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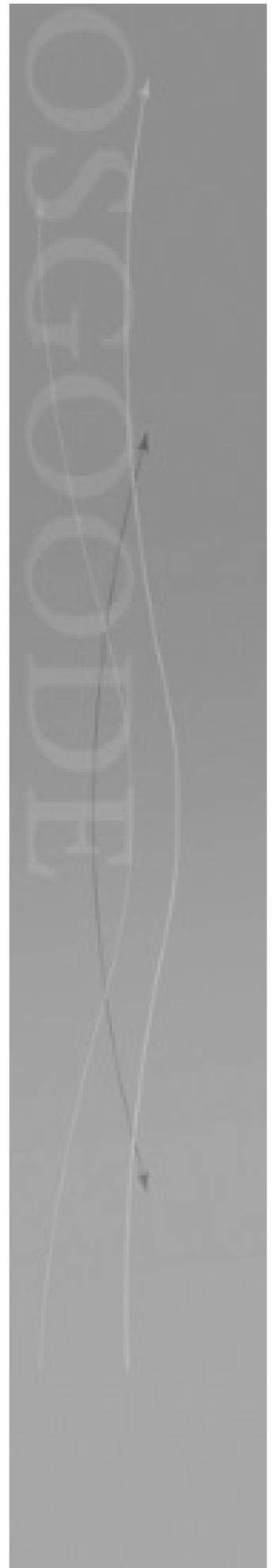
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Comparative Research in
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Polygamy and the Predicament of Contemporary Criminal Law

Benjamin L. Berger^{*}

This chapter takes a step back from the substantive debate of whether polygamy ought to be prohibited by the criminal law, asking instead what the debate on this issue discloses about the predicament of contemporary criminal law itself. There is much of interest to be said in a sociological vein about the lives of those in polygamous family units, observations that may have normative implications for the criminal law.¹ There are also many jurisprudential questions with which advocates and the courts will have to engage to decide the practical question of the constitutionality of a criminal law proscribing polygamy, including the limits of freedom of religion and the reach and interpretation of equality protections; and there is no dearth of writing identifying, examining, and sometimes staking out positions on those issues.² Much of the scholarly conversation revolves around identifying hypocrisies and unexamined assumptions in the criminalization of polygamy³ or debating harms that inhere in the practise of polygamy.⁴

^{*} Associate Professor, Osgoode Hall Law School, York University. I am grateful to Hamar Foster, John Borrows, and Janna Promislow for their discussions about, and comments on, earlier drafts of this piece. Thank you also to the editors of this volume, Gillian Calder and Lori Beaman, for their suggestions and guidance. Finally, I am indebted to Claire Truesdale and Ilona Cairns for their invaluable research assistance.

¹ See, e.g., Angela Campbell, "Bountiful Voices" (2008) 47 Osgoode Hall L.J. 183.

² See, e.g., Cheshire Calhoun, "Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy" (2005) 42 San Diego L. Rev. 1023; Nick Bala, "Why Canada's Prohibition of Polygamy is Constitutionally Valid and Sound Social Policy" (2009) 25:2 Can J Fam L 165; Benjamin L. Berger, "Moral Judgment, Criminal Law, and the Constitutional Protection of Religion" (2008) 40 SCLR (2d) 514.

³ See, e.g., Susan Drummond, "Polygamy's Inscrutable Criminal Mischief" (2009) 47 Osgoode Hall L.J. 317; Shayna M. Sigman, "Everything Lawyers Know About Polygamy is Wrong" (2006) 16 Cornell J. L. and Pub. Pol'y 101.

This paper will focus, instead, on the unacknowledged role that the debate about polygamy has had in exposing a crucial fault line within the structure of contemporary criminal law itself.

This piece is propelled by two observations about the current debate regarding the constitutionality of the prohibition of polygamy in Canada's *Criminal Code*.⁵ The first and most important is of the tremendous and disproportionate degree of anxiety that surrounds the debate over the polygamy prohibition in Canada. Section 293 of the *Criminal Code* has lain substantially fallow in its long life in Canadian criminal law, producing precious few prosecutions.⁶ Similarly, the evidence suggests that the practice of polygamy is still a marginal phenomenon. The community that has been at the centre of the debate in recent years, the Fundamentalist Latter Day Saints (FLDS) community in Bountiful, British Columbia, is a small group that, despite the criminal prohibition, has carried on its polygamous ways for decades with a wink and a nod from officials and from the small number of Canadians aware of the community's existence. Yet now that the issue has been reactivated by a zealous Attorney General in British Columbia,⁷ the issue of the criminalization of polygamy has stirred a storm of public and academic

⁴ See, e.g., Bala, *supra* note 2; Stephen A. Kent, "A Matter of Principle: Fundamentalist Mormon Polygamy, Children, and Human Rights Debates" (2006) 10:1 *Nova Religio* 7; Lori G. Beaman, "Response: Who Decides? Harm, Polygamy and Limits on Freedom" (2006) 10:1 *Nova Religio* 43.

⁵ RSC 1985, c C-46, s 293.

⁶ Bala, *supra* note 2 at 183, cites only two reported convictions for polygamy, both at the turn of the 20th century and both involving an Aboriginal accused. For a brief history of s. 293 of the *Criminal Code*, see Berger, "Moral Judgment," *supra* note 2 at 544.

⁷ In 2007 then-Attorney General Wally Oppal began a process of serially asking special prosecutors or appointed Crown Counsel to evaluate whether charges of polygamy ought to be laid against leaders in Bountiful. Having received a negative answer on a number of occasions, he finally obtained the answer for which he was looking, only to have the courts bounce the charges on the basis that Attorney General Oppal had acted outside the scope of the law (*R. v. Blackmore*, 2009 BCSC 1299). The whole episode is reminiscent of a scene in Robert Bolt's *A Man For All Seasons*, in which the Duke of Norfolk comes to Thomas More advising More that Henry VIII will be seeking More's view on divorce. Having already provided his view, More replies, "But he's had his answer." "He wants another," the Duke replies.

debate, much of it characterized by a sense of enormous stakes and a high degree of anxiety.

A second curious feature of the debate concerns who it is that one finds defending the criminal prohibition against polygamy. Amongst those supporting the law are two odd compatriots. On the one hand, one finds moral conservatives defending the use of the criminal law in this situation. Although the feminist debate on the issue is characteristically complex and positions divided,⁸ one also finds, on the other hand, that another powerful set of those defending prohibitions on polygamy do so from a foundation based in a strong line of feminist legal argument.⁹ The distance between the substantive views that energize these two sets of commentators makes the convergence of their arguments and efforts on this issue somewhat perplexing. Is this a mere coincidence or is there some principled connection between these two camps on the issue of the criminalization of polygamy? One might call this second observation the “strange bedfellows” puzzle.

The argument of this chapter is that polygamy has emerged as an issue with a particular capacity to expose a certain vulnerability at the heart of contemporary criminal law. Specifically, the debate over the constitutionality of the criminal prohibition on polygamy points to a metaphysical shortfall that afflicts contemporary criminal law. This “shortfall” or gap is not something to be patched or remediated; it is, rather, at the heart of the predicament of criminal law under the liberal culture of the constitutional rule of

⁸ See, e.g., Michèle Alexandre, "Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility" (2007) 18 *Hastings Women's L.J.* 3; Joan Iversen, "Feminist Implications of Mormon Polygyny" (1984) 10:3 *Feminist Studies* 505.

⁹ See, e.g., Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999); Beverley Baines, "Equality's Nemesis?" (2006) 5 *JL & Equality* 57. One account of a feminist argument against polygyny is given in Rebecca J. Cook and Lisa M. Kelly, *Polygyny and Canada's Obligations Under International Human Rights Law*, prepared for the Department of Justice Canada (Ottawa: Family, Children and Youth Section, 2006), part II(a).

law. If true, the nature of this vulnerability offers an answer to why polygamy has bred such anxiety and may also offer some insight into the awkward consortium of defenders of the criminal prohibition.

Ethics, Metaphysics, and the Criminal Law

Clifford Geertz begins his celebrated essay on the interpretive anthropological approach to understanding religion with a crucial lesson. Pushing back on certain instincts in the study of religion, Geertz admonishes that “[r]eligion is never merely metaphysics.”¹⁰ “The holy,” he explains, “bears within it everywhere a sense of intrinsic obligation: it not only encourages devotion, it demands it; it not only induces intellectual assent, it enforces emotional commitment.”¹¹ Geertz is arguing that religion cannot be understood simply as a set of beliefs about the way the world is. Beliefs impel certain norms of conduct: “that which is set apart as more than mundane is inevitably considered to have far-reaching implications for the direction of human conduct.”¹² Yet the inverse is equally true, and this point is crucial to this chapter:

Never merely metaphysics, religion is never merely ethics either. The source of its moral vitality is conceived to lie in the fidelity with which it expresses the fundamental nature of reality. The powerfully coercive ‘ought’ is felt to grow out of a comprehensive factual ‘is,’ and in such a way religion grounds the most specific requirements of human action in the most general contexts of human existence.¹³

For the purpose of the study of religion, Geertz goes on to translate this connection between ethics and metaphysics into a parallel pairing of ethos and worldview. Religion

¹⁰ Clifford Geertz, "Ethos, World View, and the Analysis of Sacred Symbols" in *The Interpretation of Cultures* (New York: Basic Books, 1973) 126 at 126.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

is not a set of normative rules or prescriptions for conduct (ethics/ethos) distinct from a set of beliefs about the way the world is (metaphysics/worldview). Nor can the worldview dimensions of religion be severed from the ethos that it arouses and vitalizes. For Geertz, the two sides of this equation mutually support (in his terms, “confirm”) one another. Consider his explanation:

[T]he ethos is made intellectually reasonable by being shown to represent a way of life implied by the actual state of affairs which the world view describes, and the world view is made emotionally acceptable by being presented as an image of an actual state of affairs of which such a way of life is an authentic expression.¹⁴

Geertz insists that this mutually supportive relationship between ethics and metaphysics is the key to understanding religion as a cultural system. This ineluctable union between ethics (ethos) and metaphysics (worldview) is a structural truth that, he asserts, characterizes all religions: “This demonstration of a meaningful relation between the values a people holds and the general order of existence within which it finds itself is an essential element in all religions, however those values or that order be conceived.”¹⁵ Geertz posits this structural relationship between ethics and metaphysics – the mutual reliance of the “ought” and the “is” for a coherent culture – in the context of a discussion of religion. Yet religion is, for Geertz, simply one manifestation of a broader conceptual category, that of “cultural system.”

The contemporary rule of law is also a cultural system.¹⁶ Much of my work has explored the insights that can be gained about the nature of modern constitutionalism, and

¹⁴ Ibid at 127.

¹⁵ Ibid.

¹⁶ See Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago and London: University of Chicago Press, 1999); Paul W. Kahn, *Putting Liberalism in its Place* (Princeton: Princeton University Press, 2005). Geertz would seem to concur with this understanding of law. See Clifford Geertz, “Local Knowledge: Fact and Law in Comparative Perspective” in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) 167.

in particular its relationship with religion, by taking seriously its cultural nature.¹⁷ Law, too, is a set of symbols and meanings, combined with a set of practices and rituals, that helps to make sense of and orient oneself within the world. If there is truth in this claim, then one must grapple with the relevance of Geertz's key point about the interrelationship between ethics and metaphysics necessary to sustain a culture for the understanding of law. In so doing, the criminal law occupies a special position inasmuch as it represents the most insistent and violent expression of an ethical system within the legal order. Within the culture of law's rule, criminal law is ethos writ large. The "ought" expressed in the criminal law is supported by the liberty-suspending violence of the state and represents the sharp edge of the legal relationship between community and individual;¹⁸ it is, indeed, a "powerfully coercive ought". The interesting but generally unexamined question for a cultural understanding of the criminal law begins to come into focus. Does there exist an "is" that supports this "ought"? Does an ethical system of criminal law not also depend on a mutually supportive relationship with metaphysics? Geertz argues that the metaphysical or ontological is necessary to make the ethical "intellectually reasonable" and it does so by justifying the ethical demand in a claim about the way that the world is. An ethical demand bereft of some such grounding in a claim about the way things are appears to us as simply "arbitrary" and the rule of law has an antipathy towards the arbitrary. This is one way of understanding Berman's claim that "[e]very legal system shares with religion certain elements – ritual, tradition, authority, and universality

¹⁷ See, e.g., Benjamin L. Berger, "Law's Religion: Rendering Culture" (2007) 45:2 Osgoode Hall L.J. 277; Benjamin L. Berger, "The Cultural Limits of Legal Tolerance" (2008) 21:2 Can. J. L. & Jur. 245.

¹⁸ As Reginald Allen wrote in Reginald Allen, "The Trial of Socrates: A Study in the Morality of the Criminal Process" in Martin L. Friedland ed., *Courts and Trials: A Multidisciplinary Approach* (Toronto: University of Toronto Press, 1975) 3 at 4, "[i]t is in the criminal process that law and government most narrowly touch, beneficently and also dangerously, the lives of the governed. And it is here that instinct and passion beat hardest on rationality and restraint."

– which are needed to symbolize and educate men’s legal emotions. Otherwise law degenerates into legalism.”¹⁹ There would appear to be no reason to imagine that the criminal law is uniquely exempt from Geertz’s structural observation about the relationship between ethics and metaphysics.

It might appear odd – or a philosophical indulgence – to posit the need for an ontological backing to the criminal law. Our debates about the criminal law rarely seem to turn on or even engage metaphysical questions. Yet I would argue that this rarity is simply the product of the fact that most criminal prohibitions rely upon ontologies that are either not substantially contested or are the subject of such extensive overlap among different ontologies that the metaphysical questions are not exposed. There might be significant difference, for example, on the metaphysical shape and stakes of the prohibition on murder, but the degree of consensus on the ethical result occludes the fact of these differences in worldview. It tends to be in matters of “morals legislation” that serious contestation of ontological issues takes place; indeed, it might be plausible to define “morals legislation” in the criminal law as none other than those instances in which the law’s coherence most clearly turns on the existence of a claim or position on metaphysical or ontological questions. And with this reference to morals legislation one sees that, in fact, criminal law theory has been more attentive to this problem of the relationship between ethics and metaphysics than we might normally acknowledge – the issue is right under the noses of those concerned with the criminal law.

The Hart-Devlin debate about morals legislation can be productively understood as a debate about this link between ethics and metaphysics. Devlin’s position that the

¹⁹ Harold Berman, *The Interaction of Law and Religion* (Nashville and New York: Abingdon Press, 1974) at 49.

criminal law is justified in prohibiting conduct if it is supported by the views of the “man on the Clapham omnibus” is really the assertion that the ethics of criminal law demand support from a worldview or ontology and that the adequate source of that backing can be found in a certain degree of societal consensus.²⁰ Hart’s reply is not to deny the need for this link between ethics and metaphysics to ground justifiable criminal law; rather – and this brings us closer to the rub – his answer is essentially that the only acceptable ontological foundation for a liberal criminal law is harm, unacceptable as it is for the liberal rule of law in a plural society to wade into and take positions on other metaphysical debates.²¹

The fly in the ointment regarding this link between ethics and metaphysics in the criminal law is the political culture of liberalism. If a metaphysical question at the root of a criminal law is exposed, the liberal culture of law’s rule arguably lacks the resources and most certainly lacks the appetite to answer.²² To take a position on a fraught question of worldview is antithetical to the self-understanding of the liberal rule of law. It may indeed be that a good deal of freedom is to be found in a political culture that is committed to this kind of self-understanding. But without necessarily denying the salutary effects of such a posture, if one carries forward the ideas developed in Geertz’s

²⁰ See Patrick Devlin, "Morals and the Criminal Law" in *The Enforcement of Morals* (London, Oxford and New York: Oxford University Press, 1965) 1.

²¹ See H. L. A. Hart, *Law, Liberty, and Morality* (London: Oxford University Press, 1966); H. L. A. Hart, "Immorality and Treason" in Richard A. Wasserstrom ed., *Morality and the Law* (Belmont, Cal.: Wadsworth Publishing, 1971) 48. For an interesting critique of Hart’s positivism, see Stephen Wexler, "The Moral Confusions in Positivism, Utilitarianism and Liberalism" (1985) 30 *Am J Juris* 121. The heart of Wexler’s analysis is well explained at page 123: “Law is a special sort of enterprise and the positivist distinction between law and morals, far from helping us to understand that enterprise, forces us to miss one of the most characteristic things about it: namely, that the people who engage in it believe they are engaged in a moral enterprise. This is not just a psychological point; it is a conceptual point. In order to be doing what we would call ‘law,’ a judge has to believe (or more properly, convince us that he believes) that he is engaged in a moral enterprise.”

²² Drawing from Wendy Brown’s work, I refer elsewhere to law’s commitment to its own neutrality as the “conceit” of law’s autonomy from culture. See Berger, “Cultural Limits”, *supra* note 17. See also Kahn, *Putting Liberalism in its Place*, *supra* note 16.

thought, an ethics with an unanswered metaphysics lacks a necessary coherence. Viewed in this way, there is a certain political danger surrounding criminal law in the contemporary culture of law's rule. It may be that coherent support for certain criminal laws demands the taking of an ontological stance, something that criminal law in a cultural of political liberalism cannot or will not do. To raise the question of the constitutionality – the normative justifiability in a legal order – of a criminal law dependant on such contested metaphysical foundations exposes a certain fragility in our ethical order, an order in which the criminal law has played an essential role.

In *English Speaking Justice*, George Grant calls this fragility “the terrifying darkness which has fallen upon modern justice.”²³ And in his inimitably challenging way, George Grant offers a sterling and provocative example of the dynamic that I am describing. In his famous analysis of the decision in *Roe v. Wade*,²⁴ Grant concludes that the case “raise[d] a cup of poison to the lips of liberalism.”²⁵ “The poison,” Grant explains, “is presented in the unthought ontology. In negating the right to existence for foetuses of less than six months, the judge has to say what foetuses are not.”²⁶ To adjudicate on the issue of abortion raised questions for which “contractual liberalism” does not have the resources to answer. In addressing the issue of abortion, with its central and unavoidable question of the ontological status of the foetus, Grant concludes that “[t]he judge unwittingly looses the terrible question: has the long tradition of liberal right any support in what human beings in fact are? Is this a question that in the modern era can be truthfully answered in the positive? Or does it hand the cup of poison to our

²³ George Grant, *English-Speaking Justice* (Toronto: House of Anansi Press, 1998 [1974]) at 86.

²⁴ 410 US 113 (1973).

²⁵ Grant, *supra* note 23 at 71.

²⁶ *Ibid.* at 71.

liberalism?”²⁷ Despite the enormous conceptual and political differences between the two thinkers, Geertz and Grant are on the same page here in their insistence on the cultural demand for a metaphysics that can make our ethics feel “intellectually reasonable.” We are not often met with this fraught dynamic in the criminal law. Grant, again, provides evocative assistance as to why these matters tend to stay out of our view... and when they show themselves:

The need to justify modern liberal justice has been kept in the wings of our English-speaking drama by our power and the strength of our tradition. In such events as the decision on abortion it begins to walk upon the stage.²⁸

The argument of this chapter is that the anxiety apparent in debates about polygamy can be traced to the fact that the criminalization of polygamy is another such question that gives this troubling justificatory demand its cue.

How Polygamy Raises the Ontological Question

This chapter is ultimately interested in what debates about the crime of polygamy disclose about the modern predicament of the criminal law. Drawing inspiration from Geertz and Grant, I have been exploring the idea that there is a necessary link between ethics and metaphysics, between rule and worldview, that is infrequently examined in our criminal law but structurally indispensable. Polygamy gives us a valuable line of sight into this foundational link because it places contested questions of ontology or metaphysics on the table in an atmosphere inhospitable and even hostile to such questions and without the inclination or resources to answer them. But in what way does polygamy put questions of ontology in the criminal law squarely before us?

²⁷ Ibid. at 71-72.

²⁸ Ibid. at 73.

One obvious form of answer would be to jump directly to the observation that in the debate over the constitutional status of polygamy one finds competing viewpoints expressed by religious communities. These religions hold complete and thick metaphysical positions that lead them to differ on the ethical status of polygamy. By way of example, one might gesture easily to the obvious chasm between the commitments arising from the religious beliefs of the FLDS, on the one hand, and those of the Roman Catholic Church, on the other. Though evident, this is too ready an answer – one that is both under-reflective of the scope of the problem with which I am concerned and insufficiently precise. Of interest here is that the debate over polygamy is not just a question of a clash between religious worldviews or between a metaphysically pregnant set of religious views and a comparatively arid secular understanding of criminalization. Gesturing easily to religion or religious difference simply does not capture the scope of the anxiety surrounding the issue of polygamy and it carves off the (sometimes emphatically) non-religious perspectives with considerable ontological investments in the polygamy debate. The deep contours of the polygamy issue in the criminal law are not centrally about religious difference.

If not explicable as a simple matter of a clash between a secular criminal law and religious perspectives, or a duel among religions for capture of the criminal law, what ontological questions – what questions about the “is” – does the criminalization of polygamy activate? I will point to two such questions, the answers to which carry substantial stakes for contemporary society.

(a) Marriage and the Family

First, and perhaps most obviously, the debate over polygamy puts on the table the metaphysical status of marriage and the family. The existence of a criminal law prohibiting polygamy is, for many involved in the debate, implicated in a project of protecting a conception of “the family.”²⁹ One can find expression of this view wherever one finds arguments supporting the criminalization of polygamy on the basis that it is not a “normal” or “natural” expression of family life. Packed into such arguments is a claim that there is, in fact, an ontologically identifiable and definable shape of a family and that the state has a legitimate interest in deploying the powerfully coercive “ought” of the criminal law in protection and preservation of this unit of social structure. In its most traditional expression, of course, this metaphysical family that the law has a role in preserving is the heterosexual nuclear family, with monogamous marriage serving as the foundational relationship that sustains and replicates this structure.

To claim that the legal status of marriage and the family raises ontological concerns for the law may not be intuitive. Yet legal history supports the view that marriage was not conceived of as a creation of the law but, rather, as a natural concept that served as a foundation for political, social and legal structures. Otherwise put, metaphysical commitments about the family not only precede the legal but have implications for the legal and political. This is the relationship between worldview and ethos posited by Geertz. The shape and even content of the legal is made comprehensible and acceptable by its congruence with worldview. Mark Walters explains that common and civil-law legal thinkers like Blackstone and Pufendorf understood the relationship

²⁹ For discussions of the role of Christianity in influencing modern conceptions of marriage and the family in Canada, see Robert Leckey, “Profane Matrimony” (2006) 21:2 CJLS 1; Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008).

between husband and wife as “founded in nature”,³⁰ one way of stating that this relationship formed part of an assumed ontology. For these foundational thinkers, “marriage was originally a pre-political, or natural, state in which men and women united for the purpose of having and raising children.”³¹ Marriage and the family of the historically normative form had a factual status with implications for the social and political order, an ontological reality marked by its status as part of the “natural law” that had ethical implications for human law and political society. Matrimony “furnishes, as it were, the material for the establishment of governments and states”.³²

In his book, *The Police Power*,³³ Markus Dubber offers a provocative example of this influence of a vision of the family and familial authority on modern legal governance. In Dubber’s analysis, the household and the patriarchal authority of the father serves as the ontological model for the exercise of the central power of government – the police power – which, as a “mode, or mentality, of governance spread across the entirety of criminal law.”³⁴ There is perhaps no better example of the manner in which the “is” implies an “ought” in the fabric of our legal history. Blackstone himself made this link, speaking at one point about the common law governing offences against the state as concerned with

the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to confirm their general behaviour to the rules of propriety, good

³⁰ Mark D. Walters, "Incorporating Common Law into the Constitution of Canada: *EGALE v. Canada* and the Status of Marriage" (2003) 41 Osgoode Hall LJ 75 at 90, quoting Blackstone.

³¹ Ibid at 94.

³² Ibid at 95, quoting Pufendorf.

³³ Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005).

³⁴ Ibid at 171.

neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.³⁵

In Dubber's analysis, the historical influence of the ontology of the household was sufficiently central and potent to generate a robust political and legal ethos, chiefly through the conditioning of the police power, upon which the criminal law is based.

Yet the ontology of the family has undergone stress, testing, and deep questioning in recent years. As Gillian Calder explains, "Canadians find themselves at a unique historical moment where consciousness about the way that law defines family, and particularly marriage, is heightened."³⁶ There is, of course, a social and legal coming to terms with the fact of divorce and the consequent impacts on the shape of the family. To some extent these changes have been absorbed into a margin of appreciation around the nuclear heterosexual family, an absorption that may even serve to shore up the foundational commitment. But the pressures on any stable definition of the family as a metaphysical concept have mounted from a number of sources, not least of which is the legal recognition of same-sex marriage.³⁷ The debate around same sex marriage was in many ways a debate about the ontological status of the family. Would the law adopt the view that marriage *is* between a man and a woman? Would it denounce any pre-legal conception of marriage and the family? Ultimately, Parliament and the Courts did the liberally predictable thing; in contrast to its historical roots, it refused to endorse a notion of the family embedded in a given worldview; and without that metaphysical

³⁵ William Blackstone, *Commentaries on the Laws of England*, vol. 4 (1769) at 162. Cited in Dubber, *supra* note 33 at xii.

³⁶ Gillian Calder, "Penguins and Polyamory: Using Law and Film to Explore the Essence of Marriage in Canadian Family Law" (2009) 21 C.J.W.L. 55 at 72.

³⁷ See Drummond, *supra* note 3 at 323-324, in which she describes these pressures on changes to the traditional family form and concludes that "the contemporary range of sexual and familial diversity deprives *functional* conjugality of the bright-line coherence that it might have once had in an era where the range of 'normal' families was quite narrow."

commitment, there was ultimately no backing for an exclusionary norm of marriage. To be sure, the law sought to leave space for multiple conceptions of marriage to flourish.³⁸ Yet if we take as inalienable the dialectic between metaphysics and ethics, one can easily see why those committed to a particular pre-legal, pre-political understanding of marriage took this shift as an ontological defeat – a rejection of their metaphysics.

Any pre-political definition of the family would be suspect in a liberally dedicated criminal law, which ought not to assume any position on the ontological status of the family or of marriage. To do so is to wade into the messy world of metaphysics – the liberally poisonous atmosphere of comprehensive doctrines. No position should be taken on the “is” of the family form, yet the crime of polygamy puts us face to face with a remnant of the traditional ontology of the family – monogamy.³⁹ The crime of polygamy thus opens up a point of ontological uncertainty – is there an assumed sense of the family that the crime of polygamy protects? Debate over polygamy becomes an occasion to once again take up arms over questions of metaphysics. This is one way in which polygamy puts the ontological question on the table for the criminal law and does so in a provocatively unique manner. Compare the crime of polygamy to the crimes of assault, theft, or murder. There may be strong differences amongst various worldviews on why each of these acts is wrong, positions backed by radically different metaphysics. Yet the object of criminal protection – the body, property – is not itself ontologically uncertain. Polygamy presents a very different dilemma. In a real, unique, and provocative way, at stake in debates about the crime of polygamy is the ontological status of marriage and the

³⁸ *Reference re: Same-Sex Marriage*, [2004] 3 S.C.R. 698.

³⁹ For an interesting discussion of the relationship between conceptions of monogamy and reactions to polygamy, see Elizabeth F. Emens, "Monogamy's Law: Compulsory Monogamy and Polyamorous Existence" (2004) 29 NYU Rev L & Soc Change 277.

family. If the family *is* a structure based on monogamous union, a crime of polygamy makes a certain sense;⁴⁰ if this ontology is false, the crime loses coherence. But this is a question that can't be answered without going off-side in the liberal game, particularly when the coercive force of the state will align itself behind the answer; and consider what an inability or unwillingness to answer means for the criminal law – a gap in the account of why this powerfully coercive ethics is intelligible and acceptable: a worrisome crack in the justificatory eggshell.

(b) The Nature of Harm

A reader will immediately observe that a claim about the protection of a “natural” family form is not the only basis for a justification or defence of the crime of polygamy. Independent of or agnostic to any claims about a natural or essential family form, one might say that polygamy creates certain social harms, harms that justify the criminalization of polygamy. When it isn't about the nature of the family unity, much of the debate on polygamy is about just this point: does polygamy produce harms that justify the deployment of the force of the criminal law? Measured against metaphysical claims about the nature of the family, the appeal of a debate cast in terms of harm is apparent. Reaching back to Mill, the language of “harm” has seemed to offer peaceful ontological ground on which to discuss claims about the use of the coercive force of the state. Yet, as I will explain, this promise has proved misleading in other issues involving contested notions of harm.⁴¹ On close inspection, claims about the harms of polygamy depend on

⁴⁰ Although, of course, the choice of the criminal law as the tool for enforcing this ontology raises its own set of questions.

⁴¹ I discuss the relationship between debates about the harms of polygamy to broader questions of criminal law theory in Berger, “Moral Judgment”, *supra* note 2, esp. 530-535 and 543-550.

controversial claims regarding the “is” no less than arguments based on defence of marriage or the family form.

To satisfyingly underwrite this particular criminal prohibition, these identified harms cannot be ones addressed by other crimes such as child abuse or sexual interference with a minor. To adequately fuel the ethic, one must find a harm occasioned by polygamy itself; and my claim is that the pursuit of such a harm is, in its nature, a matter of worldview and ontology. In most areas of the criminal law, questions of harm pose few metaphysical questions. The harm of stabbing another involves no elements whose factual status are at issue. The existence or reality of something called physical harm or property damage is never seriously contested. But the nature of morals legislation involves an inherent opaqueness or contestability with respect to whether a certain kind of harm can be said to exist. This opaqueness around questions of harm is at the heart of foundational debates on the limits of the criminal law, again as evidenced in the Hart-Devlin debate.⁴² In contrast to Hart, who was wary of the potential for tyranny implicit in such claims and insisted on the narrower and more traditional liberal definition of harm as involving concrete harm to others,⁴³ Devlin imagined that there was a category of things called “harm to society” or “harms to community” that could buoy the criminal law.⁴⁴ Those who seek to identify the unique harm of polygamy point to communicative harm or social harm of a different variety. Polygamy, this argument holds, involves an intrinsic communicative harm regarding the dignity and equality of women. Independent of concrete physical harms, polygamy (chiefly practiced as polygyny) visits a social harm by supporting a view of women as subservient to men and

⁴² See text accompanying notes 20 and 21, above.

⁴³ Hart, *supra* note 21.

⁴⁴ Devlin, *supra* note 20.

unequal in their political and social status.⁴⁵ The claim is that polygamy thus creates a real harm in the world, a harm that, once recognized as real, supports or even demands remedy through the criminal law. Once again one sees the reciprocal relationship between ethics and ontology.

The acceptance of this kind of claim regarding the communicative and social harms of pornography was the great victory of a particular feminist argument in *R. v. Butler*,⁴⁶ in which the Supreme Court of Canada accepted that pornography and obscenity might give rise to social harm of a form cognizable by the criminal law. Independent of any concrete physical harm, obscenity could create attitudinal harm inconsistent with the proper functioning of society. In so holding, the Court followed the structure of reasoning urged by a feminist perspective best reflected in the work of Catharine MacKinnon.⁴⁷ I am suggesting that this was, at base, an ontological victory. It was the legal recognition *as real* something whose metaphysical status was deeply contested – a certain form of harm.

In recent years, the harm principle has become the lodestar for discussion about the proper limits of the criminal law. The question of the legalization of marijuana was debated and ultimately decided on the basis of whether it causes harm.⁴⁸ The harm principle has dethroned the older “community standards of tolerance” test in matters of criminal obscenity and indecency.⁴⁹ But the harm principle is ultimately vacuous and

⁴⁵ See, e.g., Bala, *supra* note 2 at 169: “Polygamy is inherently an unequal relationship, exploitative of women, and contrary to fundamental Canadian values.” See also Baines, *supra* note 9; Susan Deller Ross, “Polygyny as a Violation of Women’s Right to Equality in Marriage: An Historical, Comparative and International Human Rights Overview” (2002) 24 *Delhi L Rev* 22.

⁴⁶ [1992] 1 S.C.R. 452.

⁴⁷ Catharine A. MacKinnon, “Pornography, Civil Rights, and Speech” (1985) 20 *Harv CR-CLL Rev* 1; Catharine A. MacKinnon, “Pornography as Defamation and Discrimination” (1991) 71 *BUL Rev* 793.

⁴⁸ *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571 [*Malmo-Levine*].

⁴⁹ *R. v. Labaye*, [2005] 3 S.C.R. 728 [*Labaye*].

debate about it decides little of interest. As Bernard Harcourt has convincingly argued, what “counts” as harm depends upon one’s normative perspective.⁵⁰ Debates cast in the idiom of harm attempt to hold off normative and interpretive questions by burying them under the second-order issue of what “counts” as a harm.⁵¹ One might therefore call debates about harm a form of “proxy debate”: a form of legal discourse apparently sanitized of the fraught reality of cultural and normative difference. Such debates are stand-ins for normative debates that employ the language of harm because of its acceptability within liberal political culture, as contrasted with the inadmissibility of debates about fundamental values. But perhaps it is more accurate or precise to say that they are proxy debates because they stand in for debates about worldview, about ontology and metaphysics. What one regards as a real harm is a metaphysical question embedded, to evoke Geertz’s language, in the web of a larger worldview.⁵²

When one argues from a perspective committed to the existence of the communicative, inegalitarian, and anti-social harms of polygamy, one is taking a fundamentally ontological position. This ontological position-taking is no different in kind than the sort never much interrogated (for obvious reasons) in the case of the physical harms of murder or the psychological harms of stalking. The difference lies in the extent to which we see how deeply worldview is at play when the harms of polygamy

⁵⁰ Bernard E. Harcourt, "The Collapse of the Harm Principle" (1999) 90:1 J. Crim. L. & Criminology 109. For a discussion of the relationship between debates about harm and religious freedom, see Lori G. Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver: UBC Press, 2008).

⁵¹ See Berger, “Moral Judgment”, *supra* note 2 at 532. Another way of characterizing this same point would be to say that reliance on the harm principle nevertheless leaves open the question of the *magnitude* or *seriousness* of harm necessary to warrant criminal sanction. See Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley and London: University of California Press, 1995) at 211. Brudner’s position is that “disrespect for another’s freedom.... and not the infliction of harm is the gravamen of crime.”

⁵² See Dan M. Kahan *et al.*, "Fear of Democracy: A Cultural Evaluation of Sunstein on Risk" (2006) 119:4 Harv. L. Rev. 1071.

are on the table. When the non-physical harms of polygamy are invoked in defence of the constitutionality of the offence, a position is being staked out on the ontological status of the social, of social harm, and the necessary implications for the criminal law. And here one finds the point of joining between the two essentially ontological questions that I suggest are placed in the light of day by the crime of polygamy. Whether founded on claims about non-physical harm or claims about the natural concept of the family, arguments about the ethical/legal status of the crime of polygamy can't help but engage us in deeply contested and fundamental questions about what "is". Polygamy thus exposes the criminal law as an ontological battleground with the real prospect of winners and losers. Just like invocations of the natural family, claims about the social harms of polygamy expose the prospect of an unanswered demand for ontological clarity to validate the powerfully coercive ethics of the criminal law. Quite uncomfortably within liberal political culture, the stakes of an argument about the harms of polygamy, and with this the constitutionality of the offence of polygamy, turn out to have an abiding metaphysical dimension.

The Polygamy Debate and the Structure of Criminal Law

At the outset of this chapter I identified two observations about the current debate regarding the constitutionality of the crime of polygamy. I suggested that these features of the debate called for some explanation. The first was the disproportionate anxiety that seems to have coalesced around the question of polygamy. Why, given its relative marginality as a social ill, has the status of the offence of polygamy drawn so much anxious debate? The second curious feature of the debate was what I called the "strange

bedfellows” problem. Lining up in support of the offence of polygamy one finds both a constellation of moral conservatives and a particular band of those on the left informed by one influential line of feminist legal argument. What accounts for this unlikely and no doubt uncomfortable coalition in defence of the crime of polygamy?

Focussing in on the relationship between ethics and metaphysics – and isolating the particular way in which the issue of polygamy gives the cue to ontological questions to walk upon the stage of political and legal debates – suggests certain answers to both of these questions.

The deep anxiety palpable around the constitutionality of the polygamy offence ceases to be quite so mysterious. At stake for those engaged in the polygamy debate is no less than the collective acceptance of certain basic ontological commitments. The extent to which metaphysical assumptions matter to the coherence of law is frequently – even generally – hidden by a substantial degree of overlapping consensus on the ultimate ethical principle. This ethical agreement masks the diversity, disparity, and even conflict among the various worldviews that are increasingly a feature of our deeply pluralistic society. The anxiety generated by the polygamy debate may be partly generated by the issue’s capacity to expose the degree of ontological uncertainty that exists behind contemporary law. Given the sharp way in which polygamy lays bare certain fundamental but contested assumptions about the order of things, the issue serves as an occasion for us to wonder about the extent of our consensus on essential ontological questions and to ask what degree of such consensus is necessary to bind us as together as a community – or at least what degree is necessary to have a legal system that is more than the formalism of an ethics without a metaphysics. If Grant is correct that liberal

political culture has lost the resources necessary to answer the very ontological questions that it poses, the result of this reflection may well be unsettling. Of course, the anxiety is compounded for those with a vested interest in a particular ontological claim engaged by polygamy, be it a claim about the “is” of the family or of social harm. For them the stakes may seem particularly high – the possible rejection of their metaphysical assumptions. And with this one also finds a solution to the strange bedfellows puzzle. Despite widely divergent or even competing normative or political visions that make for very different accounts of how they arrived there, those for whom the crime of polygamy is the natural expression of an ontological truth will find themselves standing, if awkwardly, shoulder to shoulder. Viewed in this light, finding communitarians of a certain orientation lined up on the same side of the polygamy issues as religious and moral conservatives seems utterly unremarkable.

Yet the ultimate goal of this chapter has been to explore what polygamy may disclose to us about the modern predicament of criminal law.

The criminal law that we have inherited is the child of the 19th century, a time in which those with settled and sometime fierce metaphysical convictions wielded the criminal law in unabashed support of their worldviews. In this era the criminal law took on a capacious moral role in society. And although we now inhabit a political culture of liberalism in which the conceit of metaphysical agnosticism is essential to law’s self-understanding,⁵³ our criminal law is simply not cut from the same cloth. Contemporary debates about polygamy reveal the extent to which we have an illiberal criminal law in

⁵³ Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton and Oxford: Princeton University Press, 2006) at 171: “The twin conceits of the autonomy of liberal legalism from culture and the autonomy of the self-willing and sovereign subject from culture enable liberal legalism’s unique positioning as fostering tolerance and liberal polities’ unique position as capable of brokering the tolerable.”

the midst of a political culture of liberalism. One need only flip open the *Criminal Code*, our somewhat updated late 19th century expression of ethics, to find offences that would sit comfortably in a late Victorian British elite context of largely shared basic metaphysics. Today, however, those offences – of which polygamy is no doubt one – present deep conceptual quandaries for governance in an ontologically diverse society.

Let me be clear in my view that there is great freedom to be won in the release from collective ontologies enforced by the state. There is a real good here, particularly in deeply plural societies. But as a theoretical question about criminal law as a mode of governance, release from these kinds of shared metaphysics poses certain very thorny problems. If there is any wisdom in what Geertz says about the nature of culture, if there is any truth in Grant's observations about the troubling state of a justice system that lacks the resources to answer the ontological questions that it itself poses, then is modern criminal law facing the predicament of attempting to be an ethics without a metaphysics? In effect, the ethical question – should polygamy be criminally prohibited? – serves as an access point into an ontological uncertainty that afflicts modern criminal law generally, posing a question that I'm not certain we have yet squarely asked and we have certainly not answered: what becomes of the limits of the criminal law as our sense of a shared ontology thins?

Conclusion: The Predicament of Modern Criminal Law

Debates about the offence of polygamy can thus serve as a valuable window into something important about the contemporary condition of criminal law. There is a metaphysical gap at its base, an ontological uncertainty under which it secretly labours.

When consensus on its ethical imperatives wavers and they are pushed back to look for the grounding in an ontology or worldview, there appears an abiding uncertainty, one that the political culture of liberalism in which the criminal law is embedded is philosophically averse to resolving. The criminal law shows an understandable timorousness about assertions of the “general order of existence”, assertions that Geertz nevertheless posits as essential to the coherence of the powerfully coercive “ought”. There is much of interest to explore about the history, the social location, and the ethical status of polygamy. When understood in the terms that I have suggested, the very richness of this debate – the extent to which it engages a range of positions on ontological questions – gestures to a general fragility that sits behind the swaggering and phlegmatic exterior of the criminal law.

If one were to take this structural insight to heart, it would seem that two possibilities present for the criminal law at points of ontological uncertainty. One is to embrace the need for the law to make the kinds of claims that can make its ethics “intellectually reasonable”. This approach would affirm the powerfully communicative function of the criminal law as central to its modern social role. To do so would mean breaking from the conceits of modern legal liberalism and embracing a certain role of the criminal law in staking out and expressing ontological positions. The other response to this metaphysical gap in the criminal law would be to redouble fidelity to the liberal conceit, and to recognize a narrowed scope in which criminal law can operate in a deeply diverse society with satisfying answers to the “why” of its ethical admonitions. To do so would require that the criminal law stay its hand on matters of deep ethical contestation, leaving such issues to less violent tools at the disposal of the state, be they other legal

proscriptions or alternative governmental measures. Of course this alternative would grate on the prevalent and troubling contemporary political and social instinct to turn immediately to the criminal law to address all manner of social ills, *particularly* those that involve deep normative difference.

We are met with a crucial, if vexing, ethical choice: ontological courage that risks a form of moral colonialism in a deeply diverse society or modesty in the use of criminal law that would demand agnosticism on matters of ethical moment.

Paul Kahn begins his study of the political culture of liberalism and its relationship to the culture of law's rule with a crucial insight about the central problematic in contemporary law and politics:

Every age has its own point of access to ethical and political deliberation. For us, that point is the problem of cultural pluralism. Lacking a conviction in the absolute truth of our own beliefs and practices, we are uncertain how to respond to those who live by different norms. We are all too aware that such differences exist, as we interact with cultures that put different values on life and death, family and society, religion and the state, men and women. We constantly confront the question of whether some of the practices supported by these values are beyond the limits of our own commitment to a liberal moral philosophy and a political practice of tolerance. We worry about moral cowardice when we fail to respond critically, and about cultural imperialism when we do respond.⁵⁴

Contemporary debates on polygamy show that this conundrum afflicts the criminal law as it does all parts of our political and legal culture. It is a problem posed and exacerbated by cultural pluralism; it is also a problem at the structural base of our criminal law. There is perhaps no question more important to contemporary criminal law than the question of its justified limits; and yet there is no path through this question that can bypass the relationship between metaphysics and ethics.

⁵⁴ Kahn, *Putting Liberalism in its Place*, *supra* note 16 at 1.