

Melanie Heath  
Jessica Braimoh  
Julie Gouweloos

## Judging Women's Sexual Agency: Contemporary Sex Wars in the Legal Terrain of Prostitution and Polygamy

**T**he two "P's" of gender inequality are polygamy and prostitution, argues law professor Marci Hamilton (2009). She analyzes how the lack of enforcement of prostitution and polygamy laws in North America enables the subjugation of women: "Men control the finances and the women are commodities, carrying out the sexual goals of the men." Recently Canada entered the debate over whether the two P's are harmful to women, putting the constitutionality of prostitution and polygamy laws on trial. Hamilton served as an expert witness in a case heard by the Supreme Court of British Columbia, which affirmed the constitutionality of Canada's Criminal Code banning polygamy. The justice found that polygamy harms women, children, and society. In contrast, the Supreme Court of Canada struck down three laws that made activities relating to prostitution illegal, ruling them all unconstitutional. The justices reasoned that banning these activities ultimately harmed the sex workers themselves.

These two cases pitted feminist actors against one another over conceptions of harm and sexual agency and the relationship of both to gender inequality. Hamilton's characterization reflects the danger side of recent debates over whether certain sexual practices are oppressive or liberatory. These debates originally spurred the feminist sex wars at the 1982 Scholar and the Feminist IX conference "Towards a Politics of Sexuality," widely known as the Barnard Conference, creating a divide over issues broadly relating to sexuality—pornography, erotica, prostitution, lesbian sexual practices, and sado-masochism—and whether such practices are dangerous or pleasurable for women (Ferguson et al. 1984; Abrams 1995; Duggan and Hunter 2006). Today debates over polygamy, and particularly the practice of polygyny, a single husband married to multiple wives, have joined debates about prostitution in the latter-day feminist sex wars.<sup>1</sup> Gregg Strauss (2012, 544), for

We thank *Signs* editor Suzanna Danuta Walters, Miranda Outman, and the anonymous reviewers for their insightful comments and ideas to improve earlier versions of this article. We also thank those who dedicate their time and energy to advocating for women's sexual agency. This research was supported by an Insight Grant from the Social Sciences and Humanities Research Council of Canada.

<sup>1</sup> "Polygamy" is an umbrella term that refers to the practice of having more than one spouse, whereas "polygyny" specifically designates one man with multiple wives. In this

[*Signs: Journal of Women in Culture and Society* 2016, vol. 42, no. 1]

© 2016 by The University of Chicago. All rights reserved. 0097-9740/2016/4201-0010\$10.00

example, argues that traditional polygyny is “inherently unequal” and harmful to women, heightening their economic dependence and negatively impacting their health. In contrast, Adrienne Davis (2010) treats polygamy as an “intimate liberty” and thus engages with sex-positive debates about women’s ability to choose consensual, meaningful relations—even when those relations appear unequal.

The Supreme Court cases concerning prostitution and polygamy provide a novel lens on conflicts among women’s rights activists over sexual practices, bringing legality to the forefront of how to decide questions concerning women’s agency. Feminist debates over sexuality have long influenced the language used in the legal arena to criminalize sexual practices viewed as harmful to women. In each of the cases we analyze, justices were faced with the challenge of deciding how the law should be used to protect and ensure women’s sexual agency. Both of the cases used—or claimed to use—feminist reasoning and thus demonstrate the contemporary conditions through which the sex debates continue to shape women’s lives. These developments, harkening back to the sex wars ignited in 1982, provide an opportunity to consider anew the consequences of feminist debates on gender and sexual justice.

Here we focus on these court cases to uncover the paradoxical consequences of the strange bedfellows with whom feminists find themselves engaging in order to win legal victories. A focus on the legal arena in Canada, a country that prides itself on its values of liberty, equity, and tolerance, illuminates a particular example of internal feminist conflicts over law and social control. As we outline below, both legal cases brought together evangelical Christians and feminists to argue for the continuing criminalization of both polygamy and aspects of prostitution. In comparing these two Canadian cases, we of course acknowledge the limitations of generalizing these examples to other legal contexts throughout the globe. That said, we do find that the coalitions represented in these cases are similar to the alliance of neo-abolitionist feminists and evangelical Christians in the United States and the United Kingdom (Chuang 2010), as well as the alliance between feminists and evangelical Christians to pass laws imposing severe criminal penalties on traffickers and pimps in the United States (Bernstein 2010).<sup>2</sup> This convergence may be true for other locales as well.

---

article, we use “polygamy” when the term applies generally to multiple spouses or relationships, and “polygyny” when it specifically applies to one man and multiple wives.

<sup>2</sup> We acknowledge feminist critiques of the uncritical use of the word “abolitionist” in reference to the modern-day movement against sex trafficking. As some have argued, the use of this term can suggest an easy equivalence between the contemporary movement and the

In this article, we draw on these cases to investigate how the law constructs women's ability to understand and negotiate gender-oppressive structures. Specifically, this article seeks to answer the following: First, how are legal discourses linked to contemporary feminist battles over women's sexual agency and to feminist goals aimed at challenging stigma and oppression? Second, what alliances are created between feminists and other actors? And, finally, whose voices are marginalized in this process and why? We begin with a brief overview of the literature on feminist debates over sexuality and the construction of sexual agency. We then move to our analysis of the two cases to illuminate the role of strange bedfellows in producing discourses of agency. Finally, we analyze the judgments in the two cases to elucidate similarities and differences in conceptions of women's sexual agency.

### **Constructing women's sexual agency**

The feminist sex wars have been criticized for offering two reductionist positions (Barton 2002), one among radical feminists who view existing structures of sexuality as products of male domination that are dangerous for women (Dworkin 1974, 1987; MacKinnon 1989), the other among sex-positive feminists who embrace subversive sexualities as a means to undermine patriarchy (Rubin 1984; Chapkis 1997). On the danger side, Catharine MacKinnon (1989) argues that our culture is one of pervasive sexual domination of women: "All women live in sexual objectification the way fish live in water. . . . The question is, what can life as a woman mean, what can sex mean, to targeted survivors in a rape culture?" (149). On the sex-positive side, Carole Vance (1984) critiques the radical feminist approach for its inability to speak to the "diversity in women's sexual experiences . . . ; the inadequacy of our language to describe women's experiences; the complex meaning of sexual images; and the terror aroused by sexuality" (431). In recent years, the debates over sexuality have shifted and evolved. Some radical feminists have reassessed the boundaries of danger and harm, making concessions for individual agency (O'Connell Davidson 2002). Still, for these feminists, systems of domination and power relations define the boundaries by which women enact "choice" (Overall 1992; Jeffreys 2009). A number of sex-positive feminists have also reconsidered the limits of agency, drawing attention to more nuanced understandings of the relationship between agency and harm and how agency is constrained by

---

nineteenth-century movement against slavery in the United States, thereby painting over complexities or contradictions in the present-day movement. See, e.g., Halley et al. (2006).

the particularity of one's situation (Wardlow 2004; Denov and Gervais 2007; Showden 2012).

Internal, internecine feminist debates over sexuality and agency have also influenced the state's delineation of danger and pleasure in women's lives (Canaday 2011). Engaging in these debates, state actors frequently use the law to challenge, restate, and redefine the relationship between harm and expressions of human sexuality and intimacy (Heath 2012). Some critics suggest that feminists have sought legal recourse in a manner that has expanded the scope of an already intrusive state (Abrams 1995). Laura María Agustín (2007), for example, examines the experiences of sex workers in the context of those seeking to "help," arguing that rescue work reproduces discourses of helplessness, victimization, and submission. It is the rescue industry, Agustín claims, that not only maintains the construction of "a prostitute" but also supports the actions and policies that are directed at managing the social conditions under which these women live. In this way, rescue activities deny and control women's sexual agency.

Others have investigated the ways in which legal interventions to protect girls and women result in an erasure of sexual agency. Rachel Thomson (2004) argues that age-of-consent laws in the United Kingdom instrumentally sought to constrain men's sexuality and completely disregarded women's sexual agency. Similarly, Laurie Schaffner (2005) highlights the relationship between agency, harm, and law in her analysis of the legal boundaries surrounding the sexuality and criminality of children and adults. She finds that the discursive interplay of harm, gender, and sexuality influences legal definitions of who has choice and who does not. The boundaries that emerge through these constructions work to (re)produce, yet also blur, gendered and sexualized understandings of adulthood.

Our comparison of the prostitution and polygamy cases in Canada contributes to this literature by analyzing the consequences of interactions between feminist and nonfeminist actors that led to particular legal understandings of harm and agency. The 2013 Supreme Court case on prostitution provided a landmark decision that struck down three provisions of Canada's Criminal Code: keeping or being found in a bawdy house (a brothel), living on the avails of prostitution (pimping), and communicating in public for the purpose of prostitution.<sup>3</sup> In contrast to the United States, where prostitution is generally illegal except for in parts of Nevada, prostitution itself was never illegal in Canada. However, the criminalization of most activities involved made it nearly impossible to practice it without running afoul of the law. The three plaintiffs, Terri Jean Bedford, Amy

<sup>3</sup> See *Canada (AG) v. Bedford*, 2013, in Appendix A.

Lebovitch, and Valerie Scott, all current or former sex workers, brought suit against the government in 2009 in the Ontario Superior Court, arguing that the three laws were unconstitutional as they violated their rights to “life, liberty and security of the person” guaranteed in the Canadian Charter of Rights and Freedoms (Charter), Canada’s bill of rights, which was entrenched in the Constitution of Canada that was signed into law in 1982.<sup>4</sup> Justice Susan Himel struck down the laws, and the Court of Appeal upheld the decision for the bawdy house and living on the avails laws. The Supreme Court of Canada, in a unanimous decision, struck down all three laws, finding that they created dangerous conditions that do harm to vulnerable women.

In contrast to the prostitution case, which contested banned practices within the context of de jure legalized prostitution, polygamy has been criminalized outright in Canada since 1890. The Criminal Code makes it an indictable offense to practice any form of polygamy or any kind of conjugal union with more than one person at the same time. The British Columbia polygamy trial emerged as a result of the provincial government’s attempt to prosecute two Mormon fundamentalist leaders who live in a small settlement in the province’s southeastern mountains. After the charges were dropped due to a technicality in 2009, the province’s attorney general sought an advisory opinion on whether Canada’s ban on polygamy conflicted with the freedom of religion clause in the Charter. Unlike in the United States, where an issue of federal law must begin at a state or federal court before it can be appealed to the Supreme Court, the federal or provincial government in Canada can ask the courts for advice on major legal issues. The polygamy reference case represented such an instance; however, it was the first of its kind, taking place as a trial and including the introduction of evidence and witnesses. After over a year of hearings and deliberation, Chief Justice Robert Bauman found in 2011 that the law was constitutional due to the harms inherent in the practice of polygamy. The decision was not appealed.

While these two Supreme Court cases differed structurally (the first moving through the usual trajectory to be heard by the Supreme Court of Canada and the second introduced as a reference question at the provincial level), both incorporated clear arguments over how the practice of prostitution or polygamy harms women and what role agency can play in these practices. We thus compare the two to examine the relationship between state legal apparatuses and the feminist actors who engage them. The discursive strategies of the actors in the prostitution case reflect ongoing debates that coalesce along the familiar lines of two opposing camps: the danger stance views prostitution

<sup>4</sup> See *Bedford v. Canada*, 2010, in Appendix A.

as an injustice forced upon women who have no other alternatives; the choice stance contends that prostitution is not inherently grounded in the exploitation of women. Interestingly, the discursive strategies of actors in the polygamy case—a very different context for thinking about women’s agency—reflect a similar divide: for the danger stance, polygamy, and specifically polygyny, is understood as a gendered harm that exploits women; on the choice stance, a broader definition of agency is deployed to argue against polygamy as inherently harmful.

In both cases, the danger stance engages what Elizabeth Bernstein (2010) calls “carceral feminism,” reasoning that seeks to enforce feminist goals through a law-and-order agenda. She argues that some feminist advocacy movements have evolved to embrace the criminal justice system as a means of social justice through social control (Bernstein 2012). Carceral politics incorporates a top-down, state-centered approach that individualizes social problems to justify reliance on the criminal justice system, the police, and the state to secure justice. We acknowledge that there are contexts in which such an approach has been and can be beneficial, such as fighting for recognition of sexual violence between partners, and specifically marital violence, as a crime; however, our goal in this article is to point to some of the unintended consequences of these politics.

In contrast to a carceral objective, the choice stance privileges ideas about bodily integrity and sexual authenticity; it focuses on the freedom to make decisions with respect to one’s sexual and intimate relationships. Our argument does not uncritically embrace the choice approach, which frequently prioritizes individual desire over structural analyses. Instead, we find that the choice stance enables legal judgments that recognize women’s agency and elucidates the structures that disadvantage and constrain it. We argue that this approach better reflects feminist liberatory goals.

Below we analyze the statements and judgments of the prostitution and polygamy cases from both the danger and choice stances (see Appendixes A, B, and C).<sup>5</sup> We argue that the tensions between various groups in making arguments for or against prostitution or polygamy provide insight

<sup>5</sup> We use the general term “statements” instead of the legal language of “factums” in the prostitution case and “opening statements” in the polygamy case. “Factum” is the Canadian term for “brief,” the term that is used in the United States, India, the United Kingdom, and Australia to describe a written legal document presented to a court arguing why one party to a particular case should prevail. The polygamy trial had opening statements and not factums because it was heard as a trial. We also use the nonlegal term “applicant” in lieu of “intervener” throughout this article. An intervener is someone not originally party to judicial review proceedings who is given status to participate. An intervener is also referred to as a “friend of the court” (*amicus curiae*), or as a public interest advocate.

into the current political terrain of the sex wars. Next, we analyze the judgments in the two cases in order to examine how the justices construct sexual agency. How do these two legal cases treat women's ability to negotiate gender-oppressive structures? In answering this question, we shine light on the legal mechanisms that regulate conceptions of women's sexual agency.

### **Strange bedfellows in the contemporary sex wars**

The two cases exemplify debates over how to conceive of women's agency, drawing together strange bedfellows. Within the context of the law, activists do not necessarily choose their bedfellows. The union of unlikely allies in favor of choice or danger tends to be uneasy. In her research on activist groups in the antipornography movement, for example, Nancy Whittier (2014) finds that actors cooperate in the fight against pornography in some instances but in others either oppose each other or run along separate tracks. The prostitution and polygamy cases provide insight into how different groups seek to establish a boundary to differentiate their positions from what they view as problematic arguments made by actors on the same side of a legal case. The arena of the law makes it particularly difficult for the parties to manage conflicting ideas in order to maintain a unified front for or against (de)criminalization of prostitution and polygamy.

### ***The danger stance***

Much like the global antitrafficking movements, the prostitution case united feminist and Christian actors to argue for prostitution's continuing criminalization in Canada, but the two had different stances on who should be criminalized. In 2012, in the Court of Appeal for Ontario, the Christian Legal Fellowship, the Catholic Civil Rights League, and REAL (Realistic, Equal, Active, for Life) Women of Canada (hereafter, the Christian alliance) joined together to submit a statement outlining the moral reasons to criminalize prostitution. At the same time, seven women's groups (hereafter, the women's alliance) submitted a joint statement advocating for an asymmetrical model that criminalizes clients and pimps but not the prostitutes themselves. In the Supreme Court case, two Christian groups joined with two women's abolitionist coalitions in support of the attorney general's argument that the act of prostitution itself, and not the laws, creates danger for prostitutes.<sup>6</sup>

<sup>6</sup> In the Court of Appeal for Ontario, the Christian groups in favor of criminalization included the Christian Legal Fellowship (a national association of Christian legal professionals,



While the women's and Christian alliances differed in their arguments about whom to criminalize, both grounded their reasoning in a perspective that advocated the eradication of prostitution. This reasoning—which we refer to here as the danger stance—was founded on the belief that prostitution is inherently harmful. In the words of the women's alliance: “Physical and sexual violence are not the only relevant harms of prostitution. Prostitution is itself harmful to women.”<sup>7</sup> Likewise, the Christian alliance pointed to the ways in which “prostitution fundamentally demeans the dignity of the prostitute and the client. It perpetuates a fundamentally offensive and abusive gender imbalance.”<sup>8</sup>

The views of these two alliances, however, differed on who needed to be protected. While the women's alliance argued for the need to decriminalize women, the Christian alliance claimed that prostitution is an immoral practice that is harmful to society. The Christian alliance's statement relied on moral reasoning that gives lawmakers “the right to legislate on the basis of a ‘fundamental conception of morality’ for the purpose of ‘safeguarding the values’ that are ‘integral to a free and democratic society.’”<sup>9</sup> It stated: “Parliament has held the view that prostitution is immoral since Confederation. This moral view is not based on mere prudish sensibilities nor is it legal moralism: it is a common and fundamental social value rooted in other constitutional values such as promoting gender equality, preventing the exploitation of vulnerable persons and protecting human dignity.”<sup>10</sup> Prostitution, from the Christian alliance perspective, is a choice: “It is only where the prostitute chooses to practice prostitution that she is exposed to the type of harm alleged in this case.”<sup>11</sup> The emphasis on choice justified the

---

law students, and interested persons), REAL Women of Canada (a national nonprofit organization), and the Catholic Civil Rights League (a national lay Catholic organization). The statement of the seven women's organizations for criminalization included the Canadian Association of Sexual Assault Centres, the Native Women's Association of Canada, the Canadian Association of Elizabeth Fry Societies, Action Ontarienne contre la Violence Faite aux Femmes (Ontario action against violence against women), La Concertation des Luttres contre l'Exploitation Sexuelle (Consultation of struggles against sexual exploitation), Le Regroupement Québécois des Centres d'Aide et de Lutte contre les Agressions à Caractère Sexuel (The Quebec coalition of Sexual Assault Centres), and Vancouver Rape Relief Society. In the Supreme Court case, the same Christian alliance submitted a statement, as did the Evangelical Fellowship of Canada. The same seven women's groups also submitted a statement, as did the Asian Women for Equality Society, operating as Asian Women's Coalition Ending Prostitution.

<sup>7</sup> See Women's Coalition, 2011, *Bedford*, at para. 15, in Appendix C.

<sup>8</sup> See CLF et al., 2013, *Bedford*, at para. 3, in Appendix C.

<sup>9</sup> *Ibid.*, at para. 7.

<sup>10</sup> *Ibid.*, at para. 2.

<sup>11</sup> *Ibid.*, at para. 49.



need to criminalize the prostitute herself (or himself), as well as clients and pimps.

In contrast, the women's alliance argued that prostitution is not—and never can be—a choice that women freely make and therefore is a fundamentally iniquitous and degrading system of violence against women: “Many women enter prostitution as children, often after being sexually abused and/or placed in state care. Many women are pushed into and remain in prostitution because of poverty, homelessness, low levels of education, and disability, including addictions. Many women in prostitution are racialized or have precarious immigration status.”<sup>12</sup> For the women's alliance, patriarchal male privilege leads directly and unambiguously to the exploitation of women. Further, the group pointed to systemic discrimination rooted in poverty, racialization, and sexual abuse, which puts women at substantial risk of being exploited as prostitutes. Thus, the criminalization of prostituted women ultimately punishes the women themselves for being exploited by men. The women's alliance characterized prostitution as dangerous to all women, a position exemplified in the writings of radical feminists such as MacKinnon (1989, 148), who links pornography to prostitution and rape as “a form of forced sex, a practice of sexual politics, and institution of gender inequality.”

The central disagreement between the Christian alliance and the women's alliance was over women's sexual agency. The Christian alliance cited the broader public good to justify penalizing victims for their own victimization. The women's alliance, on the other hand, avoided this contradiction by conceptualizing women prostitutes as victims unable to make decisions for themselves. In this case, feminist efforts to protect women from male exploitation engaged with conservative religious actors who viewed prostitution (or pornography) as sinful, immoral, and harmful to the family. The relationship between these actors facilitated carceral arguments, such as that of the attorney general of Canada, who spoke of the need for Parliament “to criminalize the most harmful and public emanations of prostitution.”<sup>13</sup>

The polygamy case offered similarly strange bedfellows. The groups that argued for the need to criminalize polygamy included two of the same Christian organizations that intervened in the prostitution case: the Christian Legal Fellowship and REAL Women of Canada. West Coast Legal Education and Action Fund (West Coast LEAF) joined their case as the principal feminist organization. Two organizations and one coalition working

<sup>12</sup> See Women's Coalition, 2013, *Bedford*, at para. 5, in Appendix C.

<sup>13</sup> See Attorney General of Canada, 2009, *Bedford*, at para. 141, in Appendix C.

for the rights of children were involved, as was Stop Polygamy in Canada, a nonprofit organization created to end polygamy.<sup>14</sup>

The arguments in favor of criminalization paralleled the dominant danger stance on women's victimization. These actors viewed polygamy as a practice rooted in inherent harms. Rather than offering an argument that specifically cited the need to uphold moral values, as the Christian alliance in the prostitution case did, REAL Women of Canada maintained that the criminalization of polygamy was essential to a more generalized idea of "Canadian values": "The legalization of polygamy would promote inequality and impose costs on Canadian society as it has elsewhere."<sup>15</sup> Polygamy exploits women, harms children, and its practice is contrary to fundamental Canadian values. If polygamy is allowed it would open the floodgates of immigration by polygamous families."<sup>16</sup> Since one of the questions before the court was whether banning polygamy violates religious freedom under the Charter, both Christian organizations were careful not to present arguments that could be construed as infringing on fundamental religious beliefs. The specter of opening the floodgates to immigrant polygamous populations signaled the xenophobia that often lies beneath arguments that rely on a sense of shared nationalist values.

While steering clear of the word "morality," the Christian groups embraced a family-values perspective similar to that of the Christian alliance in the prostitution case. For example, the Christian Legal Fellowship elaborated that polygamous relationships are fraudulent in comparison to monogamous marriage: "Polygamy amounts to a fraud upon the public, as the public is deprived of the social and economic certainty associated with the current social and economic realities related to the definition of marriage as a conjugal union of two persons."<sup>17</sup> Thus, the arguments of the two Christian applicants paralleled those made in the prostitution case: they linked the harms of polygamy to the exploitation of women, and they claimed more broadly that polygamy offends Canadian values and the societal norms of monogamy. As with the prostitution case, these actors supported the

<sup>14</sup> The children's rights organizations included Beyond Borders, a volunteer organization advancing the rights of children; the British Columbia Teachers' Federation; and two organizations that worked together as a coalition: the Canadian Coalition for the Rights of Children (a nonprofit developed to inform the public about the UN Convention on the Rights of the Child) and the David Asper Centre for Constitutional Rights (a center within the University of Toronto's Faculty of Law).

<sup>15</sup> REAL Women of Canada confused legalization with decriminalization, where only the latter was being considered in the trial.

<sup>16</sup> See RWC, 2010, *Reference*, at para. 13, in Appendix B.

<sup>17</sup> See CLF, 2010, *Reference*, at para. 5, in Appendix B.

arguments of the attorneys general for the need to continue to criminalize the women living in polygamy, even if they are victims themselves.

Like the two Christian groups, the feminist applicant West Coast LEAF embraced the danger stance in arguing that the ban against polygamy “fulfills the Crown’s obligations to consider the equality rights of women and girls of faith in polygamous communities and ensure that they are not exploited.”<sup>18</sup> This strategy also paralleled that of the women’s alliance in the prostitution case, offering a more nuanced intervention to support limiting the interpretation of the criminal law to apply only to exploitative polygamy. West Coast LEAF was specifically concerned that the law not capture relationships tied to a philosophy of polyamory, which the Canadian Polyamory Advocacy Association, also intervening, defined as allowing equality and self-realization. West Coast LEAF stated: “The law does not prohibit multiple spouses *per se*; rather, it prohibits the exploitative practice of polygamy.”<sup>19</sup>

By making a distinction between exploitation and self-realization, West Coast LEAF marked a clear boundary between the conditions of autonomy that women can experience in multiple relationships and the lack of self-determination and choice experienced by women and girls living in polygynous communities such as the fundamentalist Mormon community in Bountiful, British Columbia. The statement compared the prohibition of polygamy to the obscenity provision in the Criminal Code: “The prohibition on the practice of polygamy and the prohibition on obscenity both concern activities that are not inherently harmful but are harmful when practiced in an exploitative manner. Both activities contain a spectrum spanning from healthy human sexuality to exploitative power relationships. The criminal law plays an important role in prohibiting the exploitative forms of what might otherwise be an acceptable activity.”<sup>20</sup> This strategy mapped out a space for multiple spouses as neither harmful nor exploitative and avoided capturing polygynous wives as criminals. But similar to the prostitution case, the arguments made by West Coast LEAF were associated with conservative elements that embraced normative ideas about marriage and family values. Thus, although it is framed in the rhetoric of protection, the danger stance often leads to expanded criminalization.

### **The choice stance**

The various actors arguing for decriminalization in the prostitution case presented a more cohesive front than those on the criminalization side.

<sup>18</sup> See West Coast LEAF, 2010, *Reference*, at para. 30, in Appendix B.

<sup>19</sup> *Ibid.*, at para. 12.

<sup>20</sup> *Ibid.*, at para. 13.

Among the groups submitting statements to the Court of Appeal for Ontario were nonabolitionist feminist organizations such as the Downtown Eastside Sex Workers United against Violence Society and Providing Alternatives, Counseling, and Education (PACE) Society, the Canadian and British Columbia Civil Liberties Association, a joint intervention by two HIV/AIDS organizations, and two sex worker–led coalitions. In the Supreme Court, sex worker coalitions, feminist organizations, and civil liberties organizations submitted statements.<sup>21</sup>

All of the applicants viewed prostitution as a form of work that is not inherently exploitative. They framed their arguments around the question of whether sex workers have access to the same rights to workplace safety and personal security as workers elsewhere, acknowledging that some facets of sex work are riskier than others. Thus, they maintained, the purpose of the law should be to minimize harms rather than exacerbate them. A focus on choice and agency provided a very different perspective on how sex work should be regulated, specifically concerning communication. “Historically,” L’Institut Simone de Beauvoir argued, “feminists of all schools (radical, liberal, Marxist or postmodern) argue that rich and honest communication is the heart of a healthy sexuality. In the context of prostitution, there is no doubt that communication is essential to reduce violence against women and protect their autonomy.”<sup>22</sup> L’Institut Simone de Beauvoir specifically referenced “all schools” of feminism to signal the areas where feminists agree, even as the case pitted feminists against feminists. The conception of choice articulated by this applicant focused on sexual autonomy rather than on exploitation, reminiscent of the battle lines that have long been drawn in the sex wars.

<sup>21</sup> In the Court of Appeal for Ontario, the signatories to the statement of the two HIV organizations against criminalization were the Canadian HIV/AIDS Legal Network and the BC Centre for Excellence in HIV/AIDS. The first sex workers coalition included three organizations: PACE Society, Sex Workers United Against Violence (SWUAV), and Pivot Legal Society. The statement of the second sex workers coalition brought together Prostitutes of Ottawa/Gatineau Work, Educate and Resist (POWER) and a Toronto organization, Maggie’s. In the Supreme Court case, the coalition of sex workers arguing for decriminalization included Downtown Eastside Sex Workers United Against Violence, PACE Society, and Pivot Legal Society. L’Institut Simone de Beauvoir, a women’s studies program in Canada, submitted a statement, as did the Aboriginal Legal Services of Toronto, the two HIV organizations listed above, and the Secretariat of the Joint United Nations Programme on HIV/AIDS. The British Columbia Civil Liberties Association and the David Asper Centre for Constitutional Rights also submitted statements.

<sup>22</sup> See Institut Simone de Beauvoir, 2013, *Bedford*, at para. 22, in Appendix C.

Prostitutes of Ottawa/Gatineau Work, Educate and Resist (POWER) and Maggie's offered a detailed account of what is meant by personal autonomy and choice in contrast to ideas about prostitution as inherently abusive and exploitative: "The decision to pursue sex work is a choice about one's body, one's sexuality, and specifically who to have sex with and on what terms. . . . Sex work can empower women not only by providing them with financial security, but also by allowing for the 'development of alliances between women, bodily integrity and self-determination.' As well, some members of the gay and transgender communities, whose sexuality and gender expression is frequently marginalized, find that sex work provides acceptance of their sexuality and gender expression that is lacking elsewhere."<sup>23</sup> This description of choice highlighted the importance of women's right to "bodily integrity," a concept that abolitionist feminists did not address. More strikingly, POWER and Maggie's addressed the sexual agency of gay and transgender individuals involved in sex work, communities that are not discussed at all in the abolitionist feminist argument. Thus, the reference to both bodily autonomy and sexual diversity foregrounded the wide-ranging meanings of sex work for the workers themselves as well as for social relations more broadly construed.

Simultaneously, the choice stance also recognized the fact that coercion exists even as choices regarding sex work are made. These organizations often agreed with the abolitionist feminists that exploitation is present in the realm of sex work and that governments need to seek to abolish exploitative practices like sex trafficking, coercive pimping, and child prostitution. In addition, all sides acknowledged that Aboriginal women are at greater risk of exploitation due to the history of colonialism in Canada. Aboriginal Legal Services of Toronto stated: "While it is true that those who engage in survival sex have made a choice to do so, it is equally true that the range of choices available to them is severely constrained as the result of government action."<sup>24</sup> This quotation emphasizes one of the main differences between the danger and choice stances in this case: those in favor of decriminalization argued that the current laws were harmful to sex workers, contributing to the stigma and isolation that many experience. The choice stance thus advocated not only for decriminalizing sex work but also for implementing policy measures to criminalize sexual exploitation and to discourage coerced entry into sex work. These actors argued for the need to combat the harms that constrain women's (and others') choices by reducing poverty, institutionalizing pay equity, combatting colonialist structures, strengthening the

<sup>23</sup> See POWER and Maggie's, 2012, *Bedford*, at para. 5, in Appendix C.

<sup>24</sup> See Aboriginal Legal Services of Toronto, 2013, *Bedford*, at para. 22, in Appendix C.

social safety net, and increasing support for women fleeing domestic violence. Thus, the arguments on this side reflected a recognition of what Kathryn Abrams has termed “partial agency,” or agency enabled within patterns of subordination that depend on social context, variation, and contingency (1995, 306).

In contrast to the more unified actors on the choice side in the prostitution case, the polygamy case combined some interesting bedfellows. The applicants included two civil liberties groups, the British Columbia Civil Liberties Association and the Canadian Association for Freedom of Expression (CAFE); an association advocating the rights of polyamory, the Canadian Polyamory Advocacy Association; and one of the communities of fundamentalist Mormons in Canada, the Fundamentalist Church of Jesus Christ of Latter-Day Saints. CAFE—a nonprofit educational organization that has been controversial in its support of Holocaust denier Ernst Zundel—played a marginal role in the trial, but the Fundamentalist Latter-Day Saints and the Canadian Polyamory Advocacy Association were more active players. They were also diametrically opposed in their perspectives concerning polygamy. In fact, the Canadian Polyamory Advocacy Association went to great lengths to disassociate itself from the “patriarchal polygynists” who accept multiple partners only for men.<sup>25</sup> This led to some significant tensions in the coherence of the arguments made at the trial.

Importantly, none of the applicants from the choice stance explicitly identified themselves as feminist organizations, although the British Columbia Civil Liberties Association and CAFE did espouse feminist concepts concerning the ways in which law has always shaped family life, both in terms of coercion and social convention (Fineman 1995). All applicants on the choice side agreed that, under Canadian law, individuals have a fundamental right to choose the form of conjugal and family relationship that best accords with their beliefs and desires. The British Columbia Civil Liberties Association stated: “An individual’s choice of conjugal partner(s) and the family structure in which she decides to live—and may decide to raise children—is a basic manifestation of one’s personal autonomy and sense of the good in private life. . . . The criminalization of multi-party conjugal relationships tends to impose serious psychological stress on individuals who freely choose polygamous and polyamorous relationships.”<sup>26</sup> This treatment of family reflects a conception of privacy recognized by US Supreme Court Justice Anthony Kennedy, whose opinion in the landmark *Lawrence v. Texas* ruling, which overturned US antisodomy laws, defines constitutionally protected

<sup>25</sup> See *Reference* 2011, at para. 599, in Appendix A.

<sup>26</sup> See BCCLA, 2010, *Reference*, at para. 6, in Appendix B.

“liberty” as encompassing sexual intimacy in general: “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct” (quoted in Strossen 2012, xii). The assertion that the private should remain apolitical accords with liberal feminism, in contrast to radical feminism, which views the public and private realms as political. Presuming a realm of familial privacy is a weakness of the choice position, which might benefit from the radical feminist emphasis on the institutional structures of marriage, family, and heterosexuality that perpetuate male domination and homophobia (Jeffreys 1996).

Thus, the Fundamentalist Latter-Day Saints and the Canadian Polyamory Advocacy Association agreed on privacy but disagreed profoundly on what kinds of families should be protected. The Fundamentalist Latter-Day Saints asserted that the law banning polygamy discriminates against individuals on the basis of their religion and marital status. It “creates [a] regime of acceptable and unacceptable marriages based upon stereotypical assumptions about polygamous unions.”<sup>27</sup> The Canadian Polyamory Advocacy Association, on the other hand, argued that the government should restrict only “patriarchal polygyny” because it allows men to “control family life, education, economics and politics in the community.”<sup>28</sup>

Relying on what the Fundamentalist Latter-Day Saints argued were stereotypical assumptions, the Canadian Polyamory Advocacy Association drew a boundary between *polyamory* as “socially beneficial” and *polygyny* as harmful to “teenaged girls, single men and women.”<sup>29</sup> Polyamorists believe in “conjugal freedom, that all people have the right to choose the gender, the sexual orientation and the number of their conjugal partners purely as an expression of personal preference and without reference to any dogma or tradition.”<sup>30</sup> While the Canadian Polyamory Advocacy Association did not directly deal with the issue of polygynous women’s ability or inability to choose their plural marriages, its treatment of the contrast between polyamory and “traditional patriarchal polygyny” suggested a lack of sexual agency for women living in polygynous families.

The Canadian Polyamory Advocacy Association argued for either striking down the provisions or interpreting the law so that it would not “capture multi-partner conjugal relationships . . . that are egalitarian and not part of any patriarchal polygyny tradition.”<sup>31</sup> This request paralleled the danger

<sup>27</sup> See FLDS, 2010, *Reference*, at para. 17, in Appendix B.

<sup>28</sup> See CPAA, 2010, *Reference*, at para. 6, in Appendix B.

<sup>29</sup> *Ibid.*, at para. 8.

<sup>30</sup> *Ibid.*, at para. 10.

<sup>31</sup> *Ibid.*, at para. 2.



stance of the feminist organization West Coast LEAF, which wanted to interpret the law to focus on the harms and exploitative practices of polygamy. While radical feminist perspectives often view the family and the institution of marriage as sites of women's oppression, West Coast LEAF failed to address these feminist critiques, likely due to the fact that their focus was on exploitation and harm. In contrast, the Canadian Polyamory Advocacy Association dealt directly with the legacy of male dominance in monogamous relationships: "Monogamy is no guarantee of female equality. Monogamy and very high levels of male dominance often coexist. The history of Canada illustrates that phenomenon. When monogamy prohibitions were at their highest . . . women did not have the right to vote."<sup>32</sup> The critique of monogamy complemented the statements of the British Columbia Civil Liberties Association. However, the Canadian Polyamory Advocacy Association drew a boundary around polyamory that left intact the argument for the inherent harmfulness of patriarchal polygyny. This position was at odds with those of the other applicants. The British Columbia Civil Liberties Association, for example, stated: "The weight of the evidence does not support the conclusion that freely chosen multi-party conjugal unions tend to be endemically harmful to anyone."<sup>33</sup> "Freely chosen multi-party conjugal unions" could apply both to polyamorous and patriarchal polygynous families.

The tensions within the danger and choice stances in these cases illuminate the complex and contradictory strategies of organizations that represent different ideological positions yet find themselves acting in unison. The women's alliance and West Coast LEAF offered nuanced legal arguments that created a boundary between their position and that of actors who argue from the standpoint of Christian morality. Their position proposed criminalization as a means to combat women's victimization, thereby participating in a move toward carceral feminism. Likewise, the Canadian Polyamory Advocacy Association also drew a boundary to ensure that the type of polygamy it was advocating could not be confused with more patriarchal types. In contrast to the choice stance in the prostitution case, which held a united front in arguing for the partial agency of sex workers, there were strong divisions in the choice position of the polygamy case. The Canadian Polyamory Advocacy Association argued against the idea that patriarchal polygyny could benefit some women, whereas other

<sup>32</sup> *Ibid.*, at para. 64. Although we can't be certain of the meaning of "monogamy prohibitions" in this context, we assume that it refers to the idea that marriage acted as a prohibition that made monogamy mandatory.

<sup>33</sup> See BCCLA, 2010, *Reference*, at para. 10, in Appendix B.

applicants embraced an ideal of partial agency for polygynous women. Thus, the Canadian Polyamory Advocacy Association could be seen as trying to take a middle ground, embracing aspects of the radical feminist argument within its broader libertarian approach to postmodern nonmonogamy. These varied strategies set the stage for very different judgments in the two cases.

### **Arbitrating meanings of sexual agency**

While the law is often seen as an agent of social control (DeLamater 1981), our comparison of these two cases offers evidence of contrasting legal outcomes based on differing conceptions of agency. The prostitution case demonstrates how nuanced treatments of women's sexual agency can pave the way for a more just social landscape, or a landscape that better acknowledges and responds to the mechanisms through which institutions such as the law can constrain the choices, practices, and lives of women. In contrast, the polygamy case uncovers how, within the legal landscape, social control is tied to a limited conception of women's sexual agency, exemplified in the arguments of the women's alliance.

### **The prostitution case**

After deliberating for a year, Ontario Superior Court Justice Susan Himel ruled in favor of the choice stance: the Criminal Code did indeed violate sex workers' Charter rights to security of the person. She struck down the three laws associated with prostitution in 2010, and the Supreme Court of Canada confirmed this in 2013. In the Ontario judgment, Justice Himel found that each challenged provision interfered with a prostitute's rights to make decisions concerning the conditions under which she or he works. Himel determined that the communicating and bawdy house laws violated the applicants' security of the person because, first, criminalization pushed sex workers into hurried transactions in unsafe areas, and second, it prevented women from choosing indoor settings that were less dangerous (prostitution out of one's home or in a supervised brothel, for example). She further found that the living on the avails (pimping) law restricted women's security because it prevented prostitutes from "legally enter[ing] into certain business relationships that can enhance their safety."<sup>34</sup>

Justice Himel built on the arguments of the choice stance to account for the interplay of structure and agency in women's lives. Her interpretation

<sup>34</sup> See *Bedford* 2010, at para. 379, in Appendix A.

indicated that she accepted the argument that the relationship between harm and agency is more complex than the danger stance assumes. In this respect, she questioned the generalizability of evidence by former and current prostitutes that attested to the violence they had experienced: “The respondent tendered nine affidavits from prostitutes and former prostitutes, [who] . . . gave detailed accounts of horrific violence in indoor locations and on the street, controlling and abusive pimps, and the rampant use of drugs and alcohol. While this evidence provided helpful background information, it is clear that there is no one person who can be said to be representative of prostitutes in Canada.”<sup>35</sup> While acknowledging that the landscape of sex work and prostitution is varied, Justice Himmel’s dismissal of these voices seems troubling in a judgment that sought to reduce the harms that these women recounted. Her judgment, however, highlights the ways in which the laws themselves contribute to the harms experienced by these women.

Thus, according to Justice Himmel’s ruling, the contested sections of the Criminal Code do not mitigate harm because they “constrain the independent choices of prostitutes in relation to their personal safety.”<sup>36</sup> She elaborated: “The effect of the impugned provisions is to force prostitutes to choose between their liberty interest and their own personal security. The provisions place prostitutes at greater risk of experiencing violence. These risks represent a severe deprivation of the applicants’ right to security of the person.”<sup>37</sup>

Overall, the choice stance engaged with discourses of harm and choice as myriad and complex, and this resonated with Justice Himmel’s judgment. She argued for the importance of “personal autonomy, at least with respect to the right to make choices concerning one’s own body, control over one’s physical and psychological integrity, and basic human dignity . . . at least to the extent of freedom from criminal prohibitions which interfere with these.”<sup>38</sup> She thus recognized the importance of acknowledging the role of bodily integrity in sustaining autonomy and self-determination, a key argument of the choice stance, as well as the difficulty of maintaining human dignity under conditions of criminal prohibition, thus resisting the carceral feminist approach to combatting gender oppression through criminalization.

In the Supreme Court of Canada judgment, Chief Justice Beverley McLachlin also articulated the importance of personal agency: “The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go

<sup>35</sup> *Ibid.*, at paras. 87 and 88.

<sup>36</sup> *Ibid.*, at para. 426.

<sup>37</sup> *Ibid.*, at para. 422.

<sup>38</sup> *Ibid.*, at para. 284.

a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky—but legal—activity from taking steps to protect themselves from the risk.”<sup>39</sup> In effect, by accounting for the possibility of women’s sexual agency within the legal realm of prostitution, the judgment institutionalized an understanding that women have some agency over decisions they make in sex work, specifically with regard to their own sexuality and sexual practices. Thus, the prostitution case provides evidence for how more nuanced arguments in favor of women’s partial agency can pave the way for a more just social landscape.

### **The polygamy case**

In December 2011, the Supreme Court of British Columbia released its judgment upholding the constitutionality of the Criminal Code prohibition on polygamy, the opposite result of the prostitution case. Justice Robert J. Bauman concluded that the criminal law is neither arbitrary nor disproportionate, and although it “offends the freedom of religion of identifiable groups,” it only “minimally impairs” religious freedom.<sup>40</sup> He explained: “The evidence on the reference demonstrates that polygamy is associated with significant and substantial harms to individuals, particularly women and children, and to society at large. These harms have been consistently recognized throughout history and across the globe.”<sup>41</sup> For Justice Bauman, the argument offered by the danger stance—that polygamy is inherently exploitive and based fundamentally on inequality—had greater resonance. He assessed the law to be a legitimate means for Parliament to ensure the prevention of the harms inherent in polygamy.

The ruling affirming the polygamy prohibition provides insight into the power of law to exert social control over conceptions of women’s sexual agency. Despite the evidence presented by witnesses and experts that attested to women’s sexual agency within polygamous familial structures, Justice Bauman affirmed that polygamy is inherently harmful and damaging to all involved, as well as to broader societal norms. According to him, there is no “good” polygamy that might allow women in polygynous marriages to maintain their own autonomy.

First, Justice Bauman provided a moral argument for the need to protect monogamous marriage from the harms of polygamy. His justification drew on the reasoning offered by the two Christian applicants who maintained that a prohibition against polygamy was critical to the main-

<sup>39</sup> Ibid., at para. 60.

<sup>40</sup> See *Reference* 2011, at paras. 15 and 1341, in Appendix A.

<sup>41</sup> Ibid., at para. 129.

tenance of Canadian values. Speaking to those values, Bauman confirmed the distinction made by the Canadian Polyamory Advocacy Association between patriarchal polygyny and polyamory. It is polygyny that holds the greatest threat to marriage, Bauman argued, and the criminal provision “was intended to preserve monogamous marriage from the threat of polygamy and the harms believed to be associated with it.”<sup>42</sup> He based this conclusion, in part, on postulates from evolutionary biologists concerning human mating practices.

The need to protect marriage from the harms of polygyny led Justice Bauman to interpret the law as a prohibition against “practicing or entering into a ‘marriage’ with more than one person at the same time, whether sanctioned by civil, religious or other means, and whether or not it is by law recognized as a binding form of marriage.”<sup>43</sup> He thus drew a boundary between “multi-party, unmarried relationships or common law cohabitation,” which are not captured by the law, and polygyny, polyandry (one wife and several husbands), and multiparty same-sex marriages, which are prohibited.<sup>44</sup> Thus, Justice Bauman mapped out a legal space for nonformalized polyamorous relationships. His judgment gave an individual latitude to form families as long as they are not formalized as marriages, recognizing the importance of agency to form a family structure of one’s choice. Nevertheless, commending monogamous marriage as the bedrock of society ignored the extensive history of unequal gender relations and women’s subordination both legally and socially in the institution of heterosexual marriage.

His second reason for upholding the law rested on the harms to women living in polygamy. According to Justice Bauman, “Polygamy institutionalizes gender inequality,” warranting its criminalization.<sup>45</sup> There is rich irony here: Bauman’s reasoning sought to combat gender inequality by proscribing polygamy, but it simultaneously trumpeted the benefits of monogamous marriage without any critique of its problematic legacy of heteronormativity (Coontz 2005). And while Bauman acknowledged the harms that many polygynous women experience, he did not perceive them to be victims of these harms. Rather than reinterpret the law to explicitly address exploitative polygyny, as proposed by West Coast LEAF, Justice Bauman decided to maintain women’s criminality as individuals who are actually perpetuating the harms of polygyny. He stated: “I question whether the capable consenting [polygynous] spouse is a ‘victim.’ To the contrary, she

<sup>42</sup> *Ibid.*, at para. 982.

<sup>43</sup> *Ibid.*, at para. 1036.

<sup>44</sup> *Ibid.*, at para. 1037.

<sup>45</sup> *Ibid.*, at para. 12.

can be seen to be facilitating an arrangement which Parliament views as harmful to society generally.”<sup>46</sup> Seeking to protect the rights of children, he did reinterpret the law in its application to children between the ages of fourteen and seventeen who will not be prosecuted for living in polygyny.

Ultimately and paradoxically, Justice Bauman’s recognition of polygynous women’s sexual agency became a means of social control to reinforce their criminality unless they choose to leave their husbands and families. The Canadian Polyamory Advocacy Association, although on the choice side, supported this carceral reasoning. In the end, the polygamy case uncovers how, within the legal landscape, social control is tied to a contradictory conception of women’s sexual agency: it subscribes to the radical feminist argument for the need to protect women, yet it acknowledges agency, but only for the purpose of criminalizing women.

### **Conclusion: Carceral endings**

The comparison between the prostitution and polygamy cases in Canada sheds light on the consequences of contemporary legal battles over women’s sexual agency. Feminist actors in the two cases were sharply divided over whether women were vulnerable subjects in need of protection or autonomous agents able to choose their circumstances. Feminists from the danger stance viewed women in prostitution and polygamy as passive victims, bereft of agency. To protect the vulnerable women at the center of both cases, danger stance feminists proffered an alternative to the moral framework embraced by the actors they collaborated with, who wanted a form of criminalization inclusive of the women implicated. These arguments failed: in both cases the justices attributed agency to the actors that was lacking in the danger stance arguments. These interventions exposed the difficulties for feminists who follow a path of carceral politics to combat women’s oppression.

The feminist organizations that sought continued criminalization of prostitution and polygamy were strange bedfellows with the Christian groups that espoused the need to protect family values by combating the societal harms of prostitution and shielding monogamous marriage from the harms of polygamy. The danger stance arguments did little to contest the broader moral judgment attached to the procriminalization side of the case. The justices in the prostitution case rejected the moral argument and found that criminalization harmed the agency of vulnerable women.

<sup>46</sup> *Ibid.*, at para. 1197.

In the polygamy case, the justice dismissed the idea that polygynous women could be victims. These outcomes suggest a need for caution on the part of feminists whose goal is to protect the rights of populations at risk of being stigmatized and oppressed. In legal cases that engage issues relevant to the feminist sex wars, it may be that arguments recognizing women's sexual agency are more effective for the ultimate outcome of sexual justice (Kaplan 1997).

From the choice stance, the prostitution case represented a victory. The justices at all stages viewed the case in a framework of sex worker rights rather than regarding prostitution as an exploitative practice under which women have little choice. Ultimately, the justices rejected the idea that sex work is inherently violent, but they also recognized numerous ways in which prostitution is and can be associated with violence. Confirming the partial agency of sex workers, the justices evaluated the conditions of sex workers' environment in terms of being violent or safe, degrading or empowering, and struck down the criminal laws. This victory, however, was fleeting. Following the Supreme Court ruling in December 2013, the government introduced Bill C-36, the Protection of Communities and Exploited Persons Act, which came into effect on December 6, 2014. It closely resembled the asymmetrical approach that the women's alliance supported in the prostitution case, criminalizing activities that make indoor prostitution unviable and restricting open communication with clients. There has been significant controversy over this bill, particularly from sex workers and sex-work advocacy groups, which charge that it reintroduces the very harms that the judgment of the Canadian Supreme Court sought to eradicate. This outcome shines light on the power of carceral politics in contemporary democracies. Ultimately, it puts into question the conditions under which sexual justice can be won.

The polygamy case was also a victory for carceral politics. The justice drew a boundary between "good" and "bad" polygamy, where nonsanctioned polyamory and multiparty relationships fit into the "charmed circle" of hierarchies of sexual value in Canadian society, and polygyny represents a violation outside this circle, marked as abnormal and detestable (Rubin 1984, 281). Certainly, polygyny is problematic from a feminist perspective in its embrace of patriarchal sexual relations and gender inequality. However, the fact that the justice endorsed the importance of monogamous marriage as a way to combat these harms illuminates the unintended consequences of carceral feminism. The justice relied on both conservative moral and biological evolutionary perspectives to justify the need to criminalize polygamy. Both of these lines of reasoning are antithetical to the theoretical commitments of most feminisms. The justice



easily tethered perceptions concerning the importance of gender equality in Canadian society to moral convictions concerning monogamy and its evolutionary superiority. Finally, the justice dismissed the voices of the polygynous women who testified during the trial and held them out as criminals who sought to harm society (Ashley 2014).

Our analysis of these two cases points to some fundamental problems that emerge from feminist conflicts over women's sexual agency. The danger stance exemplifies an overt form of silencing women's voices, including making allegations of false consciousness and deploying stereotypes implying that women in prostitution and polygamy have limited self-knowledge and judgment. This stance also employs legal discourses of caring that speak to "saving" women from being prostituted or trapped in polygamy, ultimately denying women's sexual agency. While both the danger and choice stances have as a goal sexual justice for women, we argue that true justice can only be reached when the voices of the women implicated in this carceral form of politics are respected. Our findings suggest that the embrace of danger-oriented legal arguments to combat sexual violence and harms not only perpetuates sex-war dynamics within feminist movements that can cloud the path to fighting oppression, it also facilitates victories for socially conservative forces that empower the state to regulate sexual practices, in this case by sanctioning the ideal of monogamous marriage as a necessary component of democracy. This outcome is *dangerous* to feminist goals of sexual justice.

## Appendix A

### Cases

*Bedford v. Canada*, 2010 ONSC 4264, 102 OR (3d).

*Canada (AG) v. Bedford*, 2012 ONCA 186.

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

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

## Appendix B

### Opening Statements: Reference re: Section 293 of the Criminal Code

Beyond Borders (BB). 2010. Opening statement submitted to the Supreme Court of British Columbia.

British Columbia Civil Liberties Association (BCCLA). 2010. Opening statement on breach submitted to the Supreme Court of British Columbia.

British Columbia Teacher's Federation (BCTF). 2010. Opening statement submitted to the Supreme Court of British Columbia.

- Canadian Association of the Freedom of Expression (CAFE). 2010. An outline of a position submitted to the Supreme Court of British Columbia.
- Canadian Coalition for the Rights of Children and the David Asper Centre for Constitutional Rights. 2010. Statement of position submitted to the Supreme Court of British Columbia.
- Canadian Polyamory Advocacy Association (CPAA). 2010. Opening statement on Charter Section 1 submitted to the Supreme Court of British Columbia.
- Christian Legal Fellowship (CLF). 2010. Opening statement submitted to the Supreme Court of British Columbia.
- Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS). 2010. Opening statement submitted to the Supreme Court of British Columbia.
- Realistic, Equal, Active, for Life (REAL) Women of Canada (RWC). 2010. Opening statement submitted to the Supreme Court of British Columbia.
- Stop Polygamy in Canada (SPC). 2010. Opening statement submitted to the Supreme Court of British Columbia.
- West Coast LEAF (LEAF). 2010. Opening statement submitted to the Supreme Court of British Columbia.

## Appendix C

### **Factums: *Canada (AG) v. Bedford***

- Aboriginal Legal Services of Toronto Inc. 2013. Submitted to the Supreme Court of Canada.
- Attorney General of Canada. 2009. Submitted to the Ontario Superior Court of Justice.
- AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution. 2013. Submitted to the Supreme Court of Canada.
- British Columbia Civil Liberties Association (BCCLA). 2011. Submitted to the Ontario Court of Appeals.
- British Columbia Civil Liberties Association (BCCLA). 2013. Submitted to the Supreme Court of Canada.
- Canadian Civil Liberties Association (CCLA). 2011. Submitted to the Ontario Court of Appeals.
- Canadian HIV/AIDS Legal Network and the British Columbia Centre for Excellence in HIV/AIDS. 2011. Submitted to the Ontario Court of Appeals.
- Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, and HIV & AIDS Legal Clinic of Ontario. 2013. Submitted to the Supreme Court of Canada.
- Christian Legal Fellowship, REAL Women of Canada, and the Catholic Civil Rights League (CLF et al.). 2011. Submitted to the Ontario Court of Appeals.
- Christian Legal Fellowship, Catholic Civic Rights League, and REAL Women of Canada (CLF et al.). 2013. Submitted to the Supreme Court of Canada.
- David Asper Centre for Constitutional Rights. 2013. Submitted to the Supreme Court of Canada.
- Downtown Eastside Sex Workers United Against Violence Society, PACE Society, and Pivot Legal Society. 2013. Submitted to the Supreme Court of Canada.

Institut Simone de Beauvoir. 2013. Submitted to the Supreme Court of Canada.  
 PACE Society, SWUAV, and Pivot Legal Society. 2011. Submitted to the Ontario Court of Appeals.  
 POWER and Maggie's. 2012. Submitted to the Ontario Court of Appeals.  
 Secretariat of the Joint United Nations Programme on HIV/AIDS. 2013. Submitted to the Supreme Court of Canada.  
 Women's Coalition. 2011. Submitted to the Ontario Court of Appeals.  
 Women's Coalition. 2013. Submitted to the Supreme Court of Canada.

*Department of Sociology*  
*McMaster University* (Heath and Gouweloos)

*Department of Epidemiology and Biostatistics*  
*Western University* (Braimoh)

## References

- Abrams, Kathryn. 1995. "Sex Wars Redux: Agency and Coercion, Feminist Legal Theory." *Columbia Law Review* 95(2):304–76.
- Agustín, Laura María. 2007. *Sex at the Margins: Migration, Labour Markets and the Rescue Industry*. London: Zed.
- Ashley, Sean Matthew. 2014. "Sincere but Naive: Methodological Queries Concerning the British Columbia Polygamy Reference Trial." *Canadian Sociological Review* 51(4):325–42.
- Barton, Bernadette. 2002. "Dancing on the Möbius Strip: Challenging the Sex War Paradigm." *Gender and Society* 16(5):585–602.
- Bernstein, Elizabeth. 2010. "Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns." *Signs: Journal of Women in Culture and Society* 36(1):45–71.
- . 2012. "Carceral Politics as Gender Justice? The 'Traffic in Women' and Neoliberal Circuits of Crime, Sex, and Rights." *Theory and Society* 41(3):233–59.
- Canaday, Margot. 2011. *The Straight State: Sexuality and Citizenship in Twentieth-Century America*. Princeton, NJ: Princeton University Press.
- Chapkis, Wendy. 1997. *Live Sex Acts: Women Performing Erotic Labor*. New York: Routledge.
- Chuang, Janie A. 2010. "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy." *University of Pennsylvania Law Review* 158(6):1655–1728.
- Coontz, Stephanie. 2005. *Marriage, a History: From Obedience to Intimacy, or How Love Conquered Marriage*. New York: Viking.
- Davis, Adrienne D. 2010. "Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality." *Columbia Law Review* 110(8):1955–2046.

- DeLamater, John. 1981. "The Social Control of Sexuality." *Annual Review of Sociology* 7:263–90.
- Denov, Myriam, and Christine Gervais. 2007. "Negotiating (In)Security: Agency, Resistance, and Resourcefulness among Girls Formerly Associated with Sierra Leone's Revolutionary United Front." *Signs* 32(4):885–910.
- Duggan, Lisa, and Nan D. Hunter. 2006. *Sex Wars: Sexual Dissent and Political Culture*. New York: Routledge.
- Dworkin, Andrea. 1974. *Woman Hating*. New York: Dutton.
- . 1987. *Intercourse*. New York: Free Press.
- Ferguson, Ann, Ilene Philipson, Irene Diamond, Lee Quinby, Carol S. Vance, and Ann Barr Snitow. 1984. "Forum: The Feminist Sexuality Debates." *Signs* 10(1): 106–35.
- Fineman, Martha A. 1995. *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*. New York: Routledge.
- Halley, Janet, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas. 2006. "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism." *Harvard Journal of Law and Gender* 29(2):335–423.
- Hamilton, Marci. 2009. "The Two P's of Gender Inequality: Prostitution and Polygamy—How the Laws against Both Are Underenforced to Protect Men and Subjugate Women." *FindLaw*, July 9. <http://writ.news.findlaw.com/hamilton/20090709.html>.
- Heath, Melanie. 2012. *One Marriage under God: The Campaign to Promote Marriage in America*. New York: New York University Press.
- Jeffreys, Sheila. 1996. "Heterosexuality and the Desire for Gender." In *Theorising Heterosexuality: Telling It Straight*, ed. Diane Richardson, 75–90. Philadelphia: Open University Press.
- . 2009. *The Industrial Vagina: The Political Economy of the Global Sex Trade*. New York: Routledge.
- Kaplan, Morris. 1997. *Sexual Justice: Democratic Citizenship and the Politics of Desire*. New York: Routledge.
- MacKinnon, Catharine. 1989. *Toward a Feminist Theory of the State*. Cambridge, MA: Harvard University Press.
- O'Connell Davidson, Julia. 2002. "The Rights and Wrongs of Prostitution." *Hypatia* 17(2):84–98.
- Overall, Christine. 1992. "What's Wrong with Prostitution? Evaluating Sex Work." *Signs* 17(4):705–24.
- Rubin, Gayle. 1984. "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." In *Pleasure and Danger: Exploring Female Sexuality*, ed. Carole S. Vance, 267–319. Boston: Routledge & Kegan Paul.
- Schaffner, Laurie. 2005. "Capacity, Consent, and the Construction of Adulthood." In *Regulating Sex: The Politics of Intimacy and the Politics of Identity*, ed. Elizabeth Bernstein and Laurie Schaffner, 189–207. New York: Routledge.

- Showden, Carisa R. 2012. "Theorising Maybe: A Feminist/Queer Theory Convergence." *Feminist Theory* 13(1):3–25.
- Strauss, Gregg. 2012. "Is Polygamy Inherently Unequal?" *Ethics* 122(3):516–44.
- Strossen, Nadine. 2012. "Foreword." In *America's War on Sex: The Continuing Attack on Law, Lust, and Liberty*, ed. Marty Klein, ix–xv. Santa Barbara, CA: ABC-CLIO.
- Thomson, Rachel. 2004. "'An Adult Thing'? Young People's Perspectives on the Heterosexual Age of Consent." *Sexualities* 7(2):133–49.
- Vance, Carol. 1984. "Epilogue." In *Pleasure and Danger: Exploring Female Sexuality*, 431–40. Boston: Routledge & Kegan Paul.
- Wardlow, Holly. 2004. "Anger, Economy, and Female Agency: Problematizing 'Prostitution' and 'Sex Work' among the Huli of Papua New Guinea." *Signs* 29 (4):1017–40.
- Whittier, Nancy. 2014. "Rethinking Coalitions: Anti-Pornography Feminists, Conservatives, and Relationships between Collaborative Adversarial Movements." *Social Problems* 61(2):175–93.