A Question of Strangeness

by

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Abstract

This paper examines leading Canadian decisions in the areas of obscenity and indecency law and freedom of religion to demonstrate that the strangeness of a practice will be a major factor in determining the harm associated with it. Since “strangeness” in sexual deviance cases turn on the perceived objectification and subjugation of women and minority religion cases turn on communal behaviours, these strands intersect in the debate over polygamy. The impact that these skewed perceptions will have on findings of harm in the polygamy context is examined, as are how the benefits of the legislation may be overstated. Finally, the effects of “othering” are addressed for the practice of polyamory, a relationship structure that lacks harm but may nevertheless be equally prohibited.
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I. Introduction

In January 2009, Winston Blackmore and James Oler, members of a fundamentalist Mormon sect located in Bountiful, British Columbia, were charged with polygamy.¹ These charges were later dismissed because the initial two special prosecutors refused to go ahead with the action.² However, they served to bring the issue of criminalization of polygamy to the forefront in Canada. A reference on the question of the criminalization polygamy is scheduled to be heard before the British Columbia Supreme Court, and will inevitably make its way to the Supreme Court of Canada.³ Within the next few years, the highest court in our land will determine whether the criminalization of polygamy can be sustained in our multicultural and tolerant society.

The debate over polygamy provides an interesting lens with which to view Canadian society and the extent of its tolerance. We may aspire to respect all cultures and religions but we also value equality between the sexes. This leaves the courts with the question of what to do when these aims conflict, as they seemingly do in the case of polygamy. Of course, the matter of whether the criminal prohibition ought to be sustained is multi-faceted and will be the subject of a great deal of evidence and argument during the reference proceedings. As such, it is well beyond the scope of this paper. Instead, the purpose of this work is to demonstrate that the courts may not be as neutral as we would like to believe when dealing with practices which raise feelings strangeness and discomfort in most Canadian. It will do so by examining how the courts have treated areas which cause similar unease, and by demonstrating how the current prohibition against polygamy does little to address the underlying harms. It will further consider the

practice of polyamory as a warning against the danger of seeing harm too readily, and how it could result in entirely unjustifiable encroachments on personal freedoms rather than searching for solutions which better address harms.

In order to do so, this work will focus on the courts’ treatment of two areas which intersect in the consideration of polygamy: minority religions and the subjugation of women. This reference case is the first modern instance where an in depth consideration of fundamentalist Mormon polygamy is requires. That being the case, the decisions relating to minority religions do not deal directly with Mormonism, but with the varying deference shown by the courts to the practices of Jehovah Witnesses, Hutterites and Sikhs. Furthermore, the work of Lori Beaman\textsuperscript{4} (relating to the courts perception of harms when dealing with refusal of blood transfusions by Jehovah Witness children and what factors influence these perceptions) will be drawn upon. Beaman’s insights and useful framework will be applied to decisions dealing with Sikhism (a “good” religion, with practices which are understandable to most Canadians) and the Hutterite faith (a “bad” religion, with a focus on communal, faith-based lifestyle). A comparison of the Supreme Court of Canada decisions of \textit{Multani}\textsuperscript{5} and \textit{Hutterian Brethren}\textsuperscript{6} will show that the treatment a religious practice receives is not dependant only the harm caused, but on the strangeness of the practice. While the courts do seek to allow religious exercises to the greatest extent possible, in reality only those practices which are readily comprehensible to a secular society are given full shrift. Other practices are discounted, due either to a failure to view them as religious in nature or a refusal to accept them as true exercises of personal agency.

\textsuperscript{5} \textit{Multani v. Commission scolaire Marguerite-Bourgeoys}, 2006 SCC 6. (“Multani”)
\textsuperscript{6} \textit{Alberta v. Hutterian Brethren of Wilson Colony}, 2009 SCC 37. (“Hutterian Brethren”)

Similarly, the decisions dealing with vulnerability and subjugation of women do not arise within the multiple marriage context, but rather in another area where objectification and autonomy meet: namely, obscenity and indecency law. Since the rejection of community standards in R. v. Butler\(^7\), infringements on freedom of expression and liberty in these areas have been justified by the need to protect against harm. While Butler dealt with harm to women in heterosexual-oriented pornography, subsequent cases have tackled other sorts of activities, including homosexual depictions, strip clubs and sex clubs. While the subject of the harm has shifted, the likelihood that harm will be found is still largely dependent on the strangeness of the practice and the perceived autonomy of the women involved. A examination of Little Sisters\(^8\) (a case which addressed the obscenity of depictions of non-heterosexual acts) shows that apparently voluntary activities which lack the damaging gender dynamic present in Butler will nevertheless be deemed harmful, largely because of their strangeness. Likewise, a comparison of the indecency law decisions of Mara\(^9\) and Labaye\(^10\) demonstrates that the courts are willing to accept one and reject another based on black and white constructs of objectification and consent. The same use of such absolutes is what would likely lead to the courts easily dismissing polygamy in the future.

These disparate areas of case law are then consolidated in order to demonstrate that polygamy is an area which is a “perfect storm” of sorts for these markers of strangeness. The focus on religion and communal lifestyle, combined with the apparently subjugated role of women, will not allow the courts to take a neutral view. In doing so the courts are apt overestimate the harms actually present, discount the choices of the women involved (thus stripping them of their agency), and overestimate the benefits of the prohibition at issue. The paper thus concludes by

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\(^7\) R. v. Butler, [1992] 1 S.C.R. 452. ("Butler")
\(^8\) Little Sisters Book and Art Emporium v. Canada (Minister of Justice), 2000 SCC 69. ("Little Sisters")
\(^10\) R. v. Labaye, 2005 SCC 80. ("Labaye")
examining how this is especially troubling in the matter of polygamy, as this reaction to strangeness may end up damaging two separate groups. The first are those involved in traditional polygamy; the reaction to strangeness may blind society from seeing that the prohibition may hurt those that it wishes to protect, by focussing on reducing the incidences of polygamy rather than the harm caused by the lifestyle. The second are those who are involved in polyamorous relationships, some of whom must live with the (remote but existent) possibility of prosecution, and all of whom are subject to the knowledge that society judges their lifestyle as too strange to be worthy of equal freedom.
II. Harm and Strangeness

1. Perceptions of Harm
In *Defining Harm*, Lori Beaman addresses the difficulties in reliably determining harm occurring in a context that differs from the norm. Beaman’s work uses the case of *B.H.*¹¹ (in which a Jehovah Witness girl named Bethany Hughes had refused chemotherapy treatments because of the need for blood transfusions) to illustrate how the courts and the public are inclined to see harm when the person at issue is somehow “other”. Beaman addresses this “othering” largely in the context of minority religions, making it particularly applicable to the issues raised by polygamy practiced by fundamentalist Mormons. Though the Jehovah Witness and Mormon faiths are not particularly linked by belief, they are not far apart in terms of public perception. They are both at the outer edges of “acceptable” religious behaviour, with fundamentalist Mormonism falling outside.

More interesting, however, is that the same analysis employed by Beaman can be extended to Charter decisions dealing with obscenity and indecency. Whether the departure from the understandable (and therefore acceptable) involves sexual deviance or religious fervour is irrelevant; what matters is that the person has strayed too far from the “normal” path and must be corrected. These decisions demonstrate a tendency by the courts to see harm (largely suffered by women, though sometimes by society at large) more readily in practices which raise societal discomfort. This is key to the polygamy question because it shows the inclination to see harm when women are put in positions inconsistent with the larger project of gender equality. In such instances the consent of women becomes valueless, because it does not arise out of what

is perceived to be a “true” choice. Even in situations where consent is not central to the issue (as in obscenity decisions) the harm is seen more readily when the depictions are too abnormal. Harm is inevitable when the activity depicted is one that the members of the courts cannot imagine a person (usually a woman) freely consenting to, regardless of whether that particular someone actually did. Odd lifestyles are more susceptible to findings of harm, whether the oddity arises from a fringe religion or an alternative sexual practice.

2. “Defining Harm”

Beaman’s thesis is that those people who have put themselves outside of the boundaries of the model citizen are accorded less respect for their choices, and therefore fewer rights. They essentially lose the right to make the wrong decision. Freedom of religion may exist for all but practically speaking, the degree of this freedom depends on what faith is involved:

A key problem is that religious freedom seems to apply only in the easy cases – those religions that look like mainstream Christianity or that are most familiar to many Canadians. Those beliefs and practices that lie outside of that hegemony are often constructed as harmful, or as potentially resulting in harm, and thus their limitation is justifiable in a free and democratic society.¹²

This is not because of any punitive intent on the part of the community or justice system, but rather is due to how such people are perceived, especially in regard to the degree of agency they are viewed as having. This determines the amount of state protection required, whether that protection is from themselves, their beliefs or their religious community. Beaman addresses a number of interrelated factors which lead to harm being more readily found, but for present purposes, these can be reduced to three main areas: risk and excess; the use of common sense; and the characterization of irrationality.

A. Risk and Excess

¹² Defining Harm, supra note 4 at 67.
Beaman links the perceived harm to fear through the language of risk and excess. She posits that religious beliefs and practices that are too far off the beaten path are viewed as “excessive” and unlikely to have been the subject of real consent. While all religions are protected, only certain types of practices are understood as reasonable religions; those falling outside of those boundaries are viewed as lesser (possibly even cult-like) and therefore not as worthy of protection:

Behaviour that is construed as excessive, or as being made without her true consent, will not be interpreted within the bounds of the degrees of freedom available to the citizen as she acts freely. The boundaries of what constitutes excessive behaviour and how consent is calculated are constantly in flux through power struggles over the definition. The citizen/consumer is free within the boundaries of the extremes of consent and excess. Located at the edges of these are power relations and struggles over the definition of ‘consent’ and of ‘excess’.

This notion of excess, when put in the legal context, becomes a discourse of risk of harm, and at the outer bounds where the excess is simply too great, intervention may be required. Law is seen as the proper method for such intervention: “Law is the pivot-point, and excess builds an image of harm, or risk of harm, that can be bounded by law’s mechanism.”

This presents difficulties in Canadian law, in which the harm analysis has become predominant in Section 2(a) and 2(b) cases. The harm framework is largely viewed as a useful tool in Section 1 analysis because it is seen as a neutral means of balancing numerous rights and interests. Its greatest strength lies in its seeming neutrality, but this becomes its greatest failing if it is not acknowledged that the concept of harm is far from objective. All too often, there is a failure to recognize that implicit in harm frameworks are contain societal assumptions about

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13 Ibid. at 57.
14 Ibid. at 69.
15 Ibid.
16 Ibid. at 83.
17 Ibid.
what is good or valuable.\textsuperscript{18} What constitutes harm depends on the society judging it, and it is only natural that any behaviour that deviates too far from societal norms will more readily have harm attributed to it. In this way, harm is seen as a “joker card” of sorts, because it is such a fluid concept.\textsuperscript{19} This is not to say that such frameworks are not useful, but they must be employed with caution and with constant awareness of the underlying “moral assumptions about what is good, or right, or desirable.”\textsuperscript{20}

\textbf{B. Common Sense}

An additional difficulty “othered” groups face is the willingness of the courts to use common sense (especially in matters of risk or harm) to fill in the gaps that have not been (or cannot be) established by evidence. It is a device that appeals to courts because it is seemingly irrefutable and yet does not require proof or explanation.\textsuperscript{21} It also has a simplicity about it that brings our sometimes complicated and fanciful legal concepts and arguments back to what is really at issue. One of the general public’s common complaints about law is how divorced it seems to be from reality; the use of common sense instead grounds findings on something that everyone can understand:

Common sense marks concepts about fairness and justice that connect law to the everyday person. It lends legal decision making an air of legitimacy through its accessing of “what everyone knows.” Common sense assumes that we share notions of what comprises fairness and justice, and also that common sense is in fact common, or shared by most members of society.\textsuperscript{22}

The problem is that these underlying assumptions are quite simply wrong, in that not everyone shares the same common sense. Common sense, while having a veneer of neutrality, fails as an objective tool because it draws from the experiences of the dominant culture, without

\begin{footnotes}
\item[18] \textit{Ibid.} at 85.
\item[19] \textit{Ibid.} at 86.
\item[20] \textit{Ibid.}
\item[21] \textit{Ibid.} at 90.
\item[22] \textit{Ibid.} at 92.
\end{footnotes}
recognizing that it is doing so. Like harm, it is useful only if one remembers that common sense itself is not fixed, nor is it the same for all people.

Just as the common sense of today is not the same as that of the Middle Ages, the common sense that applies to a largely secular culture is different from those immersed in a religious lifestyle. Yet common sense is largely treated as assumed knowledge, irrefutable because it is seen as so obviously true. Minorities therefore bear the burden of proving all aspects and are stymied by aspects that are not provable by the usual means, while majoritarian claims can be established just by their obvious, self-evident truth. As noted by Beaman, “‘Everybody knows that’ is a difficult position to counter.”

Though common sense itself has been endorsed by the Supreme Court as a means of accepted reasoning in the absence of evidence of a specific, obvious point, the term does not often arise in Section 2 decision. However, the phenomenon can be seen in the willingness to attribute harm even when no evidence has been presented to make such a connection. The obviousness or inevitability of harm is equally hard to counter, absent evidence, regardless of whether or not the phrase “common sense” is used to justify it.

### C. Irrationality and Brainwashing

The increased willingness to see harm and to rely on common sense to fill in the gaps lends an air of inexplicability to some choices. Why, after all, would someone choose to engage in behaviour that seems contrary (or even harmful) to their interests? This leads to a perception of the group member as irrational, sometimes to the point where his or her agency is questioned. In the context of behaviour associated with religious faith, this perception of irrationality can

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23 Ibid. at 95.
often be attributed, at least in part, to the importance that the individual puts on membership in a particular group.\textsuperscript{25}

Present day society prizes individualism and it is the effects on the individuals that are emphasized, even in areas such as religion in which the right is fundamentally relational.\textsuperscript{26}. Those who participate in groups which seemingly limit their rights are therefore incomprehensible to outsiders. In seeking an answer to why these people are behaving in ways that seem contrary to their own interests, the courts will sometimes turn to the language of brainwashing for an explanation\textsuperscript{27}. The seemingly bad choices are given the explanation that the chooser is under the influence of others and has lost control over his or her own life. A person is either an autonomous decision maker or completely lacking in agency, with the court allowing for no middle ground: “The either/or interpretation of autonomous individual or brainwashed groupie leaves a gap in understanding the individual’s relationship to the religious group.”\textsuperscript{28}

However, this fails to acknowledge that choices are rarely made completely free from the influence of others. Even those who are models of secular citizenship do not live in a vacuum. It is unfair to portray the influence that fringe groups have as brainwashing, while those following the edicts of major religions do not face the same marginalization. What seems (to the outsider) to be the product of brainwashing may be an important expression of faith to the individual. After all, decisions fall on a spectrum, and are rarely the product of the extremes of either physical force or reflection entirely absent influence.

\textsuperscript{25} Defining Harm, supra note 4 at 107.
\textsuperscript{26} Ibid. at 104.
\textsuperscript{27} Beaman is careful to note that the actual term “brainwashing” was not used in the B.H. decision; the language of the decisions only implies a connection: Ibid. at 108.
\textsuperscript{28} Ibid. at 105.
3. **Fundamental Freedoms and Strange Practices**

Though Beaman largely confines her hypothesis to the treatment of Jehovah Witnesses, it can be extended not just to other religions, but also to other areas where people behave in a manner inexplicable to most Canadians. Polygamy is particularly susceptible to the effect of othering because it is an area of intersection of two strands of strangeness – communal religious practices and subjugation of women – intersect. In order to demonstrate that these are areas where the courts are more likely to over-perceive harm, two recent Supreme Court of Canada decisions must be addressed: *Multani* and *Labaye*. Those who would dispute Beaman’s contentions would likely cite these cases as evidence to the contrary. After all, what could be better proof of Canada’s live and let live attitude than decisions which, respectively, allowed a child to take a dagger (a religious totem) onto a schoolyard and deemed a swingers club to be within the bounds of decency of downtown Montreal?

However, it can be shown that despite appearances these cases do not fall afoul of the “dangerous other” categorization. Indeed, they provide prime opportunities for the courts to tout the importance of fundamental freedoms without having to confront areas of discomfort. This will be demonstrated by contrasting these decisions with other cases where these indicators of strangeness are present. *Multani* will be examined in conjunction with *Hutterian Brethren*, which involved a minority religion with communal practices, and where religious freedom was sacrificed for a dubious state interest. Since objectification and subjugation are not limited to acts but can include depictions, the comparators to *Labaye* will not be limited to another indecency decision (*Mara*) but will also include an obscenity case (*Little Sisters*).

**III. Treatment of Religious Practices**

1. “Normal” Religion: *R. v. Multani*
A. Kirpan: Weapon or Totem?

The facts of Multani are fairly straightforward. Gurbaj Singh Multani was an orthodox Sikh child attending a public school; his beliefs required him to wear a ceremonial metal dagger (called a kirpan) at all times. After he accidentally dropped this kirpan while on his school’s playground, the school mandated that it be carried in a certain way, in order to limit its accessibility. However, the school board overruled this decision, determining that only an ornamental, plastic kirpan could be worn for safety reasons. The administrative decision was ultimately appealed up to the Supreme Court, which held that the safety-based objections were largely baseless and would be satisfied by the solution originally proposed by the school. The proper balance between Multani’s freedom of religion and the safety concerns was to permit a functional metal kirpan, but to require that it be kept in a sheath, which was in turn enclosed in a sealed pouch and sewn into Multani’s clothing.

It may seem that the Court was making a rather extreme declaration in favour of freedom of religious practice, given that it allowed a blade on a schoolyard in the name of religion; however, this decision is far less revolutionary than it appears. Indeed, it fits most of the parameters of “good” religious practice as discussed by Beaman. While Sikhism is far from being the dominant religion in Canadian tradition, it is one of the most practiced religions in the world.29 It is not practiced in isolated collectives, but instead has temples where adherents worship. A family-oriented religion with monogamous marriages, one of the values held is the equality of men and women (though this may be truer in theory than in practice).30 Meditation is encouraged, while violence is discouraged.

29 “Major Religions of the World Ranked by Number of Adherents”, online: Adherents.com <http://www.adherents.com/Religions_By_Adherents.html>.
Certainly, the Sikh religion involves practices that are alien to those who are familiar with Christian traditions. However, these are generally non-threatening or falls into modes of worship that are in line with Christian or other accepted practices. The Sikh prohibition against cutting one’s hair[^31] is not that different from Orthodox Jewish women covering their hair[^32].

Practices such as these differ in detail, but not fundamentally in nature. Other shared aspects, such as dietary requirements, are common components to “ordinary” religions. Similarly, though a kirpan is a knife which could conceivably be used for violent ends, it is also (and especially when sealed within clothing) a religious symbol of non-violence (as the evidence presented in the case established). Wearing a kirpan is really not that strange of a practice to a society accustomed to the wearing of a symbol marking the Christian deity]’s gruesome demise. Adorning oneself in a certain way as a demonstration of faith is a practice that is eminently understandable to Canadian society, even if the religion itself is not.

Furthermore, the carrying of the kirpan has no elements of coercion or non-consent. There was never any contention that Multani was forced to wear the kirpan, nor that the act of wearing it either caused or signified some inequality foisted upon him by his religion. The Multani decision is a rarity – an example of the exercise of religious freedom and multiculturalism, without any of the complicating factors dealing with inequality to women within the minority religion (as have arisen worldwide in decisions involving the wearing of the chador). It is also an instance of a person practicing his religion in an individual way, which is to say in a way that society is comfortable with. It remains to be seen whether a different decision would have been reached if a similar situation arose which involved a religion that was more isolated and communal in nature. Because such individual practices are understandable,

they are more likely to be accepted as an activity to be encouraged and valued, and will therefore mandate more judicial protection.

**B. Assessment of Risk**

The characterization of the risk in *Multani* is illustrative of how clearly the courts can see risk if not distracted by discomforting factors. The Supreme Court, while not dismissive of the safety risk, makes a clear assessment of the realities of the danger. Rather than overemphasize the bare fact that allowing the wearing of a kirpan would permit a blade on the school grounds, the Court looks at how this risk falls on the spectrum of danger already present. It rejected the argument that the kirpan was a symbol of violence and noted that to suggest as much was both disrespectful to the Sikh population and contrary to the cherished value of multiculturalism.  

The Court also took pains not to overstate the risk associated with the blade, affirming the superior court judge’s finding that if other children wished to obtain a weapon, there were easier ways to do so than by stealing Multani’s kirpan. It would be simpler to bring a weapon from home or use available items such as pencils, scissors or baseball bats, rather than go through the various layers of protection to get to the kirpan.

More significantly, Charron J. wholly rejected the argument that Sikh children’s religious practices ought to be limited because of the reactions of others. The contention had been made that other children might feel so threatened by Sikh children being allowed to carry kirpans that they might wish to arm themselves in response, leading to a poisoning of the school environment. The Court went beyond merely rejecting the evidence of the school board’s

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33 *Multani*, supra note 5 at para. 71.
expert, chastising him and his research methods with a finding that he was giving a personal opinion rather than reporting on directed research.\(^{35}\)

This expert’s study had not been directed at the carrying of the kirpan, but rather to studies of the perception of safety in schools; he determined that the perception of lack of safety would increase and that it would engender feelings of resentment of other students. The expert provided the example scenario that permitting the chador to be worn would leave some students feeling that Muslims got special treatment, given that the other students were not able to wear caps.\(^{36}\) This comparison in particular was derided by Charron J., who noted that the attempt to equate the two forms of head coverings was “indicative of a simplistic view of freedom of religion that is incompatible with the *Canadian Charter.*”\(^{37}\) If this reaction was to occur because of the presence of a kirpan, that was very much the problem of those viewing the practice, and not those engaging in it:

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Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is ... at the very foundation of our democracy.\(^{38}\)
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Permitting the wearing of the kirpan allowed the Court the luxury of taking a strong stance on freedom of religion in a situation where there was very little to balance against it. *Multani,* despite appearance was at its core an easy case. It allowed for the Court to come down squarely on the side of both freedom of religion and multiculturalism, without having to temper the ruling with considerations of how women are treated within those religions and cultures. The subject

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\(^{35}\) Ibid. at para. 73.  
\(^{36}\) Ibid. at para. 72.  
\(^{37}\) Ibid. at para. 74.  
\(^{38}\) Ibid. at para. 76.
of women’s rights and freedoms never arises, making this a rarity in modern cases where minority religions and multiculturalism intersect.

Instead of vulnerable women needing protection the players are an unreasonable school board and (hypothetical) bigoted children, who equate their frivolous wish to wear a cap with a legitimate religious practice. These interests being obviously dismissible (and perhaps even contemptible), the Court has the ideal decision under which to become a champion of minority religious rights and multiculturalism. It was provided with an excellent platform to deliver its message on the value of all cultures and religions, and did not waste this opportunity. The passage that best exemplifies this consummate Canadian attitude towards multiculturalism can be found in the portion of the judgment addressing the proportionality of the measures taken:

A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects.39

_Multani_ certainly represents an embrace of minority religion, but only of those that are not too different. When all that stands against a child fulfilling his religious obligations by carrying a largely symbolic object is illusory harm, it is impossible to deny him a right to this practice. However, when the wearing of a religious article is complicated by its association with subjugation of women (whether this is real or perceived), the reins on religion are sharply tightened. The debate over the chador and similar coverings worn by Islamic women is much more complicated than the question arising in _Multani_, and is being faced by multicultural states throughout the world. The role that women are seen to play in some versions of Islam is so

39 _Ibid_ at para. 79.
contrary to gender equality (and so divergent from how women are normally perceived in secular society) that Islam becomes a strange creature, and therefore more susceptible to findings of harm.

Of course, subjugation of women is not the only aspect of a religion that can lead to it being viewed with suspicion. In a society that prizes the individual, a religion which is group-focused will also be perceived as odd. This is especially true if the adherents practice a communal lifestyle isolated from the rest of society, as was the case for the members of the Wilson colony, practitioners of the Hutterite faith.

2. Falling Outside the Norm: *Hutterian Brethren*

*Hutterian Brethren* provides an interesting counterpoint to *Multani*, given that Beaman’s framework provides some insight into why the beliefs of these colonists were accorded less deference than those of *Multani*. While Multani’s kirpan led to an initially serious apprehension of harm, in *Hutterian Brethren* the harm appeared insignificant and yet was sufficient to justify a curtailment of a religious practice.

A. The Significance of Photographs

The Hutterite faith includes a prohibition against adherents voluntarily having their photographs taken. The Alberta government ran afoul of this belief when they instituted a mandatory photo identification program for all those holding driver’s licences in the province. Rather than exempt the approximately two hundred and fifty Hutterites from the photo requirement, the government proposed a compromise. The photographs would be taken, but then only kept in the photo identification bank; they would not have to be carried by the license-holder. This proposal did not address the needs of the adherents, and led to a result where the
group would either have to hire outside drivers or breach the tenets of their faith so they themselves could drive.

The majority, in an opinion authored by Chief Justice McLachlin, determined that the purpose the universal photo identification bank would serve in combating fraud justified its infringement on religious freedom. That thousands of non-driving Albertans would not be included in the system – constituting a far greater risk of fraud than the much smaller Hutterite community – was not a compelling argument to the majority.

It is clear from the decision that the Court was concerned about the effect which a too-broad freedom of religion would have on the ability of the government to regulate. If every non-trivial impact on religious practice were verboten in a multicultural society, universality of regulation would never be possible. Rather than making this determination based on whether there is a conflict at all, the degree of the impact had to be considered.

In judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important. However, this perspective must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs. The bare assertion by a claimant that a particular limit curtails his or her religious practice does not, without more, establish the seriousness of the limit for purposes of the proportionality analysis. Indeed to end the inquiry with such an assertion would cast an impossibly high burden of justification on the state. We must go further and evaluate the degree to which the limit actually impacts on the adherent.

Clearly, this is necessary balance; no freedom can be taken so far that it unduly limits the ability of a society to govern itself. Arranging alternative transport would not end the Hutterite colony’s way of life, which to the Court meant that the regulation was a reasonable one:

40 *Hutterian Brethren, supra* note 6 at para. 36.
Many businesses and individuals rely on hired persons and commercial transport for their needs, either because they cannot drive or choose not to drive. Obtaining alternative transport would impose an additional economic cost on the Colony, and would go against their traditional self-sufficiency. But there is no evidence that this would be prohibitive.\(^{42}\)

However, the disregard for the importance of the belief in this particular case is curious, especially when combined with the fact that the photo bank would never be fully complete, regardless of the outcome. The system was already imperfect; allowing another few hundred people to also abstain from having their pictures taken, when their religious teachings command they avoid this, seems out of line with the respect paid to religion in recent case law. It would have been more expected that the court would follow the reasoning presented in Abella J.’s dissent, which characterized the degree of harm very differently:

> The harm to the constitutional rights of the Hutterites, in the absence of an exemption, is dramatic. Their inability to drive affects them not only individually, but also severely compromises the autonomous character of their religious community.\(^{43}\)

Abella J. also took a more critical approach to the government’s characterization of the real benefit to the system that would be provided by having the Hutterite colony members photographed. Given that there were already 700,000 unphotographed Albertans, failure to include a few hundred more would not have a discernable effect on the fight against identity theft.\(^{44}\)

This dissent took a deeper look into the life of the Hutterite group, and the close ties their religion had to their overall lifestyle. Unlike the common, individualistic concept of religion, the Hutterite faith was deeply interwoven into their day to day life. Instead of having their faith as a discrete part of their lives, their entire lifestyle was directed towards following and


\(^{44}\) *Ibid.* at para 115.
strengthening their religion. Abella J. cited both historical sources and jurisprudence which demonstrated that maintaining their independence from others was key to the survival of their religion; indeed, their agrarian lifestyle was chosen specifically for that purpose.\textsuperscript{45} While for the majority of Canadians arranging transport from a third party would not impact their religious practice or chosen lifestyle, to the residents of the colony this was an intolerable increase in dependence. Abella J. was the only member of the Court to attribute the proper significance to this seemingly trivial transaction:

To suggest, as the majority does, that the deleterious effects are minor because the Colony members could simply arrange for third party transportation, fails to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community. When significant sacrifices have to be made to practise one's religion in the face of a state imposed burden, the choice to practise one's religion is no longer uncoerced.\textsuperscript{46}

Despite having this set out for the court, the majority nonetheless found that the effect of the regulation was trivial, and it could therefore be upheld.

In light of the tolerance shown to religious practice in permitting the wearing of a kirpan in a school, how can this be reconciled with \textit{Multani}? The answer lies in the Court’s view of what counts as a religious practice, as well as the lifestyle that practice promotes. Exempting the colony members from the photo identification requirement did not fit neatly into what the majority considers a religious requirement and promoted a lifestyle that is antithetical to what is generally considered desirable.

\textbf{B. Communal Lifestyle and Strange Faith}

The ruling in \textit{Hutterian Brethren} can be explained by the intersection of two of Beaman’s named factors which lead to suspicion of “other” religions: the use of common sense

\textsuperscript{45} Ibid. at para. 165.
\textsuperscript{46} Ibid. at para. 167.
and the emphasis on individualism. Though the phrase “common sense” is not present in the judgment, the technique is nevertheless used as reasoning to uphold the regulation.\footnote{Interestingly, the same sort of common sense is not applied to the government in its justification for the regulation. The idea that whether these few hundred colonists would be photographed or not would have little impact on fraud prevention at all is deemed a mischaracterization by the majority. The question is not the effect on security, but rather the effect on the universality of a system composed only of Alberta drivers.} This is apparent from the consideration of the degree to which the claimants’ religious freedom is affected by the necessary regulation. Rather than consider how this particular group is stymied by the inability to drive to and from their colony (and how interwoven Hutterian independence, lifestyle and religion are) the majority brings the analysis back to how the restriction would affect the average person.

The detriment is reduced to the simple matter of hiring a driver, which many individuals and businesses do. McLachlin J. acknowledged that this would reduced the self-sufficiency of the colony, but ultimately characterized this as a mere economic cost which was hardly prohibitive.\footnote{\textit{Ibid.} at para. 97.} Having reduced the difficulties faced by the community to a purely economic matter, these were then readily dismissed:

\begin{quote}
This will impose some financial cost on the community and depart from their tradition of being self-sufficient in terms of transport. These costs are not trivial. But on the record, they do not rise to the level of seriously affecting the claimants' right to pursue their religion. They do not negate the choice that lies at the heart of freedom of religion.\footnote{\textit{Ibid.} at para. 99.}
\end{quote}

There had been no claim made that hiring drivers would result in the economic ruin of the community, so the majority was certainly correct on this narrow point. However, the issues that the Hutterite colonists had with the inability to obtain drivers licences was not only the additional cost of transport, but the impact this would have on their independence. Autonomy and the ability to live as separately as possible from the outside world are central to the
community’s lifestyle, and may indeed be the reason that this faith is still practiced today. This centrality was acknowledged by Abella J. in her dissent, when she turned to the words of earlier case law addressing the Hutterite lifestyle:

This self-sufficiency was explained in *Hofer v. Hofer*, [1970] S.C.R. 958, where Ritchie J. wrote that "the Hutterite religious faith and doctrine permeates the whole existence of the members of any Hutterite Colony" (p. 968). Quoting the trial judge, he observed: "To a Hutterian the whole life is the Church... . The tangible evidence of this spiritual community is the secondary or material community around them. They are not farming just to be farming - it is the type of livelihood that allows the greatest assurance of independence from the surrounding world" (p. 968). Justice Ritchie further noted that to the colonies, "the activities of the community were evidence of the living church" (p. 969). 50

Requiring that the colonists rely on others for transport (thereby increasing their exposure to the outside world) has a nontrivial detrimental effect on their religion, as the isolation of the lifestyle is a deliberate measure enacted to ensure the religion remains strong. The seclusion itself may not be a religious practice, but it is this very seclusion which permits the continuation of other behaviours, themselves more easily classified as religious in nature.

However, the majority either refused to see this isolationism as an aspect of the religious practice or entirely discounted its value; the ruling effectively treats the colonists as if engaging drivers has the same importance to them as it would to one who practices a more “normal” version of religion. Isolationism is not to be encouraged in our society, as it is seen as potentially valuable to the religion, but detrimental to those practicing it. It is hardly surprising, then, that a religious belief which has the promotion of isolation at its core would be rather easily discounted in favour of even dubious benefits to the government.

The dangers of carrying the kirpan are no more illusory as the overall benefits to the identity fraud prevention system. In the former case, this is seen clearly because the practice of carrying a religious totem is respected and understandable; it is a mark of good citizenry. In contrast, a religious practice that is unfamiliar and irrational can be trumped by a government scheme with questionable benefits, so long as the program does not prohibit behaviours that are easily recognizable as religious. Interference with larger values and practices that allow the religion to survive is allowable in this case, because isolation is not something to be encouraged or valued. Religions of this type are seen as incompatible with modernity, such that shielding their membership from society is consistent with bad citizenship. Having established that there are certain aspects of religion which make it more likely that some practices will not be tolerated, the question then turns to what the equivalent factors are in the area of obscenity and indecency.

IV. Obscenity and Indecency
Exercises of freedom of religion will be more closely scrutinized if they involve alien practices and values, such as communal, isolationist lifestyles. While neither Hutterian Brethren nor Multani dealt with the treatment of women in seemingly hostile cultural climate, other freedom of religion decisions dealing with minority religions may give closer inspection to practices if apparent objectification of women is involved. Religion and sexual expression have this in common, as indecency and obscenity cases may turn upon the objectification (perceived or real) of women and aberrant behaviour.

In the religion context, this aberrant behaviour may be irrational beliefs or a focus on a communal lifestyle; in the sexual behaviour context, the behaviour may be anything that pushes the boundaries of the norm, so as to make the majority uncomfortable. If women are involved
in sexual conduct that causes discomfort to most, there is a greater likelihood that the practice will be deemed harmful and therefore, ripe for prohibition. The dividing line for strangeness will depend on factors other than measurable harm such as the nature of the practice and the perceived freedom of choice of the participants. These elements indicating strangeness help explain why under Canadian law, a swingers club is within the bounds of decency but strip club activities are not, and why a test designed for heterosexual depictions was applied to representations of sadomasochistic lesbian sex. The first step towards understanding this is to examine a decision that did not contain these elements of strangeness: *R. v. Labaye*.

1. **Strangely Acceptable Practices:** *R. v. Labaye*

   **A. The Bounds of Decency**

   *Labaye* involved the contested indecency of the operation of a sex club in downtown Montreal. The evidence established that all of the behaviour was consensual and did not involve payment for services, though there was a fee for membership in the club. The sex acts took place on an upper floor of the building that was accessible only to members and their guests, and members were screened to ensure they understood and were copacetic with the activities taking place. These factors, taken together, led the majority to characterize the activities taking place within the club as private.

   Bastarache and LeBel JJ., in their dissenting reasons, took a different view of the privacy level, noting that the door was protected only by a numeric keypad and that the membership questions were mere formalities, which guests did not even have to complete. Nevertheless, there was never any question that the general public would not be inadvertently exposed to the behaviour, nor was there any indication was any lack of consent in the participants.

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51 *Labaye, supra* note 10 at para. 5.  
McLachlin C.J. delineated the distinct kinds of harm (grounded in the values represented by the Charter) which indecency laws aim to protect against. They were separated into three types:

- Harm to one’s autonomy and liberty, in cases where one is confronted by the offensive conduct against their wishes;
- Harm to society, where the conduct “[predisposes] others to anti-social conduct”; and
- Harm to participating individuals.  

There was no issue with the first or second types of harm in Labaye, as there was no risk of exposure to the public. The only people aware of what was taking place were those who wanted to be there, so the analysis instead focussed on harm to the group of participants. In doing so, the Court took pains to state that “sexual activity is a positive source of human expression, fulfillment and pleasure”\(^{54}\), but then went on to detail when sexual behaviour could result in harm. Women could be forced into the sex trade, or become assault victims, as could men and children.\(^{55}\) Further, the consent involved might not be true consent:

> The consent of the participant will generally be significant in considering whether this type of harm is established. However, consent may be more apparent than real. Courts must always be on the lookout for the reality of victimization. Where other aspects of debased treatment are clear, harm to participating individuals may be established despite apparent consent.\(^{56}\)

Much like in Multani, the particular factors present were a perfect storm of relatively easy acceptability. Unlike in Butler and Little Sisters, the majority dismissed the importance of the commercial element of the enterprise, determining that it did not “render the sexual activities taking place there commercial in nature.”\(^{57}\) The membership fee bought nothing more than

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\(^{53}\) Ibid. at para. 36.  
\(^{54}\) Ibid. at para. 48.  
\(^{55}\) Ibid.  
\(^{56}\) Ibid. at para. 49.  
\(^{57}\) Ibid. at para. 67.
access to a place to engage in their proclivities with others of a similar bent. The precautions taken by the club were emphasized, and allowed the court to dismiss any concerns of harm to the public. There were no practices which might push the boundaries of consent to the public mind. While exhibitionism, voyeurism and group sex all took place, there was no indication in the evidence of sadomasochistic activities in the evidence, where the lines between actual non-consent and purported non-consent might be blurred.

Taken together, this presented the ideal opportunity for the court to make a statement regarding the limits of indecency (and by extension, obscenity) laws and how they are now entirely based on harm, rather than community standards. It removed the suggestions of intolerance inherent these types of laws, as individual opinions of the activities are irrelevant to their legality so long as there is no indication of unacceptable harm. The court also emphasized that assessments must be objectives, and judges must be ever vigilant in not confusing their views of acceptability with findings of harm:

First, judges should approach the task of making value judgments with an awareness of the danger of deciding the case on the basis of unarticulated and unacknowledged values or prejudices. Second, they should make value judgments on the basis of evidence and a full appreciation of the relevant factual and legal context, to ensure that it is informed not by the judge’s subjective views, but by relevant, objectively tested criteria. Third, they should carefully weigh and articulate the factors that produce the value judgements. By practices such as these, objectivity can be attained.58

As noted by McLachlin C.J., the determination of whether conduct causes such harm as to render it indecent requires evidence of what precisely this harm is and the impact it has on those affected (whether that is society or the individuals involved). An expert witness will be required to provide his or her interpretation, as the trier of law will be “generally unlikely to be able to

58 Ibid. at para. 54.
gauge the risk and impact of the harm, without assistance from expert witnesses.”\textsuperscript{59} This expert evidence is what allows for the inquiry to be more objective, as any conviction can only be based on actual harm or a significant risk of actual harm.\textsuperscript{60}

\textbf{B. Unjustified Assumptions}

Certainly, the decision in Labaye presents a noble ideal and one that ought to be strived for in all cases: judgment based solely on evidence. This is not always possible in such cases, however. Much like in the decisions on religion, courts are more inclined to see harm within practices they find strange (and perhaps, personally abhorrent). Recourse to evidence does not solve this problem because the risk of harm is not generally measurable by any objective standard; it is a matter of common sense and is subject to the previously mentioned deficiencies of that reasoning method. Even when experts are brought in to assess the harm, the court will be most likely to follow the argument that is most in line with their own assessment.\textsuperscript{61}

Statements within \textit{Labaye} indicate that the harm framework utilized by the Court is more influenced by what is considered excessive (to use Beaman’s term) than it may be aware of. An example of this can be seen in McLachlin C.J.’s description of what took place at L’Orage:

Unlike the material at issue in Butler, which perpetuated abusive and humiliating stereotypes of women as objects of sexual gratification, there is no evidence of anti-social attitudes toward women, or for that matter men. No one was pressured to have sex, paid for sex, or treated as a mere sexual object for the gratification of others. ... The case proceeded on the uncontested premise that all participation was on a \textit{voluntary and equal basis}.\textsuperscript{62}

[Emphasis added.]

\textsuperscript{59} \textit{Ibid.} at para. 60.
\textsuperscript{60} \textit{Ibid.}
\textsuperscript{61} “Disciplining the Unruly”, \textit{infra} note 67.
\textsuperscript{62} \textit{Labaye, supra} note 10, at para. 67.
It is difficult to see how any amount of evidence could have given rise such a definitive statement. Leaving aside the issue of payment for sex, whether there was pressure to take part in the activities or objectification of the participants is not a binary issue, but rather exists on a spectrum. The dynamics of human relationships are such that some may have taken part in the activities because their partner was enthusiastic and persuasive, rather than because it was an activity in which they truly wished to engage. This, despite being far from the legal requirements for duress, is nevertheless a type of pressure. Yet the writing of the judgment gives the impression that consent is a black and white issue – it either exists or it does not – and the lack of obvious non-consent means that the issue can be entirely disregarded.

Objectification is likewise on a continuum. The person may be participating for their own enjoyment, but her expression and fulfillment may be far from the minds of many of those who are participating or watching. The statement that all participation be on a “voluntary and equal basis” is essentially meaningless, as the idea of equality in this context is impossible to quantify. The need to impose such clear distinctions indicates that the court is still only willing to accept behaviour of this sort if it falls into the category of “good sex”, even if the parameters of this category have expanded somewhat (just as good religion expanded to include Multani’s practice of Sikhism). “Equal” sex is good sex, but whether the conduct is perceived to be equal will vary with the audience and how outside the norm the activities are.

*Labaye* stands for the notion that so long as sexual activities are 1) “equal” or lacking in objectification; 2) wholly consensual; and 3) not for payment⁶³, they will fall under the umbrella

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⁶³ *Labaye*, as it deals with indecency law, also requires some public character to the actions. This will not be addressed because it is has a logical basis in preventing the exposure of unwilling parties and is not rooted in the nature of the activity or identity of the participants. However, it is interesting to note that there are also grey areas in the public/private divide which could be more readily asserted when the conduct itself was otherwise “strange.”
of behaviour that a “vigorou and tolerant... Canadian society” \textsuperscript{64} can withstand. While it is worthwhile to ask how many acts of sexual expression would really pass this stringent test, the more important point is what these factors have in common.

All of these qualifiers can be traced back to a protectionist attitude towards women. Of course, men can also be objectified, fail to consent (or give dubious consent) and be paid for participation, but these are roles generally played by women. This can be traced back to the revolutionary \textit{Butler} decision, which established that a finding of obscenity and indecency is largely based on whether it is harmful to women (those participating or in general). However, another way of looking at the test is as a question of whether the behaviour or material is something that women need protection from. Inherent in the test is the perception that women are weak and vulnerable.

While it is a worthwhile venture for the courts to limit harm – after all, there must be some regulation of indecency and obscenity – the combination of factors leads to a view of women solely as the hapless victims and men as violent threats. This provides a justification for limiting any acts which the courts view as perpetuating this dynamic. However, in order to prevent this from happening, the court may be too anxious to see harm where there is none and ironically, hinder society from approaching equality. Even if this vulnerability is due to societal factors (rather than genetic ones) there is a danger in treating one group as inherently in need of additional protection. It can lead to a corresponding lack of respect for the decisions made by this group, and can also result in the rights of other groups being sacrificed in the name of protection, even when this protection may be unnecessary.

\textsuperscript{64} \textit{Ibid.} at para. 70.
The decisions following *Butler* have demonstrated that, while the community standards test may have fallen by the wayside, the risk of harm test covers nearly as much ground with as little justification. Behaviour that falls outside of the realm of acceptable conduct will be determined to be harmful, even if there is no evidence that the “strange” acts are actually damaging in any way. The courts will be more likely to find harm to women in an activity that requires bondage gear instead of an apron, even though they may raise similar (though differently situated) issues of consent and objectification. We, as a society, are so accustomed to the image of a woman as a housewife that the potential embedded harm is not questioned in the same way that it would be when shown something which raises discomfort, such as a dominatrix. This phenomenon was illustrated by the post-Butler obscenity decision of *Little Sisters*.

2. **Deviant Behaviour: *Little Sisters***

*Little Sisters* typified how the “other” could be treated differently by the courts, while they simultaneously maintained apparent neutrality. This was the first Supreme Court case to apply the *Butler* test to same-sex materials, and involved a range of different materials of varying mediums sold by a LGBT bookstore. Arguments had been made by many groups that a different standard ought to be at play for such materials, as the gender dynamic underscoring the *Butler* test was inapplicable in non-heterosexual materials.

This notion was roundly rejected by the Court, which stated that there could not be different standards for different people. Under its reasoning, applying such differential treatment would actually cause alternative lifestyles groups more harm than good, as it could allow for standards to change depending on community and circumstances.\(^65\)

\(^{65}\) *Little Sisters, supra* note 8 at para. 58.
This would seem to be a prime opportunity for the Court to apply notions of common sense. If women are vulnerable because of societal gender roles, leading to objectification which causes harm to women at large, the removal of gender differences must change this dynamic. How can a test based on perceptions of male/female relations apply to cases where that dynamic is entirely absent? If not an entirely different test, there should at least be awareness that the same activities depicted in heterosexual and homosexual pornography would have different connotations. Common sense would suggest that whether something is degrading or dehumanizing should include a regard for gender dynamics and the role that such material might play in the identity of a community.

However, common sense was not employed in this instance and the unchanged test was applied, based on the justification that harm could also occur in same-sex pornography. In support of the idea that there was no need to have separate tests for same-sex and opposite-sex depictions, the Court provided an example of when there would be harm in the former case:

... The material must also create a substantial risk of harm which exceeds the community's tolerance. The potential of harm and a same-sex depiction are not necessarily mutually exclusive. Portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable.66

This is a telling statement as it relates to the mindset of the Court. Sadomasochistic conduct is so inappropriate that it is chosen as the example of deplorable (and inherently harmful) conduct. The subject is referred to as a “victim” and her consent is questioned, if not outright dismissed, by having her labelled as “ostensibly willing.” There is no rationale provided as to why this behaviour is so intolerable, leaving one to assume that all those who do not engage in such

66 Ibid. at para. 60.
“other” activities would know why it is unacceptable: its harmfulness and incompatibility with society are just common sense.

Indeed, this particular passage was commented on by Brenda Cossman in her analysis of the *Little Sisters* decision. Cossman notes that though the harm test as set out in *Butler* purports not to be majoritarian, in actuality, reliance on the “prevailing standards or sexual morality” is inevitable. As the harm from pornography cannot be proven, only a reasonable apprehension of harm is required, and this will be found only in those behaviours that deviate from the norm. Binnie J.’s statement about sadomasochistic sex exemplifies Cossman’s point. While making an attempt to reassure some parties that homosexual groups would not be treated differently under the test, the majority outright dismissed a different form of consensual activity as inherently unworthy of protection:

> The portrayal of sadomasochistic sexuality apparently presents such an obvious risk of harm that virtually no evidence is required to support that assertion. A dominatrix engaged in a scene with a slave simply presents a risk of harm. No sources or experts are cited; rather than Court uses the example to make a point about the gender neutral nature of the harms-based test... [It] is virtually unthinkable to the Court that the sex slave is actually consenting, that the sex slave is not a victim, or that the conduct could be normal or pleasurable to the slave. In the single slight of a pen, the Court blatantly condemns this marginal sexuality.

Cossman characterizes these “sexual outlaws” in much the same way that Beaman refers to participants in outside of the norm religion: using the language of excess. Cossman’s position is that the risk of harm transformed from harm to women (as in *Butler*) to attitudinal harm in general; the behavioural changes that may occur in observers or voyeurs are now the key. This

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70 *Ibid* at 91.
voyeur therefore becomes the focal point of the harm analysis, because of the possibility that he might be allowed to go too far under the law. The court, according to Cossman, seeks to maintain the distinction between good sex and bad sex, but is stymied by the voyeur:

[All] along, the voyeur himself (or herself, though this still does not appear to be at the forefront of the court’s imagination) threatens to undermine this distinction, and the borders that the Court is working so hard to fortify. Because the voyeur is always on the verge of excess. Because the voyeur will watch what there is to be watched. Because the voyeur, which the Court is attempting to rehabilitate as a potentially good sexual subject, inhabits the world of excessive, uncontrollable and unruly sex. In the end, the Court remains the arbiter, with the power to discipline, and the power to punish those who will not punish themselves.71

While attempts at rehabilitation may be futile, this has not stopped the courts from trying to save these people from their bad choices, whether these are sexual or religious in nature. This can not only lead to a curtailment in liberty and expression, but may also serve to perpetuate harmful viewpoints, by depicting those who make “bad” choices as lacking in autonomy. In this way, the courts can still maintain that they respect the choices of consenting adults, by characterizing the consent of those who act in ways they disapprove of as less than “true” consent. This is what occurred in the indecency law predecessor to Labaye: R. v. Mara.

3. The Irrelevance of Consent: R. v. Mara

Mara involved charges of indecency arising from activities in a strip club where there was physical contact between the dancers and the patrons which went well beyond the negligible but fell short of intercourse. As described by Sopinka J. (writing for the Court) “men, along with drinks, could pay for a public, sexual experience for their own gratification and those of

71 Ibid. at 93.
The Court upheld the Court of Appeal’s finding of indecency, quoting those reasons in support of this finding:

The conduct in issue in this case in the context in which it takes place is harmful to society in many ways. It degrades and dehumanizes women and publicly portrays them in a servile and humiliating manner, as sexual objects, with a loss of their dignity. It dehumanizes and desensitizes sexuality and is incompatible with the recognition of the dignity and equality of each human being. It predisposes persons to act in an antisocial manner, as if the treatment of women in this way is socially acceptable and is normal conduct, and as if we live in a society without any moral values.73

[Emphasis added.]

The Court in *Mara* confirmed that proof of harm is not a requirement in such cases, because harm itself is the inevitable consequence of objectification:

...social harm is not a fact susceptible of proof in the traditional way, but rather where the activities or material in question involve the degradation and objectification of women, or perhaps children or men, the law infers harm simply from that degradation and objectification.74

Furthermore, the consent to the activities was not only irrelevant, but could (somewhat paradoxically) worsen the nature of them:

It is unacceptably degrading to women to permit such uses of their bodies in the context of a public performance in a tavern. Insofar as the activities were consensual, as the appellants stressed, this does not alter their degrading character. Moreover, as I stated in Butler, at p. 479, "[s]ometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing".75

This language is striking in its depiction of women as passive objects: they do not use their bodies, but rather permit them to be used. Presumably, the Court was attempting to say that

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72 *Mara, supra* note 9 at para. 34.
74 *Ibid.* at para. 44.
75 *Ibid.* at para. 35.
consenting to degrading activities normalizes them; however, it is difficult to see how it would be less dehumanizing to see these acts performed without the consent of the participants. Moreover, this statement seems contradictory to the later decision in Labaye, where the consent of the participants was a major factor in failing to find the behaviour indecent.

Indeed, consent is a running theme through many of these decisions and the importance placed on it seems ever-changing. The Court did not question the consent of the female participants at L’Orange, yet deems the consent of exotic dancers irrelevant, going so far as to find the consent of those in pornographic depictions actually exacerbates the harm. Apparently, consent itself is not the issue; what matters is who consents. Moreover, in no other area of law such a distinction made between genuinely wanting to do something and merely agreeing to do so, with the courts going so far as to imply that no one (who was thinking clearly) would truly want to do engage in certain acts.\textsuperscript{76} If the activities are unfathomable (or repulsive) enough for the judiciary, then no consent is possible, no matter how heartily claimed; nor could these activities ever fail to be harmful.

The three cases of Labaye, Little Sisters and Mara capture the two paths by which harm will be inevitably found: strangeness of behaviour and subjugation of women. The women at issue in Mara were exotic dancers, engaged in objectifying behaviour for payment. The activities were such that no woman would engage in them for reasons of her own fulfillment, rendering the performances indecent. Women who strip are perceived as lacking education and resources and therefore as more vulnerable. Their need for protection rendered their own consent meaningless; the courts must protect them from themselves so that these women would no

\textsuperscript{76} One can only imagine the havoc that would result if similar considerations were applied to contract law, and only those agreements that parties really wished to enter into were enforced.
longer “permit such uses of their bodies”. They may not be bad citizens, but they are certainly hapless ones.

*Little Sisters* brings in the notion of strangeness. The depictions were of homosexual acts and, while acceptance of gay and lesbian people has improved by leaps and bounds in the last few decades, this behaviour is still outside the norm. While the result was at least partially favourable (to the extent that it was acknowledged that the customs inspectors were unfairly targeting this group) the language of the discussion indicates that perceptions of harm will still turn on strangeness more than anything else. One may not be able to stigmatize depictions of gay and lesbian sex but other odd behaviour can easily be deemed valueless without weighing the actual harm involved.

*Labaye*, in contrast, contained no such obvious markers. The women involved were not being paid for their attendance or participation and there was no evidence of the badges of “bad” sex, where the appearance of resistance masks actual consent. That the court knew little of the women’s stories and reasons for participating did not matter. The “bright line” indicators of payment, non-consent and objectification were not obviously present, so the court did not have to look any closer. Those involved stayed within the bounds of good citizenry, if only just.

V. The Effects of “Othering” on Non-Monogamous Lifestyles

1. Why is Polygamy Particularly Susceptible to Othering?
The indecency and minority religion decisions are indeed very disparate lines of cases. Other than showing different faces of intolerance for out of the norm behaviour, there is little connection between indecency and religious freedoms. However, as previously noted, these two strands meet in the debate over the decriminalization of polygamy.
This is because polygamy is the site of two areas of discomfort: objectification of women and strange, communal religious practices. If caution is not employed, the intersection of these two strands could have serious negative consequences. The degree and risk of harm to the women involved would be amplified, while the effects on liberty and religious practice would be more easily dismissed as not valuable or important. Moreover, the courts also have to guard against seeing greater beneficial effects from the regulation than are indicated from the evidence.

It is also significant that the Criminal Code prohibits polygamy of all sorts; it does not limit the criminalization to polygyny nor to polygamy practiced for religious reasons.\textsuperscript{77} It applies to all forms of plural marriage, including polyandry and polygyny associated with religious or cultural traditions that were not of concern when the provision was originally enacted.\textsuperscript{78} With the relatively recent developments of the recognition of common law spouses and gay marriage, the definition in the Criminal Code prohibition could arguably include any group of two or more adults cohabiting while in a romantic or sexual relationship. The law thus may apply to forms of polyamorous plural partnerships, the outlawing of which cannot be justified by referring to the same harmful connotations as polygamy as practiced by fundamentalist Mormons.

\textsuperscript{77} Section 293 of the \textit{Criminal Code}, R.S.C. 1985, c. C-46 reads as follows:
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
...

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

\textsuperscript{78} The fundamentalist Mormon community could more accurately be described as practicing polygyny, as it only involves marriages with multiple wives. Polygamy is a more all-encompassing term, referring to the taking of multiple spouses of either sex; it includes polygyny and polyandry under its umbrella. However, polygamy is the term commonly used in the public consciousness to refer to the Mormon form of plural marriage, and will be employed for ease of understanding.
The remainder of this paper will address these two separate issues: 1) the likely effect that the strangeness of fundamental Mormonism will have on the perceptions of harm inherent to that lifestyle and the proper means of reducing these harms; and 2) the impact that this view will have on those who practice polyamory.

2. Harms Associated with Mormon Polygamy
   A. Fundamentalist Mormons Today

A brief description of the religion and lifestyle of those in Bountiful is necessary to indicate how strange this lifestyle is in comparison with what is considered usual in Canadian society. The communal nature of the practice and the extreme isolation of such communities put them at odds with society at large. Though Mormonism is considered by its adherents to be a branch of Christianity, it has little in common with mainstream Christian thought. In particular, the version of this faith as practiced in communities such as Bountiful is further afield from the norm than religions which have no connection to Christianity, such as Sikhism or Hinduism. Indeed, this lifestyle is located much further from the norm than the Jehovah Witnesses who were the subject of Beaman’s work.

Mormonism is based on the notion that it is the true Christian faith, as was passed on to (then) modern prophets. This was revealed to Joseph Smith causing him to found the Church of Latter Day Saints in 1830.79 One of the original beliefs of Mormonism that a man could not enter heaven unless he had at least three wives, with additional wives allowing him to attain even greater heights in the afterlife.80 Polygamy, necessary as it was for entry into the afterlife, therefore formed one of the key beliefs (and central distinguishing feature) of Mormonism.81 Unsurprisingly, both the American and Canadian governments disapproved of this practice, and

81 Rhetorical Holy War, supra note 79 at 321-22.
it was criminalized before the turn of the twentieth century. Indeed, the fear of this practice was so great in America that President James Buchanan attacked its adherents from all sides, enacting various laws and sending the U.S. Army into Utah, intending to eradicate polygamy. This campaign continued for decades, culminating in the enactment of legislation which permitted the federal government to seized the church’s assets. These serious blows having been struck, just a few years later the then-president of the church renounced the practice on his deathbed, claiming that God had revealed to him that it was no longer the will of the Lord for the church to sanction plural marriage.

The combination of this renunciation and the criminalization resulted in the majority of Mormons abandoning the practice. Present day members of the mainstream Church of Latter Day Saints no longer believe that the practice of plural marriages is necessary to their faith. However, some refused to reject the old ways, and formed offshoot sects which today are largely located in Texas, Utah, Colorado and British Columbia.

The members of these splinter communities live a lifestyle completely alien to most Canadians. All adherents wear the garb of an earlier time, with women in long dresses more suitable to the era in which the religion was born. The communes are generally located a fair distance away from populated centres, but are not agrarian in the same way that Hutterite or Amish colonies are. Indeed, these communities are run in a manner akin to that of a corporation. All the property is owned by the church, and is merely leased to the male heads of

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83 Banner, *supra* note 80 at 6-7.
84 *Ibid* at 251-52.
85 *Ibid* at 252.
87 Banner, *supra* note 80 at 33.
the families living there. The monies made by all the members largely go to the church, as well. This includes the government funds received by female members, obtained under a practice known as “bleeding the beast”. Since only the first marriage is officially documented, the remaining wives masquerade as single mothers to the government so that they can receive various social safety net benefits. This is encouraged by the Church, which holds to the belief that the community ought to take as many government benefits as it can, while paying as little in the way of taxes as possible. The funds do not stay with the women, but are largely passed to the Church, so that the any number of plural wives and their children are living a subsistence existence, despite receiving government funds.

As well as being wealthy, the Church has a great deal of control over the community. Men are not permitted to choose who (and how many) they marry, but are allotted wives by the community church leaders. Given that there is a finite pool of marriageable females, wives are only granted to the most wealthy and powerful, or those who are otherwise in favour; this leaves the younger, less powerful males without mates. To avoid the effects of this imbalance, these boys are ousted from the colony when they are in their early teens. They are forced to make their own way on the streets, a circumstance made even more difficult because of their young age and lack of usable education. More commonly in Canada, these “lost boys” are not entirely removed from the circle of the community, but are kept on the margins so that they can provide cheap labour for the church’s money-making projects.

90 *Ibid*. at 327.
92 *Ibid*. 
Life is also difficult for fundamentalist Mormon children kept within the community. While the law requires that the Mormon communities provide schooling to both girls and boys, the monitoring process is lax at best. These children are not taught skills which would be useful in the outside world, but instead only educated on the proper Mormon lifestyle. There are also high incidences of child abuse (sexual and otherwise) in such communities, and quite often marriages are arranged between minor girls and much older men.

Having established the basics of this lifestyle (and that it is one that would be intolerable to most Canadians), it is now possible to discuss the harms it might give rise to. However, in doing so, one must be careful to keep opinion separate from the harm analysis. Since this culture includes both a communal lifestyle and subjugation of women – both of which stand in stark contrast to the values held in present-day Canada, which prioritize individuality, equality and rational decision making – there is a great readiness to see harm inherent in the practice. In order to both separate out the actual harm that is occurring and to determine the best way to remedy it, it is necessary for the courts to be cognizant of the skew of their own perceptions and how this may affect their analysis.

**C. Communal, Overly Religious Lifestyle**

Communal religions are decidedly an oddity in Canadian society. Those that are more newly-formed are largely regarded as cults; more established religions are given a bit more respect, but are still objects of suspicion, views largely as relics of our less rational past. They are seen as unnecessary in this day and age, leading to a perception that those who have this level of engagement in their faith may be irrational. This phenomenon has been discussed by

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93 Ibid. at 228.  
94 Legalizing Polygamy, supra note 89 at 328.
James Beckford in the context of new religion movements, but applies equally well to Mormon fundamentalism:

The fact that members of some minority religious movements choose to order aspects of their lives in accordance with different priorities makes them objects of suspicion because, among other things, their non-conventional ways of living imply that something is wrong with the machinery of “normalization”. The public sense of fear and outrage is all the more intense because it is widely believed that late modernity is a time of great individualism and that non-conventional religious practices are therefore unnecessary.  

Beckford notes that acceptable deviations from acceptable modes of conduct are limited to more trivial matters, such as dress and leisure activities, but that “departures from the expected patterns of education, employment and consumption are grounds for suspicion and, in some cases, demonization.” In particular, departures from “normal” religions are troubling because they run contrary to the emphasis society places on individual freedom of choice:

The fact that some people choose to abandon the path of ‘normal’ education or employment for the sake of non-conventional religious ideals is experienced by others as an affront to their conviction that modern individuals are free, rational decision-makers.

It is difficult to reconcile much-valued individuality with the choices made by those involved in these outside of the the norm religions. This leads to a view of their adherents having lost their agency, an impression which carries with it implications of brainwashing.

In her analysis of such occurrences in Canadian jurisprudence relating to Jehovah Witnesses, Beaman found that outright accusations were rarely made. Instead, there were only undertones

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96 Ibid.
97 Ibid. at 15.
of indoctrination and lack of autonomy. This approach was in some ways more insidious, as such implications are nearly impossible to refute:

...brainwashing language is employed in a subtle manner so as to preserve the integrity of the notion of freedom of religion but leaving open the possibility of an assessment of irrationality. The problem with this is that any behaviour outside the bounds of the rational is deemed to be both irrational and suspect. Rationality, however, is as fluid as ‘harm.’

In the $B(H)$ case that Defining Harm focuses on, Bethany Hughes was depicted as not understanding the choice she was making. Instead of her choice being a credible option corresponding with her religious beliefs, she was portrayed as being under the influence of her irrationally religious mother. The conflict over Bethany’s body was set up as if it were between a mother placing her religion over her daughter’s life, and a father and doctors with a cure in their hands, if they could only give it to her. Of course, with such a dynamic at play, Bethany can only be seen as irrational, because she is choosing death over life. The religion, as the source of this belief, must be in some way taking away her ability to make a rational decision. It is this seeming irrationality that the discourse of brainwashing arises from, because there is no concern with religious motivation if it results in rational choices.

However, as noted by Beaman, rationality cannot be objectively determined; it depends on one’s point of view. Looked at from another angle, Bethany’s choice to avoid a procedure which would doom her for all eternity and yet only give her a small chance of saving her life could be seen as the epitome of rationality. This decision was so readily dismissed at least in part because this particular belief seems so irrational – even silly – to most people. Vulnerable people are only allowed to make their own choices if those choices fit in with the societal construct of rationality. This is consistent with the more recent Supreme Court of Canada ruling

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98 _Defining Harm_, supra note 4 at 108.
99 _Ibid._ at 131.
in *A.C.*\(^{100}\), in which the decision-making ability of those younger than sixteen years of age was at issue. The Court, in describing the current state of the law, noted:

> Where a child’s decisional capacity to refuse treatment has been upheld... it has been because the court has accepted that the mature child’s wishes have been consistent with his or her best interests.\(^{101}\)

This statement seems to lend the child’s some autonomy in decision making but in reality, it renders the child powerless. The court only adheres to these wishes when they match up with its own definition of his or her best interests, which means that the wishes essentially never have any effect; the court’s version of best interests wins every time.

While both sexes live lives of equal religiosity and isolation, it is only the impact which this has on the women involved that is problematic. Women in polygamous marriages are not explicitly equated with children,\(^{102}\) yet are often viewed as having just as little agency. Outsiders see women with little power, only a fraction of her husband’s time, a disproportionate number of children, and very limited resources. Since no rational person would choose such a life, the natural assumption is that these women (and potentially men) have been brainwashed, and no longer have any real agency. Of course, the alternative explanation is that these people truly believe that they are following the way of life that most closely corresponds with their faith, even if that does result in hardship. However, this possibility is largely dismissed quickly by those outside of the religion, if it is even acknowledged at all.

The truth is likely somewhere in between. Women may see the value in having sister-wives and keeping to a traditional lifestyle; it is equally possible that they do not know any better. However, the key is not to *assume* that the wives have not exercised a real choice

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\(^{100}\) *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

\(^{101}\) *Ibid.* at para 62

\(^{102}\) Though there is a high incidence of child brides, the women being addressed in this work are largely those who have reached the age of majority, whether this occurred before or after entering into their marriages.
(whether that was to enter into the marriage, or stay within it afterwards). It needs to be recognized that those who are not part of such communities are more apt to see them as hives for brainwashing and perhaps, view the entire institution of polygamy as detrimental. Instead, the focus must be on the actual consent provided and the actual harms suffered. This is made more difficult because of the tendency to view the women involved in these polygamous relationships as lacking in agency.

D. Subjugation and Consent of Women

It is in the area of women’s agency where the trends shown in the obscenity and indecency decisions become particularly relevant. The issues of consent and objectification present in discussions of the sanctioning of sexual behaviour pale in comparison to those that arise in the context of polygamous communities. These range from the mundane (wearing the clothing of a past era) to the most extreme (marriages being determined not by the parties involved, but by the church; increased incidences of sexual abuse). Women are objectified in the truest sense; they are valuable commodities, necessary for ascension into heaven and increased wealth on earth. As such, they are given little choice in how they live their lives, and most especially, in whom they marry.

The women in these communities have less freedom in their day to day lives than the typical Canadian woman, and certainly less than is ideal to advance gender equality. However, equality is not the only value embodied in the Charter; multiculturalism and religious freedom are also worthy goals of the Charter project. While women may be less equal within a certain lifestyle, it is unclear if this is a result of choice or because it has been forced upon them. If the inequality truly is through their own choice (even if this only applies to some of these women), then it is makes little sense to hinder freedom of religion and cultural expression in order to
advance a form of equality which may not even be desired. After all, if such women value their religion and culture higher than their equality, who are we to question this?

The constraints on fundamentalist Mormon women are often presented in sharp contrast to the total freedom of the typical Canadian woman. These Mormon women must have either been forced into polygamous marriages (and would not participate in them if they had any choice in the matter) or are willing participants only because they do not know any better. Like children, they either have no control over their lives or do not know how to properly exert the control that they do have. In contrast, modern Canadian women are seen as having total freedom in who they marry and how they live, and this freedom is not seen to be reduced if they choose to enter into a monogamous union.

Presenting the issue as this sort of contrast is a rather useless venture, as the validity of consent is not a black and white issue. Instead, there is a continuum of consent, ranging from no consent at all to what might be considered “pure” (as in entirely free of outside pressure). What we accept as valid consent in our society is far from the ideal. There are a host of reasons that one may enter into marriage when one does not entirely wish to. Consider the following scenarios:

- A teenage girl who finds herself pregnant, and gets married because it seems to be the best option available at the time;
- A lesbian who has no interest in marriage to a man, but enters into a marriage arranged by her traditional Hindu parents because her family expects this; and

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- A woman approaching her forties who wishes to have children but does not want to raise them on her own, accepts a proposal from a man she considers less than desirable.

These are all very different scenarios and women, yet they do have one thing in common: under Canadian law, the consent to marry given by the women (and in the first case, also by the parents) is valid. More tellingly, the consent would not even be questioned, either by the courts or members of society.

The issue then becomes determining at what point the consent given by the woman is no longer meaningful. Clearly, the women who only acceded to an unwanted arrangement because she had no other choice is not providing anything beyond nominal consent. However, this cannot be assumed to be the case for all women in polygamous relationships. The fact that they have not had exposure to other religions does not mean that their beliefs are wrong or that they are not fervently held. Just as Bethany Hughes may have weighed the risks and benefits of accepting a blood transfusion, a Mormon woman may actually want to become a plural wife because to do so is an expression of her faith. It is not a simple matter to separate what is forced upon someone from what they believe is required of them for religious reasons. This is made especially difficult when that person has had no exposure to other ways of life. At what point do the courts determine that what she really wants and what she says she wants are two very different things?

This is a dangerous area to tread, because it can result in objectification equal (though different in nature) to what these women currently suffer. The courts are trying to improve the situation of these women, by negating their consent on the grounds that they do not know any better and would have made different choices, if they had additional options and information. They are
trying to bring the lives of women in line with equality, but in doing so are taking away women’s choices just as effectively as the institutions that society is so bothered by. Beaman explains why this phenomenon can be so damaging:

The denial of agency acts to displace the autonomous citizen as an incapable other. When a subject is constructed as incompetent, she enters the realm of the ‘other, who is, paradoxically, both invisible in her subjectivity and a subject to be controlled.’

Angela Campbell has addressed this trend within the context of the polygamy debate. She notes that there is danger in ascribing a total lack of autonomy to the women involved. The term “false consciousness” is applied to the idea that the women who claim to be making autonomous choices have no sense of the truth. This assumption, far from aiding women, effectively silences them:

Thus, espousing the idea of false consciousness leaves women, especially those who offer their perspectives from within cultural minority groups, disempowered and “othered.” Rather than bearing any agency, they continue to be spoken for in the discourse, except that now they are spoken for by enlightened (Western) women who have somehow surmounted patriarchal brainwashing rather than by the male leaders of their own communities.

Furthermore, the assumption of harm (or lack of true consent to any harm) is based on a view of fundamentalist Mormon women as a homogenous whole. It paints all polygamous women with the same brush; however, these women may have very different experiences with life in these communes. As an example, first wives enjoy a fair amount of power over their sister-wives.

Given this additional influence and prestige (which they would not have in monogamous

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104 Defining Harm, supra note 4 at 102.
106 Ibid. at 129-30.
107 Ibid. at 128.
relationships), it is foolish to view them as being in the same position as the other wives. In addition, some women appreciate that the presence of these other wives assists in alleviating some of the burdens of child-rearing and sharing of household responsibility, as well as providing female companionship between co-wives.\footnote{Angela Campbell, “How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis” in Polygamy in Canada, supra note 88 at 5.} There may be legitimate benefits to polygamous relationships and one cannot let the strangeness of this lifestyle blind society to these benefits while at the same time magnifying the harms.

Of course, one could question why this matters, in the end. Even if the harms occurring in communities such as Bountiful are overstated and the benefits minimized, surely this does not occur to such an extent as to put the deleterious effects in the acceptable range. What, then, is the problem with failing to recognize this distortion in viewpoint?

Even leaving aside the necessity of an accurate harm assessment for Charter analysis to properly function, letting this slant remain in place could have two distinct unfortunate consequences in this case. First, it may actually remove from consideration the possibility that criminalization could actually increase the actual harms faced by the vulnerable members of polygamous sects. Second, it entirely discounts the effects that such a prohibition has on those who practice forms of non-monogamy that are bereft of the harms associated with traditional polygamy. In a society which values personal freedom (to the extent that curtailing such freedoms will generally only be justified if it is to prevent harm to others) permitting a prohibition to remain in place when it both limits freedom and fails to reduce harm is unacceptable.

2. The Dangers of this Viewpoint
   A. Criminalization as an Inadequate Measure in Minimizing Harm
It may be that the societal aversion to the fundamentalist Mormon lifestyle (and by extension, to polygamy) is so extreme that it would cause a rejection of legalization, even if that is the best means by which the harms associated with polygamy could be reduced. If the practice of polygamy is inherently harmful, then criminalization could not fail to reduce the harms to at least some extent. It is this inevitable benefit that is then weighed against any detriment to liberty and religious freedom. Since the existing bias causes the harm to be exaggerated and the infringements on freedom minimized, it is virtually assured that the decision would be in favour of the harm-reducing measure.

What this ignores, however, is that the above question is a matter of proportionality, and that if looked at with a critical eye unhindered by a bias against polygamy, the matter might not even reach that stage. Under Canadian law, proportionality is only considered once the preliminary matter of rational connection is settled. Before determining if the good done by a measure adequately balances out any injurious consequences, it needs to be clear that the benefits are indeed real. Normally, this is a given; it is just common sense that if the state bans a practice, the harm resulting from that practice will be reduced, along with its incidence.

The problem is that in the case of polygamy this common sense correlation may not apply, because it is based on two implicit assumptions. First, that the prohibition will be prosecuted on a reasonably thorough basis, so that the incidence of the behaviour will decrease, at least to some degree. Second, that the degree and nature of the harm would remain constant with the practice, leading to a correspondence between decreased incidence and overall harm reduction. However, the experience since the first criminal prohibition was put in place, well over a century ago, shows that this is far from the case on both counts.

a) Non-prosecution of Polygamy
Laws are generally enacted to be used, and vigorous prosecution may have been the intention when the first polygamy prohibition was enacted. However, reasonably diligent prosecution is no longer the norm in this area, and has not been for a very long time. Though it is common knowledge that polygamy is practiced in Bountiful, charges have been few and far between. Reduction in the incidence of polygamy is much more closely related to early utilization of the law, rather than its continued existence.

More significantly, the failure to prosecute has not only given the fundamentalist Mormon lifestyle a space in which to flourish, but has lent it an air of state complicity. Some have posited that having such a law on the books and yet allowing the practice could be seen (by both outsiders and those within the community) as the state passively condoning the lifestyle.\(^\text{109}\) It is this lifestyle, and not the existence of polygamy itself, that is the real problem. The question then becomes what the effect of this criminalization has had on lifestyle which is associated with traditional polygamy.

b) **Degree of Harm**

In the Charter era, community standards alone cannot justify laws which infringe upon fundamental freedoms. For a criminal prohibition which does so to stand, it must curtail harm or otherwise provide a real benefit. Polygamy can no longer be criminalized simply because a majority disapproves of the institution; the ban must reduce the harm suffered by those involved in the practice. However, in this case even if one assumes that the prohibition has reduced the number of polygamous unions, it may not have reduced the overall harm. Instead, the prohibition has arguably caused the effects of polygamous unions to mutate into a much more harmful form.

\(^{109}\) *Legalizing Polygamy, supra* note 89 at 331.
In both Canada and the United States, the consequence of prohibition has resulted in fewer – but arguably much more harmful – polygamous marriages taking place in communities made insular by the drive to protect their own from the authorities. To make an analogy, it is as if the state introduced stronger sanctions against marijuana use, and while some stopped indulging entirely, others then turned to heroin.

In “The Positive Effects of Legalizing Polygamy: ‘Love is a Many-Splendored Thing’”, Emily Duncan addresses the idea that more damage is caused by prohibition of plural marriage than would be by its legalization. Removing the threat of prosecution could result in community members co-operating with authorities on other matters and increased contact with the outside world, both of which would lessen the harm to the vulnerable women and children involved:

Legalizing polygamy should lead to greater regulation because several aspects of current state and federal law will have to be altered and new laws and policies adopted to support alternative family models. Moreover, legalization and corresponding regulation will encourage these communities to emerge and acclimate to society because they will no longer fear criminal charges for their lifestyle choice.\textsuperscript{110}

Decriminalization would allow for a more focus to be placed on preventing the harms and assisting in the recovery of them. Permitting plural marriage would mean that the communities would largely lose the motivation to falsify or fail to record marriage and birth documentation.\textsuperscript{111} Knowledge of the birth dates would allow for increased successful prosecution of statutory rape charges, and the elimination of the threat of prosecution for bigamy should alleviate some of the difficulty in getting community members’ testimony in cases dealing with other offences.\textsuperscript{112} Duncan speculates that adding regulations which provide

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\textsuperscript{110} Ibid at 315. \\
\textsuperscript{111} Ibid. at 333. \\
\textsuperscript{112} Ibid. 
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benefits associated with recognition of these marriages would provide an incentive for polygamists to enter into this new regime, rather than remaining hidden.\textsuperscript{113}

Increased prosecution of statutory rape and child abuse would be far from the only potential benefits. Better documentation would aid in the finding and charging of birth parents who allow their male children to be banished from the community without resources, perhaps curtailing the number of lost boys. It would also be an economic benefit to the state, as the by allowing social services to recognize when the women claiming to be a single mother is, in fact, a co-wife.\textsuperscript{114}

While there are as of yet no economic studies on this matter, given the high price tag of “bleeding the beast”, it is not unreasonable to posit that a decrease in this exploitation could potentially cover the costs of any economic incentive programs.

More importantly, legalization combined with increased regulation and prosecution of the crimes associated with the fundamentalist Mormon lifestyle would demonstrate that the state would be “going after the crimes, not the culture.”\textsuperscript{115} The offences that people would be tried for are those that all Canadians are susceptible to prosecution from and which are unacceptable for all members of society, regardless of marital status.

Of course, it cannot be known for certain that decriminalization of polygamy would make the practice less harmful, but one must acknowledge that it is a real possibility. The prohibition has been in place for well over a century; it has been thoroughly tested and found wanting. Its effectiveness at reducing the incidence of polygamy is questionable, and the ban may actually increase the severity of the harm for those who do participate. The best solution may be one that does not infringe on any fundamental freedoms: namely, allowing polygamy to exist while

\textsuperscript{113} Ibid.  
\textsuperscript{114} Ibid.  
\textsuperscript{115} Ibid. at 334.
simultaneously increasing contact with polygamous communities and vigorously prosecuting other criminal acts which take place in those communities. It would be a tragedy to discount this possibility merely because of discomfort with the strange way that members of these communities choose to express their faith and live their lives. It would be equally deplorable to discount a rather progressive and certainly non-misogynistic lifestyle merely because it bore some surface similarities to traditional polygamy; yet, that is what is in danger of occurring with polyamory.

B. The Impact on Polyamory

If the opposition to polygamy is based on the harm it causes to the women involved, then it follows that there ought not to be any objection to a form of polygamy that does not perpetuate these harms. This often goes unaddressed because proponents of the prohibition only see it applying to polygyny rooted in religious traditions, whether these are Mormon or Muslim. However, there is an increasing trend towards a very different form of non-monogamy which is also affected: namely, polyamory.

While polyamory (sometimes called polyfidelity) is not a common phenomenon, it is on the upswing. Unlike more traditional polygyny, polyamory is not rooted in a subjugated vision of women, but is instead commonly associated with the most progressive and feminist segments of society:

Polyamory has thus arisen from the confluence of a number of sexually emancipatory discourses. It tries to provide languages and ethical guidelines for alternative lifestyles and sexual and intimate relationships beyond the culture of ‘compulsory monogamy’. At its most basic, the concept of polyamory stands for the assumption that it is possible, valid and worthwhile to maintain intimate, sexual, and/or loving relationships with more than one person.116

The term “polyamory” covers a wide variety of romantic and sexual relationship forms, both temporary and permanent, and may involve gay, straight or bisexual people:

Common polyamorous set-ups include people having one or two “primary” partners and other “secondary” ones, triads (where three people are involved with each other), and quads (e.g., two couples being involved with each other). Some polyamorous people live together in families or tribes, some have “polyfidelity” within their group and others are “open”...

Unlike traditional religious polygyny, which takes a very rigid form (many wives “sharing” one husband, with all participants presumably heterosexual), the parties involved in polyamorous relationships rarely fall into strictly defined roles. Instead, they must often formulate the relationship as it goes along, an exercise which requires strong communication skills. This has led some scholars to comment that these forms of relationships are well suited to strengths typically associated with women. In research conducted, some of the women studied “presented [polyamory] as a more feminine way of managing relationships, with emphasis placed on open communication, expression of emotions, and support networks.”

What readings there are on this subject indicate that while polyamory may present its own set of difficulties, it does not objectify and subjugate women in the ways that traditional polygyny is alleged to do so. Instead, it can be a vehicle by which the traditional gender roles (which still exist in any number of monogamous relationships) may be challenged and potentially reworked. As noted in Meg Barker’s reflections on her research, “polyamory may have the potential also to question the heterosexual ideal of the active man and the passive woman.” Even if there is as of yet no data to indicate that polyamory does not cause harm to women, it is a safe assumption to make that it is no more harmful than monogamy. Why, then,

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117 Meg Barker, “This is my Partner, and this is my Partner’s Partner: Constructing a Polyamorous Identity in a Monogamous World” (2005), 18 Journal of Constructivist Psychology 75 at 76.
118 Ibid.
119 Ibid at 77.
ought it to be the subject of criminalization, when more damaging forms of monogamy are allowed to stand, based solely on the number of people involved in a relationship?

Some will, of course, argue that the sanction would not affect those involved in polyamorous relationships at all, because they would be in no danger of prosecution. This is not an adequate answer, because it does not acknowledge that the polyamorous community is affected in two distinct ways by this criminalization. Most obviously, the prohibition puts some of those who live in multi-party marriage-like arrangements at risk of incarceration. Section 293 of the Criminal Code makes it a crime for any person “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.” This applies “whether or not it is by law recognized as a binding form of marriage.” Neither “polygamy” nor “conjugal union” is defined within the Code, such that on its face, the prohibition applies to any and all forms of marriage involving more than two people.¹²⁰

Whatever the original intent of Parliament, the expansiveness of this definition means that it is certainly not limited to only traditional polygamy. Taking the marriage rites themselves out of the equation, those in polyamorous relationships who are living together (whether in triads, quads or other family groups) are in conjugal unions, albeit common law ones. There is no longer any requirement that people must be of opposite genders to marry, and recognition of common law marriage does not require any formalizing procedure, only the passage of time. Recent years and jurisprudence have shown that the concept of marriage in current Canadian society is a fluid one, and Section 293 encompasses polyfidelity as much as it does traditional polygyny. The

¹²⁰ “Polygamy” is defined by the Merriam-Webster dictionary as “marriage in which a spouse of either sex may have more than one mate at the same time”, while “conjugal” is “of or relating to the married state or to married persons and their relations”. Given that when the original criminalization was enacted, it was directed at the Mormon community, it is likely that by polygamy, the drafters intended to refer to “polygyny”.
probability of inclusion is only increased when the participants in the polyamorous relationships take part in commitment ceremonies.

However, even if it could be guaranteed that the state would confine its use of Section 293 to traditional polygamy, this does not wholly eliminate the effect of criminalization on those involved in polyamory. There would remain a statement in our criminal law – the moral compass of our society – expressing disapproval of multi-party relationships. In a sense, it does not matter that there has not been any real push to allow for the formalization of polyamorous relationships or that they are unlikely to be prosecuted. What is significant is that the state is still expressing disapprobation of the practice, and by extension, those involved in it. It is a statement that though those who practice non-monogamy may be tolerated, the practice itself is distasteful, perverse and not to be treated on an equal footing with monogamy. This grudging indulgence is not based on any harm resulting from the practice; after all, the forms of polyamory are so varied that one could not generalize that multiple relationships cause harm. Instead, it derives from the strangeness of the practice and the corresponding disregard for the freedoms of its practitioners. While most can agree that the circumstances of those in polygamous sects are indeed unfortunate, that does not lessen the repugnancy of trampling over the rights of polyamorists in a (perhaps futile) attempt to aid an entirely unrelated group.

VI. Conclusion

There is little doubt that the circumstances surrounding fundamentalist Mormon communities are troubling to most Canadians, and that the push to retain the current polygamy prohibition stems from an urge to prevent harm to the vulnerable parties involved. However, in order to do so effectively, one needs to have a clear picture of what harms they are actually suffering and
whether they wish to be involved in such relationships. Unfortunately, this will not be possible until it is recognised that, despite what we as a society might like to think, the harm that we see does not mirror the actual harms present. Our perceptions are influenced by how inexplicable and distasteful we find the choices of others; if they fulfill either count sufficiently, the participants are more likely to be viewed as irrational actors who are in need of protection, whether from themselves or others. While Multani and Labaye demonstrate that the bounds of Canadian tolerance are indeed expanding, they do not yet extend to practices which are deemed too strange.

In the case of non-monogamy, the strangeness is largely tied to why women would choose to elevate their religious beliefs to the extent that they forsake their equality and autonomy. This leads to a societal urge to save them from themselves which, in the case of polygamy, is viewed as best accomplished by maintaining the criminal prohibition plural marriages.

This satisfies the societal need to stamp out a practice which is simply too strange, but may not serve the larger purpose of helping the vulnerable parties involved. It homogenizes the experience of the women in such communities, unilaterally removes their autonomy (by assuming that the consent of all women is meaningless), and ignores the possibility that it might be the criminalization itself that is contributing to the actual harms that are suffered. Furthermore, it entirely discounts the effect on criminalization on polyamory, a practice that may very well be more equal and less harmful than monogamy. Therefore, in order to protect both the vulnerable parties and fundamental freedom, it is vital that the courts be cognizant of these increased perceptions of harm in the upcoming polygamy reference case. Otherwise, the viewpoint of the court might lead it to choose a solution that unnecessarily infringes upon liberty and freedom of religion, while failing to truly help those who need it most. Allowing
distaste for a practice to be the overriding factor would only lead to a situation where everyone loses.
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