J.S. Mill & Mormon Polygamy in the Canadian Context

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Abstract: This paper examines the legal treatment of Mormon polygamy in Canadian society through the lens of John Stuart Mill’s *theory of liberty*. It outlines the essential elements of his theory, and compares his response to the practice with those of modern liberal societies. The author argues that although the Canadian criminal prohibition on polygamy adequately reflects the “harm principle” in Mill’s theory, it undermines the individuality of those who consensually engage in the practice. The paper suggests that the Canadian legislation on polygamy ought to balance regulation of the harm that often stems from the practice with respect for the individuality of those who consent to such unions. The author recommends a number of ways in which the Canadian government’s approach to the practice can conform with the liberal principles of Mill’s theory.

Keywords: J.S. Mill, theory of liberty, Mormon polygamy, harm principle, Canadian Charter

John Stuart Mill’s theory of liberty provides a critical lens through which to analyze legislation in contemporary liberal societies. Mill’s theory provides an interesting assessment of the issue of polygamy, since this matter demands a discussion on the limit of state intervention in individual actions. As they did in Mill’s time, modern liberal states have confronted the polygamy that is practiced by members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS), a branch of Mormonism. The criminal prohibitions on polygamy in Canada and the U.S. have prompted these communities to become insular in order to protect this fundamental tenet of their faith. In 2011, the B.C. Supreme Court upheld the constitutionality of the Canadian polygamy prohibition. This ruling revived the issue as a vibrant political question in Canada and provided the most comprehensive judicial assessment of polygamy of any modern liberal society. Although the Canadian criminal prohibition on polygamy adequately reflects the harm principle in Mill’s theory of liberty, it undermines the individuality of those who consensually engage in the practice. The Canadian legislation on polygamy ought to balance regulation of the harm that often stems from the practice with respect for the individuality of those who consent to such unions.

Before entering into a discussion of polygamy in the Canadian context, it is worth considering the fundamental principles of Mill’s theory of liberty. Mill begins *On Liberty* by declaring that the subject of his essay is social liberty, that is, “the nature and limits of the power which can be legitimately exercised by society over the individual.” Mill notes that in ancient times, limits on the power of authoritarian rulers were essential to protect the liberty of their subjects. However, he suggests that modern democratic governments also require limits to prevent the “tyranny of the majority” from suppressing the liberty of
individuals. Renowned legal theorist H.L.A. Hart has suggested that “Mill’s essay On Liberty ... was a powerful plea for a clearheaded appreciation of the dangers that accompany the benefits of democratic rule.” Mill’s definition of liberty provides the basis for his argument against state-intervention in personal affairs. He describes liberty as “pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.” He contends that “[t]here is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.” It is the practical question of where to place this limit that Mill addresses in his theory of liberty. Mill’s theory of liberty is therefore intended to adjudicate the limit of state intervention in the lives of individuals in a liberal society.

To establish the limit on which state intervention in an individual’s actions is justified, Mill makes the distinction between self-regarding and other-regarding actions. Self-regarding actions are actions that only affect their agent, and therefore must not be impeded by state interference. Over these actions, “the individual is sovereign.” He suggests that distasteful self-regarding actions must be left to the informal domain of social censure, in which society can reproach the actions it finds unpleasant and express its preferences for acceptable behaviour. Social censure can take the form of snubbing those who engage in objectionable actions or participating in public campaigns to condemn their actions, but he contends that coercion is never an acceptable response to such actions. He argues that it is only actions that affect others in which the state ought to play a role in regulating. These other-regarding actions can again be divided into two groups: those that are benign or beneficial to others, and those that are harmful to others. Mill notes that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” Again, he contends that social censure is the appropriate response to other-regarding actions that inflict no harm on others, but that society may nonetheless find undesirable. State intervention, on the other hand, is only justifiable where harm is present. More specifically, he suggests that the state ought only to intervene when an individual’s actions harm the “permanent interests” of others; that is, the vital things to peoples’ well-being that everyone has a permanent interest in protecting. Mill’s description of permanent interests includes the liberal values of security, life, liberty, individuality, and property – fundamental elements that are necessary in order to live fulfilling lives. Although Mill does not believe that these are natural rights, he contends that permanent interests ought to be constituted as rights in law. Once integrated as rights in positive law, the state can use its coercive powers to protect the permanent interests of all individuals. He makes no distinction on the grounds of race, religion or gender—the rights of all individuals are to be equally respected and protected. Mill’s parsimonious account of the limit of state intervention in individual actions is often described as the “harm principle,” a fundamental element of his theory of liberty that is exceptionally relevant to the discussion of polygamy in liberal societies.

Finally, Mill’s account of individuality is also a notable aspect of his theory of liberty that must be considered in a discussion on polygamy. He asserts that liberty is a necessary prerequisite to individuality because it provides the conditions in which individuals can freely express themselves. His concept of individuality rests on his belief that human nature has a capacity for self-development. He argues that individuals’ inward forces should be allowed to flourish, because
human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.

It is through permitting this self-development that individuals can maximize their potential and make choices about how to live their lives in ways that are meaningful to them. Mill describes the intrinsic worth of individuality when he writes that an individual’s “own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode.” He believes that individuality is fundamental to human happiness, but also describes how individuality is of utility to society. When individuals become more valuable to themselves, they also become “capable of being more valuable to others … [and] when there is more life in the units there is more in the mass which is composed of them.” Society can also benefit from learning of better ways of living from individuals who have tried them first. It is therefore important to “give the freest scope possible to uncustomary things, in order that it may in time appear which of these are fit to be converted into customs.”

Mill contends that individuality is therefore enormously valuable to both the individual and society. Considering the personal choice made in entering polygamous unions, it is an important angle from which to critique the legal restrictions on liberty.

Throughout On Liberty, Mill uses his theory of liberty to analyze a number of examples and make prescriptions about the appropriate level of state intervention in individual affairs. Famously, he used his theory of liberty to condemn criminal prohibitions on polygamy. During his time, the issue was fraught with controversy because the leaders of the Mormon Church in the United States - “believed by hundreds of thousands” - sanctioned the practice of polygamy. Although polygamy was widely known as a traditional practice in foreign cultures, it “seem[ed] to excite unquenchable animosity when practiced by persons who speak English, and profess to be a kind of Christians.” Mill believed this to be a clear example of the tyranny of the majority condemning marital arrangements outside of the status quo of monogamy. Although not personally in favour of the practice - he describes the power inequality that is inherent in polygamy as the “merely riveting of the chains of one half of the community, and an emancipation of the other from reciprocity of obligation towards them” - he nonetheless defends the practice on the grounds that those who enter polygamous marriages do so by choice. Mill therefore clearly frames polygamy as a self-regarding action that does not warrant state intervention. As long as those practicing polygamy do not “invoke assistance from other communities,” he believes that the American government should not require that a condition of things with which all who are directly interested appear to be satisfied, should be put an end to because it is a scandal to persons some thousands of miles distant, who have no part or concern in it.

Mill contends that American society can express its disdain for the practice through social censure, but that any coercive response on the part of the state to prohibit polygamy is not justified. His denunciation of state intervention in polygamy is therefore respectful of the individual choices made by those who engage in polygamous unions.
Although Mill does not actively consider the harm that stems from polygamy in his adjudication of the practice, his harm principle can, and in fact does, provide the primary justification for criminal prohibitions on polygamy in modern liberal societies. Since Mill’s harm principle has become a foundational tenet of criminal legislation in liberal societies such as Canada, their legislatures have enacted criminal prohibitions against polygamy that reflect the harm stemming from the practice. In 1886, the Canadian Parliament enacted *An Act respecting Offences relating to the Law of Marriage*, which included a criminal prohibition on bigamy. The wording of the ban on polygamy was “virtually identical”<sup>xviii</sup> to that of British law, suggesting its inheritance from Britain. When the Canadian Criminal Code was first consolidated in 1892, the bigamy prohibition from the previous Act was included. In 1951, a Royal Commission was tasked with updating and simplifying the Criminal Code, and as such the modern prohibition on polygamy was drafted. The current prohibition of polygamy is outlined in section 293 of the Criminal Code:

293(1) Everyone who
(a) practises or enters into or in any manner agrees or consents to practise or enter into
   i) any form of polygamy, or
   ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage; or
(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.<sup>xi</sup>

In the 2011 B.C. Supreme Court ruling regarding the constitutionality of section 293, Chief Justice Robert Bauman suggested that the criminal prohibition on polygamy was in no way designed as an attack on the religious beliefs of the early Mormon settlers in Canada, but that it “was the practice of polygamy and the harms with which it was associated that concerned Canadian lawmakers.”<sup>xx</sup> In fact, in their opening remarks of the B.C. reference case, the Attorney General admitted that the Crown’s case against polygamy was all about harm. As Chief Justice Bauman explained, “[a]bsent harm, [the Crown] accepted that s. 293 would not survive scrutiny under the Charter.”<sup>xxi</sup> Criminal prohibitions on polygamy have therefore had a long history in Canadian law and have been defended on the basis that they prevent the harm that stems from the practice.

In affirming the constitutionality of the criminal prohibition on polygamy in its 2011 reference ruling, the B.C. Supreme Court delineated the nature of the harm that the practice inflicts on vulnerable victims. The Court found that the Attorney General “demonstrated ‘concrete evidence’ of harm” associated with polygamy, which informed its decision that the criminal prohibition on polygamy was justifiable in limiting Charter rights.<sup>xxii</sup> Perhaps two of the most profound ways that polygamy perpetuates harm is that it institutionalizes inequality within communities, and it causes both psychological and physical harm to the women and children involved in such relationships. Concerning the harmful dimension of inequality, it is important to note how polygamist arrangements often privilege the men in polygamist communities. As Julia Chamberlin and Amos N.
Guiora note in their paper, “Polygamy: Not Big Love, But Significant Harm”, polygamy creates a natural power imbalance by

[structuring] the marital relationship unequally on the basis of sex. A core right - the right to take additional spouses - is extended to one spouse (the husband), but not the other (the wife). This asymmetry is premised on sex and sex role stereotypes that ascribe to men and women different attributes and characteristics that ostensibly warrant an unequal distribution of rights and obligations in marriage.xxxi

The polygamy practiced by FLDS communities therefore institutionalizes power inequality in favour of males and severely restricts the liberty of women to choose their spouses. From their study, Chamberlin and Guiora also found that children in polygamous communities have greater “exposure to, and potential internalization of, harmful gender stereotypes,”xxxii perpetuating the oppression of women in these communities. Gender inequality is therefore integral to the power distribution in polygamist communities, and as a result severely impedes the equality of rights that Mill characterizes as a permanent interest.

The psychological and physical harm that polygamy inflicts on women and children was also of great concern to the Court in its 2011 ruling, and ought to be a central concern for any liberal state when creating legislation to deal with the matter. One of the central concerns of the Court was that polygamous arrangements prevent parents from forming meaningful relationships with their children, which threatens the emotional security of the children. The Court relied on testimony of many young adults who had fled from various polygamous communities to relate their experiences about their former lives. As one young adult explained:

I didn’t have a relationship with my dad. He didn’t know my name or who my mother was or even that I was his child unless I was in the house with him. And that was for 13 years that I lived with him.xxxv

As another witness stated, “I felt very lost in the family. Like a number more than, you know, a valuable member of it.”xxxvi This testimony suggests that polygamy clearly impedes parents from effectively caring for the emotional security of their children. Both Mill and modern liberal states would undoubtedly encourage state intervention in these cases to remedy the egregious failure of parents to care for their children. In addition, the “lost boys” phenomenon that is prevalent in polygamous communities also harshly derails the emotional security of young men. The asymmetrical nature of polygamous communities encourages the banishment of young men in order to reduce competition for young brides. As Chamberlin and Guiora found, the FLDS community often justifies this banishment by “[explaining] to the boys that they have failed to meet the rigorous FLDS religious standards.”xxxvii Upon banishment from their communities, these boys are homeless and struggle to legally provide for themselves because they are minors. Their indoctrination with religiously extreme values also impedes their socialization into society, and “[u]ltimately they face a difficult and dangerous road as they attempt to raise themselves and survive in a world they are ill-equipped to face.”xxxviii In terms of physical harm, the child bride phenomenon often found in polygamous communities has adverse effects on the health of young girls. Since the asymmetry of polygamous arrangements
requires more women to be involved in the unions, the demand for brides extends to younger and younger women. As Chamberlin and Guiora note, “the resultant early sexual activity, pregnancies and childbirth have negative health implications for girls.” Although Mill only ever explicitly discusses physical harm throughout On Liberty, his theory needs no significant adjustment to acknowledge the harmful effects of polygamy on both the psychological and physical security of children born into such arrangements. The B.C. Supreme Court gave serious attention to the various dimensions of harm that polygamy inflicts on vulnerable victims in order to justify the constitutionality of the criminal prohibition against polygamy. In this regard, the current Canadian judicial evaluation of polygamy is consistent with Mill’s harm principle, and in fact refines it by considering the psychological harm that stems from the practice.

Although the current criminal prohibition on polygamy in Canada is based on Mill’s harm principle, its overbearing nature ironically renders it ineffective in preventing the harm that stems from the practice. In reality, liberal states are hesitant to pursue polygamy charges because it inevitably draws them into debates about the appropriate limit of state intervention in religious practices – a sensitivity evident in Mill’s own assessment of the law. In the Canadian context, polygamists are rarely prosecuted. Indeed, the polygamy charges pressed against James Oler and Winston Blackmore were not laid until 2007, when the RCMP had known about Bountiful’s polygamous unions for decades. As journalist Stephanie Levitz suggested at the time, the Canadian government had never previously taken action against Bountiful’s polygamists because it was “fearful that the law against polygamy would be overturned by an argument that the law against it violates the Charter.” The B.C. Supreme Court reference ruling was an attempt to clarify if the legislation did, in fact, infringe on Charter rights after the charges against the two men were stayed. As Chamberlin and Guiora suggest, “the state’s failure to act, in an institutionalized manner, results in an overall failure to protect the vulnerable.”

The Canadian government’s failure to intervene to prevent the harm that polygamy inflicts on vulnerable victims would surely be characterized as negligent by Mill, as the various dimensions of harm that are evident undoubtedly justify state intervention according to his theory. The current overbearing prohibition on polygamy is, in fact, an inadequate response to the harm of polygamy because it encourages ignorance of polygamy to avoid conflict rather than taking a proactive approach to managing the harm that stems from the practice.

In order to better deal with the issue of polygamy, liberal states such as Canada ought to consider the individuality of polygamists in their legislative responses to the practice. Those who consent to polygamous unions often do so because it is a foundational tenet of their religion. For example, the FLDS doctrine of plural marriage is linked to a notion of celestial marriage, “according to which men and women who obey the covenant on plural marriage … will become gods of their own heavenly kingdoms and principalities after death.” For both the men and women who enter polygamous relationships, religious commitment rather than love is the primary motivation, which speaks to the significance of religious beliefs in informing their life choices. In his description of individuality, Mill is critical of the role of religion in dictating the life choices of individuals, and believes that this stifles individuality. Mill’s criticisms of the authoritarian nature of Calvinism could certainly be extended to the religious doctrines of the FLDS that espouse polygamy. However, as Bruce Baum suggests in his paper “Feminism, Liberalism, and Cultural Pluralism: J.S. Mill on Mormon Polygyny”, those who enter polygamous unions are “voluntary participants in a meaningful sense,” and
engage in rational decision-making within the context of their religious beliefs. And, the philosopher Peter Jones adds, both Mill and liberal societies need to recognize that “[w]hat constitutes ‘flourishing’ and ‘fulfillment’ for individuals or groups must be tied to their fundamental beliefs.” Mill’s description of how religion restricts individuality therefore fails to consider how obedience to FLDS doctrine is integral to the individuality of devout Mormons. The Canadian law should also be more considerate of the significance of polygamy to the individuality of those who consensually engage in the practice.

To diminish the harm that stems from polygamy while respecting the individuality of those who engage in the practice, liberal states should adopt legislative strategies to satisfy both considerations. Perhaps the best way to do this is to introduce legislation that decriminalizes polygamy while regulating the practice to ensure that it does not inflict harm on vulnerable victims. As Bruce Baum suggests, Mill qualifies his support of polygamy with a few “striking conditions,” some of which could be useful to modern liberal states in formulating their approach to regulating the practice. First, Mill contends that polygamous relations must be “as much voluntary on the part of the women concerned in it ... as is the case with any other form of the marriage institution.” He also insists that polygamous communities must “allow perfect freedom of departure to those dissatisfied with their ways.” In this spirit, perhaps the Canadian state could regulate polygamy through ensuring that women entering into such unions do so by choice without coercion from others in their communities, and with an informed knowledge of the harms associated with the practice. The state should also ensure that participants in polygamous unions can easily walk away from the practice. In the case of preventing harm towards children, the state should actively enforce the monitoring of family situations to ensure that polygamist parents provide adequate care for their children, including conformity to education laws. The decriminalization of polygamy could, in fact, help to erase the stigma associated with the practice, encouraging the victims of harm to reach out to the state for help when necessary. There are certainly ways in which liberal states can limit the harm that stems from polygamy while respecting the individual choices of those who consent to polygamous unions. Although implementation of such policies will inevitably prove to be a challenge, it is this legislative response to the issue that is most consistent with Mill’s theory of liberty.

Although Mill’s harm principle provides the basis for the current criminal prohibition on polygamy, the B.C. judiciary has enhanced this principle by considering not only the physical, but also the psychological nature of harm that stems from the practice. However, liberal states should also consider Mill’s concept of individuality, and refine that concept further by taking into account how religion is fundamental to the individuality of devout Mormons who practice polygamy. Aside from promoting a more liberal approach to the issue, lifting the criminal prohibition on polygamy while providing regulation of the unions could actually produce many benefits for both polygamists and to Canadian society. Polygamous communities would no longer have to remain insular in order to protect themselves from state intervention in this fundamental aspect of their faith. This in itself could eradicate many of the harms associated with polygamy by promoting greater socialization of its members into Canadian liberal society. By respecting the individuality of polygamists, the Canadian state could also encourage their integration as productive members of society, something that Mill would surely commend.
Mill’s theory of liberty therefore provides an excellent framework through which to analyze the issue of polygamy in the Canadian legal context, and could have a number of positive implications if fully applied to legislation concerning the practice. However, the Canadian Conservative government has recently proposed new legislation, entitled the *Zero Tolerance for Barbaric Cultural Practices Act*, which threatens immigrant polygamists with deportation. Clearly, given this attempt to further ostracize polygamists, it is not likely that Canadians will see a legislative response to the issue that is consistent with Mill’s theory of liberty any time soon.

**Bibliography**


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