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Polygamy, State Racism, and the Return of Barbarism: The Coloniality of Evolutionary Psychology

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ABSTRACT *This article examines the race-thinking and colonial reasoning circulating in two recent developments in Canadian law with respect to polygamous marriage: the* Polygamy Reference *(2011) that upheld the Criminal Code provision on polygamy and the* Zero Tolerance for Barbaric Cultural Practices Act *(2015). This legislation introduced changes to Canada's immigration regulations, which include the practice of polygamy as a basis for refusing foreign applicants and deporting foreign nationals. I address how insights from the field of evolutionary psychology were applied in the* Polygamy Reference *and what discursive and material resonances they had in the* Zero Tolerance Act*. Drawing on the work of Sylvia Wynter, I situate these judicial and legal developments in relation to violence, within colonial formations of state power, and as forces supporting white supremacy through the continuing valorization of monogamy as a foundational aspect of social and sexual citizenship in Canada.*

KEYWORDS polygamy; Canada; immigration; evolutionary psychology; coloniality; racism

> You see and feel modernity, it is announced, it is promoted, it is celebrated, it is full of promises. Coloniality is more difficult to see. Modernity's storytelling hides it. But it is felt, it is felt by people who do not fit the celebratory frames and expectations of modernity. (Mignolo, 2016, p. vii)

To mark Canada's 150th year of Confederation, Canada Post issued a "marriage equality" stamp, the fourth in a set of 10 that were unveiled throughout 2017 and showcased select moments of white settler nation-

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making over the past 50 years.[1] This particular stamp commemorates the passage of the *Civil Marriage Act*, which legalized same-sex marriage across Canada in 2005. Stylized in the shape of a maple leaf, its visual centre consists of a rainbow flag with the words "Canada 150" to its right and "Marriage Equality" in both French and English directly below. Celebrating this specific legal reform, the stamp exemplifies a particular kind of Canadian (homo)nationalism that prides itself on its tolerance of sexual and gender diversity and imagines Canada (and Canadians) as inclusive, benevolent, and modern. As a commodity that enables the cross-border travel of paper and packages, this stamp is a metonym for Canada as a safe haven in the face of homophobia elsewhere, not here, and so participates in "modernity's storytelling" (Mignolo, 2016, p. vii). Yet the stamp does more than this; it also captures, in its negative space, the penalization and subjugation of difference and the suppression of resistance that have made monogamy the only "lawful" union and form of conjugal relations worthy of recognition by the state.

Attending to this context, and particularly to the state repudiation of non-monogamous unions, this article examines two developments in Canadian law that are coextensive with same-sex marriage equality and continue to set limits on the types of conjugal unions that can be recognized and legally tolerated in Canada. The 2011 decision of the Supreme Court of British Columbia (Reference, 2011; hereinafter the *Polygamy Reference*) upheld 19th century Criminal Code provisions on polygamy, while Bill S-7 (*Zero Tolerance for Barbaric Cultural Practices Act*, 2015; hereinafter the *Zero Tolerance Act*) introduced changes to Canada's immigration regulations to include the practice of polygamy as a basis for refusing foreign applicants and deporting foreign nationals. This article highlights what Sylvia Wynter (2003) calls the "coloniality of being, of power" that circulates in both judicial and legislative formations of polygamy to double down on the primacy accorded to monogamous marriage as a marker of a nation's cultural and political identity as white and civilized. My particular interest here is how historically intractable racist sentiments are engaged to demonize polygamy through the colonial logic of "barbarism," so as to mark its fundamental difference from monogamy and its incompatibility with national identity.

I begin by discussing the role played by the relatively new field of evolutionary psychology in the *Polygamy Reference*. Its insights were employed to dismiss feminist expert evidence; to vault over the histories of racial animus that undergird anti-polygamy law in Canada while

[1] Other commemorative stamps include depictions of Expo 67, the Charter of Rights & Freedoms, the Canadarm, the Trans-Canada Highway, and Terry Fox's Marathon of Hope (Canada Post, n.d.).

simultaneously reinvesting in racism to do so; and, concomitantly, to usher in a "coloniality of power" that seeks to racially stratify for the purpose of domination. Evolutionary psychology is a knowledge-for-domination project that is sourced from colonial logics and marks racial difference as a signifier of cultural difference. That evolutionary psychology appeared as common sense in a 21st century Canadian courtroom is disconcerting and should give those of us dreaming of and working towards social justice tremendous pause: What knowledge formations were galvanized in the name of gender equality and women's rights?

Three years after the Criminal Code provisions on polygamy were upheld as constitutional in the *Polygamy Reference*, the federal government introduced legislation that ostensibly protected Canadians from "barbaric cultural practices." The second part of the article, then, provides an overview of the *Zero Tolerance Act* and some of its material effects. I contend that the lexicon and colonial grammar of evolutionary psychology mediates both the intent and materiality of this Act, even while it is not clearly identified as an operating frame.

To accomplish these goals, I draw on two key concepts from Sylvia Wynter's (2003) work: the "coloniality of being" and the "coloniality of power." She describes the "coloniality of being" as the overrepresentation of a Western bourgeois conception of Man, an exclusionary mode of being human that denies Others the ontological status of "human" (2003, p. 282). The "coloniality of power" refers to Western and colonial knowledge systems that produce social stratifications for the purposes of domination, replete as they are "with an imperial bend, a will to objectivity and truth" (Mignolo, 2014, p. 110; Wynter, 2003). In short, I argue throughout this paper that the state's use of evolutionary psychology structurally embeds the violence of racism into law by reviving a racial taxonomy of human populations and perpetuating a 19th century understanding of racial-cum-cultural difference. It becomes knowledge in the service of colonial formations of state power and a force supporting white supremacy in the continual valorization of monogamy as a foundational aspect of social and sexual citizenship in Canada.

In offering an analysis of the work evolutionary psychology does in the *Polygamy Reference* and its discursive traces in the *Zero Tolerance Act*, this paper contributes to scholarly literature in Canada that demonstrates the imbrication of colonial race-thinking in the legal treatment of polygamy (e.g., Carter, 2008; Denike, 2010, 2014; Lenon, 2015; Rambukkana, 2015) and contributes a race-critical analysis of the regulation of polygamous marriage to socio-legal and political science literatures (Calder & Beaman, 2014; Campbell, 2013; Campbell et al., 2005; Gaucher, 2016, 2018). This paper's analysis of Canadian juridical and legislative (re)positionings on polygamy's harms brings Mignolo's (2016) opening epigraph to life: through the celebration of monogamous marriage, against the necessary foil of the "barbaric practice" of polygamy, modernity is made visible; it is announced, it is promoted, it is celebrated. What remains critical is unmasking the

enduring structures of white supremacy on which the modernity of the prohibition of polygamy is built and experienced by those whose different marriage relations are targeted under the banner of equality and security. To all these literatures, then, this paper offers a meditation on the polysemous term "social justice" as racial justice, one that has not liberal humanism as its horizon but rather the abolition of the very conceptual frames of European/Canadian modernity that legitimize relations of dominance so as to imagine otherwise worlds, refashion new modes of relational logics, and reimagine a society without a colour line as arbiter of differentiated well-being.

Mesmerizing the Court: Evolutionary Psychology and the Criminalization of Polygamy

The residents of the community of Bountiful, British Columbia follow fundamentalist Mormon teachings of the Church of Latter Day Saints (LDS), including plural marriage as a central tenet of faith. Bountiful has long been the subject of police investigation. In the mid 2000s, the Attorney General of B.C. had actively sought advice from three different special prosecutors to determine whether the community's two competing leaders, Winston Blackmore and James Oler, could be charged for violating the Criminal Code's prohibition on polygamy (section 293) without such a charge being interpreted as violating their freedom of religion as guaranteed by the *Charter of Rights and Freedoms* (hereinafter, the *Charter*). Criminal charges were finally pressed against the two men in 2008 but these were subsequently dismissed in 2009 by the BC Supreme Court. It ruled that the Attorney General had been overly aggressive in its pursuit of a prosecution against Blackmore and Oler.[2] Instead of appealing this decision, the Attorney General tasked the Supreme Court of British Columbia with assessing the constitutional validity of section 293 through a *Reference* case.[3] The specific questions referred to the court were (i) Is section 293 of the Criminal Code of Canada consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?; and (ii) What are the necessary elements of the offence in section 293 of the Criminal Code of Canada? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?[4]

Several weeks of hearings in late 2010 and early 2011 featured arguments from a number of interested parties: the Attorney General of B.C. who

[2] See *Blackmore v. British Columbia (Attorney General)*, 2009.
[3] See *Criminal Code of Canada, Section 293,* 2011.
[4] See *Criminal Code of Canada, Section 293,* 2011, para 16.

defended the polygamy provision; the court-appointed *amicus curiae's* challenge to the law; Bountiful residents' testimonies about life in polygamous families; social scientists' and legal scholars' expert evidence; and 11 third-party interveners' testimonies and submissions.[5] Chief Justice Bauman, in a 300-plus page decision that was released in November 2011, found that, while section 293 did not infringe on freedom of expression, association, or equality rights, it did violate freedom of religion under section 2(a) of the *Charter*, and affected the section 7 liberty interests of children between 12 and 17 years of age who were married into polygamy. The Court, however, found these violations justifiable under section 1 of the *Charter* because of the intrinsic harms it understood polygamy to pose to women, children, society at large, and, perhaps most importantly, to the institution of monogamous marriage itself. With one small revision, namely that section 293 cannot criminalize minors who engage in plural marriage, Chief Justice Bauman held that Canada's anti-polygamy provision was valid and enforceable.

One particularly striking feature of the decision is its reliance on evolutionary science, specifically the field of evolutionary psychology, as the theoretical and methodological framework through which the harms of polygamy could be objectively identified and even quantified. Chief Justice Bauman began his review of the evidence of polygamy's harms "at the macro level of evolutionary psychology (simplistically, understanding current human behaviour by appreciating our evolutionary past)" (*Polygamy Reference*, 2011, par. 487). The expert evidence he draws on "posits that based on human mating psychology, certain harms are a predictable consequence of polygyny" (*Polygamy Reference*, 2011, par. 487).[6] Evolutionary psychology is a Darwinian approach to thinking about human inclinations in terms of historically evolved *tendencies* and adaptations (Tooby & Cosmides, 2005). Drawing from 19th century horizons of understanding and taking the past several millennia as its temporal field, this approach returns to the scene of reproduction, to sexual difference, sex selection, and reproductive success that have long been used to explain the evolved characteristics and behavioral traits of animals. Consequently, its proponents focus especially on "mating preferences" that ostensibly provide "reproductive advantage" through enhanced chances of genetic survival and proliferation in a competitive, hostile world. An approach to biological and

[5] The list included the B.C. Teachers Federation, Canadian Coalition for the Rights of the Child, Christian Legal Fellowship, David Asper Centre for Constitutional Rights, Real Women Canada, Stop Polygamy in Canada, and West Coast LEAF. For the *amicus curiae*, interveners included the B.C. Civil Liberties Association, Canadian Association for Free Expression, Canadian Polyamory Advocacy Association, and the Fundamentalist Church of Jesus Christ of Latter Day Saints.

[6] Polygamy is a kinship-family structure that contains both polygynous (one man, multiple women) and polyandrous (one woman, multiple men) forms. It is polygynous polygamy that is of central concern in this legal case.

physiological variation is brought to bear on social and political relations, historical contexts, cultural practices, and the individual and collective decisions through which we constitute norms. Underpinning this is a scaffolding that hierarchically and normatively organizes differences between cultures and behavioural tendencies that is concerned with their "fitness," survival, and advancement. As I argue below, evolutionary psychology is a knowledge project sourced from colonial logics that racially stratifies populations under the sign of "barbarism," and in so doing (re)institutes contemporary relations of colonial difference on which modernity is established.

Craig Jones, the lead counsel for the Attorney General of B.C., enthusiastically embraced evolutionary psychology as *the* justificatory framework for upholding a criminal prohibition of polygamy in Canada. Reflecting on this strategy in *A Cruel Arithmetic*, Jones (2012) constructs polygamy in a way that resonates with 19th century political theory, that is, in the context of the nasty and brutish battle for survival that is typically described as "human nature." Polygamy is something to be feared and reckoned with: it is "a powerful, primitive force; it is always there; it breathes, it waits and when it is released, it grows and consumes" (Jones, 2012, p. 49). It is the force of "the primitive" – that is, of the (colonial) idea of "the primitive" as that which is within us and that drives our lesser natures, as that which is both "hardwired" into humans and that we rise above culturally, politically, and legally – that seemed to mesmerize the Court. Against the "power of polygamy, uncorked" (Jones, 2012, p. 58), as Jones describes what he wants us all to imagine and to dread as the inevitable consequence of decriminalizing polygamous marriage in Canada, is the Law, and, in this case, the time-honoured criminal laws by which we prevent such a descent. By this account, the legal imposition and preservation of monogamy is society's salvation, an adaptive survival mechanism through which we protect the future of civil society and by which we establish our social, political, and cultural sophistication against the force of nature.

The social good of imposing monogamy is that it will manage and curtail what Jones' leading expert, Dr. Joseph Henrich, characterized as the likely "non-trivial" increase in the incidence of polygyny were it to be decriminalized (Henrich, 2010, p. 21). For Henrich, Jones, and ultimately the Court, evolutionary principles suggest that there is an "arithmetic" to polygamy's harms: no matter how you cut it, "polygamy uncorked" increases demand for younger women as marriage partners; the phenomenon of "lost boys";[7] an increase in men's violence and criminality; a decrease in parental investment in children (by men in particular); and a decrease in gender

[7] "Lost boys" is a collective label for Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS) boys who are pushed out of their communities to increase the ratio of women to men for older, more powerful, male members (Rambukkana, 2015, p. 188).

equality that is intrinsic to Western democratic values. As Chief Justice Bauman argues, "s. 293 was, and indeed still is, intended to address the harms viewed as arising from polygamy; harms to women, to children, to society and, importantly, to the institution of monogamous marriage" (*Polygamy Reference*, 2011, par. 881). Polygamy's harms, he adds tautologically, "directly threaten the benefits felt to be associated with the institution of monogamous marriage" and they have done so since "the advent of socially imposed universal monogamy in Greco-Roman society" (*Polygamy Reference*, 2011, par. 883). By incorporating a prohibition on polygamy in Canada's original Criminal Code, Chief Justice Bauman concludes that Parliament was enacting its duty to safeguard the institution of monogamous marriage by actively suppressing "the evil reasonably apprehended to be associated with the practice of polygamy" (*Polygamy Reference*, 2011, par. 888). Following the lexicon of evolutionary psychology, imposing monogamy is an adaptive strategy that keeps polygamy's harms in check, and "may have helped to create the conditions for the emergence of democracy and political equality at all levels of government" (Henrich, 2010, p. 60). Western civilized societies, as this suggests, adhere to a social contract that favours and "imposes" monogamy.

It is at the heart of this creative application of evolutionary principles, invoked here to keep ourselves civilized, that we find the structures of tautological colonial reasoning and the burden of white man's laws. The concern here is less with the merits of evolutionary psychology as a conceptual framework to explain human behaviour and more with the work that its role as evidence was made to do in this critical ruling on the constitutionality and social necessity of Canada's criminal prohibition on polygamy. Following Sylvia Wynter, Katherine McKittrick (2014) remarks that science is "produced as an objective system of knowledge that enumerates and classifies 'difference' – botanical, racial-sexual, spatial, linguistic, and so forth" (p. 145). In Wynter's estimation, the scientific expressions of modernity – rational Man, the cartographies of the plantation, the metrics of non-white/enslaved/gendered bodies, the mathematics of nature, the biological sorting – "disclose the ways in which the question of human life is mapped out by scientific imperatives that increasingly profit from positing that we, humans, are fundamentally biocentric and natural beings" (McKittrick, 2014, p. 145).

Three examples tie Wynter's insights to the work evolutionary psychology does in the *Reference* decision. First, evolutionary psychology was given primacy of place in conceptualizing polygamy's harms and thereby it helped justify a 19th century prohibition against polygamy. In fact, Chief Justice Bauman dismissed as "somewhat naïve" (*Polygamy Reference*, 2011, par. 752) feminist expert evidence for the *amicus curiae*, evidence that highlighted more nuanced understandings of women's experiences in polygamous families outside the discourse of harm. As Lori Beaman (2014), one of these expert witnesses writes, "reasoned discussion about whether

polygamy is inherently harmful to women was, in my experience at least, almost impossible" (p. 132).

Second, adopting the reasoning of evolutionary psychology provided a new gloss to old biopolitical social contracts that tether marriage formations to political and cultural progress. Often analogized to slavery as a "relic of barbarism" (Gordon, 2002), characterizations of polygamy as barbaric, despotic, and degenerate, and white Mormons as "race traitors" (Ertman, 2010) were sensationalized through popular fiction and newsprint, circulated through political theory and philosophy, materialized in a series of draconian anti-polygamy laws, and applied in the jurisprudence of polygamy-related cases in the late 19th century U.S. that sought to curtail fears of a Mormon theocracy taking hold in some states.[8] In its seminal legal decision, *Reynolds v. the United States* (1878), the U.S. Supreme Court (in)famously reasoned that polygamy was "odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people." The Court further argued that polygamy ultimately "fetters the people in stationary despotism" (pp. 164, 165-166). These same sentiments were articulated in a later Supreme Court ruling, *Late Corporation v. U.S.* (1890) that upheld both the dissolution of the church corporation and the forfeiture of its assets. The Supreme Court posited that "Mormons were degrading the morals of the country through their religious practices" and that organizing "a community for the spread and practice of polygamy" constituted "a return to barbarism" (Harrison, 2015, p. 106). Such a community, the Court declared, "is contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the western world" (Harrison, 2015, p. 106). In the face of such legal, political, and social persecution, the President of the LDS Church issued the First Manifesto in 1890, in which he advised followers to "refrain

[8] These laws included the Morrill Anti-Bigamy Act (1862), which criminalized polygamy, dis-incorporated the LDS Church, and prohibited religious organizations from owning property in excess of $50,000. In 1878, the U.S. Supreme Court upheld the constitutionality of the Morrill Act in *Reynolds v. United States*. Such legal initiatives failed to curtail the practice of polygamy. Thus, Congress passed the Edmunds Act (1882), which, in addition to banning cohabitation, disenfranchised both practicing polygamists and their wives. The Supreme Court again upheld the Edmunds Act in *Murphy v. Ramsay*, praising the legislature's choice of monogamy as "the best guaranty" of morality (see Eichenberger, 2012, p. 1077). In an effort to legislate an even harsher stance against polygamy, Congress passed the Edmunds-Tucker Act (1887), which criminalized male adultery and repealed the incorporation of the LDS Church. Church property in excess of that proscribed by the Morrill Act was forfeited to the US government for the use and benefit of public schools in the Territory. It annulled illegitimate children's succession rights and disenfranchised female voters. As Eichenberger (2012) notes, in recognizing that Mormon women were not passive victims of plural marriage, the Edmunds-Tucker Act signaled a turning point in the anti-polygamy campaign where Mormon women, once the subjects of pity, had morphed into objects of public derision. See also Gordon (2002) and Harrison (2015).

from contracting any marriages forbidden by the law of the land" (Harrison, 2015, p. 102).

It is against this backdrop that Mormon settlers arrived in Southern Alberta in 1887 with the hope of finding refuge from the discrimination and persecution that targeted them in the U.S. (Carter, 2008; Embry, 1989; Palmer, 1990). As recounted by Carter (2008), Canada, however, was hardly obliging and specified that the condition of their sanctuary was that Mormon settlers cease to practice polygamy. Canada had inherited a common law definition of marriage in *Hyde v. Hyde and Woodmansee* (1866) that explicitly defined marriage "as understood in Christendom [as] the voluntary union for life of one man and one woman, to the exclusion of all others" (at 134). This definition of marriage was a *civil* prohibition on the recognition of polygamous marriage. *Criminalizing* polygamy occurred with the incorporation of an anti-polygamy provision into Canada's first comprehensive Criminal Code of 1892. This provision included a reference to Mormons, which remained in place until minor amendments were made in 1954. While Canadian officials were comparatively less hostile than their American counterparts of the time, the archives reveal similar racial anxieties. Polygamy was described by politicians as "a serious moral and national ulcer" (House of Commons, 1890, p. 3177), that "once gets a footing in Canada will be very hard to stamp out" (Bolderson, 1899). They further described Mormons as "a self-satisfying sect" that "is a danger and a shame to every Christian people" (Royal, 1889).

It is important to also consider how such discursive rhetoric used sexuality, gender, and kinship to draw not only transnational lines of civilization versus barbarism but internal, national ones as well. What Scott Morgensen (2011) calls "settler sexuality" and Kim TallBear (2018) calls "settler sex and family," that is, heterosexual, biologically reproductive monogamous white marriage and family, were made central to the project of white settler nation-building. Settler sexuality and family took shape through violent legislative, educational, economic, and religious targeting of Indigenous kinship formations. In this context, anti-polygamy law was materially and discursively put in the service of "settlement's labour" (Simpson, 2014, p. 21). For example, it was used by the Department of Indian Affairs in the 19th century to target Indigenous customary marriage law that allowed for more than one wife (Carter, 2008). Yet as Carter (2008) argues, such efforts at criminalization were not entirely successful as (what were understood as) polygamous marriages continued. While efforts to eradicate the "evils" of polygamy were caught up in transnational fears of a barbarous "there" having made its way to a civilized "here," Rifkin (2011) suggests that the symbolic and cultural force that has been brought through law to the imposition of monogamy on Indigenous communities might also signal lurking insecurity over assertions of Indigenous sovereignty.

Adopting the reasoning of evolutionary psychology allowed the Court in the *Polygamy Reference* to vault over these racialized histories. Evolutionary

psychology was deployed to map marriage tendencies across cultures in terms of a hierarchy of development measured by proximity to (Western) "civilization" (as progressive, democratic) or remove from "barbarism" (as stagnant, despotic regimes). It recast the Orientalist narrative of hierarchically ordered cultural difference as something empirically verifiable, biologically and genetically hard-wired, however much such verification was not furnished in this case, or at least beyond the statistical projections of polygamy's "cruel arithmetic." Such statistical projections were primarily based on a seemingly timeless application of primate sex reproduction and mating strategies onto humans, as well as profoundly ahistorical, big data, quantitative surveys on the nature and variation in human mating and marriage patterns (Henrich, 2010). While humans and other primates share a range of similarities due to our shared phylogeny, critical interventions into evolutionary biology and psychology caution that evolution is as much about discontinuity as it is about continuity (Fuentes, 2021). The vast array of human ecological, social, and historical contexts offers better explanatory frameworks for male and female reproductive relationships, physiologies, and behaviour than differences in their reproductive classifications or patterns (Fuentes, 2021). Concepts such as mating strategies and marriage patterns, for example, are not stable sets of relations in biological, social, or political terms; they are neither inevitable outcomes of nature nor are they apolitical formations whose durability over time and space remain unchanged (Smith, 2021). Yet it was the broad, flat application of evolutionary analyses across time and across space that seems to capture the Court and breathe new life into consolidating an imagined West as a set of morally and politically advanced yet vulnerable Christian nations. Vulnerable because, by its "cruel arithmetic" over deep evolutionary time, "human beings will have a tendency to adopt the practice [of polygamy] when the environment permits" (*Polygamy Reference*, 2011, par. 575). Aberrations from monogamy, as a pinnacle of human evolution, come to be understood as reversions to more primitive states (Smith, 2021). Anti-polygamy law becomes, then, not a measure of the workings of racial and religious animus as much as a reflection of the evolution of social strategies that reflect the repudiation and management of humanity's baser impulses. The "imposition" of monogamy, so formative to Western civilization, reflects the advanced cultural "evolution" that those societies who practice polygamy lack. Here, then, is the third, related example of the work that evolutionary psychology accomplished in the *Polygamy Reference*: by ushering in the race-thinking of coloniality, it made seemingly self-evident the superiority of monogamous marriage norms over the "cultural" practices of polygamy affiliated with "Eastern," and particularly Muslim, states.

It is with the prospect of biopolitical vulnerability that the Court returns to the specter of the immigrant and the importance of taking steps to prevent

polygamy from slipping past the national border. Even though it is not their cultural practices but rather those of home-grown 'celestial marriages' of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS) that prompted this *Reference* case, racialized populations figure as a looming presence. Chief Justice Bauman calls attention to the role that immigration law already plays and might even further play in curtailing what he is convinced would be the likely spread of polygamy by permitting its entry into Canada. The evidence furnished by evolutionary psychology regarding the population demographics of polygynous communities "suggest that in the event these immigrant communities were to become stable, their populations would expand comparatively rapidly" (*Polygamy Reference*, 2011, par. 560). Even more at issue in dictating the need for a criminal ban on polygamy is "the possibility of an increase in the incidence of polygamy among those who are here" (*Polygamy Reference*, 2011, par. 574). Rather tellingly, these are invariably not among "Canadians," but what he calls "people from cultures and faiths which practice polygyny who are already resident in Canada who might take it up were it not prohibited" (*Polygamy Reference*, 2011, par. 575).

It is from within and beyond the border, yet always invariably in sight of it, that the imagined return of barbarism underpins the regulation of polygamous marriage in Canada. The task then, as this court sees it, is to make sure the environment remains hostile to polygamy, what the Canadian government, three years after the *Reference* decision, would call "protecting Canadians from barbaric cultural practices" (Government of Canada, 2014). As I discuss in the next section, evolutionary psychology haunts such legislative hostility. As Toni Morrison (1988, p. 136) reminds us, invisible things are not necessarily *not* there. Tracking the appearance and repetition of the continuities that have persisted in the juridical and legislative imposition of monogamy helps lay bare the enduring forms of race-thinking and colonial logic that insistently make the regulation of marriage a function of national identity. It is to this more recent manifestation in the *Zero Tolerance Act* and the racist reforms that it makes to the *Immigration and Refugee Act* of Canada that I now turn.

Border Racism

In 2014, the (then) federal Conservative government introduced Bill S-7, the *Zero Tolerance for Barbaric Cultural Practices Act*. This legislative initiative was touted as protecting "Canadian values," described as the antithesis to barbarism. With the Canadian border plainly in sight, it amends sections of the *Civil Marriage Act*, the *Criminal Code*, and the *Immigration and Refugee Protection Act* (IRPA) ostensibly to "prevent barbaric cultural practices from

happening on Canadian soil" (Government of Canada, 2014), defined as forced marriages, polygamy, and honour killings.[9] "Canadian soil," or as Katherine McKittrick (2014) suggests, the "sociospatial expression of Western modernity" (p. 143), conceals the violences it requires as much as it reveals them. The "soil" of this territory currently called Canada can only be ontologically claimed as such because of the ongoing structure of settler colonialism that has dispossession as its aim and "settler sex and family" as its ideal. Despite its inflammatory title and leveraging of Islamophobic stereotypes, or perhaps in part because of them, Bill S-7 was passed by a majority in the House of Commons across party lines. This conceptualizing of particular practices of violence against women as "barbaric" was shared terrain between political parties. If the consensus across the political spectrum is that polygamy is immoral and therefore rightfully illegal, then monogamous marriage too comes to stand as an evolved Canadian value in need of protection, in discursive continuity with the *Polygamy Reference*. The discourse of barbaric cultural practices from elsewhere (over there, not here) coming to "Canadian soil" obfuscates the gendered violence required to "make" Canada in the first place. Far from violence against women being a contradiction of Canadian values, Canada's existence is a product of and indeed relies on ongoing violence against Indigenous women and girls (see in particular Simpson, 2016). What and who, then, is barbaric? This "coloniality of power" (Wynter, 2003) is part of what evolutionary psychology allowed the Court in the *Polygamy Reference* to vault over in its biopolitical aim to protect the institution of monogamous marriage.

The amendments made to the IRPA with respect to polygamy pertain to valid foreign polygamous marriages and not the plural unions of Bountiful as these are legal nullities (Bailey et al., 2005). To enter or remain in Canada, foreign nationals and permanent residents must meet the eligibility requirements for the applicable visa (if required) and must not be inadmissible under sections 33-43 of the IRPA, which include engaging in espionage, terrorism, criminality, or misrepresenting the material facts in the course of an immigration application (Béchard & Elgersma, 2015). Turning on the understanding of the general and specific harms interpreted in the *Polygamy Reference*, the *Zero Tolerance Act* introduces a new section 41.1 that explicitly ties family class migration to a securitization project. Specifically, the Act states, "A permanent resident or a foreign national is inadmissible on grounds of practising polygamy if they are or will be

[9] Bill S-7 is divided into three parts. Part 1 modifies the *Immigration and Refugee Protection Act* (IRPA) in order to amend the inadmissibility provisions. Part 2 amends the *Civil Marriage Act* (2005, c. 33) with respect to consent to contract a marriage, the age of marriage and when a new marriage can be contracted. Part 3 amends the *Criminal Code* (R.S., c. C-46) and makes consequential amendments to other Acts, changing the defence of provocation and introducing new offences and procedures related to forced marriages or marriages in which spouses are underage (Béchard & Elgersma, 2015, p. 4).

practising polygamy with a person who is or will be physically present in Canada at the same time as the permanent resident or foreign national." Prior to these reforms, a foreign national seeking temporary residence who practises polygamy in their country of origin was generally allowed entry, though with only one designated spouse; s.41.1 now bars their admission altogether, including were this person to seek to join one of their spouses in Canada. Additionally, an application for Permanent Residence can now be denied to someone not only on the basis of the relations they are currently in, but on the prospect that they may do so (i.e., that they "will be practicing polygamy with a person who is or will be physically present in Canada at the same time" as the applicant; METRAC, n.d.). Even for Permanent Residents who already have status in Canada, a finding of their practice of polygamy could result in their deportation on this basis alone. Prior to these reforms, a Permanent Resident could face deportation if they were convicted under s.293 of the Criminal Code, or if they had misrepresented the facts about their status on their application. Now, s.41.1 authorizes immigration officers to deport permanent residents and non-citizens suspected of engaging in polygamy even in the absence of a criminal conviction or a finding of misrepresentation.

It must be noted that the IRPA already imposed restrictions on family class immigration that effectively prohibited multiple spouses from being recognized. In other words, polygamy is not a form of marriage recognized for immigration purposes by Canada.[10] Of course, this does not mean that these relationships do not exist or that they are not lived, felt, solemnized, and celebrated. The state's refusal to recognize them, however, means that they are lacking the social and institutional support and public resources and services that are provided by law to those in monogamous unions. As noted by community advocates (South Asian Legal Clinic of Ontario, 2014) and feminist scholars (Bailey et al., 2005; Campbell, 2005; Gaucher, 2016) alike, this lack of recognition heightens the vulnerability and increases the isolation of women and children and restricts their access to important support services. Far from protecting them from polygamy's harms, the reinforcement of anti-polygamy provisions would necessitate concealment, secrecy, and isolation, deterring women who are subject to abuse in such relations to seek health and social service supports so as not to jeopardize their immigration status and that of their children, thereby exposing them to greater risks of violence (METRAC, n.d.). These consequences are the material effects of law's violence: the affective lived realities of the micro and macro aggressions of state prohibitions and regulations that not only

[10] Some provinces and territories such as Ontario, Yukon, Prince Edward Island and the Northwest Territories have extended recognition to polygamous marriages for the purposes of legal protections for polygamous spouses, including succession rights, spousal support, and division of marital property. Parties to a polygamous marriage, however, may not obtain a divorce under Canada's *Divorce Act* (see Bailey et al., 2005, pp. 10-12).

deny recognition of such diverse family forms and erase them from view through their criminalization but that justify discrimination against them.

So, whither evolutionary psychology? While its framework is not made explicit in debates over Bill S-7 nor in the legislation itself, its language and racist tropes are acutely present, "cajoling us to reconsider the very distinctions between there and not there, past and present, force and shape" (Gordon, 1997, p. 6). I return to Toni Morrison's (1988) exhortation that "certain absences are so stressed, so ornate, so planned, they call attention to themselves; arrest us with intentionality and purpose" (p. 136). Where, she asks, "is the shadow of the presence from which the text has fled?" (p. 137). It is clear from the foregoing description of the legislation, including its name, that the lexicon and colonial grammar of evolutionary psychology mediates both the intent and materiality of the *Zero Tolerance Act*.

It does not need to be made explicit in order to ascertain its presence. The framework of "barbaric cultural practices" that so profoundly underpins the legislation does not make sense without the work that evolutionary psychology did to double down on monogamous marriage as civilized and evolved in the *Polygamy Reference*. Evolutionary psychology, as a Western/colonial knowledge formation, is the constitutive logic of the *Zero Tolerance Act*. It is part of the Western/European "cosmo-political, religio-social worldview" (Walcott, 2020, p. 347) that characterizes itself as evolved and normal relative to its own experienced "norm of being human" (Wynter, 2003, p. 292); it is part of the Western/European worldview that constitutes itself as the apex of civilization and draws a socio-ontological line between rational, political (and I would add, monogamous) Man (the settler of European descent) and its irrational Human Others (subordinated Indians and enslaved Negroes) (Wynter, 2003, p. 314); and, lastly, a worldview that conceives itself therefore as always under threat. The absence of evolutionary psychology in the *Zero Tolerance Act* is a presence that gives shape to the body politic through the IRPA amendments. These amendments provide immigration officials, as the front line of state administration of immigration policy, with the renewed means to draw what W.E.B. DuBois (1903) identified as the colour line. The seeming absence of evolutionary psychology is nonetheless a presence that is felt through the tragic irony of colonial benevolence that plagues the legislation in its desire to provide "more protection and support for vulnerable immigrants, primarily women and girls" (Government of Canada, 2014). This is a benevolence that understands itself as saving imperilled Muslim women from dangerous Muslim men, one that masks its own violence by locating its source in the "barbarism" of backwards, less evolved cultural practices (Razack, 2004). The work, then, of evolutionary psychology, evinced by the juridical and legislative interventions on polygamous marriage, is inseparable from white supremacy's violences. The temporality of both the *Polygamy Reference* and

the *Zero Tolerance Act* is palimpsestic, where the fears of barbarism are imperfectly erased, remaining visible across time – historically continuous – to still haunt and give formation to modern (hence racial) nation-states.

Conclusion

The formations of race-thinking that imbue anti-polygamy provisions add further nuance to the significance of monogamous marriage to national identity, and to its role in marking the literal boundaries of the nation and the racial formations of its national character. In tracking the alignments between marriage and nationhood and attending to the work that has been put into securing in place the convention of monogamy, we come up against the colonial logic that keeps the structures of racial hierarchy in place, the very structures that organize the patterns of representation that have ensured that entire cultures and peoples can be rendered erasable, inadmissible, and deportable.

In both the *Polygamy Reference* and the *Zero Tolerance Act*, coloniality seeps out of modernity's legal and evolutionary storytelling about why the universal imposition of monogamy is something that speaks to our moral superiority and ability to keep barbaric impulses in check. Yet it is worth entertaining, however ironically, another variation of the common sense that evolutionary psychology makes out of human behavioural tendencies. This is to consider what must also be the behavioral product of evolution: the social formations and biopolitical practices of marking distinctions between groups, of fostering and protecting some to the exclusion and at the expense of others. That is to say, we need to consider also as an adaptation the tendencies of race-thinking and racism that seize upon marriage, not because it cares to "protect women" but because it facilitates the adaptive persistence of racial domination (Denike, 2017). That is, it is worth asking how forms of race thinking and racism themselves have evolved and indeed are adapted so effectively, yet work spectrally including through law and policy so as to mask them as the works of hero-ism against violence and not as expressions and mechanisms of violence that they are.

But I want more than this. Yes, race and racism were created as an organizing logic of humanity, of the arbiter of differentiated humanness. And racism shapeshifts across time and space. But if we want to imagine otherwise possibilities, otherwise worlds, then we must abolish the very conceptual frames and modality of thought that produce categorical distinctions between populations, cultures, cosmologies, and worldviews that make such categorical distinctions desirable and understand them as maintainable (Crawley, 2020). As evolutionary psychology is a Western knowledge formation sourced from colonial logics and thus invested in and predicated on racial-cum-cultural difference, then the social justice, that is, the racial justice project that I orient to is what Sylvia Wynter (2003) calls

"unsettling the coloniality of being/power/truth/freedom." This is a project of social and racial justice whose task is to unsettle the foundations of what we have inherited from imperialism and colonialism: the white, patriarchal, hetero-monogamous concept of Man, produced by modern philosophical and scientific thought (including evolutionary psychology) so as to disavow other cosmologies, worldviews, forms of life, and "modes of being human" (Wynter, 2003, p. 300). Man overrepresents itself as if it were the human itself, the "final frontier/normal way of life" (McKittrick, 2014, p. 153; Wynter, 2003). One cannot "unsettle" the "coloniality of power," Wynter writes, without a "redescription of the human outside the terms of our present descriptive statement of the human, Man, and its overrepresentation… in the question of the who and the what we are" (p. 268) in all our relational possibilities so that we can secure "the well-being of the human species itself/ourselves" (p. 260). One small part of this, of re-imagining an *otherwise*, is a racial justice project that wants to unhook from the logics and conditions of European/Western/settler intimacies that organize monogamy as a category of racial differentiation. In short, "the difficult labor of thinking the world anew" (McKittrick, 2014, p. 6).

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