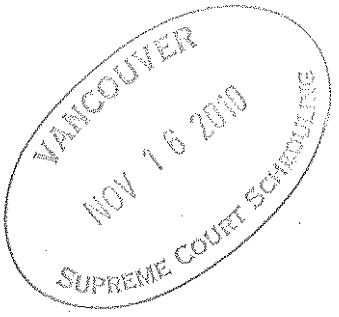

Affidavit #2 of Marci A. Hamilton
Sworn November 2, 2010

No. S097767
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1996, C. 68

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF S. 93 OF THE *CRIMINAL CODE OF CANADA*, R.S.C. 1985, C. c-46

AFFIDAVIT

I, **Marci A. Hamilton**, law professor, of 55 Fifth Avenue, New York City, New York, United States of America, MAKE OATH AND SAY THAT:

1. I have personal knowledge of the facts and matters deposed to in this Affidavit, save and except where the same are stated to be made upon information and belief and where so stated I verily believe them to be true.

2. I have read the Affidavit #1 of Martha Ertman sworn to October 15, 2010 and the Affidavit #1 of Jonathan Turley sworn to October 20, 2010.

3. In reply to the opinions expressed by Martha Ertman and Jonathan Turley in their affidavits, I have the following comments. Attached hereto and marked as Exhibit "A" to this my Affidavit is a true copy of a report I prepared for use in these proceedings.

4. I prepared the report attached as Exhibit "A" at the request of Stop Polygamy in Canada, and to address the issues stated within it. I am aware of my duty under Rule 11 of the *Supreme Court Civil Rules* to assist the Court and not assume the role of advocate for any participant, and I certify that this report is made in conformity with that duty. If called upon to give testimony, I will do so in conformity with that duty.

SWORN BEFORE ME at the City of New York, in the State of New York, United States of America, this 2nd day of November 2010.)

A Commissioner for taking Affidavits for the State of New York)

Marci A. Hamilton

ISABEL K. BALSON
Notary Public State of New York
No. 01BA4877323
Qualified in Kings County
Commission Expires 11/17/2010

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REPORT

REPLY TO AFFIDAVITS OF MARTHA ERTMAN AND JONATHAN TURLEY

I. Jonathan Turley and Martha Ertman Ignore Critical Historical Facts and Settled Legal Doctrine to Concoct their Theory that the Anti- polygamy Laws Are Unconstitutional

Professors Ertman and Turley labor to establish that the anti-polygamy laws aimed at the Utah Territory unconstitutionally targeted the Latter-Day Saints. They ignore critical historical facts and conflate the polygamy provisions of federal law with separate and distinct elements of those federal laws.

A. The Federal Laws Against Polygamy Simply Extended to the Utah Territory the Long-Settled Doctrine Already in Place in the States and Under Common Law

One fundamental error in Ertman's and Turley's reasoning is that they conveniently fail to take into account that polygamy was illegal in every state and under common law long before the anti-polygamy laws were enacted that would apply to the Utah Territory. Hamilton Affidavit # 1 at 3. The federal law against polygamy did not by its language or purpose single out Mormons, but rather outlawed the practice of polygamy regardless of who practiced it.[1] The states and the Northwest Territories[2] outlawed polygamy before Congress considered the issue for the Utah Territory. Polygamy was not illegal in the Utah Territory until Congress took action.

The criminalization of polygamy in the Utah Territory required repeated federal legislation, because of the resistance of the Utah citizens and justice system to the law. First, Congress outlawed the practice with the Morrill Anti-Bigamy Act of 1862,[3] as every state already had. But the Utah courts did not enforce the law. There were problems with jury nullification, failure to prosecute by local authorities, and conflicting pro-polygamy local statutes[4], and, therefore,

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[1] *Reynolds v. United States*, 98 U.S. 145, 164-65 (1879) ("At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. ... By the statute of 1 James I. (c. 11), the offence [of polygamy]...was made punishable in the civil courts, and the penalty was death. ... [I]t was at a very early period re-enacted, generally with some modifications, in all the colonies. ... [W]e think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity [than under the former English law]."); *Commonwealth v. Putnam*, 1 Pick. 136 (Mass. 1822) (man convicted of adultery for marrying and living with a second wife after a divorce should have been charged with polygamy instead); *State v. Robbins*, 28 N.C. (6 Ired) 23 (N.C. 1845). *See* Sarah Barringer Gordon, *The Mormon Question: Polygamy & Constitutional Conflict in Nineteenth Century America* 153 (2002).

[2] Canada enacted its first anti-polygamy law in 1892. That provision exists today in Part 8 of the Canada Criminal Code, Section 293. Section 293 states that anyone who "practices or enters into . . . celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a" polygamous relationship is guilty of a crime punishable by up to 5 years imprisonment. R.S.C. Crim. Code, P. 8 § 293 (2010).

[3] Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862).

[4] Gordon, *supra* note 1, at 97-111 (discussing that the Morrill Act proved hard to enforce, due to difficulties establishing proof of a second marriage without public or church records, uncooperative Mormon witnesses, and Mormon control of the Utah judiciary).

Congress enacted the Poland Act of 1874, which contained a series of procedural and structural mechanisms designed to facilitate enforcement of the Morrill Act.[5] Even that was inadequate and, therefore, after the 1879 ruling in *Reynolds v. United States,* 98 U.S. 145 (1879), which upheld the Morrill Anti-Bigamy Act, Congress enacted the Edmunds Anti-Polygamy Act of 1882, making polygamy a federal felony for all individuals.[6] The Edmunds Act did not single out Mormons for negative treatment. To the contrary, the one reference to the Mormons was to their benefit as it established that the children of Mormon pre-existing polygamous marriages were legitimate.[7]

Congress then passed the Edmunds-Tucker Act of 1887, which made clear that the Act's prohibitions did not extend to "opinion" about polygamy or bigamy. Rather, it only criminalized the conduct.[8] Therefore, the beliefs of the Mormons were not to be prosecuted; only their actions. The Edmunds-Tucker Act also established protections for the first wives of polygamous husbands by requiring the registration of all marriages, establishing protections from charges against first wives, dictating that only a first wife was immune from testifying against her husband, and providing property rights for first wives upon their husband's death.[9] This is a reflection of the widely shared social view that polygamy rests on the "patriarchal principle," which can be dangerous and oppressive to women.[10]

Beyond reinforcing that polygamy was a felony, and in the face of the Mormons' continuing resistance to the federal law, the Edmunds-Tucker Act also imposed additional penalties on the Mormons: it revoked the corporate charter of the Church, limited Church ownership of real property to $50,000, with all excess to escheat to the federal government for the establishment of public schools which would teach anti-polygamy values, and abolished the Church's Emigration Fund which had been designed to finance Mormon converts' immigration from Europe to Utah.[11] It stripped Utah probate courts of any non-probate jurisdiction granted to them by the Utah legislature.[12] It made anti-polygamy oaths a precondition for voting and prohibited anyone in violation of the law from doing either.[13] In addition, it abolished the office of Utah Superintendant of District Schools, replacing it with a Commissioner of Schools to be appointed by the Utah Supreme Court and granted that Commissioner plenary power over Utah public schools' chosen curriculum.[14] Each of these provisions would face stiff constitutional challenges today were they being enforced, but they are separable and distinct from the law against polygamy. Under standard constitutional doctrine, the individual and discrete provisions of a statute are appropriately subject to independent constitutional analysis. Thus, while elements of the Edmunds-Tucker Act are constitutionally suspect, the anti-polygamy provisions are not simply because of those provisions.

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[5] Poland Act, ch 469, 13 Stat. 253 (1874).
[6] Edmunds Anti-Polygamy Act, ch. 47, 22 Stat. 30 §1 (1882).
[7] Edmunds Anti-Polygamy Act, ch. 47, 22 Stat. 30 §7 (1882).
[8] Edmunds Anti-Polygamy Act, ch. 47, 22 Stat. 30 §9 (1882).
[9] Edmunds-Tucker Act, ch. 397, 24 stat. 635 §18 (1887).
[10] 98 U.S. at 166
[11] Edmunds-Tucker Act, ch. 397, 24 stat. 635 §§13-17 (1887).
[12] Edmunds-Tucker Act, ch. 397, 24 stat. 635 §12 (1887).
[13] Edmunds-Tucker Act, ch. 397, 24 stat. 635 §24 (1887).
[14] Edmunds-Tucker Act, ch. 397, 24 stat. 635 §25 (1887).

The Mormons challenged the Edmunds-Tucker Act in Court. It was upheld in *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). The majority upheld the entirety of the Act. The dissent agreed with the majority on the constitutionality of the provisions criminalizing polygamy. Chief Justice Fuller (along with Justices Lamar and Field) only objected to the separate provisions relating to Mormon property. Id. at 67-68 (Fuller, J., dissenting).

Far from having a sole purpose to target Mormons, these laws merely reinforced the idea that polygamy in all its form was anathema to the Christian settlers and missionaries that came from Europe to the Americas. Early Americans viewed the polygamy among Native Americans as negatively as they viewed the Mormon's polygamous practices. *See* John D'Emilio & Estelle B. Freedman, *Intimate Matters* 6 (Univ. of Chicago Press 1997) (1988) ("In every region in which Europeans and Indians came into contact, however, the Europeans, applying the standards of the Christian tradition, judged the sexual lives of the native peoples as savage; in contrast to their own 'civilized' customs. Thus Spanish and French missionaries attempted to eradicate 'devilish' practices, such as polygamy and cross dressing, and condemned the 'heathen friskiness' of the natives.") ("Europeans and Americas also expressed horror at the practices of polygamy and premarital sex among Indian tribes. In the case of the Plains Indians, for example, whites wrote that polygamy demeaned women. ... Missionaries to various Indian tribes failed to recognize the advantages of this practice and demanded that Indian converts adhere to strict monogamy."). Id. at 87.

Thus, the criminalization of polygamy was neither novel nor crafted to apply solely to Mormons. Unlike the animal sacrifice law at issue in *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993), which was designed to apply solely to the Santerians, the extension of the anti-polygamy principle to the Mormons followed and extended neutral, generally applicable laws with a long history.

Under the First Amendment, just because a social evil is perpetrated by a religious group and legislators then pass laws to meet the social evil does not mean that the religious entities are being targeted or unfairly treated. It is worthwhile to examine a situation parallel to the polygamy laws. Over the last decade, the Roman Catholic Church hierarchy has been under sharp attack for the cover up of child sex abuse by priests. When victims attempted to sue for the cover-up, they routinely discovered that the statutes of limitations blocked their lawsuits. Marci A Hamilton, *Justice Denied: What America Must Do to Protect Its Children* 6-8 (2005). In response to these revelations, laws were enacted to open the statutes of limitations for all child sex abuse victims in some states.[15] The Church's lawyers routinely challenged these laws with the argument they were unconstitutional, because they "targeted" the Church.

Their arguments have not prevailed. While it is true that such laws were prompted by the revelations about the Catholic hierarchy's handling of sex abuse, the laws passed were neutral and generally applicable, and available to all child sex abuse survivors, regardless of the perpetrator or institution involved. Courts, thus, have rejected this argument, because the statute of limitations reforms have applied to all victims, not just those abused by the Church. *Deutsch*

[15] Cal. Code Civ. Proc. §340.1 (2010); Del. Code Ann. tit. 10, § 8145 (2010).

v. Masonic Homes of California, Inc., 80 Cal. Rptr. 3d 368, 378-9 (Cal. Ct. App. 2008); *Melanie H. v. Defendant Doe*, No. 04-1596-WQH-(WMc), slip op. at 25 (S.D. Cal. Dec. 20, 2005).

If the statute of limitations laws were enacted to only apply to cases involving the Catholic Church, then there would be a constitutional problem, because the laws would target the Church. Similarly, only if the polygamy laws were crafted to apply solely to the Latter-Day Saints, would there be a constitutional problem. They clearly were not, and, therefore, Ertman's and Turley's conclusions are unfounded.

II. Response to Affidavit of Jonathan Turley

A. Professor Turley Misinterprets Free Exercise of Religion Doctrine

Professor Turley fails to take into account a critical element of constitutional doctrine and, therefore, errs. The United States Supreme Court routinely has rejected motive as a factor in finding laws unconstitutional. *Palmer v. Thompson,* 403 U.S. 217, 224 (1971) (holding that the "Court has [never] held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869) ("We are not at liberty to inquire into the motives of the legislature."). *See also, Fletcher v. Peck,* 6 Cranch 87, 130 (1810) (declining to set aside the Georgia Legislature's sale of lands on the theory that its members were corruptly motivated in passing the bill.). The relevant question for constitutional analysis is legislative purpose, not motive. *Washington. v. Davis*, 426 U.S. 229, 240 (1976) (finding that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

Motive cannot be the arbiter of constitutionality, because it is impossible to assess the interior motives or drives of any individual, let alone a collection of elected representatives. Rather, the law must be judged by its purpose, which is evidenced by its language and how it operates. *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. ___, 130 S. Ct. 2149, 2156 (2010) ("In all cases that raise a question of statutory construction, a court begins by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose.") (internal citations omitted); *Mobile v. Bolden*, 446 U.S. 55, 58 (1980) ("[L]egislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. To prove such a purpose. ... [a] plaintiff must prove that the disputed plan has been conceived or operated as a purposeful device to further racial discrimination.").

With respect to free exercise, Turley focuses on motive rather than the anti-polygamy laws' legitimate purposes. Turley Affidavit at 34. He is correct that the polygamy laws in the Utah Territory were enacted in response to the Mormons' practices, and those practices were roundly condemned. They were enacted, however, not because Mormon polygamy was different, but rather because polygamy itself is "odious." The language of the laws outlawing polygamy encompassed all polygamy, whether practiced by Mormons or not, whether secular or not. And it has been applied to a wide range of bigamists/polygamists engaged in secular or other-religious polygamy. Hamilton Affidavit # 1 at 4 (stating "[t]hose laws did not target Mormon, or even religiously-motivated polygamy, but rather outlawed it whether it was

practiced in a secular or religious context. The practice was made illegal, not the LDS version of it.").

B. Professor Turley's Equal Protection and Due Process Analysis Is Irrelevant to the Legal Construct of Marriage

For purposes of constitutional analysis in the United States, sex and marriage are two completely distinct categories. Turley confuses the two and therefore reaches the wrong conclusion. Turley Affidavit # 1 at 21-22 (stating "[f]our adults are protected in having sexual relations and even having children outside of marriage. However, the same individuals can be imprisoned simply because they choose to treat themselves as a family or acknowledge personal (not legal) obligations to each other."). The point about multiple sex partners simply misses the point.

Some adult, consensual sex enjoys protection as part of federal privacy doctrine. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (holding state anti-sodomy law unconstitutional as violation of right to privacy). There is no absolute protection even so; sex with children, killing, or disabling a partner as part of the sex remain capable of state regulation regardless of the privacy right. Id. at 578 (distinguishing the facts of *Lawrence* from cases involving "minors," "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused," "public conduct or prostitution," or those "involving whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

The question whether someone has a right to choose their sex partners is a very different question from whether someone has a right to have multiple marriage partners.

Sex is a private activity, but marriage is a state construction that has momentous consequences for all of society. It determines the legitimacy of children, inheritance, benefits, and property ownership. Marriage law is not about who can have sex with whom. It is, instead, about who has enduring obligations to whom.

Only by oversimplifying marriage can Turley make his equal protection and due process arguments work. He also misses the obvious point that the legislature does not need to have evidence that every polygamous marriage inflicts harm to ban the practice. Enough polygamous marriages are abusive and/or put women in subservient roles at odds with gender equality to justify the laws against it. Hamilton Affidavit # 1 at 13, n. 7.

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