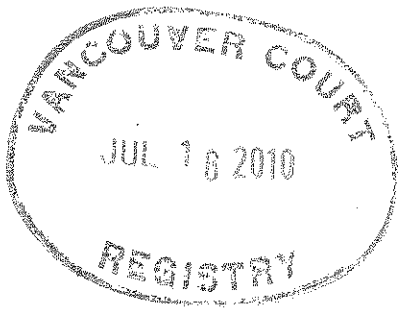

Affidavit #1 of Marci A. Hamilton
Sworn July 15, 2010

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 am the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law at Yeshiva University in New York City, New York. Attached hereto and marked as Exhibit "A" to this my Affidavit is a true copy of my *curriculum vitae*.

3. Attached hereto and marked as Exhibit "B" 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 "B" 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 Newtown, in the State of Pennsylvania, United States of America, this 15 day of July 2010.

A Commissioner for taking Affidavits for the State of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
MARIA GALLAGHER CHUBB, Notary Public
Newtown Twp., Bucks County
My Commission Expires April 22, 2012

Marci A. Hamilton

MARCI A. HAMILTON
Paul R. Verkuil Chair in Public Law
Benjamin N. Cardozo School of Law
Yeshiva University
55 Fifth Avenue
New York, NY 10003
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EMPLOYMENT

BENJAMIN N. CARDOZO SCHOOL OF LAW, Yeshiva University
Paul R. Verkuil Chair in Public Law, 2000-Present
Professor of Law, 1995-2000
Associate Professor of Law, 1993-95
Assistant Professor of Law, 1990-93
Advisor, Cardozo Advocates for Kids
E. Nathaniel Gates Award, for outstanding scholarly work or public advocacy, March 2008
Founder and Director, Cardozo Intellectual Property Law Program, 1995-2002
Cardozo AALS "Teacher of the Year," 2001
Student Bar Association Award for Best Professor, 1992, 1998, 2000
Courses Taught: Law and Religion Constitutional Law I
First Amendment Law Constitutional Law II
Columnist on Church/State and Constitutional Issues, www.Findlaw.com, 2000-Present

PRINCETON UNIVERSITY
Visiting Professor of Public Affairs, Woodrow Wilson School
Martin and Kathleen Crane Senior Research Fellow
Program in Law and Public Affairs, 2007-2008

PRINCETON THEOLOGICAL SEMINARY
Visiting Scholar, 1997-98, Fall 2004
Fellow, Center of Theological Inquiry, Princeton, NJ, 1997-98

NEW YORK UNIVERSITY SCHOOL OF LAW
Visiting Professor of Law, 2000-01

EMORY UNIVERSITY SCHOOL OF LAW
Distinguished Visiting Professor of Law, Fall 1999

This is Exhibit "A" referred to in the affidavit of Marci A. Hamilton made before me on July 15, 2010

A Commissioner for taking Affidavits for the State of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
MARIA GALLAGHER CHUBB, Notary Public
Newtown Twp., Bucks County
My Commission Expires April 22, 2012

PREVIOUS EMPLOYMENT

JUSTICE SANDRA DAY O'CONNOR, United States Supreme Court, Judicial Clerk, 1989-90
JUDGE EDWARD R. BECKER, United States Court of Appeals for the Third Circuit, Judicial Clerk, 1988-89
OFFICE OF THE SOLICITOR GENERAL, United States Department of Justice, Summer, 1988
DAVIS POLK & WARDWELL, Summer Associate, 1987
JUDGE ARLIN M. ADAMS, United States Court of Appeals for the Third Circuit, Summer Intern, 1986

EDUCATION

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
Juris Doctor, *magna cum laude*, 1988
Order of the Coif
Editor-in-Chief, UNIVERSITY OF PENNSYLVANIA LAW REVIEW
Fellowship, American Association of University Women Education Foundation, 1987-88
Nathan Burkan Memorial Competition
University of Pennsylvania Law School and National Prizes
PENNSYLVANIA STATE UNIVERSITY
Master of Arts, English, High Honors, 1984
Master of Arts, Philosophy, 1982
Eric A. Walker Fellowship, 1980-81
VANDERBILT UNIVERSITY
Bachelor of Arts, *summa cum laude*, 1979
Majors: Philosophy and English
Phi Beta Kappa

RELATED PUBLICATIONS: LAW AND RELIGION

BOOKS

JUSTICE DENIED: WHAT AMERICA MUST DO TO PROTECT ITS CHILDREN (Cambridge 2008)
GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (Cambridge 2005, paperback 2007) (recipient of *Foreword Magazine*'s 2005 Annual Political Science Book Award, Silver).

BOOK CHAPTERS

Lynch v. Donnelly and Allegheny County v. ACLU: *"Christ is Not a Turkey," in* LAW AND RELIGION: CASES IN CONTEXT (Leslie C. Griffin, ed., Aspen, 2010).
The Calvinist Paradox of Distrust and Hope at the Constitutional Convention, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293-306 (Michael W. McConnell et al., eds. 2001).
Religion and the Law in American Politics, in RELIGION AND AMERICAN POLITICS: THE 2000 ELECTION IN CONTEXT 75 (Mark Silk ed., 2000).

The Reverend John Witherspoon and the Constitutional Convention, in LAW & RELIGION: A CRITICAL ANTHOLOGY 54-66 (Stephen M. Feldman, ed. 2000).

ARTICLES AND ESSAYS

Christ is not a Turkey, and Neither is Justice O'Connor's Endorsement Test, Sandra Day O'Connor Reunion Symposium, ARIZ. ST. L.J. (forthcoming 2011).

The "Licentiousness" in Religious Organizations and Why it is Not Protected Under Religious Liberty Constitutional Provisions, 18 WM. AND MARY BILL RTS. J. 953 (2010).

The Rules Against Scandal and What They Mean for the First Amendment's Religion Clauses, 69 MD. L. REV. 115 (2009).

Review Essay: *An Imperfect Vocabulary of Religious Liberty*, 25 J.L. & RELIGION 101 (2009).

Reflections on Employment Div. v. Smith *and* Boerne v. Flores *and the Relationship Between the Legal Academy and the United States Supreme Court,* forthcoming as part of symposium held at Central European University, June 2009.

A Response to Professor Greenawalt, 30 CARDOZO L. REV. 1535 (2009).

The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up, 29 CARDOZO L. REV. 225 (2007).

Autonomy is Not a Better Path to "Truth", 22 J.L. & RELIGION 215 (2007).

The Religious Origins of Disestablishment Principles, 81 NOTRE DAME L. REV. 1755 (2006) (with Rachel Steamer) (earlier version was translated into French for distribution by the University of Paris).

What Does "Religion" Mean in the Public Square?, 89 MINN. L. REV. 1153 (2005).

Religious Institutions, the No-Harm Doctrine, and the Public Good, 2004 BYU L.REV.1099 (2004).

Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy, 18 J.L. & POLITICS 387 (2002).

Free? Exercise, 42 WM. & MARY L. REV. 823 (2001).

Religion and the Law in the Clinton Era: An Anti-Madisonian Legacy, 63 LAW & CONTEMP. PROBS. 360 (2000).

The Constitutional Rhetoric of Religion, 20 U. ARK. LITTLE ROCK L.REV. 619 (1998).

RELATED RECENT OP-EDS

A Modest Proposal for the 21st Century, HUFFINGTON POST, June 10, 2008, http://www.huffingtonpost.com/marci-hamilton/a-modest-proposal-for-the_b_106303.html

Ignorance is the Enemy of Children, Cupblog May 22, 2008, *available at* http://cupblog.wordpress.com/2008/05/22/ignorance-is-the-enemy-of-children/

Truth Comes With a Price, THE PHILADELPHIA INQUIRER, May 20, 2008, *available at* http://www.philly.com/philly/opinion/inquirer/20080520_Editorial__Child_Abuse.html?adString=ph.opinion/inquirer;!category=inquirer;&randomOrd=052008061301

Vows of Silence: the Cult Within, May 13, 2008, *available at* http://cupblog.wordpress.com/2008/05/13/vows-of-silence-the-cult-within/

The Story Behind the Story of Polygamy in the West, Cupblog May 8, 2008, *available at* http://cupblog.wordpress.com/2008/05/08/the-story-behind-the-story-of-polygamy-in-the-west/

The FLDS Arguments Will Not Hold Up, FORT WORTH STAR-TELEGRAM, May 4, 2008, *available at* http://www.freerepublic.com/focus/f-news/2011041/posts

How to Prosecute a Religious Sect, Cupblog April 16, 2008, *available at* http://cupblog.wordpress.com/2008/04/16/how-to-prosectute-a-religious-sect/

When Church Autonomy is Tyranny, Cupblog April 10, 2008, *available at* http://cupblog.wordpress.com/2008/04/10/when-church-autonomy-is-tyranny/

Prosecuting Polygamy in El Dorado, HUFFINGTON POST, April 8, 2008, *available at* http://www.huffingtonpost.com/marci-hamilton/prosecuting-polygamy-in-e_b_95674.html

A 'Window' For Victims of Abuse, L.A TIMES, July 19, 2007, *available at* http://articles.latimes.com/2007/jul/19/opinion/oe-hamilton19

What the Clergy Abuse Crisis Has Taught Us, 195 AMERICA (Jesuit magazine) 8, Sept 25, 2006, *available at* http://www.votfbpt.org/What_the_Clergy_Abuse_Crisis_Has_Taught_Us.pdf

RELATED COLUMNS (http://writ.news.findlaw.com/hamilton/)

The Two P's of Gender Inequality: Prostitution and Polygamy – How the Laws Against Both Are Underenforced to Protect Men and Subjugate Women, July 9, 2009

Taking Stock of the 2008 Intervention at the Texas Fundamentalist Latter-Day Saints Compound On Its One-Year Anniversary: The Lessons We Must Learn to Effectively Protect Children in the Future, April 16, 2009

A Roundup of 2008's Developments Relating to Harms Suffered By Children in Religious Settings: Our Disturbing Current Status, and Some Signs of Progress, Jan. 8, 2009

The United States Senate Judiciary Committee Holds Hearings on Polygamy Crimes: What Needs to Be Done at the Federal Level to Protect Children from Abuse and Neglect, Jul. 24, 2008

Why the Costs of Sexual Abuse and the Costs of Non-Enforcement of Anti-Sexual-Abuse Laws Are Too High, June 26, 2008

Why the Texas Supreme Court's Ruling Regarding the FLDS Mothers Is Significantly More Protective of the Children Involved than the Media Have Painted It to Be, Jun. 3, 2008

Why a Texas Appellate Court Seriously Erred In Concluding that Texas Child Protective Services Should Not Have Rescued All of the Children at the FLDS Compound, May 29, 2008

The Rescue of Children from the FLDS Compound in Texas: Why the Arguments Claiming Due Process Violations and Religious Freedom Infringement Have No Merit, May. 01, 2008

RELATED PRESENTATIONS

The "Licentiousness" in Religious Organizations and Why it is Not Protected Under Religious Liberty Constitutional Provisions, Osgoode Hall Law School, University of Toronto, March 17, 2010.

Liberty and Religious Liberty, Symposium, Twenty Year Anniversary of *Employment Div. v. Smith*: Reassessing the Free Exercise Clause and the Intersection Between Religion and the Law, S.D. L. REV., February 18, 2010

Understanding a Silent Tragedy: A Conference on Childhood Sexual Abuse, Panelist, William Mitchell School of Law, St. Paul, MN, April 24, 2009

The Theology of Secrecy and Religious Liberty, Constitutional Roundtable, University of Toronto Law School, March 17, 2009

Organizer, *The Evolving Balance: Abuse in Religious Communities and the Law*, day-long symposium with leading experts in the field discussing the legal aspects of the phenomenon of child abuse within religious communities, Mar. 3, 2009.

Religion and Constitutionalism, Maryland Discussion Group on Constitutionalism ("Schmooze") University of Maryland School of Law, February 27-28, 2009

The Importance of Being Honest About Religion, Candor or Respect: Talking About the Religion of Others, Symposium, Columbia University School of Law, Feb. 26, 2009.

When Religious Practices Conflict with the Law, Plenary speech, 2008 Appellate Judges Education Institute Annual Summit, Phoenix, AZ, November 14, 2008.

Annual Fordham Debate, *Resolved, The State should prosecute polygamous parents and remove their children from the home*, University of Utah School of Law, October 22, 2008.

Discussion of JUSTICE DENIED, Childhood Sexual Abuse Litigation Group Meeting, American Association for Justice Annual Convention, Philadelphia, PA, July 14, 2008.

Keynote, *Legislative Change for Clergy Abuse Victims*, Annual SNAP (Survivors Network of those Abused by Priests) Conference, Chicago, IL, July 12, 2008.

Distinguished Legal Lecture, International Cultic Studies Association, *Religion, the Truth, and the Public Good*, June 26-9, 2008.

Separation of Church and State, United States Court of Appeals for the Third Circuit Judicial Conference, Cambridge, MD, April 29, 2008.

Annual Helen Hamilton Keynote, University of North Dakota, *How the American Legal and Constitutional Culture Has Placed Women and Children at Risk*, April 19, 2008.

Annual Spring Meeting, American Bankruptcy Institute, *The Church in Chapter 11: The Lessons of the Catholic Diocese Cases*, Washington, DC, April 5, 2008.

Lecture, Program in Law and Public Affairs, Princeton University, *Challenging the Vatican in Court: The Child Sex-Abuse Cases*, March 31, 2008.

Benjamin N. Cardozo School of Law, NYC Press Conference, *Call To Action for State and National Laws Lifting the Statute of Limitations on Sexual Abuse Victims' Lawsuits,* September 25, 2007.

Keynote, Survivors Network of those Abused by Priests National Conference, July 11-13, 2007.

Columbia University, Associates-in-Law Workshop Series, *Religion and the Public Good*, Apr. 12, 2007.

University of Dayton, Annual Distinguished Lecturer, *God, Power, and Politics,* Nov. 16, 2006.
Featured Speaker, Christ Church Annual Lecture Series, *God vs. the Gavel,* Christiana, DE, Sept. 17, 2006.
American Inns of Court, Harrisburg, PA, *God vs. the Gavel*, Apr. 5, 2006

RELATED PRO BONO ACTIVITIES AND HONORS

Advisory Board, National Crime Victims Bar Association, 2009-Present
Establishment of website to track and report on international movement to reform statute of limitations for child sex abuse victims -- www.sol-reform.com
Testimony before both houses of the Delaware and Wisconsin legislatures regarding legislative reform of the statutes of limitations for childhood sexual abuse.
Drafted model statutes for federal law to reform child sex abuse laws, Violence Against Children Act and Hidden Predators Act
Numerous written legal analyses of the pending New York Child Victims Act, and particularly its impact on victims of sexual abuse permitted by public and private entities. Press conference to educate the public on the issues, April 21, 2009.
Advisory Board, Justice for Children, Washington, DC, 2007-Present
Advisory Board, Child Protection Project, 2008-Present
Distinguished Alumnus, Wheaton North High School, Wheaton, IL, October 2, 2009
Board of Directors, Policy Committee, and National Advisory Board, National Association to Prevent the Sexual Abuse of Children, 2007-09
International Advisory Board, The Awareness Center, 2007-08
Advising neighborhoods dealing with the Religious Land Use and Institutionalized Persons Act
Numerous amicus briefs for nonprofit organizations in cases involving child sex abuse or discrimination by religious organizations
PA CARES, committee formed to reform childhood sexual abuse laws, 2006-Present.
Lifetime Achievement Award for Pro Bono Legal Service to veterans groups, presented by the Air Force Association, the National Association of Uniformed Services, and CORMV, 2001.
Board of Directors, National Coalition Against Censorship, 1999-2001

RELATED OTHER PROFESSIONAL ACTIVITIES

Advisory Board, Bernard G. Segal Institute for Appellate Advocacy, Philadelphia, PA, 2006-Present
Special Assistant District Attorney, Philadelphia District Attorney's Office, Grand Jury Investigation of Philadelphia Archdiocese with respect to clergy abuse, 2004-05.
Legal Representation of the City of Boerne, TX, *Boerne v. Flores*, 521 U.S. 507 (1997) (holding Religious Freedom Restoration Act unconstitutional).
Legal Representation of victims of childhood sexual abuse by clergy, including San Diego, Portland and Spokane Diocese federal bankruptcies; cities and neighborhoods involved in litigation under the Religious Land Use and Institutionalized Persons Act; and employees involved in discrimination cases involving religious institutions.

Oral arguments in constitutional cases before:

United States Supreme Court
United States Courts of Appeals for the Second, Third, Fourth, Seventh, and Ninth Circuits
Illinois Supreme Court
New Hampshire Supreme Court
New Jersey Supreme Court
Wisconsin Supreme Court
Numerous other federal and state courts

Appearances on numerous media to comment on constitutional and church/state issues, including *The Daily Show with Jon Stewart*; *Good Morning America*; *The Today Show*; ABC News; CBS News; NBC News; *The Anderson Cooper Show; Lou Dobbs Show*; *O'Reilly Factor*; *Hannity & Colmes*; C-Span2 BookTV; CNN Headline News; Fox News; *The Tavis Smiley Show*; National Public Radio, including *Justice Talking* and *Radio Times*; solicited blogs for *Washington Post* and *Los Angeles Times*; and many other media outlets. Op-eds in the *New York Times*, *Los Angeles Times*, *Chicago Sun-Times*, *Wall Street Journal*, *Dallas Morning News*, *Fort Worth Star-Tribune*, *Newsday*, and numerous others.

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

Marci A. Hamilton
Paul R. Verkuil Chair in Public Law

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July 15, 2010

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

REPORT

UNITED STATES HISTORY AND CONSTITUTIONAL DOCTRINE UPHOLDING POLYGAMY LAWS AGAINST CHALLENGES BY RELIGIOUS ENTITIES AND BELIEVERS

This is Exhibit "B" referred to in the affidavit of Marci A. Hamilton made before me on July 15, 2010

A Commissioner for taking Affidavits for the State of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
MARIA GALLAGHER CHUBB, Notary Public
Newtown Twp., Bucks County
My Commission Expires April 22, 2012

Before the United States grappled with religiously motivated polygamy (and/or bigamy), common law and all of the states had made it illegal.[1] In the first Supreme Court case to address religiously motivated polygamy, Reynolds v. United States, 98 U.S. 145, 165 (U.S. 1879), the Court explained the long tenure of the polygamy laws: "From that day to this we 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." The Court went on to explain that it was inconceivable that polygamy would be a protected religious practice given the universal law against it: "In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life." Id.

The federal and state courts in the United States repeatedly have upheld the polygamy laws. The Supreme Court,[2] the lower federal courts[3], and the state appellate courts[4] are all in agreement

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[1] Reynolds v. United States, 98 U.S. 145, 164-65 (U.S. 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."). See also Joseph Story, Commentaries on the Constitution of the United States: Volume II 417 n.1 (Thomas M. Cooley ed., 4th ed. 1873) ("It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts[.]") (quoting 1 Kent's Comm. Lect. 14, p. 293, 294)); See generally John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 7 (1988) (noting "polygamy" among the sexual practices "proscribed by European church and state" during the era of North American settlement.).

[2] Cleveland v. United States, 329 U.S. 14, 20 (U.S. 1946) (upholding Mann Act conviction of Fundamentalist Mormon claiming right to engage in movement of girls across state lines); Davis v. Beason, 133 U.S. 333, 342-43 (1890) (holding state polygamy laws violate neither the First Amendment nor principles of federalism), overruled in part on other grounds by Romer v. Evans, 517 U.S. 620, 650 (U.S. 1996); The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 50 (U.S. 1890) (noting government proscription of polygamy does not violate the First Amendment); Miles v. United States, 103 U.S. 304, 310-11 (U.S. 1880) (finding no violation of constitutional rights in disqualification of polygamist juror); Reynolds v. United States, 98 U.S. 145, 166 (U.S. 1879) (holding federal anti-polygamy laws constitutional against free exercise challenge).

[3] Bronson v. Swensen, 500 F.3d 1099, 1103 (10th Cir. 2007) (affirming constitutionality of Utah's prohibition of polygamy); White v. State of Utah, 41 Fed.Appx. 325, 326 (10th Cir. 2002) (finding Utah's criminalization of polygamy constitutional); Potter v. Murray City, 760 F.2d 1065, 1068 (10th Cir. 1985) (finding no violation of free exercise rights of police officer discharged for practicing polygamy); LaVigne v. United States Gov't, 2007 U.S. Dist. LEXIS 31019 (D.N.C. 2007) (finding plaintiff's constitutional allegations in complaint frivolous); New York City C.L.A.S.H. v. City of New York, 315 F. Supp. 2d 461, 474 (S.D.N.Y. 2004) (noting, in expressive conduct context, that "[f]reedom of religion does not exempt polygamy or compliance with child labor and immunization laws."); Barlow v. Evans, 993 F. Supp. 1390, 1394 (D. Utah 1997) (finding

that polygamy laws do not violate United States constitutional rights, whether the court has addressed free exercise, due process, or equal protection challenges.

Some have tried to argue that the federal polygamy laws were solely a product of animus against the Church of Jesus Christ of Latter-Day Saints ("LDS" or "Mormon"), see Affidavit No. 1 of Dr. William John Walsh, In re the Matter of The Constitutional Question Act, R.S.B.C., C.68, No. S-097767 (Sup. Ct. Brit. Colum., Jun. 7, 2010), [hereinafter Walsh Aff.], but that is both an exaggeration and a mischaracterization. As mentioned above, well before the federal government considered whether to outlaw polygamy in the Territories, where the Mormons resided, the common law and then the states had made it illegal. The Mormons are the most well-known religious organization with a history of

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Fair Housing Act does not reach discrimination against religiously-motivated polygamy because such conduct is in violation of criminal law and not entitled to First Amendment protection.); Mohammad v. Sommers, 238 F. Supp. 806, 811 (D. Mich. 1964) (holding religious liberty did not include right to cause breaches of peace and noting "[t]he state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced.")

[4] State v. Holm, 137 P.3d 726, 741-743 (Utah 2006) (upholding state anti-bigamy statute against free exercise and due process challenges); Shepp v. Shepp, 906 A.2d 1165, 1170 (Pa. 2006) (finding while expression of polygamists beliefs are protected under First Amendment, there is no free exercise right to practice polygamy which can be and has been legitimately proscribed by the state); State v. Green, 99 P.3d 820, 825-830 (Utah 2004) (finding state anti-bigamy law does not violate Free Exercise Clause, even in light of Lawrence v. Texas, 539 U.S. 558 (U.S. 2003)); In re State in Interest of Black, 283 P.2d 887, 900-905 (Utah 1955) (finding state's consideration of parental encouragement of polygamy to be form of "child neglect" violates neither the free exercise nor due process clause); State v. Barlow, 153 P.2d 647, 654-655 (Utah 1944) (finding state law prohibiting bigamous cohabitations does not violate defendants' First Amendment rights); People v. Ellis, 266 P. 518 (Cal. 1928) (noting legislature has constitutional authority to criminalize continuous cohabitation of bigamous couples); Long v. State, 137 N.E. 49, 50 (Ind. 1922) (affirming exclusion of defendant's testimony that polygamous marriage was a religious act); Toncray v. Budge, 95 P. 26, 43 (Idaho 1908) (upholding state law prohibiting polygamists from voting or holding public office against First Amendment challenge); People v. Pierson, 68 N.E. 243, 246 (N.Y. 1903) (noting in free exercise context that "[a] person cannot, under the guise of religious belief, practice polygamy and still be protected from our statutes constituting the crime of bigamy."); Shepherd v. Grimmett, 31 P. 793, 796 (Idaho 1892) (declining to declare anti-polygamy voting statute void as it was neither an ex post facto law nor a bill of attainder); Wolley v. Watkins, 22 P. 102, 105, 110 (Idaho 1889) (upholding state law prohibiting polygamists from voting and holding public office against free exercise challenge); United States v. Snow, 9 P. 697, 699 (Utah 1886) (finding state may prohibit polygamous cohabitations without offending free exercise); United States v. Tenney, 8 P. 295 (Ariz. 1885) (upholding use of federal anti-polygamy law to convict bigamist married in multiple territories); State v. Fischer, 199 P.3d 663, 667 (Ariz.App. Div. 2008) (refusing to depart from Reynolds line of precedent in finding anti-bigamy statute constitutional against both equal protection and due process defenses); State v. Bateman, No. 1 CA-CR 07-0043, 2008 WL 4516447, *7 (Ariz. App. Div 1 Oct. 02, 2008) (holding bigamy law constitutional against equal protection and due process defenses); State v. Gonzalez, No. 22829-1-III, 2005 Wash. App. LEXIS 614 , *7 (Wash. App. Apr. 12, 2005) (noting that "bigamy statute is a neutral law of general application" which does not offend free exercise clause); Dorre v. State, Nos. 05-98-01259-CR, 05-98-01260-CR, 2000 WL 99956, *2 (Tex. App.-Dallas Jan. 31, 2000) (holding proscription on bigamy constitutional against free exercise challenge); Barlow v. Blackmun, 798 P.2d 1360, 1366 (Ariz. Ct. App. 1990) (holding anti-bigamy statute does not violate Free Exercise Clause); People v. Wood, 93 Misc. 2d 25, 33 (N.Y. J. Ct. 1978) (noting in free exercise context that "a statute proscribing bigamy does not contravene the religious scruples of those practicing the bigamist marriage.").

embracing a doctrine encouraging polygamy,[5] and their defiance at the time of the long Anglo-American tradition outlawing polygamy spurred members of Congress to enact laws to end polygamy in the Territories.[6] Those 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.[7]

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[5] See Richard S. Van Wagoner, Mormon Polygamy: A History 8 (2d ed. 1989) (describing 1830s America as a time marked by an influx of opportunistic messiahs and prophets). While Joseph Smith's movement was by far the most public and successful, he was in the company of several parallel "communitarian groups advocating a 'community of wives' and other marital variations.") The book briefly discusses the "Perfectionists," "Cochranites," and followers of "Matthias the Prophet." Id. at 9. However, none of Smith's contemporaries gained the traction and publicity of the Mormon polygamists, especially under Brigham Young's reign: "though the Mormons were living in isolation, hundreds of miles from other settlements, their polygamous behavior became increasingly apparent to the outside world," from across the United States and throughout Europe. Id. at 83-84. This "influx," however, must be juxtaposed with the mainstream ministers and pastors of the era. Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy,* 18 J.L. & Politics 387, 399 (2002) ("Far from urging civil disobedience, many eighteenth century sermons exhorted believers to obey the civil law.").

[6] Morrill Anti-Bigamy Act of 1862, ch. 126, 12 Stat. 501(banning bigamy in all United States territories); Edmunds Anti-Polygamy Act of 1882, ch. 47, 22 Stat. 30 (making polygamy a felony). Congress later amended these acts into the Edmunds-Tucker Act of 1887, ch. 397, 24 stat. 635 (extending the ban on polygamy to the Utah Territory and all territories under the jurisdiction of the United States).

[7] The religiously motivated polygamy currently practiced in the United States and Canada by members of the breakaway fundamentalist Mormon sects also includes a strong correlation to child sex abuse, under-age 'celestial' bigamist marriages, incest, statutory rape of both boys and girls, and even permanent expulsion of unwanted male children, known as "lost boys." See generally Daphne Bramham, The Secret Lives of Saints: Child Brides and Lost Boys in Canada's Polygamous Mormon Sect (2009); Brent W. Jeffs with Maia Szalavitz, Lost Boy (2009); Elissa Wall with Lisa Pulitzer, Stolen Innocence: My Story of Growing Up in a Polygamous Sect, Becoming a Teenage Bride, and Breaking Free of Warren Jeffs (2008); Susan Ray Schmidt, Favorite Wife: Escape from Polygamy (Lyons Press 2009) (2006); Carolyn Jessop with Laura Palmer, Escape (2007); Benjamin G. Bistline, The Polygamists: A History of Colorado City, Arizona (2004); Dorothy Allred Solomon, Daughter of the Saints: Growing up in Polygamy, (2003); Melissa Merrill, Polygamists's Wife (Pocket Books Simon & Schuster 1977) (1975).

The fundamentalist polygamists have invoked the First Amendment and state free exercise guarantees to defend against liability for under-age marriages and child sex abuse. Marci A. Hamilton, God vs. the Gavel: Religion and the Rule of Law (2005); Stephen Singular, When Men Become Gods: Mormon Polygamist Warren Jeffs His Cult of Fear and the Women Who Fought Back 114 (2008) ("For decades, Jeffs's church had claimed that under the First Amendment to the U.S. Constitution, it had the absolute right to practice its religion as it chose; county, state, and federal governments had no business interfering with the FLDS and no jurisdiction over it.") ("Bugden [Jeffs's attorney] aggressively took issue with the judge's ruling and later reiterated what he'd been saying since early fall: his client's First Amendment rights were being trampled on by Utah's legal system, and this case was about nothing but the religious persecution of Warren Jeffs.") Id. at 236 ; Nicholas Riccardi, *Leader's Conviction Won't Stop Polygamous Sect,* Houston Chron., Sept. 30, 2007, at A3 ("Sam Barlow, then the marshal of FLDS-controlled Colorado City, Ariz., told believers those efforts conflicted with First Amendment guarantees on freedom of religion. 'We have challenged them on whether or not in a country where the Congress can make no law respecting an establishment of religion or prohibiting the free exercise, whether a legislature can predetermine at what age a person can make a religious covenant," said Barlow, then in a recording played at the Jeffs trial last week.'"); see also Jennifer Dobner, *Polygamous Sect Leader Warren Jeffs Refuses Texas Extradition,* Deseret News, June 29, 2010, *available at* http://www.deseretnews.com/article/700044148/Polygamous-sect-leader-Warren-Jeffs-refuses-Texas-extradition.html ("Jeffs, 54, faces charges of bigamy, sexual assault of a child and aggravated assault in Texas. The charges stem from alleged marriages to one girl under age 17 and another under age 14, both in 2005. The Texas charges stem from evidence gathered in a raid on the church's ranch near Eldorado in April 2008. Records confiscated during the raid indicated multiple marriages to underage girls, some as young as 12 years old. Jeffs, according to the records, had dozens of wives; 58

Because the practice was a crime under common law even before the United States was formed, and then across the states and Territories, and the LDS Church was the only known organization that based its culture on the practice, the LDS Church and polygamy became synonymous for a period of history. When the LDS persisted in polygamy, members of Congress, still intent on eliminating polygamy, sought to break up the church itself until polygamy ended. See Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 12 (U.S. 1890) (upholding provisions of the Edmunds-Tucker Act of 1887 which revoked corporate charter and seized real property of LDS, on ground that grant of legal charter to "Saints" was government support of their corporation, and thus an implicit acceptance of their "nefarious" polygamist practices which were "repugnant to our laws and to the principles of our civilization.") See also Walsh Aff. ¶ 17-23. Once polygamy was disavowed by the LDS, the strictures against the church were removed. See Walsh Aff. ¶ 24; see also Richard S. Van Wagoner, Mormon Polygamy: A History 105-176 (2d ed. 1989); Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America 119-220 (2002).

This report will focus on the history of and the doctrine governing religious liberty in the United States as they apply to religiously motivated polygamy.

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were listed in the year before the alleged marriages that led to his indictment. In 2007, a Utah jury convicted Jeffs of two counts of rape as an accomplice for his role the 2001 marriage of a 14-year-old follower to her 19-year-old cousin. He is serving consecutive terms of five years to life in prison. Until recently, Jeffs had been in a Mohave County, Ariz., jail, awaiting two trials on sexual misconduct charges related to marriages of underage FLDS girls. Prosecutors asked a judge to drop the charges on June 6 after the two alleged victims said they no longer wanted to proceed with prosecution.").

I. The History and Doctrine Support Categorical Exclusion of Licentious Behavior, Including Polygamy, from Religious Liberty Guarantees

The history of United States attitudes and law regarding polygamy reveals that religious liberty guarantees have not been interpreted to encompass polygamy.

A. Religious Liberty Was Not Intended to Encompass Licentiousness, Which Was Understood to Include Polygamy

Contemporary discourse at times treats liberty as though it is impossible to have too much. Such reasoning, though, is a perversion of the history behind religious liberty in the United States, which limited liberty by incorporating the concept of "licentiousness."[8] This history as well as the references to conduct involving "licentiousness" found in a number of state constitutions and in United States cases, strongly argues for an exception from religious liberty guarantees for claims involving polygamy. As the Supreme Court noted in Reynolds, given the pervasiveness of the laws against polygamy, it was never an activity intended to be encompassed by the Free Exercise Clause of the Constitution, or the state free exercise guarantees.

If one looks carefully into the history of religious liberty, contemporary presumptions that incorporate no limitation turn out to be unfounded and ahistorical. Nineteenth and early twentieth century writings[9] and cases equated "licentiousness" with the variety of illicit sex activities-adultery,

[8] Elements of this section are derived from my article, Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why it is Not Protected Under Religious Liberty Constitutional Provisions*, 18 Wm. & Mary Bill Rts. J. 953 (2010).

[9] See e.g., John Leland, Short Sayings on Times, Men, Measures and Religion Exhibited in Address, Delivered at Cleslie, July 5, 1830, in The Writings of the Late Elder John Leland 579 (1845) (" It is not designed to defend the religious opinions of any, but the persons and rights of all; so that Jews, Turks, Pagans and Christians, with all their subdivided opinions, may peaceably live together in the same domain—each one enjoying the free exercise of his religious opinions, and all impartially protected by the law. Should any one man, or one sect, attempt to force another to believe, act or support, what they

(see United States v. Clapox, 35 F. 575, 577 (Ore. Dist. Ct. 1888); Kelley v. State, 226 S.W. 137, 138 (Ark. 1920); In re Estate of Jessup, 22 P. 742, 746 (Cal. 1889); King v. United States, 17 F.2d 61, 63 (4th Cir. 1927); Lake & Barron v. Governor, 2 Stew., 395, 398 (Ala. 1830); Tully v. Tully, 69 P. 700, 700 (Cal. 1902)), child sex abuse, (see Mut. Life Ins. Co. v. Terry, 82 U.S. (15 Wall.) 580, 589 (1872); Hansel v. Purnell, 1 F.2d 266, 270-71 (6th Cir. 1924); People v. Stouter, 75 P. 780, 780-82 (Cal. 1904); Blount v. State, 138 So. 2, 2-3 (Fla.[A] 1931); People v. Hoosier, 142 P. 514, 516 (Cal App. 3d Div. 1914); In re Petition of Todd on behalf of Todd, 186 P. 790, 795 (Cal. App. 3d. Div. 1919); People v. Camp, 183 P. 845, 848 (Cal. App. 3d Div. 1919); People v. Anthony, 129 P. 968, 970 (Cal. App. 1st Div. 1912); People v. Adams, 47 P.2d 320, 320 (Cal. App. 3d Div. 1935); Cheeseman v. Cheeseman, 278 P. 242, 242 (Cal. App. 3d Div. 1929)), and polygamy or bigamy (see Davis v. Beason, 133 U.S. 333, 348 (1890)).[10] Some courts have equated "licentiousness" with incest as well. See Campbell v. Crampton, 2 F. 417, 428 (N.Y. Cir. Ct. N.D. 1880).

Dictionaries also defined "licentious" as "dissolution" or "sexual immorality."[11] In the

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themselves believe in, with this plea, *that the others were licentious and heretical,* the assailants would be the offenders, to be punished by the law; *for when a man's religion leads him to commit overt acts, he should be punished for his actions and pitied for his delusion.*") (emphasis added); see also Nathaniel Hawthorne, The Minister's Black Veil, *in* Twice-Told Tales 25-37 (Modern Library 2001) (1837); Nathaniel Hawthorne, The Scarlet Letter (Modern Library 2000) (1850).

[10] The term "licentious[ness]" has been used by multiple courts in cases prosecuted under the White Slave Act of 1910, 36 Stat. 825, c. 395. See Athanasaw v. United States, 227 U.S. 326, 331 (U.S. 1913) (affirming conviction for transporting a girl for the purpose of debauchery in violation White Slave Act); United States v. Long, 16 F. Supp. 231, 232 (Ill. E.D. 1936) (convicting defendant for transporting 2 girls for the purpose of debauchery in violation of the White Slave Act.).
The White Slave Act, officially the Mann Act, 36 Stat 825, 18 USC 398 (1910), was also used for the prosecution of polygamists. See Cleveland v. United States, 329 U.S. 14, 20 (1946) (holding the interstate transportation of a plural wife, for or by a member of a polygamist sect constitutes an "immoral purpose" under the Mann Act (36 Stat 825, 18 USC 398), and that such conviction under the Mann Act did not violate defendant's free exercise rights) ("It is also urged that the requisite criminal intent was lacking since petitioners were motivated by a religious belief. That defense claims too much. If upheld, it would place beyond the law any act done under claim of religious sanction. But it has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy. (citing Reynolds, 98 U.S. 145) Whether an act is immoral within the meaning of the statute is not to be determined by the accused's concepts of morality. Congress has provided the standard. The offense is complete if the accused intended to perform, and did in fact perform, the act which the statute condemns, viz., the transportation of a woman for the purpose of making her his plural wife or cohabiting with her as such.").

[11] See 3 Century Dictionary 3436 (William Dwight Whitney ed., Century Co. 1889) ("*Licentious... a.* 1. Characterized by or using license; marked by or indulging too great freedom; overpassing due bounds or limits; excessive. ...Specifically--2. Unrestrained by law, religion, or morality; wanton; loose; dissolute; libidinous: as, a licentious person; licentious desires"; "*Licentiously... adv.* In a licentious manner; with too great freedom; especially, in contempt of law and morality; lasciviously;

1850s, Canada also enacted a law that protected religious liberty but explicitly excluded acts of licentiousness.[12] According to historian John Philip Reid, those in the eighteenth century "had as great a duty to oppose licentiousness as to defend liberty."[13] Historian Bernard Bailyn has explained that the

> very idea of liberty was bound up with the preservation of this balance of forces. For political liberty, as opposed to the theoretical liberty that existed in a state of nature, was traditionally known to be "a natural power of doing or not doing whatever we have in mind" so long as that doing was "consistent with the rules of virtue and the established laws of the society to which we belong"; it was "a power of acting agreeable to the laws which are made and enacted by the consent of the PEOPLE, and in no ways inconsistent with the natural rights of a single person, or the good of the society." Liberty, that is, was the capacity to exercise "natural rights" within limits set not by the mere will or desire of men in power but by non-arbitrary law-law enacted by legislatures containing within them the proper balance of forces.[14]

A number of state constitutions exclude "licentiousness," or illicit sex, from religious

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loosely; dissolutely."; *Licentiousness… n.* The state or character of being licentious; want of due restraint in any respect; especially, dissolute or profligate conduct; sexual immorality."); Francis Allen, A Complete English Dictionary 448 (1765) ("*licentious, Adj.* not restrained by law, morality or religion."); see also 4 John Ogilvie, The Imperial Dictionary of the English Language 785 (Charles Annandale, ed., 1883) ("*Fille de joie.* [Fr.] A woman of licentious pleasure; a prostitute."). Even as far back as Shakespearean times, licentiousness was affiliated with illicit sex. See, e.g., Eric Partridge, Shakespeare's Bawdy 175 (3d. Ed. 1968) (defining Shakespeare's usage of the word licentious in his works: "licentious. *Addicted to illicit sexual indulgence.* 'How dearly'—says Adriana—'would it touch thee to the quick, Shouldst thou but hear I were licentious', Com. of Errors, II ii 129-130.—Henry V, II iii 22 ('licentious wickedness').—'Fill'd the time With all licentious measure', Timon, V iv 3-4") (first emphasis added).

[12] Denise J. Doyle, *Religious Freedom in Canada*, 26 J. Church & St. 413, 418 (1984) ("In 1851, the legislature of Canada…repealed those sections of the Constitutional Act that dealt with endowed parsonages. The statute contained an important section, that has increased in importance over the years: 'That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so the same be not made an excuse for acts of licentiousness, or justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.' This was the first statute to declare religious freedom in Canada. By the terms of the later of the British North America Act this Freedom of Worship Statute has remained in effect in Quebec and Ontario.") ("The British North America Act of 1867 (BNA) joined four Canadian provinces together in a confederation known as the dominion of Canada. The BNA Act, the former Canadian Constitution, made no express statements on the subject of religion or religious freedom. Section 129 of the Act allows for the continuance of provincial laws as long as they are not repealed. This ensured that whichever religious rights had been achieved—as, for example, the Freedom of Worship Statute--would remain in effect." Id. at 419) ("The plaintiff in Cribben v. The City of Toronto (1891) was unsuccessful in having a bylaw declared invalid prohibiting all religious speeches in public parks….The idea being that religious freedom is freedom for religion not freedom from the law." Id. at 427-28); see also David H. Moore, *Religious Freedom and Doctrines of Reluctance in Post-Charter Canada*,1996 BYU L. Rev. 1087, 1090-91 (1996). See generally Douglas A. Schmeiser, Civil Liberties in Canada (London: Oxford Univ. Press 1964).

[13] John Phillip Reid, The Concept of Liberty in the Age of the American Revolution 35 (1988).

[14] Bernard Bailyn, The Ideological Origins of the American Revolution, 76-77 (Belknap Press of Harvard University Press, 1992). See also David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence* 45 Am. J. Legal Hist. 154 (2001).

liberty protections along the lines of the language in the California Constitution:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.[15]

This exclusion from free exercise protection first appeared in the Charter of Rhode Island and Providence Plantations of 1663, which stated:

> That our royall will and pleasure is, that noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and theire owne judgments and consciences, in matters of religious concernments, throughout the tract of land hereafter mentioned; they behaving themselves peaceablie and quietlie, and **not useing this libertie to lycentiousnesse** and profanenesse, **nor to the civill injurye or outward disturbeance of others.**[16]

The prohibition against "licentiousness" was reflected in a few other early state constitutions besides Rhode Island's Charter,[17] but it became most prevalent in the states and appeared in Canada during the nineteenth century.[18] Most early constitutions also included a provision that made

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[15] Cal. Const. art. I, § 4 (emphasis added). See Ariz. Const. art. II, § 12; Colo. Const. art. II, § 4; Conn. Const. art. I, § 3; Geo. Const. art. I, § 1, ¶ IV; Idaho Const. art. I, § 4; Ill. Const. art. I, § 3; Minn. Const. art. I, §16; Miss. Const. art. III, § 18; Mo. Const. art. I § 5; Nev. Const. art. I, § 4; N.Y. Const. art. I, § 3 (2001); N.D. Const. art. I, § 3; S.D. Const. art. VI, § 3; Wash. Const. art. I, § 11 (1993); Wyo. Const. art. I, § 18.

[16] Charter of Rhode Island and Providence Plantations 1663), *reprinted in* 8 Sources and Documents of the United States Constitutions 362 (William F. Swindler ed., 1979) [hereinafter Sources & Documents] (emphasis added).

[17] N.Y. Const. of 1777, art. XXXVIII, *reprinted in* 7 Sources and Documents, *supra* note 14, at 168 ("And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: Provided, That the liberty of conscience, hereby granted, *shall not be so construed as to excuse acts of licentiousness*, or justify practices inconsistent with the peace or safety of this State.") (emphasis added).

[18] See Cal. Const. of 1849, art. I, § 4, *reprinted in* 1 Sources and Documents, *supra* note 14, at 447; Colo. Const. art. II, § 4; Conn. Const. of 1818, art. I § 3, *reprinted in* 2 Sources and Documents, *supra* note 14, at 144; Fla. Const. of 1868, Decl. of Rights, § 4, *available at* http://www.floridamemory.com/Collections/Constitution_1868_Articles/1868_preamble.cfm ; Ga. Const. of 1877, art I, § 1, ¶ XIII, *reprinted in* 2 Sources and Documents, *supra* note 14, at 514; Idaho Const. art. I, § 4; Ill. Const. of 1870, art. II, § 3, *reprinted in* 3 Sources and Documents, *supra* note 14, at 544; Minn. Const. art. I, §16; Miss. Const. of 1817, art. I § 3, *reprinted in* 5 Sources and Documents, *supra* note 14, at 347; Mo. Const. of 1875, art. II, § 5,

laws protecting peace and safety exceptions to the free exercise of religion.[19]

This exclusion of illicit sex from the universe of religious liberty protections is consistent with the leading philosopher to influence the founding and framing generations, John Locke, who distinguished licentiousness from protectable religious belief and conduct as follows:

> I will not here tax the pride and ambition of some, the passion and uncharitable zeal of others. These are faults from which human affairs can perhaps scarce ever be perfectly freed; but yet such as nobody will bear the plain imputation of, without covering them with some specious colour; and so pretend to commendation, whilst they are carried away by their own irregular passions. But, however, that some may not colour their spirit of persecution and unchristian cruelty with a pretence of care of the public weal, and observation of the laws, and that others, under pretence of religion, may not seek impunity for their libertinism and licentiousness; in a word, that none may impose either upon himself or others, by the pretences of loyalty and obedience to the prince, or of tenderness and sincerity in the worship of God; I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other.[20]

This view of licentiousness as beyond free exercise guarantees was further confirmed in the United States Supreme Court's earliest application of the Free Exercise Clause, in the Mormon polygamy cases. In Davis v. Beason, 133 U.S. 333 (1890), the Court clearly identified polygamy as licentious: "The constitutions of several States, in providing for religious freedom, have declared expressly that such freedom shall not be construed to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the State." Id. at 348.

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reprinted in 2 Sources and Documents, *supra* note 14, at 544; Nev. Const. art. I, § 4; N.D. Const. art. I, § 3; S.D. Const. art. VI, § 3, *reprinted in* 10 Sources and Documents, *supra* note 14, at 282; Wash. Const. of 1878, art. VI, § 4, *available at* http://www.sos.wa.gov/_assets/history/1878Constitution.pdf ; Wyo. Const. art. I, § 18; see also Ariz. Const. art. II, § 12 (Arizona's Constitution was ratified in 1912.).

[19] See Conn. Const., art. I § 3, *reprinted in* 2 Sources and Documents, *supra* note 14, at 144; Fla. Const. of 1868, Decl. of Rights, § 4, *available at* http://www.floridamemory.com/Collections/Constitution_1868_Articles/1868_preamble.cfm; Ga. Const. of 1777, art. LVI, *available at* http://avalon.law.yale.edu/18th_century/ga02.asp ; Md. Const. of 1776, art. XXXIII, *reprinted in* 4 Sources and Documents, *supra* note 14, at 372; Mass. Const. art I, § 2 (ratified in 1780); N.H. Const. art I, § 5 (ratified in 1784); N.J. Const. of 1776, art. XIX, *reprinted in* 6 Sources and Documents, *supra* note 14, at 449; N.Y. Const. of 1777, art. XXXVIII, *reprinted in* 7 Sources and Documents, *supra* note 14, at 168. See also Thomas Jefferson, Va. Stat. for Establishing Religious Freedom of 1786, ¶ 1, *available at* http://religiousfreedom.lib.virginia.edu/sacred/vaact.html.

[20] John Locke, A Letter Concerning Toleration 7 (John Horton & Susan Mendus eds., Routledge 1991) (1689) (emphasis added).

B. The Polygamy Laws in the United States Do Not Violate Constitutional Guarantees

The primary constitutional arguments against polygamy in the United States have been based on free exercise, equal protection, and due process theories. None of them have been successful.

1. The Polygamy Laws Do Not Violate Free Exercise Doctrine

The free exercise of religion provides for the absolute protection of belief, Employment Div. v. Smith, 494 U.S. 872, 877 (U.S. 1990); Cantwell v Connecticut, 310 U.S. 296, 304 (U.S. 1940); Reynolds v. United States, 98 U.S. 145, 164 (U.S. 1879), but it permits the regulation of conduct. Smith, 494 U.S. at 879; Reynolds, 98 U.S. at 164. The first free exercise case at the United States Supreme Court declared the principles that would undergird the vast majority of the Court's free exercise cases:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?
>
> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Reynolds, 98 U.S. at 166-67. This reasoning was derived from Thomas Jefferson's statement, in reply to an address to him by a committee of the Danbury Baptist Association, that:

> 'Believing with you that religion is a matter which lies solely between man and his god; that he owes account to noneother for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, -- I contemplate with

> sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.'

Reynolds, 98 U.S. at 164. Along the same lines, the Utah Supreme Court decades ago explained, "Freedom of religion has never been considered to be so absolute as to be beyond some regulation, and the practice of polygamy, human sacrifice, nudism, or other practices deemed so morally reprehensible as to be shocking to the conscience of the community may be restrained, even though practiced in the name of religion." Int'l Union of Operating Eng'rs, Local No.3 v. Utah Labor Relations Bd., 203 P.2d 404, 408 (Utah 1949). The polygamy laws do not involve regulations that prohibit religious belief or that single out religiously motivated conduct, but rather are integral elements of the marriage laws that determine the number of spouses. In the United States, marriage laws are a matter of state, not federal, law. Gill v. Office of Pers. Mgmt., No. 09-10309-JLT, 2010 WL 2695652 at *2 (D.Mass. July 8, 2010) ("The House Report [for the Defense of Marriage Act] acknowledged that federalism constrained Congress' power, and that '[t]he determination of who may marry in the United States is uniquely a function of state law.'") ("The states alone have the authority to set forth eligibility requirements as to familial relationships and the federal government cannot, therefore, have a legitimate interest in disregarding those family status determinations properly made by the states.") Id. at *13.

In the United States, the Free Exercise Clause places no bar to generally applicable, neutral laws that regulate conduct. Church of The Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520 (U.S. 1993); Locke v. Davey, 540 U.S. 712, 720 (U.S. 2004); Boerne v. Flores, 521 U.S. 507, 513-14 (U.S. 1997); Smith, 494 U.S. at 885. There is only one Supreme Court case to find a free exercise violation by a law regulating conduct; in that case, a law against animal sacrifice operated so

that it would not apply to anyone engaging in the conduct other than the Santerians. This "gerrymander," or targeting of a practice peculiar to a single religious group, was subjected to strict scrutiny and found to be unconstitutional. Lukumi, 508 U.S. at 542. Unless a law treats religion with "animosity" or "hostility", or creates a "religious gerrymander" that singles out a religious group by itself, the law is presumed constitutional and subject to rationality review. Lukumi, 508 U.S. at 534-535; Locke, 540 U.S. at 720-21. Without question, the laws outlawing polygamy are generally applicable and neutral on their face, do not create religious gerrymanders. Their language is facially neutral and they have been applied to both secular and religious bigamy and polygamy. Therefore, they are subject to deference from the courts, or rationality review.

The marriage laws apply to all adults equally, regardless of religious belief or status. For this reason, federal and state courts have upheld these marriage laws for over a century. See supra notes 1, 2, 3. Utah has dealt with the most cases. See United States v. Snow, 9 P. 697, 699 (Utah 1886) (under its power to regulate marriage, state may prohibit polygamous cohabitations without offending free exercise clause of the constitution); State v. Green, 99 P.3d 820, 827 (Utah 2004) (dismissing assertions that state bigamy statute subliminally targets religious marital practices). Even in Utah, where the LDS Church practiced polygamy in the nineteenth century and where Fundamentalist Mormons continue to engage in the practice, the state supreme court has refused to interpret the polygamy laws as though they are directed at the Mormons or any other religious organization: "In accordance with the standards adopted in Hialeah, Utah's bigamy statute explains what it prohibits in secular terms, without referring to religious practices. The statute does not on its face mention polygamists or their religion. In addition, the word 'cohabit' does not have religious origins or connotations; rather, it is a word of secular meaning." State v. Green, 99 P.3d 820, 828 (Utah 2004). It also has been applied in secular

settings. State v. Geer, 765 P.2d 1, 6-7 (Utah Ct. App.1988) (upholding conviction for bigamy in secular context).

The United States Supreme Court consistently has upheld the polygamy laws as well. The Court in Smith explicitly and repeatedly favorably referenced its earlier decision upholding the polygamy laws in Reynolds. Smith, 494 U.S. at 879, 882, 885, 890. Frequently, Plaintiffs have failed to apprehend the distinction between what the Constitution requires and what it permits. They argue that free exercise rights require mandatory accommodation of their religious practices, but they have confused mandatory with permissive accommodation. The Free Exercise Clause does not mandate accommodation by the courts, though it may permit accommodation if the legislature sees fit to create an exemption. See Smith, 494 U.S. at 890 (discussing accommodation made for religious use of peyote through the political process).

They also have asked courts to reopen well-settled case law in order to examine the motive behind marriage legislation. They claim that the marriage laws excluding polygamy were enacted solely in response to a motive to suppress the LDS Church. The history of the polygamy laws in the United States severely undermine such an argument.

Their motive argument also misunderstands United States constitutional law. In the United States, the subjective motive of each of the lawmakers is not the proper focus of any court. See United States v. O'Brien, 391 U.S. 367, 383 (U.S. 1969) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); see also Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 559 (U.S. 1993) (Scalia, J., concurring). The legitimate constitutional issue is not what a lawmaker had in his or her mind or heart when voting for a bill. Rather, courts are limited to examining the purpose of the law, based on the language of the law. See, e.g., Locke, 540 U.S. at 724-25. The polygamy laws speak

to marriage to multiple spouses, whether the partners are joined together for secular or religious ends. Accordingly, the polygamy laws have been applied in cases involving secular polygamy. See State v. Geer, 765 P.2d 1, 6-7 (Utah Ct. App.1988) (affirming conviction for bigamy despite defendant's assertions state selectively prosecuted only those bigamists who practice bigamy for non-religious reasons and holding Utah's statute neutral both in intent and application); State v. Caulder, 262 S.W. 1023 (Mo. 1924) (affirming bigamy conviction for marrying woman already married); Biddy v. State, 256 S.W. 271 (Tex. Crim. App. 1923); State v. Hayes, 104 La. 461 (La. 1900) (forfeiting bond of man indicted for bigamy who disappeared before trial); Williams v. State, 54 Ala. 131 (Ala. 1875) (affirming bigamy conviction); State v. Robbins, 28 N.C. (6 Ired) 23 (N.C. 1845) (affirming bigamy conviction); Commonwealth v. Putnam, 1 Pick. 136 (Mass. 1822) (finding man convicted of adultery for marrying and living with second wife after divorce should have been charged with polygamy instead).

The polygamy laws are very different from the law at issue in Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (U.S.1993). In that case, the Supreme Court struck down a city ordinance that forbade the "sacrifice" of animals, because the ordinance on its face showed animus toward religion. As the Court recently explained the case: "In Lukumi, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion." Locke, 540 U.S. at 720. In this case, the relevant laws regulate all marriages, not only those marriage practices of certain religious sects, and therefore Lukumi is inapposite, and rationality review applies.

The language of the federal and state laws simply do not carry any religious freight, but rather impose a neutral marriage requirement on all peoples, all of whom are subject to laws that punish "act inimical to the peace, good order, and morals of society." In re State in Interest of Black, 283 P.2d 887, 904 (Utah 1955). It is not irrational for the federal and Utah legislatures to conclude that polygamy

conflicts with the civil rights of women and children, and is inimical to the good order of society, which are conclusions the United Nations has embraced recently.[21]

2. The Polygamy Laws Do Not Violate the Constitutional Doctrine Relating to Equal Protection

Plaintiffs also sometimes attempt to argue that the polygamy laws in the United States are unconstitutional because they violate equal protection by imposing a disparate impact on religiously motivated polygamists. Because the general and neutral rules defining marriage to exclude polygamy affects some who believe in polygamy as part of their religious credo, they argue the anti-polygamy laws must be unconstitutional. There are two reasons this argument has not persuaded American courts.

First, the Supreme Court has rejected "disproportionate impact" evidence to prove unconstitutional purpose by the government. See, e.g., Hernandez v. New York, 500 U.S. 352, 359-60 (1991); Memphis v. Greene, 451 U.S. 100, 129, (U.S. 1981) (White, J., concurring); Washington v. Davis, 426 U.S. 229, 242 (U.S. 1976). "A disparate impact, even upon members of a racial minority, the classification of which we have been most suspect, does not violate equal protection. The Clause is

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[21] United Nations Div. for the Advancement of Women, United Nations Econ. Comm'n for Afr., Expert Group Report: Good Practices in Legislation on "Harmful Practices" Against Women 26-27 (May 26-29, 2009), available at http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Report%20EGM%20harmful%20practices.pdf ("Where polygamy exists, violence against women by their husband, as well as violence between co-wives, tends to be high. ...'Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.' In order to ensure that this discriminatory practice ends, legislation is required that prohibits polygamy."). See Terri Langford, *Fight For Eight FLDS Children Renewed,* Houston Chronicle, Aug. 6, 2009, available at http://www.chron.com/disp/story.mpl/front/5927121.html ("[Dr.] Barlow was indicted on July 22 on a charge of failure to report sex abuse.... In an affidavit written by CPS caseworker Paul Dyer that was filed with the court Tuesday, Barlow said he had delivered many babies to minor girls....'Dr. Barlow was asked if he had ever delivered children to girls under the age of 18 on the ranch and he said many times both on this ranch and in other places.'") ("Barlow also informed CPS that domestic violence is something handled internally by the FLDS. [A caseworker] asked Dr. Barlow what a young woman's recourse was should she be a victim of domestic violence, [...] Dr. Barlow stated that the church elders would handle the situation first."). See generally Andrea Moore-Emmett, God's Brothel (2004); TAPESTRY Against Polygamy, *available at* http://www.polygamy.org/ (last visited Jul. 10, 2010).

not a panacea for perceived social or economic inequity; it seeks to "guarantee equal laws, not equal results." M.L.B. v. S.L.J., 519 U.S. 102, 135 (U.S. 1996). See also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. ___, Slip Op. at 35 (U.S. 2010) (Stevens, J., concurring) (stating "it is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination."). The courts are to examine a law's purpose, and not its impact, for proper constitutional analysis.

Second, courts have held that the fact that a particular act inimical to the peace, good order and welfare of the state is only practiced by a single group cannot make that public policy illegal. If the conduct is harmful to others, or to society in general, it can be proscribed, regardless of how many engage in the conduct. For example, a law that forbids adults from refusing to feed children will have a disparate impact on a religious sect that believes in starving babies to keep them pure. See, e.g., Nicholson v. State, 600 So. 2d, 1101 (Fla. 1992), cert. denied 506 U.S. 1008 (U.S.1992); State v. Kahey, 436 So. 2d, 475 (La. 1983); Commonwealth v. Cottam, 616 A.2d 988 (Pa. Super. 1992). Yet, by outlawing the starvation of children, the state has not acted beyond constitutional boundaries, even if there is only one sect that is engaged in such systematic starvation.

Similarly, with the laws defining marriage to exclude polygamy, the fact that such laws might have disproportionate impact on groups that believe in polygamy for religious reasons does not in itself make the laws unconstitutional. Under United States constitutional doctrine, these laws are generally applicable and neutral, and the impact is irrelevant for this Court's purposes.

3. The Polygamy Laws Do Not Violate the Constitutional Doctrine Relating to the Right to Privacy

Some have attempted to piggyback a right to polygamy onto the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (U.S. 2003), which struck down a Texas law against sodomy.[22] These attempts have not been successful.. Lawrence stands for the proposition that adults have a right of privacy regarding sexual practices in private. Lawrence, 539 U.S. at 578. The Court treated the right as one belonging to consenting adults and one limited to private sexual practices. At no time did the Court indicate that it considered its holding relevant to marriage laws. It is too far a leap to conclude from Lawrence that the Court held that the states would be displaced from their historic role in determining marriage law. The decision itself disavows any intention to determine marriage law. Id.

The existence of a fundamental right of privacy over one's body, which was recognized in Lawrence, does not translate into a right to determine the parameters of the social institution of marriage. Courts have held that marriage is a social construct—not an inherent element of the human condition—and therefore marriage law is a legislative policy choice, not a constitutional mandate. Hodgson v. Minn., 497 U.S. 417, 435 (U.S. 1990) (explaining that "[s]tate regulation ...of marriage is obviously permissible," provided the state has a mere legitimate concern); Sosna v. Iowa, 419 U.S. 393, 404 (U.S. 1975) ("The State... has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created [.]" (internal citations omitted.) See Nan D. Hunter, Marriage, Law, Gender: A Feminist Inquiry, 1 Law & Sexuality 9, 13 (1991); Maynard v. Hill, 125 U.S.

[22] See e.g., State v. Holm, 137 P.3d 726, 742-743 (Utah 2006) (concluding that Lawrence is not sufficiently broad enough to protect polygamous activity) ("In fact, numerous litigants have relied upon the Lawrence decision to attempt to expand the sphere of behavior protected by the federal constitution. Given the quite limited nature of that case's holding, however, it should come as no surprise that the Lawrence opinion has been distinguished more than forty times since it was issued."); State v. Fischer, 199 P.3d 663, 669 (Ariz.App. Div. 2008) (rejecting assertion that Lawrence provides polygamist defendants with due process protection).

190, 205 (U.S. 1888). When state legislatures construct the institution of marriage, they must weigh multiple social ends and needs. The attempt to construe the institution of marriage as a fundamental right over one's body misses the distinctions between private sex and the public institution of marriage, including the consequences that flow: inheritance, legitimacy of children, and obligations to spouses and children.[23]

[23] See Dan Markel, et al., *Privilege or Punish: Criminal Justice and the Challenge of Family Ties*, 33 Harv. J.L. & Pub. Pol'y 1151, 1172 (book review) ("The argument for criminalizing bigamy, adultery, and incest is strong. Each is *malum in se*. Each is almost universally regarded as immoral and deserving of social reprobation. Each act attacks a defining feature of family life; in other words, each seriously subverts a socially important set of relationships."); John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 118 (1988) ("Polygamy, in essence, extended the traditional patriarchal family beyond the boundaries of one household. Just as southern men took slave mistresses and northern men visited prostitutes, Mormon men affirmed male dominance when they took additional mates, a privilege unavailable to women. Unlike the northern middle classes, for whom marital intimacy and reproductive control became increasingly important during the nineteenth century, the Mormons rejected romantic love, intense courtship, and contraception."). See also Reynolds, 98 U.S. at 165-66 ("Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.").

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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

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