essentialism, coined by Cayatri Chakravorty Spivak, is the move away from essentialism as a negative practice and towards essentialism as a means to resist essentialism.<sup>101</sup> It is the choice to

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<sup>98</sup> David Gauntlett, *Media, Gender and Identity: An Introduction* (New York: Routledge, 2002) at 160.

<sup>99</sup> *Ibid.*

<sup>100</sup> Lara Karanian, “The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis, Queer Porn and Canadian Anti-Discrimination Law” in Martha Fineman, Jack E Jackson & Adam P Romero, eds *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Burlington: Ashgate Publishing, 2009) at 378.

<sup>101</sup> *Ibid.*

develop an essentialized community, discrete minority or general category, such as “woman” or “queer,” for the purpose of advancing specific political goals. Postmodern feminists and queer theorists turn to strategic essentialism as a means to empower previously subordinated groups through self-definition, as opposed to being defined by those who would oppose them.<sup>102</sup> The deconstructive and yet politically effective nature of this strategy is derived from the acknowledgement that the essential attributes of this group are themselves socially constructed as opposed to inherent or innate.<sup>103</sup>

Although this political strategy recognizes the socially constructed nature of identity categories, by utilizing strategic essentialism, one misses the critical opportunity to destabilize the totalized, fixed, and immutable understandings of sex, gender and sexuality, as well as their relationships to one another. While strategic essentialism has been a useful tool in the achievement of basic human rights protections in Canadian law, we must begin to embrace the opportunities for creative discursive interventions that resist the normalizing thrust of categorization.

Unfortunately, the common strategy among non-monogamous groups has been to disassociate and distance themselves from each other as a means to counter perceived assumptions that they are all the same.<sup>104</sup> For example, many who identify as being polyamorous are quick to draw a line between polyamory and more casual sexual relationships—such as swinging—as a means of situating emotionally based relationships as superior to other relationships based solely on sex.<sup>105</sup> However, the move to essentialize polyamory as a relationship structure based on love and not sex, merely assimilates polyamory into model mono-normative values where notions of “love” are central to relationships. As Christian Klesse argues, a “love- and intimacy-centered discourse of polyamory can be presented as being superior to other forms of non-monogamy that emphasize more strongly the pursuit of sexual pleasure.”<sup>106</sup> Such hierarchies are in danger of reinforcing mono-normative relational ideologies and

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<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> Barker, “Understanding Non-Monogamies”, *supra* note 6 at 48.

<sup>105</sup> *Ibid.*

<sup>106</sup> Christian Klesse, “Polyamory and its ‘Others’: Contesting the Terms of Non-Monogamy” (2005) 9 *Sexualities* 565 at 578.

limiting the more sex radical politics of non-monogamy that some critics have championed.<sup>107</sup> Instead of using discrete and exclusive categories to resist discrimination, a deconstructive legal strategy that resists the framing of relationships as essentialized categories may help to bolster queer theory's broader insurgent project: one aimed at freeing sexuality from categorical identity constraints and from law's regulative project.<sup>108</sup>

#### 4. A Queer Critique on Litigating for Change Under the *Charter*

In Canada, the categorical approach to anti-discrimination law depends upon binaries that necessarily privilege one identity resulting in subordination of the other.<sup>109</sup> It is within this concept that polygamous activists must be cautious in arguing for change under the *Charter*. A challenge to section 293 of the *Criminal Code* (as we have seen in *Reference re: Criminal Code of Canada (B.C.)*) and the civil definition of marriage may be brought under the *Charter*'s section 15 equality guarantee, the section 7 liberty guarantee or the section 2(a) right to freedom of religion. It may seem desirable to approach the subordination of non-monogamies through section 15 of the *Charter*, as it is the predominant legal tool in which to address state discrimination. However, because the section 15 analysis turns on a categorical approach to discrimination, it becomes difficult to align queer theory with a section 15 *Charter* challenge.

As was developed by the Supreme Court of Canada, when asserting a section 15 *Charter* challenge, the claimant must draw an analogy between the enumerated ground and the unenumerated ground based on historical or social disadvantage due to discriminatory treatment, which has been suffered by individuals as a consequence of membership in the group.<sup>110</sup> This focus on *categories* of discrimination has led to much criticism. A general concern raised is that categories can become naturalized and essentialized and as a result the list of enumerated categories may appear historically and socially fixed.<sup>111</sup> As Nitya Iyer has argued, this approach to anti-

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<sup>107</sup> Barker, "Understanding Non-Monogamies", *supra* note 6 at 50.

<sup>108</sup> Karaian, *supra* note 100 at 386.

<sup>109</sup> Stychin, *supra* note 86 at para 10.

<sup>110</sup> *R v Kapp*, 2008 SCC 41.

<sup>111</sup> Stychin, *supra* note 86 at para 7.

discrimination law fails to acknowledge that social identities are geographically and historically contingent.<sup>112</sup> Moreover, the existence of a series of categories masks the “invisible background norm”.<sup>113</sup> Each category becomes a distinction from the norm, for which protection is appropriate while the norm remains in place, permanently fixed, immutable, and “undeconstructed”.<sup>114</sup>

The essentialist/immutability model and the categorical approach that it accompanies are highly problematic from the perspective of queer theory. The categorical approach constrains the challenge posed by queer activists to the coherence and stability of identity categories and disguises the role of relations of oppression in their construction and maintenance.<sup>115</sup> Thus, arguing that either the *Criminal Code* prohibition or the definition of marriage in the *Civil Marriage Act* discriminates against polygamists under section 15 requires polygamy to be assigned a fixed identity, distinct from other relationship forms. Monogamy, in turn, would remain the undeconstructed norm. As a result, this approach would do nothing to question and deconstruct sexual, relational and familial identity categories.

Further, in litigating for change under section 15 of the *Charter*, a claimant must fit his/her experience into a ground of discrimination—a process that may be difficult for many claimants to do.<sup>116</sup> Douglas Kropp argues that the Canadian courts’ use of the “enumerated or analogous grounds” approach, with its reliance on neat, tidy and rigidly demarcated categories to define the rights-bearing subject, ensures that those persons who are unable to categorize or caricaturize themselves according to one of the enumerated categories find themselves “falling through the cracks” of Canadian equality and anti-discrimination law.<sup>117</sup> This approach raises two concerns: (1) it demands that differences in terms of disadvantage and social location between individuals who share

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<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.* at para 24.

<sup>116</sup> Douglas Kropp, “‘Categorical’ Failure: Canada’s Equality Jurisprudence – Changing Notions of Identity and the Legal Subject” (1997) 23 *Queen’s LJ* 201 at para 3 (QL).

<sup>117</sup> *Ibid.* at para 1.

membership in the same group are overlooked in the course of articulating the shared disadvantage;<sup>118</sup> and (2) the focus on immutability demands that categories—both enumerated and analogous—be based on “personal characteristics” that are stable, fixed and not a matter of choice. Queer theory, in part, is about a logic of identity that is far more complex than just gender or sexuality, but instead recognizes that dimensions such as race, ethnicity, and religion all combine to constitute a person’s identity. Therefore, to reduce a discrimination claim to sexual orientation or family status—both grounds that polygamists might rely on under section 15—would overlook important aspects of a person’s identity as well as other factors that may have contributed to the discrimination faced by polygamists.

Moreover, there is a concern that individuals who experience discrimination based on their involvement in a polygamous union may be unable to describe that experience as being based on an enumerated or analogous ground. Although parallels have been drawn between polygamy and same-sex marriage, in that they both involve challenges to the traditional definition of marriage, sexual orientation has been recognized as a prohibited ground of discrimination because it is an inherent aspect of a person’s identity.<sup>119</sup> In contrast, many view polygamy as a particular type of chosen behaviour. Although the CPAA asserts that “conjugal polyamory is not just an outward practice but an inward component of the self of those who engage in it,”<sup>120</sup> the argument that it may not be an immutable characteristic could preclude a successful claim. In general, the test of immutability contradicts queer theory by underscoring a view of so-called personal characteristics as essential, neutral, and historically continuous rather than as historically specific, culturally changeable, and the outcome of a “particular pattern of social relations” based upon oppression.<sup>121</sup>

Although section 15 of the *Charter* relies to a great extent on the categorization of discrimination, it could be argued that pursuing change to the legal status of polygamy under sections 7 or 2(a) of the *Charter* aligns itself with queer theory. Due to the fact that this paper

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<sup>118</sup> Sychin, *supra* note 56 at para 8.

<sup>119</sup> Bala, “Constitutionally Valid”, *supra* note 24 at para 67.

<sup>120</sup> CPAA, *supra* note 19 at paras 17-18.

<sup>121</sup> Sychin, *supra* note 56 at para 15.

wishes to break the stereotype that polygamy is only a religious practice (found predominantly in the Mormon and Muslim faiths), I will not address a section 2(a) freedom of religion, claim. However, in retaining a queer perspective of sexuality and relationships, a challenge under section 7 of the *Charter* may be a progressive means of moving forward. In being denied the right to live in polygamous relationships without criminal prosecution and the right to formally enter marriage with more than one person, polygamists might be able to argue that their right to “liberty and security of the person” has been breached. Moreover, as was argued by the *amicus curiae* in *Reference re: Criminal Code of Canada (B.C.)*, by banning polygamy, section 293 of the *Criminal Code* 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.<sup>122</sup> Both the threat of imprisonment and the curtailment of a fundamentally personal choice constitute deprivations of liberty for the purposes of section 7.<sup>123</sup> In contrast to a section 15 challenge, a challenge to anti-polygamy laws under section 7 would retain the idea that sexuality and relationships are fluid and can encompass a plurality of forms. In denying a person the right to chose for themselves how their personal relationships can best meet their needs, both the criminal law and marriage law have denied these individuals their right to liberty as is guaranteed under the *Charter*.

However, like section 15, there are also problems associated with litigating for change under section 7. Some have argued that the view of marriage as simply a personal choice is wholly inadequate to evaluate the strategy of pursuing legal marriage because it neglects marriage’s legal and cultural consequences on others, such as those who resist marriage or those who are drawn to it for a mix of reasoning not of their own making.<sup>124</sup> Indeed, presenting marriage as an unconstrained individual option requires us to forget it is a social system of both permission and restriction.<sup>125</sup> In arguing for change, it must be borne in mind that marriage is not simply a choice that can be exercised privately without costs to others. In providing

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<sup>122</sup> *Amicus Curiae*, *supra* note 18 at para 58.

<sup>123</sup> *R v Malmo-Levine; R v Caine*, 2003 SCC 74, 3 SCR 571.

<sup>124</sup> Warner, *supra* note 92 at 109.

<sup>125</sup> *Ibid* at 97.

legitimacy to a range of relationship structures, attention must be called to the ways in which relationships are constructed in society and the repercussions of state regulation. Therefore, whatever legal strategy is pursued, any argument for plural marriage requires a concern about how that strategy defines relationships and the effect of that strategy upon the pursuit of a plurality of sexed and gendered practices.

#### **Part IV: Going Forward: Pluralizing Marital and Familial Forms**

The discussion thus far has attempted to broaden the current polygamy debate that is ongoing in the British Columbia courts. I have argued, first, that the ideal of monogamous marriage is a socially and politically constructed institution, perpetuated in Western societies through cultural stereotypes and dominant discourse. Second, I have shown that by deconstructing and questioning the boundaries and identity categories of intimate relationships, we can begin to appreciate a plurality of sexual practices and identities and empower those who do not fit into the mono-norm.

How, then, should the law respond to this queer perspective on intimate relationships? The first obvious step would be to remove the criminal law's regulating power over intimate relationships. The utility of section 293 of the *Criminal Code*, which prohibits the entry into "any form of polygamy" or live in "any kind of conjugal union with more than one person at the same time", is thought to protect women and children from evils such as child abuse, domestic violence, and forced or underage marriage—all of which are already prohibited under other laws in Canada.<sup>126</sup> As a law solely based on racist and political motivations, section 293 of the *Criminal Code* merely perpetuates the mono-normative perspective of monogamy as an essential foundation of personal relationships and the natural pattern of living together. From this perspective, polygamy, as well as other relationships which do not represent this pattern, are demonized, pathologized, marginalized, and subject to the criminal law's punitive power. Only through the decriminalization of polygamy will Canada begin to recognize the value in non-

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<sup>126</sup> Carter, *supra* note 50 at 168.

monogamous relationships. Further, beyond section 293, we must begin to consider other status-discriminatory regulations for sexuality. Although this paper has focused on polygamy, we must question the criminal law's regulatory hold over all forms of sexual practices and intimacies. Although some legal restrictions are likely legitimate due to their aims of protecting individuals from harm, other provisions, like the prohibition against polygamy, may simply be a means of perpetuating hegemonic norms.

Secondly, people engaging in non-monogamous relationships are often unable to claim the relationship rights gained by monogamous couples. It is therefore suggested that we begin to question Canada's conception of what marriage is and who is legally able to participate in marital unions. From the viewpoint of liberal theory, the state should remain neutral with respect to competing conceptions of what marriage is and of how individuals' needs for sex and emotional intimacy, material support in daily life, reproduction and childrearing are to be met.<sup>127</sup> The state fails to be neutral when it chooses one particular form of relationship to support.<sup>128</sup> We must question the desirability of defining a single form of state marriage. With the multiplicity of care-giving and familial structures in Canada, the notion that relationship rights and marriage should be limited to dyadic, conjugal unions is an archaic assumption that is out of touch with the reality of life in Canada. Thus, Canada would do better to move toward a more pluralistic conception of personal relationships, and it might do so in one of two ways. As suggested by Cheshire Calhoun, "we might adopt a fully contractual approach to emotional, sexual, childrearing, and adult support relationships. In that case, the state would simply enforce the terms of the contracts agreed upon by the contracting parties."<sup>129</sup> Alternatively, we can retain the institution of marriage, but expand it to include a plurality of marriage or relational options rather than a single state-sanctioned form of marriage. Due to the symbolic importance of marriage in Canada for both the dominant majority and those who identify more with subjugated groups, arguably the retention and expansion of marriage

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<sup>127</sup> Cheshire Calhoun, "Who's Afraid of Polygamous Marriage? Lessons For Same-Sex Marriage Advocacy From The History of Polygamy" in Kim Brooks & Carissima Mathen, eds, *Women, Law and Equality: A Discussion Guide* (Toronto: Irwin Law, 2010) at 47.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid* at 49.



would be the preferred option. While this approach may be questioned due to the de-legitimizing and invalidating nature of marriage, an expansion of marriage could be seen as a step towards the larger goal of breaking down the privileging, regulatory manner in which Canada views intimate relationships.

## Conclusion

In the first post-*Charter* case to deal with the issue of same-sex marriage, *Layland v Ontario*, Justice Greer, in dissent, stated: “It is a basic theory in our society that the state will respect choices made by individuals and the state will avoid subordinating these choices to any one conception.”<sup>130</sup> Despite the fact that the Supreme Court of Canada ultimately adopted this position with respect to same-sex marriage, Canada continues to assert the belief that marriage can only take place between two people to the exclusion of all others. Not only does our law fail to recognize plural marriage; it actually penalizes individuals who enter into any kind of conjugal union with more than one person at the same time. In taking this stance, the law has over-generalized and stereotyped an intimate relationship structure as being inherently gender discriminatory and harmful to women and children. Instead of accepting the diverse reality of intimate relationships, our legal system has situated monogamy as the only valid way of relating.

The Supreme Court of British Columbia is finally faced with the important opportunity to address this discrimination.<sup>131</sup> Instead of focusing on the polygyny practiced in Bountiful, BC, in giving respect to all forms of plural unions, the Court must acknowledge that polygamy can be practiced in a way that promotes equality, dignity and love. For too long the monogamy bias has been accepted

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<sup>130</sup> *Layland v Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 OR (3d) 658, 104 DLR (4th) (Ont Sup Ct (Div Ct)) at para 46.

<sup>131</sup> Subsequent to the completion of this article, the B.C. Supreme Court rendered their decision on section 293 of the *Criminal Code* in *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588. On November 22, 2011, the Court concluded that section 293 is constitutionally valid, thereby continuing to make polygamy an indictable offence punishable by imprisonment for up to five years. The *Amicus Curiae* has indicated that he will not be appealing the B.C. Supreme Court decision (see: Marc Ellison, “Polygamy Ruling Won’t be Appealed” 21 December 2011 (Toronto) *Globe and Mail*); however, it is still open to the Attorneys General to appeal to a higher court.

in Western society without question. For the most part, we have ignored the manner in which monogamous marriage privileges, excludes, and provides the vehicle in which the state can regulate intimate relationships. The deconstruction and questioning of this social institution will hopefully provide opportunities for resistance against mono-normativity and stimulate a discourse wherein intimate relationships can be viewed as fluid instead of categorical and exclusive.

Marriage continues to be an important institution in Canada and abroad. Despite the fact that it has been used as a tool to privilege the dominant class and exclude people that might be considered as “other,” entry into it carries with it the symbolic power to transform community and culture. Through the queering of the monogamy/polygamy divide, an important opportunity emerges in which we can collapse the boundaries of sexuality, expose relationships as fluid, and pluralize sexed and gendered practices. Therefore, decriminalizing polygamy and expanding marriage to include a plurality of relationship forms would be an important step in breaking the monogamy bias. Although the idea of marriage itself and the state’s continued regulatory hold over intimate relationships are essentially antithetical to queer theory, a deconstructive legal strategy which aims to break down the categorical, exclusionary nature of marriage may help to bolster queer theory’s broader insurgent project to free sexuality from categorical identity constraints and open up a legitimate range of sexual, gendered and relational possibilities.