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## THE “LICENTIOUSNESS” IN RELIGIOUS ORGANIZATIONS AND WHY IT IS NOT PROTECTED UNDER RELIGIOUS LIBERTY CONSTITUTIONAL PROVISIONS

Marci A. Hamilton\*

There is no doubt that the sexual abuse of children occurs within religious organizations and that these organizations too often operate to perpetuate cycles of abuse. There was a time when such a statement was counter-intuitive, but it is now merely a statement of fact. One difficult question to answer is how the law has failed to protect the vulnerable in religious organizations. Misguided reliance on the First Amendment is partly to blame.

There are many reasons why the law has been insufficient to protect children in religious organizations, some more obvious than others. First, children have not had the legal capacity until relatively recently to challenge their abusers.<sup>1</sup> Second, the statutes of limitations for child sex abuse have been constructed in a way to make it virtually impossible for the vast majority of victims to get to a prosecutor and/or civil courts before their claims have expired.<sup>2</sup> Third, as a society, we have tended to adopt a “romantic attitude” and trust most religious organizations, which gave them latitude to hide abuse.<sup>3</sup> That changed in 2002 when the *Boston Globe* revealed that the Boston Archdiocese of the Roman Catholic Church had covered up horrendous abuse by serial pedophiles, including Father Paul Shanley and Father John Geoghan.<sup>4</sup>

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<sup>1</sup> See JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006); ANNE LAWRENCE, *PRINCIPLES OF CHILD PROTECTION: MANAGEMENT AND PRACTICE* 35–84 (2004); JOHN R. LUTZKER, *HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT* 3–52 (1998); BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* (2008); *THE CHILD PROTECTION HANDBOOK* 195–246 (Kate Wilson & Adrian James eds., 3d ed. 2007).

<sup>2</sup> See MARCIA A. HAMILTON, *JUSTICE DENIED: WHAT AMERICA MUST DO TO PROTECT ITS CHILDREN* (2008); Marci A. Hamilton, *The Maturing of a Movement: Statute of Limitations Reform for Sex Abuse Victims*, FINDLAW, June 11, 2009, <http://writ.news.findlaw.com/hamilton/20090611.html>. See generally *Statute of Limitations Reform*, <http://www.sol-reform.com> (last visited Apr. 20, 2010) (containing information regarding attempts to extend SOLs in various states).

<sup>3</sup> MARCIA A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 3–11 (2005).

<sup>4</sup> Sacha Pfeiffer, *Famed ‘Street Priest’ Preyed Upon Boys*, BOSTON GLOBE, Jan. 31, 2002, at A21 (singling out Shanley as “among the most insidious cases of clergy sex abuse found” by the *Globe*’s investigative team with the number of victims “unclear”); Walter V. Robinson

While there had been trickles of information to the public before then,<sup>5</sup> it was not until the larger picture of the Catholic hierarchy's handling of abuse that the public started to comprehend that its practices were uniform across dioceses, and even other countries,<sup>6</sup> and then that such practices were not peculiar to the Catholic Church.<sup>7</sup>

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& Matt Carroll, *Documents Show Church Long Supported Geoghan Officials Gave Comfort Despite Abuse Charges*, BOSTON GLOBE, Jan. 24, 2002, at A1 (Geoghan was accused of abuse by at least 130 people); Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases: Settlements Kept Scope of Issue Out of Public Eye*, BOSTON GLOBE, Jan. 31, 2002, at A1. Shanley was convicted in February 2005 of raping a student and sentenced to twelve to fifteen years in prison. Joanna Weiss, *Shanley Gets 12 to 15 Years; Defrocked Priest's Accuser Hailed as Hero*, BOSTON GLOBE, Feb. 16, 2005, at A1. The Massachusetts Supreme Judicial Court affirmed the denial of Shanley's motion for a new trial in January 2010. *Commonwealth v. Shanley*, 455 Mass. 752 (2010). Geoghan was convicted in 2002 and sentenced to nine to ten years, Kathleen Burge, *Geoghan Sentenced to 9–10 Years*, BOSTON GLOBE, Feb. 22, 2002, at A1, but the conviction was voided after he was killed in prison while an appeal was pending. Yvonne Abraham, *Geoghan's Death Voids Conviction, Prosecutors Say*, BOSTON GLOBE, Aug. 27, 2003, at B1.

<sup>5</sup> See, e.g., JASON BERRY, *LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN* (2000); F. RAY MOUTON & THOMAS P. DOYLE, *THE PROBLEM OF SEXUAL MOLESTATION BY ROMAN CATHOLIC CLERGY: MEETING THE PROBLEM IN A COMPREHENSIVE AND RESPONSIBLE MANNER* (1985), available at [http://www.bishop-accountability.org/reports/1985\\_06\\_09\\_Doyle\\_Manual/](http://www.bishop-accountability.org/reports/1985_06_09_Doyle_Manual/); Jason Berry, *The Tragedy of Gilbert Gauthe*, TIMES OF ACADIANA (Lafayette, La.), May 23, 1985, available at [http://www.bishop-accountability.org/news/1985\\_05\\_23\\_Berry\\_TheTragedy.htm](http://www.bishop-accountability.org/news/1985_05_23_Berry_TheTragedy.htm); Maureen Graham & Larry Lewis, *Sex Abuse Suit Claims Coverup by Bishops*, PHILA. INQUIRER, Nov. 1, 1994, at A1; Andrew M. Greeley, Op-Ed., *Priestly Silence on Pedophilia*, N.Y. TIMES, Mar. 13, 1992, at A31; see also Jon Nordheimer, *Sex Charges Against Priest Embroil Louisiana Parents*, N.Y. TIMES, June 20, 1985, at A24 (chronicling the story of Rev. Gilbert Gauthe's admission of molesting thirty-seven children in rural Louisiana).

<sup>6</sup> See, e.g., COMMISSION TO INQUIRE INTO CHILD ABUSE, COMMISSION REPORT (2009), available at <http://www.childabusecommission.com/rpt/>; JOHN JAY COLLEGE OF CRIMINAL JUSTICE, *THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES* (2004), available at <http://www.usccb.org/nrb/johnjaystudy/>; YVONNE MURPHY ET AL., COMMISSION OF INVESTIGATION: REPORT INTO THE CATHOLIC ARCHDIOCESE OF DUBLIN (2009), available at <http://www.dacoi.ie/>; FRANCIS D. MURPHY ET AL., *THE FERNS REPORT* (2005), available at <http://www.bishop-accountability.org/ferns/>; WINTER COMMISSION REPORT (1990), available at <http://www.cta-usa.org/Winter/summary.pdf> (summary and extracts available online); see also BRUCE BLYTH, *COUNTING THE COST: CHRISTIAN BROTHERS AND CHILD CARE IN AUSTRALIAN ORPHANAGES* (1999); MICHAEL HARRIS, *UNHOLY ORDERS: TRAGEDY AT MOUNT CASHEL* (1990) (telling the story of a sex abuse scandal at a Catholic orphanage in Canada); JOE RIGERT, *AN IRISH TRAGEDY: HOW SEX ABUSE BY IRISH PRIESTS HELPED CRIPPLE THE CATHOLIC CHURCH* (2008); *Irish Catholic Cover-Up of Child Sex Abuse Echoes Past Priestly Scandals*, CHRISTIAN CENTURY, Dec. 29, 2009, at 16, available at <http://www.christiancentury.org/article.lasso?id=8083>; David Sharrock, *Irish Bishop Donal Murray Resigns Over Cover-Up of Child Sex Abuse*, TIMES ONLINE, Dec. 18, 2009, <http://www.timesonline.co.uk/tol/comment/faith/article6961000.ece>.

<sup>7</sup> See, e.g., MARTHA BECK, *LEAVING THE SAINTS: HOW I LOST THE MORMONS AND FOUND MY FAITH* (2005); APRIL DANIELS & CAROL SCOTT, *PAPERDOLLS: A TRUE STORY OF*

There have been two other hurdles to adequate legal protection for children at risk in religious organizations, both of which have originated from religious groups themselves. One important reason for the law’s ineffectiveness has been the intentional opacity, or secrecy, of religious organizations on these issues.<sup>8</sup> For a number of religious organizations, there are built-in theological or religious rules that keep child abuse in particular secret.<sup>9</sup> When that dynamic is combined with the fact that most perpetrators against children abuse more than one child,<sup>10</sup> cycles of abuse become entrenched within the organization and far more children are abused than would have been had the organization not kept abuse internal. Sealing off abuse from the legal and social forces constructed to protect children disables legal efficacy in this field and creates a system within which more children are abused.

The second way in which religious organizations have impeded the capacity of the law to protect children is the perverse decision to defend their actions establishing the conditions for abuse by invoking federal and state religious liberty guarantees.<sup>11</sup>

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CHILDHOOD SEXUAL ABUSE IN MORMON NEIGHBORHOODS (1993); HAMILTON, *supra* note 3, at 12–13; HAMILTON, *supra* note 2; CAROLYN JESSOP WITH LAURA PALMER, *ESCAPE* (2007); Assoc. Press, *Judge to Mediate \$45m Sex Abuse Suit Against LDS Church*, SALT LAKE TRIB., July 27, 2007; Alison Gendar & Simone Weichselbaum, *Abuse Comes to Light: Hasidim Silence on Perverts Cracking*, N.Y. DAILY NEWS, Feb. 28, 2009, at 26; John Metcalfe, *One Man’s Brutal Encounter With Sexual Abuse in the Mormon Church*, SEATTLE WEEKLY, May 30, 2007 (detailed feature on sexual abuse in the Mormon Church); Gustav Niebuhr, *Mormons Paying \$3 Million to Settle Sex Abuse Case*, N.Y. TIMES, Sept. 5, 2001, at A14; Peter Wilkinson, *The Life and Death of the Chosen One*, ROLLING STONE MAG., June 30, 2005, at 114; Kareem Fahim, *Focus on Sex Crimes in Orthodox Jewish Communities*, N.Y. TIMES ONLINE, Apr. 1, 2009, <http://cityroom.blogs.nytimes.com/2009/04/01/brooklyn-officials-focus-on-sex-crimes-in-orthodox-jewish-communities/>; Miriam Karp, *Responding to Child Predators in the Jewish Community*, CHABAD.ORG, July 12, 2009, [http://www.chabad.org/blogs/blog\\_cdo/print/true/aid/880142/jewish/Responding-to-Child-Predators-in-the-Jewish-Community.htm](http://www.chabad.org/blogs/blog_cdo/print/true/aid/880142/jewish/Responding-to-Child-Predators-in-the-Jewish-Community.htm); Scott Michels, *Orthodox Jewish Community Struggles with Abuse Allegations*, ABC NEWS, May 5, 2009, <http://abcnews.go.com/TheLaw/Story?id=7376057&page=1>.

<sup>8</sup> See THOMAS DOYLE ET AL., *SEX, PRIESTS, AND SECRET CODES: THE CATHOLIC CHURCH’S 2000-YEAR PAPER TRAIL OF SEXUAL ABUSE* 175–261 (2006); Marci A. Hamilton, *The Rules Against Scandal and What They Mean for the First Amendment’s Religion Clauses*, 69 MD. L. REV. 115 (2009).

<sup>9</sup> DOYLE, *supra* note 8, at 47–61; Hamilton, *supra* note 8, at 122–26.

<sup>10</sup> KENNETH V. LANNING, *CHILD MOLESTERS: A BEHAVIORAL ANALYSIS* 37 (4th ed. 2001), available at [http://www.cybertipline.com/en\\_US/publications/NC70.pdf](http://www.cybertipline.com/en_US/publications/NC70.pdf) (“Although a variety of individuals sexually abuse children, preferential-type sex offenders, and especially pedophiles, are the *primary* acquaintance sexual exploiters of children. A preferential-acquaintance child molester might molest 10, 50, hundreds, or even thousands of children in a lifetime, depending on the offender and how broadly or narrowly child molestation is defined. Although pedophiles vary greatly, their sexual behavior is repetitive and highly predictable.”).

<sup>11</sup> Mainstream religious organizations like the Roman Catholic Church and the Church of Jesus Christ of Latter-Day Saints have in recent years pushed for a “church autonomy” First Amendment doctrine, which would keep them unaccountable for their negligent acts

Typically, the sexual abuse practices are not supported by the religious beliefs of these organizations.<sup>12</sup> Fundamentalist polygamous groups, though, raise a slightly more interesting issue under religious liberty theory, because their sexual abuse of children and child bigamy are rooted in the religious edicts of powerful spiritual leaders. The purpose of this Article is to show that even when abuse is rooted in such religious sources, conduct involving illicit sex, including child sex abuse, was never meant to be constitutionally protected and should be categorically excluded from religious liberty protection.

It was widely understood by English and American society before and when the First Amendment and state constitutions were drafted that there can be too much liberty, which they called “licentiousness.”<sup>13</sup> They tended to view certain actions as beyond any religious liberty guarantee. This means that certain actions were never intended to receive protection under religious liberty guarantees. Among the liberties that were never intended to be protected, clearly, were polygamy and sexual abuse. They were consciously excluded from free exercise protection.

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that led to child sex abuse. Their most recent initiative was to file amicus briefs in the Nevada Supreme Court urging the Court to embrace expansive First Amendment immunity for religious organizations accused of permitting child sex abuse within their organizations. *See* Brief Amicus Curiae of the Church of Jesus Christ of Latter-Day Saints, *Ramani v. Segelstein*, No. 49341 (Nev. Oct. 5, 2009); Joinder of the Roman Catholic Bishop of Las Vegas and of the Roman Catholic Bishop of Reno, *Ramani v. Segelstein*, No. 49341 (Nev. Oct. 12, 2009). As I have explained previously, this is an argument that cannot be justified in the face of the extraordinary harm that has been caused by religious organizations against children. *See* Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 *CARDOZO L. REV.* 225 (2007). In this Article, I am making the even stronger point that there are no rights under free exercise guarantees in cases involving child sex abuse.

<sup>12</sup> *See* *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief.”); *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 795 (9th Cir. 2005) (Fletcher, J., concurring in denial of petition for en banc rehearing) (“No court has ever held that sexual harassment by a minister is protected by the First Amendment.”); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) (“[Free Exercise] rationale does not apply here, for the Jesuits most certainly do not claim that allowing harassment to continue unrectified is a method of choosing their clergy.”); *McKelvey v. Pierce*, 800 A.2d 840, 857–58 (N.J. 2002) (stating that in order to apply the ministerial exception, the dispute must involve an ecclesiastical or religious belief); *see also* *Longo v. Regis Jesuit High Sch. Corp.*, No. 02-cv-001957-PSF-OES, 2006 U.S. Dist. LEXIS 4142, at \*18–19 (D. Colo. Jan. 25, 2006) (holding that a disabled teacher’s claim for discriminatory discharge under Americans with Disabilities Act could go forward in part because no religious justification was offered for the termination); *Melanie H. v. Defendant Doe*, No. 04-1596-WQH-(WMc) (S.D. Cal. Dec. 20, 2005) (holding that where child sex abuse was not part of church’s religious belief, church could still be liable in tort for child sex abuse); *Linklater v. Prince of Peace Lutheran Church*, No. 505, slip op. at 20–21 (Md. Ct. Spec. App. Mar. 16, 2009) (allowing tort claims to go forward against church where church had no religious belief in harassment).

<sup>13</sup> *See infra* Part II.

In this Article, I will first briefly examine the beliefs and practices of the fundamentalist polygamists, primarily but not exclusively the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS), which have led to a cycle of severe and entrenched child sex abuse. The point of focusing upon the fundamentalist polygamists is that their sexual abuse of children is grounded in their religious scriptures and beliefs. Therefore, if there is any religious liberty defense to furthering child sex abuse, they arguably would have the most powerful arguments.

Second, I will survey the rich history that establishes that “licentious,” or illicit, sexual behavior was never intended to be protected by free exercise protections in the history of the United States (or Canada), even if religiously motivated. It is beyond the reach of free exercise guarantees, whether in the state or federal constitutions. I will also look to First Amendment doctrine, which further supports categorical exclusions. Free speech cases already recognize this principle in the context of child pornography and exploitation, which are constitutionally unprotected activities. If the First Amendment was not designed to protect the act of creating images of children engaging in sex, it follows that neither should it protect the acts that lead to child sexual abuse itself. Third, I will extend this reasoning to contemporary cases and explain why carving out licentiousness from religious liberty’s reach can keep these cases from negatively affecting other aspects of the doctrine.

#### I. THE FUNDAMENTALIST POLYGAMISTS AND THE BELIEFS AND CONDUCT THAT HAVE CONTRIBUTED TO CYCLES OF CHILD SEX ABUSE

The United States has struggled with religiously motivated polygamy for well over a century. Though there are exceptions, in the main, religiously motivated polygamy has elevated men to positions of nearly absolute power, demeaned and disabled women, and harmed children. Despite popular cultural propaganda like the television show *Big Love*, those women who have escaped from such marriages, which are often initiated when they are under-age, reveal lives of desperation and great sadness.<sup>14</sup> If there was ever a religiously motivated practice that should be outside the bounds of constitutional protection, this is it.

##### *A. Historical Background*

There are a number of fundamentalist polygamist groups whose history traces back to the early decades of the Church of Jesus Christ of Latter-Day Saints (LDS

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<sup>14</sup> See, e.g., JESSOP & PALMER, *supra* note 7; MELISSA MERRILL, *POLYGAMIST’S WIFE* (Pocket Books 1977) (1975); SUSAN RAY SCHMIDT, *FAVORITE WIFE: ESCAPE FROM POLYGAMY* (Lyons Press 2009) (2006); DOROTHY ALLRED SOLOMON, *DAUGHTER OF THE SAINTS: GROWING UP IN POLYGAMY* (2003); ELISSA WALL WITH LISA PULITZER, *STOLEN INNOCENCE: MY STORY OF GROWING UP IN A POLYGAMOUS SECT, BECOMING A TEENAGE BRIDE, AND BREAKING FREE OF WARREN JEFFS* (2008); see also *Tapestry Against Polygamy*, <http://www.polygamy.org/> (last visited Mar. 9, 2010).

Church or Mormon).<sup>15</sup> While the LDS Church practiced polygamy for some decades during the nineteenth century, its leaders issued two later manifestoes that, first, rejected the practice,<sup>16</sup> and, second, instituted excommunication for those who continued to engage in polygamy.<sup>17</sup> A small number of Mormons, though, rejected these new revelations and continued to practice polygamy in Mexico and the United States,<sup>18</sup> and later Canada.<sup>19</sup> “Every fundamentalist group has its own particular rules and mode of dress, and the members blindly follow their leader. Though some of their practices differ concerning the act of procuring wives, every group is convinced that they are a ‘peculiar people.’”<sup>20</sup> Thus, they have broken into separate sects, but continue to practice polygamy.

Laws against polygamy were in place well before the United States was founded,<sup>21</sup> and existed in every state during the nineteenth century through today.<sup>22</sup> They blanketed the states before Congress took up the Morrill Anti-Bigamy Act of 1862 and the Edmunds-Tucker Act of 1887, which extended the ban on polygamy to the Utah

<sup>15</sup> See SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002); MERRILL, *supra* note 14, at 34–37; ANDREA MOORE-EMMETT, *GOD’S BROTHEL* 21–31 (2004); IRENE SPENCER, *CULT INSANITY: A MEMOIR OF POLYGAMY, PROPHETS, AND BLOOD ATONEMENT* 2–8 (2009).

<sup>16</sup> Official Declaration of Wilford Woodruff, President of the Church of Jesus Christ of Latter-Day Saints (Sept. 24, 1890), in *THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 256–57 (1921) [hereinafter *DOCTRINE AND COVENANTS*].

<sup>17</sup> Joseph F. Smith, President of the Church of Jesus Christ of Latter-Day Saints, Official Statement at the 74th Annual Conference of the Church of Jesus Christ of Latter-Day Saints (Apr. 6, 1904), available at <http://search.ldslibrary.com/article/view/274597> (“I hereby announce that all such marriages are prohibited, and if any officer or member of the Church shall assume to solemnize or enter into any such marriage he will be deemed in transgression against the Church and will be liable to be dealt with, according to the rules and regulations thereof, and excommunicated therefrom.”).

<sup>18</sup> See BENJAMIN G. BISTLINE, *THE POLYGAMISTS: A HISTORY OF COLORADO CITY, ARIZONA* 16 (2004); JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* 5, 253–55 (2003); SCHMIDT, *supra* note 14, at 1–19; SPENCER, *supra* note 15, at 3.

<sup>19</sup> See BISTLINE, *supra* note 18, at 144–60; DAPHNE BRAMHAM, *THE SECRET LIVES OF SAINTS: CHILD BRIDES AND LOST BOYS IN CANADA’S POLYGAMOUS MORMON SECT* 3 (2009); KRAKAUER, *supra* note 18, at 29–30; MOORE-EMMETT, *supra* note 15, at 25–31.

<sup>20</sup> SPENCER, *supra* note 15, at 7.

<sup>21</sup> *Reynolds v. United States*, 98 U.S. 145, 164–65 (1879) (“At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society. . . . By the statute of 1 James I. (c. 11), the offence [of polygamy] . . . was made punishable in the civil courts, and the penalty was death. . . . [I]t was at a very early period re-enacted, generally with some modifications, in all the colonies.”).

<sup>22</sup> *Id.* “[W]e think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity [than under the former English law].” *Id.* at 165. Notably, the Model Penal Code reaffirmed past practice by making bigamy a misdemeanor and polygamy a felony of the third degree. MODEL PENAL CODE § 230.1 (1962).

Territory (and all territories under the jurisdiction of the United States) before the states in those areas were established.<sup>23</sup> Thus, the extension of anti-polygamy laws to the territories followed the law in the states. None of the anti-polygamy laws were limited to Mormons, or any other religious group, but were applicable to all who engaged in polygamy, secular or religious.<sup>24</sup>

The Republican Platform of 1856 situated polygamy in the same moral universe as slavery:

*Resolved:* That the Constitution confers upon Congress sovereign powers over the Territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism—Polygamy, and Slavery.<sup>25</sup>

The Republicans were committed to “humanitarian reform” in both arenas and to ending the “enslavement of women in Utah.”<sup>26</sup>

When the United States Supreme Court was asked to rule on whether there is free exercise protection for polygamy, it reiterated the phraseology of the twin relics of “barbarism”<sup>27</sup> and described polygamy as a violation of historical practices and equality between women and men:

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<sup>23</sup> See Morrill Anti-Bigamy Act of 1862, ch. 126, 12 Stat. 501 (banning bigamy in all United States territories); Edmunds Anti-Polygamy Act of 1882, ch. 47, 22 Stat. 30 (making polygamy a felony). Congress later amended these acts into the Edmunds-Tucker Act of 1887, ch. 397, 24 Stat. 635. This was the act that precipitated the confrontation between the Church of Jesus Christ of Latter-Day Saints and the United States government that ultimately led to the issuance of the Woodruff Manifesto. See also RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 105–76 (2d ed. 1989).

<sup>24</sup> See *Williams v. State*, 54 Ala. 131 (1875); *State v. Hayes*, 29 So. 22 (La. 1900) (man indicted for bigamy disappeared before trial and his bond was forfeited); *Commonwealth v. Putnam*, 18 Mass. (1 Pick.) 136 (1822) (man convicted of adultery for marrying and living with a second wife after divorce should have been charged with polygamy instead); *State v. Caulder*, 262 S.W. 1023 (Mo. 1924) (man convicted for marrying a woman who was already married); *State v. Robbins*, 28 N.C. (6 Ired.) 23 (1845); *Biddy v. State*, 256 S.W. 271 (Tex. Crim. App. 1923); *State v. Geer*, 765 P.2d 1 (Utah Ct. App. 1988) (affirming conviction for bigamy despite defendant’s assertions that State selectively prosecuted only those bigamists who practiced bigamy for non-religious reason because the court found that knowledge of defendant’s religious beliefs was not a factor in the decision to prosecute).

<sup>25</sup> REPUBLICAN PLATFORM OF 1856, available at [http://www.ushistory.org/gop/convention\\_1856republicanplatform.htm](http://www.ushistory.org/gop/convention_1856republicanplatform.htm).

<sup>26</sup> GORDON, *supra* note 15, at 55–83; John Kincaid, *Extinguishing the Twin Relics of Barbaric Multiculturalism—Slavery and Polygamy—from American Federalism*, 33 *PUBLIUS* 75 (2003); Letter to the Editor, *Republicans and Polygamy*, *N.Y. TIMES*, Nov. 30, 1899, at 6, available at <http://query.nytimes.com/gst/abstract.html?res=9C02E3D7133DE633A25753C3A9679D4689ED7CF>.

<sup>27</sup> *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 48–50 (1890) (“[T]he inculcation and spread of the doctrines and usages of the Mormon



In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, 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. . . . An 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; but 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.<sup>28</sup>

The Court thus acknowledged that there might be instances of polygamy that do not result in oppression, but that in the main, the practice tended to generate severe harm to women and children. This acknowledgment has been borne out on the international stage with the United Nations identifying polygamy and plural marriage as violations of the human rights of women.<sup>29</sup> That oppression, in fact, has been visited repeatedly

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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. . . . The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. . . . One pretense for this obstinate course is that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guarantee of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.”)

<sup>28</sup> *Reynolds*, 98 U.S.145, 165–66 (1879).

<sup>29</sup> See United Nations Div. for the Advancement of Women, United Nations Econ. Comm’n for Afr., *Expert Group Report: Good Practices in Legislation on “Harmful Practices” Against Women* 27 (May 26–29, 2009), available at [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2009/Report%20EGM%20harmful%20practices.pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Report%20EGM%20harmful%20practices.pdf) (“Polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.” In order to ensure that this discriminatory practice ends, legislation is required that prohibits polygamy.”); see also *id.* at 26 (“Where polygamy exists, violence against women by their husband, as well as violence between co-wives, tends to be high.”).

upon the vulnerable in the Mormon-derived polygamous societies in the United States. In order for the men to have numerous brides, they have drawn from girls and adolescents,<sup>30</sup> and they have discarded rebellious boys.<sup>31</sup> While these practices have been widespread, there have been relatively few prosecutions,<sup>32</sup> in part because so much of the abuse occurs under mandatory layers of secrecy, but also because FLDS leaders claim that the enforcement of the laws against statutory rape and child bigamy and polygamy violate their free exercise rights.<sup>33</sup>

*B. The Religious Beliefs and Conduct that Have Contributed to Child Sex Abuse in Fundamentalist Mormon Communities*

The fundamentalist Mormons actually view the LDS Church as the true church, though its leaders abandoned the mandate of polygamy.<sup>34</sup> Thus, there are beliefs and practices within the LDS Church that cast light on FLDS practices. (They also cast light on the origins of the serious child sex abuse occurring within the LDS Church itself.)<sup>35</sup>

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<sup>30</sup> See, e.g., BISTLINE, *supra* note 18, at 392–95; BRAMHAM, *supra* note 19, at 2; JESSOP & PALMER, *supra* note 7; MOORE-EMMETT, *supra* note 15, at 49; STEPHEN SINGULAR, WHEN MEN BECOME GODS 31–32 (2008); VAN WAGONER, *supra* note 23, at 212.

<sup>31</sup> See, e.g., BISTLINE, *supra* note 18, at 142–43; BRAMHAM, *supra* note 19; BRENT W. JEFFS WITH MAIA SZALAVITZ, LOST BOY (2009); SINGULAR, *supra* note 30.

<sup>32</sup> See *State v. Bateman*, No. 1 CA-CR 07-0043, 2008 WL 4516447 (Ariz. Ct. App. Oct. 2, 2008); *State v. Fischer*, 199 P.3d 663 (Ariz. Ct. App. 2008); *State v. Holm*, 137 P.3d 726 (Utah 2006), *cert. denied*, 549 U.S. 1252 (2007); see also Brooke Adams, *Trial for Fourth FLDS Man Starts Monday*, SALT LAKE TRIB., Mar. 8, 2010; Brooke Adams, *Polygamist Sentenced to 10 Years for Sexual Assault of Teen ‘Bride,’* SALT LAKE TRIB., Nov. 10, 2009; Assoc. Press, *Polygamous Sect Member Convicted of Sex Assault in Texas*, SALT LAKE TRIB., Dec. 15, 2009.

<sup>33</sup> *Holm*, 137 P.3d at 737–38; *Jeffs v. Stubbs*, 970 P.2d 1234, 1243–44, 1249 (Utah 1998), *cert. denied*, 526 U.S. 1130 (1999); SINGULAR, *supra* note 30, at 114; Nicolas Riccardi, *Leader’s Conviction Won’t Stop Polygamist Sect*, HOUSTON CHRON., Sept. 30, 2007, at A3 (“Sam Barlow, then the marshal of FLDS-controlled Colorado City, Ariz., told believers those efforts conflicted with First Amendment guarantees on freedom of religion. ‘We have challenged them on whether or not in a country where Congress can make no law respecting an establishment of religion or prohibiting the free exercise, whether a legislature can predetermine at what age a person can make a religious covenant,’ said Barlow, then in a recording played at the Jeffs trial last week.”).

<sup>34</sup> SPENCER, *supra* note 15, at 7 (“Though ostracized by the LDS Church, most fundamentalists believe the LDS Church is God’s true church, which will someday be put in order.”).

<sup>35</sup> See *Fleming v. Church of Latter Day Saints*, 275 F. App’x 626 (9th Cir. 2008); *Sherratt v. Friel*, 275 F. App’x 763 (10th Cir.), *cert. denied*, 129 S. Ct. 503 (2008); *Joseph v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, No. Civ. 06-4143, 2008 WL 282163 (D.S.D. Jan. 31, 2008); *Olinger v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 521 F. Supp. 2d 577 (E.D. Ky. 2007); *Kathleen B. v. Shubeck*, No. E046682, 2009 WL 467873 (Cal. Ct. App. Dec. 9, 2009); *Green v. Texas*, No. 12-06-00402, 2008 WL 787282 (Tex. Ct. App. Mar. 26, 2008); *Franco v. Church of Jesus Christ of Latter-Day*

### 1. Principles from the Mainstream Mormon Church

LDS texts establish beliefs and practices that operate to keep child sex abuse secret. First, there is a commitment to keep the image of the LDS Church pure. There is a belief that “[i]t is our great mission . . . to be a standard to all the world.”<sup>36</sup> This requires measures that “safeguard the purity, integrity, and good name . . . or moral influence of the Church.”<sup>37</sup> The Church’s image, therefore, is a driving force permeating the faith, and operates even with respect to instances of child sex abuse.

Leaders are discouraged from cooperating in cases involving abuse as detailed in the 1998 Church Handbook of Instructions:

To avoid implicating the Church in legal matters to which it is not a party, leaders should avoid testifying in civil or criminal cases reviewing the conduct of members over whom they preside. A leader should confer with the Church’s Office of Legal Services or the Area Presidency:

1. If he is subpoenaed or requested to testify in a case involving a member over whom he presides.
2. Before testifying in any cases involving abuse.
3. Before communicating with attorneys or civil authorities in connection with legal proceedings.
4. Before offering verbal or written testimony on behalf of a member in a sentencing hearing, parole board hearing, or probationary status hearing.

Church leaders should not try to persuade alleged victims or other witnesses either to testify or not to testify in criminal or civil court proceedings.<sup>38</sup>

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Saints, 21 P.3d 198 (Utah 2001); *see also* DANIELS & SCOTT, *supra* note 7; MARILYN WARENSKI, *PATRIARCHS AND POLITICS: THE PLIGHT OF THE MORMON WOMAN* (1978); Stephen Hunt, *April Trial Set for Ex-FLDS Seminary Principal*, SALT LAKE TRIB., Nov. 10, 2009; Lindsay Whitehurst, *LDS Youth Leader Arrested on Suspicion of Sex Abuse*, SALT LAKE TRIB., Feb 10, 2010; Lindsay Whitehurst, *Police: Fourth Sex Abuse Allegation Against LDS Youth Leader*, SALT LAKE TRIB., Feb. 13, 2010.

<sup>36</sup> CHURCH EDUCATIONAL SYSTEM, *DOCTRINE AND COVENANTS: STUDENT MANUAL* § 115:5, at 286 (2d ed. 2001), *available at* [http://www.ldsces.org/inst\\_manuals/d\\_cInst32493000/start\\_here.pdf](http://www.ldsces.org/inst_manuals/d_cInst32493000/start_here.pdf) (“D&C 115:5. How Is the Church to Be a Standard to the Nations?”); *see also* *DOCTRINE AND COVENANTS*, *supra* note 16, § 115:5, at 209, *available at* <http://scriptures.lds.org/en/dc/115> (“Arise and shine forth, that thy light may be a standard for the nations . . .”).

<sup>37</sup> CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *CHURCH HANDBOOK OF INSTRUCTIONS: BOOK 1*, at 105 (2006) [hereinafter *CHURCH HANDBOOK 2006*] (“The third purpose of Church discipline is to safeguard the purity, integrity, and good name of the Church. Consequently, transgressions that significantly impair the good name or moral influence of the Church may require the action of a disciplinary council.”).

<sup>38</sup> CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *CHURCH HANDBOOK OF*

Second, while there is no hierarchy in the sense of a monarchy, there is leadership, and it is made up of “prophet[s]” who “speak[] for God.”<sup>39</sup> These first two principles have situated the Church and its leaders as barriers between victims, perpetrators and legal authorities.

Third, believers are required to be obedient to the commands of the prophets, and if they are obedient, “[g]reat [b]lessings [f]ollow.”<sup>40</sup> “When a prophet speaks for God, it is as if God were speaking.”<sup>41</sup> Members are told to do that which the prophets tell them to do, because a “prophet will never be allowed to lead the Church astray.”<sup>42</sup> Therefore, believers “should follow his inspired teachings completely.”<sup>43</sup>

Although there is a general proposition that members should obey authorities and the law,<sup>44</sup> there are only two crimes that believers are required to report to the authorities: murder and theft.<sup>45</sup> Instances of adultery, in contrast, “shall be tried

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INSTRUCTIONS: BOOK 1, at 151 (1998) (“Legal Matters”). The more recent 2006 Handbook made one substantive change by eliminating the specific reference to “abuse.” It also eliminated the list format:

To avoid implicating the Church in legal matters to which it is not a party, Church leaders should avoid testifying in civil or criminal cases reviewing the conduct of members over whom they preside. In the United States and Canada, a leader should confer with the Church’s Office of General Counsel if he is subpoenaed, is considering testifying in a lawsuit, is asked to communicate with attorneys or civil authorities regarding legal proceedings, or is asked to offer verbal or written testimony. Outside the United States and Canada, leaders should contact the administration office to obtain local legal counsel in these situations.

Church leaders should not try to persuade alleged victims or other witnesses either to testify or not to testify in criminal or civil court proceedings.

CHURCH HANDBOOK 2006, *supra* note 37, at 178.

<sup>39</sup> CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GOSPEL PRINCIPLES 47 (1997).

<sup>40</sup> *Id.* at 50.

<sup>41</sup> *Id.* at 47.

<sup>42</sup> *Id.* at 49.

<sup>43</sup> *Id.*

<sup>44</sup> JOSEPH SMITH, THE ARTICLES OF FAITH OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ¶ 12, *reprinted in* JAMES E. TALMAGE, THE ARTICLES OF FAITH iii (1899), *available at* <http://www.lds.org/library/display/0,4945,106-1-2-1,FF.html> (“We believe in being subject to kings, presidents, rulers, and magistrates, in obeying, honoring, and sustaining the law.”); *see also* DOCTRINE AND COVENANTS, *supra* note 16, § 58:21–22, at 91, *available at* <http://scriptures.lds.org/en/dc/58> (“21. Let no man break the laws of the land, for he that keepeth the laws of God hath no need to break the laws of the land. 22. Wherefore, be subject to the powers that be, until he reigns whose right it is to reign, and subdues all enemies under his feet.”).

<sup>45</sup> DOCTRINE AND COVENANTS, *supra* note 16, § 42:79, at 65, *available at* <http://scriptures.lds.org/en/dc/42> (“[I]f any persons among you shall kill they shall be delivered up and dealt with according to the laws of the land.”); *id.* § 42:84–85, at 65 (“84. And if a man or woman

before two elders.”<sup>46</sup> In cases of abuse, there is no requirement that the authorities be contacted on behalf of the victims. Rather, conduct is shaped in a way that keeps abuse internal. “Church leaders should be sensitive to such [abuse] victims,”<sup>47</sup> but the primary focus of the section on “Abuse and Cruelty” revolves around how to handle the perpetrator: he or she is required to be disciplined within the Church, but later may be “restored to full fellowship or readmitted by baptism and confirmation.”<sup>48</sup> If either the victim or the perpetrator needs counseling, leaders and bishops are supposed to call LDS Social Services, so that counseling will be “in harmony with gospel principles.”<sup>49</sup> The strongest suggestion regarding reporting abuse requires urging an *abuser* to turn him or herself in: if a bishop or stake president learns of a “member’s abusive activities,” they “should urge the member to report these activities to the appropriate government authorities.”<sup>50</sup> There is an implicit acquiescence to reporting of abuse to the authorities by the leadership if there is mandatory reporting in the state, but no directive.<sup>51</sup> If reporting is legally mandated, the leader is required to “encourage

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shall rob, he or she shall be delivered up unto the law of the land. 85. And if he or she shall steal, he or she shall be delivered up unto the law of the land.”). There is also a requirement that those who lie must be “delivered up unto the law of the land.” *Id.* § 42:86, at 65.

<sup>46</sup> *Id.* § 42:80, at 65. There must also be “two witnesses.” *Id.* §§ 42:80, :81.

<sup>47</sup> CHURCH HANDBOOK 2006, *supra* note 37, at 186.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> In Utah, like some other states, clergy are required to report abuse unless it is obtained during a “confession.” UTAH CODE ANN. § 62A-4a-403 (2009). The same is true in Arizona, ARIZ. REV. STAT. ANN. § 13-3620 (2009), Oregon, OR. REV. STAT. § 419B.010 (2007) (incorporating by reference the clergy-penitent privilege at OR. REV. STAT. § 40.260 (2007)), and California, CAL. PENAL CODE § 11166(d) (Deering 2009). Differences between the states, though, rest on how broadly or narrowly “confession” is interpreted. The LDS Church and other religious groups have argued with success that most clergy communications satisfy the “confession” exception to the requirement to report, successfully in Utah, Montana, and Washington, but not in California. *See Scott v. Hammock*, 870 P.2d 947, 949 (Utah 1994) (holding that “nonpenitential communications are privileged under Utah law if they are intended to be confidential and are made for the purpose of seeking spiritual counseling, guidance, or advice from a cleric acting in his or her professional role and pursuant to the discipline of his or her church”); *State v. MacKinnon*, 957 P.2d 23, 28 (Mont. 1998) (holding that “Utah’s broader interpretation of the clergy-penitent privilege as set forth in *Scott*” applies); *State v. Martin*, 975 P.2d 1020, 1026 (Wash. 1999) (holding that “[o]ne element of the privilege requires the clergy member to act in a professional capacity”). *But see Doe 2 v. Superior Court*, 34 Cal. Rptr. 3d 458, 465–69 (Cal. Ct. App. 2005) (holding that “[i]n order for a statement to be privileged, it must satisfy all of the conceptual requirements of a penitential communication: 1) it must be intended to be in confidence; 2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and 3) such member of the clergy has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret” (quoting *People v. Edwards*, 248 Cal. Rptr. 53, 56 (Cal. Ct. App. 1988))).

the [abusing] member to secure qualified legal advice.”<sup>52</sup> The same advice is not given to victims.

The LDS Church thus has created an opaque system when it comes to child sex abuse. While polygamy, child brides, and sex abuse are not permitted or encouraged, the structure of the organization, its self-image as a leader of virtue in the world, and its patent intent to protect the Church from liability, have yielded a cycle of abuse not unlike that widely documented in the Roman Catholic Church.<sup>53</sup>

## 2. Practices Within the FLDS

The fundamentalist groups are less devoted to securing a pure public image, no doubt because they are engaging in a great deal of illegal conduct (from polygamy to statutory rape to child abandonment), but they observe with fervor the mainstream LDS principles of deference to leaders and the disinclination to involve legal authorities in cases of abuse.<sup>54</sup> The fundamentalist polygamous communities that split off from the LDS Church to sustain their beliefs in divinely-mandated polygamy have followed strict patriarchal principles. Their leaders have fought each other for control and have claimed that they are God or have the most direct relationship with God.<sup>55</sup> This has meant that their edicts have been treated as orders from God. Power is typically secured through the mandate of communal property controlled by the leadership.<sup>56</sup>

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<sup>52</sup> CHURCH HANDBOOK 2006, *supra* note 37, at 186.

<sup>53</sup> See, e.g., Assoc. Press, *supra* note 7; Metcalfe, *supra* note 7; Niebuhr, *supra* note 7.

<sup>54</sup> See *infra* notes 60–62 and accompanying text.

<sup>55</sup> SPENCER, *supra* note 15, 5–6 (describing turf wars between polygamous sect leaders); see also KRAKAUER, *supra* note 18, *passim* (describing the infighting and political and theological power struggles in the American and Canadian enclaves); Daphne Bramham, *Key Players in the Bountiful Case*, VANCOUVER SUN, Jan. 7, 2009, (noting that Winston Blackmore was the head of the Canadian Fundamentalist Church of Jesus Christ of Latter Day Saints “until he was ousted by Warren Jeffs, the church’s prophet. Blackmore now leads a breakaway group in the southeastern corner of B.C.”).

<sup>56</sup> Jennifer Dobner, *CPA Asks Court to Order Release of Housing Fees in Polygamy Trust Case*, SALT LAKE TRIB., July 7, 2009 (“The Unified Effort Plan Trust is a communal property trust and an arm of the FLDS church. Formed in 1942, the trust holds most of the land and homes in Hildale, Utah, Colorado City, Ariz., and a church enclave near Bountiful, British Columbia.”); Mark Shaffer, *Polygamist Sect Loses Grip on Towns*, ARIZ. REPUBLIC, June 23, 2005, at A1 (“The trust was formed in 1940 based on utopian, frontier Mormon concepts of all possessions being shared within a community by the faithful. The trust maintains legal control of all property and buildings while church members tithed their work earnings to the sect.”); Ben Winslow, *Some to Get FLDS Deeds*, DESERET NEWS, Apr. 15, 2007, at B01 (“The UEP was originally based on the early Mormon concept of a ‘united order,’ where people would put everything into a common pot and the church would distribute it. The UEP Trust controls homes, businesses and property in the FLDS enclaves on the Utah-Arizona border and in British Columbia in Canada.”).

This principle of communal holdings was first in the LDS Church’s doctrines, originating in DOCTRINE AND COVENANTS, *supra* note 16, § 42:30–39, at 62–63, available at <http://>

Warren Jeffs, who is now incarcerated for a series of charges involving statutory rape and child abuse, is the most notorious polygamous sect prophet in recent years.<sup>57</sup> He has directed which men would have which women and girls, and even has broken up marriages and families to rearrange them to his edicts.<sup>58</sup> Jeffs exercised exclusive power to choose who would live on the Yearning for Zion Ranch near Eldorado, Texas, and handpicked each of the men, women, and children from other enclaves, putting asunder pre-existing families to put together the most righteous among his flock, according to his lights.<sup>59</sup> Secrecy has been central to the FLDS's practices, and has been furthered by prohibitions on filing birth or death certificates,<sup>60</sup> on obtaining medical care outside their enclaves,<sup>61</sup> and on reporting child sex abuse or statutory rape

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scriptures.lds.org/en/dc/42 (“And it shall come to pass, that after they are laid before the bishop of my church, and after that he has received these testimonies concerning the consecration of the properties of my church, that they cannot be taken from the church, agreeable to my commandments, every man shall be made accountable unto me, a steward over his own property, or that which he has received by consecration, as much as is sufficient for himself and family.”), but later evolved in the LDS Church so that tithing to the organization displaced sharing all property. Frank W. Hirschi, *Consecration: Law of Consecration*, in 1 *ENCYCLOPEDIA OF MORMONISM* 312, 313 (Daniel H. Ludlow ed., 1992) (“The law of consecration requires dedicating all of one’s time, talents, and possessions to the Church and its purposes (D&C 82:19; 64:34; 88:67–68; 98:12–14). John A. Widtsoe, an apostle, noted that its operation was quite simple. Those who joined such an order were to place all their possessions in a common treasury—the rich their wealth, the poor their pittance. Then each member was to receive a sufficient portion—called an ‘inheritance’—from the common treasury to enable that person to continue in trade, business, or profession as desired.”); see also Karl Ricks Anderson, *Consecration: Consecration in Ohio and Missouri*, in 1 *ENCYCLOPEDIA OF MORMONISM*, *supra*, 312, 314–15; *DOCTRINE AND COVENANTS*, *supra* note 16.

<sup>57</sup> See SINGULAR, *supra* note 30; Hilary Hylton, *Jeffs’ Conviction: A Winning Ploy*, TIME, Sept. 25, 2007, available at <http://www.time.com/time/nation/article/0,8599,1665547,00.html>; *State Requests Foster Care for 8 FLDS Children*, CNN.COM, Aug. 5, 2008, <http://www.cnn.com/2008/CRIME/08/05/polygamy/index.html>.

<sup>58</sup> Brooke Adams, *Warren Jeffs Profile: Thou Shalt Obey*, SALT LAKE TRIB., Mar. 14, 2004; Elissa Wall, *Warren Jeffs’ FLDS Church and What I Left Behind*, HUFFINGTON POST, May 17, 2008, [http://www.huffingtonpost.com/elissa-wall/warren-jeffs-lds-church\\_b\\_102195.html](http://www.huffingtonpost.com/elissa-wall/warren-jeffs-lds-church_b_102195.html) (“When I was fourteen years old, I, like many young FLDS girls, was forced by Jeffs to marry a man whom I did not want to wed.”).

<sup>59</sup> See Adams, *supra* note 58.

<sup>60</sup> See TEX. DEP’T OF FAMILY AND PROTECTIVE SERV., *ELDORADO INVESTIGATION* 3, 6 (2008), available at [http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22\\_Eldorado.pdf](http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22_Eldorado.pdf) (noting the inability of children to determine their ages and familial relationships and lack of records to ascertain such information); Trish Choate, *FLDS: Lawmaker Proud of Sect’s Ire*, SAN ANGELO STANDARD-TIMES, Dec. 26, 2009 (detailing planned law in Texas to create criminal penalties for failing to report a birth or file a birth certificate, primarily due to FLDS practices); Terri Langford, *First FLDS Sex Assault Trial Starts on Monday*, HOUSTON CHRON., Oct. 24, 2009, (noting that prosecutors have a difficult time proving underage sex because “many of the children do not have birth certificates.”).

<sup>61</sup> For example, Warren Jeffs refused to take a girl who had been in labor for three days to the hospital. See Trish Choate, *FLDS TRIAL: Defense Grills Ex-member of Sect*, SAN ANGELO

to outside authorities.<sup>62</sup> The result has been entrenched and widespread child sex abuse, statutory rape, and child bigamy within a significant number of these organizations.<sup>63</sup>

Along with the Catholic hierarchy, the LDS leaders, and other religious organizations,<sup>64</sup> the fundamentalist polygamists have invoked the First Amendment and state free exercise guarantees to defend against liability for under-age marriages and child sex abuse.<sup>65</sup> Intuitively, such claims seem meritless on their face, but courts have

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STANDARD-TIMES, Nov. 4, 2009, available at <http://www.gosanangelo.com/news/2009/nov/04/former-flds-teacher-takes-stand-in-jessop-trial/> (“One dictation or ‘priesthood records’ from Warren Jeffs was about a 16-year-old in difficult labor at the YFZ Ranch in 2005, according to evidence Nichols read aloud in court. Warren Jeffs didn’t consider taking her to the hospital to be an option because the girl was underage, and he was a fugitive, according to a document the prosecutor read from Tuesday.”); James C. McKinley, Jr., *Polygamist Sect Leader Convicted of Sexual Assault*, N.Y. TIMES, Nov. 5, 2009, at A19 (“One of the most damning pieces of evidence presented in court was a written record of Mr. Jeffs’s instructions in August 2005 not to take the girl to a hospital even though she had been struggling in labor for three days at a clinic on the ranch.”).

<sup>62</sup> Terri Langford, *Fight For 8 FLDS Children Renewed*, HOUSTON CHRON., Aug. 6, 2008 (“[Dr.] Barlow was indicted on July 22 on a charge of failure to report sex abuse. . . . In an affidavit written by CPS caseworker Paul Dyer that was filed with the court Tuesday, Barlow said he had delivered many babies to minor girls. ‘Dr. Barlow was asked if he had ever delivered children to girls under the age of 18 on the ranch and he said many times both on this ranch and in other places,’ Dyer wrote. . . . Barlow also informed CPS that domestic violence is something handled internally by the FLDS. ‘(A caseworker) asked Dr. Barlow what a young woman’s recourse was should she be a victim of domestic violence,’ Dyer wrote. ‘Dr. Barlow stated that the church elders would handle the situation first.’”); Assoc. Press, *Polygamist Convicted of Sexual Abuse*, Nov. 5, 2009, available at <http://www.msnbc.com/id/33699837> (“In all, 12 FLDS men have been indicted on charges ranging from failure to report child abuse to sexual assault since authorities raided the ranch last year.”); see also Brooke Adams, *Texas FLDS Raid: Defense Attorney Alleges Search Too Broad, Evidence Tainted*, SALT LAKE TRIB., July 13, 2009; Assoc. Press, *FLDS Sect Member Convicted of Sex Assault*, HOUSTON CHRON., Nov. 6, 2009; Ben Winslow, *13 FLDS Children in Court Custody*, DESERET NEWS, Jan. 20, 2009, available at <http://www.deseretnews.com/article/1,5143,705279101,00.html>.

<sup>63</sup> See Brooke Adams, *Escape from Polygamy*, SALT LAKE TRIB., Oct. 16, 2007. See generally MOORE-EMMETT, *supra* note 15.

<sup>64</sup> See *supra* note 11 (describing the push by Catholic and Mormon organizations to use the First Amendment as a barrier to tort liability including the most recent foray into the courts with the filing of amicus briefs in the Nevada Supreme Court in *Ramani v. Segelstein*).

<sup>65</sup> See Jeffrey Michael Hayes, *Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists*, 3 STAN. J.C.R. & C.L. 99, 127 (2007); Charles C. Haynes, *Polygamy Showdown: Balancing Child Welfare, Religious Freedom*, FIRST AMENDMENT CENTER, Apr. 27, 2008, <http://www.firstamendmentcenter.org/commentary.aspx?id=19969>; see also *Cleveland v. United States*, 329 U.S. 14, 20 (1946) (polygamy is not protected by the First Amendment); *Potter v. Murray City*, 760 F.2d 1065, 1068–70 (10th Cir.), *cert. denied*, 474 U.S. 849 (1985) (affirming summary judgment for defendant city and state because police officer’s discharge for practicing polygamy did not violate his free exercise rights); *State v. Green*, 99 P.3d 820, 836 (Utah 2004) (denying free exercise challenge and affirming bigamy conviction); *In re State in Interest of Black*, 283 P.2d 887, 905 (Utah), *cert. denied*, 350 U.S.



struggled with free exercise doctrine and apply it to institutions responsible for creating opportunities for and constructing cycles of child sex abuse. By now, most courts to address the issue have rejected such constitutional defenses using contemporary doctrines.<sup>66</sup> A few states, however, have reached the counter-intuitive conclusion that religious liberty guarantees apply as defenses to child sex abuse claims, most notably Missouri, Utah, and Wisconsin.<sup>67</sup> The next section argues that history confirms intuitions: licentious, or illicit sexual, behavior was never intended to be protected by religious liberty guarantees.

## II. THE HISTORY AND DOCTRINE SUPPORT CATEGORICAL EXCLUSION OF LICENTIOUS BEHAVIOR (ESPECIALLY INVOLVING CHILDREN) FROM RELIGIOUS LIBERTY GUARANTEES

Contemporary discourse treats liberty as though it is impossible to have too much. Such reasoning, though is a perversion of the history behind religious liberty, which limited liberty by incorporating the concept of “licentiousness.” The epitome of

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923 (1955) (affirming removal of children from polygamist homes over appellants’ objection that the judgment of the Juvenile Court violated their constitutional right to worship as they see fit and to speak freely); SINGULAR, *supra* note 30, at 114 (“For decades, Jeffs’s church had claimed that under the First Amendment to the U.S. Constitution, it had the absolute right to practice its religion as it chose; county, state, and federal governments had no business interfering with the FLDS and no jurisdiction over it.”); *id.* at 236 (“Bugden [Jeffs’s attorney] aggressively took issue with the judge’s ruling and later reiterated what he’d been saying since early fall: his client’s First Amendment rights were being trampled on by Utah’s legal system, and this case was about nothing but the religious persecution of Warren Jeffs.”); Ben Winslow, *Arizona, Feds Pursuing Cases Against Warren Jeffs*, DESERET MORNING NEWS, Sept. 23, 2007, at B1 (“Defense attorneys successfully argued to have some of the evidence returned on the grounds it is protected by Jeffs’ First Amendment right to freedom of religion and that some of the documents constitute ‘clergy-communicant privilege.’ The U.S. Attorney’s Office recently returned many items seized to Jeffs’ attorneys.”).

<sup>66</sup> See, e.g., *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 431 (2d Cir. 1999); *Perry v. Johnston*, No. 4:09-CV-105, 2009 U.S. Dist. LEXIS 74706, at \*11 (E.D. Mo. Aug. 24, 2009); *Melanie H. v. Defendant Doe*, No. 04-1596-WQH-(WMC), slip op. at 8 (S.D. Cal., Dec. 20, 2005); *Rashedi v. Gen. Bd. of Church of the Nazarene*, 54 P.3d 349 (Ariz. Ct. App. 2002); *Doe v. Evans*, 814 So. 2d 370, 371 (Fla. 2002); *Malicki v. Doe*, 814 So. 2d 347, 351 n.2 (Fla. 2002) (listing states that have rejected this doctrine and permitted church liability); *State v. Young*, 974 So. 2d 601, 613 (Fla. Dist. Ct. App. 2008); *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426 (Minn. 2002); *Olson v. First Church of Nazarene*, 661 N.W.2d 254 (Minn. Ct. App. 2003); *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213 (Miss. 2005); *N.H. v. Presbyterian Church*, 998 P.2d 592, 602 (Okla. 1999); *Young v. Gelineau*, No. 03-1302, 2007 WL 3236736 (R.I. Super. Sept. 20, 2007).

<sup>67</sup> *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997); *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198, 203 (Utah 2001); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780 (Wis. 1995), *cert. denied*, 516 U.S. 1116 (1996).

licentiousness was illicit sexual behavior. This history as well as the references to conduct involving “licentiousness” found in a number of state constitutions, Canadian law, and in United States cases, strongly argues for an exception from religious liberty guarantees for claims involving sex abuse. It was an activity not intended to be encompassed.

This historically grounded principle of excluding licentious behavior (particularly involving children) from religious liberty guarantees is also reflected in free speech doctrine, where child pornography is an unprotected category of speech because of its link to child sex abuse.<sup>68</sup>

#### A. “*Licentiousness*” Was Understood to Be Too Much Liberty

If one looks carefully into the history of religious liberty, contemporary presumptions that incorporate no internal limitation turn out to be unfounded and ahistorical. There was a widely shared view that too much liberty is as bad as no liberty. Nineteenth and early twentieth century writings<sup>69</sup> and cases equated “licentiousness” with the variety of illicit sex activities—adultery,<sup>70</sup> child sex abuse,<sup>71</sup> and polygamy or bigamy.<sup>72</sup> Dictionaries also defined “licentious” as “dissolution” or “sexual

<sup>68</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747, 774 (1982).

<sup>69</sup> See, e.g., NATHANIEL HAWTHORNE, *The Minister’s Black Veil*, in *TWICE-TOLD TALES* 25–37 (Modern Library 2001) (1837); NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Modern Library 2000) (1850); 2 JOHN LELAND, *A VIEW OF THE PRINCIPAL DEISTICAL WRITERS OF THE LAST AND PRESENT CENTURY* 303, 571 (5th ed. 1755).

<sup>70</sup> *King v. United States*, 17 F.2d 61, 63 (4th Cir. 1927); *United States v. Clapox*, 35 F. 575 (Or. Dist. Ct. 1888); *Lake v. Governor*, 2 Stew. 395, 398 (Ala. 1830); *Kelley v. State*, 226 S.W. 137, 138 (Ark. 1920); *Tully v. Tully*, 69 P. 700, 700 (Cal. 1902); *In re Estate of Jessup*, 22 P. 742, 746 (Cal. 1889). Some courts have equated “licentiousness” with incest as well. See *Campbell v. Crampton*, 2 F. 417, 428 (C.C.N.D.N.Y. 1880).

<sup>71</sup> *Mut. Life Ins. Co. v. Terry*, 82 U.S. (15 Wall.) 580, 589 (1872); *Hansel v. Purnell*, 1 F.2d 266, 270–71 (6th Cir. 1924); *People v. Stouter*, 75 P. 780, 780–82 (Cal. 1904); *People v. Adams*, 47 P.2d 320, 320 (Cal. App. 1935); *Cheeseman v. Cheeseman*, 278 P. 242, 242 (Cal. App. 1929); *People v. Camp*, 183 P. 845, 848 (Cal. App. 1919); *In re Petition of Todd*, 186 P. 790, 795 (Cal. App. 1919); *People v. Hoosier*, 142 P. 514, 516 (Cal. App. 1914); *People v. Anthony*, 129 P. 968, 970 (Cal. App. 1912); *Blount v. State*, 138 So. 2, 2–3 (Fla. 1931).

<sup>72</sup> *Davis v. Beason*, 133 U.S. 333, 348 (1890). The term “licentiousness” has been used by multiple courts in cases prosecuted under the White Slave Act of 1910, ch. 395, 36 Stat. 825 (current version at 18 U.S.C. §§ 2421–2428 (2006)). See *Athanasaw v. United States*, 227 U.S. 326, 331 (1913) (affirming conviction for transporting a girl for the purpose of debauchery in violation of the White Slave Act); *United States v. Long*, 16 F. Supp. 231, 232 (E.D. Ill. 1936) (convicting defendant for transporting two girls for the purpose of debauchery in violation of the White Slave Act).

The White Slave Act, officially the Mann Act, was also used for the prosecution of polygamists. See *Cleveland v. United States*, 329 U.S. 14, 20 (1946) (holding the interstate transportation of a plural wife, for or by a member of a polygamist sect constitutes an immoral purpose under the Mann Act, and that such conviction under the Mann Act did not violate defendant’s free exercise rights).

immorality.”<sup>73</sup> In the 1850s, Canada also enacted a law that protected religious liberty but explicitly excluded acts of licentiousness.<sup>74</sup>

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It is also urged that the requisite criminal intent was lacking since petitioners were motivated by a religious belief. That defense claims too much. If upheld, it would place beyond the law any act done under claim of religious sanction. But it has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy (citing *Reynolds v. United States*, 98 U.S. 145 (1878)). Whether an act is immoral within the meaning of the statute is not to be determined by the accused’s concepts of morality. Congress has provided the standard. The offense is complete if the accused intended to perform, and did in fact perform, the act which the statute condemns, viz., the transportation of a woman for the purpose of making her his plural wife or cohabiting with her as such.

*Id.* (internal citations omitted).

<sup>73</sup> See 3 THE CENTURY DICTIONARY 3436 (William Dwight Whitney ed., 1889) (“Licentious . . . *a.* . . . 1. Characterized by or using license; marked by or indulging too great freedom; overpassing due bounds or limits; excessive . . . Specifically—2. Unrestrained by law, religion, or morality; wanton; loose; dissolute; libidinous: as, a *licentious* person; *licentious* desires”; “Licentiously . . . *adv.* In a licentious manner; with too great freedom; especially, in contempt of law and morality; lasciviously; loosely; dissolutely. Licentiousness . . . *n.* The state or character of being licentious; want of due restraint in any respect; especially, dissolute or profligate conduct; sexual immorality.”); see also FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY 448 (1765) (“*LICENTIOUS*, *Adj.* not restrained by law, morality, or religion.”); 4 JOHN OGILVIE, THE IMPERIAL DICTIONARY OF THE ENGLISH LANGUAGE 785 (Charles Annandale ed., 1883) (“*Fille de joie*. [Fr.] A woman of licentious pleasure; a prostitute.”).

Even as far back as Shakespearean times, licentiousness was affiliated with illicit sex. See, e.g., ERIC PARTRIDGE, SHAKESPEARE’S BAWDY 175 (3d ed. 1968) (defining Shakespeare’s usage of the word licentious in his works: “[L]icentious. *Addicted to illicit sexual indulgence.* ‘How dearly’—says Adriana—‘would it touch thee to the quick, Shouldst thou but hear I were licentious’, *Com. of Errors*, II ii 129–30.—*Henry V*, II iii 22 (‘licentious wickedness’).—‘Fill’d the time With all licentious measure’, *Timon*, V iv 3–4” (first emphasis added)).

<sup>74</sup> Denise J. Doyle, *Religious Freedom in Canada*, 26 J. CHURCH & ST. 413, 417–18 (1984) (“In 1851, the legislature of Canada . . . repealed those sections of the Constitutional Act that dealt with endowed parsonages. The statute contained an important section, that has increased in importance over the years: ‘That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so the same be not made an excuse for acts of licentiousness, or justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty’s subjects within the same.’ This was the first statute to declare religious freedom of worship in the Province of Canada. By the terms of the later of the British North American Act, this Freedom of Worship statute has remained in effect in Quebec and Ontario.”); see also *id.* at 419 (“The British North American Act of 1867 (BNA) joined four Canadian provinces together in a confederation known as the Dominion of Canada. The BNA Act, the former Canadian Constitution, made no express statements on the subject of religion or religious freedom. Section 129 of the Act allows for the continuance of provincial laws as long as they are not repealed. This ensured that whichever religious rights had been achieved—as, for

According to historian John Philip Reid, those in the eighteenth century “had as great a duty to oppose licentiousness as to defend liberty.”<sup>75</sup> Historian Bernard Bailyn explained that

[t]he very idea of liberty was bound up with the preservation of this balance of forces. For political liberty, as opposed to the theoretical liberty that existed in a state of nature, was traditionally known to be “a natural power of doing or not doing whatever we have in mind” so long as that doing was “consistent with the rules of virtue and the established laws of the society to which we belong”; it was “a power of acting agreeable to the laws which are made and enacted by the consent of the PEOPLE, and in no ways inconsistent with the natural rights of a single person, or the good of the society.” Liberty, that is, was the capacity to exercise “natural rights” within limits set not by the mere will or desire of men in power but by non-arbitrary law—law enacted by legislatures containing within them the proper balance of forces.<sup>76</sup>

A number of state constitutions exclude “licentiousness,” or illicit sex, from religious liberty protections along the lines of the language in the California Constitution:

Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are *licentious* or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.<sup>77</sup>

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example, the Freedom of Worship Statute—would remain in effect.”); *id.* at 427–28 (“[T]he plaintiff in *Cribben v. The City of Toronto* (1891) was unsuccessful in having a bylaw declared invalid prohibiting all religious speeches in public parks. . . . The idea being that religious freedom is freedom for religion not freedom from the law.”). For more information, see David H. Moore, *Religious Freedom and Doctrines of Reluctance in Post-Charter Canada*, 1996 BYU L. REV. 1087, 1090–91. See generally DOUGLAS A. SCHMEISER, CIVIL LIBERTIES IN CANADA (reprint ed. 1977).

<sup>75</sup> JOHN PHILIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 35 (1988).

<sup>76</sup> BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 76–77 (1992); see also David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 163–64 (2001).

<sup>77</sup> CAL. CONST. art. I, § 4 (emphasis added); see ARIZ. CONST. art. II, § 12; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; GA. CONST. art. I, § 1, ¶ IV; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 18; MO. CONST. art. I, § 5; NEV. CONST. art. I, § 4; N.Y. CONST. art. I, § 3 (amended 2001); N.D. CONST. art. I, § 3; S.D. CONST. art. VI, § 3; WASH. CONST. art. I, § 11 (amended 1993); WYO. CONST. art. I, § 18. See Appendix A for the full texts of the sixteen current state free exercise clauses containing the term licentious[ness].

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

That our royall will and pleasure is, that noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinionne in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and their owne judgments and consciences, in matters of religious concernments, throughout the tract of land hereafter mentioned; they behaving themselves peaceable and quietlie, and not using this libertie to *lycentiousnesse* and profanenesse, nor to the civill injurye or outward disturbance of others.<sup>78</sup>

The exclusion of “licentiousness” was reflected in a few other early state constitutions besides Rhode Island’s Charter,<sup>79</sup> but it became most prevalent during the nineteenth century.<sup>80</sup> Most early constitutions also included a provision that made laws protecting peace and safety an exception to free exercise.<sup>81</sup>

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<sup>78</sup> CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663), *reprinted in* 8 SOURCES AND DOCUMENTS OF THE UNITED STATES CONSTITUTIONS 362 (William F. Swindler ed., 1979) [hereinafter SOURCES & DOCUMENTS].

<sup>79</sup> *See, e.g.*, N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 7 SOURCES & DOCUMENTS, *supra* note 78, at 168 (“And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.”).

<sup>80</sup> *See* CAL. CONST. of 1849, art. I, § 4, *reprinted in* 1 SOURCES & DOCUMENTS, *supra* note 78, at 447; COLO. CONST. art. II, § 4 (ratified in 1876); CONN. CONST. of 1818, art. I, § 3, *reprinted in* 2 SOURCES & DOCUMENTS, *supra* note 78, at 144; FLA. CONST. of 1868, art. I, § 5, *reprinted in* 2 SOURCES & DOCUMENTS, *supra* note 78, at 353; GA. CONST. of 1877, art. I, § 1, ¶ XIII, *reprinted in* 2 SOURCES & DOCUMENTS, *supra* note 78, at 514; IDAHO CONST. art. I, § 4 (ratified in 1890); ILL. CONST. of 1870, art. II, § 3, *reprinted in* 3 SOURCES & DOCUMENTS, *supra* note 78, at 286; MINN. CONST. art. I, § 16 (ratified in 1858); MISS. CONST. of 1817, art. I, § 3, *reprinted in* 5 SOURCES & DOCUMENTS, *supra* note 78, at 347; MO. CONST. of 1875, art. II, § 5, *reprinted in* 5 SOURCES & DOCUMENTS, *supra* note 78, at 544; NEV. CONST. art. I, § 4 (ratified in 1864); N.D. CONST. art. I, § 3 (ratified in 1889); S.D. CONST. art. VI, § 3 (ratified in 1889); WASH. CONST. of 1889, art. I, § 11, *reprinted in* 10 SOURCES & DOCUMENTS, *supra* note 78, at 282; WYO. CONST. art. I, § 18 (ratified in 1890); *see also* ARIZ. CONST. art. II, § 12 (Arizona’s Constitution was ratified in 1912.).

<sup>81</sup> *See* CONN. CONST. of 1818, art. I, § 3, *reprinted in* 2 SOURCES & DOCUMENTS, *supra*

Laws prohibiting illicit sex were among those laws expected to be enforced throughout society.<sup>82</sup> As I have discussed previously, ministers and pastors themselves during the founding era preached the rule of law for religious believers from their pulpits.<sup>83</sup> Influential Baptist preacher John Leland removed “licentious indulgence of the carnal appetite” from the sphere of religion, placing it squarely under control of “human law”:

It is not designed to defend the religious opinions of *any*, but the persons and rights of *all*; so that Jews, Turks, Pagans and Christians, with all their subdivided opinions, may peaceably live together in the same domain—each one enjoying the free exercise of his religious opinions, and all impartially protected by the law. Should any one man, or one sect, attempt to force another to believe, act or support, what they themselves believe in, with this plea, that the others were licentious and heretical, the assailants would be the offenders, to be punished by the law; for when a

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note 78, at 144; FLA. CONST. of 1868, art. I, § 5, *reprinted in* 2 SOURCES & DOCUMENTS, *supra* note 78, at 353; GA. CONST. of 1777, art. LVI, *reprinted in* 2 SOURCES & DOCUMENTS, *supra* note 78, at 443; MD. CONST. of 1776, art. XXXIII, *reprinted in* 4 SOURCES & DOCUMENTS, *supra* note 78, at 372; MASS. CONST. art. I, § 2 (ratified in 1780); N.H. CONST. art. I, § 5 (ratified in 1784); N.J. CONST. of 1776, art. XIX, *reprinted in* 6 SOURCES & DOCUMENTS, *supra* note 78, at 449; N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 7 SOURCES & DOCUMENTS, *supra* note 78, at 168; *see also* VA. CODE ANN. § 57-1 (2009) (noting adoption of Thomas Jefferson’s *Act for Establishing Religious Freedom*, adopted by the Virginia legislature on January 16, 1786. *See* 12 STATUTES OF VIRGINIA AT LARGE; BEING A COLLECTION OF ALL THE LAWS 84–86 (William Waller Hening ed., 1823)).

<sup>82</sup> *See, e.g.*, JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 27–38 (2d ed. 1997) (noting the strict enforcement of laws regulating sex in colonial America); Douglas Greenberg, *Crime, Law Enforcement, and Social Control in Colonial America*, 26 AM. J. LEGAL HIST. 293, 297–99 (1982) (explaining that ‘morals’ crimes—including “fornication, adultery, sodomy, buggery, and . . . [even] public masturbation”—were often regularly and strictly enforced in colonial New England); Carolyn B. Ramsey, *Sex and Social Order: The Selective Enforcement of Colonial American Adultery Laws in the English Context*, 10 YALE J.L. & HUMAN. 191, 211, 226 (1998) (book review) (“New England’s magistrates took a hard line toward extramarital sex, just as the Puritan leaders of the Commonwealth did . . . [N]orthern magistrates distinguished between problems dividing the family and those afflicting the state. They saw sexual misconduct as a sin that required correction . . .”); *see also* 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 417 n. 1 (Thomas M. Cooley ed., 4th ed. 1873) (“It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts . . .”).

<sup>83</sup> Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & POLITICS 387, 399 (2002) (“Far from urging civil disobedience, many eighteenth century sermons exhorted believers to obey the civil law.”).

man's religion leads him to commit overt acts, he should be punished for his actions and pitied for his delusion.<sup>84</sup>

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

I will not here tax the pride and ambition of some, the passion and uncharitable zeal of others. These are faults from which human affairs can perhaps scarce ever be perfectly freed; but yet such as nobody will bear the plain imputation of, without covering them with some specious colour; and so pretend to commendation, whilst they are carried away by their own irregular passions. But, however, that some may not colour their spirit of persecution and unchristian cruelty with a pretence of care of the public weal, and observation of the laws, and *that others, under pretence of religion, may not seek impunity for their libertinism and licentiousness*; in a word, that none may impose either upon himself or others, by the pretences of loyalty and obedience to the prince, or of tenderness and sincerity in the worship of God; I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other.<sup>85</sup>

This view of licentiousness as beyond free exercise guarantees was further confirmed in the United States Supreme Court's earliest application of the Free Exercise Clause, in the Mormon polygamy cases. In *Davis v. Beason*,<sup>86</sup> the Court clearly identified polygamy as licentious: "The constitutions of several States, in providing for religious freedom, have declared expressly that such freedom shall not be construed to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the State."<sup>87</sup> In *Reynolds v. United States*,<sup>88</sup> the Court did not use the term licentious itself, but its reasoning plainly fit polygamy and bigamy into the category of illicit sexual and family arrangements and, therefore, also the concept that they are unprotected by the First Amendment:

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<sup>84</sup> John Leland, Short Sayings on Times, Men, Measures and Religion Exhibited in Address, Delivered at Cleslie, July 5, 1830, in *THE WRITINGS OF THE LATE ELDER JOHN LELAND* 579 (1845).

<sup>85</sup> JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 17 (John Horton & Susan Mendus eds., Routledge 1991) (1689) (emphasis added).

<sup>86</sup> 133 U.S. 333 (1890).

<sup>87</sup> *Id.* at 348.

<sup>88</sup> 98 U.S. 145 (1879).

From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.<sup>89</sup>

The descriptions of illicit sex in the context of religious organizations or by religious actors are consistent with these assumptions and world views.<sup>90</sup>

The history of freedom of the press also included a parallel debate about the mutual parameters of liberty and licentiousness.<sup>91</sup> Thus, the notion that free exercise

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<sup>89</sup> *Id.* at 165.

<sup>90</sup> *Hansel v. Purnell*, 1 F.2d 266, 271–72 (6th Cir. 1924) (“[T]he plaintiff offered evidence tending to prove . . . that Benjamin in particular was guilty of the most disgusting and revolting crimes against the chastity of young girls who were members of this community; that he accomplished the debauchery of these young girls by and through his further interpretation of the faith, which interpretation was not publicly taught, but communicated only in private to the ‘inner circle,’ and in particular to the young girls whom he purposed to make the victims of his lust, by quotations from the Bible, by his representations, in which they implicitly believed . . . by his declarations and claims that sexual intercourse with him was not sinful, but a means by which they might be cleansed and receive immortal life of the body, and an act evidencing faith and obedience to Benjamin the ‘Seventh Messenger sent to gather the elect together and prepare their bodies to receive the Kingdom of God.’ . . . In the experience of the human family there are no meaner, more contemptible, or more despicable methods of accomplishing the debauchery of womanhood than the methods described by these witnesses, and which they testified were employed by Benjamin in the accomplishment of the ruin of these young girls who had been raised from childhood in this colony and had been taught to believe that Benjamin was a divinely inspired messenger to whom they must yield unquestioned obedience. If this testimony is true, it necessarily follows that Benjamin is a fraud and an imposter, a modern satyr of unspeakable lust, and wholly unfit to organize and control a religious society of any faith through the instrumentality of which he may prey upon the innocent and unsuspecting, prostitute womanhood to his lewd and licentious purposes, and hide his own rottenness under a cloak of righteousness.”); *see also* *People v. Mills*, 54 N.W. 488, 488–89 (Mich. 1893); LAWRENCE, *supra* note 1, at 16–19 (“The sexual regulation of children has been part of social life since antiquity. . . . The first report of sexual abuse as a major hazard to child health is said to have occurred in the nineteenth century in France. It would seem this was the first modern acknowledgement of child sexual abuse as being of professional concern. . . . Prior to the latter half of the twentieth century, the most striking feature of the history of child abuse and child sexual abuse has been the intermittent nature of public concern. . . . [T]his pattern is due to what Myers refers to as society’s ‘blind spot for child sexual abuse’. . . . [I]t is only in the last 30 years that there has been an overwhelming societal condemnation of the problem. . . . [A]round the turn of the twentieth century, formal laws for the protection of children appeared for the first time in the western world. The nineteenth-century moral campaigns for children were made acceptable to politicians when new concepts about children and the state’s right to intervene in family life emerged.” (internal citations omitted)).

<sup>91</sup> Leonard Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767, 791–92 (1985) (“In



necessarily encompasses all possible conduct is simply wrong. The intuition that child sex abuse cannot be constitutionally protected conduct is firmly grounded in history.

*B. The Free Speech Cases Have Already Incorporated the Principle of Excluding a Category of Licentious Speech from Constitutional Protection*

The principle that a category defined by illegal sexual behavior is unprotected by a liberty guarantee is not a new doctrinal element within First Amendment jurisprudence. First Amendment free speech doctrine supports the categorical exclusion from free exercise of licentious acts. Under the Free Speech Clause, several types of speech are not protected, or protected to a scant degree.<sup>92</sup> For example, obscenity is not protected,<sup>93</sup> and pornography receives low-level protection.<sup>94</sup> Defamation and incitement to illegal conduct are also beyond the reach of the Free Speech Clause.<sup>95</sup>

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the sense that Blackstonianism implied that seditious libel was a crime, the Sedition Act embraced Blackstonianism and the new libertarianism repudiated it. What was new about the new libertarianism was the outright rejection of the very concept of seditious libel. The new libertarianism asserted that free republican government and the crime of seditious libel were incompatible even at a state level. It repudiated the old distinction between licentiousness and liberty, abandoned the requirement of proving malice as being of little use to a defendant in a political trial, assaulted the claim of truth-as-self-defense on the ground that the truthfulness of political opinions could not be proved, and perhaps most significantly, discarded reliance on the jury as a defense against prosecutorial and judicial bias. The new libertarianism relied on the overt acts test; although the test was not new, invocation of it in cases of political opinion was.” (internal citations omitted).

<sup>92</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (“The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”).

<sup>93</sup> *See Miller v. California*, 413 U.S. 15, 20 (1973) (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”) (quoting *Roth v. United States*, 354 U.S. 476 (1957)); *Roth*, 354 U.S. at 485 (“We hold that obscenity is not within the area of constitutionally protected speech or press.”).

<sup>94</sup> *Free Speech Coal.*, 535 U.S. at 249 (child pornography); *City of Erie v. PAP’s A.M.*, 529 U.S. 277, 289, 294 (2000) (nude dancing); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 565–68 (1991) (nude dancing); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 49–50 (1986) (zoning); *New York v. Ferber*, 458 U.S. 747, 763–64 (1982) (child pornography); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 78–80 (1976) (zoning).

<sup>95</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 268–69 (1964) (“[T]he Constitution does not protect libelous publications. . . . Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations.”).

Nor are fighting words protected<sup>96</sup> or advocacy to illegal action if violence is imminent.<sup>97</sup> Most important for purposes of this Article is the Supreme Court’s persistent refusal to provide free speech protection for child pornography that involves actual children.<sup>98</sup> Child pornography, and not just child obscenity, is categorically unprotected speech. These free speech categories of excluded speech—which involve sex and/or violence—provide further support for the proposition that free exercise guarantees appropriately exclude illicit sexual behavior, especially child sex abuse.

The Supreme Court steadfastly has refused to extend constitutional guarantees to the category of child pornography, because of the overriding governmental interest in protecting children from sex abuse and exploitation.<sup>99</sup> In 1982, the Court explicitly recognized that “the exploitative use of children in the production of pornography has become a serious national problem.”<sup>100</sup> The members of the Court have accepted “[t]he legislative judgment, as well as the judgment found in relevant literature . . . that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child,”<sup>101</sup> as well as the need to censor child pornography because it is used “to seduce other children into sexual activity.”<sup>102</sup>

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<sup>96</sup> See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“[F]ighting words—‘those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction’—are generally proscribable under the First Amendment.” (citing *Cohen v. California*, 403 U.S. 15, 20 (1971))); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992) (“[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words . . .”).

<sup>97</sup> *Brandenburg*, 395 U.S. at 447 (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

<sup>98</sup> See, e.g., *United States v. Williams*, 128 S. Ct. 1830 (2008); *Free Speech Coal.*, 535 U.S. 234; *Osborne v. Ohio*, 495 U.S. 103 (1990); *Ferber*, 458 U.S. 747.

<sup>99</sup> *Williams*, 128 S. Ct. at 1846 (“Child pornography harms and debases the most defenseless of our citizens.”); *id.* at 1848 (Souter, J., dissenting) (“Dealing in obscenity is penalized without violating the First Amendment, but as a general matter pornography lacks the harm to justify prohibiting it. If, however, a photograph . . . shows an actual minor child as a pornographic subject, its transfer and even its possession may be made criminal. The exception to the general rule rests not on the content of the picture but on the need to foil the exploitation of child subjects.” (internal citations omitted)); *Free Speech Coal.*, 535 U.S. at 240; *Ferber*, 458 U.S. at 761.

<sup>100</sup> *Ferber*, 458 U.S. at 749.

<sup>101</sup> *Osborne*, 495 U.S. at 109 (quoting *Ferber*, 458 U.S. at 758).

<sup>102</sup> *Id.* at 111.

Child pornography involving actual children, therefore, has been afforded no protection under the Free Speech Clause, starting with *New York v. Ferber*, which contains the first and most detailed explication of the Court's reasoning:

Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, however, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.

*First.* It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). "A democratic society rests, for its continuance, upon the health, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

...

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern:

"[T]here has been a proliferation of exploitation of children as subjects in sexual performance. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances." 1877 N.Y. Laws, ch. 910, § 1.

...

The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

*Second.* The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

...

Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexual explicit depiction need not be “patently offensive” in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. “It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.” Memorandum of Assemblyman Lasher in Support of § 263.15. We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.”<sup>103</sup>

The rationale for excluding child pornography from free speech guarantees has been the compelling and actually extraordinary interest in protecting children from harm. As Justice O’Connor pointed out in concurrence in *Ferber*, the audience’s assessment of the “social value” of child pornography is “simply irrelevant to New

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<sup>103</sup> *Ferber*, 458 U.S. at 756–61.

York's asserted interest in protecting children from psychological, emotional, and mental harm."<sup>104</sup> Thus, the state's "special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material."<sup>105</sup>

The child protection rationale for divorcing pornographic speech from free speech rights applies just as powerfully, if not more so, to excluding child sex abuse perpetrated by religious organizations and clergy from free exercise rights. Victims of child sex abuse also suffer lifelong debilities,<sup>106</sup> and those that would permit such abuse need to be strongly deterred in order to protect future children.<sup>107</sup> Affording religious organizations and clergy constitutional protection for their acts involving child sex abuse is as contrary to society's fundamental interest in the protection of children

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<sup>104</sup> *Id.* at 775 (O'Connor, J., concurring).

<sup>105</sup> *Id.* at 776 (Brennan, J., concurring).

<sup>106</sup> *New Jersey v. Schnabel*, 952 A.2d 452, 462 (N.J. 2008) (observing that Child Sexual Abuse Accommodation Syndrome "involves five behavior patterns that may be exhibited by a sexually abused child: secrecy, helplessness, entrapment and accommodation, delayed reporting, and recantation"); DALE ROBERT REINERT, *SEXUAL ABUSE AND INCEST* (1997); Christopher Bagley et al., *Victim to Abuser: Mental Health and Behavioral Sequels of Child Sexual Abuse in a Community Survey of Young Adult Males*, 18 *CHILD ABUSE & NEGLECT* 683, 689 (1994) (noting that the most common response as to why individuals who were molested once did not report abuse was that they could "handle the abuse" (50.7%), with the second most common response being that they were afraid of how other people would react (40%)); Kenneth S. Kendler et al., *Childhood Sexual Abuse and Adult Psychiatric and Substance Use Disorders in Women*, 57 *ARCHIVES GEN. PSYCHIATRY* 953, 953-59 (2000) (finding that young girls who are forced to have sex are three times more likely to develop psychiatric disorders, and/or abuse alcohol and drugs in adulthood, than girls who are not sexually abused); Mary L. Paine & David J. Hansen, *Factors Influencing Children to Self-Disclose Sexual Abuse*, 22 *CLINICAL PSYCHOL. REV.* 271, 271-75 (2002) (discussing that victims sometimes feel shame and embarrassment about the abuse, making the victim feel they are to blame for the abuse); Mavis Tsai & Nathaniel N. Wagner, *Therapy Groups for Women Sexually Molested as Children*, 7 *ARCHIVES SEXUAL BEHAV.* 417 (1978) (finding that sexual victimization may profoundly interfere with and alter the development of attitudes toward self, sexuality, and trusting relationships during the critical early years of development).

<sup>107</sup> If the First Amendment is a barrier to criminal and tortious liability, such cases are suppressed and future children lack the knowledge needed to be protected from the abusers in the organizations and from the organizations that create the conditions for abuse. Most child predators seek far more than one victim over the course of their lives. See LANNING, *supra* note 10, at 40; Ray Blanchard & Howard E. Barbaree, *The Strength of Sexual Arousal as a Function of the Age of the Sex Offender: Comparisons Among Pedophiles, Hebephiles, and Teleiophiles*, 17 *SEXUAL ABUSE: J. RES. & TREATMENT* 441, 442 (2005) (finding that the more deviant the sexual practices of the offender, the greater the treatment noncompliance; and the greater the number of paraphilic interests reported by the offender, the higher the likelihood of re-offense).

as protecting child pornographers. Therefore, the exclusion of child sex abuse from free exercise doctrine is not novel and is both historically and doctrinally sound.

### III. RELIGIOUS LIBERTY GUARANTEES TODAY OFFER NO PROTECTION FOR CONDUCT CONTRIBUTING TO LICENTIOUSNESS, ESPECIALLY CHILD SEX ABUSE

State decisions granting free exercise rights in cases where children have been sexually abused are the *Dred Scott*<sup>108</sup> decisions in the emerging movement of civil rights for children.<sup>109</sup> There is no element of contemporary religious liberty doctrine that contradicts the plain intent to exclude licentiousness from religious liberty guarantees and no element that argues in favor of bringing acts related to illicit sex under the umbrella of religious liberty guarantees. As the states have worked out these issues, the vast majority have interpreted modern-day doctrine to exclude First Amendment shields in these cases, without reference to this history.<sup>110</sup> Those few states that persist in protecting religious actors with respect to illicit sex<sup>111</sup> have unwittingly reversed the original intent of such guarantees.

The states that have concluded that the First Amendment bars liability for religious organizations dealing with licentiousness have treated the claims as ones that

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<sup>108</sup> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

<sup>109</sup> James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 850 (2003) (“[T]he Article aims to identify areas where children’s interests do not receive legal protection and state decision making is likely in some cases to disserve their interests. In those areas, the failure to confer rights would be morally significant.”); James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 158–59 (2000) (“Importantly, the right of incompetent adults to have decisions based on what is best for them is not affected by the religious beliefs of their caretakers. In fact, it would be unconstitutional for a State to diminish or eliminate an incompetent adult’s rights because of the religious beliefs of her caretaker. The State would be affording certain incompetent adults lesser protection of the laws than it gives to others, for reasons not tied to their well being, and would therefore violate the Equal Protection Clause.”); James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1323 (1996) (“In numerous areas of the law relating to children’s care and education, certain parents enjoy an exemption from normal parental legal responsibilities solely because they have religious beliefs in opposition to the conduct that those responsibilities would entail. These exemptions and the cultural ethos that supports them reflect a pervasive social indifference to the interests of particular groups of children. These children cannot speak for themselves and have no one to speak for them except the very parents who want to deny them the benefits and protections that the law guarantees other children.”); see also HAMILTON, *supra* note 2; WOODHOUSE, *supra* note 1.

<sup>110</sup> See *Malicki v. Doe*, 814 So. 2d 347, 351 n.2 (Fla. 2002) (listing states that have rejected this doctrine and permitted Church liability).

<sup>111</sup> *Ehrens v. The Lutheran Church-Mo. Synod*, 269 F. Supp. 2d 328 (S.D.N.Y. 2003); *H.R.B. v. J.L.G.* 913 S.W.2d 92 (Mo. Ct. App. 1995).

require courts to determine the characteristics of a reasonable member of the clergy, and, therefore, concluded that the claims mandate excessive entanglement between courts and religious doctrine.<sup>112</sup> There is not a shred of evidence that proves that

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<sup>112</sup> *Franco v. The Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198, 203 (Utah 2001) (“[T]he entanglement doctrine does not bar tort claims against clergy for misconduct not within the purview of the First Amendment, because the claims are unrelated to the religious efforts of a cleric [citing slip and fall cases]. . . . However, it is well settled that civil tort claims against clerics that require the courts to review and interpret church law, policies, or practices in the determination of the claims are barred by the First Amendment under the entanglement doctrine.”). The court in *Franco* goes on to declare that

despite *Franco*’s characterization of her negligence-based claims as gross negligence, negligent infliction of emotional distress, and breach of fiduciary duty, we must deal with the real issue here—clergy malpractice.

. . . [A] determination of the claims . . . could not be made without first ascertaining whether the LDS Church Defendants performed within the level of expertise expected of a similar professional, i.e., a reasonably prudent bishop, priest, rabbi, minister, or other cleric in this state. Indeed, malpractice is a theory of tort that would involve the courts in a determination of whether the cleric in a particular case—here an LDS Church bishop—breached the duty to act with that degree of “skill and knowledge normally possessed by members of that profession.” Restatement (Second) of Torts § 299A (1965). Defining such a duty would necessarily require a court to express the standard of care to be followed by other reasonable clerics in the performance of their ecclesiastical counseling duties, which, by its very nature, would embroil the courts in establishing the training, skill, and standards applicable for members of the clergy in this state in a diversity of religions professing widely varying beliefs.

This is as impossible as it is unconstitutional; to do so would foster an excessive government entanglement with religion in violation of the Establishment Clause.

*Id.* at 205–06; *Gibson v. Brewer*, 952 S.W.2d 239, 246–47 (Mo. 1997) (“Questions of hiring, ordaining, and retaining clergy, however, necessarily involve interpretation of religious doctrine, policy, and administration. Such excessive entanglement between church and state has the effect of inhibiting religion, in violation of the First Amendment.”); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wis. 1995) (“[W]e conclude that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices. . . . The rationale for this rule was recently aptly summarized by a pair of commentators as follows: Examining the ministerial selection policy, which is infused with the religious tenets of the particular sect, entangles the court in qualitative evaluation of religious norms. Negligence requires the court to create a ‘reasonable bishop’ norm. Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort-law reasonableness of the church’s mercy toward the offender. . . . The tort of negligent selection of unsuitable teachers has been recognized in civil courts. If negligent selection of a potential pedophile for the religious office of priest, minister or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the nonselected seminarian

religious liberty guarantees in the states or at the federal level were ever intended to immunize religious organizations or individuals from their actions related to illicit sexual behavior. The states going down the wrong path and other religious organizations that have led them down that path have mischaracterized the issue, which is not whether there should be a standard for the reasonableness of clergy. The question is who has acted in a way that is reasonable and decent, with no constitutional carve-out for religious actors in the arena of illicit sex.

Those religious organizations arguing for free exercise immunity in child sex abuse cases would be well served to embrace the history and doctrine that support exclusion of such cases from free exercise doctrine. They have expressed concern that such cases will erode the doctrine that forbids courts from deciding intra-organizational disputes over doctrine, ecclesiology, or governance.<sup>113</sup> While their concerns have not been realized in the many states that have permitted such claims to go forward,<sup>114</sup> any concerns they do have would be mitigated if child sex abuse cases were not part of free exercise jurisprudence. By excising child sex abuse from the constitutional doctrine, the cases cannot create a slippery slope within the existing jurisprudence. When the issue is schism or property ownership between warring factions or who should be in leadership, the child sex cases simply will not apply.<sup>115</sup> In any event, the protection of children from child sex abuse is so compelling that any incidental burden on religious groups from receiving no free exercise protection is an acceptable price, just as publishers must organize their speech to avoid using children for child pornography or creating child obscenity. Moreover, religious groups have demonstrated no superiority to secular organizations in protecting children and have harmed their own reputations through these failures.<sup>116</sup> Courts do them no favors by creating constitutional barriers to being accountable to society for the protection of children.

It should be clear by now that as a historical and doctrinal matter, the appropriate default legal rule is that conduct involving licentiousness is unprotected religious conduct. The history of the intent behind the First Amendment and state constitution free exercise provisions, their interpretation in cases involving licentious acts in religious organizations, and First Amendment doctrine relating to child sex abuse strongly support the vast majority of state courts, which have concluded that

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against the theological seminary that declines to ordain a plaintiff into ministry because of his psychological profile? How far shall the courts' qualitative entanglement with religious selectivity extend?" (quoting James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting The Difficult Constitutional And Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 47–48 (1994)).

<sup>113</sup> Brief Amicus Curiae of the Church of Jesus Christ of Latter-Day Saints, *supra* note 11, at 3–4.

<sup>114</sup> See *infra* note 117.

<sup>115</sup> See Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYUL REV. 1099, 1190–91 (noting that courts still traditionally decline to take part in purely ecclesiastical disputes).

<sup>116</sup> Hamilton, *supra* note 8, at 118–20.



the First Amendment is no barrier to criminal or civil liability for religious organizations in cases involving child sex abuse.<sup>117</sup>

The nineteenth century United States Supreme Court decisions and their reasoning upholding the laws against polygamy remain good law at the Court 132 years later,<sup>118</sup> making them powerful elements of the law today and deserving of stare decisis in child sex abuse cases. The Court's conclusions regarding the polygamy laws have been followed many times in the lower courts.<sup>119</sup> The reasoning of *Reynolds* and

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<sup>117</sup> See *supra* note 66 (listing state court decisions holding that the First Amendment is not a defense to tort liability); see also *Malicki v. Doe*, 814 So. 2d 347, 351 n.2 (Fla. 2002) (listing states that have rejected this doctrine and permitted Church liability).

<sup>118</sup> *Church of The Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 535 (1993) (citing *Reynolds* favorably); *Employment Div. v. Smith*, 494 U.S. 872, 879, 882, 885 (1990) (same).

The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145, (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

*Id.* at 879.

<sup>119</sup> *Bronson v. Swenson*, 500 F.3d 1099 (10th Cir. 2007) (rejecting a Utah couple's free exercise challenge to a clerk's refusal to issue them a marriage license); *Potter v. Murray City*, 760 F.2d 1065 (10th Cir.), *cert. denied*, 474 U.S. 849 (1985) (rejecting free exercise challenge by police officer after being fired for his polygamous practices); *State v. Holm*, 137 P.3d 726 (Utah 2006) (holding that Utah's neutral statute banning polygamy did not impermissibly infringe upon free exercise rights); *In re State in Interest of Black*, 283 P.2d 887, 904 (Utah 1955) ("It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. 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." (emphasis omitted)); *State v. Barlow*, 153 P.2d 647, 653 (Utah 1944) ("Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by zeal of the practitioners swept into the First Amendment. *Reynolds v. United States* and *Davis v. Beason* denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate." (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (internal citations omitted))).

*Davis v. Beason*<sup>120</sup> was not intended to be limited solely to polygamy. In the Supreme Court’s words, it “was never intended or supposed that the [First] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.”<sup>121</sup> Nor has any Supreme Court decision since *Reynolds* and *Beason* ruled that the First Amendment is an appropriate vehicle for religious actors to overcome laws relating to illegal sexual conduct or involving the sexual abuse of children. In fact, the Supreme Court has never had an opportunity to address sexual abuse within religious organizations, though the reasoning of its free speech jurisprudence involving child pornography has laid groundwork that requires the rejection of claims to free exercise rights regarding the sexual abuse of children. It is nonsensical to refuse to extend free speech rights to individuals because they traffic in child pornography on the ground that pornography involves child sex abuse and then to erect free exercise rights for religious organizations and individuals who engage in and foster child sex abuse. It is imminently sensible to exclude cases involving child sex abuse from the reach of free exercise jurisprudence.

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<sup>120</sup> 133 U.S. 333 (1890).

<sup>121</sup> *Id.* at 342.

## APPENDIX A

### 1. Arizona Constitution, art. II, § 12

The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. No religious qualifications shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.

### 2. California Constitution, art. I, § 4

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

### 3. Colorado Constitution, art. II, § 4

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

### 4. Connecticut Constitution, art. I, § 3

The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.

## 5. Georgia Constitution, art. I, § 1, ¶ IV

No inhabitant of this state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions; but the right of freedom of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

## 6. Idaho Constitution, art. I, § 4

The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace or safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any person to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes.

## 7. Illinois Constitution, art. I, § 3

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.

## 8. Minnesota Constitution, art. I, § 16

The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by

law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

9. Mississippi Constitution, art. III, § 18

No religious test as a qualification for office shall be required; and no preference shall be given by law to any religious sect or mode of worship; but the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred. The rights hereby secured shall not be construed to justify acts of licentiousness injurious to morals or dangerous to the peace and safety of the state, or to exclude the Holy Bible from use in any public school of this state.

10. Missouri Constitution, art. I, § 5

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.

11. Nevada Constitution, art. I, § 4

The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State, and no person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief, but the liberty of conscience [conscience] hereby secured, shall not be so construed, as to excuse acts of licentiousness or justify practices inconsistent with the peace, or safety of this State.

12. New York Constitution, art. I, § 3 (amended 2001)

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured

shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state. (Amended by vote of the people November 6, 2001.)

13. North Dakota Constitution, art. I, § 3

The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

14. South Dakota Constitution, art. VI, § 3

The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the state.

No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.

15. Washington Constitution, art. I, § 11 (amended 1993)

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: Provided, however, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

## 16. Wyoming Constitution, art. I, § 18

The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief whatever; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.