J. Turley #1
October 20, 2010

No. S-097767
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE CONSTITUTIONAL QUESTION ACT, R.S.B.C. 1986, 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. 293 OF THE *CRIMINAL CODE OF CANADA*, R.S.C. 1985, c. C-46

AFFIDAVIT #1 OF JONATHAN TURLEY

I, Jonathan Turley, professor of law, of Washington, D.C., MAKE OATH AND SAY AS FOLLOWS:

1. I am professor of law at George Washington University Law School in Washington, D.C., where I hold the Shapiro Chair in Public Interest Law.

2. I have written more than three dozen legal articles, many of which have appeared in leading journals such as those of Cornell, Duke, Georgetown, Harvard and Northwestern universities. My areas of specialty include constitutional law and international law. I have served as legal commentator for NBC and CBS during national legal controversies. I regularly write on legal and policy topics for national newspapers.

3. I have also served as counsel in a wide range of cases, some of which have received significant media attention. Among my current cases, I am criminal

defense counsel for the participants in a new reality television series called "Sister Wives", which focuses on polygamous families.

4. A true copy of my curriculum vitae is attached to this Affidavit as **Exhibit "A"**.

5. I have been retained by the *amicus curiae* in this reference to provide an expert opinion on issues raised by polygamy in American constitutional and international law. My report also responds to some of the comments made in the affidavits of Marci Hamilton and Rebecca Cook filed in this proceeding.

6. Attached hereto and marked as **Exhibit "B"** to this my Affidavit is a true copy of my report, in which I set out my true opinion on the issues addressed therein.

7. I certify that I:

   a. am aware that in giving my opinion to the Court, I have a duty to assist the Court and am not to be an advocate for any party;

   b. have made this Affidavit and my report in conformity with that duty; and

   c. will, if called on to give oral or further written testimony, give that testimony in conformity with that duty.

SWORN BEFORE ME at Washington, D.C. this 20th day of October, 2010.

A Commissioner for taking Affidavits in the District of Columbia.

JONATHAN TURLEY

This is Exhibit "A" referred to in the affidavit of Jonathan Turley sworn before me at Washington, District of Columbia, this 20th day of October 2010

Susan R. Krause

A Commissioner for taking Affidavits for the District of Columbia

District of Columbia: SS
Subscribed and sworn to before me, in my presence,
this 20th day of October, 2010

Susan R. Krause
Notary Public, D.C.

My commission expires 2/28/2015

JONATHAN TURLEY
JB. and Maurice C. Shapiro Professor of Public Interest Law
George Washington University Law School
2000 H Street N.W.
Washington, D.C. 20052
(202) 994-7001
e-mail: jturley@law.gwu.edu

CURRENT POSITION:

George Washington University Law School, Washington, D.C.
JB. and Maurice C. Shapiro Professor of Public Interest Law
Chaired Professor 1998; Professor of Law 1993; Tenured 1992; Associate Professor 1990.

--Course subjects: Constitutional Criminal Procedure; Constitutional Law and the Supreme Court, Legislation, Litigation, Torts, Environmental Criminal Law, Environmental Law.
--Director, Project for Older Prisoners (POPS) since 1990.
--Director, Environmental Law Advocacy Center 1995 -2004.
--Director, Environmental Crimes Project since 1991.
--Chair, Judicial Clerkship Committee 1990 to 1996.
--Clinical Affairs Committee Member 1991 to 1996.
--Minority Clerkship Committee Member 1990 to 1995.
--Faculty Developments Committee Member 1990 to 1991.
--Public Interest Law Committee Member 1991 to 1992.

George Washington University Environmental Law Advocacy Center, Washington, D.C. -- (Chartered 1995; Re-chartered 1999) -- Executive Director since 1995.

Columnist appearing regularly in various national newspapers such as Los Angeles Times as well as one of the Board of Contributors for USA Today. Winner of the Columnist of the Year award for Single-Issue Advocacy for his columns on civil liberties by the Aspen Institute and the Week Magazine.

PREVIOUS POSITIONS:

NBC Legal Analyst in 2005.

CBS NEWS Legal Analyst during the election in 2004.

Legal Adviser to the Florida House of Representatives from January to April 2004.

CBS NEWS Legal Analyst during the Electoral Crisis in 2000-2001.

NBC/MSNBC Legal Analyst on the Clinton Impeachment 1998-1999.

Tulane Law School, New Orleans, LA--Associate Professor 1990; Assistant Professor 1988-1990.

--Course subjects: Constitutional Criminal Law, Property, Torts.
--Founder and Director, The Tulane Project for Older Prisoners (POPS).
--University Faculty Benefits Committee member 1989-1990.
-- Clinics and Externship Committee member 1988-1989.
--Law School Minority Clerkship member 1988-1993.
--Law School Library Committee member 1989-1990.
--Advisor, Tulane Public Interest Law Foundation 1988-1990.

United States Court of Appeals for the Fifth Circuit, Lafayette, LA--Judicial clerk (The Hon. W. Eugene Davis) 1987-1988.

Jenner & Block, Chicago, IL--Summer Associate 1987.

National Security Agency, Office of the General Counsel, Fort Meade, Maryland, 1985-1986 (intermittent internship).

Phelan, Pope & John, Ltd., Chicago, IL, Summer Associate 1986.

Defense Consultant, Chicago and Washington, D.C. 1983-1984.

United States Senate, Office of the Hon. William Proxmire, Washington, D.C., 1982-1983. Senatorial intern (Speechwriting).

Chesapeake Center for Environmental Research, Edgewater, Maryland, Summer 1978. Smithsonian intern assisting environmental experiments.

United States House of Representatives, Washington, D.C., Congressional Page to the Hon. Sidney R. Yates from 1977-1978 (Leadership Page).

EDUCATION:

J.D. 1987, Northwestern University School of Law, Chicago, IL.
--Coordinating Articles Editor (Book Review and Symposium Editor), Northwestern University Law Review.
--Member, Faculty Appointments Committee.

B.A. 1983, University of Chicago (international relations), Chicago, IL.
--Departmental and General Honors Graduate

BAR AND PROFESSIONAL ACTIVITIES:

--Board Member, Center for Judicial Process.
--Board, National Youth Leadership Forum
--United States Supreme Court Bar member.
--District of Columbia Bar member.
--Illinois Bar member.
--American Bar Association.
--District of Columbia Bar Association.
-- District of Columbia, Second, Fourth Fifth, Seventh, Ninth and Tenth Circuits.
--Court of Appeals for the Armed Forces.

LITIGATION EXPERIENCE:

Legal representation in various contracts, criminal, constitutional, environmental, employment discrimination and whistleblower cases on in state and federal courts. Some of these cases include:

Lead counsel for Dr. Sami Al-Arian in his Virginia contempt imprisonment for refusal to testify before a grand jury.

Lead counsel to Dr. Ali Al-Timimi, alleged spiritual leader of the so-called Virginia Paint-ball Jihad, in his appeal and later his remanded trial litigation following his life sentence in Northern Virginia.

Lead counsel representing airline pilots approaching or beyond the age 60 retirement age.

Lead counsel for federal Judge Thomas Porteous in his impeachment trial before the United States Senate.

Lead counsel for the cast of the TLC reality show "*Sister Wives*" on possible polygamy charges in Utah.

Lead counsel to Larry Hanuaer, House Intelligence Committee staff member accused of leaking the Presidential National Intelligence Estimate to the New York Times in 2006.

Co-lead counsel to Dr. Thomas Butler in his criminal case stemming from the alleged loss of 30 vials of bubonic plague in Texas and other violations of national security and transportation rules.

Co-lead counsel to journalists and legal observers arrested and detained during the 2002 Word Bank and IMF protests in Washington, D.C.

Lead counsel for the twenty-three former members of Special Grand Jury 89-2, or the so-called "Rocky Flats Grand Jurors." The Rocky Flats Grand Jury was the first Grand Jury to go public with criticism of the Department of Justice and its handling of a major environmental criminal case.

Lead counsel to four former United States Attorneys General in litigation successfully opposing the creation of the "protective function" privilege for the United States Secret Service (appearing with the Hon. Judge Kenneth Starr before the United States Court of Appeals for the District of Columbia). The Attorneys General included the Hon. William P. Barr, the Hon. Griffin B. Bell, the Hon. Edward Meese, and the Hon. Richard Thornburgh.

Lead counsel to accused spy Navy Petty Officer Daniel King, who was cleared in military court in what is believed to be the military's first loss of an espionage case.

Counsel to Mr. Nicholson was the highest-ranking CIA officer ever accused of espionage. Nicholson agreed to a plea bargain.

Pro bono counsel to the Groom Lake workers, who have alleged that the Department of the Air Force and government contractors were responsible for injuries and deaths of workers due to the release of hazardous material at a secret Air Force base outside of Las Vegas, Nevada.

Co-lead counsel to eighteen nuclear couriers in Tennessee in a case involving national security rules and whistleblower allegations. These workers claim retaliation after disclosing security and safety violations in the transport of nuclear components. The DOE settled the case with a comprehensive package of damages and reforms.

Lead counsel to Dr. Eric Foretich in the constitutional challenge (as a bill of attainder) of a congressional intervention into a pending family court matter. Dr. Foretich is the father in the bitter custody dispute over Hilary who was taken to New Zealand by her mother, Dr. Elizabeth Morgan. In 2004, the D.C. Circuit unanimously reversed the district court and struck down the Elizabeth Morgan Act as an unconstitutional bill of the attainder. The Supreme Court has found only five such bills of attainder in history.

Lead counsel to the Citizens of East Liverpool, Ohio, who oppose the Waste Technologies (WTI) hazardous waste incinerator on the Ohio River. Located on a flood plane, the plant surrounded by residential areas and located 1100 ft. from a school yard.

Lead appellate counsel for Prince Miller in "Supreme Team" case, a ten-defendant narcotics case one of the largest drug task force operations in New York and the question of the use

and admissibility of electronic surveillance evidence under Title III.

Lead counsel to Justice Department whistleblower who accused the Clinton Administration of retaliation after he refused to commit unethical and unlawful acts. This successful case established important precedent on attorney-client privileges for government employees.

Lead Counsel in the impeachment trial of Judge Thomas Porteous before the United States Senate.

Appointed member and reporter to the Environmental Crimes Advisory Group during the Administration of George P. Bush. This group was established by the United States Sentencing Commission to draft a new sentencing proposal governing organizational environmental crimes.

Executive Director, George Washington Environmental Law Advocacy Center (Chartered 1995; Rechartered 1999). The Center includes the Shapiro Environmental Law Clinic, the Environmental Legislative Project, and the Environmental Crimes Project.

Founder and Director, Project for Older Prisoners (POPS). POPS was the first organization in the country to work exclusively on the problems of infirm and geriatric prisoners. With offices in Louisiana, Michigan, North Carolina and Washington, D.C., POPS has worked in over a dozen states in developing new legislation and policies for the rising geriatric prison population. Supervised law students in each office work on individual parole, pardon, and commutation cases across the country.

GOVERNMENTAL TESTIMONY:

United States Senate, Senate Impeachment Committee, Trial of Impeachment of Judge Thomas Porteous, September 4, 2010.

United States Senate, Senate Impeachment Committee, Pre-Trial Motions and Issues in the Impeachment of Judge Thomas Porteous, August 4, 2010.

United States House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, "The District of Columbia House Voting Rights Act of 2009," January 27, 2009.

United States House of Representatives, Subcommittee on Commerce and Administrative Law, Committee on the Judiciary, "The Executive Office for United States Attorneys," June 25, 2008.

United States House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, "Legislative Proposals to Amend Federal Restitution Laws," April 3, 2008.

United States Senate, Committee on the Judiciary, "Ending Taxation Without Representation: The Constitutionality of S. 1257," May 23, 2007.

United States Senate, Committee on Homeland Security and Governmental Affairs, "Equal Representation in Congress: Providing Voting Rights to the District of Columbia," May 15, 2007.

United States House of Representatives, Committee on the Judiciary, "The District of Columbia Fair and Equal House Voting Rights Act of 2007," March 14, 2007.

United States House of Representatives, Subcommittee on the Constitution, Committee on the Judiciary, "The District of Columbia Fair and Equal House Voting Rights Act of 2006," September 14, 2006.

United States House of Representatives, Committee on the Judiciary, "Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution," May 30, 2006.

United States House of Representatives, Permanent Select Committee on Intelligence, The Media and The Publication of Classified Information, May 26, 2006.

United States House of Representatives, Subcommittee on Homeland Security, "Protection of Privacy in the DHS Intelligence Enterprise," April 6, 2006.

United States House of Representatives, House Judiciary Committee (Democratic members), "The Constitutionality of NSA Domestic Surveillance Operation," January 20, 2006.

United States House of Representatives, Committee on Agriculture, Strengthening the Ownership of Private Property Act of 2005, September 7, 2005.

United States Senate, Senate Judiciary Committee, Subcommittee on Terrorism, Technology, and Homeland Security, September 13, 2004.

Florida House Judiciary Committee, Tallahassee, Florida, "The Parental Notification Amendment to the Florida Constitution," March 9, 2004.

Florida House Judiciary Committee, Tallahassee, Florida, "The Parental Rights Amendment to the Florida Constitution," February 17, 2004.

California Senate, Joint Hearing of the Senate Committee on Public Safety, Senate Select Committee on the California Correctional System, and Senate Subcommittee on Aging and Long Term Care. "California's Aging Prison Population: An Agenda for Reform," Sacramento, California, February 25,2003.

United States House of Representatives, Committee on Government Reform, Subcommittee on Government Management, Information, and Technology, "H.R. 4187: The Presidential

Records Act Amendments of 2002," April 24, 2002.

United States House of Representatives, Committee on Transportation and Infrastructure, Aviation Subcommittee, "Airport Security and Passenger Profiling," February 27, 2002.

United States House of Representatives, Committee on Government Reform, Subcommittee on Government Management, Information, and Technology, "Oversight Hearing on National Identification Cards," September 16, 2002.

United States Senate, Committee on the Judiciary, "Department of Justice Oversight: Management of the Tobacco Litigation," September 5, 2001.

United States Senate, Select Committee on Intelligence (closed classified hearing), "The Prosecution and Investigation of the King Espionage Case," April 3, 2001.

United States House of Representatives, Committee on Government Reform, Subcommittee on Government Management, Information, and Technology, "Implementation of the Presidential Transition Act of 1963," December 4, 2000.

United States House of Representatives, Committee on Government Reform, Subcommittee on Criminal Justice, Drug Policy, and Human Resources, "The Privacy Act and the Presidency," September 8, 2000.

United States Senate, Committee on the Judiciary, "Big Government Lawsuits: Are Policy Driven Lawsuits in the Public Interest?," November 2, 1999.

United States House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, on "The Background and History of Impeachment," November 9, 1998.

United States Senate, Committee on the Judiciary, Subcommittee on Constitution, Federalism, and Property Rights on "Indictment or Impeachment of the President," September 9, 1998.

United States House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law on "Administrative Crimes and Quasi Crimes," May 7, 1998.

United States House of Representatives, Committee on Government Reform, Hearings on H.R. 1855, August 4, 1995.

Joint meeting of New York Senate and Assembly Committees, "The Geriatric and Older Prisoner Act of 1994," May 3, 1994.

United States Sentencing Commission, "Sentencing Reform within the Federal System," March 24, 1994.

United States Sentencing Commission, "The Proposed Chapter Nine: Environmental Crimes Sentencing in the Federal System," Closed Session with the Full Commission, February 24, 1994.

Illinois Task Force on Crime and Prisons, "Overcrowding and the Long-Term Incarceration in the State of Illinois," October 9, 1992.

District of Columbia City Council, "Medical Parole in the District of Columbia," October 7, 1992.

United States House of Representatives, Committee on the Judiciary, Subcommittee on Crime and Criminal Justice, Hearings on H.R. 5305: "Environmental Crimes Act of 1992," June 11, 1992.

United States Sentencing Commission on amending the United States Sentencing Guidelines, February 25, 1991.

United States Parole Commission, December 4, 1990, on chronic overcrowding in federal prisons.

Special Budget Task Force, Louisiana State Senate, Hearing Room A, February 13, 1990, on the changing demographics of the prison population and new policy reforms.

Special Budget Task Force, Louisiana State Senate, Hearing Room A, October 23, 1990, on the problem of older prisoners in Louisiana.

Numerous presentations to state parole boards and legislative bodies on new sentencing and environmental matters.

LEGAL PUBLICATIONS AND WORK-IN-PROGRESS:

BOOK CHAPTERS:

LEGACY OF 9-11, Chapter, Collateral Damage: The American Adoption of Torture In The Wake of the 9-11 Attacks (2010)

RELIGIOUS FREEDOM AND SAME-SEX MARRIAGE, Chapter, Unholy Union: Same-Sex Marriage and Governmental Penalties for Unpopular Religious Practices (forthcoming)

Foreword, OPERATION HOLLYWOOD: HOW THE PENTAGON SHAPES, SANITIZES, AND CENSORS THE MOVIES (by David L. Robb).

THE HERITAGE GUIDE TO THE CONSTITUTION, Heritage Foundation (2003) (chapters on the good behavior clause, the compensation clause, and the habeas corpus provision)

Robert L. Bartley, ed., 5 WHITEWATER: THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON (Wall Street Journal 1999).

Robert L. Bartley, ed., 4 WHITEW ATER: THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON (Wall Street Journal 1998).

MANUAL:

CITIZEN LAW ENFORCEMENT: FIGHTING ENVIRONMENTAL CRIME (Tides Foundation 1996).

ARTICLES:

"The Porteous Model: The Use of Pre-Federal Conduct To Remove A Federal Judge," (work-in-progress-2011)

"The Appearance of Impropriety as a High Crime or Misdemeanor" (WIP-2010)

"Form Polygyny to Polyandry to Polyamory: The Right to Plural Unions in a Pluralistic Society" (WIP-2010)

"The Curious Case of *The Sister Wives*: When Polygamy Becomes a Reality" (WIP – 2010)

"Siren Zong Jianchaguan Zai Huanjing Fa Zhixing Guocheng Zhong de Zuoyong" (The Role of the Private Attorney General in the Enforcement of Environmental Law) Chinese publication 2009.

Remembering Henry Hyde, Human Life Review 89-91 (Winter 2008).

Too Clever By Half: The Partial Representation of the District of Columbia in the House of Representatives, 76 George Washington University Law Review 305-374 (2008).

Art and the Constitution: The Supreme Court and the Rise of the Impressionist School of Constitutional Interpretation, 2004 Supreme Court Review 57-83 (Cato Institute).

Unpacking the Court: The Expansion of the Supreme Court in the Twenty-First Century,

Symposium on The Supreme Court and the Rule of Law, 33 Perspectives on Political Science 155-163 (2004) (Symposium).

Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance, 71 George Washington Law Review 1-90 (2003)

Presidential Records and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Control and Ownership of Presidential Records 88 Cornell Law Review 651-732 (2003).

The Military Pocket Republic, 97 Northwestern University Law Review 1-134 (2002).

Registering Publicus: The Supreme Court and Right to Anonymity, 2002 Supreme Court Review 57-83 (Cato Institute).

Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian Democracy, 70 George Washington Law Review 649-769 (2002).

The Constitutional Guild: The Problem of Banality in Constitutional Law, 96 Northwestern University Law Review 335-338 (2001).

Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege, 60 Maryland Law Review 205-248 (2000) (Symposium).

"From Pillar to Post": The Prosecution of Sitting Presidents, 37 American Criminal Law Review 1049-1106 (2000).

A Crisis of Faith: Congress and The Federal Tobacco Litigation, 37 Harvard Journal on Legislation 433-481 (2000).

Through a Looking Glass Darkly: National Security and Statutory Interpretation, 53 Southern Methodist University Law Review 205-249 (2000) (Symposium).

Transformative Justice and the Ethos of Nuremberg, 33 Loyola Law Review 655-680 (2000) (Symposium).

Senate Trials and Factional Disputes: Impeachment as a Madisonian Device, 49 Duke Law Journal 1-146 (1999).

The "Executive Function" Theo_ the Hamilton Affair and Other Constitutional Mythologies, 77 North Carolina Law Review 1791-1866 (1999).

Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President, 67 George Washington University Law Review 735-790 (1999) (Symposium).

Reflections on Murder, Misdemeanors, and Madison, 28 Hofstra Law Review 439-471 (1999) (Symposium).

Environmental Law and Individual Property Rights, 1994 Ecology Law Quarterly .

Dualistic Values in the Age of International Legisprudence 44 Hastings Law Journal 145-275 (1992).

"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality 84 Northwestern University Law Review, 598-664 (1990).

Transnational Discrimination and the Economics of Extraterritorial Regulation, 70 Boston University Law Review 339-364 (1990).

Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation, 29 William and Mary Law Review 441-500 (1988).

The Hitchhiker's Guide to CLS, Unger, and Deep Thought, 81 Northwestern University Law Review 593-620 (1988).

The Not-So-Noble Lie: The Nonincorporation of State Consensual Surveillance Standards in Federal Court, 79 Journal of Criminal Law and Criminology 66-134 (1988).

The RICO Lottery and the Gains Multiplication Approach: An Alternative Measurement of Damages Under Civil RICO, 33 Villanova Law Review, 239-79 (1988).

United States v. McNulty: Title III and the Admissibility in Federal Court of Illegally Gathered State Evidence, 80 Northwestern University Law Review 1714-52 (1986).

The Admissibility of Evidence of Subsequent Remedial Conduct in a Product Liability Case, PLI (1986) (with John Pope).

GOVERNMENTAL REPORTS, LEGAL BACKGROUNDERS, AND ACADEMIC STUDIES:

Holding Government Accountable for Its Environmental Misconduct, 22 Hazardous Waste Litigation Reporter at 16 (2001).

The Controversial Role of the Government as Both Environmental Cop and Environmental Felon, The Washington Legal Foundation, October 2000 (Legal Backgrounder).

Report, The Graying of America's Prison Population: An Empirical Study.

Final Report, Criminal Environmental Prosecution by the United States DeQartment of Justice.

Report to the State of New York, Task Force on Crime and Corrections, Preliminary Report, May 3, 1994.

Report to the State of Illinois, Task Force on Crime and Corrections, Preliminary Report, March 1, 1993.

Preliminary Report to the Honorable Charles E. Schumer, Chairman of the House Subcommittee on Crime and Criminal Justice, Criminal Environmental Prosecution by the United States Department of Justice (1992).

OPINION EDITORIALS AND NONLEGAL PUBLICATIONS:

AMERICAN CIVIL WAR MAGAZINE:

Was Lincoln Right? The Constitutional Debate That Led To the Civil War, American Civil War Magazine, September 2010. (Cover Story)

AMERICAN HISTORY MAGAZINE:

The Top Nine Justices of All Times, American History Magazine, September 2009, cover story.

ARKANSAS DEMOCRAT:

A Fitting Consequence, The Arkansas Democrat, June 1,2000, at B8.

ATLANTA JOURNAL-CONSTITUTION:

Exhibit One Against Martha Stewart: The Salmon Knot, The Atlanta Journal and Constitution, Sept. 24, 2002.

Lawyers Licking Chops Over Fast-Food Target, The Atlanta Journal and Constitution, July 31, 2002, at D 11.

Take Down Tom Watson, The Atlanta Journal and Constitution, August 14,2000, Sunday, at Dl1.

AUSTIN AMERICAN STATESMAN

Ashcroft and Enemy Combatants, The Austin American Statesman, August 19,2002, at 14.

The Case Against Martha Stewart, The Austin American Statesman, Sept. 24, 2001.

BALTIMORE SUN:

Living in a City of Spies, The Baltimore Sun, April 3, 2006, at 15A.

Woodward's Belated Disclosure Raises Troubling Questions, The Baltimore Sun, November 17, 2005, at A15.

Democrats Disarray Muddles Court Fight, The Baltimore Sun, July 2, 2005, at A15.

Political Critics. Protesters and Artists are Among Victims of Ashcroft, The Baltimore Sun, June 23, 2004, at 15A.

Defense on Lay-Away, The Baltimore Sun, June 6, 2003, at 15A.

Lawyers Drooling Over Fat Awards, The Baltimore Sun, August 1, 2002, at 19 A.

Military Tribunal Rules Put Over Values to Test, The Baltimore Sun, March 25, 2002, at 7 A.

The Terrorist Lottery, The Baltimore Sun, March 4,2002, at 13A.

A Viewer's Guide to the Enron Hearings, The Baltimore Sun, February 20, 2002, at 13A.

Losers in Legal Denial, The Baltimore Sun (Sunday), February 10, 2002, at Fl.

Ashcroft's Chilling Attack on Critics, The Baltimore Sun (Sunday), December 16,2001, at F5.

Destroying American Values, The Baltimore Sun (Sunday), November 18,2001, at C1.

Taking AI-Qaeda Seriously, The Baltimore Sun, October 24,2001, at l1A.

U.S. Can Beat Bin Laden Without a War, The Baltimore Sun, September 18, 2001, at 21 A.

Why the President Must Be Impeached, The Baltimore Sun, December 11, 1998, at 33A.

CHICAGO TRIBUNE:

Yielding to Bias: Segregating Kids Removes the Victims, Not Their Tormentors, The Chicago Tribune, October 24, 2008, at 7.

The Henry Hyde I Knew, The Chicago Tribune, November 20, 2007, at 27.

NSA Ruling Like a Pig in the Parlor, The Chicago Tribune (Sunday), August 20, 2006, at 5.

Well-Paved Road to Political Perdition, The Chicago Tribune (Sunday), June 25, 2006, at 7.

Gen. Hayden Earns His 'Bones', The Chicago Tribune, May 10, 2006, at 27.

Tackling a Judge's Ideology, The Chicago Tribune (Sunday), January 8, 2006, at 9.

Chicago's Segregated Schools, The Chicago Tribune, November 10, 2005, at 25.

The Nomination of John Roberts, The Chicago Tribune (Sunday), July 25, 2005, at 9.

Personal Look at the Impasse Over Stem-Cell Research, The Chicago Tribune (Sunday), March 13, 2005, at 11.

A Special Kind of Justice, The Chicago Tribune, November 19, 2004, at 27.

Six Degrees from Karl Rove, The Chicago Tribune, October 20, 2004, at 31.

The Lost Art of the Apology, The Chicago Tribune (Sunday), July 18,2004, at 9.

The High Court's Enfant Terrible, The Chicago Tribune, April 16, 2004, at 27.

Reparations Cause is Coming Up Empty, The Chicago Tribune, January 30, 2004, at 27.

Ashcroft Unplugged, The Chicago Tribune, August 26,2003, at 27.

'Educating' Congress at the Hands of Lobbyists, The Chicago Tribune (Sunday), June 22, 2003, at C25.

Bush Myopic Stem Cell Police, The Chicago Tribune, May 15, 2003, at C25.

A Secret CIA Assassination Policy for Citizens, The Chicago Tribune, Dec. 27, 2002, at C27.

The American Gothic Amendment, The Chicago Tribune (Sunday), May 19,2002, at C7.

Mockery of Justice, The Chicago Tribune (Sunday), March 10, 2002, at C7.

Living in a State of Constitutional Denial, The Chicago Tribune (Sunday), February 10,2002, at 9.

A Prescription for Disaster, The Chicago Tribune, January 2,2002, at 19.

Bring Back the Silent Condit, The Chicago Tribune, Sunday, August 26, 2001, at 19.

The Ghost Fleet and Other Dumb Ideas, The Chicago Tribune, Sunday, May 20,2001, at A21.

A Farewell to Sid Yates, The Chicago Tribune, October 10, 2000, at A 15.

Of Boy Scouts and Bigots, The Chicago Tribune, June 30, 2000, at A27.

Reforming the Great American Litigation Lottery, The Chicago Tribune, October 31, 1999, at All.

Last Rites for the Independent Counsel Act, The Chicago Tribune, June 30,1999, at A21.

Witnesses for the Prosecution, The Chicago Tribune, August 30, 1998, at A19.

Hashing Out Ockham's Razor Over Eggs, The Chicago Tribune, July 13, 1998 at All.

The Approaching Constitutional Crisis, The Chicago Tribune, June 5, 1998, at A13.

The Trouble with Hubble, The Chicago Tribune, May 3, 1998 at All.

The Government versus the Grand Jury, The Chicago Tribune, September 23, 1993, at A 11.

Why Prison Health Care is a Crime, The Chicago Tribune, March 19, 1991, at A19.

Global Dinosaurs: Charting the Rise and Fall of Great Powers, The Chicago Tribune, May 8, 1988, at 5,9.

CIVIL WAR MAGAZINE:

Uncivil Action: Was Lincoln Right? Civil War Magazine October 2010 (cover story)

CONNECTICUT LAW TRIBUNE:

More Oracles than Orators, The Connecticut Law Tribune, December 6, 1999.

Trials of the Century, The Connecticut Law Tribune, October 4, 1999.

A Grand Opera is Playing Before Grand Jury, The Connecticut Law Tribune, March 2, 1998.

The Blow-Up Over Banana Republic, The Connecticut Law Tribune, April 15, 1996.

DENVER POST:

Popularity Is No Defense, The Denver Post, December 13, 1998, at G-O3.

DESERET NEWS:

Broken Promise to Vets is Height of Hypocrisy, The Deseret News, November 30,2002, at A16.

War Poses Zen-Like Problem, The Deseret News, December 26,2001, at Al 7.

Afghanistan's Faction Could Learn a Lot From Madison, The Deseret News, December 18,2001, at A 23.

Clinton Case Reflects Our Legal Morals, The Deseret News, August 24, 2000, at A 25.

GUARDIAN:

Stop Persecuting Polygamists, The Gaurdian, Nov. 28, 2006, at 1

THE HILL:

The Little Terrorist Engine That Could, The Hill, January 28, 2004, at 16.

"The Best Possible Equipment" Should Include Kevlor and Boots, The Hill, October 7, 2003, at 19.

Congress and Anti-Terrorism, The Hill, September 19,2001, at 25.

HOUSTON CHRONICLE:

The Truth About Bush's No-So-Dirty Dozen, The Houston Chronicle, April 20, 2005, at A13.

It's Too Soon to Tell Whether Reagan Fits the Bill, The Houston Chronicle, June 13,2004, at AI3.

Verdict? Denial of Truly Olympic Proportions, The Houston Chronicle. December 22,2004, at AI3.

U.S Engaging in Torture at its Own Deadly Risk, The Houston Chronicle, March 9, 2003, at AI3.

A Clear and Present Danger, The Houston Chronicle (Sunday), August 16, 2002, at A 13.

The Rowley Memo Ignores the Constitution, The Houston Chronicle, June 2, 2002, at A13.

A Legal System in a Burka, The Houston Chronicle, November 18, 2001, at A13.

It is Time to Rethink Our Position on Assassination, Houston Chronicle, September 14, 2001, at 41.

One Man on the Spot - and It Isn't Clinton, Houston Chronicle, August 25,2000, at 41.

Consider Risks Before Putting Democracy On-line, Houston Chronicle, January 20, 2000, at 33.

Who Controls Justice. Citizens or Government?, Houston Chronicle, October 11, 1993, at 17.

LAS VEGAS REVIEW-JOURNAL:

The Terrorist Lottery, The Las Vegas Review-Journal, March 13, 2002, at A15.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE CONSTITUTIONAL QUESTION ACT, R.S.B.C. 1986, 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. 293 OF THE *CRIMINAL CODE OF CANADA,* R.S.C. 1985, c. C-46

EXPERT REPORT PREPARED FOR THE
AMICUS CURIAE

by

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This is Exhibit "A" referred to in the affidavit of Jonathan Turley sworn before me at Washington, District of Columbia, this 20th day of October 2010

Susan R. Krause

A Commissioner for taking Affidavits for the District of Columbia

District of Columbia: SS
Subscribed and sworn to before me, in my presence, this 20th day of October, 2010

Susan R. Krause
Notary Public, D.C.

My commission expires 2/28/2015

I. INTRODUCTION

1. This Report addresses American ("domestic") and international perspectives on the criminalization of plural unions.

2. In my view, governing international and domestic sources strongly support the right to self-determination of private relations and family matters free of government intrusion. These same sources bar the arbitrary enforcement of state power. My analysis below explores legal principles and authorities from the United States. I also discuss, particularly with regard to Professor Rebecca Cook's report, the international sources favoring or disfavoring plural unions.

3. While polygamists represent an insular and sometimes hated minority, they are entitled to protection from such majoritarian animus and bias vis-à-vis their private lifestyle and relations. Their status under domestic law is a civil rights issue deserving the same protections afforded to homosexuals and other minority groups. Indeed, these protections are designed not for the majority of citizens (who need little protection given their majority status) but those who are despised and objectified in society. Ultimately, this matter compels consideration of whether law remains a tool for the imposition of a uniform moral agenda or tenets on citizens.

4. Despite my respect for the academic credentials and writings of Professors Marci Hamilton and Rebecca Cook, I believe their analyses rely heavily on majoritarian mores and assumptions in a matter of civil liberties.

5. Courts in the United States and elsewhere are now grappling with the need to honestly and consistently recognize the right of citizens to order their private relations according to their religious, philosophical, and social values.[1] What is at issue here is not the recognition of polygamy as with recent cases involving the recognition of same-sex marriage. It is only the obligation of

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[1] I have previously written on the subject of marriage laws and the need to remove religious tenets from civil recognition of such unions. *See* Jonathan Turley, "Unholy Union: Same-Sex Marriage and Governmental Penalties for Unpopular Religious Practices," chapter in Religious Freedom and Same-Sex Marriage (2001); Jonathan Turley, *How to End the Same-Sex Marriage Debate*, USA Today, April 3, 2006, at 15A; Jonathan Turley, *The American Gothic Amendment*, The Chicago Tribune (Sunday), May 19,2002, at C7. To that end, I have written in favor to removing the term "marriage" from state laws in favor of uniform "civil union" terminology to confine the role of the state to certifying the legal commitment between consenting adults. This report, however, does not concern the status or scope of marriage interpretations since polygamous families virtually never seek such recognition.

courts to protect consensual private relations, including relations that the majority finds obnoxious or offensive.

II. SUMMARY

6. My findings in this report begin with the threshold fact that polygamy is not a monolithic term confined to polygyny, or single "husbands" with multiple wives. Polygamous unions cover a wide variety of arrangements that are motivated by both religious and non-religious beliefs.

7. As to those polygamists motivated by religion, the establishment of plural families is one of the oldest religious traditions and articles of faith. Polygamy is based on foundational works and beliefs in Christianity, Judaism, Islam, and other faiths. It continues to be openly and widely practiced throughout the world. These practices also included aboriginal peoples in North America. It is by any definition a *bona fide* religious belief.

8. Polygamy is also based on well-documented and recognized cultural and philosophical values.

9. Based on the foregoing, in the United States compelling arguments can be made under principles of free exercise, equal protection, and due process for decriminalization of polygamy under existing precedent. While the courts in the United States have uniformly ruled against polygamists, recent cases strongly suggest that this prior precedent will have be re-evaluated as inconsistent with governing constitutional principles.

10. The analysis of Professor Hamilton, in my view, relies on flawed Eighteenth Century precedent that is in the process of revision and, in some cases, outright rejection. The use of the law to impose majoritarian moral tenets is not currently viewed as a valid basis for criminal statutes in the United States and any analysis of the status of polygamists must be based on a broader acknowledgement of the variety of plural unions and the fact that such unions are not inherently harmful. Finally, I believe that Professor Hamilton's well-considered and well-researched analysis is nonetheless flawed in its highly cabined treatment of principles of free exercise, equal protection, and due process.

11. With regards to both the Hamilton and Cook affidavits, it is important to emphasize that the analysis appears limited to polygyny. Polygyny appears on the face of s. 293 of the *Criminal Code*, which I have reviewed, and certainly on the face of various American criminal statutes, to be only part of the plural union and conjugal unions which are criminalized. To that extent, any review must consider the full panoply of plural unions in establishing the legitimacy of such provisions.

12. Professor Cook offers a comprehensive and insightful case for the criminalization of polygamy. She acknowledges that some polygamous unions have been found to be positive and not harmful. However, she maintains that international legal principles compel the criminalization of polygamy. I must again respectfully disagree both on the binding effect and meaning of the cited sources. International law protects the political and civil rights of citizens to make their own choices in matters of private consensual relations. Indeed, international sources supporting the right of women to make their own choices and decisions in their private lives include the right to choose between monogamous and plural unions.

13. At present, courts around the world are grappling with the inherent rights of sexual minorities as well as the diminishing legitimacy of state-imposed and criminally enforced morality codes. As a matter of civil rights and liberties, this question must be answered without reliance on social bias or assumptions as to the conditions of plural unions.

III. TERMINOLOGY AND USAGE

14. The term polygamy generally refers to any form of plural marriage and is derived from the Greek *polys gamos*, literally meaning "often married." While polygamy is often used as synonymous with marriages composed of one husband and multiple wives (as opposed to monogamy), it can refer to any of three common forms of plural marriage. Miriam K. Zeitzen, Polygamy: A Cross-Cultural Analysis 3 (Berg Publishers 2008).

15. *Polygyny* is specifically a plural marriage of a man and more than one wife.

16. *Polyandry* is specifically a plural marriage of a woman with more than one husband.

17. Finally, there are some families who have multiple husbands and wives which are commonly referred to as "group marriages."

18. While polygyny, polyandry, and group marriages are the three principal groups of polygamy, there is a fourth group that has a distinct history and meaning: polyamorists.

19. *Polyamory* is subject to more varied definitions, but generally refers to consensual relationships where participants have more than one sexual partner. Polyamorists often express lasting relationships and expectations with their lovers. Under some laws, these relationships would qualify as common law marriage or cohabitation or conjugal unions – and thus treated as polygamy or bigamy. Polyamory may, for example, more properly describe some relationships in some communal homes where a subset of individuals

consider themselves partners. This is sometimes referred to as *polyfidelity*. Zeitzen, at 14.

20. None of the three different forms of polygamy are exclusively based on religious tenets or exclusively practiced in religious families. Indeed, all three forms have appeared in non-religious contexts and can be motivated by social, political, or simply personal choices.

21. Polyandry and group marriage are particularly found in non-religious settings. In the 1960s and 1970s in the United States and Canada, such plural families were often found in communes or alternative communities. For example, polyandrous families (and polyamorist relationships) were not uncommon in the San Francisco area and group families were found throughout the United States and Canada in the 1960s. Zeitzen, at 13.

22. As discussed below, polygamous (and specifically polygynous) families are often an expression of long-standing religious practices and beliefs.

23. Indeed, some feminists have long supported polyandrous and polyamorous unions as more consistent with their philosophical and political values than monogamous unions. *See generally* Wendy McElroy, *An Unlibertarian Raid on the Polygamous Ranch*, iFeminist.com, Apr. 18, 2008, http://www.ifeminists. com/e107plugins/content/content.php?content.327.

24. A final term that features prominently in the discussion of plural relationship is *bigamy*. Bigamy is generally the act of marrying one person while still legally married to another. Black's Law Dictionary 69 (3rd pocket ed. 2006). Unlike polygamy, bigamy is often done without the knowledge of one or more spouses, representing plural marriage without the consent of a partner. Likewise, unlike polygamy, bigamous defendants often seek and secure official recognition of their marriages.

25. Bigamy can involve multiple wives or multiple husbands. While only a handful of states in the United States outlaw polygamy per se, many prohibit bigamy generally. *See* Ariz. Const. art. 20 ¶ 2; Me. Rev. Stat. Ann. Tit. 17-A, § 551; Mass. Gen. Laws ch. 272, § 13; Mich. Comp. Laws Ann. § 750.441; Miss. Code Ann. 97-27-43; N.M. Const. art. 21, § 1; OK Const. art. 1; Utah Code Ann. 1953 § 76-7-101; Va. Code Ann. § 18.2-363.

26. Polygamy is practiced by millions of people around the world and remains quite common in some countries like Senegal. Indeed, in the so-called "polygyny belt" from Senegal in the west to Tanzania in the east, studies

estimate that between 20-30% of married men are engaged in polygynist marriages.[2]

27. In an oft-cited survey found in the *Ethnographic Atlas Codebook*, only 186 were found to be monogamous with the rest found to have different rates of polygyny or (less commonly) polyandry. 1998 Ethnographic Atlas Codebook, 10 World Cultures 86 (J. Patrick Gray, ed., 1998).

28. Historically, polygamy is found in virtually every culture and continent at one time. These relationships reflected the nature around early human beings. Indeed, the vast majority of animal species on Earth have multiple sexual partners. *See, e.g.*, P.J. Greenwood, *Mating Systems, Philopatry and Dispersal in Birds and Mammals*, 28 Animal Behavior 1140 (1980).

29. Many early human relations might be more properly called polyamorous. Secular writers and advocates have cited polyamory as a logical and efficient alternative to monogamy. Indeed, many authors have written about polyamorous unions being the accepted or preferable practice in novels such as Robert A. Heinlein's *Stranger in a Strange Land* and Vonda Neel McIntyre's *Starfarers* series.

30. Plural marriage was often embraced historically among royal or ranking families on virtually every continent.

31. Many Native American tribes or nations also practiced forms of polygamy, particularly polygyny. Notably, some Europeans in frontier areas adopted the same practices after exposure of polygamous tribes.

32. Polygamy was particularly common among southeastern and Plains tribes or nations. Notably, many of these tribes or nations were also communal and matrilineal, or tracing descent through the female line.

33. While polygyny is more common than polyandry, the latter has been long practiced and is particularly present among Canada's diverse families. Indeed, polyandrous families have been given legal protection in Saskatchewan. *Winik v. Wilson Estate*, [1999] 1999 Sask. R. LEXIS 424, *21. It is also found in other parts of Canada.

34. Outside of Canada, polyandry has been practiced in parts of the Canary Islands, Kenya, India, Bhutan, Polynesia, Monogolia, Nepal, Nigeria, Sri Lanka, Tanzania, Tibet, and other countries.

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[2] H. G. Jacoby, *The Economics of Polygyny in Sub-Saharan Africa: Female Productivity and the Demand for Wives in Cote d'Ivoire*, 103 Journal of Political Economy 938, 939 (1995).

35. In polyandrous societies, children can be raised by multiple fathers under a practice Pennsylvania anthropologist Stephen Beckerman calls "partible paternity."[3]

36. Indeed, researchers have challenged the assumptions behind monogamous marriage as bias and tied to one vision of "universal human nature" that turns on the need of males to be certain of the parentage of their children. These assumptions do not acknowledge the long and continuing practices of polyandrous unions and partible paternity.[4]

37. Ironically, as will be discussed below, those views supporting monogamous marriage are often explained by the very values that Professors Cook and Hamilton associate with polygamy: the sense of control and possession of women.

38. The history of polygamy reveals that the practice evolved from not just religious but cultural and even economic preferences – resulting in both traditions of multiple husbands and multiple wives. *Zeitzen*, at 57 (discussing the potential profitability of polygamous relationships in rural farming cultures).

39. According to the *Ethnographic Atlas Codebook*, of 1231 societies noted, 453 had occasional polygyny, 588 had more frequent polygyny, and 4 had polyandry. 1998 Ethnographic Atlas Codebook, 10 World Cultures 86 (J. Patrick Gray, ed., 1998).

40. The documentation of group families is far more difficult to document because, like other polygamist families, they do not normally seek official approval or recognition. However, communal families are also quite varied and not based on solely religious values. Communal families are also disfavored in cultures that associate the family unit with a single male and female parent. As shown below, there are strong similarities between the majoritarian bias in favor of the nuclear over the communal family models and the bias shown in favor of the monogamous over polygamous models.

41. Finally, as will be discussed more fully below, there is no conclusive study showing the occurrence of child or spousal abuse in polygamous families. This is due in part to the fact that, since polygamy is a crime, society has forced these families to live outside of the public view and to minimize contact with authorities.

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[3] *See generally* S. Beckerman and P. Valentine, *The Concept of Partible Paternity Among Native South Americans*, *in* Cultures of Multiple Fathers: The Theory and Practice of Partible Paternity in Lowland South America, 1-13 (Univ. of Florida Press 2002).

[4] *Id.* at 4.

IV. POLYGAMY AS A RELIGIOUS PRACTICE

42. An analysis of the legal status of polygamy should begin with an evaluation of the underling religious, cultural, and social basis for polygamous practices and values. There are many *bona fide* religious or cultural values that are insulting or even obnoxious to the majority of citizens. Yet, such values and related practices are generally protected both in the United States and under international norms.

43. While there are obviously legitimate legal limitations that can be placed on religious, political, or cultural values (particularly as expressed in actual and harmful conduct), the threshold inquiry should be the basis for these practices.

44. While many polygamous families are not motivated by religious belief, the practice of polygamy is one of the longest religious-based practices in the world. Below are cursory but illustrative examples of the basis for this religious belief. While many of us in monogamous marriages (including the affiant, who is neither associated with The Church of Jesus Christ of Latter-day Saints (LDS) or The Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS)) reject this lifestyle and faith structure, it is solidly based in the same religious texts as other protected religious practices.

The Old Testament

45. The Old Testament is a natural starting point for this inquiry since it is not simply a foundational source for both the Jewish and Christian faith, but it is also incorporated into Islamic beliefs and faiths like the LDS and FLDS.

46. Many of the central biblical figures from the Old Testament were polygamists. As will be discussed below, Abraham had three wives (*Genesis* 16:1, 16:3, 25:1), Moses is believed to have had two wives (*Exodus* 2:21, 18:1-6; *Numbers* 12:1), and David is believed to have had 18 wives (1 *Samuel* 18:27, 25:39-44; 2 *Samuel* 3:3, 3:4-5, 5:13, 12:7-8, 12:24, 16:21-23).

47. The Bible teaches that these figures were chosen by God and, for many Christians, the Bible is the literal word of God.

48. Notably, even though some Biblical scholars argue that the references to multiple partners were actually "concubines" rather than "wives," these accounts would amount to polygamy, bigamy, cohabitation, or conjugal unions under Canadian and American laws.

49. In the Old Testament, *Genesis* 16:1-11 suggests Abram's taking of a second wife is directly acknowledged and supported by God:

1 NOW Sarai Abram's wife bare him no children: and she had an handmaid, an Egyptian, whose name was Hagar.
2 And Sarai said unto Abram, Behold now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai.
3 And Sarai Abram's wife took Hagar her maid the Egyptian, after Abram had dwelt ten years in the land of Canaan, and gave her to her husband Abram to be his wife.
4 And he went in unto Hagar, and she conceived: and when she saw that she had conceived, her mistress was despised in her eyes.
5 And Sarai said unto Abram, My wrong be upon thee: I have given my maid into thy bosom; and when she saw that she had conceived, I was despised in her eyes: the LORD judge between me and thee.
6 But Abram said unto Sarai, Behold, thy maid is in thy hand; do to her as it pleaseth thee. And when Sarai dealt hardly with her, she fled from her face.
7 And the angel of the LORD found her by a fountain of water in the wilderness, by the fountain in the way to Shur.
8 And he said, Hagar, Sarai's maid, whence camest thou? and whither wilt thou go? And she said, I flee from the face of my mistress Sarai.
9 And the angel of the LORD said unto her, Return to thy mistress, and submit thyself under her hands.
10 And the angel of the LORD said unto her, I will multiply thy seed exceedingly, that it shall not be numbered for multitude.
11 And the angel of the LORD said unto her, Behold, thou art with child, and shalt bear a son, and shalt call his name Ishmael; because the LORD hath heard thy affliction.

50. In *Genesis* 29:21-30, Jacob is acknowledged as a polygamist:

21 And Jacob said unto Laban, Give me my wife, for my days are fulfilled, that I may go in unto her.
22 And Laban gathered together all the men of the place, and made a feast.
23 And it came to pass in the evening, that he took Leah his daughter, and brought her to him; and he went in unto her.
24 And Laban gave unto his daughter Leah Zilpah his maid for an handmaid.
25 And it came to pass, that in the morning, behold, it was Leah: and he said to Laban, What is this thou hast done unto me? did not I serve with thee for Rachel? wherefore

then hast thou beguiled me?
26 And Laban said, It must not be so done in our country, to give the younger before the firstborn.
27 Fulfil her week, and we will give thee this also for the service which thou shalt serve with me yet seven other years.
28 And Jacob did so, and fulfilled her week: and he gave him Rachel his daughter to wife also.
29 And Laban gave to Rachel his daughter Bilhah his handmaid to be her maid.
30 And he went in also unto Rachel, and he loved also Rachel more than Leah, and served with him yet seven other years.

51. In *Genesis* 30:4-9, 25-26, Jacob is also the subject of a polygamy passage:

4 And she gave him Bilhah her handmaid to wife: and Jacob went in unto her.
5 And Bilhah conceived, and bare Jacob a son.
6 And Rachel said, God hath judged me, and hath also heard my voice, and hath given me a son: therefore called she his name Dan.
7 And Bilhah Rachel's maid conceived again, and bare Jacob a second son.
8 And Rachel said, With great wrestlings have I wrestled with my sister, and I have prevailed: and she called his name Naphtali.
9 When Leah saw that she had left bearing, she took Zilpah her maid, and gave her Jacob to wife.
...
25 And it came to pass, when Rachel had born Joseph, that Jacob said unto Laban, Send me away, that I may go unto mine own place, and to my country.
26 Give me my wives and my children, for whom I have served thee, and let me go: for thou knowest my service which I have done thee.

52. In *Genesis* 31:17, Jacob is again the reference of a polygamous union:

17 Then Jacob rose up, and set his sons and his wives upon camels;
18 And he carried away all his cattle, and all his goods which he had gotten, the cattle of his getting, which he had gotten in Padanaram, for to go to Isaac his father in the land of Canaan.

53. In *Exodus* 21:10, the basis for polygamous marriage is defined as well as the basis for leaving such a union:

> 10 If he take him another wife; her food, her raiment, and her duty of marriage, shall he not diminish.
> 11 And if he do not these three unto her, then shall she go out free without money.

54. Multiple wives are repeatedly referenced as either allowed or denied depending on the circumstances. For example, in *Deuteronomy* 17:14-17 the future Kings of Israel are instructed not to multiply wives or wealth in a direct reference to the accepted practice of polygamy:

> 14 When thou art come unto the land which the LORD thy God giveth thee, and shalt possess it, and shalt dwell therein, and shalt say, I will set a king over me, like as all the nations that are about me;
> 15 Thou shalt in any wise set him king over thee, whom the LORD thy God shall choose: one from among thy brethren shalt thou set king over thee: thou mayest not set a stranger over thee, which is not thy brother.
> 16 But he shall not multiply horses to himself, nor cause the people to return to Egypt, to the end that he should multiply horses: forasmuch as the LORD hath said unto you, Ye shall henceforth return no more that way.
> 17 Neither shall he multiply wives to himself, that his heart turn not away: neither shall he greatly multiply to himself silver and gold.

55. The Old Testament even details how to settle disputes between multiple wives. In *Deuteronomy* 21:15-17, it states:

> 15 If a man have two wives, one beloved, and another hated, and they have born him children, both the beloved and the hated; and if the firstborn son be hers that was hated:
> 16 Then it shall be, when he maketh his sons to inherit that which he hath, that he may not make the son of the beloved firstborn before the son of the hated, which is indeed the firstborn:
> 17 But he shall acknowledge the son of the hated for the firstborn, by giving him a double portion of all that he hath: for he is the beginning of his strength; the right of the firstborn is his.

56. The Old Testament details the accepted practice of polygyny in *Isaiah* 4:1*:*

> 1 AND in that day seven women shall take hold of one man, saying, We will eat our own bread, and wear our own apparel: only let us be called by thy name, to take away our reproach.

57. Ironically, Gideon (the judge of the Old Testament) was a polygamist according to *Judges* 8:30:

> 30 And Gideon had threescore and ten sons of his body begotten: for he had many wives.

58. David, who is a central figure for Jewish, Christian, and Islamic theology, also was a polygamist. In 2 Samuel *2:2*, the following passage appears:

> 2 So David went up thither, and his two wives also, Ahinoam the Jezreelitess, and Abigail Nabal's wife the Carmelite.

59. David is believed to have had at least six wives and numerous concubines (who today would fall under polygamy laws). 2 *Samuel* 5:13; 1 *Chronicles* 3:1-9, 14:3. One passage in 2 *Samuel* 5:13 states:

> 13 And David took him more concubines and wives out of Jerusalem, after he was come from Hebron: and there were yet sons and daughters born to David.

60. Indeed, David's practice of adding wives is described in 2 *Samuel* 12:7-9 concerning his possible excesses:

> 7 And Nathan said to David, Thou art the man. Thus saith the LORD God of Israel, I anointed thee king over Israel, and I delivered thee out of the hand of Saul;
> 8 And I gave thee thy master's house, and thy master's wives into thy bosom, and gave thee the house of Israel and of Judah; and if that had been too little, I would moreover have given unto thee such and such things.
> 9 Wherefore hast thou despised the commandment of the LORD, to do evil in his sight? thou hast killed Uriah the Hittite with the sword, and hast taken his wife to be thy wife, and hast slain him with the sword of the children of Ammon.

61. David's expanding plural marriage however, paled in comparison to King Solomon, another central biblical figure. As described in 1 *Kings* 11:1-4:

> 1 BUT king Solomon loved many strange women, together with the daughter of Pharaoh, women of the Moabites, Ammonites, Edomites, Zidonians, and Hittites;
> 2 Of the nations concerning which the LORD said unto the children of Israel, Ye shall not go in to them, neither shall they come in unto you: for surely they will turn away your heart after their gods: Solomon clave unto these in love.
> 3 And he had seven hundred wives, princesses, and three hundred concubines: and his wives turned away his heart.
> 4 For it came to pass, when Solomon was old, that his wives turned away his heart after other gods: and his heart was not perfect with the LORD his God, as was the heart of David his father.

62. Other passages detail how King Solomon's son Rehoboam had 18 wives and 60 concubines (2 *Chronicles* 11:21). Then there is the reference to fourteen wives for Abijah who "waxed mightly" (*2 Chronicles* 13:21). Joash who was "right in the sight of the LORD" was given two wives (2 *Chronicles* 24:3). Then "there was a certain man of Ramathaimzophim" who had two wives. (1 *Samuel* 1:1-2). Then there was Lamech who "took unto him two wives." (1 *Kings* 11:3).

63. These and other biblical passages are often cited by fundamentalists to support polygamist practices as a central component of their religion.

64. This reading of the Old Testament was once an accepted view among Christians. Indeed, polygamy was described by some Protestants as the "ideal form of marriage." The preference for polygamy is found in Europe, for example, among the Anabaptists in Münster in 1535-36.[5]

65. Indeed, Martin Luther stated publicly that his reading of the Bible affirmed the validity of polygamy and further noted in a *rather* prescient moment that the authorities should leave such questions to personal choices of citizens:

> I confess that I cannot forbid a person to marry several wives, for it does not contradict the Scripture. If a man wishes to marry more than one wife he should be asked whether he is satisfied in his conscience that he may do so

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[5] John Cairncross, After Polygamy Was Made A Sin: The Social History Of Christian Polygamy (London 1974) ("German city of Munster proclaimed polygamy as the ideal form of marriage."); *id.* ("Phillip of Hesse felt impelled by his reverence for the sacraments to mend his first marriage by contracting a second one even while his wife was alive. And he did so with the sanction of the Fathers of the Reformation.")

> in accordance with the word of God. In such a case the civil authority has nothing to do in the matter.[6]

66. Some Protestants continue to form polygamous families as central to their Christian faith.[7]

67. The Jewish Talmud also makes reference and apparent acceptance of the existence of polygamy among Jewish families. For example, passages in the Babylonian Talmud, Tractate Kethuboth 93a – 93b discuss how to deal with estates after a man dies with multiple wives.

68. The *Jewish Encyclopedia* states: "[t]he Mosaic law, while permitting polygamy, introduced many provisions which tended to confine it to narrower limits, and to lessen the abuse that might arise in connection with it."[8]

69. The Jerusalem Talmud (Yevamot 4:12) refers to a rabbi with 300 wives. Indeed, it is the famed Rabbi Gershom who is credited with banning polygamy among Jews, even though this ban roughly 1000 years ago was not accepted at the time by Sephardic and Yemenite rabbis as opposed to Ashkenazi Jews.

70. Polygamy is known to be practiced in Israel despite criminal provisions against it. Moreover, there is a growing movement of polyamory among Jews in the United States. Indeed, Rabbi Jacob Levin came out recently as a polyamorist – triggering a recognition of the growing numbers of Jews engaging in such relations.[9] These unions could be defined as cohabitation or conjugal unions or even bigamy in some cases under laws in the United States.

71. Eventually, despite the acceptance of polygamy in Judeo-Christian history, religious organizations not only moved against the practice but, abandoning Luther's view of this matter as a matter for private choice, enlisted the

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[6] De Wette II at 329-30.

[7] Hannah Wolfson, *Polygamy without Book of Mormon: Christian Polygamy Takes Root in Utah*, Salt Lake Tribune, July 24, 1999.

[8] Vol. X, *Jewish Encyclopedia*, "Polygamy," at 120-22, available at http://jewishencyclopedia.com/view.jsp?artid=425&letter=P&search=polygamy.

[9] Sarah Goldstein, *The Loves That Dare Not Speak Their Names*, Heeb Magazine (Winter 2007) ("Group websites like KinkyJews, which welcomes "all sexual orientations and all streams of Judaism" (and boasts more than 1,000 members), and the listserv AhavaRaba ("big love"), an online forum for poly Jews, offer the opportunity for people to share their experiences living as poly within the constraints of Judaism and the larger, monogamous-centered culture.")

criminal law to enforce their religious values against the small minority of polygamists.

The Qur'an (Koran)

72. As with some fundamentalists Christian and Jewish adherents, many Muslims believe that polygamy, and specifically polygyny, is an important part of their faith.

73. The Qur'an in Sura 4:3 states:

> And if you be apprehensive that you will not be able to do justice to the orphans, you may marry two or three or four women whom you choose. But if you apprehend that you might not be able to do justice to them, then marry only one wife, or marry those who have fallen in your possession. Sayyid Abul A'La Maududi, 1 The Meaning of the Qur'an 305.

74. The life, decisions, and statements of Muhammad are studied by Muslims around the world. The study of Sunnah supplies details on everyday life as well as a model for the moral life based on Muhammad's example.

75. While the number of wives is in dispute, the Prophet Muhammad was a polygamous with clearly more than four wives.

76. Sharia law now generally enforces a limit of four wives for a Muslim man under Sura 4:3, but recognizes the right to plural marriage.

77. The widespread practice of polygyny under Islam is evidence of the view that plural marriage is specifically sanctioned by God.

The Book of Mormon

78. As described above, polygamy has been practiced throughout the world on every continent at various points in history.

79. However, the most cited religion (besides Islam) in modern cases is the traditional practice of polygamy by The Church of Jesus Christ of Latter-day Saints (LDS) and the current practice by adherents of The Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS).

80. Joseph Smith, the prophet and founder of the Mormon Church, not only attested to the divine origins of polygamy but was himself a polygamist.

81. The basis for the religious belief in polygamy for Mormons could be found in the same Old Testament passages discussed above and the revelations to Smith.

82. Smith's revelations were disclosed on July 12, 1843 in Nauvoo, Illinois (though based on divine instructions in 1831), according to the official History of the Church (H.C.). H.C. 5: 501–507.

83. Through "celestial marriage" and polygamy, men could become gods under Smith's teachings. Brigham Young, 11 J. of Discourses 269.

84. Smith directly tied the practice of polygamy to attaining ultimate salvation and elevation under the tenets of the faith:

> Some people have supposed that the doctrine of plural marriage was a sort of superfluity, or non-essential to the salvation or exaltation of mankind. In other words, some of the Saints have said, and believe, that a man with one wife, sealed to him by the authority of the Priesthood for time and eternity, will receive an exaltation as great and glorious, if he is faithful, as he possibly could with more than one. I want here to enter my solemn protest against this idea, for I know it is false.[10]

85. Smith's recorded revelations directly from God refer to the Old Testament and the polygamous relations of figures such as Abraham and David.

86. These revelations specifically detail the right to plural wives and the divine sanctioning of these unions.

87. Building on the earlier passages related to Sarah (Sarai), the Mormon *Law of Sarah* affirms that a man's first wife holds the right to consent to, or prohibit, her husband's wishes to marry additional wives according to Section 132 of the Mormon sacred text known as the *Doctrine and Covenants*. However, the first wife is expected to grant such consent.

88. According to the *Doctrine and Covenants*, Section 132:1-6, those rejecting such divine guidance on plural marriages are to be "damned":

> 1 VERILY, thus saith the Lord unto you my servant Joseph, that inasmuch as you have inquired of my hand to know and understand wherein I, the Lord, justified my servants Abraham, Isaac, and Jacob, as also Moses, David and Solomon, my servants, as touching the principle and doctrine of their having many wives and concubines- 2

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[10] B. Carmon Hardy, *Doing the Works of Abraham: Mormon Polygamy: Its Origin, Practice, and Demise, in* Kingdom in the West: the Mormons and the American Frontier, Vol. 9) (Arthur H. Clark Co. 2007), at 113 (statement of Joseph F. Smith, July, 7, 1878).

> Behold, and lo, I am the Lord thy God, and will answer thee as touching this matter. 3 Therefore, prepare thy heart to receive and obey the instructions which I am about to give unto you; for all those who have this law revealed unto them must obey the same. 4 For behold, I reveal unto you a new and an everlasting covenant; and *if ye abide not that covenant, then are ye damned; for no one can reject this covenant and be permitted to enter into my glory*. 5 For all who will have a blessing at my hands shall abide the law which was appointed for that blessing, and the conditions thereof, as were instituted from before the foundation of the world. 6 And as pertaining to the new and everlasting covenant, it was instituted for the fulness of my glory; and he that receiveth a fulness thereof must and shall abide the law, *or he shall be damned*, saith the Lord God. (emphasis added).

89. Ironically, many Mormon leaders condemned monogamous marriage under the same claims of harm espoused today by some critics of plural marriage: as the cause of birth defects, poor health, and immorality.

90. Polygamy (and more specifically polygyny) was openly practiced by the LDS Church for about 50 years until roughly 1890 when then church president Wilford Woodruff issued a manifesto explicitly disavowing the continued practice of polygamy by LDS members.

91. Brigham Young, who replaced Joseph Smith as head of the LDS Church after Smith's assassination, reportedly had as many as 55 wives. Jeffrey Odgen Johnson, *Determining and Defining 'Wife' — The Brigham Young Households*, 20 Dialogue: A Journal of Mormon Thought 57, 58 (1987).

92. Young is revered by LDS and FLDS members alike as a person guided directly by God.

93. Even today, while the modern Mormon Church forbids polygamy, many LDS members view the practice as having divine origins. It was both instituted and later discontinued due to revelations from God.

94. The rejection of polygamy occurred at the time that Utah was seeking to enter the Union as a state. At that time, there was considerable anti-Mormon prejudice in the United States, including many incidents of persecution and physical attacks on Mormons.

95. The public's response to Utah's request to enter the Union was highly negative and fueled by prejudice. Eventually, the Congress made clear that the LDS would have to abandon the practice of polygamy if it wanted

admission as a state. *See* Utah Const. art. III, § 1 (explicitly prohibiting polygamous and plural marriages).

96. Many Mormons found the rejection of polygamy to be against the founding principles of the LDS and left the church. These former Mormons created their own religious groups, including but not limited to the FLDS.

97. FLDS members are not part of the Mormon Church and therefore not properly called Mormons.

98. For followers of the original view of Smith and other Church prophets, plural marriage is a critical component in achieving salvation. For these consenting adults, a state ban on the practice of these beliefs constitutes a barrier to such salvation.

99. What is clear from these different sources – including these foundational authorities for the vast majority of religious persons in the world – polygamy is a *bona fide* religious belief, albeit a belief rejected by the majority in the United States.

V. POLYGAMY AS A CULTURAL PRACTICE

100. In addition to being a religious practice, polygamy must also be considered a cultural practice under international and domestic laws.

101. Cultural traditions and practices are given protection under international law and U.S. law. *See, e.g.,* International Covenant on Economic, Social and Cultural Rights (ICCPR) (1966) (Article 15) ("guaranteeing "the right of everyone: (a) to take part in cultural life"). This includes protections of minority cultural groups and practices. Thus, Article 27 of the ICCPR guarantees that insular minorities "not be denied the right, in community with the other members of their group, to enjoy their own culture." *See also Lovelace v. Canada*, (1981) HRC 36 U.N. GOAR Supp. (no. 40) Annex XVIII; U.N. Doc. A/36/40 (1981) (upholding minority right to culture over the enforcement of Indian Act).

102. Clearly, such protection has its limits when the practices or conduct is harmful to society or others. Thus, such practices as female genital mutilation (FMG) are generally not protected despite their strong cultural ties in some societies.

103. What is clear is that polygamous associations are based on long standing cultural norms that include ceremonies, traditions and rites that structure their lives and families. Absent crimes like child abuse, these communities insist that these cultural practices are not harmful but helpful to the raising of their children.

104. Polygamous families are often part of clearly defined and sometimes segregated communities with a heritage that can extend back for thousands of years in some cases.

105. The cultural traditions referenced here are inherited from both North American polygamous groups and groups of immigrants from areas like the Middle East and Africa where polygamy is still practiced in large numbers.

106. While most of the parties affected by the criminalization of polygamy may not be from indigenous peoples, for many polygamists, this practice is integral to both their religion and their culture. Every aspect of their lives is molded around such concepts as "sister wives" or multiple spouses.

VI. POLYGAMY AS A POLITICAL AND ASSOCIATIONAL RIGHT

107. While clearly related to the foregoing religious and cultural norms, the the practice of polygamy is also a political and associational right as that would be characterized under domestic law and international norms.

108. As noted above, there are many polygamists and polyamorists who believe in plural unions founded upon a deep philosophical belief or strong associational tie shared with other families.

109. Polyandrists, for example, are sometimes motivated by a belief in the centrality of a matriarchal figure or role of women as a joining force in a family unit.

110. Many people believe strongly that monogamous unions are artificially restrictive and counter to the biological and emotional needs of human beings. These individuals simply have a broader view of a family and intimacy that reflects a complex mix of social, political, and personal values.

111. The law already protects the right of individuals to have as many sexual partners as they wish in the United States. These individuals are allowed to have children with multiple partners so long as they support their offspring.

112. Rather than such casual encounters, polygamous and polyamorist families maintain stable plural unions that are not confined (or defined) by the sexual relationship alone. They wish to treat each other as spouses while not seeking official recognition of such unions as marriages.

113. While convenient, it is not accurate to treat all polygamist and polyamorist families as identical to FLDS families. Indeed, even accepting the general view of FLDS families, there is great variation as seen in the controversy over

the TLC program "*Sister Wives*." The Brown family featured in that program lives in a city, has monogamous friends, sends their children to public school, has wives with jobs outside of the home, drinks alcohol, and believes in divorce.

114. The issue should not be whether some polygamist groups have harmful practices – any more than evaluating a ban on monogamy based on the practices of one monogamous group. The issue should be whether consenting adults can practice polygamy without abusing children or committing other crimes such as fraud. The obvious answer is that such families do exist and that they are motivated by a panoply of different religious, cultural, philosophical, and social beliefs.

VII. POLYGAMY AS A PROTECTED INDIVIDUAL RIGHT

115. In the United States, polygamy has been the subject of a relatively small number of cases – generally cases where there are allegations of child abuse or fraud.

116. Nevertheless, the courts have uniformly upheld such prosecutions against constitutional challenges.[11]

117. Some scholars, including the affiant, have argued for many years that these rulings are facially flawed and that the courts will eventually have to recognize the right of consenting adults to have plural unions without threat of prosecution.

118. In the United States, the most obvious legal claims against the criminalization of polygamous marriages are the denial of free exercise, equal protection, due process (privacy), and the right to association.

119. Section 293 of the Criminal Code of Canada raises additional issues with the alternative basis for prosecution under 293 (1)(a)(ii) for anyone who "practises or enters into or in any manner agrees or consents to practise or enter into . . . any kind of conjugal union with more than one person at the same time where or not it is by law recognized as a binding form of marriage."

120. The conjugal union language sweeps exceptionally broadly to encompass acts outside of polygamous relationship, including casual, consensual relationships. In the United States, such a provision would be presumptively

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[11] *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1879); *Bronson v. Swenson*, 500 F.3d 1099, 1103 (10th Cir. 2007); *Utah v. Holm*, 2006 UT 31, 137 P.3d 726; *State v. Green*, 2004 UT 76, 99 P.3d 820; *Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998).

unconstitutional and its enforcement would raise selective prosecution concerns.

121. The closest statute to the conjugal union provision in the United States is probably the Utah bigamy statute, which states: "[a] person is guilty of bigamy when, knowing he had a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or *coinhabits with another person.*" Utah Code Ann. § 76-7-101 (2010) (emphasis added). Provisions on conjugal unions and cohabitation sweep into areas of traditional adultery and fornication under classic morality codes common to the Eighteenth Century.

122. Under such provisions, the existence of a private, undisclosed union is sufficient to trigger criminal prosecution. It is not the recognition but the existence of such plural unions that is the focus of the laws.

123. The closest analogies to these laws are the recently struck-down statutes in the United States where some states criminalized homosexual relations. In these cases, the gay couples did not seek recognition from the state. Rather the state sought to prosecute couples for their chosen lifestyles and relationships. After *Lawrence v. Texas*, 539 U.S. 558 (2003), those laws have been struck down in the United States.

124. Given the long-standing and recognized religious basis for plural marriage, the most obvious claim is free exercise. The *Reynolds* decision was an early interpretation of the free exercise clause of the First Amendment. That interpretation, as will be shown, was rigid and controversial in barring free exercise claims supporting polygamy.

125. In cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court adopted a more robust approach.[12] In that case, the Court overturned a state decision to deny unemployment benefits to a practicing member of the Seventh-day Adventist Church after she declined to work a six-day work week in violation of her faith. Justice William Brennan held "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406.

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[12] This case was later abrogated in *Employment Division v. Smith* 494 U.S. 872 (1990). However, it was resurrected by Congress in the federal Religious Freedom Restoration Act (RFRA) of 1993. The scope of its application in federal cases was articulated by the Court in *City of Boerne v. Flores,* 521 U.S. 507 (1997) and *Gonzales v. O Centro Espírita Beneficente União do Vegetal,* 546 U.S. 418 (2006).

126. Likewise, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court ruled in favor of Amish families who challenged compulsory education after the 8th grade on the ground that it violated their free exercise of religion.

127. There are polygamists and polyamorists, however, who do not adopt plural unions out of religious belief. Those families are more likely to claim associational rights as part of the First Amendment as well as equal protection and due process rights to protect their private affairs from government intrusion. These claims will be explored more fully below.

128. In addition to the free exercise claim, polygamists have a strong claim under equal protection. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." US Const Amend XIV, § 1.

129. Absent a fundamental right or a suspect class, equal protection analysis affords a state a deferential standard of review – requiring a showing of a rational basis for the legislation. *See Minnesota v. Clover Leaf Creamery Co.*, 449 US 456, 464 (1980), *Romer v. Evans*, 517 US 620, 631 (1996). Under this standard, the law must show a rational relationship to some legitimate government interest. *See Heller v. Doe*, 509 US 312, 319-320 (1993).

130. This deferential standard, however, is not blind deference and courts have struck down laws based on prejudice or purely majoritarian dislike for regulated activities or people. Courts "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 US at 632; *Heller*, 509 US at 321 (basis for a classification must "find some footing in the realities of the subject addressed by the legislation"). For example, in *Plyler v. Doe*, 457 U.S. 202, 228 (1982), the Supreme Court rejected a prohibition on undocumented children attending public school as irrational because "the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc").

131. Specifically, equal protection review is meant to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." Romer, 517 US at 633.

132. In my view, the criminalization of polygamy should fail under an equal protection challenge even if it is found not to involve a suspect class or fundamental right. There is no rational basis for criminalizing the private relations of consenting adults absent proof of harm to children or others. Moreover, criminalization creates an arbitrary and capricious distinction between unprotected polygamy and protected adultery. Four 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 very same relationships can exist if the individuals take steps to reject the appearance of a family – as with a purely casual sexual relationship. The state then retains the right to pronounce certain plural relationship as polygamy while accepting other plural relationship as simply casual sex or adultery.

133. A third strong claim for polygamists can be found under arguments of due process and privacy. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court struck down a Texas statute criminalizing homosexual conduct – a decision that overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986). Using many of the same arguments as Professor Marci Hamilton, the Court in *Bowers* had upheld a Georgia law under the rational basis test. In *Lawrence,* the Court relied on "broad statements of the substantive reach of liberty under the Due Process Clause [of the Fourteenth Amendment] in earlier cases." *Lawrence*, 539 U.S. at 565, 567:

> Their penalties and purposes . . . touch[ ] upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes . . . seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being *punished as criminals*.

134. The *Lawrence* Court acknowledged "an emerging awareness [in the past half century] that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." The same rationale applies to those who choose plural unions over monogamous relations. These individuals structure their private lives to acknowledge spiritual (rather than legal) commitments to each other. Even under a rational basis test, I believe these laws should fail as a matter of due process.

135. Polygamists also have a legitimate claim under the right of association, which is protected under the European Convention on Human Rights as well as Universal Declaration of Human Rights and International Labor Organization Conventions.

136. In the United States, while clearly protected under the First Amendment, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom

to associate is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

137. In the case of polygamists, the state is criminalizing the very association due to a majoritarian rejection of consensual plural unions. Ironically, since the state does not recognize such unions as marriages (and polygamists do not seek such recognition), this association is clearly a choice of a private lifestyle that can range from polygyny to polyandry to polyamory to group homes. The denial of this right to association is based exclusively on unsupported claims of harm and more relevantly a general view that plural unions are immoral. In my view, the imposition of majoritarian moral tenets is not a sufficient basis to justify the denial of the right to association.

138. Some claims are not as compelling in the context of decriminalization. For example, the right to marry is viewed as fundamental right protected by the Due Process Clause. *See Turner v. Safley*, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right" and marriage is an "expression of emotional support and public commitment."); *Cleveland Board of Education v LaFleur*, 414 US 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving v. Virginia*, 388 US 1, 12 (1967) (The "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."). However, in the decriminalization context, the issue is not recognition but prosecution for what remains a private association or lifestyle.

VIII. A RESPONSE TO PROFESSOR MARCI HAMILTON

139. Professor Marci A. Hamilton has supplied a detailed report to the Court on her view that the criminalization of plural unions under polygamy laws does not contravene constitutional guarantees in the United States.

140. In fairness to Professor Hamilton, it is important to acknowledge that prior cases have uniformly gone against the constitutional claims raised by prosecuted polygamists.

141. However, I have strong disagreements with some of the analysis in the Hamilton affidavit and I obviously disagree with her ultimate conclusion on the merits of these claims.

142. As a threshold matter, the fact that constitutional claims have been previously rejected in the United States does not resolve the merits of this controversy. Indeed, our courts maintained a series of rulings in this constitutional area for decades (or even centuries) that are now viewed as not just obnoxious but horrific. Those rulings range from defining escaped slaves as property (*Dred*

Scott) to upholding anti-miscegenation statutes (*Pace v. Alabama*) to upholding the constitutionality of criminal prohibitions of homosexuality (*Bowers v. Hardwick*). Each of these cases was defended on virtually the same type of analysis as presented in the opposing affidavit.

143. When presented with challenges over the denial of basic individual rights, the Supreme Court certainly considers *stare decisis*, but it has routinely set aside prior rulings that denied or limited core individual rights. Regardless of the rivaling views of the caselaw presented by myself and Professor Hamilton, the issue is whether the state may continue to prosecute consenting adults for decision to enter plural unions.

144. As a general matter, the progression of American constitutional law has been the gradual expansion of individual rights, particularly in the elimination of discriminatory rules based on race, religion, gender, nationality, and (most recently) sexual orientation. That progression often requires the Court to deal with flawed and even prejudiced doctrines from prior centuries.

Reynolds Analysis

145. The heavy reliance of Professor Hamilton on *Reynolds v. United States* is a case in point. While it is certainly understandable that one would cite the Supreme Court decision that upholds the criminalization of polygamy, the rather infamous language and bias contained in that decision should not go without mention. The quotes in the affidavit omit passages that reveal not just open animus but indefensible legal logic.

146. The Court's decision in *Reynolds* is rife with open hostility for Mormons and racist elements. Indeed, some conservative legal experts have denounced the use of *Reynolds* as precedent due to its questionable analysis. *See* Kenneth W. Starr, *Liberty and Equality Under the Religion Clauses of the First Amendment*, 1993 BYU L. Rev. 1, 2 (1993) (criticizing those justices who invoke such antiquated precedent as *Reynolds v. United States*).

147. Professor Hamilton states that "[s]ome have tried to argue that the federal polygamy laws[13] were solely a product of animus against the Church of Jesus Christ of Latter-Day Saints . . . that is an exaggeration and a mischaracterization." Hamilton Affidavit at 3. However, *Reynolds* and the history that it cites shows open animus.

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[13] If this is a reference to U.S. precedent, I am unclear what Professor Hamilton is referencing by "federal polygamy laws" since these laws were state laws. This could be a reference to federal rules barring polygamous families from admission into the United States. 8U.S.C. § 1182(a)(10)(A) (2008); U.S. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Sec. 212(a)(10)(A). This is consistent with the current rule in Canada. *Ali v. Canada* (1998), 154 F.T.R. 285.

148. The Court finds, for example, that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people." *Reynolds*, 98 U.S. at 164. This statement is simply untrue, as the foregoing discussion demonstrates. Indeed, polygamy was widely practiced in North America and was embraced by not just Mormons, but some Protestants and Jews.[14]

149. The *Reynolds* Court simply takes judicial notice that this practice is "odious" and deserving of little defense. Indeed, the Court repeatedly cites the majoritarian views against polygamy – the very inverse of what is called for under the Constitution, which is designed to protect minorities and the free exercise of religion against majority animus.

150. Nevertheless, Professor Hamilton quotes with approval the Court's statement upholding "the universal law" against polygamy: "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." From a methodological standpoint, this rationale is one of the most disturbing in both the opinion and Professor Hamilton's affidavit. The First Amendment protects the free exercise of religion while prohibiting the establishment of religion by the state. Yet, here, the Court is saying that the scope of the guarantees under the First Amendment should be limited in light of the majoritarian hatred of polygamy. Undoubtedly there were a plethora of religious practices that the Framers would have found personally "odious." However, that does not mean that Constitution must be assumed to exclude such beliefs from protection in light of their preferences for "social life."

151. The Court further simply endorses the assertion that "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." *Reynolds*, 98 U.S. at 166. This sweeping statement is facially unsupported to cover all plural unions, as well as an assumption that such "despotism" cannot long exist in monogamous union (despite the evidence to the contrary, as shown below in studies of abuse).

152. Likewise, the Court observes that "from the earliest history of England polygamy has been treated as an offence against society." *Id.* at 164.

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[14] Professor Hamilton later makes the same factual representation, stating "the LDS Church was the only known organization that based its culture on the practice." Hamilton Affidavit at 5. As noted earlier, polygamy was practiced by indigenous peoples and some European settlers long before the Mormons. It is also worth noting that Professor Hamilton appears to agree that, at least with regards to the LDS, polygamy is not simply a religious but a cultural practice, as noted earlier in this affidavit.

However, as the Court itself acknowledges, the early prosecution of polygamists (or persecution, depending on one's perspective) was done by ecclesiastical courts, and only until the time of James I. Thus, those early English "cases" involved a state-supported religion punishing the adherents of opposing religious views – hardly a promising precedential start if you are arguing that these cases were not based in animus or sectarian bias.

153. The criminalization of polygamy was later enforced by the State, which upheld the view of the Church of England.

154. Notably, the *Reynolds* Court adopts a position that is consistent with the Hamilton affidavit: "it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." *Id.* at 166. Yet, under this logic, Congress could tomorrow criminalize all monogamous unions. Clearly, the Supreme Court would not today endorse such a flawed and frightening rationale. Moreover, that view was later repeatedly rejected, with the Court striking down the right of "civil government to determine" the meaning of a marriage in cases like *Loving v. Virginia,* 388 U.S. 1 (1967), where the Court struck down discriminatory laws against mixed race couples.

155. Notably, the *Reynolds* Court acknowledges that "[a]n exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it," *id.*, but promptly dismisses the fact that plural unions can exist without harm because "there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." *Id.*

156. In other words, the Court rejects the relevancy of whether polygamy is (or can be) practiced without any harm to others or society. The Court simply leaves it to the majority to allow or to bar plural unions.

157. *Reynolds* was handed down just four years before *Pace v. Alabama*, 106 U.S. 583 (1883), where the Court upheld Alabama's anti-miscegenation statute (including a majority of Justices who signed on to the *Reynolds* decision). That decision was later overturned in *Loving*. At that time, the Supreme Court expressly denied the sweeping suggestion that marriage is anything the majority says it is:

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment,

> is surely to deprive all the State's citizens of liberty without due process of law. *Loving*, 388 U.S. at 12.

158. In addition to *Reynolds*, Professor Hamilton also quotes with approval the Court's ruling in *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 12 (1890) to show that the Court had rejected the arguments of this "nefarious" church. Hamilton Affidavit at 5. However, the full quote shows the Court again expressing open animus for the Mormons and polygamists from an expressly Christian perspective:

> [It] is a matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of Latter- Day Saints, one of the distinguishing features of which is the practice of polygamy,-a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by congress,-notwithstanding all the efforts made to suppress this barbarous practice,-the sect or community composing the Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching, upholding, promoting, and defending it. It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine, and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the western world. *Id.* at 48-49.

159. These decisions from the Nineteenth Century have not been entirely overturned, but they are rife with sectarian and religious bias by the Court. They are hardly evidence of a neutral and reasoned rationale for the criminalization of consensual plural unions. Indeed, in *Lawrence v. Texas* Associate Justice Antonin Scalia complained in dissent that the Court had rejected the premise of morality legislation as a legitimate basis for its ruling. *Id.* at 603 (Scalia, J., dissenting) ("What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change.").

Presumed Abuse

160. Professor Hamilton reinforces the *Reynolds* language with an equally sweeping and, in my view, unsupportable factual assertion: "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.'" For this remarkable factual representation, Professor Hamilton cites a relatively small collection of books which are almost exclusively first hand accounts of abuses in particular polygamist groups. One book deals with the history of polygamy.

161. The representation of a "strong correlation" between "religious motivated polygamy" and such things as the rape of both boys and girls is highly questionable. There are thousands of known polygamist families in the United States. Utah has an official "Safety Net Committee" that works with such families and a long-standing policy not to prosecute absent evidence of such crimes. The website of Utah Attorney General Mark Shurtleff states that "law enforcement agencies in both [Utah and Arizona] have decided to focus on crimes within polygamous communities that involve child abuse, domestic violence and fraud." Website of the Utah Attorney General (found at http://attorneygeneral.utah.gov/polygamy.html). The Committee is described as working directly with polygamous families:

> The Safety Net Committee began in 2003 and currently holds monthly meetings in Salt Lake City and St. George, Utah, Colorado City, Arizona and Creston, British Columbia. Government agencies, non-profits and interested individuals work together to insure that people associated with the practice of polygamy have the same educational opportunities and access to justice, safety and services as the general public. This is done through a coordinated effort to open communication, break down barriers and accomplish these original goals: provide training and develop materials for public awareness; reduce isolation, secrecy, abuses of power and crime; and find ways to provide access and education to members of polygamous communities.

162. While there are believed to be tens of thousands of polygamists practicing in the United States, there have been a very small number of cases of such prosecutions in the history of the United States.[15] The books cited by Professor Hamilton largely come from those cases or associated groups from those prosecutions. This type of empirical claim would be akin to saying that there is a strong correlation between the Catholic priesthood and child rape

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[15] *See* BBC Mormonism, at http://www.bbc.co.uk/religion/religions/mormon/features/polygamy.shtml ("There are said to be over 30,000 people practising [sic] polygamy in Utah, Idaho, Montana and Arizona, who either regard themselves as preserving the original Mormon beliefs and customs, or have merely adopted polygamy as a desired way of life and not as part of the teachings of any church.").

because of books detailing the small minority of priests found to have been pedophiles.

163. As in *Reynolds*, there is no consideration given in the Hamilton affidavit to the fact that there are polygamist families which have never been accused of such vile acts.

164. As in *Reynolds*, there is no consideration given in the Hamilton affidavit to the fact that non-religious polygamy is also criminalized under this law or that conjugal unions, including polyamorists and polyandrists, are subject to prosecution.

165. The assumptions of abuse in polygamous families are based in part on the anecdotal evidence of the relatively small number of cases prosecuted in the United States and Canada. However, in states like Utah, prosecutors have largely waived prosecution of polygamist families without evidence of child abuse, child brides, welfare fraud or other such crimes. Ironically, given the small number of prosecutions (and the thousands of known polygamist families in Utah), a countervailing argument could be made that these cases could create a presumption of non-abuse. Neither presumption is well-supported on such evidence.

166. What is demonstrably clear is that monogamous families have consistently shown high rates of spousal and child abuse. Report To Congress, The Fourth National Incidence Study of Child Abuse and Neglect (NIS – 4)[16] found:

> Using the stringent Harm Standard definition, more than 1.25 million children (an estimated 1,256,600 children) experienced maltreatment during the NIS–4 study year (2005–2006). This corresponds to one child in every 58 in the United States. A large percentage (44%, or an estimated total of 553,300) were abused, while most (61%, or an estimated total of 771,700) were neglected.

167. Virtually all of these 1,256,600 children in the last recorded year were abused or neglected in monogamous families. Yet, those documented rates are never raised as evidence of the inherently abuse nature of monogamous unions. As discussed below, even with tens of millions of children abused in the last ten years in monogamous families, such rates of criminality would not be a legitimate basis for calling for a ban on monogamous unions.

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[16] NIS-4 is a widely cited study by U.S. Department of Health and Human Services (DHHS), Administration for Children and Families (ACF), Office of Planning, Research, and Evaluation (OPRE) and the Children's Bureau.

168. Turning to the rate of domestic violence and abuse, a study by the United States Department of Justice found that in 1995-1996, nearly 25% of women and 7.6% of men were raped and/or physically assaulted by a current or former spouse, cohabiting partner, or dating partner/acquaintance at some time in their lifetime. Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 181867, *Extent, Nature, and Consequences of Intimate Partner Violence*, at *iii* (2000), available at http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm.

169. Just focusing on assault, approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner annually in the United States. *Id.* at *iv*.

170. Despite the millions of citizens abused or neglected each year in monogamous families, no responsible academic would suggest that such criminal and abusive conduct should be the basis for a ban on monogamous marriage. The validity of monogamous (and polygamous) marriage should turn on the right of consenting adults to engage in such unions absent such crimes.

Licentiousness

171. My greatest disagreement with Professor Hamilton lies in her defense of the right of society to criminalize acts of "licentiousness" and to impose moral values through criminal codes.

172. With all due respect to Professor Hamilton, she is advancing an argument that has been rejected by the Supreme Court and is viewed by civil libertarians as an extension of "majoritarian terror."

173. Professor Hamilton is certainly correct that early courts reaffirmed the right of society to force compliance with moral tenets and to criminalize what was viewed as acts of immorality and licentiousness. What her affidavit fails to fully explain is the range of such laws, including criminal prohibitions on adultery, fornication, and homosexuality.[17] Indeed, under the logic of Professor Hamilton, society is free to criminalize homosexuality as in *Bowers v. Hardwick* as licentious and immoral conduct. We have fortunately rejected that position – as shown in the decision in *Lawrence v. Texas*.

174. Professor Hamilton has previously rejected, as she does here, the notion that "it is impossible to have too much [liberty]." Hamilton Affidavit at 6. No one seriously argues that liberty theories generally encompass the liberty to commit murder or mayhem. The issue is whether it is impossible to have too

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[17] *See generally,* Jonathan Turley, *Adultery Still A Crime*, USA Today, April 25, 2010, at 10; Jonathan Turley, *From Adultery to Polygamy: The Dangers of Moral Legislation*, Washington Post, September 5, 2004, at C1.

much liberty over private, consensual choices of adults in our society. It really comes down to a certain presumption.[18]

175. Professor Hamilton suggests that the state has the inherent authority to criminalize licentiousness, noting with approval that past cases have "equated 'licentiousness' with a variety of illicit sex activities - adultery . . . child sex abuse . . . polygamy or bigamy . . . incest." *Id.* at 14. What is not mentioned is that it has also been used to crackdown on "licentious books," *Smith v. Turner,* 48 U.S. 283, 293 (1849); dismiss rape allegations on the basis of "licentious submissiveness" on the part of the victim, *United States v. Nicholson,* 8 U.S.C.M.A. 499 (1957); proving "licentious and unchaste thoughts," *People v. Smittcamp*, 70 Cal. App. 2d 741, 746 (App. Ct. 1945); charging "licentious language in presence of a female," *State v. Coffing*, 3 Ind. App. 304, 29 N.E. 615 (1892); and dismissing burglary charges because the victim was "a licentious, dissolute woman . . . with lewd and lascivious habits and character," *Robinson v. Maryland*, 53 Md. 151 (1880); as well as a host of other acts or attributes.

176. It would be curious to resolve concerns over the criminalization of plural unions by relying on a general term that is defined by Merriam-Webster as "lacking legal or moral restraints" or "marked by disregard for strict rules or discipline." One can understand that Professor Hamilton dislikes the presumption that you can never have too much personal liberty but such a term would make personal liberty entirely discretionary for a government.

177. Once again, Professor Hamilton supports her argument in favor of criminalizing anything deemed licentious by returning to Eighteenth Century rulings – a period that bears little resemblance to contemporary mores or legal thought on such question. She notes with approval that licentiousness can encompass anything that is deemed "sexual immorality." Hamilton Affidavit at 7. This argument puts our relative positions in the sharpest relief. Where such a fluid and subjective term is unacceptable in my view as the basis for legislation, Professor Hamilton treats it as proof that prosecuting plural unions is easily subsumed in long-standing morality codes.

178. This was precisely the type of argument rejected in the due process context in *Lawrence v. Texas*:

> It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual

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[18] Indeed, the opposing presumption was once described in *United States v. Hudson*, 65 F. 68 (W.D. Ark. 1894): "All the liberty we know anything about under this government is liberty regulated by law. Everything else is licentiousness, because it gives to each person the right to trample upon the rights of all others." *Id.* at 74.

> conduct as immoral. . . . For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833, 850 (1992). *Lawrence*, 539 U.S at 571.

179. The heavy reliance on such Eighteenth Century cases and mores ignores the fact that constitutional terms tend to evolve with society. In the United States Constitution, for example, what constitutes "cruel and unusual punishment" under the Eighth Amendment is gradually changing with society. In *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958), the Supreme Court recognized that "the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Privacy interpretations have shown a similar expansion with society.

180. The ability of states to impose moral codes through criminal provisions has also evolved with a maturing society. Today, adultery and fornication statutes (once defended as punishing licentious and immoral conduct) are presumptively unconstitutional and rarely enforced. Indeed, as noted above, Professor Hamilton's historical and legal analysis would suggest that states could criminalize homosexuality – which like polygamy has been historically treated as a crime and a "nefarious" practice.

181. Professor Hamilton again returns to some of the same Justices who handed down *Reynolds* and *Pace* in *Davis v. Beason*, 133 U.S. 333 (1890). Again, it is worth fully quoting this Court, which embraced the standard of licentiousness. As in the prior rulings, the Court emphasized the fact that Mormon practices of polygamy do not comport with its own Christian values and noted that it would no sooner decriminalize adultery (which is now of course effectively decriminalized):

> However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the

> passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance. *Id.* at 342-43.

182. Thus, the *Davis* decision equated adultery and polygamy with human sacrifice as part of its licentiousness inquiry. These cases should be a deterrent, not an invitation, for this Court to engage in the same biased and arbitrary analysis.

Free Exercise

183. Professor Hamilton's analysis of the lack of a free exercise claim for polygamists actually begins with two points of agreement. First, I certainly agree that the free exercise clause affords absolute protection for religious beliefs. Hamilton Affidavit at 4. Second, I believe that a natural starting point in understanding free exercise is Thomas Jefferson's famous letter to the committee of the Danbury Baptist Association that reads:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of 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 to man all his natural rights, convinced he has no natural right in opposition to his social duties.

184. Professor Hamilton reads this passage as allowing a broad degree of state prosecution for religious conduct as opposed to religious beliefs. I, and I

believe many other civil libertarians, read it quite differently. Jefferson was articulating what came known as the "wall of separation" between Church and State and was stressing that the government should not advance sectarian views.

185. No one argues that any act can be done in the name of religion. The question is whether the government can punish acts that do not comport with majoritarian moral views or tenets. Jefferson wanted a neutral government that left such religious tenets to the private decisions and lives of citizens.

186. If the distinction was simply one between conduct and belief, the government could curtail outward expressions of faith. The Supreme Court has rejected such a radical line of distinction. While the Court has allowed the government to regulate or prosecute religious-motivated acts[19], it rejected this distinction in *Church of The Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520 (1993). In that case, the government banned "unnecessar[y]" killing of "an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id.* at 527. Because the law was passed specifically with the Santerian Church in mind, the Court applied strict scrutiny and struck it down. *Id.* at 547.

187. As Professor Hamilton correctly notes, the Court noted the "animosity" shown this particular religious group and called the statute a form of "religious gerrymandering." *Lukumi*, 508 U.S. at 534-35. However, this argument seems to counteract the earlier position of the Hamilton affidavit that this is primarily a matter limited to the FLDS. Moreover, *Reynolds* (which is also cited on the free exercise analysis by Professor Hamilton) and later cases showed clear hostility for the non-Christian practices of Mormons.

188. More importantly, the mere fact that the government is targeting acts and not beliefs is not proven simply because a law uses neutral terminology. Not only can such language (as in the *Lukumi* case) not be found truly neutral, but the mere fact of prosecuting acts as opposed to beliefs is not determinative in a constitutional query. The government cannot arbitrarily deny religious practices by citing the majority opposition on morality grounds.

189. In some cases, the government's taking sides on certain religious acts could trigger an establishment challenge. For example, if Congress prohibited the sale of non-Kosher food on the Sabbath, it would likely trigger an establishment challenge for citizens who are opposed to such Kosher traditions.

190. Moreover, it is also worth noting that in 1993 Congress passed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, to require that the

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19 *See, e.g., Locke v. Davey*, 540 U.S. 712 (2004).

government satisfy the highest standard of strict scrutiny in any substantial burdens on the free exercise of religion. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Supreme Court ruled that the government had not satisfied its burden in seizing 30 gallons of *hoasca* (ayahuasca) tea containing dimethyltryptamine, a Schedule I substance under federal drug laws. *Id.* at 423.

191. Professor Hamilton argues that the *Lukumi* case concerned animus toward that particular group which motivated some of the analysis of the Court. In this context, the animus is directed toward a relatively small insular group of polygamists. Hamilton Affidavit at 13. While they may not all belong to the same sect, Professor Hamilton's own analysis shows how the focus is on FLDS as opposed to the array of other polygamist and polyandrous families. It pushes credulity after such analysis to say that these laws "impose a neutral marriage requirement on all peoples" any more than the ordinance in *Lukumi* imposed a neutral animal sacrifice restriction.

192. What is clear is that polygamy is a long-established religious practice that is honored by millions of families around the world in a variety of different religions. In identifying plural families, the state imposes a majoritarian rejection of the practice and prosecutes any polygamists who tried to maintain a plural union in the privacy of their own home.

193. The use of Jefferson's letter to endorse state regulation of religious conduct would create a revolving door in Jefferson's wall of separation for government authorities.

Equal Protection

194. Professor Hamilton also dismisses any equal protection claims against the criminalization of polygamy. She largely confines her analysis to rejecting any claim under "disproportionate impact."

195. Professor Hamilton in my view does not address the full equal protection claims discussed earlier. Specifically, on the disproportionate impact argument, I do not agree with the suggestion that such claims are no longer viable under existing precedent.

196. Professor Hamilton quotes a concurrence from Associate Justice John Paul Stevens from *Christian Legal Society Chapter of the University of California v. Martinez*, 561 U.S., Slip Op. at 35 (2010) to suggest that disparate impact is not a grounds for striking down a law or policy. *Martinez* concerned a clearly neutral school policy requiring the inclusion of all students who want to join school-sponsored groups.

197. Stevens noted that the policy applies equally to secular and religious reasons for the exclusion of students. He further stressed that there was "no evidence that the policy was adopted because of any reason related to the particular views that religious individuals or groups might have, much less because of a desire to suppress or distort those views." Indeed, he observed that the "policy's religion clause was plainly meant to promote, not to undermine, religious freedom." *Id.*

198. Stevens then adds:

> To be sure, the policy may end up having greater consequence for religious groups—whether and to what extent it will is far from clear *ex ante* —inasmuch as they are more likely than their secular counterparts to wish to exclude students of particular faiths. But there is likewise no evidence that the policy was intended to cause harm to religious groups, or that it has in practice caused significant harm to their operations. And it is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination. The dissent has thus given no reason to be skeptical of the basic design, function, or rationale of the Nondiscrimination Policy.

199. Stevens was not, in my view, rejecting disparate impact evidence. He was saying that parties need to show that there was some intent, animus, or design to limit a religious practice.

200. In the matter of polygamy, it takes an act of willful blindness to ignore the specific references to Mormon beliefs, comparisons to Christianity, and rejection of the cultural practices associated with FLDS families.

201. There is not only the disparate impact questioned by Stevens in *Martinez* but an effort to target this insular group. Prosecutions have been virtually exclusively focused on FLDS families and enforcement targets the singular practice that clearly distinguishes these groups from other religious groups.

202. *Martinez*, however, was primarily a first amendment case and not an equal protection case.

203. Professor Hamilton also quotes *M.L.B. v. S.L.J.*, 519 U.S. 102, 135 (1996) for the proposition that disparate or disproportionate impact is not sufficient as proof of an equal protection claim. However, that long quote is not from the majority opinion but from the dissent of Associate Justice Clarence Thomas and was only joined in whole by Associate Justice Scalia (though Chief Justice Rehnquist joined in this section of the opinion).

204. In fact, the majority in *M.L.B.* rejected the argument advanced in the affidavit and the Thomas dissent. As in the Hamilton affidavit, the respondents in *M.L.B.* argued that the Court had rejected the use of a law neutral on its face as the basis of an equal protection claim because "it may affect a greater proportion of one race than of another." *Id.* As with Professor Hamilton, the respondents cited *Washington v. Davis*, 426 U.S. 229 (1976). The Supreme Court rejected the argument and noted:

> *Washington* v. *Davis*, however, does not have the sweeping effect respondents attribute to it. . . . To comprehend the difference between the case at hand and cases controlled by *Washington* v. *Davis,* one need look no further than this Court's opinion in *Williams* v. *Illinois*, 399 U.S. 235 (1970). *Williams* held unconstitutional an Illinois law under which an indigent offender could be continued in confinement beyond the maximum prison term specified by statute if his indigency prevented him from satisfying the monetary portion of the sentence. The Court described that law as " `nondiscriminatory on its face,' " and recalled that the law found incompatible with the Constitution in *Griffin* had been so characterized. 399 U. S., at 242 (quoting *Griffin,* 351 U. S., at 17, n. 11) . . . Sanctions of the *Williams* genre, like the Mississippi prescription here at issue, are not merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus "visi[t] different consequences on two categories of persons," *ibid.*; they apply to all indigents and do not reach anyone outside that class.
>
> In sum, under respondents' reading of *Washington* v. *Davis*, our overruling of the *Griffin* line of cases would be two decades overdue. It suffices to point out that this Court has not so conceived the meaning and effect of our 1976 "disproportionate impact" precedent. See *Bearden* v. *Georgia*, 461 U. S., at 664-665 (adhering in 1983 to "*Griffin*'s principle of `equal justice' ").[20] *Washington*, 426 U.S. at 126-27.

205. The Court held in *Griffin v. Illinois*, 351 U. S. 12, 17 n. 11, "[A] law nondiscriminatory on its face may be grossly discriminatory in its operation."

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[20] Professor Hamilton also cites *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991) for the same proposition. The majority did reject the claims in the case but again simply held that disproportionate impact evidence must be accompanied with some evidence of a "discriminatory intent or purpose."

That is precisely the circumstance here, even if one were to accept the proposition of facial neutrality.

206. The Supreme Court has recognized that laws violate equal protection when they are directed at a group defined by their sexual practices or orientation. In *Romer* v. *Evans*, 517 U.S. 620 (1996), the Court struck down an amendment to Colorado's constitution which denied homosexuals, lesbians, or bisexuals (defined either by "orientation, conduct, practices or relationships") of protection under state antidiscrimination laws. Once again, the Court found the law to be "born of animosity toward the class of persons affected" and found that it could not meet even the lowest rational basis test under equal protection. *Id.* at 634.

207. Lower courts have rejected the analysis found in the Hamilton affidavit and struck down statutes and referendums barring same-sex marriage – rejecting the claim of total deference to state authority in defining marriages. For example, in *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010), the federal district court struck down Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C.S. § 7, that barred same-sex marriage. The court ruled that the prohibition violated equal protection and refused to defer to the inherent right of states to define marriage.

208. In the debate leading up to the passage of DOMA, members made the same arguments that are cited by Professor Hamilton in the rationale for criminalizing polygamy. *Gill*, 699 F. Supp. 2d at 378 ("The House Report further justified the enactment of DOMA as a means to 'encourag[e] responsible procreation and child-rearing,' conserve scarce resources, and reflect Congress' 'moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'").

209. The court found that upholding a moral code of the majority was not sufficient grounds to discriminate against a group of citizens based on their sexual orientation. *Id.* at 389-90 ("As the Supreme Court made abundantly clear in *Lawrence v. Texas* and *Romer v. Evans*, 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law....'") (quoting *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). The court found no rational basis for the prohibition on same-sex marriage.

210. The analysis in the Hamilton affidavit was also rejected in the recent case of *Perry v. Arnold Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), where a federal judge struck down a California referendum barring same-sex marriage on due process and equal protection grounds. In finding that the state could not even meet the rational basis test, the Court noted that "[t]he "ancient lineage" of a classification does not make it rational . . . Rather, the

state must have an interest apart from the fact of the tradition itself." *Id.* at 998. Thus, returning to the Eighteenth Century to show that such practices as polygamy were viewed as "nefarious" does not advance the analysis under the equal protection clause.

211. Professor Hamilton concludes her equal protection analysis by saying that "if the conduct is harmful to others, or to society in general, it can be proscribed regardless of how many engage in the conduct." Of course, this returns the analysis to the presumed harm from *any* plural union under the law whether it is polygyny or polyandry or polyamory. There is simply no record showing such a fact. Indeed, the record suggests otherwise in states like Utah where state officials regularly deal with polygamist families and decline prosecution absent evidence of such harm.

212. This statement also reintroduces the concept of "social harm" and the earlier discussion of the right to prosecute acts of perceived immorality or licentiousness. After all, polygamists are not generally complaining about the policy to "proscribe" marriage recognition.[21] They are not seeking marriage recognition. They are seeking to keep the government from prosecuting them for their private relations and plural unions.

213. Polygamists are prosecuted even though they are indistinguishable in most respects from citizens who have children out of wedlock by one or more partners. It is accepted that the state cannot prosecute an individual who has intimate relations with multiple partners and produces offspring, so long as he or she supports such offspring. However, if those same partners privately declare commitments to each other and raise the children together, they can be prosecuted in the United States and Canada. Indeed, if a polygamist family were to simply live next to each other and deny any obligation to each other (beyond that imposed under state law), they would be left alone as harmless adulterers. It is only when they seek to live as a family that they can be raided, prosecuted, and have children taken from them. Even under a rational basis test, such an arbitrary system is indefensible on a constitutional level.

214. These concerns become even more acute when you apply the logic of the Hamilton affidavit to conjugal unions and polyamorist relations. Presumably, the same "social harm" can be easily satisfied under this analysis.

Privacy

215. Professor Hamilton briefly considers and rejects any claim that can be made under privacy by plural family members. Here, she insists that *Lawrence v.*

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[21] One exception was the case of *Bronson v. Swenson*, 500 F.3d 1099 (10th Cir. 2007), where polygamists tried to obtain multiple marriage licenses to challenge the statute.

Texas, 539 U.S. 558 (2003), has little relevance to the prosecution of polygamists.

216. Again, I disagree with Professor Hamilton's analysis. Polygamy prosecutions raise a classic privacy dispute. As noted earlier, polygamist families do not generally seek recognition from the state for plural marriages. Indeed, the threat of prosecution has forced the vast majority of such families underground or out of the public eye. In order to prosecute a family, the state normally intrudes into their home, declares them to be living as married couples, and then prosecutes them for bigamy or polygamy.

217. In cases of conjugal unions, it gets even more extreme as the state identifies acts that would normally be defined as adultery as matters for prosecution.

218. The cursory dismissal of *Lawrence* in the Hamilton Affidavit is surprising since, as noted above, most of Professor Hamilton's arguments were used to defend the criminalization of homosexuality. It was viewed as immoral, licentious, and harmful to society. It was alleged to promulgate unhealthy lifestyles and spread disease. It was often tied to the abuse of minors and psychological injury.

219. While it is true that the majority avoided any holding directly related to same-sex marriage, it clearly rejected the authority of states to intrude into the bedrooms of Americans to enforce a majoritarian moral code. As with polygamists, homosexuals did not seek recognition for their relationships in *Bowers v. Hardwick*. They simply sought to be left alone and to be allowed to structure their private lives in accordance with their private values. Justice Anthony Kennedy wrote for the majority:

> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice. *Lawrence*, 539 U.S. at 567.

220. Lower courts have rejected the analysis found in the Hamilton affidavit and struck down statutes and referendums barring same-sex marriage – rejecting the claim of total deference to state authority in defining marriages.

221. Even in areas of traditionally high deference for government policy, courts have struck down federal statutes on the basis of substantive due process. In *Witt v. Air Force*, 2010 U.S. Dist. LEXIS 100781 (September 24, 2010), a federal court struck down the policy of Don't Ask, Don't Tell (DADT) in the military. The court relied on *Lawrence* to impose a heightened level of scrutiny due to the intrusion into the private lives of military personnel. *Id.* at *11("Because DADT constitutes an intrusion 'upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, it is subject to heightened scrutiny.' To survive plaintiff's constitutional challenge, the statute must (1) advance an important governmental interest, (2) the intrusion must significantly further that interest, and (3) the intrusion must be necessary to further that interest."). The court found that the military could not shoulder that burden.

222. The similarities with polygamy prosecutions are obvious. Plural families are subject to raids and prosecutions regardless of whether there is any evidence of harm to children or criminal act such a fraud. The existence of a claim of unsanctioned and unrecognized marriage is sufficient to justify such action.

IX. A RESPONSE TO PROFESSOR REBECCA J. COOK

223. Professor Rebecca J. Cook raises a series of authorities to support the notion that Canada is obligated to ban forms of polygamy. I strongly disagree that a Court is in any way barred from striking down criminal provisions regarding consensual plural unions that do not involve child abuse, fraud or other crimes beyond the existence of the plural union itself. Countries are given latitude in how to achieve the purposes of these agreements. Indeed, courts in some countries still uphold public regulation of polygamous marriages. *See, e.g., M Insa, S.H.*, Decision Number 12/PUU-V/2007 (upholding consent provisions for polygynous marriage).

224. Indeed, I believe international principles support the decriminalization of such consensual arrangements that are based on religious, cultural, and personal values. *See, e.g.,* International Covenant on Civil and Political Rights (ICCPR) (1966); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 35(1), Nov. 4, 1950, 321 U.N.T.S. 221, E.T.S. 5.

225. Article 17 of ICCPR expressly protects the right of privacy and specifically condemns arbitrary laws that invade the homes of citizens:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or

correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

226. Indeed, laws targeting homosexuals have been ruled as violations by The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the ICCPR. For example, in 1994, the Human Rights Committee found a Tasmanian criminal provision on homosexuality to be a violation of articles 17, paragraph 1, juncto 2, paragraph 1, of the Covenant. *See Toonen v. Australia*, (Communication No. 488/1992), Report of the Human Rights Committee, Vol. II, GAOR, Forty-Ninth Sess., Supl. No. 40 (A/49/40), pp. 226-237.

227. Various international sources protect private decisions relating to sexual relationships and family. For example, Article 8 of the European Convention on Human Rights (ECHR) (formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*) mandates that "Everyone has the right to respect for his private and family life, his home and his correspondence." *See also Kokkinakis v. Greecei* (1993), 260 A Eur. Ct. H.R. (Ser. A) 18 (reviewing criminal laws that undermine free exercise).

228. As noted above, criminalizing plural unions but not plural relations is arbitrary and capricious. The law in the United States protects the right of citizens to have multiple partners and even to have children with such partners. However, if the parties privately agree to be obligated to each other as a plural union, they can be prosecuted.

229. As reflected by the reliance on Eighteenth Century jurisprudence in both the Hamilton and Cook affidavits, the continued right of states to punish consenting adults for their private relations is an artifact of an earlier and more abusive period. The clear trend of human rights in the last century has been to protect the right of individuals to make such choices absent a clear showing of harm to others or society – beyond injury to majoritarian moral tenets.

230. As a threshold matter, it is important to note that, like Professor Hamilton, Professor Cook appears to focus her attention not on polygamy in general (as does the subject law), but only polygyny. This is done despite the fact that the law extends to conjugal unions and most certainly includes plural relationship such as polyandry. It appears inconsistent to argue for the criminalization of plural unions with multiple wives but not multiple husbands.

231. Professor Cook's position in favor of criminalizing polygyny is also based on sweeping principles that would mandate radical changes if actually accepted by a court. For example, Professor Cook explains that the "inherent wrongs" of polygyny motivating criminalization include opposition to "patriarchal

structuring" of family life. Cook Affidavit at 5. Such structuring might, in Professor Cook's view, "offend[] women's dignity", but it is a common structuring in North America and around the world in traditional families.

232. Professor Cook also qualifies any obligation stated under these international sources, stating that "states *might well be* obligated to use the criminal law as an appropriate measure to eliminate [polygyny]." *Id.* at 6. Once again, this does not suggest any equal obligation to eliminate polyandry or polyamory. Moreover, it does not state a clear obligation even in cases of polygyny. Notably, while scholars have suggested that some countries are in violation of international principles by allowing polygyny but not polyandry, Canada would presumably de-criminalize plural unions generally. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 Berkeley J. Int'l L. 213, 250 (2003) ("Where states allow polygamy but not polyandry (as per Islamic law), they violate the basic principle against sex discrimination contained in Article 16(1) of CEDAW.").

233. Instead, Professor Cook cited such sources as a General Comment to the Equality of Rights Between Men and Women and a Recommendation to from the CEDAW Committee on Equality of Marriage and Family Relations.[22] I agree with Professor Cook's interpretation of Comment 14 of the disapproval expressed for polygamy in these sources, a view shared by other academics. *See, e.g.*, Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 Case W. Res. J. Int'l L. 263, 273 (2002) ("for example, the practice of polygamy is inconsistent with the CEDAW because it undermines women's equality with men and potentially fosters severe financial inequities."). However, such sources do not require courts to continue to allow the criminalization of consensual relations of Canadian in their private lives. *See* Linda M. Keller, *The Convention on the Elimination of Discrimination Against Women: Evolution and (Non)implementation Worldwide*, 27 T. Jefferson L. Rev. 35, 37 (2004) (" Article 18 specifically notes that states can indicate 'factors and difficulties affecting the degree of fulfillment of obligations' – implying that compliance is not really expected. When states' reports are considered, the Committee can merely offer suggestions and general recommendations.").[23]

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22 *See generally* Yakar-Oul Jansen, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 Akron L. Rev. 311, 321-22 (2007) (As the committees are not judicial bodies and therefore cannot issue binding decisions, the recommendations are, at most, an authoritative interpretation of the rights embodied in the treaties."); Dina Bogecho, *Putting It to Good Use: The International Covenant on Civil and Political Rights and Women's Right to Reproductive Health*, 13 S. Cal. Rev. L. & Women's Stud. 229, 265 (2004) (noting that "general comments and recommendations are not legally binding.").

23 *Cf.* Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 Cornell J.L. & Pub. Pol'y 101, 169-70 (2006) (noting the United States did not ratify

234. Moreover, the exclusive reliance on Comment 14 of the Recommendation to from the CEDAW Committee on Equality of Marriage and Family Relations ignores the countervailing principle contained in Comment 16: "A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being." This includes the "same right freely to choose a spouse and to enter into marriage only with their free and full consent." If consensual plural unions to be decriminalized (while coerced or abusive relationships continued to be prosecuted), women would be guaranteed the same rights as called for under Comment 16.

235. Professor Cook encourages the Court to correct the historical practice of marriages where a woman is "subsumed within her husband's legal personality." Cook Affidavit at 9. This tradition would appear to extend to such practices ranging from treating marriage couples as a single entity for purposes of legal privilege to the adoption of man's surname in marriage. I would only suggest that criminal provisions should not be enlisted in a fight against "[s]tereotypes of feminine dependence, fragility, and commercial naivety" and counter "stereotypes of masculine protective breadwinning and financial acumen." Living in a free pluralistic society means that people are free to make choices with which we do not agree. Criminalization should be about true crimes, not unpopular choices.

236. Moreover while Professor Cook states that "[n]ormative systems that permit polygyny continue to rely on sex as a central axis in the distribution of marital rights and obligations," *id.* at 10, the same criticism can be levied against polyamorists or polyandrists or even many monogamist unions. Many traditional monogamous families treat women on some level as "procreators" and deny women choice in "determin[ing] the number and spacing of children." *Id.* Indeed, traditional Catholic families often follow the Church's admonitions against contraception -- as do other faiths.

237. I simply do not agree that there is a clear distinction to be drawn over "the centrality of motherhood (thereby creating fatherhood) [that] is evident in some of the religious and customary norms governing marriage among Islamic and African communities." *Id.* at 11. While I am no anthropology expert, I believe that the Court can take judicial notice of such "centrality" in many, if not most, monogamous unions in North America.

238. I respect the willingness of Professor Cook to concede that "[i]n some contexts, polygyny can undoubtedly serve a beneficial function for some women and children" and "the degree to which individual experiences of

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CEDAW and "[i]t debatable whether formal treaty obligations commit the United States to a policy of prohibiting polygamy".

plural families can differ." *Id* at 13. Indeed, she notes later that "commentators argue that in certain circumstances, polygyny may increase family wealth." *Id.* at 18. This is precisely the issue raised with regard to Professor Hamilton's testimony: whether this Court should ignore the fact that it is possible to have plural unions that are not harmful or otherwise abusive. I believe that must be the starting point of any analysis. We do not define free speech rights, for example, by focusing on the use of speech to commit crimes. Rather, we recognize that free speech can be used in unpopular but otherwise harmless ways. Otherwise, we could ban monogamous marriages based on the fact that millions of such unions produce spousal or child abuse every year in North America.

239. Harm cannot be simply assumed by anecdotal evidence or by reliance in the Cook affidavit on studies of the Mende or Masai tribes in Africa. *Id.* at 14. As she fairly notes, "[e]merging ethnographic work in Bountiful, British Columbia, suggests that collaboration is common among co-wives, though feelings of competition and jealousy are also present." *Id.* at 15. Indeed, as noted by Professor Shayna Sigman:

> Absent any other harms, it is unclear why adult women should not be [allowed to enter into a plural marriage], provided they are well-informed about the decision, offered the opportunity to choose alternatives, and provided an opportunity to leave polygamy if they so desire . . . there is no evidence that polygamy per se creates abuse or neglect. Having sister wives can be a support network. The status of senior wives versus junior wives and the relationships among these women vary between cultures. In fact, by banding together, women sometimes wield more power to change their husband's problematic behavior. [Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 Cornell J. L. & Pub. Pol'y 101, 171-72 (2006)].

240. There is a danger, as with same-sex marriage controversies, in "the use of relationships as a legal proxy for societal evils, as it leads to unmerited persecution and perpetuates prejudice." Jaime M. Gher, *Polygamy And Same-Sex Marriage -- Allies Or Adversaries Within The Same-Sex Marriage Movement*, 14 Wm. & Mary J. of Women & L. 559, 598-599 (2008).

241. Indeed, the success of the television program "Sister Wives" (detailing the lives of my clients, the Brown family) is in part due to the revelation for many viewers that a polygamous family can have strong if not dominant women. I have found the Browns to have a loving and equal relationship among the spouses and well-adjusted children with friends from both monogamous and polygamous families. Indeed, the Brown women include "sister wives" who were either raised in monogamous families or actually came from prior

monogamous marriages. They believe in the right of divorce and their children are given the full choice not to adopt a polygamous lifestyle for themselves. Indeed, some of the older children have indicated that they want a monogamous marriage for themselves, while others indicate that they would prefer a polygamous marriage. Moreover, the majority of Brown women work and pool their wealth and resources – a relationship that they value over a monogamous union or living as a single mother.

242. While it is true that there have been some "closed and semi-closed systems of polygyny," this is often due to the fact that polygamy is a crime. It is rather circular to cite the insularity of such families as the basis for criminalization when the criminalization compels insularity. Families like the Brown family in Utah are not insulated. They live in a town and send their children to public schools. The adults work outside of the community of polygamists and have monogamist co-workers and friends. Courts cannot and should not assume that all polygamists live in a closed compound and wear prairie outfits to make the legal analysis easier in upholding criminalization.

243. Professor Cook relies on *Reynolds v. United States*, as did Professor Hamilton. Cook Affidavit at 35. I will simply note the same objections to the open animus and bias shown in the case toward Mormons that were raised in the response to Professor Hamilton.

244. Even if it were the case that a state is somehow obligated to take "all appropriate measures" to eliminate polygyny, that does not mean that such measures must or should include prosecution. A state can have a policy against polygamy and seek to educate families against any perceived ills associated with plural unions. It might also refuse to recognize plural marriage by barring marriage certificates. However, no state is obligated to intrude into the private lives of citizens and prosecute consenting adults for their choice of a plural union. It is quite a stretch, in my view, to tie the criminalization of polygamy to an obligation under CEDAW to "eliminate prejudices and practices that are based upon the inferiority of women and on their stereotypical roles." Such stereotypical roles are common in monogamous marriages as well. Moreover, the same arguments have been made to justify the criminalization of pornography or the restriction of magazines like Playboy. Related arguments have uniformly failed in the United States where courts allow consenting adults to buy pornography and engage in stereotyping of women. *See, e.g, Am. Booksellers Assoc., Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (striking down Indianapolis Ordinance banning pornography as a form of discrimination against women) ("The Constitution forbids the state to declare one perspective right and silence opponents.").

245. The HRC did condemn polygamy in General Comment No. 28 on Equality of Rights between Men and Women in a brief and highly generalized statement:

> It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with the principle. Polygamy violates the dignity of women. It is any inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.[24]

246. First, one must note that General Comment No. 28 uses the general reference of polygamy as opposed to polygyny. It is unclear if the authors meant to include polyandry, for example, as violating the dignity of women or more generally polyamory. It would be inconceivable that such a generalized and brief statement would be treated as binding on states to criminalize polygamy, particularly given the fact that polygamy is widely and openly practiced in many states. Second, the affirmative statement that a practice should be "abolished" does not necessarily mean polygamists should be prosecuted. A state can officially oppose polygamy while recognizing that it is a practice that can be consensually entered into by adults as a matter of free will. Merriam-Webster, for example, defines "abolish" as "to end the observance or effect of." A state can refuse to recognize such marriages or deny giving any effect to such marriages. However, in North America, the issue is not one of recognition but prosecution for consensual plural unions.

247. It is equally unsupportable, in my view, to cite as authority a CEDAW Concluding Observation as compelling criminalization of polygamy. Cook Affidavit at 62. There is a great difference between a stated concern and an international obligation. The Concluding Observation was expressed as a concern over:

> the prevalence of a patriarchal ideology in the State party with firmly entrenched stereotypes and the persistence of deeprooted adverse cultural norms, customs and traditions, including forced and early marriage, polygamy . . . that discriminate against women, result in limitation to women's educational and employment opportunities and constitute serious obstacles to women's enjoyment of their human rights.

248. Many of us would agree with this list of offensive practices, but part of a woman's enjoyment of her human rights is to be able to make a choice, including a choice between a singular or plural relationship.

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[24] *General Comment No. 28: Equality of Rights Between Men and Women (Article 3), UN HRCOR, 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000)* at para 24.

249. It would be a dangerous practice to take a general principle to convert nondiscriminatory principles into criminal prohibitions. There are a great variety of matters that could be viewed as "customs and practices which constitute discrimination against women." Cook Affidavit at 59. This, according to Professor Cook, includes traditions and views that "essentialize women's reproductive capacity." *Id.* at 61. From arranged marriages to dowry systems, such an approach would obligate states to criminalize large segments of their societies.

October 20, 2010

No. S-097767
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF:

THE CONSTITUTIONAL QUESTION ACT, R.S.B.C. 1986, 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. 293 OF THE *CRIMINAL CODE OF CANADA*, R.S.C. 1985, c. C-46

AFFIDAVIT #1 OF JONATHAN TURLEY

TAD/ls

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