FROM TOLERATION TO ACCOMMODATION:

REFOCUSING THE RELATIONSHIP OF RELIGION AND

LAW IN THE UNITED STATES

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ABSTRACT

The problem this dissertation seeks to solve is the lack of a principled decision-making process for courts to consider claims of religious free exercise. The problem arose with the initial First Amendment claim: polygamy in 1879. Since then, Courts have engaged in jurisprudential gymnastics to deal with *Reynolds v. United States.* I reject both the *Reynolds* division of religious belief from practice, and its consideration of religious practices as exceptions to neutral laws.

To refocus the discussion, I create a definition of religion that begins with the metaphysical implications of death. There is a fact of the matter about what happens at death but it cannot be accessed to determine which religious claim is correct. Therefore, the government must adopt a stance of *ontological agnosticism*. Governments are composed of individuals situated in specific cultural and historical contexts. Therefore, neutrality is as impossible as objectivity, so they must employ *epistemic perspectivism*, adopting the point of view of the impacted religious individual. Toleration relates to the accommodation clause: all religions are permitted but none may be favored. For religious expression, however, it would mean that the state *puts up with* the religious identity of its citizens, and is inappropriate. I situate religious personal identity as similar to race or sexual orientation. Shifting the attitude to accommodation creates new legal perspectives.

I look to José Ortega y Gasset for a response to relativism: we get closer to truth by accumulating perspectives. The concern that all religious acts must then be permitted is addressed through Ibn Khaldun's concept of social/cultural identity that I use to locate the contours of community toleration and address changes over time. The potential hazard of using social/cultural identity as an outer boundary of toleration suggests two constraints: first, a

Supreme Court ruling that would not be supported or enforceable, and second, any prohibition loses its justification if relevant social mores change.

To test my framework, I apply it to polygamy in *Reynolds* and in 2017. Morocco's regulatory scheme suggests how participants could be better protected. Accommodation of Islamic veils in the U.S. demonstrates the success of my philosophical refocus.

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ACKNOWLEDGMENTS

In addition to coursework and publications, this dissertation taken form through presentations at conferences. I am especially indebted to participants in the *Workshop on: Radically Rethinking Marriage* conducted at the International Institute for the Sociology of Law, Oñati, Spain July 16-17, 2015, and especially the coordinators Suzanne Lenon of the University of Lethbridge and Nicola Barker of Kent Law School for mentoring before and after the event. Similarly, participants in the *Islamic Critical Thinking: Ethics and Sensitive Contemporary Issues* Summer School in Granada, Spain June 16-20, 2014 have heavily influenced my perspective on Islamic philosophy and ethics as fellow members of the Research Center for Islamic Legislation and Ethics (CILE) Alumni Network.

The reaction to my presentation "Equal yet Plural? Polygamy and the Status of Women in the United States" by participants in the *International Family Conference III*, Istanbul, Turkey Nov 29-30, 2014 helped me to see how U.S. law on women and marriage is perceived from other countries. The opportunity to present "Why Tolerate Men? Religion as an Element of Personal Identity" in the poster session of the *Rocky Mountain Ethics Congress* August 9, 2013 Boulder, Colorado was pivotal to development of the functional definition of religion used in this work. The impact of religion upon personal identity was further developed in my "Secularism as 'Don't Ask, Don't Tell'" Philosophy Department Research Presentation December 12, 2014 at the University of Hawai'i at Mānoa (UHM).

My first presentation in the UHM Uehiro *CrossCurrents* Comparative Philosophy Conference on March 20, 2008 came as I was completing work in the masters program at the University of Colorado at Boulder (CU-B). I attended each of the subsequent annual conferences

during my time as a philosophy doctoral student, presenting occasionally, always enriched by the conversations of comparative philosophers. Papers from one of those graduate student conferences became the book *Crosscurrents: Comparative Responses to Global Interdependence*, which I co-edited with Ian Sullivan.

Throughout my philosophical journey, the chair of my dissertation committee, Dr. Tamara Albertini, has served as an invaluable guide. She opened many doors and provided resources to help clarify my theories without imposing her own. The other members of the committee have also contributed wise counsel, helping me to avoid error in developing my argument over many iterations. I owe the greatest debt of gratitude to the philosophy students and faculty members at UHM and CU-B who have welcomed, challenged, and supported my philosophical pursuits.

PREFACE

The roots of this dissertation were planted in a Spring 2007 *Law and Religion* course taught by Richard Collins in the law school of the University of Colorado at Boulder. As we read the "Mormon cases," I was astounded at the ferocity of the campaign against the Church of Jesus Christ of the Latter-day Saints (LDS) in Civil War-era United States. My final paper for that course traced the legal and procedural history of a then-current lawsuit seeking a marriage license for a religious plural marriage (which failed). I concluded that any successful legal challenge to the polygamy ban created by the U.S. Supreme Court in *Reynolds v. U.S* would have to come on non-religious grounds. Philosophically, that seemed backwards.

At the time, I was a masters student with a focus on philosophy of religion. As I read the cases and articles for the law course, I realized that the LDS concepts of God, Jesus Christ, humans, and souls are significantly different from those of Protestant Christianity or Roman Catholicism, even though they use the same words. For my MA thesis, I explored a Mormon response to the problem of evil (why bad things happen in the world if there is a God who is all powerful, loving, and knowing). I had discovered a robust philosophical debate between Mormon and evangelical philosophers on this and other theological themes. My interest was not only in how the LDS Church responds to natural and moral evil, but also in how that reveals why the problem of evil poses such a dilemma for Protestant Christianity.

The centrality of polygamy to the early LDS Church was connected to its concept of identity, which precedes embodiment and continues after death. The family is a central component of this eternal entity. I was intrigued by the impact of laws that sought to prevent polygamous marriages upon this view of human life. I combined what I had learned in the law

class and my MA thesis into a paper called: “Mormon Metaphysics and the Politics of Polygamy,” which I used as my writing sample in applying to the philosophy PhD program at the University of Hawai‘i at Mānoa. My philosophical interests began in philosophy of religion but include philosophy of law, and especially their interaction. At UH, I sought to ground both in a global perspective, which I found in Islamic philosophy.

I returned to the problem I had identified in Professor Collins’ classroom: *if this is how the U.S. government can treat religion, what could the words of the First Amendment possibly mean?* As I wrote these chapters, the perfect legal challenge to *Reynolds* arose. The case worked its way through the courts using an approach similar to what I had suggested might be successful in the 2007 law school paper. It failed.

In this dissertation, I stepped back from precedent and procedure to ponder the philosophical issues at the heart of the *Reynolds* decision. In the process, I developed a framework that I believe is far more satisfactory for analyzing religion/law conflicts. It holds great promise for resolving present and future religious free exercise challenges. Yet, when I applied that framework to the facts of *Reynolds*, it did not produce the result I had expected. It did, however, provide an answer to my philosophical quest:

what the words of the First Amendment could possibly mean.

Cindy Scheopner
Honolulu, 2017

Congress shall make no law

respecting an establishment of religion,

or prohibiting the free exercise thereof *…*

-- First Amendment, U.S. Constitution

INTRODUCTION

Laws are made for the government of actions and while they cannot interfere with mere religious beliefs and opinions, they may with practices.

-- Reynolds v. United States at 166

As the states sprung from English colonies tried to unite into a new nation, one of the items of agreement was that religion would be neither compelled nor compromised by government. Yet, the first time this guarantee of the First Amendment to the United States Constitution was tested, all three branches of government read its language to permit a sustained governmental campaign against a central tenet of American-born Church of Jesus Christ of the Latter-day Saints[1] that ended only when the Mormons changed one of their core doctrinal beliefs. In the process, individuals were imprisoned and sentenced to hard labor for freely exercising their religious beliefs; church property and other assets were seized; and military forces were poised near a civilian settlement: all to emphasize the determination of the United States government to grind out the practice of polygamy by the Mormons. It won. But one cannot read the court cases of that time without feeling that the church and the First Amendment came away from their confrontation equally bloodied.

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[1]The Church of Jesus Christ of the Latter-day Saints traces its beginning to an 1830 vision received by Joseph Smith in western New York. Members of the faith are commonly referred to as Mormons, after The Book of Mormon scripture (Taylor, S., n.p.)

One legacy of that encounter is that polygamy[2] remains illegal in the United States. While the practice may have been "odious" over a century ago, it now produces a conundrum (*Reynolds v. United States* at 165).[3] The Mormon family in *Reynolds* sought an exception to the law enforcing monogamy as the sole acceptable form of marriage. In the intervening years, laws criminalizing sexual activity outside marriage have largely been repealed, or are rarely enforced. Marriage between individuals of different races is no longer banned, and same-sex marriages are common. Rather than an exception from common practice based upon religious belief, polygamy now is only illegal *because* it has a religious connotation. Non-marital intimate relationships among multiple partners are no longer criminalized. Such behavior may not be the norm, but it is not considered shocking and would likely fall under the same personal liberty protections extended to same-sex relationships.

Contemporary practitioners of religious polygamy are now excluded from the right to marry that has been extended to others, regardless of race or sexual orientation. They are unable to have non-licensed commitment ceremonies similar to those used by same-sex couples after their relationships were decriminalized but before the Supreme Court ruled that they must be permitted to marry. Any plural relationship that is considered by the participants to be a marriage runs afoul of anti-bigamy statutes.

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[2]Although the issue has arisen in the legal cases cited in this work with one husband and multiple wives, "polygamy" refers to marriage in which a spouse of either sex has more than one mate at the same time.

3 "Polygamy has always been odious among the northern and western nations of Europe and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people" (*Reynolds* at 165).

The legal status of polygamy illustrates the difficulty of putting into practice the free exercise of religion in a nation with diverse beliefs. The approach that the Supreme Court took in *Reynolds* was to divide religious beliefs from practices. It held that laws may not restrict religious belief, but may forbid practices based on those beliefs. In the case of polygamy, that approach has produced the opposite result in two ways. First, banning the practice of polygamy contributed to a change in the belief by members of the LDS Church that it is required for salvation. Religious belief and practice are not severed without impacting both. Second, laws against polygamy now target practices only when they have religious beliefs attached.

Not all religious groups with roots in the prophecies of Joseph Smith have abandoned the practice of plural marriage. Some have sought to remove the ban, but direct challenges based upon religious exercise have failed. Courts have held that *Reynolds* is controlling. The state of Utah also created a legal Catch 22 when it stopped arresting individuals for being in polygamous relationships, absent other charges such as child abuse (*Bronson v. Swenson*).[4] Because the families could not show that they were at risk of being arrested, they could not challenge the criminal penalties.

A reality television program produced the first challenge to the criminalization of polygamy to succeed in Utah courts. *Sister Wives* featured a family composed of a husband with four wives who base their relationship upon fundamentalist religious beliefs.[5] The notoriety of

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[4] "Plaintiffs subscribe to the religious doctrine of plural marriages, which they define as a "man having more than one wife," similar to that practiced by the Church of Jesus Christ of Latter-day Saints in Utah prior to 1890."

[5] The series began airing in 2010. Shortly thereafter, the family appeared on national television news and talk shows.

weekly television exposure prompted the state of Utah to begin an investigation into the family's legal status. Based upon that fear of prosecution, the family moved to Nevada and filed a court case (*Brown v. Buhman*). The husband had only one civil marriage – the additional marriages were religious, spiritual marriages but no governmental license was sought.

In a landmark ruling, a Utah federal district judge ruled in favor of the family on their challenge to the part of the Utah statute that criminalizes cohabitation. However, he determined that *Reynolds* was controlling on the issue of legal marriage. A three-judge panel of the 10th U.S. Circuit Court of Appeals in Denver refused to reach the merits of the case, ruling in early 2016 that the family was not in fear of arrest for their relationship(s), so could not qualify for relief from the courts.[6] The case was appealed to the U.S. Supreme Court, which refused to hear it. Because the lawsuit did not rely upon the First Amendment free expression clause, even a successful resolution would not have shed light on what the *Reynolds* court should have done differently, nor provide guidance for a future court when faced with a religious practice that nonbelievers still find abhorrent.

Problems in practice

The *Reynolds* belief/practice distinction has never been a workable formula, but has neither been abandoned, nor replaced with a better framework. An equally-problematic legacy of that case is the idea that individuals must seek an exception for religious practices. Laws that are neutral and apply equally to everyone have an unwarranted presumption of fairness that operates

[6] The Utah district court ruling was vacated for mootness by the Tenth Circuit Court of Appeals in *Brown v. Buhman* 10th Cir. 14-4117 May 13, 2016; request for *en banc* ruling denied, April 11, 2016. The U.S. Supreme Court denied the Petition for certiorari on January 23, 2017. This result is discussed in Chapter Four.

to penalize unpopular religions. A philosophical re-examination of the issues that confronted the *Reynolds* court will both clarify the problems and suggest a solution. The court considered issues that remain key to First Amendment jurisprudence, such as: What is religion? How can conflicting demands among religions be resolved? How much does society have to tolerate?

The goal of this project is to (1) identify conditions for any adequate legal approach to problems of religious exercise, and (2) make a case for treating religious exercise as a component of personal identity. Any adequate philosophical framework for restricting religious practices must respect both the constitutional promise of free exercise and the need for people of different faiths to live peacefully in the same political state.

The starting place for this inquiry must be one of perspective. I argue that there is no neutral perspective when considering religion. When individuals or Courts pretend to be neutral, they privilege their metaphysical view as "normal," making it the accepted starting point from which other religious views must seek an exception. Rather, I set two initial premises. First, conflicting claims about the metaphysics of ultimate reality cannot be settled by courts, so the appropriate legal approach to religious free exercise is one of *ontological agnosticism*. I use this phrase to mean bracketing the validity of claims about whether actions while embodied have an impact on a future self that survives physical death. Courts consider the religious requirements as though they are correct. The answer to a restriction on action cannot be that it arises out of an erroneous religious belief. Second, the impact of the restriction on religious activity must be evaluated from the perspective of the impacted believer. I call this *epistemic perspectivism*. The answer to a restriction on action cannot be that it does not trouble my religion so it should not

trouble yours. I argue that both of these perspectives must be part of any successful evaluative framework to replace the *Reynolds* dichotomies of belief/practice and exception to neutral rules.

The success of an approach to the free exercise of religion can be tested by considering how well it can accommodate Islam. Islam presents a direct contradiction to the *Reynolds* belief-practice rubric, in that the requirements of the faith all include actions/practices. Adopting an Islamic perspective also helps to reveal religious influences in law and legal theory. Laws in the United States that are presumed to be neutral often privilege Protestant Christianity, which is either unarticulated as a perspective or presumed to be neutral.

Viewing the interaction of religion, individuals and society from an Islamic perspective suggests a new approach. Morocco is an example of a country with an official religion, which most citizens observe. And yet, not all acts permitted by Islam are permitted by civil laws. Polygamy is limited in a recent revision of the family code that followed adoption of a new Constitution in 2011. The difference between the Moroccan and U.S. Constitutions helps to illustrate a key concept that I will use to determine the limits of toleration.

Philosophical perspective

This concept comes from philosopher Ibn Khaldun, who analyzed the history of North African civilizations in the fourteenth century. His family had emigrated to Spain from south Arabia (now Yemen). They served in important administrative and political posts under the Umayyad, Almoravid and Almohad dynasties, but fled to the northern coast of Morocco just before the Christian conquest of Seville and Córdoba. Ibn Khaldun was born in Tunisia in 1332 and died in 1406 in Cairo, Egypt. He held posts in Spain and North Africa during a politically tumultuous time following the collapse of the Almohad Empire.

Ibn Khaldun lived in a time and place that experienced differences in religious beliefs and practices. "At the intersection of Jewish, Christian, and Muslim influences, heir to Greek science and Arabic poetry, and connected by trade and history to Asia, the Mediterranean Sea had become the nexus of Muslim cosmopolitanism by the fourteenth century" (Lawrence, vii). Amid these influences, he developed a philosophy of history that accounts for societal change.

More than half a millennium after Ibn Khaldun, another philosopher with an interest in history, society, and change wrote during equally tumultuous times. José Ortega y Gasset[7] spent much of his childhood in Córdoba or Málaga, the same parts of southern Spain that remained under Muslim rule during Ibn Khaldun's life. During Ortega's lifetime, Spain was a constitutional monarchy under King Alfonso XIII, who lost power to dictator Miguel Primo de Rivera. When his government resigned, the Second Republic was formed; an unsuccessful coup attempt resulted in the Spanish Civil War, which led into the Second World War, and the iron rule of Francisco Franco.

Ortega studied classical philology and philosophy in Germany, as well as neo-Kantianism. He also pursued an interest in phenomenology, later saying that he "abandoned

[7] Much of Ortega's thought was first produced as essays published in newspapers or magazines, or lectures given in university courses. It was later collected into the twelve volumes of his complete works (*Obras Completas*), some posthumously. At least two dozen books have been published containing one or more essays around a theme. His works have multiple publication dates in the original language (Spanish except for a few written originally in German) as well as translations into multiple languages. To indicate the source, therefore, I have used the title of the source material and the page number in that version. The dates reflect publication, which was generally much later than the works were first written or presented as lectures.

phenomenology at the very moment of accepting it" (*Obras Completas* 8, 273).[8] Ortega developed his own philosophy of life that includes individuals and their interaction in history. From him, I borrow a concept of personal identity that is amenable to religious identity. His philosophy of point of view, or perspective, also suggests a workable way to accommodate religious difference.

Method

Throughout this work, my method is in the spirit of Ortega. Although discussing technical themes in philosophy and law, I have attempted to use clear language accessible to a non-specialist. Foreign language terms are discussed and equivalencies proposed. For ease of reading, non-English words are italicized only on first use. Similarly, diacritics commonly used with Arabic transliteration are omitted. The Arabic letter '*ayn* is represented by ᶜ to distinguish it from the *hamzah* represented by '.

I have undertaken a philosophical examination of the original *Reynolds* decision using two key concepts: Ortega's concept of personal identity and Ibn Khaldun's concept of social cohesion. This work employs these concepts from philosophers steeped in their respective traditions to analyze contemporary problems in jurisprudence. The focus is on how U.S. law treats religion, not the resources that religion may employ to respond to regulation, such as the Islamic concept of (*maslaha*) community welfare (mentioned in Chapter Three).

[8] I use the MLA citation style as middle path between the footnotes of traditional philosophical works and the legal Bluebook style. Sources are noted inline by author and page number, footnotes are used for editorial comments or additional information. A Table of Cases is included for case citations, but law review articles are cited in MLA style in the References section. Although MLA style no longer requires it, I use the notation "n.p." to indicate an online source with no page numbers.

This is a work of comparative philosophy, in that it draws from both Western and Islamic traditions. It contextualizes the thought of Ortega and Ibn Khaldun, rather than merely extracting their theories from their surroundings and influences. The concept of perspectival personal identity from Ortega helps to explain the role that religious belief plays in lived experiences. I argue that his view of a person in the world is under-nuanced in that it fails to account for components of personal identity that are unchosen, such as sex/gender and race. Ibn Khaldun's concept of ᶜasabiyya provides both a theory of group identity and of change in that identity over time. Together, these concepts provide the philosophical underpinnings of a new jurisprudential approach to resolving claims of religious free expression in the United States.

This dissertation is rooted in place and time: post 9/11 United States. For that reason, I undertake a discussion of contemporary Islam before considering how Islamic head coverings may serve as a contemporary example of religious conduct. I do not presume that readers have a pre-existing background in either Islamic theology, history, or philosophy, but some knowledge of each is important to understanding the perspective of the women who are impacted.

About veils

Choosing which term to describe Islamic head coverings is far from simple. Anna-Mari Almila and David Inglis use "veils" and "veiling" as a general term for religiously-motivated head coverings for both men and women in their *International Handbook to Veils and Veiling*. However, Katherine Bullock rejects the word "veil" as laden with negative colonial stereotypes. She uses "*ḥijāb*" to refer to the concept of covering, which includes apparel and actions such as lowering the gaze with the opposite sex (xli). She uses "headscarf" for women who cover all but their face and hands, and *niqāb* for the face covering that exposes only eyes. Although she

employs this vocabulary in her analysis, the title of her book is: *Rethinking Muslim Women and the Veil* and it drew from her PhD dissertation entitled: *The Politics of the Veil*.

In addition to the question of how the head coverings are described, there is the issue of how they are regarded. Bullock distinguishes two feminist approaches against the simplistic, pop culture view that the veil is a symbol of the complete subjugation of Muslim women. The school she calls "liberal feminists" includes Muslim and non-Muslim women. They argue that Islam subordinates women, like any patriarchal religion. Although informed about Islamic history and practice, they see veiled women as Other.

> [T]hese writers do not ultimately find Muslim women's arguments for the meaning of covering persuasive. They remain convinced that a satisfying life in the veil is still an oppressed life. Like the mainstream view, their assumptions are also ultimately grounded in liberalism. The concepts most at play are liberal concepts of individualism, equality, liberty, and oppression.

The second school of feminists also includes Muslim and non-Muslim women, many trained in anthropology or history. It attempts to understand the meaning of the social practice of veiling as it is experienced by women. "These feminists may also be grounded in liberalism to some extent, but their methodological approach leads them away from using mainstream Western liberal categories to judge the Other's voice" (Bullock, xvii). She calls this a 'contextual approach' and counts herself as a member of this group. Bullock converted to Islam and wears a hijab, so her perspective is from the within the Other.

My own view of the veil is strongly influenced by my participation in the postgraduate studies program "Islamic Critical Thinking: Ethics and Sensitive Contemporary Issues" of the Center for Islamic Legislation and Ethics (CILE) in Granada, Spain. June 16-20, 2014. The director of CILE is philosopher Tariq Ramadan. The focus of the annual summer school is upon

Islamic responses to ethical issues, using theological and philosophical resources. I attended the first year, during which participants were predominantly female. Photos of the next two cohorts show more male participants, but still over half are female. They also show nearly every configuration of head covering imaginable: traditional hijab, turbans, and several fashionable variations. The year that I participated, all of the women wore some sort of head covering except a Moroccan woman now working for the French government in Paris, a Ukrainian Christian Scientist and me (we were the only two non-Muslims). Some also wore the *jilbab*, but many did not.[9] The women were well-educated professionals, many in higher education, government or diplomatic corps. They were far from subordinate or submissive, regardless of their choice of head covering. They were undaunted in challenging our male instructors, including religious leaders, and sexist interpretations of textual sources.

The discussion in this dissertation regards the legal treatment of women who are motivated by religion to cover their heads. It is not upon how they have come to that decision or what it represents to them. I use veil as a generic term to encompass the many types of Islamic head coverings. It applies to non-Islamic religions, as well. Although beyond the scope of this work, a courtroom or school yard ban on all head coverings would implicate Catholic or Episcopalian nuns who still wear veils, as well as Amish prayer caps.

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[9] The term *jilbab* can refer to any cloak worn in public, but often means a long tailored coat (in a wide variety of colors and fabrics). An *abaya* is a loose over-garment with sleeves that opens in front. A *chador* is common among Shiᶜa Muslims. It is a floor-length covering that hangs from the top of the head and is open in front. A *burqa* is a veil and robe combination that covers all of the body, including the eyes. The word is often used incorrectly to refer to a *niqab*, which is a veil that covers the head and lower face but exposes the eyes (Taylor, n.p.).

Chapter overview

The quotation at beginning of this chapter describes the approach to religious free expression the *Reynolds* court used to prohibit polygamy. It imagined that a line could be drawn between religious belief and practices. In this dissertation, I demonstrate how that approach is not feasible from a religious perspective and has not been workable from a jurisprudential perspective. I reject the belief/practice distinction and make two claims. First, that any adequate approach to religious free exercise must employ ontological agnosticism and epistemic perspectivism, and second, that the framework I propose meets my first requirement and is an improvement upon the *Reynolds* dichotomy both for that case and for contemporary issues in religious practice. The entire *Reynolds* opinion is included as an Appendix for ease of reference. Each chapter evaluates a key philosophical component of the *Reynolds* opinion and introduces a part of my new framework.

Can a man excuse his practices … 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 (Reynolds v. United States at 167).

In Chapter One, I first describe the religious and political situation for polygamy as practiced by the early LDS Church in the United States. I then review the *Reynolds* opinion to highlight the legal issues and philosophical concerns, including the relativism articulated in the opening quote. The chapter's review of court cases sets the problem for this dissertation: the lack of a principled decision-making process for evaluating claims of religious free exercise. The First Amendment to the Constitution sets the goal of religious exercise unrestricted by Congress in a country with no officially-sanctioned religion. The cases demonstrate the many ways laws that

seemingly do not target religious belief still impinge upon the practices of some religions. The chapter concludes with an analysis of the contemporary *Brown* polygamy legal challenge and the philosophical issues it raises.

The precise point of the inquiry is, what is the religious freedom which has been guaranteed (Reynolds v. United States at 162).

In Chapter Two, I create a three-part definition of religion based upon the way religion is lived. First, as *Reynolds* recognized, religion is a competing normative authority with civil government. Second, religion makes a claim about the metaphysics of ultimate reality. In the case of Mormons, that a deity exists; that heavens are populated with the essences of people who once lived on this earth. This leads to the third relevant aspect of religion that *Reynolds* mentioned but did not explore: religion includes an account of embodiment. I also examine the concept of toleration and how it should be applied to the three aspects of religion.

The account of personal identity that I develop looks to the "perspectivism" of José Ortega y Gasset for a concept of self as not only embodied, but also embedded in time and place. From Ortega, we take the approach that each person participating in the process does so from a point of view, and identifying that point of view makes it possible to compare it with others. Collecting additional points of view helps to complete the picture.

With this definition, I seek to locate religious identity along side other components of personal identity, such as race and gender. This changes the language from toleration to accommodation and changes the perspective from requiring an exception to full acceptance. I draw a parallel between religious identity and sexual orientation. The discussions of this chapter

create an account of identity for religious individuals that can be recognized in court and produce more just outcomes for religiously-motivated conduct.

[T]here 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 (Reynolds v. United States at 166).

Chapter Three situates contemporary Muslim practices in religious and U.S. history. It roots Ibn Khaldun in the Islamic philosophical tradition and introduces his concept of ᶜ*asabiyya*, a sort of community consciousness or cohesion. While there are issues of translation for this term, it is used to describe the animating force of a group. In the context of religious exercise, it helps to characterize the limits of toleration. I am using it to describe the social/cultural identity that changed between *Reynolds* and *Brown* in the attitude toward polygamy in the United States.

Morocco's approach to religious exercise and polygamy provides an illustration of ᶜasabiyya that is useful in exploring the impact of community on identity and locating the limits of toleration. It permits limited polygamy, based upon Islamic tradition. This differs from the polygamy practiced by the early LDS Church, which required it of men who were designated by religious authorities. Mormon polygamy also had an impact on the after life, which Muslim polygamy does not. However, the model of Morocco will prove helpful in dealing with both.

The framework for evaluating religious expression that I propose is in penultimate form in Chapter Three. Situated, enculturing individuals with eternal identities have a First Amendment protection for religious practices in the United States. When the free exercise of

those practices violates a social/cultural norm, the government adopts an attitude of ontological agnosticism and employs epistemic perspectivism to accommodate the fullest possible exercise. The next chapter considers what limits on exercise may be needed and how to determine them.

[T]he question is raised whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land (Reynolds v. United States at 162).

In Chapter Four, I address the approach of considering religious practices as exceptions to neutral laws. I use the example of Islamic head coverings as belief/acts connected to personal identity. This illustrates the power of accommodating religious identity rather than tolerating exceptions to societal norms. In this chapter, I propose two constraints on the use of social/cultural identity to justify limits on behavior. The first is the strength of the opposition that must be demonstrated to compromise a belief/act (ability to enforce). The second is the necessity for review when social conditions change.

With the framework complete, I revisit *Reynolds* to consider what approach the court could have taken in the existing social and historical situation. I propose three possible outcomes, only one of which was viable at the time and also likely to produce a better result in 2017. I also consider whether the approach taken by Morocco would have worked for the marriages of George Reynolds or Kody Brown.

This project refocuses religious exercise as a component of personal identity to be accommodated, rather than tolerated, in legal analysis. As a work in philosophy of law, this approach rejects the search for a neutral perspective, inserting social situation as a critical component of any evaluation of religious exercise. It does not require any particular social, moral

or political theory. It inserts religious identity along side race, gender and sexual orientation, so is compatible with varying views of the self across philosophical points of view. It challenges any legal or philosophical approach that is silent with regard to race or sex as relevant to personal identity theory.

CHAPTER ONE: FROM POLYGAMY TO PEYOTE AND BACK

Can a man excuse his practices … 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.

-- Reynolds v. United States at 167

The Supreme Court case that presented polygamy as a Constitutional challenge arose amid a prolonged cultural battle pitting the government of the United States against the Church of Jesus Christ of the Latter-day Saints (LDS) at a critical time for both the religion and the nation. The church had taken refuge in the Salt Lake Valley of what was then Mexico after having been violently driven out of every state it entered. By the time Utah became a territory in 1850, polygamy had become a national political issue. The 1856 Republican Party platform called polygamy and slavery the "twin relics of barbarism" (Republican Party Platform. 1856, .np.) The political battle with the LDS church at the western edge of the United States took place at the same time as the secession by states to the South that precipitated the Civil War.[10]

The LDS Church

In 1820, a teen-aged Joseph Smith found the variety of religious offerings so overwhelming that he knelt in prayer to ask God which church he should join. Smith's early writings record that the Methodists didn't like the Baptists, Baptists didn't like the Methodists and neither group liked the Presbyterians (Williams 2003, 101). He reported having a vision in

[10] The chronology that follows is synthesized from several sources, including: Van Wagoner, McConnell, Garvey, & Berg, Gordon, Drakeman, and Harmer-Dionne.

which God the Father and his son Jesus Christ told him that none of the existing churches was true. Over the next ten years, Smith recorded more visions and angelic visits that led him to find and translate gold plates, which formed the basis for the Book of Mormon and a new religion. The church was organized in April 1830 when Smith and a few converts met in a small house in upstate New York. By the end of that year, several hundred converts had joined, making the Saints successful and immediately controversial.

> The new church was both socially and theologically radical: It challenged many cherished American beliefs, including the importance of individual private property, the traditional family, the separation of church and state, and the sufficiency of the Bible as a source of revelation (McConnell, Garvey and Berg, 111).

The controversy intensified with the growth of the church. The community moved from New York to Pennsylvania, to Ohio, on to Missouri, where thirty LDS church members (including women and children) were killed, and then to Illinois. In each state, followers were forced out by hostile citizens. Missouri issued an order that allowed Mormons to be shot on sight. In response, Joseph Smith formed his own militia and decided to run for President of the United States. He and his brother were killed in 1844 by a mob while in an Illinois jail.

The centrality of polygamy

Polygamy is uniquely identified with the LDS Church in the United States, and "the principle" held a central place in Mormon theology at the time of *Reynolds.*[11] Smith's views on polygamy developed as part of his focus on the Old Testament. In 1843, Smith announced two

[11] A detailed analysis of the Mormon cosmology is explored in my philosophy of religion thesis *Deity, Dogma and Doubt: A Mormon Response to the Problem of Evil*. MA Thesis, University of Colorado, 2008. ProQuest.

revelations that called for the restoration of Biblical polygamy within the framework of marriage to be solemnized (or sealed) for eternity. The Church did not publicly declare adoption of the practice until 1852 when Brigham Young accepted the Smith revelations as part of the Church's official canon.

Smith taught that polygamy was central to the work of the church on this earth, and to salvation in the next life. More wives meant more children and greater future glory. Although first wives had to consent to additional wives, their salvation depended upon being in a relationship with a polygamist male. (Aitman & Ginat, 26).

Politics of polygamy

After the death of Joseph Smith, Brigham Young led the group to the Salt Lake Valley of what was then still officially a territory of Mexico.[12] As a frontier area distant from Mexico City, little effort was expended in enforcing marriage laws. The land had been captured by the U.S. in the Mexican War and was ceded in the Treaty of Guadalupe Hidalgo, which allowed LDS leaders to attempt statehood. A constitutional convention in 1849 created a proposed state of Deseret that included the present state of Utah, along with most of what is now Nevada and Arizona, and parts of California, Wyoming, Colorado, New Mexico, Oregon and Idaho. Congress refused to recognize the state because it was so large and it lacked the requisite 60,000

[12] The interaction of polygamy and politics in the US is detailed in my article "Equal Yet Plural? Polygamy and the Status of Women in the United States." *Conference Proceedings of the International Family Conference III: International Family Policies*, Ed. Cüneyt Dinç. The Journalists and Writers Foundation Press, 2015, 140-153.

voters to be eligible for statehood. It later passed a bill authorizing a much smaller Utah Territory in 1850.

When the LDS church publicly acknowledged the practice of plural marriage, it became an obstacle to statehood. The 1856 Republican National Convention declared that it was the "duty of Congress to prohibit in the territories those twin relics of barbarism – polygamy and slavery" (Republican Party Platform, 1856, n.p). Soon, a law did just that. The Morrill Anti-bigamy Act was passed in 1862, outlawing plural marriages in the territories.[13] Initially, polygamy was asked only of church leadership, but when it came under attack, the practice spread as bishops called more men to polygamy. During the "Mormon Reformation" of 1856 – 1857, 65% more polygamous marriages took place than during any other two-year period (Aitman & Ginat, 33). Although it had been difficult to enforce, the LDS Church decided to challenge the anti-bigamy law it believed to be a clear violation of the First Amendment.

The *Reynolds* test case

The man whose name has become synonymous with polygamy was the personal secretary to Brigham Young. George Reynolds was an English immigrant to the United States who married soon after settling in Utah Territory in 1865. Nine years later, he took another spouse, which resulted in arrest. At trial, his second wife was placed in the position of admitting either that she was in a plural marriage, or was participating in an illicit relationship with a married man (Davis, 288). Amelia Jane testified that she had been married in a church (not civil) ceremony. The jury found Reynolds guilty of bigamy, sentenced him to a year in prison and a

[13] After many attempts, Utah finally achieved statehood in 1896 on the stipulation that its constitution banned the practice of polygamy "forever."

$300 fine. A retrial was conducted due to confusion over the number of jurors required, which also resulted in a finding of guilty and an increased punishment of two years imprisonment at hard labor and a $500 fine (the statutory maximum).

On appeal to the territorial supreme court, George Reynolds argued that taking a second wife was a mandate of his church and that punishment deprived him of his first amendment right to the free exercise of religion. His conviction was affirmed without reference to religious liberty. Two years later, the U.S. Supreme Court affirmed the conviction on January 6, 1879.

Opinion of the Court

Six questions were presented to the high court for review (*Reynolds* at 153).[14] All of the questions dealt with procedural issues except number 5: "Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty?" Justice Waite, writing for the court, rephrased the question as, "whether religious belief can be accepted as a justification for an overt act made criminal by the law of the land" (*Reynolds* at 162). This restatement put the focus on the justification for an exemption, rather on the legitimacy of the law, itself.

Waite affirmed that Congress cannot pass a law (in this case, for a Territory) that prohibits the free exercise of religion, and continued "The question to be determined is, whether the law now under consideration comes within this prohibition" (*Reynolds* at 162). There was no

[14] All citations in this section are to *Reynolds v. United States*, 98 U.S. 145 (1878), Appendix.

doubt that the First Amendment applied to this situation. The law had been passed by Congress and, as a territory, Utah was under federal jurisdiction.

There also was no question of fact about the conduct at issue. The high court accepted that Reynolds had proved to the lower court that he was a practicing member of a church that required polygamy upon the penalty of "damnation in the life to come." Reynolds had asked for a jury instruction that if they found he was married in pursuance of what he believed to be a religious duty, the verdict must be 'not guilty.' He had acted with the firm conviction that a second marriage was not criminal because it was required by his religion, which was protected by the First Amendment.

When faced with this direct conflict, the Court made an odd turn. To decide this case, it began by discussing what qualified as a religion and then "what is the religious freedom which has been guaranteed." Because the word "religion" is not defined in the Constitution, Justice Waite felt justified in looking elsewhere to determine its meaning, "and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted" (*Reynolds* at 162). In the next paragraph, he mentioned concerns about citizens being taxed against their will to support a religion they may not have believed, and citizens being punished for failing to attend public worship or for entertaining heretical opinions. We would now consider those concerns to be directed at the establishment clause, as would the specific case he next discussed, a bill in Virginia to provide for teachers of the Christian religion.

In response to this Virginia bill, James Madison wrote his *Memorial and Remonstrance,* which the Court described as follows: "[I]n which he demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government" (*Reynolds* at 163). The bill

was defeated at the next session of the Virginia House of Delegates and another, authored by Thomas Jefferson, passed. The Court found the definition of religion it sought here:

> In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined; and after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that it is time enough for the rightful purpose of civil government for its officers to interfere when principles break out into overt acts against peace and good order.' **In these two sentences is found the true distinction between what properly belongs to the church and what to the state** (*Reynolds* at 165, emphasis added).

While not mentioned in the *Reynolds* opinion, Jefferson believed that the Virginia Act for Establishing Religious Freedom "was meant to be universal … to comprehend within the mantle of its protection *the Jew and the Gentile, the Christian and Mahometan the Hindoo, and Infidel of every denomination*" (Choper, 587 fn 53). This Virginia statute was passed a year before the Constitutional Convention, which the Court next summarized. Noting that Jefferson did not participate because he was in France as a government minister, the opinion cited correspondence between Jefferson and a friend: "[Jefferson] expressed his disappointment at the absence of an express declaration insuring the freedom of religion (2 Jeff. Works, 355), but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations" (*Reynolds* at 164) Several states proposed amendments to the Constitution that included some sort of declaration of religious freedom, so the first session of the First Congress considered how to respond. The Court said, "[T]he amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted" (*Reynolds* at 164). The procedure was not quite so clear cut as that, but the Court continued on to its next supporting text.

In the next sentence, the Court quoted Jefferson's address to the Danbury Baptist Association at length. Because the Court relied so heavily upon its language, I will do so as well:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, -- I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.' **Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order** (*Reynolds* at 164, emphasis added).

The first text advanced (Virginia statute) would have given state support to teachers of religion. Madison's objection was that religious duty is personal, between an individual and his Creator, not to be compelled or supported by the State. The second text (Constitution) is silent as to any religious relationship, other than to say that a religious test may not be required for public office. Jefferson's concern, echoed by the States, was that the new federal government might still try to force some sort of support for religion or religious conduct. The First Amendment was in response to that concern – it left open the possibility that individual states might favor one religion and not another, as many continued to do for a time.

The third text (Danbury Baptists) is Jefferson's personal view. Remember that he did not directly participate in the Constitutional Convention. Further, he supported language protecting freedom of conscience (repeated here) rather than freedom of religion, which was not adopted.

The letter is far from the "authoritative declaration of the scope and effect of the amendment" (*Reynolds* at 164) that the Court pronounced. Even if it were, it was written to a religious congregation and the language quoted could easily be interpreted as saying that the First Amendment protects religion from a federal government that could favor one over another through taxes, forced attendance, or paying teachers.

The Court concluded "that Congress was … left free to reach actions which were in violation of social duties or subversive of good order" (*Reynolds* at 164). The documents it cited were concerned with religious belief or practice being *compelled* by the government, not with whether the government could *prevent* the free exercise of religion through force. The *Reynolds* Court took documents that reflected the public will to limit intrusion of the federal government into religion, and turned them into a grant of power for the federal government to trod upon any religion so long as the target is religiously-motivated actions and not "mere belief." Rather than protecting religion from government interference, the threshold suggested for regulating religious acts puts every religion at the mercy of judicial popularity.[15]

The Court may have struggled with the definition of religion, but it had a specific religious act clearly in its sights, revealed in the next paragraph: "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people" (*Reynolds* at 164). The Court did not further flesh out the significance of this inaccurate

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[15] See discussion of "From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law" in Chapter Two.

historical claim or how it related to the case at hand.[16] The Court could easily have found polygamy in Judeo-Christian history, especially since it was the practice of polygamy by Biblical patriarchs that inspired Smith's adoption of the practice. The practice of a male having more than one wife was permitted in Judaism well into the Middle Ages. Catholicism did not explicitly reject the practice until the 16th century.[17] Some openly advocated polygamy during the Protestant Reformation of the 1500s, including a community of Protestant Anabaptists in Münster, Germany – a nation of northern and western Europe (Aitman & Ginat, 41-41).

Although the Court's earlier query "What is religion?" was answered by contrasting religion to the State, there seemed no question that the LDS Church qualified as a religion and was appropriately seeking refuge in the protection of the First Amendment. The LDS Church was founded in the United States and was then flourishing in one of its Territories. The Court seemed to consider it relevant that the Mormon polygamists were white and culturally English-American.

Next, the Court reviewed English common law prohibiting polygamy, which originated in the ecclesiastical courts. The opinion never considered that English courts were operating in a country with an official state religion, unlike the United States. Even if these courts considered

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[16] Members of Native American tribes in the US were allowed to follow tribal rules regarding marriage, even if they allowed polygamy (Strasser, Article 1).

[17] "Nowhere in either the Hebrew Bible or the New Testament is polygamy forbidden. Indeed, some European Jews practiced polygamy until the eleventh century ... Martin Luther, while not endorsing polygamy as an ideal or pervasive practice, nevertheless observed that polygamy does not contradict the Scripture and so cannot be prohibited by Christianity. And within Catholicism, the question of whether polygamy was acceptable in exceptional circumstances was not finally settled until the Council of Trent in 1563 (Calhoun, 1028-1029 internal references omitted).

polygamy to be an offense against society, that would not automatically apply to a society in a nation with no established church and a guarantee of religious free exercise. The one reference to religion in the original text of the Constitution (before the Amendment at issue) was to prohibit a religious test for holding public office, a direct repudiation of the English religious test designed to sort out Catholics from Protestants.[18]

The Court found special significance in the fact that Virginia enacted a statute making polygamy punishable by death in 1788, *after* it passed Jefferson's Virginia Bill for Establishing Religious Freedom. "From that day until 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 … 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" (*Reynolds* at 165).

It is quite possible to believe that the constitutional guarantee of religious freedom was intended to prohibit *the federal government* from enacting legislation with regard to marriage as a most important feature of social life. As the court noted, most colonies and then states had enacted local laws outlawing polygamy. Marriage, divorce and child custody (family law) are traditionally governed by states, with sometimes-significant differences among them. If it were within the power of states, such as Virginia, to prohibit polygamy, it would be presumably within

[18] The Test Act of 1678 was "An Act for preventing dangers which may happen from popish recusants." It forbade transubstantiation, invocation of saints and the sacrament of the mass. The specific oath was: "I ____ do declare that I do believe that there is not any transubstantiation in the sacrament of the Lord's Supper, or in the elements of bread and wine, at or after the consecration thereof by any person whatsoever" (British History Online). See discussion of the Catholic doctrine of Transubstantiation herein.

their power to permit it. The unstated problem was that Utah Territory permitted polygamy, and had an extensive set of laws and customs that supported it. Had Utah already been a state, it would have been more difficult for the court to pre-empt its authority over domestic matters.

Congress had passed the Morrill Act specifically to outlaw polygamy as permitted in Utah Territory and as practiced by members of the Mormon Church. Some sort of argument was necessary to justify this direct conflict with the First Amendment, but none was attempted. This was the Court's justification: "In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control" (*Reynolds* at 166).

Waite balanced the interest of Mormons in practicing polygamy with society's interest in marriage. This balancing approach has continued in every subsequent religious free exercise case; the First Amendment was not considered to be absolute. In such a context, the way the competing interests are described often makes a decisive difference in how the weights are balanced. As framed by the Court, the balance was between the future of the United States as a democratic nation and the right of Mormons to multiple wives. Waite found that society was built upon marriage; quoting Professor Lieber for the proposition that polygamy leads to the patriarchal principle, which "fetters the people in stationary despotism" (*Reynolds* at 166).

Although not further qualified in the opinion, Lieber was influential in U.S political and legal thought (Soifer, "Francis Lieber").[19] In the article that may have informed the Chief Justice's opinion, Lieber called religion "a purely mental or psychological matter," saying "religious liberty means that no one shall be troubled about his faith – his inner man; but acts remain for ever subject to the law" (232). He cataloged crimes and vices that have "at some time or other formed an avowed element of religious systems" (233) aiming particular venom at Mormons throughout the article, and especially in an extended footnote: "Mormonism, from its very beginning, has been encrusted with vulgarity, jugglery, license and muddy materialism. That our propositions are loathsome, cannot be urged as a fair objection to them – at least not by the Mormons" (233). Attributing monogamy to Greeks, Romans, and Germans, Lieber said "It is one of the primordial elements out of which all law proceeds, or which the law steps in to recognize and to protect" and is "the foundation of all that is called polity. It is one of the pre-existing conditions of our existence as civilized white men …" (234). The article concluded that the Mormons must not be admitted to the Union. It considered what might be done if an existing state "should *become* as foul and festering as they [Mormons] now are" perhaps by adopting French communism, or becoming filled with Chinese so that the whites were absorbed, or

[19] Of special interest in this context, Soifer notes "Lieber was not … a lawyer. Perhaps this explains why Lieber's view … was anything but formalistic. Nor did he display much of the abstract theorizing often associated with his native Germany. Instead, we find … clear, early signs of the distinction between construction and interpretation that Lieber developed in his *Legal and Political Hermeneutics*. There was already little concern for exactitude as to what the words being interpreted or construed actually said. There might be one true meaning of the original text, but Lieber obviously spent little time worrying about how to find it. Instead, he concentrated on pragmatic readings derivable from, but not limited to, that text" ("Francis Lieber," 2310).

Africanized. He stopped short of advocating that such a state could be expelled from the Union, only because it would be speculative and he would wait until a specific case arose (236).

One contemporary Mormon writer criticized the *Reynolds* opinion for opening what became a culture war on all Mormons whether or not they were polygamous,[20] for the vagueness of its belief-conduct distinction, and for the "excessively eclectic" reasoning employed, saying that Waite "sifted through both Jefferson's writings and Lieber's books to find what was supportive while rejecting equally compelling material from these same authors which supported the Mormons' case… Nor did Waite tell his audience that Jefferson was not a Christian but a Deist, suspicious of all revealed religion, or that Lieber was as blatantly anti-Mormon as he was anti-Catholic – hardly unbiased sources on the duties of the faithful" (Clayton, 50).

Application

Although the literal language of the statute limits it to territories, the *Reynolds* opinion has been enforced as applicable within the individual states, as well. However, the opinion gave no consideration to issues of federalism or justification for usurping the traditional control of states over domestic relations. By enforcing monogamy as the official definition of marriage, the Supreme Court established Christianity as the *de facto* state religion, with Protestant Christianity as the preferred expression.

The *Reynolds* Court found itself stymied by what is essentially a philosophical puzzle:

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20 Idaho Territory enacted a test oath provision that stripped the right to vote from all Mormons, whether or not they were involved in plural marital relationships. Idaho Terr. Rev. Stat. (1887) § 508.

> Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances (*Reynolds* at 167).

Nested within this paragraph are two related concerns: how can one religious belief be compromised or privileged when all receive the same Constitutional guarantee, and how can government survive if it cannot regulate the religious conduct of its citizens when it conflicts with civil laws?

The idea that every citizen would become a "law unto himself" could be described philosophically as relativism: the concern that what is true, or in this case, morally permissible, is not a single objective standard but rather is relative to what different cultures or religions allow. In the case of religion, however, religious believers generally agree that truth is objective and accessible through belief in a divinity. So, secular thinkers could see the conflicting religious claims as relative while the religious adherents see them as one objective truth with competing false accounts. The "law unto himself" worry could be a sort of double-relativism: what is morally permissible is relative to the province of religion generally rather than something else (civil law, cultural practice) and, within the set of all religions, some practices are permitted by one religion while constrained by another.

The language of the Court indicates a belief that there is a single, objective standard of truth and that Mormons have gotten it wrong: God does not require polygamy of white

Christians in the United States.[21] At the time of *Reynolds*, the Court and the country held firmly to the social framework of Protestant Christianity; it was the default social construct against which other religions and practices were measured. The Court was not quite able to say that the LDS church was not a religion within the meaning of the Constitution (although Congress did),[22] but it was fully willing to say that polygamy is un-American and a threat to the nation. Further, given the historical setting, the concern about a "law unto himself" could have been directed at the head of the LDS Church, rather than the individual believer.[23]

The Court's choice of a standard also betrays a religious bent: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices" (*Reynolds* at 166). Religions that require practices, then, are at a disadvantage over religions that require mere belief and opinion. If a creed requires only that a person acknowledge Jesus Christ as his/her personal lord and savior, its members are not in eternal jeopardy if a civil law requires them to work on the Sabbath or salute the flag or forbids

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[21] Chief Justice Waite's biographer commented that the Chief Justice referred to his opinion in Reynolds as his "sermon on the religion of polygamy, one of the most scathing indictments of what he considered an immoral practice which he ever delivered from the bench" (Trimble 244 n. 18).

[22] The House Judiciary Committee Report on the Morrill Act said that the framers of the Constitution and First Amendment "did not mean to dignify with the name of religion a tribe of Latter Day Saints disgracing that hallowed name, and wickedly imposing upon the credulity of mankind" and "If the odious and execrable heresy of Mormonism can be honored with the name of religion" then Utah has established one form of religious worship to the exclusion of all others (*Brown* at 19, fn. 27)

[23] Vice President Schuyler Colfax, after visiting Salt Lake City in the fall of 1869, argued that "it is time to understand whether the authority of the nation or the authority of Brigham Young is the supreme power in Utah; whether the laws of the United States or the laws of the Mormon Church have precedence within its limits." (Van Wagoner)

multiple marriage partners. Rather than a neutral division of thought and practice, this standard privileges Protestant Christianity over almost all others.

At the time of the *Reynolds* decision and for decades following, there also was an idea that a common "American" culture was to be developed, that the "melting pot" of American society would assimilate immigrants into the dominant culture. More recently, both cultures and religions have resisted the pressure to meld into a white, Protestant Christian definition of citizenship and have retained individual and group differences. This approach more nearly reflects the philosophical idea of pluralism; that groups with differing belief systems coexist and maintain unique traditions. The worry about each person being a "law unto himself" is especially troubling to civil harmony if there is no prospect of eventual assimilation or agreement on norms of conduct.

Philosophical considerations

To serve as a contemporary guide to analysis and action, the *Reynolds* philosophical puzzle must answer how we can mediate among various religious beliefs while granting each an equal claim to both validity and Constitutional protection. This requires that religious belief/acts[24] have constitutional protections on par with beliefs and opinions. It must also address the concerns of those with no religious faith. They existed at the times of the Constitutional Convention and later *Reynolds* decision but not with the openness and comfort of contemporary

[24] I am indebted to Dan Demetriou for suggesting the term "belief/act" to denote an action either arising out of a religious belief or constituting the belief itself (i.e., fasting, honoring parents).

atheists and agnostics. Further, it must develop a ground of legitimacy and authority for civil laws that constrain belief/acts by religions that give a higher authority to deity than civil law.

Post-Reynolds precedent

Reynolds began the tortuous path of Constitutional protection for religious free exercise, and the philosophical puzzles at the heart of the decision remain unresolved. However, it is important to look at two more recent key cases to clear the ground for a new approach. Most of the issues that make it to the Supreme Court involve minority religions, due at least in part to societal conventions that automatically accommodate mainstream religions. It has been unnecessary for Protestant Christians to challenge laws that either favored them or did not trouble a religion that requires little in the way of daily practice. These two cases mark the poles of religious free exercise jurisprudence.

Wisconsin v. Yoder

Wisconsin v. Yoder stands as a legal high-water mark for accommodation of religion. While it is more expansive than other cases that precede or follow it in allowing a religious practice to conflict with civil law, it is philosophically troubling. Members of two conservative Amish orders challenged Wisconsin's compulsory secondary school attendance law. According to the Supreme Court, the religions "are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence" (*Yoder* at 210). This belief grounds their objection to formal education beyond the eighth grade as an impermissible exposure to worldly influences. The trial court determined that the Wisconsin law did interfere with sincere Amish religious belief, but found that a law requiring

high school attendance for all children was a "reasonable and constitutional exercise of governmental power."

The Supreme Court established this standard of evaluation:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests (*Yoder* at 215).

This sets a very high burden for government intrusion upon religion. For the Amish to succeed, however, the Court said they must be able to show that their religious faith and way of life are "inseparable and interdependent" (*Yoder* at 215). A virtuous and admirable way of life that is based on secular considerations, such as Thoreau's Walden Pond experience, is not protected by the Religion Clauses of the Constitution.

The Court was persuaded that the Amish met this first obstacle, saying their claim was

> one of deep religious conviction, shared by an organized group, and intimately related to daily living. … Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community (*Yoder* at 216).
> …
> In sum, the unchallenged testimony of acknowledged experts in education and religious history regarding almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger, if not destroy, the free exercise of respondent's religious beliefs (*Yoder* at 219).

For its part, the State of Wisconsin argued that religious beliefs are absolutely free from control by the State, but that actions, even if grounded in religious belief, are outside the protection of the First Amendment.

The Supreme Court noted that religiously-grounded conduct is often subject to the police power of the State, but that belief/action is not the bright line that *Reynolds* suggested. "[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment, and thus beyond the power of the State to control, even under regulations of general applicability" (*Yoder* at 220). The compulsory attendance law applied to everyone, not just the Amish, but that didn't automatically save it. A regulation that seems to be neutral might still "unduly burden" the free exercise of religion, but a religious exception to a general rule might also be seen as violating the Establishment Clause. The Court said this is a tightrope that can be "successfully traversed" by charting a course that preserves the autonomy and freedom of religious individuals while avoiding a semblance of established religion.

In its consideration of the arguments advanced by the State of Wisconsin, the Court waxed rhapsodic about the virtues of the Amish lifestyle, saying its members are productive and very law-abiding members of society, that Congress recognized their self-sufficiency by exempting them from social security taxes, that their system of "learning by doing" is an "ideal system" of education, comparing them to religious orders in the Middle Ages that preserved important values of the civilization of the Western World by isolating themselves from worldly influences and to the virtues of Thomas Jefferson's 'sturdy yeoman' who would form the basis of an ideal democratic society.

The Court found that the Amish were able to establish that they are an identifiable religious sect, that their religious beliefs are sincere and interrelated with their daily lives, that the Wisconsin law would have a severe impact on their religion, and that their alternative "informal vocational education" also met the interests of the State in educating high school stuents to contribute to society. "In light of this convincing showing, one that probably few other religious groups or sects could make" (*Yoder* at 236) the Court found that the State failed to show how granting an exception would adversely affect its interest in compulsory education.

It certainly seems plausible that the polygamous Mormons of *Reynolds* could make the same showing. There was no doubt that plural marriage was based upon a sincerely-held religious belief, that the law as enforced would result in the extermination of the LDS religion, and that the social/legal infrastructure of Utah Territory could meet any State concern about the administration of marriage laws. Whereas the *Reynolds* Court believed that the Mormons had gotten their faith wrong, the *Yoder* Court seemed convinced that the Amish have gotten it right. The sets of religious practices differ in that one religion is seen as worthy of admiration and the other not.

Yoder, then presents two questions: did it change the *Reynolds* analysis, and how do we evaluate future claims of religious free exercise? Perhaps the answer to the first question is that public attitudes changed from 1878 to 1972, and *Reynolds* no longer applied as a standard. (It certainly seems to apply on the facts, as outlined above). That possibility was raised in Justice Douglas' dissent, "What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed, and it even promises that in time *Reynolds* will be overruled" (*Yoder* at 247). However, Douglas also suggested a less optimistic interpretation:

> I think the emphasis of the Court on the "law and order" record of this Amish group of people is quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be. I am not at all sure how the Catholics, Episcopalians, the Baptists, Jehovah's Witnesses, the Unitarians and my own Presbyterians would make out if subjected to such a test (*Yoder* 246).

On this reading, the Court's sympathy for both the content and the conduct of the Amish religion influenced its result. It made a value judgment about whether Amish belief and practice constitute a *good* religion, entitled to extended protections based upon an affirmative finding. In extending benefits to one religion, then, the Court decided whether a group was a religion and then whether it was a religion entitled to deference – both determinations that the First Amendment denies to the State in the context of free exercise claims.

Douglas was also disturbed by the Court's exclusion of Thoreauean claims of conscience. He embraced a more expansive view of religion as outlined in *United States v. Seeger* in determining the meaning of "religious training and belief" in the Selective Service Act.

> The test might be stated in these words: a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others … (*Yoder* at 248).

Douglas saw "no acceptable alternative … now that we have become a Nation of many religions and sects, representing all of the diversities of the human race" (*Yoder* at 249, citing *Seeger*, at 192-193, concurring opinion).

In answer to the second question, it would seem that the *Yoder* Court: removed the belief-action distinction of *Reynolds*, kept the requirement that religious conduct be part of an identifiable sect (contra *Seeger*), and required religions to show both that the legally prohibited conduct would have a severe impact on their religion and that allowing it would either cause

little disruption to the State interest or that there was an alternative method of meeting the State interest. The extended paean to the Amish mode of life could be considered as nonbinding dicta (in a harmless interpretation) or could open the door to an evaluation of the merits of religion (in a pernicious reading). The revelatory test occurred when a less exalted religion sought First Amendment protection in the face of a more pressing State interest before a far less sympathetic Supreme Court.

Employment Division vs. Smith.

Two members of the Native American Church were fired from their jobs with a private drug rehabilitation organization in 1983 and 1984 because they ingested sacramental peyote during religious ceremonies. They applied for unemployment benefits, which were denied because their firing was considered work-related misconduct. The court case arose amid two protracted battles, one national and one in Oregon. The national battle was the War on Drugs declared by President Nixon in 1971. Although not part of the official case, a far different religious issue likely spurred the Oregon Attorney General's insistence in pursuing it.

In Oregon, a prolonged religious battle was waged between followers of Bhagwan Shree Rajneesh and local residents of Wasco County. The religious followers incorporated Rajneeshpuram as a city that reached a population of 7,000 for a time. Disputes with neighbors frequently played out in court, but also included charges of poisoning hundreds to prevent them from voting by infecting restaurant salad bars with salmonella. That extended political and legal battle began in the early 1980's and ended at the Oregon Supreme Court in 1987 (*1000 Friends of Oregon v. Wasco County Court*). The Oregon Court of Appeals ruled on *Employment Division v. Smith* in 1987; the Oregon Supreme Court ruled on it in 1986 and again in 1988 (between the

two rulings, the U.S. Supreme Court considered the case and remanded it for clarification of the basis for the Oregon Supreme Court's judgment).

The ongoing dispute between followers of Rajneesh and other local residents involved planning, zoning, state land-use plans and nearly every function of municipal government, as well as criminal charges. If every law at every level could be abrogated by a mere claim of religious purpose, it would leave long-time local residents legally defenseless against the newer religious arrivals. On a superficial view of the parallel cases, it might have seemed necessary to state officials that they dig in against the drug-use exception for peyote in order to remain consistent in their opposition to religiously-cloaked misbehavior in and around Rajneeshpuram.

Justice Scalia wrote the majority opinion for the Supreme Court, noting at the outset that the exercise of religion can include not only belief and profession, but also "The performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation" (*Smith* at 877). He speculated that the free exercise of religion would be implicated if the State tried to ban acts only because of their religious character: "It would doubtless be unconstitutional, for example, to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf" (*Smith* at 877-878). The problem for the dismissed drug counselors was that their activity violated criminal laws when the *purpose* of the anti-drug laws was not to prevent religious behavior. If the purpose of the law is not to prohibit religious free exercise but "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended," Scalia wrote (*Smith* at 878). The *Smith* opinion returned to *Reynolds,* quoting with approval the distinction between

belief and practice, including the specific worry: "To permit this would be to make the professed doctrines of religious belief superior to the laws of the land, and in effect to permit every citizen to become a law unto himself" (*Smith* at 879).

How, then, to deal with *Yoder*? Scalia grouped it with other First Amendment cases that combined two Constitutional claims (a free exercise claim along with interests of parenthood or with freedom of speech or press) as hybrid situations. Decades of religious free exercise rulings were dispensed with by this felicitous definition.

> Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. **We have never held that, and decline to do so now**. … [T]he rule to which we have adhered ever since *Reynolds* plainly controls (*Smith* at 882, emphasis added)

Scalia rejected the idea that the government must show a "compelling state interest" to be permitted to burden religion, even though that is the standard for different treatment on the basis of race or the content of speech. He said that in those cases, the standard produced equality of treatment and free speech, which are core constitutional norms. Applied to religion, however, the standard would produce "a private right to ignore generally applicable laws"-- a constitutional anomaly. He also rejected a move to require a compelling state interest only when the conduct at issue is "central" to the religion, saying it is inappropriate for a Court to determine how central a belief is to any religion:

> What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." … Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim (*Smith* at 887).

Following a fine apocalyptic tradition in Constitutional scholarship, Scalia presented a parade of horribles that if the "compelling state interest" test were applied in a society as diverse as the United States: "[P]recisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." To do so would allow exemptions from: compulsory military service, payment of taxes, health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, social welfare legislation such as minimum wage laws, animal cruelty laws, environmental protection laws, and laws providing for the equality of opportunity for races (*Smith* at 888-889).

Justice O'Connor's concurring opinion said those prior cases demonstrate that the court has been quite capable of striking "sensible balances" between religious liberty and competing state interests (*Smith* at 902). In response, Scalia said, "It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice" (*Smith* at 891).

He suggested that religious practices instead seek protection in the legislature, giving as an example that many states had exempted religious use of peyote from drug laws. He admitted, "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," but he saw the alternative as worse, because this "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs" (*Smith* at 890).

In the push to the legislature, Scalia ignored two counterexamples, both noted in the case before the Court. During Prohibition, an exemption for communion wine was written into the governing administrative rules.[25] It was unnecessary for Christians or Jews to seek protection from the legislature because a sympathetic government automatically provided it. The use of peyote for the Native American Church holds a metaphysical position similar to the communion wine of Catholicism.[26] The difference in protections illustrates the religious bias in favor of majority religions built into the government (and, that by the time of Prohibition, Roman Catholics were considered more favorably than they were at the time of *Reynolds*).

The second counterexample is *Minersville School District v. Gobitis*. The Supreme Court ruled that Jehovah's Witnesses could be required to salute the flag in school. At the end of the decision, Justice Frankfurter suggested that, while judicial review is an important limitation on popular government, the legislature is also committed to the "guardianship of deeply cherished liberties. … To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies, rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people." The problem for Scalia is that Frankfurter's

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[25] National Prohibition Act, Title II, § 3, 41 Stat. 308, cited in footnote 6 of Justice Blackmun's dissent.

[26] While wine is used in Jewish traditions and some Protestant communion services, it is considered to be symbolic for most. Lutherans hold a view called consubstantiation, in which the body and blood of Jesus Christ coexist with the bread and wine. The Roman Catholic Church teaches that the bread and wine transform into the actual body and blood of Christ through a doctrine called transubstantiation. This metaphysical transformation is a culminating moment in the Catholic Mass and cannot take place if substitutions are made, for example, grape juice rather than wine (or non-wheat bread). I have written on the philosophical significance of this in my 2007 article: Transubstantiation in Aquinas and Ockham, *NEXT: Emerging Voices in Religious Studies Scholarship*, Vol. 1. University of Colorado.

position was overturned three years later when the Court reversed itself and responded directly by saying:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. (*West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624).

The retreat to the belief-action distinction of *Reynolds* got judges out of the business of evaluating religious content and conduct, towards which *Yoder* teetered. But it came at a high price. Smith allowed government again to forbid religious belief/acts as long as the offending law is not explicitly and directly aimed at them. While some laws will still be so inartfully drawn as to be invalid,[27] it is far more common that religion is burdened as an incidental side effect of an otherwise neutral law. To leave that as the standard of protection for religious belief/acts eviscerates the free exercise guarantee of the First Amendment.

Jurisprudential puzzles

Religion clause jurisprudence has reached "a state of incoherence that leaves many uncomfortable, both on and off the bench" (French 90). Following the *Smith* decision, Congress signaled its discontent by passing the Religious Freedom Restoration Act (RFRA), which the Supreme Court struck down in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). "After a

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[27] "[T]he laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. at 524 regarding Santeria practices.

majority relegated religious freedom to majoritarian political process in *Smith*, the Court in *Boerne* invalidated one of the clear products of that practice – RFRA, passed by a nearly unanimous Congress" (Soifer, "Fullness of Time," 263). In her lengthy dissent, Justice O'Connor cited many examples of exceptions given to members of religions in the early days of the country that parallel recent cases where accommodation has been denied. There seems to be no principled approach to evaluating religious exercise claims.

To the "each conscience is a law unto itself" of *Reynolds*, *Smith* added the concern that "judges weigh the social importance of all laws against the centrality of all religious beliefs." Granted, the approach of *Yoder* is worrisome, in that the value of religion to society seems important. But are judges really not able to tell the difference between "the practice of throwing rice at church weddings … and the practice of getting married in church?"[28] Those kinds of decisions seem to be at the heart of most judicial determinations. And if it is not to be judges, are legislatures more qualified to assess how much a law burdens a specific religion? Would they not look to the same sort of evidence? Our first new worry is: who decides how to accommodate religious practices.

The second new worry is what exactly counts as a religious act. This concern was removed by *Yoder*, but *Smith* reintroduced the belief/action distinction. The majority opinion noted that religious belief includes some acts: assembling for worship, sacramental use of bread and wine, proselytizing, abstaining from certain foods or modes of transportation. It provides no guidance for assessing whether a religious act comes within the protection of the First

[28] Majority opinion footnote 4.

Amendment, except to say that the sacramental use of peyote *during religious services* does not because that act violates a law that is not specifically directed at the religious nature of the practice. The character of the act is not at issue. It seems that religious belief is protected and an act motivated by religious belief is protected if a law targets the belief, but the same act is not protected if a law targets the practice regardless of belief. The underlying religious belief is the same in either case, and the religious act is the same in both. The only thing that has changed is the intent of the law. This changes the standard for assessing infringement from whether religious free exercise was burdened to whether the government *intended* to burden religious free exercise. Thus the *Reynolds* belief-practice division remains with the caveat that practices specifically targeted by laws directed at religious belief move to the protected side of the line.

On this analysis, the Morrill Act targeting polygamy because it was a practice of the LDS Church specifically fails. Certainly the set of laws passed in the effort to exterminate polygamy is legally similar to the group of municipal ordinances targeting Santeria animal sacrifice invalidated by the post-*Smith* court.

> But the ordinances when considered together disclose an object remote from these legitimate concerns [suffering or mistreatment of animals]. The design of these laws accomplishes instead a 'religious gerrymander," … an impermissible attempt to target petitioners and their religious practices. It is a necessary conclusion that almost the only conduct subject to [the ordinances] is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. (*Church of the Lukumi Babalu Aye, Inc., et al v. City of Hialeah at 535).*

Smith purports to return to the *Reynolds* analysis without revisiting the underlying core conflict. Perhaps the Court was so distracted by the parade of horribles *Yoder* would seem to permit that it sought improvident refuge.

Back to polygamy

Although the LDS church renounced the practice of polygamy (at first reluctantly and later enthusiastically), other religions sharing the same prophetic roots have retained the belief that plural marriage is essential for salvation. Some left the United States for Canada or Mexico, others moved to remote locations in the U.S. southwest. Members of these groups have continued to lodge futile legal protests to both the civil and criminal bans on polygamy. Until 2015, no case was able to successfully challenge polygamy in Utah state or federal district courts. That changed, due (at least in part) to two television programs.

A sympathetic account of fictional polygamist families in HBO's *Big Love* (2006-2011) spawned a reality show called *Sister Wives* (2011-2015) on TLC network.[29] That program featured Kody Brown and his four wives, who lived in a religious polygamist relationship in Utah. The public exposure forced the hand of Utah law enforcement officials. The state had adopted a policy of not prosecuting polygamy unless another criminal charge, such as spousal or child abuse, was alleged. Embarrassed by the open flouting of the law by the Brown family, the county attorney launched an investigation into their legal status. The Browns moved out of Utah, and filed a lawsuit challenging the state statute that bans marriage, purported marriage, and/or cohabitation of more than one man and one woman.

While some prior plaintiffs had sought multiple marriage licenses (*Bronson v. Swenson*), the Brown family claimed only that they should not be subject to arrest for their personal

[29] Another reality program called *My Five Wives* aired on TLC for two seasons, from 2013-2015. The Williams family remained polygamist after leaving their church.

relationships. They held one marriage license, between Kody and his first wife.[30] The subsequent wives did not request legal status as spouses. The legal battle over polygamy had earlier attracted the attention of legal scholar and Constitutional law professor Jonathan Turley. He volunteered to represent the Brown family free of charge. Their legal challenge detailed seven constitutional claims: due process, equal protection, free speech, free association, free exercise, the Establishment Clause, and 42 U.S.D. § 1983 (*Brown v. Buhman*).

The Brown family's Establishment Clause challenge was to the 1973 Utah Statute banning polygamy and cohabitation. It argued that the statute was the result of a "sectarian dispute" over the practice of polygamy between the LDS Church and members of fundamentalist religions with Mormon roots. Turley's brief included statistics showing that 62% of the Utah population belonged to the LDS Church, including 90% of the 75 Utah House members and 27 of 29 senators. The Brown family argued this makes the LDS Church the de facto established religion in the state, especially on issues on which it takes an official stand. Federal District Court Judge Clark Waddoups noted that "it is perhaps a bitter irony of the history at issue here that it is possible to view the LDS Church as playing the role of both victim and violator in the saga of religious polygamy in Utah (and America)" (*Brown* at 14).

As defined in the Utah statute (passed by the LDS-dominated legislature long after the church disavowed polygamy), cohabitation can include people in adulterous relations. Since the law seems to be neutral on its face, the Judge Waddoups examined whether it was neutral in

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[30] That changed in 2014 when they obtained a civil divorce and Kody performed a civil marriage ceremony with his fourth wife. All four remained spiritual wives.

operation, observing, "[T]he court notes the commonplace occurrence of cohabitation in contemporary society" (*Brown* at 54).

During oral argument, he posed a series of scenarios to the assistant attorney general representing the state.

1. Court: a man has intimate relationships with three different women, who live in different residences and he has children with all of them. There is no marriage license or recognized public document that he is married to any. State: that would not be called polygamy because there is no marriage. (Although, the judge noted that in a prior case, the State applied to have one of the relationships declared to be a legal marriage so that the husband could then be charged with bigamy under the cohabitation statute (*State of Utah v. Green*) The defendant in that case had also appeared on national television.)
2. Court: a man is legally married to one woman but has intimate sexual relationships continuing with two other women, with no commitment. State: this situation is no different from someone having an affair, the cohabitation statute does not apply.
3. Court: a man is legally married to one woman and has intimate relationships with two other women but to one of the women he says "I'm committed to this woman, I'm going to take care of her for the rest of her life." State: this may not change the analysis because there has to be a second marriage of some sort.
4. Court: the man from scenario 3 makes the same profession before a Jewish rabbi. State: it is not the fact of recognition by the religion, but when they hold themselves

> out as husband and wife, that the statute applies. If the couple says they are not married but just living together, the statute does not apply.

The exchange continued for some time, with the assistant attorney general finally linking the statute directly to religious polygamy:

> But let's look at how this really works in practice. In practice, there is the marriage, it may not be recognized by the state, but it is a marriage, it's performed, there is a wedding ceremony performed, there are vows exchanged. The problem is proving it. The federal government had that problem in the 1880s. That's why they added cohabitation to the Edmunds Statute. The same thing with the Utah statute. The problem was proving that they were married, so they added cohabitate, but the person has to cohabitate knowing that the other person is married …
>
> Court: so tell me what's different between adultery and what you've just described. State: the one is that they claim to be married. But just because the state can't prove it doesn't mean it hasn't happened. That's what's happening in the [religious] polygamist communities. Court: so it's the expression of the fact that the person is a wife that makes it illegal. State: yes. (*Brown* at 59-62)

The summary of facts compiled by the judge includes: prosecutions under the statute have been rare and published cases in the last three decades only involve religious families; Utah government officials are aware of thousands of polygamist families in the state, but investigation of the Brown family began only after the first episode of *Sister Wives* aired.

The 91-page opinion contained multiple references to the lack of effort made by the State of Utah, which clearly felt that mentioning *Reynolds* was all that was necessary to prevail. "It would be an easy enough matter for the court to do as Defendant urges … defaulting simply to *Reynolds v. United States*, 98 U.S. 145 (1879) without seriously addressing the much developed constitutional jurisprudence that now protects individuals from the criminal consequences intended by legislatures to apply to certain personal choices" (*Brown* at 10). Waldoupps

evaluated each of the claims, and found for the Brown family on the issue of cohabitation – a ruling that was hailed as a landmark at the time (Bryson, n.p.). However, he felt bound by *Reynolds* on the issue of marriage, even after criticizing its many legal and philosophical failings.

> The court notes that 113 years after Reynolds, non-Mormon counsel for Plaintiffs have vigorously advanced arguments in favor of the right of religious polygamists to practice polygamy (through private "spiritual" marriages not licensed or otherwise sanctioned by the state, a relationship to which the court will refer as "religious cohabitation") that would have perhaps delighted Mormon Apostles and polygamy apologists throughout the period from 1852 to approximately 1904. To state the obvious, the intervening years have witnessed a significant strengthening of numerous provisions of the Bill of Rights, and a practical and morally defensible identification of "penumbral"[31] rights "of privacy and repose" emanating from those key provisions of the Bill of Rights, as the Supreme Court has over decades assumed a general posture that is less inclined to allow majoritarian coercion of unpopular or disliked minority groups, especially when blatant racism (as expressed through Orientalism/imperialism), religious prejudice, or some other constitutionally suspect motivation, can be discovered behind such legislation (internal citations omitted) (*Brown* at 11).

Pointing to a change in legal precedent is one facet of determining how claims of religious exercise should be evaluated. However, as the Supreme Court noted in its opinion legalizing same-sex marriage, "The nature of injustice is that we may not always see it in our own times" (*Obergefell v. Hodges*, 11). It is easier to identify past wrongs than to predict future inequity, and most difficult still to decide in the midst of a current controversy.

Chapter Two begins that task by considering a functional definition of religion that includes the power relationship identified by *Reynolds*, but extends it to the lives of individuals

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[31] A penumbra is a space of partial illumination between shadow on all sides and full light. Henley (81-100) traces the legal development of the term from Justice Oliver Wendell Holmes in 1873 to its more recent usage by Justice William O. Douglas in recognizing a right to privacy in *Griswold v. Connecticut*: "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance" (*Griswold* at 484).

who seek to express religion freely. These individuals will differ in beliefs about what has been called "the metaphysics of ultimate reality" that include differences in personal identity. This approach will be guided by the philosophy of José Ortega y Gasset on the nature of the self and how to reconcile conflicting points of view. It also considers the interaction of toleration and religion, and explores how misidentification of the appropriate target of toleration harms religious believers.

Chapter Three will make use of philosophy to consider what has changed between the marriages (and court cases) of George Reynolds and Kody Brown, guided by the philosophy of Ibn Khaldun. His concept of social/cultural identity will be defined and applied to the context within which religious free exercise claims arise, and how to address changes in that context over time. I will apply the functional definitions of religion and personal identity from Chapter Two in an Islamic perspective by looking at how Morocco handles polygamy.

Finally, Chapter Four grounds and then rejects the approach of considering religious exercise as requests for exemptions from neutral laws. It uses the example of Islamic veils to illustrate the difference between creating exceptions and accommodating identity. I set two constraints on accommodation of belief/acts that conflict with social/cultural identity. The chapter then returns to the social and political context of the original *Reynolds* opinion to ask what the court could have done differently *at the time* to accommodate Reynolds and engender a more coherent approach to the family of Kody Brown.

CHAPTER TWO: PHILOSOPHICAL PERSPECTIVE

The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

-- Reynolds v. United States at 162

The Supreme Court is not alone in struggling to identify or define religion. After surveying several attempts at definition, the editor of a textbook on philosophy of religion concludes that "a considerable degree of consensus has emerged amongst scholars of religion that it is not possible – or perhaps even desirable – to define religion so as to completely remove any and all ambiguity about whether a particular thing is a religion or not" (Eshleman, 4). Comparative religion scholar Wilfred Cantwell Smith devoted a chapter in his book *The Meaning and End of Religion* to a discussion of whether the concept of "religion" serves any useful purpose. He noted that a historian of religion asks different questions than a philosopher of religion or man of faith, saying "The rich panorama of man's religious life over the centuries presents the observer with a bewildering variety of phenomena" (Smith, 4).

The approach of this chapter is to build upon Chapter One's description of how law has treated religion to consider how law should treat religion. For, as Cantwell Smith also observed "Yet religion itself continues, and in many parts of the world appears perhaps to be resurgent. For a time some thought that the onslaught of science, comparative religion, uncertainty, and the rest – in a word, the onslaught of modernity – meant or would mean the gradual decline and disappearance of the religious tradition. This no longer seems obvious" (Smith, 3). There would be no pressing need to inquire into the religious freedom that is guaranteed by the First Amendment if contested issues no longer made their way to court.

Limiting the inquiry to the interaction of religion with law may reduce the scope without increasing the focus, however. Rebecca Redwood French chronicled the Supreme Court's struggle to either define or characterize the term "religion," saying that it has stumped the Court and its commentators.

> By the 1990s, a significant section of the academy has given up on the endeavor entirely, others have declared that looking for a single definition … is not useful, and a third group has turned to a wealth of interdisciplinary sources. The appearance of deep incoherence in the religion-related decisions by the Court in the past decade is often cited as the reason for the continuing move to definition in the legal academy (French, 49).

In her delightfully-entitled article "From *Yoder* to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law," French looked at how members of the Court regard any particular religion. She abstracted and analyzed all the First Amendment cases to extract hundreds of "contextualized quotes characterizing religion" (French, 55). From these, the language was grouped into categories, and then into clusters of types of religion. She found, and wrote descriptions for, the three basic types of religion listed in the title of her article. French found that each type occurred both positively and negatively in Court opinions. The traditional model "has a positive normative weight when it represents an American Quaker in the founding period … but it has a negative weight when it is used to typify the former Hindu practice of *suttee* [in *Reynolds*]. … Both images are derived from the central prototype of a devout population with a strong religious cosmology" (French, 57). The conclusion and predictive value that French proposes for her study are philosophically disturbing: "The opinions of the Court are determined, to a large degree, by the stereotypical images that the Justices have of the particular religion involved in the case" (French, 91).

Philosopher Brian Leiter has argued that the problem is not definition, but rather justification. He attempted to make the case that there is no reason for giving religion *qua* religion special treatment in law. In his book *Why Tolerate Religion?*, Leiter began with the example of a boy who enters a new middle-school classroom wearing a dagger on his belt. The teacher alerts the principal, who calls police, who confiscate the dagger because weapons are not allowed in school. Leiter wondered why the boy would be allowed to wear the dagger if he is a member of the Sikh religion but not if the dagger were a family heirloom, passed on through the generations as a signifier of "manhood." In both cases, carrying the dagger is central to the boy's identity. He argued that both boys should be out of luck. He maintained that there has been no principled argument for why religious practices should receive special legal and moral treatment. While I disagree with Leiter on his conclusion, I agree with this goal:

> Any examination of religion ought to do some justice to our pretheoretical intuitions about what counts as religion. An analysis according to which Catholicism is not a religion, but devotion to one's favorite football team in the World Cup is a religion is prima facie (and probably irredeemably) deficient. But pretheoretical intuitions about what counts as religion are not the only relevant considerations. Most important, we want to identify religion in such a way that we can see why it has some moral and possibly legal claim on special treatment (Leiter, 30).

Leiter offered four characteristics of religion:

1. Religions issue demands on action that believers take to be categorical – demands that must be satisfied no matter what the consequences are in terms of worldly incentives or disincentives.
2. Religious doctrines are insulated from ordinary standards of evidence and rational justification.

3. Religious beliefs involve a metaphysics of ultimate reality. He uses "ultimate" to mean most important for "valuable/worthwhile/desirable human lives … that is, the reality that makes their lives worthwhile and meaningful" (Leiter, 48).
4. Religions offer existential consolation, they render intelligible and tolerable the basic existential facts about human life, such as suffering and death.

Leiter used the third factor to rule out groups like Maoist personality cults from the definition of religion. However, he quickly decided that it is unnecessary because number two already captures what is significant about religion (the *metaphysical* character of religious beliefs about ultimate reality) and many non-religious belief systems are also concerned about human welfare. The remainder of his analysis relied only upon factors one, two and four. He considered whether religion so defined is worthy of either toleration or respect on Kantian or Utilitarian grounds, concluding that there should be no exemptions from neutral laws for religious conduct.

Leiter's treatment of the metaphysics of religious belief, however, keeps a focus on actions arising out of religious commitment without addressing the most basic metaphysical question: what exists? Leiter's "ultimate reality" (what makes life worthwhile) is only answerable by reference to that more basic question. Rather than serving no practical purpose, the metaphysics of ultimate reality is the heart of religion. The schoolboy who wears a dagger given to him by his father when he reached manhood does not believe that it will be a consideration in what happens to him after death. The Sikh schoolboy's dagger wearing is a belief/act that impacts his eternal existence.

I propose that the concept of religion contains three interrelated aspects that are often conflated. Teasing them apart illustrates why the question of religious belief and behavior is so vexatious. It also allows us to consider law's appropriate response to each aspect.

Refocusing religion

Mormon polygamy in the United States fused this religious practice with political significance. It was not difficult for the *Reynolds* court to identify religion as a competing normative authority. Government limited marriage to one man and one woman of the same race (if they were white); the LDS church required polygamy of those who were selected. A second concern was less certain. If there is a divine mandate for plural marriage, what can civil government rely upon as authority to forbid the practice? It is a question that arises because the civil government is committed to allowing religious diversity, and religions make competing claims about what actually exists – the metaphysics of reality. Rather than a detailed doctrinal survey, this aspect is captured by asking: what happens when human beings die? The answer leads to the third relevant aspect of religion that *Reynolds* mentioned but did not explore: religion includes an account of embodiment. These three aspects of religion must be addressed in any satisfactory framework for evaluating religious free exercise – and a philosophical analysis of each points to a possible resolution.

Competing normative authorities

The interaction between civil government and religion varies by country. The First Amendment to the Constitution defines that relationship in the United States: all religions are permitted but none may be favored. The *Reynolds* court, then, made a sort of category error when it looked to English common law for precedent in handling polygamy *as a religious*

practice. The Church of England is established as the official religion, so its beliefs may be favored when regulating practices of citizens in that country. Indeed, the opinion notes that the prohibition on polygamy originated in ecclesiastical courts. But an established church was one of the very things rejected by the framers of the U.S. Constitution. The identification of the proper relationship between civil laws and religious practices, then, is only the beginning of the inquiry, rather than the conclusion. It sets the terms of engagement.

The relationship of church and state as competing normative authorities in the United States may be described as one of mutual toleration.[32] The government "puts up with" the different demands of religion upon its citizens. Churches recognize that they may not seek governmental preference, and that some limits on their authority may be imposed. In a country with varying religious beliefs and no state religion, conflict is inevitable. *Reynolds* correctly determined that the right to religious exercise cannot be unlimited if civil government is to survive. The challenge is to determine when and how the government may intrude upon religious exercise, rather than pretending that regulating religious actions is no imposition upon belief.

Metaphysics of reality

Religions make conflicting claims about what exists – the metaphysics of reality. One way to categorize these claims is by asking what happens at death. One option is that the death of the material body is the end of life, *simpliciter*. A second option is that some sort of non-physical life continues, as a spiritual or energy force, or through reincarnation. The common theme for

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[32] "The word toleration had its origins in the Latin term *tolerantia*, meaning to endure or bear ... In the 16th century, the noun form of the word appeared, meaning the permission or concession allowing another religion to exist" (Creppell 8-9).

this option is that the entity after death is not aware of the memories or activities of the entity before death. A third option is that some sort of individuated life continues, which retains memories of, and perhaps responsibility for, the experiences of the entity before death. This may include resurrection of the physical body, as in both Christianity and Islam.

This functional definition of religion helps to illustrate why religious actions are both important and problematic. They impact eternity, yet are impervious to verification when law matters - before death. The lack of epistemic access creates another baseline for interactions between church and state, or civil authority and citizens. It requires that government adopt a stance of ontological agnosticism. There is a fact of the matter about what happens at death but it cannot be accessed to determine which, if any, of the three options in my functional definition of religion is correct. From a religious point of view, the existence of an afterlife is taken as a fact. It is this perspective that generally creates Court cases concerning belief/acts, so is the focus of analysis going forward.

Underlying the campaign against polygamy conducted by the U.S. government was the attitude that Mormons were wrong about the importance of polygamy to eternal salvation (of the option three, Protestant Christian type), so prohibiting it did no metaphysical insult. Whether or not that was acceptable as a governmental attitude in the 1800s, it is no longer an adequate foundation for either legislation or jurisdiction in the U.S. as a multicultural, multi-religious society.

Embodied eternal identity

The religious options outlined above do more than describe what happens at death, they define how we live. Rather, they define who we are *as* we live. On option one, I am an embodied intelligence that will cease when my body dies. Option two defines me as an intelligence with a spirit or essence that will continue after the death of my physical body. This spirit may, or may not, be impacted by the actions of my physical body during life. Option three makes significant demands upon my embodied existence. As I live each day, I am a body with an intelligence and an eternal essence, or soul. This invisible identity is the most important, because it continues for eternity. On the LDS view, it also pre-dates my physical existence: my currently-invisible self exists as an individuated essence both before and after embodiment.

The Supreme Court acknowledged that George Reynolds believed practicing polygamy was essential to his salvation. At the time, it was a threshold consideration, in that his marriage was based upon a belief that was taken to be religious and sincere. No other components of personal identity that now receive Constitutional protection would have been relevant at the time.[33] Although they had recently been freed from slavery, black men were far from equal citizens. Women not only lacked the right to vote, they also lost rights to person, property and progeny upon marriage. The idea that a man and woman of different races might marry was almost 90 years away (*Loving v. Virginia*). Protections for sexual orientation or same-sex marriage were even more distant.

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[33] The Due Process Clause of the Fourteenth Amendment now protects such fundamental liberties.

Interacting Identity

Two concepts that will refocus religious exercise are found in the work of Spanish philosopher José Ortega y Gasset. Ortega wrote extensively about political issues, as Spain worked through civil war and several forms of government during his lifetime. He was educated in Jesuit schools but was not a religious man. If presented with problems about the interaction of government and religion, his first concern would have been to eliminate any influence of religion upon civil life; his second would have been to increase the rigor of religious rhetoric and logic. In this spirit, he is a most appropriate philosophical patron saint for this dissertation.

Ortega was born in 1883 into a family of Spanish newspaper publishers.[34] When young, his family spent each fall and winter in Córdoba or Málaga. Ortega studied under the Jesuits in Málaga and went on to pursue philosophy, letters and law at the University of Salamanca, where Miguel de Unamuno was one of his examiners. He received a *licenciatura* in philosophy and letters from the Central University of Madrid in 1902. Ortega studied philosophy in Germany on two occasions as a young adult, including neo-Kantianism at Marburg under Hermann Cohen and Paul Natorp. He also became acquainted with phenomenology. Upon his return to Spain, he took up a post as professor of Metaphysics at Central University of Madrid, which he held for 24 years.

Spain was beset with political turmoil throughout his life. When military dictator Miguel Primo de Rivera closed the University for a time, Ortega delivered a series of lectures on "What is Philosophy" in student residence halls, the auditorium of a private school, and a theatre. He

[34] A detailed biography with discussion of Ortega's many lectures, publications and travels is in Holmes, 3-21.

was re-appointed to his position as chair by King Alphonso XIII, who later fled the county when the second Republic was proclaimed. During the Spanish Civil War, Ortega left for France and then Argentina. He returned to Spain at the end of World War II, dying in Madrid in 1955.

Ortega's philosophical approach is a variation of perspectivism.[35] Perspectivism was developed in the 1700s and by 1882 the term was used to describe the theory that the world consists of different, equally valid, points of view, each offering a unique perspective that is indispensable to the whole. Some aspects of perspectivism appear in many philosophical approaches, including phenomenology, existentialism, pragmatism, analytic, and process philosophy. What these approaches have in common is a move away from an external standard of reality and truth, such as God or a realm of eternal truths or universal concepts. They also include the idea that our interaction with the physical world adds an important dimension – for some, the only dimension – to truth and reality. Philosophers engaged in perspectivism still provide slightly different responses to charges of relativism and how we interact with the world and other humans.

Ortega's metaphysical innovations provide a different way of looking at how civil government may interact with citizens of varying faiths. In each of the concepts, I will describe Ortega's position, and then a modified version of the concept that is catholic, in the sense of

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[35] This paragraph and other parts of this section appear in: "Perspectivism" in *Multicultural America: A Multimedia Encyclopedia*, Carlos Eliseo Cortés, J. Geoffrey Bolson, editors, Thousand Oaks, CA: SAGE Publishing, 2013.DOI: http://dx.doi.org/10.4135/9781452276274.n686

universal or all-embracing. But first, it is important to address issues of translation for the names of these concepts, and another to be considered in the next chapter.

About translation

The terms Ortega used to describe his philosophy of life are problematic when translated into English. The English phrases have been too superficial, and yet difficult to dislodge. Andrew Dobson defended his translation of *razón vital* as 'reason from life's point of view' against the common rendering of 'vital reason.' He noted a previous translator felt compelled to use the standard translation but it no longer makes sense in modern English. "Although the word for 'vital' in English can still mean 'full of life and force' or 'necessary for life', its primary meaning is that of 'very necessary' or 'of the greatest importance' " which is inadequate to convey the "immediate sense" of the term as Ortega intended it (Dobson 171).

And yet, he lodged no complaint against the translation of a phrase I find equally troublesome: *yo soy yo y mi circunstancia* as 'I am I and my circumstances.' I will avoid the common English translation for the same reason: circumstance in English is understood differently than Ortega intended it, no matter how closely the words seem to appear. Instead, I translated the phrase in context as "enculturing self" to capture both the dynamic and relational aspects of human life as described by Ortega.

Ortega wrote an insightful essay on translation in which he discussed difficulties in approach and execution. He concluded that the best translation captures the spirit of the original language in the second.

> What is appreciated is … carrying the possibilities of their language to the extreme of the intelligible so that the ways of speaking appropriate to the

> translated author seem to cross into theirs. The German versions of my books are a good example of this. In just a few years, there have been more than fifteen editions. This would be inconceivable if one did not attribute four-fifths of the credit to the success of the translation. And it is successful because my translator has forced the grammatical tolerance of the German language to its limits in order to carry over precisely what is not German in my way of speaking. In this way, the reader effortlessly makes mental turns that are Spanish (Schulte 110).

Translating "circumstance" as *umstande* in German, then invokes the sense of *lebensumstände* understood as "life circumstances." This seems to indicate a closer connection to personal identity than the word's English connotation of external events or actions.

The majority of contemporary philosophical engagement with Ortega's thought is done in the Spanish language, in Spain and Central/South America. Many articles, lecture notes, and his completed works remain untranslated. Popular books have been translated by journalists and historians (and one who remained anonymous). Critical engagement with Ortega in English reveals current translations to be superficially correct but philosophically under-nuanced. With his permission, I translate Ortega to retain some of his rhetorical flair in philosophical terms. The original Spanish is quoted in the footnotes. I follow this approach in the next chapter, as well, when considering a term used by Ibn Khaldun.

Enculturing self

Ortega introduced the concept of a socially-situated self in his first book as a philosophy professor, *Meditaciones del Quijote*, a work he calls *amor intellectualis* (saying he is resuscitating Spinoza's term). A man, Ortega said, achieves the most of his capacity when he

obtains the full awareness of his surroundings.[36] Through them, he communicates with the universe (MQ 9).[37] To describe what he meant by surroundings, Ortega added the Latin ¡*Circum-stantia*! (circum: around, near, among; stantia: stand, remain). [38]

> The voiceless things that surround us! Very close, so close to us they raise their silent features with a gesture of humility and yearning as though desirous that we accept their offer yet embarrassed at the obvious planeness of their contribution. And we walk among them, blind to them, focusing on remote ventures, planning the conquest of far-away hypothetical cities (MQ 9).[39]

For Ortega, each self is this reciprocal relationship between the body and its surroundings (Holmes 85). Huéscar retains the hyphenation when explaining "the locution 'circum-stance' … refers to the bodily or 'physical' world (including my own body and its particularities) and the mental 'world' (including my own 'soul' and its individual characteristics)" (Huéscar 126). Dobson adds the dynamism of the relationship "'Things' in their radical reality are what they are in terms of their action on me and in this sense must be conceived of in a transitive rather than a static fashion" (Dobson 146). Ortega was never really happy with the term *cosas* ("things"), explaining later "my human life … puts me in direct relation with everything about me -- minerals, plants, animals, other men …" (*Man and People* 59).

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[36] El hombre rinde el máximum de su capacidad cuando adquiere la plena consciencia de sus circunstancias. Por ellas communica con el universo (9).

[37] MQ is used to denote *Meditactions del Quijote*, which was published separately as well as in Ortega's later *Obras Completas*.

[38] ¡La circunstancia! ¡*Circum-stantia*!

[39] ¡Las cosas mudas que están en nuestro próximo derredor! Muy cerca, muy cerca de nosotros levantan sus tácitas fisonomías con un gesto de humildad y de adhelo, como menesterosas de que aceptemos su ofrenda y a la par avergonzadas por la simplicidad aparente de su donativo. Y marchamos entre ellas ciegos para ellas, fija la mirada en remotas empresas, proyectados hacia la conquista de lejanas ciudades esquemáticas (9).

Dobson followed the translation of "realidad radical" as "radical reality" by Willard Trask in *Man and People*,[40] even though Ortega took pains to explain: "We must go back to an order of ultimate reality, to an order or area of reality which because it is *radical* (that is, of the root) ..." (M&P 38). Not radical in the sense of extreme or exhaustive, this *root* is the reality of our individual lives. Ortega roots his perspectivism in the reality of human existence, in the way in which embodied individual humans encounter and impact the external world.

Far from solipsistic, however, on Ortega's view our individual lives include, and are included in, the lives of others. "What we call 'other people's lives' – the life of one's friend, of one's sweetheart – is something that appears in the scenario that is my life, the life of each, and hence supposes that life" (M&P 39). Unlike philosophers who have imagined man as essentially isolated, Ortega's philosophy accounts for the biological fact that humans are born into pre-existing relationships of family and community. "The part of my world that first appears to me is the group of men among whom I am born and begin to live, the family and the society to which my family belongs – that is, a human world through which and influenced by which the rest of the world appears to me" (OC 7, 151-152). Society, then, is not an institution but a condition in which man finds himself "irremediably and without any hope of true escape" (*Concord and Liberty* 33).[41]

Ortega's explanation of how we understand others contrasts with the phenomenological approach of his contemporary, Edmund Husserl. Husserl used *Einfühlung* or "empathy" as a

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[40] *Man and People* is abbreviated as M&P hereafter.

[41] *Concord and Liberty* is abbreviated as C&L hereafter.

theory of how we experience others.[42] Ortega read this as presenting the "Other" as analogous to my "I".

> 'It is assumed, for him, that it is a double of my "I" and still does not serve the function of explaining the most difficult question – namely, how is it possible that this "double" of myself continues to appear to me as constituting the other?' … For Ortega, this manifestation of "[my life as] radical reality" constitutes the fundamental feature of being-for-and-with-others and consequently cannot be explained as an isolated "I" that somehow discovers a way of confronting another equally isolated "I". … The "I" and the other, then, are constituted by their appearance before each other, in the common world of society, and as each engages in reciprocal interaction (Holmes, n.p.).

Ortega's view of how we interact with others opens the possibility for us to experience in our lives people with whom we are not empathetic, or sympathetic. We need not understand their motivations to realize their impact upon our immediate reality.

Language is also part of our interaction with our surroundings. The real meaning of a word is in the way that it functions in human relationships. "Hence, we must know who says it to whom, when and where. Which indicates that meaning, like all things human, depends on circumstance" (C&L 12). Verbalization is only part of the meaning that is created in the living interaction.[43] As an example, the word "black" can mean either a color or a mood. But when a customer says "black" to the waitress, they both know that it means "no cream in the coffee."

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[42] I have explored the concept of empathy in Desiato, C. & Scheopner, C. "Empathy by Design: Enhancing Diversity in Online Participation," in *Practical Wisdom in the Age of Technology: Insights, Issues and Questions for a New Millennium*, N. Dalal, A. Intezari, M. Heitz (Eds.). Gower Publishing (2016).

[43] Translator Helene Weyl used the English word "vital" for the Spanish "*vital*," when Ortega's meaning was "living" rather than "essential."

"What the word fails to say, circumstance mutely adds. … The real meaning of a word is not in the dictionary, it is in the instant" (C&L 13).

Ortega changed the definition of "I" from static to relational – bringing concentric levels of experience into what it is to be me. We relate to the world in a dynamic process of becoming, rather than being. This means that we have no fixed "nature" but rather a history – social/cultural milieu into which we are born and within which we create ourselves. My situation includes the physical world – my body, the mental world – my mind/soul, my family, the social and cultural world, "opinions, beliefs, ideas, institutions, artifacts, instruments … everything in which I am immersed" (Huéscar 126). We exist in the interaction, whether or not we realize it. If we become attuned to our surroundings, we become fully human.

Ortega's strong reading of this relationship is that there is no "I" to abstract away from my surroundings. No "self' exists outside this ongoing, enculturing relationship. However, a weaker reading of the concept is useful in situations with varying views of the self, such as religious difference. On that reading, the "I" may be any reading of the self previously described (embodied eternal identity). However, it is *always* influenced by the surrounding culture. Individuals who believe that they are adopting a neutral or objective stance are merely unaware of their influences and incorrectly perceive themselves as unaffected by them.

Situated selves

Ortega introduced his doctrine of the point of view in *El tema de nuestro tiempo* (TNT). Building upon the idea that we are enculturing selves, he added the concept that we each see things from our own perspectives.

> The body in which I live infused, shut up, inexorably makes me a spatial person. It puts me in a place and excludes me from other places. It does not permit me to be ubiquitous. At each moment, it fastens me to the one place like a nail and exiles me from everything else. Everything else, that is, the other things in the world, are in other places, and I can only see them, hear them, and sometimes touch them, from where I am. … I can change my place, but whatever place it may be, it will be my "here." Apparently *here* and I, I and *here* are inseparable for life. And since the world, with all the things in it, must be for me from *here*, it automatically changes into a perspective" (Holmes 85).

It does not make sense to say that one person's view of their surroundings is false. Ortega rejected the relativistic approach that would say difference is because we don't know which of two conflicting perspectives is really true. That assumes that there is some position that is more true than either of theirs – an absolute, or "God's eye view" to which they defer.

While Ortega's perspectivism reflects similarities with Leibniz, in this matter they diverge.[44] Leibniz connected the multiple perspectives to God in two ways: first, God could see from any of the perspectives, so the created substances each provide a unique point of view of the world; and second, because he is omniscient, God is able to see from each perspective simultaneously. For Ortega, "This model landscape does not exist, nor could it exist. Cosmic reality is such that it is only possible to see from a certain perspective. Perspective is one of the components of reality. Far from being a deformity, it is the organization. The idea that there is one reality that will always be the same when seen from any point is an absurd concept" (TNT 149).[45]

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[44] Ortega conducted a detailed analysis of the concept of principle in Leibniz and his contributions to mathematics in *La Idea de Principio en Leibniz y la Evolución de la Teoría Deductiva.*

[45] Ahora bien, ese paisaje arquetipo no existe ni puede existir. La realidad cósmica es tal, que sólo puede ser vista bajo una determinada perspectiva. La perspectiva es uno de los

If two people arrive at different truths, the difference between their worlds does not mean that one is false. "On the contrary, precisely because what they both see is real, each perspective produces an aspect of reality. The perspectives are not contradictory, but complementary" (TNT 150-151).[46] Each life provides an irreplaceable perspective of the universe.[47] Truth, or total reality, is the accumulation of all points of view from all humans who ever live.

Ortega's strong position denied that there is any truth over and above the collection of perspectives. A weaker version of the position allows that no abstract perspective is possible in this earthly existence, and that we get closer to truth by accumulating perspectives. It is an approach that resonates with the legal process.

Situated, enculturing selves

The way we see things is influenced not only by our physical connection with what we are looking at but also by our experiences of reality. People who have different cultural influences have different views of the world. An example of this is a small triangular island in Hawai'i. The Native Hawaiians thought it looked like the fluke at the end of a lizard's tail and called it Mokoli'i (little lizard). Westerners named the island "Chinaman's Hat." The idea of a

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componentes de la realidad. Lejos de ser su deformación es su organización. Una realidad que vista desde cualquier punto resultase siempre idéntica, es un concepto absurdo (149).

[46] Dos sujetos diferentes –se pensaba – llegarán a verdades divergentes. Ahora vemos que la divergencia entre los mundos de dos sujectos no implica la fasledad de uno de ellos. Al contrario, precisamente porque lo que cada cual ve es una realidad y no una ficción, tiene que ser un aspecto distinto del que otro percibe. Esa divergencia no es contradicción, sino complemento (150-151).

[47] Cada vida es un punto de vista sobre el universe. En rigor, lo que ella ve no lo puede ver oitra. Cada individuo – persona, pueblo, época – es un órgano insustituible para la conquista de la verdad (151).

triangle-shaped island was common to Hawaiians and westerners so they could each understand why the other chose its name, even though they saw something different when they looked offshore. I have a clearer understanding of the island when I am both physically near to it and when I know why it has two names.[48]

In this approach, Ortega aligns with Friedrich Nietzsche, who used a comparison with perception. The way we see things is influenced by our perspectives – not only our physical connection with what we are looking at but also the internal concepts that we use to organize our experience of reality. But there is a way that perception and perspective are unrelated. With perception, I can point to a physical object that exists apart from my view of it, and I can consult laws of optics to determine the accuracy of my perception. If I am colorblind or using binoculars, the way that I see the island is affected in predictable ways and I can determine which perception is more accurate. However, there is no way for me to experience the world without internal concepts. My beliefs influence the way that I see things, and my belief that something is true only captures how it appears from my perspective. With no objective reality and no neutral standard of truth, each perspective is relative.

Nietzsche suggested that, while perspectives are unique to the individual, they overlap sufficiently that we can communicate, as with the triangle-shaped island. One way that we can broaden our own perspective is to try to see things from other points of view. There may still be times when perspectives are incommensurable and have views of truth that are incompatible. In

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[48] The example of Mokoli‘i is taken from my article: “Perspectivism” in *Multicultural America: A Multimedia Encyclopedia,* Carlos Eliseo Cortés, J. Geoffrey Bolson, editors, Thousand Oaks, CA: SAGE Publishing (2013).

these cases, there is no way to automatically select one over the other. Because there is no privileged perspective, the best we can do is to compare different perspectives to one another to expose limitations or evaluate strengths. If many perspectives hold the same view, it is "truer". Nietzsche was comfortable with the idea that there is no such thing as objective Truth.

> By contrast with Nietzsche's program, a Hegelian might insist that these various perspectives are all ultimately compatible by complete historical self-understanding of the Spirit in the moment of Absolute Knowing. Nietzsche, of course, denies that any such *a priori* guarantee of total success in our cognitive enterprise is available. For him, it is an empirical question whether any two perspectives useful for knowledge can be reconciled in a single, broader perspective; we can only try it and see (Anderson, 20).

Ortega added social and historical dimensions to the idea of individual perspective. Humans relate to the world in a dynamic process of becoming, rather than being. Ortega gave an example of how the enculturing and situated selves interact in *La deshumanización del arte* (OC 3, 361). He described a man on his deathbed, attended by his wife and a doctor, while a journalist reported on the scene and an artist painted them all. Each person related to the event from a different point of view and each had a different story about reality. Certainly the scenario would not exist for discussion were there not a man on his deathbed, but the wife's experience of torment or helplessness (or relief) is a perspective which alters the event itself with its presence. So, too, with the journalist and the painter. It may be that the journalist saw something that the wife overlooked in her grief – his perspective makes the reality of the event more complete.

The painter's detachment may be what was needed for modern art, an approach that comes as a result of earlier ones (realism, surrealism) in the sort of historical grounding of surpassed perspectives Ortega described for philosophy of history. In this sense, the painter is an intersection of the tools he chooses to use to record the event, his own personal history, the

history of art, and the presence of an ill man on his deathbed. Each of those strands contains many contingencies – it is not necessary that he produce this particular painting. Each participant is living the event in Ortega's point of view of life. Without any one of them, it would be a different event; reality would be different.

Ortega's perspectivism is especially apt for this discussion of personal identity. He includes history as part of our present because it shapes who we have become, it is "something active in us now" (OC V: 40, 55). Holmes describes Ortega's concept as "the reality of human life is the 'vital', living action of the present, and one with the past **and the future**. History characterizes what we are, instead of something that we possess" (emphasis added, n.p.). Our belief in our future after death is part of our present, of our current personal identity.

Examining exercise

The philosophical concepts now join to refocus the interaction between civil authority and citizens in the context of religious exercise. From the first section of this refocused approach, we take that governments define their relationship with religion as competing normative authorities. This relationship may be one of establishment, or varying levels of toleration. In the United States, the First Amendment operates to say that all religions will be equally tolerated, none will be favored, nor will any be persecuted. It is a relationship between institutions, of which citizens are simultaneous members. This is a goal toward which the government (courts, legislatures, presidents) has made imperfect progress. But it is possible to ask that toleration be the starting point for considering any controversy involving religion. It is also important for the governmental entities to recognize their perspective is not neutral, but rather historically and culturally situated.

The second section is the recognition that religion makes claims about the metaphysics of reality that are not susceptible of verification. Because they are beyond current epistemic access, the government must treat each as equally true, adopting an attitude of ontological agnosticism. Any limitation on the practice of religion must not be based on the content of religious beliefs (or judicial biases). Again, this is not a neutral position, but rather a consideration of perspectives as equally valid.

The third section is that the metaphysical commitments entail a belief about my present personal identity. The province of courts is my period of embodiment, but a condition of that embodiment is my eternal self. I live in this world as an individual with a race, sex, and religious eternal identity. None of us is able to adopt completely another point of view, but in making the attempt, we exercise empathy toward fellow citizens of differing identities and expand our own perspectives. When considering claims of religious exercise, courts should employ epistemic perspectivism – considering the issue from the point of view of the impacted party.

About toleration

An attitude of toleration may exist between the state and religion, however it becomes problematic when it is between a state and its citizens. We have demanded a more robust acceptance of racial difference, gender and sexual orientation. Toleration would mean that the state *puts up with* the religious identity of its citizens in a manner inconsistent with other elements of personal identity. To illustrate how this sort of toleration operates, consider the parallel with a policy called “Don’t Ask, Don’t Tell” (DADT) regarding military service and sexual orientation.

The U.S. military banned gays and lesbians from service from the earliest days of the nation. The first documented military dismissal for homosexuality was under a 1778 order from General George Washington during the colonies' quest for independence. The official charge was "attempting to commit sodomy" with a fellow soldier (Fitzpatrick, 1931-44). That language was later incorporated into the Articles of War of 1916. A 1920 modification created a new crime of sodomy but kept "assault with intent to commit sodomy" as a separate offense (USNI).

The focus of these regulations seemed to address conduct, but by World War II, the status of being, or appearing to be, homosexual was sufficient for dismissal. A 1941 directive of the Selective Service System banned anyone with "homosexual proclivities" from the draft. A system set up in 1947 created two classifications: a general discharge for servicemen or women who were found to be gay, and an undesirable discharge for anyone found guilty of engaging in homosexual conduct (Berube, 139). An executive order by President Dwight D. Eisenhower in 1953 listed "sexual perversion" as grounds for dismissal or denial of employment with the federal government or any of its contractors.[49] A 1981 Department of Defense directive declared "homosexuality is incompatible with military service." (USNI). It was no longer necessary to consider specific conduct, although that was still prohibited. Merely being identified as gay ended any military career.

By the time of Bill Clinton's presidential election, public attitudes were changing. However, his campaign promise to remove the military ban on gay servicemen and women was opposed by military leaders and blocked by Congress, which seemed ready to convert what had

[49] The order used "sexual perversion" as a code word for homosexuality, making it the first time that sexual orientation was considered behavior threatening to national security (Brube, 19).

been only military policy into federal law. The result was a compromise called “Don’t Ask, Don’t Tell” (DADT). From 1993 to 2010, gays and lesbians could serve in the military as long as they did not disclose their sexual orientation. A question regarding sexual orientation was removed from the application, and commanders were forbidden to ask about the sexual orientation of their troops (Don’t Ask). However, servicemen and women could not openly identify as gay or lesbian and remain in the military (Don’t Tell). DADT was repealed in 2010 and the military ban on consensual sodomy was repealed in 2013.

Conduct vs. status

The history of the military treatment of gay servicemen and women indicates that both status and conduct were at issue. The initial offense of sodomy was expanded to include appearance, proclivities, and finally just being identified as gay was sufficient for a general discharge. Further, after the ban on status (DADT) was lifted, it was still necessary to remove the specific charge of sodomy.

However, during debate on DADT, Joint Chiefs of Staff Chairman Colin L. Powell, who is black, rejected comparisons with race, saying sexual orientation was not a civil rights issue (Berman). Powell called sexual orientation a “behavioral characteristic” that could undermine military order and discipline. But he described race the “benign, non-behavioral characteristic of skin color” (De Young, n.p.).

Those affected by the ban felt differently. An example was this comment to the news media by a man who considered joining the military but decided not to due to DADT and the guilt that he would face from hiding his sexuality. “It was too hard to think about going into the

service," Bob Kavanagh said, "having to hide a part of who I am" (Hornick, n.p.). Sexual orientation was a component of his personal identity, rather than or in addition to, behavior.

By the time of the repeal, sexual orientation was considered to be something more than conduct or behavior (Lee, n.p.). President Barack Obama, who is also black, told the story of a man saved in World War II by a fellow soldier who he learned was gay only when they were both elderly. "[H]e knew that valor and sacrifice are no more limited by sexual orientation than they are by race or by gender or religion or by creed …" (Lee, n.p.). Sexual orientation was specifically equated to race as a status.

Individual vs. societal impact

Another important aspect of DADT was the perceived impact on other members of the military if they were to serve with openly-gay servicemen and women. When a repeal of DADT was being considered, Marine Corps Commandant General James Amos told reporters that he was very concerned about a possible loss of "unit cohesion" and combat readiness if the ban were overturned. When gatherings of Marines serving in Afghanistan had been asked, they agreed, almost unanimously, that repealing DADT would negatively impact morale (Perry, n.p.).

By the time of the repeal, the Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, (the same position that Colin Powell held when it was enacted) said all servicemen and women "sacrifice a lot for their country, including their lives. None of them should have to sacrifice their integrity as well" (Lee, n.p.). The perspective of the individual gay serviceman or woman was acknowledged and given at least as much weight as concerns about "unit cohesion." Once sexual orientation was equated to race, it was harder to privilege the comfort of the unit

over the integrity of the individual, especially in light of the forced integration of the armed forces under President Harry S. Truman.

Philosophical principles

The working premises of DADT were:

- Sexual orientation is something you DO not someone you ARE
- IF KNOWN, threatens military order, discipline and unit cohesion
- The perspective of the majority prevails
- The perspective of gay/lesbian troops is less (un)important

When governments enact bans on visible religious symbols, or political philosophers bar religious points of view from the public square, they mischaracterize the nature of religious commitment as experienced by people of faith. In addition to private conviction, religion directly impacts the manner in which citizens participate in government. Personal or individual religious conviction is more than mere belief or opinion on par with being a fan of a particular sports team. The parallel with DADT is, for opponents of openly-religious conduct:

- religious identity is something you BELIEVE, not someone you ARE
- IF KNOWN, threatens social order, discipline, cohesion
- Perspective of the majority prevails
- Perspective of religious individuals is less (un)important

Religious personal identity is similar to race or sexual orientation (which I take to include elements of sex and gender). Each component contributes to our enculturing self, on Ortega's view, the *my* (mi) in *yo soy yo y **mi** circunstancia*. Shifting the concept of religious exercise to

identity makes it possible to change the language from toleration to accommodation. It also illustrates another problem with Leiter's demand for neutrality with no exceptions – that is no longer the way we treat other components of personal identity.

In the 1950s, many police and fire departments in the United States had height and requirements that automatically screened out all women and many men, including entire ethnicities. These were "neutral" laws, in that they applied to everyone, but hardly equitable in impact. Since then, any physical requirements for employment must be linked to job performance. But suppose we offer a thought experiment along these lines: NASA requires that all astronauts be under 5'5" and 150 pounds. This is neutral and has legitimate job performance characteristics: more room in the cockpit, less fuel required, and so on. There would certainly be a large enough pool of qualified applicants so as not to jeopardize future missions. It would screen out most white men, but there are no exceptions to a neutral rule on Leiter's formulation. Is there a problem? If so, it is along the lines of not wanting to exclude a category of individuals for something they cannot change, an essential component of their identity – in this case, body size. What principled argument could be made that white men should not be excluded from space travel that would not apply with even greater force to accommodation for eternal identity?

Refocus Recap

To recap the argument thus far: (1) church and state are competing normative authorities. Between them, toleration is one of several possible relationships, and is the one described in the First Amendment to the U.S. Constitution. (2) Religions make competing claims regarding the metaphysics of ultimate reality that are not possible of verification. When evaluating claims involving religion, courts adopt an attitude of ontological agnosticism, treating the (often

incompatible) claims of various religions as equally valid. (3) Courts and Congress are made up of individuals who are situated in specific cultural and historical contexts. Therefore, neutrality is as impossible as objectivity, so they adopt an attitude of epistemic perspectivism, adopting the point of view of the religious individuals seeking relief. These are the requirements for any successful approach to the free exercise of religion. (4) The approach I propose is to treat religion as a component of personal identity, similar to sexual orientation. This changes the approach to one of governmental accommodation of situated, encultured individuals with eternal identities.

With this framework, is there any limit to belief/acts? The *Reynolds* Court's question remains – what role can courts have in civil law if every claim to religious exercise is automatically allowed? The next chapter examines the parameters of acceptability and how they are determined. To do so, it adopts an Islamic perspective and considers the Constitution of Morocco, which has Islam as an official religion. A philosophical concept from Ibn Khaldun provides guidance.

CHAPTER THREE: ISLAMIC PERSPECTIVE

[T]here 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.

-- Reynolds v. United States at 166

Islam presents a direct challenge to the Supreme Court's division of belief from action. It is a faith rooted in praxis, providing general guidelines and specific practices for the conduct of daily activities. Religion is expressed through belief/acts, with no tidy division into belief vs. action, personal vs. communal, or public vs. private. Religion is integrated into the various aspects of identity. An attempt to resolve contested religious practices by permitting belief but restricting actions would be meaningless. However, an approach that successfully engages with Islam also applies to other religions where integration also occurs but is less obvious.

Three sources of authority provide guidance for almost every aspect of human life: the *Qur'an*,[50] the word of God/Allah as revealed to the prophet Muhammad; the *Sunna*, the words and deeds of Muhammad; and the *Shari*^{c}*a*, the duties and requirements for human interactions.

[50] See discussion of when non-English words are italicized in the Introduction.

As a set of norms and values, Shari^{c}a includes what would fall under criminal, civil and commercial law in other contexts. [51]

With more recent global developments, Muslims find themselves living under non-Muslim rule, which was rare in the early days of the religion. Addressing Muslims living in Western countries, contemporary political philosopher Tariq Ramadan has identified conditions that protect the public welfare[52] for Muslims: freedom to manifest faith and spirituality; freedom to worship individually and collectively; physical security; freedom to educate others about Islam; and freedom to participate in the social, political and economic life of the community. Within his definition of the right to the practice of Islam are included the traditional "pillars," detailed below. Ramadan defines a "space of testimony" (*dar al-shahada*) where Muslims are "*free from* government intrusion on their religious beliefs and practices and *free to* teach others about Islam and act on Islamic principles." (Tampio, 618-19). This space includes interaction in political communities, rejecting the idea that belief and practice be severed or confined to the private sphere. "Islam is not just an abstract belief but an ethics that infuses a Muslim's whole life" (Tampio, 620).

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[51] I have written in greater detail on these requirements and how duties arising out of them impact U.S. society in "Islamic Ethics" in *The SAGE Encyclopedia of Business, Ethics and Society, 2nd edition,* Robert Kolb, editor, Sage Publishing, 2017.

[52] Public welfare (*maslaha*) is a principle of Islamic jurisprudence in Sunni discourse. It prohibits or permits actions based on whether or not they serve the public interest. The concept allows consideration of equity in cases not clearly regulated by the Qur'an or Sunnah. It is described in the first collection of jurisprudence by Muhammad ibn Idris al-Shafi'i (767-820), founder of the Shafi'i school and a student of Malik ibn Anas al-Asbahi (714-796), founder of the Maliki school.

This chapter extends the description of how U.S. law has treated religion in Chapter One and Chapter Two's philosophical consideration of how law should treat religion to ask how the law can treat religion. It is a pragmatic concern about the limits and legitimacy of civil law as a normative authority over citizens with embodied eternal identities. Adopting an Islamic perspective is useful not only because Islam challenges the belief/action dichotomy, but also because it confronts the latent Protestant Christian influence on U.S. jurisprudence. Before returning to the central question of this work, I first situate this section of the discussion with regard to Muslims in contemporary society, their religious roots, and the impact that has on philosophy as it is practiced within Islam.

Implications of Islam[53]

Muslims live on all continents, but are concentrated in Asia (60%), the Middle East and North Africa (20%). Islam is the fastest rising religious group, as a share of the world's population, 23.2% of the global population is Muslim (Pew). If current trends continue over the next four decades, the number of Muslims will nearly equal the number of Christians worldwide. In Europe, Muslims will make up 10% of the overall population.[54] Of the global Muslim population, almost 90% are Sunni. Most Shi'a Muslims live in four countries: Iran, Pakistan, India, and Iraq.

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[53] This phrase is used by Oliver Leaman (1999, ix), as mentioned in the Introduction. Text of section is taken from my "Islamic Ethics" in *The SAGE Encyclopedia of Business, Ethics and Society, 2nd edition,* Robert Kolb, editor, Sage Publishing (2017).

[54] All of the population figures and projections in this section are from the Pew report "The Future of World Religions: Population Growth Projections, 2010 – 2050," which is online and has no page numbers. The data was updated 8/9/17.

Pew estimates about 3.3 million Muslims of all ages were living in the United States in 2015, about 1% of the total U.S. population. However, this share is projected to double by 2050. Christians will decline from more than three-quarters of the population to two-thirds, while Muslims will outnumber those who identify as Jewish. U.S. Muslims are predominately Sunni, 55% to 16% Shi[c]a. No racial or ethnic group is the majority of Muslim American adults. Forty-one percent report their race as white, 20% black, 28% Asian, 8% Hispanic and 3% other or mixed race. Although Sunni and Shi[c]a are historically the primary doctrinal divisions in Islam, they are less significant to black Muslims in the U.S. Of native-born African-American Muslims, most say they are Sunni (45%). The next largest number (43%) either said they do not identify with any particular denomination or did not answer the question. Although the Nation Islam was once high-profile, with members such as Malcolm X and Muhammad Ali, only 3% of US-born black Muslims identify with it.[55]

Religion and philosophy[56]

While the approach of this dissertation is not to seek answers from within Islamic religious law, it is important to have a general understanding of Islam to engage with its thought. The difference between theology and philosophy is one of mutual influence, rather than a sharp divide. "[F]or an appropriate understanding of Islamic philosophy it is important to have some grasp of the main issues in Islamic theology. Philosophy often emerges out of what were

[55] Pew's Demographic portrait of Muslim Americans uses the Census Bureau definition of white "origins in any of the original peoples of Europe, the Middle East or North Africa." http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/

[56] The summary in this section is compiled from several sources, including Hourani, Fakhry, Pew, and Ramadan.

originally theological disputes, and we shall see that many theological debates are highly philosophical in nature" (Leaman, 16).

Islam has a primary division over leadership and authority. The split came in the designation of a successor after the death of Muhammad. Shiᶜites supported Muhammad's cousin ᶜAli, believing that religious and political leadership should remain in the family lineage. Sunnis believed that the community should choose a political leader from among the male members of Muhammad's tribe (the Quraysh), with religious authority residing only in the scriptures. Shiᶜa follow an imam who must be a descendant of Muhammad. Sufi orders may be either Sunni or Shiᶜa; to either authority, they add the importance of learning from a spiritual master.

Five specific acts of worship, often called the "Five Pillars" (*arkan*), are universally recognized as applying to all Muslims. These rituals are not similar to Catholic sacraments, in which God is believed to be present. They are formalized ways of expressing belief. One of the earliest descriptions of these acts of worship (ᶜ*ibadat*) is in the *Risala* of Muhammad ibn Idris al-Shafiᶜi. Although he mentions them as important practices, he does not present them as a defining element of Islam. "To frame this conundrum somewhat differently, even though these five pillars seem to have played a role in the development of Muslim identity from a fairly early period, it is hard to know at what point they became the primary ritual markers of this identity" (Khadduri, 210). The interpretation of the five pillars has remained "neither theoretically nor practically constant" (Hughes, 208). The meanings vary by time and place, and also by the individual who performs them. Other than the profession of faith, "Some Muslims do not perform any of the actions associated with pillars yet still regard themselves quite contentedly as Muslims" (Hughes, 204).

> A practicing Muslim is one who abides by the five pillars of Islam (testament of faith, prayer five times daily, fasting during the month of Ramadan, annual charity and pilgrimage once in a lifetime). Many Muslims no longer practice their faith, just as many Christians no longer go to church and many Jews no longer attend the synagogue or observe kosher. Nonpractice does not imply nonbelief (Bullock, xvii).

However, Muslims would consider it an infringement on religious exercise if they are prohibited from being able to perform any of the pillars.[57]

The first pillar is the profession of faith (*Shahada*), which includes two declarations: there is no god but God and Muhammad is the messenger of God (*Allah* is the Arabic word for God). The second is the five daily prayers (*Salat*), although there are differences between Sunnis and Shiʿites in the form, method, and time of the prayers. Sunnis pray just before dawn, at noon, in mid-afternoon, just after sunset, and in the evening. Shiʿites may combine prayers into three distinct times, rather than five. The prayers are made in the direction of Mecca, and include both recitation and ritual movements. Friday is the main day of public prayer. The third pillar is the annual alms tax (*Zakat*), generally set at 2½% of the assets of the believer. These alms are used to feed the poor or otherwise support the faith. Fourth is fasting during the daylight hours of the month of Ramadan (*Sawm*) each year. The believer abstains from food, drink, and sexual activity (many also forbid smoking). Fifth is the pilgrimage (*Hajj*) to Mecca during the first ten days of the month of *Dhu al-Hijjah*. The pilgrimage is an obligation only for believers who are financially able to make the trip and physically able to perform the rites. Muslims are encouraged to make the pilgrimage at least once in their lives.

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[57] In the United States, this commonly arises in work situations that do not allow breaks or spaces for prayer.

Islam is practiced in countries around the world, which gives rise to some cultural and linguistic variations in specific interpretations. Before he was a prophet, Muhammad was a merchant. His first wife, Khadija, was a wealthy and successful trader who hired him as her business agent before they married. After the migration of Muslims from Mecca to Medina, Muhammad added the role of civil authority to religious prophet. He is credited with the *Constitution of Medina*, a detailed description of the relationships among the various tribes that inhabited the city and region. Accounts of Muhammad's words and deeds, then, include practical concerns grounded in a transcendent perspective.

Islamic philosophy has varied by century and civilization, as have other religious and secular approaches. The defining characteristic of Islamic theory is that it must be compatible with both revelation and religious practice. Schools of jurisprudence[58] have developed norms according to a hierarchy of acts: compulsory/duty (*fard*), recommended/desirable (*mustahabb*), neutral/permissible (*mubah*), disliked/undesireable (*makruh*) and sinful/prohibited (*haram*). The five daily prayers and ritual fasting fall into the category of *fard*. This category of divine decree is distinguished from *wajib*, which is a duty imposed by law (Albertini, 462).

These norms are generally applied by Muslims deciding by themselves, although they are heavily influenced by family and society. Most individual ethical decision-making occurs in the intermediate categories between duty and prohibition (Albertini, 464). When the application is unclear, individuals may seek an official legal determination (*fatwa*). This is often the case when

[58] Four schools, or *madhhabs* (habits of thought and practice) are accepted in contemporary Sunni jurisprudence: Hanafi, Shafi'i, Hanbali and Maliki. Each is named after the founder, scholars of the ninth to eleventh centuries, and are predominant within geographic regions. *See* Albertini, 459-461.

Muslim society addresses new issues, such as cloning or other technological innovations. A fatwa can only be issued by an expert in Islamic jurisprudence (*mufti*); any issued by unqualified individuals are considered void. Even valid fatwas are guidance that the individual may accept or decide not to respect.

U.S. history

In discussions of religious freedom during the drafting of the Constitution, Bill of Rights and other foundational documents, Islam was frequently mentioned along with other non-Christian faiths as a demonstration of the breadth of religious tolerance envisioned for the new nation. Thomas Jefferson owned and read an English translation of the Qu'ran. Although he developed negative perceptions of Islam (as anti-science and reason), he consistently included Muslims in his vision of religious liberty, such as this comment on the adoption of the Virginia Statute for Religious Freedom.

> Where the preamble declares, that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word "Jesus Christ," so that it should read, "a departure from the plan of Jesus Christ, the holy author of our religion;" the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination" (Ford, Document 45).

Indeed, there were many references to "Mahometans" (with various spellings) in political exchanges of the times, including writings of Baptists and Presbyterians, who had been persecuted as dissenters from the established Anglican church in various colonies (Izadi, n.p.). One from the Hanover Presbytery used the specter of Islam to oppose any national establishment of religion:

> Certain it is that every argument for civil liberty gains additional strength when applied to liberty in the concerns of religion, and there is no argument in favor of establishing the Christian religion but what may be pleaded with equal propriety for establishing the tenets of Mohammed by those who believe the Al Koran (Smylie, 355).

Non-Christian religions were often linked in expressions, such as "Jews, Turks and Infidels" (Borden). However, Catholics and Jews suffered civic harms from the religious tests used to exclude them from voting or holding office in many colonies and then states. Muslim citizens or office holders were considered to be hypothetical (Izadi n.p.). Far from the political debates, however, thousands of Muslims were living in the colonies at the time of the Constitutional Convention. Perhaps the first to arrive was a Moroccan slave called Estevanico in 1528. While he escaped to explore much of the Southwest, most other Muslims in early America remained in servitude. It is estimated that twenty percent of enslaved Africans were Muslims. Some attempted to retain the faith, others accommodated by adopting Christian terms (Manseau n.p.).[59]

"Turks" was a reference to the Ottoman Empire, the most consistent Islamic political power to engage with Christian Europe over centuries. It was still a viable threat in the early days of the United States, led by Sultan Selim III from 1789 to 1807. The U.S. also had first-hand experience with other Islamic nations from its earliest days. Morocco was one of the first states to recognize the independence of the United States, with a declaration on December 20, 1777 allowing U.S. ships to pass freely into Moroccan ports, along with the ships of other nations who had treaties with Sultan Sidi Muhammad Ben Abdullah. Preoccupied by the war and

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[59] A Christian missionary to slave plantations in the South observed, "Mohammedan Africans" ... had found ways to "accommodate" Islam to the new beliefs imposed upon them. "God, say they, is Allah, and Jesus Christ is Mohammed. The religion is the same, but different countries have different names" (Manseau, n.p.).

governmental organization, the U.S. failed to respond to the Sultan's declaration (or subsequent restatements) until he seized a U.S. ship in 1784, offering to free it in exchange for a treaty. The Treaty of Marrakech was finally signed in 1786 and ratified by Congress in 1787, marking the beginning of diplomatic relations. It was the first treaty between any Arab, Muslim or African State and the U.S. (Embassy, n.p.).

After he became president, Jefferson hosted the first Muslim ambassador to the United States, an envoy from Tunisia, on December 8, 1805. Sidi Soliman Mellimelli arrived during Ramadan. When Jefferson invited him to dinner, he changed the customary 3:30 pm starting time to "precisely at sunset," making it the first known *iftar* at the White House (IIP, n.p.). [60] Mellimelli remained for six months during a dispute over attacks on U.S. merchant ships by pirates from the Barbary states, and the American blockade of Tripoli which resulted in the seizure of Tunisian vessels.

Philosophical perspective

Islamic philosophy has developed in conversation with western philosophy, but retains significant differences – one of the most important for this work is the relationship between reason and revelation. Seyyed Nasr introduced his study of Islamic philosophy by describing connections between philosophy and prophecy in early Greek thought, then described how the Christian and Islamic philosophical traditions parted ways.

> In the West philosophy became more and more distanced from theology after the eighth/fourteenth and ninth/fifteenth centuries onward … gradually the main schools of philosophy… ceased to be Christian philosophy, and in fact philosophy

[60] The Ramadan fast is broken at sunset with a meal called *iftar*.

> in many of its schools turned against religion in general and Christianity in particular, pitting philosophy as the main rival to religion. In contrast, in the Islamic world philosophy continued to function within a universe dominated by the reality of prophecy (Nassr, 5).

Nasssr said some of the western scholars have been interested only in the role Islamic philosophy played in Latin scholasticism. Others tried to make sense of Islamic philosophy in terms of Western schools of thought, or considered it as a historical artifact. But in the second half of the twentieth century, some began to study Islamic philosophy "as a living school of thought … treating Islamic metaphysical and philosophical ideas as something of innate philosophical value rather than being of only archaeological interest." (17).

In applying an Islamic perspective to the question of how the free exercise of religion is accomplished in a pluralistic society, it is this aspect of Islamic philosophy as a lived experience that is most helpful. I also wish to consider Ibn Khaldun in context, within the fabric of Islamic thought.[61] Rather than a solitary figure, he was well versed in the philosophers before him. He developed the key concept that I wish to borrow from personal experience in Islamic politics and observation of other civilizations.

Early ethical discussions in the seventh and eighth centuries explored the priority of God's commands and the power of the caliph (the successor of Muhammad as the leader of the Muslim community) to determine right and wrong. Theologians differed with one another about the definition of terms in the Qur'an or Sunna and the role of human rationality with regard to revelation. Unlike developments in the history of philosophy in the west, there was no inherent

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[61] This section is drawn from Jackson, Leaman, Nasr and Fakhry.

conflict between science and religion. Where philosophy contradicted Islam or neglected science, Muslim philosophers adopted varying approaches.

From the eighth to eleventh centuries, a prominent schools of thought was that of the rationalist *Muᶜtaliza*. They held that dogmas of faith may be known through reason prior to revelation, although they may not contradict it. Principal tenets included: the oneness and justice of God, human freedom of action, and the creation of the Qur'an. Muᶜtazilites have been called the "first organised theologians of Islam" (Campanini, 43) and influences are seen in later Shiᶜa and Sunni thought. Under Caliph al-Ma'mun, it became the official theology in 827 when he launched an inquisition (*mihna*) to enforce the dogma of the created Qu'ran, designed to allow a continuous interpretation of scripture. The mihna was reversed around 850 in the reign of al-Mutawakkil and the Muᶜtazilite influence waned.[62]

Although centered in Iraq (Baghdad and Basra), Muᶜtazilite thought did not coalesce around a single founder or leader. George Hourani explored possible origins of Muᶜtazilite ethical rationalism, leaving open the possibility that they were influenced by non-Islamic religions, such as Zoroastrianism, Manichaeism, or Christianity. He ruled out influences from Arab pagans or Judaism and concluded that Muᶜtazilite theologians "either knew something of Greek philosophy or had it available if they wished to study it" so their decision not to make use of it must have been a deliberate choice (Hourani, 92).

The philosophical conversation expanded in the early ninth century with the massive

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[62] Martin et al detail a contemporary revival of interest in Islamic rationalism and Campanini describes a Neo-Mu'tazilism that seeks to emphasize the role of reason in Islamic ideology.

translation project of the *Bayt al-Hikmah* (House of Wisdom).[63] Beginning with al-Kindi,[64] philosophical ethics explored problems that were common across cultures. Aristotle, Socrates, and Plato were engaged as authorities, in addition to the Qur'an and Sunna. Al-Kindi found no contradiction between philosophy and religion, rather that the tools of science advance knowledge of both. In a treatise that would resonate with contemporary analytic philosophers, al-Kindi argued mathematics is required to learn philosophy. He engaged with Aristotle on the nature of the soul and intellect, and whether the world is eternal.

Al-Farabi[65] excelled at Aristotelian logic sufficiently to be called the "Second Master." He wrote many commentaries on Aristotelian logic and on his *Nicomachean Ethics*. He saw philosophy and religion as two different ways of expressing truth, aimed at different audiences.

Ibn Sina's[66] philosophy and medical knowledge heavily influenced medieval and Renaissance thinkers. His book on medicine remained a principal reference in European medicine into the eighteenth century. Ibn Sina found al-Farabi to be the key to understanding Aristotle. Later Islamic philosophers engaged with Ibn Sina as a primary authority, along with Greek philosophers. He became the target of al-Ghazali but inspired Ibn Tufail's masterpiece.[67]

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[63] Founded by Abbasid Caliph al-Mansur, the Bayt al-Hikma flourished under al-Ma'mun and his successors but began to decline under al-Mutawakkil, who deemphasized Greek philosophy in favor of orthodox Islam. The collection was destroyed in the Mongol invasion of Baghdad in 1258.

[64] Abu Yusuf Yaᶜqub bin Ishaq al-Kindi (805-873) known as al-Kindus in the west, many works translated into Latin by Gerard of Cremona.

[65] Abu Nasr Muhammad ibn Muhammad ibn Tarkhan al-Farabi (872-950), known in the west as Alpharabius. Albertus Magnus and his student Thomas Aquinas were scholars of his work. His *Classification of the sciences* was translated as *De scientiis*.

[66] Abu ᶜAli al-Husain Ibn Sina (980-1037), known to the west as Avicenna.

[67] *The treatise of Hayy Ibn Yaqdhan*. Ibn Tufail's version was known to John Locke.

One of the best-known classical philosophical ethicists was Ibn Miskawayh,[68] who drew upon Platonic psychology for his concept of virtue, which requires submission to Shariaᶜa as the holy law emanating from God. His treatise *The Refinement of Character*, influenced by Aristotle's concept of the mean, later inspired Nasir al-Din Tusi's[69] ethics. This blend of philosophical and religious ethics is perfected in al-Ghazali,[70] who identified three fundamental doctrines that must not be violated: monotheism, Muhammad's prophecy, and the descriptions in the Qur'an regarding life after death. In all other matters, philosophers may use reason and Aristotelian demonstration to reach truth. Al-Ghazali merged the ethical traditions of Greek philosophy and Sufism, concluding that God's revelation of Shariᶜa is to benefit humans in this world and the next.

Al-Ghazali is often seen as the final contributor in Islamic philosophy's golden age. There is still a general assumption that philosophy and science came to an end with the destruction of Baghdad. However, centers of Islamic learning merely shifted west, where the Iberian peninsula soon became a major world center of learning and another major translation project. Under the patronage of the Bishop of Granada, works of philosophy, medicine, and science were translated from Arabic to Latin and Hebrew (Hasse, n.p.). Although beyond the scope of this work, Peter Adamson explores the mutual influences of Christian, Jewish and Islamic philosophers during this time (Adamson, 148-294).

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[68] Abu ᶜAli Ahmad ibn Muhammad ibn Yaᶜqub ibn Miskawayh (930-1030).
[69] Nasir al-Din Tusi (1201-1274) was a contemporary of Aquinas and Roger Bacon.
[70] Abu Hamid al-Ghazali (1058-1111).

Ibn Bajja[71] lived in Seville, Granada, and Fez. Unlike al-Farabi and Ibn Sina, his knowledge of Aristotle was not filtered through Neoplatonism. Like al-Farabi, he considered the interaction of an individual and the virtuous city. Overlapping with Ibn Bajja, Ibn Tufail[72] served as court physician to the Almohad sultan of Morocco and Andalusia for two decades. His only extant work in philosophy is *Hayy Ibn Yaqdhan*,[73] which was translated into many languages from 1671-1900 (Al-Allah, 277). Ibn Tufail's introduction made reference to the thought of al-Farabi, al-Ghazali, and Ibn Bajja.

The same duties as court physician that may have limited Ibn Tufail's philosophical output prompted him to engage Ibn Rushd to write commentaries on Aristotle for the caliph.[74] In addition to his original philosophical works, Ibn Rushd spent three decades writing the commentaries of varying lengths on Aristotle's available works (which did not include *Politics*) and Plato's *Republic*. When Greek philosophy was re-introduced to the west, it was through these commentaries. In medieval philosophy, he was referred to as Averroes, and called "The Commentator." However, Ibn Rushd's renown in the West must not eclipse his contribution to Islamic philosophy.

> No one would wish to understate Ibn Rushd's contribution to the interpretation of Aristotle. For in this lay his unquestioned right to stand in the foremost ranks of that international continent of scholars who, from Theophrastus to al-Farabi and

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[71] Abu Bakr Muhammad bin Yahya (1106-1138), known as Avempace. His most famous works were translated into Hebrew and Latin.

[72] Abu Bakr Muhammad Ibn Tufail (1116-1185), known as Abubacer.

[73] The title is the same as an earlier work of Ibn Sina. The story of an infant who grows to adulthood on an island with only the company of nature is thought to have inspired Robinson Crusoe (Adamson, 177)

[74] Abu al-Walid Muhammad ibn Ahmad ibn Rushd (1126-1198), known as Averroes.

> St. Thomas Aquinas, have illustrated through their dedication to the same cause the philosophical unity of mankind. But if, in the process, his vital intellectual interests and his place in the historic context of Islamic thought are ignored, a grave injustice would be done to him … For a correct understanding of the philosophical and theological ideas of the Muslim Ibn Rushd, the most important source is, without question, his *Tahafut al-Tahafut* (Incoherence of the Incoherence), one of the greatest philosophico-theological works (Fakhry, 284-5).

In this work, Ibn Rushd responded to al-Ghazali's attack on the two foremost Muslim interpreters of Aristotle, al-Farabi and Ibn Sina, in his *Tahafut al-Falasifah* (Incoherence of the Philosophers) (Fakry, 229).

Islam engaged with the conflicts between philosophical and theological thought within the context of a revealed religion long before religious authorities in Europe were presented with the challenge. However, their philosophical concerns were different from those of medieval Christian interlocutors, such as Thomas Aquinas, because their cosmological commitments were rooted in Islam. Majid Fakhry traced the interaction of philosophical, theological, and jurisprudential themes in Islamic thought from Arab conquest of Alexandria (641) to contemporary thinkers such as Moroccan Muhammad ᶜAbid al-Jabiri (1935-2010). While many names are familiar to European philosophical audiences, Fakhry situates them in conversation with fellow Islamic philosophers.

Cultural identity

Ibn Khaldun[75] identified a concept that will illuminate the contours of toleration in society. Born in Tunis in 1332 (732 AH),[76] his family was of the Kinda tribe of Hadhramaut,

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[75] Wali al-Din ᶜAbd al-Raḥman Ibn Muḥammad Ibn Khaldun al-Tunisi al-Ḥadrami

[76] The Islamic calendar dates from the *Hijrah*, the term for the migration of Muhammad from Mecca to Medina in September 622 C.E. It is composed of twelve lunar months, which

Yemen. (Alatas 2006, 783). During the Muslim conquest of the Iberian peninsula (now Spain and Portugal), his ancestors settled in Seville and became prominent in politics. One established a quasi-independent state near Seville (Rosenthal, xxxiii-xxxiv).[77] They left al-Andalus in the *Reconquista*, settling in what is now Tunis.[78]

The battle between Christians and Muslims over control of the Iberian peninsula continued throughout Ibn Khaldun's lifetime. The Caliphate of Cordoba had collapsed in 1031, dividing into 23 *Taifas*. These principalities battled each other and the combined Christian armies of the north. However, final Christian domination did not come until 1492.

Through his family history of political service, Ibn Khaldun was acquainted with three dynasties of Morocco: the Almoravids (1040-1147), Almohads (1147-1248), and Marinids (1248-1465). Each of the dynasties was associated with an indigenous Amazigh[79] tribe: Ṣanhaja for the Almoravids, Masmuda for Almohads and Zanata for Marinids. The Amazigh were the

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begin with the sighting of the crescent moon. Dates are commonly abbreviated A.H. for *Anno Hegirae* (Muhanna, n.p.).

[77] Pedro the Cruel, the Christian king of Castille, offered to return the legacy of Banu Khaldun to entice him to stay in 1363 (Alatas 2012, 6).

[78] Muslims first took control of the Iberian peninsula from the Visigoths in 711-718. At its peak, the area under Muslim control (called al-Andalus) reached into southern France. The Christian reconquest proceeded by region, turning what had been Muslim jurisdictional areas into individual kingdoms, which were not united into the nation of Spain until after Ibn Khaldun's death. Spanish history is drawn from O'Callaghan, unless otherwise noted.

[79] The Amazigh are descendants of the pre-Arab inhabitants of North Africa. Arabs used the term "Berber," derived from *barbarian* (speakers of languages other than Latin or Greek) to combine the many indigenous tribes into a single group. Ibn Khaldun adopted this term and worldview.

population of the *Maghrib*[80] before the Arab migration in the eighth to eleventh centuries (Alatas 2012, 14). The Sunni Marinid/Zanata dynasty ruled throughout Ibn Khaldun's life.

Ibn Khaldun's early education included customary topics in jurisprudence, theology, and linguistics. He was later exposed to philosophers such as al-Kindi,[81] Ibn Sina,[82] and Ibn Rushd (with whom he took issue).[83] His familiarity with Muᶜtazilite arguments was demonstrated in later writing.[84] His political life was punctuated with terms in prison for backing the wrong side in court intrigues. Over the first twenty years of his professional life, he bounced back and forth between al-Andalus and the Maghrib, serving a series of sultans. When hostilities between Fez and Granada broke out, Ibn Khaldun went to Granada but the Fez court would not let his family join him. "Ibn Khaldun had to return to North Africa where he was out of favour with practically all the rulers" (Alatas 2012, 8). He retreated to a fort to begin his history of the Arabs and Berbers. [85]

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[80] *Maghrib* is "west" in Arabic. It refers generally to North Africa, the area that is now Morocco, Algeria, and Tunisia. During Ibn Khaldun's life, the Merinids controlled the Maghrib from a capitol in Fez (although rule was split in 1374 to add a capital in Marrakesh). Morocco is referred to as *Maghrib al-Aqsa* (farthest west).

[81] Quoted in a discussion on racial characteristics (I ,175). Ibn Khaldun critiqued historian al-Mas'udi (893?-956) for relying upon the authority of Galen and al-Kindi without adding an original contribution.

[82] Ibn Khaldun quotes a passage from Ibn Sinna when discussing skin color (I ,171).

[83] See p. 96 below.

[84] He made several references to Muᶜtazila and "speculative theologians" I ,189).

[85] After this four-year interlude, Ibn Khaldun returned to Tunis for access to libraries and historical sources for his history. The sultan pressed him into service in battle, which he avoided by seeking permission to perform the hajj. Instead, he went to Cairo where he was appointed a Maliki judge. His wife and children were detained in Tunis. When they were allowed to join him, their ship sank on the way to Egypt. His wife and daughters died, while two sons may have survived. Ibn Khaldun accompanied the sultan to Damascus in response to an invasion by Timur

While in seclusion, he completed the *Muqaddimah*, the prologue to a larger historical survey, the *Kitāb al-'Ibar* (Alatas 2008, 784). In this introduction, Ibn Khaldun detailed his method, such as how to determine if stories are accurate and factors that produce untruth. He also described his overall approach as creating an original science, one concerned with human civilization and social organization. (Muqaddimah I, 77) Rather than theorizing an ideal polis, Ibn Khaldun's new science recorded history as it tried to understand it. He sought the inner meaning of history, the causes and origins of things that exist and of events. "History, therefore, is firmly rooted in philosophy. It deserves to be accounted a branch of it" (I, 6). He also revealed a motivation for undertaking such a monumental project.

The Great Plague in 1348 was a formative experience for Ibn Khaldun.[86] It took both of his parents and most of his circle of scholars (Alatas 2012, 4). It also transformed civilization.

> [C]ivilization both in the East and the West was visited by a destructive plague which devastated nations and caused populations to vanish. It swallowed up many of the good things of civilization and wiped them out. … Civilization decreased with the decrease of mankind. Cities and buildings were laid waste, roads and way signs were obliterated, settlements and mansions became empty, dynasties and tribes grew weak. The entire inhabited world changed. … It was as if the voice of existence in the world had called out for oblivion and restriction, and the world had responded to its call (I, 64).

(Tammerlane). After the sultan returned to Cairo due to a plot to overthrow him, Ibn Khaldun met with Timur in an unsuccessful effort to save Damascus. Back in Cairo, Ibn Khaldun was again appointed judge, relieved of his post, and reappointed (six times in all). He died on March 16, 1406 (Alatas 2012, 11-13).

[86] Plague in early Islamic history followed commercial routes, attesting to the importance of trade throughout the Mediterranean. Dols also credits plague with prompting interest in pre-Islamic medical works, such as the writings of Hippocrates and Galen. "In this manner, the massive translation of classical medical works into Arabic in early Islam should be considered as part of the endeavor to understand the nature of recurrent disease and not as a purely academic exercise" (Dols, 381-2).

This drastic change in conditions, as if the world were "brought into existence anew," prompted Ibn Khaldun to "systematically set down the situation of the world among all regions and races, as well as the customs and sectarian beliefs that have changed" (I, 65).

Translation again

As with Ortega's self and circumstance of the previous chapter, a central concept in Ibn Khaldun's philosophy of history resists facile translation. The concept of *ᶜaṣabiyya* was first translated into Western terms by William MacGuckin de Slane in *Prolégoménes d'Ebn-Khaldoun*, published in three volumes released in1862, 1865, and 1868.[87] In producing a French translation of the *Muqaddimah*, de Slane relied upon a full Arabic edition by Étienne Marc Quatremère (1858), the Arabic manuscripts that Quatremère used, and a 1859 Turkish translation.[88] In his translation of the *Muqaddimah*, de Slane generally used *esprit de corps* for ᶜasabiyya, although not consistently.[89]

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[87] A 1636 Latin translation of Ibn 'Arabshāh's book on Timur includes a mention of the historic meeting between Ibn Khaldun and the Mongol warrior. A biography of Ibn Khaldun was included in d'Herbelot's *Bibliothèque Orientale* in the latter part of the seventeenth century. But it was more than 100 years before translations of his work appeared in Europe. Extracts of Ibn Khaldun's work were published in French by Silvestre de Sacy in 1810 and in German by Joseph von Hammer-Purgstall in 1818, 1822 (Alatas 106).

[88] Ottoman Turks began a sustained study of Ibn Khaldun as early as 1550 and "scholars and statesmen vied with each other in their interest in Ibn Khaldun's work and ideas" (Rosenthal, lxvii). The first complete translation of the *Muqaddimah* was into Turkish in 1730, published in 1859 (Rosenthal, cvii).

[89] Other words substituted for ᶜaṣabiyya include: family, kinsmen, group of friends, devoted group, community, a people animated by a sense of its own dignity, sympathy, fellow feeling, zeal and ardor, feeling and interest, patriotism, tribal spirit, national spirit, national feeling, party, strength, power, support, army (Lacoste, 103).

In his "Translator's Introduction" to the *Muqaddimah*, Rosenthal defended de Slane's version from critiques that it was too "free" (I, cviii). He agreed there were occasional mistakes of translation, few explanatory footnotes, and rare attributions to sources. However, the stylistic choice was intentional and "perfectly legitimate" for a work such as the *Muqaddimah.*

The greater issue was that scholars relied upon de Slane "almost to a man" for their quotations from the *Muqaddimah* until Rosenthal's edition in 1958 (I, cviii). In addition to diffusing the concept of ᶜaṣabiyya, de Slane read Ibn Khaldun through a Western lens of social progress that was alien to his original work.[90] Western sociologists, historians, and philosophers also presented Ibn Khaldun as a sort of solitary genius, springing from the soil of Islamic North Africa, rather than linked to centuries of Islamic philosophy, theology, and legal theory.

Included among them was José Ortega y Gasset, who published an essay in 1934 titled *Abenjaldún nos revela el secreto: pensamientos sobe Africa Menor* (Ibn Khaldun reveals to us the secret: thoughts on North Africa). Ortega's focus was the Spanish enclave of Melilla, which has remained under Spanish rule since 1497 even though it is on the coast of North Africa, now within the boarders of Morocco. Although writing from an Orientalist perspective, Ortega attempted to apply Ibn Khaldun's theory to the current situation, "Ortega regarded the *Muqaddimah* as the first ever philosophy of history … [and] insisted that Spaniards would not be able to understand their past, present and future if they did not understand North Africa. The same cultural influences that affected the northern part of Africa also passed through Spain"

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[90] Lacoste rendered ᶜaṣabiyya as a sort of Hegelian dialectic of state formation, when the contemporary concept of nation-state was far from Ibn Khaldun's imagination, not to mention observation.

(Alatas 107). However, Ortega did not generalize Ibn Khaldun's thought beyond areas directly impacted by Arabic civilizations.

The rendering of ᶜasabiyya as *esprit de corps* "is in itself not a terrible translation, but when that translation was transplanted to (Toynbee's) *A Study of History*, it acquired misleading Bergsonian overtones of *élan vital*" (Irwin, 471). Arnold Toynbee's 1934 depiction of ᶜasabiyya as 'the basic protoplasm out of which all bodies politic and bodies social are built up' (Volume Three, 474) was the only treatment of Ibn Khaldun's theories in English until Franz Rosenthal's translation of the *Muqaddimah* in 1958 (Irwin, 466).

Rosenthal used "group feeling," which is both ubiquitous and reviled in contemporary scholarship. He realized it was a "rather artificial loan rendering" (I, cx), but wished to preserve Ibn Khaldun's use of ᶜasabiyya as term of art. Rather than translating ᶜasabiyya according to the particular context, as de Slane had done, Rosenthal used "group feeling" throughout. "[A]ny other procedure would irrevocably have destroyed the essential unity of Ibn Khaldun's work, which is one of its main claims to greatness" (I, bcx).

Yves Lacoste criticized both *esprit de corps* and "group feeling" as too broad or general. He surveyed proposed translations of ᶜasabiyya over four pages, noting that "Virtually everyone who has written on Ibn Khaldun has his own interpretation of ᶜasabiyya" (100). His discussion then used the untranslated ᶜasabiyya. In the introduction to the 2005 abridged edition of Rosenthal's *Muqaddimah*, Bruce Lawrence agreed with criticism of "group feeling" as too static for "what remains for Ibn Khaldun a variable pinned between the state (*dawla*) and religion (*din*)" but also did not suggest an alternative term (Rosenthal, xv).

Many contemporary writers use the untranslated Arabic because they are so dissatisfied with English equivalencies. Rabi insisted upon replacing "group feeling" with ᶜasabiyya even in direct quotes from Rosenthal. Alatas introduced ᶜasabiyya as "tribal social solidarity or group feeling" (785). By 2012, he described ᶜasabiyya as "a type of group feeling or social cohesion" (56). Aranson and Stauth called ᶜasabiyya one of Ibn Khaldun's "most untranslatable terms" (33).

Irwin undertook an etymology of the term, saying the concept may derive from the root verb ᶜ*asaba* for "he twisted" to "summon up the image of men twisted together by blood ties or physical proximity." Another possibility is from the noun ᶜ*isaba* as "something wound around the head" to serve as a sign of tribal allegiance, or "band or league" (472). Regardless of the original derivation, the word had a commonly-understood meaning with negative connotations by the time that Ibn Khaldun wrote.

ᶜAsabiyya had a pre-Islamic meaning of "making common cause with one's agnates" (Rabi, 48). Arabic tribes were founded upon this kinship through male ancestors. However, Muhammad criticized it as an unquestioning allegiance. With the advent of Islam, tribal ties were to be sublimated to religion (Rabi, 48). "Religion does supersede ᶜasabiyya, but it does so by redefining it rather than denying it" (Lawrence, xv). This provides one way to reconcile the pre- and post Islamic manifestations of ᶜasabiyya: as an indicator of the primary (but not exclusive) allegiance.

The Khaldunian dilemma is thus: using untranslated ᶜasabiyya pushes the definition back a step, but does not obviate it. Even philosophers fluent in Arabic must agree on what work the concept is doing in analysis. Absent that agreement, ᶜasabiyya is useless as an analytic concept.

My greater concern is that not translating ᶜasabiyya renders the concept mute in non-Islamic philosophical discourse. My contention is that Ibn Khaldun has something interesting to say about how societies tolerate difference, which requires an explication of ᶜasabiyya. An adequate translation would allow this concept to participate in contemporary philosophical discussions on identity and community. Ibn Khaldun used ᶜasabiyya as a technical term, describing it in terms of sources and functions (Kaypinar, 166). Following Ibn Khaldun, then, let us consider how ᶜasabiyya functions in his theory.

Community contours

Ibn Khaldun introduced ᶜasabiyya as a component of civilization in the opening lines of Book One of the *Kitāb al-ʻIbar*. "[History] deals with such conditions affecting the nature of civilization as, for instance, savagery and sociability, group feeling/ᶜasabiyya and the different ways by which one group of human beings achieves superiority over another" (I, 71).[91] He applied the term to individuals when discussing human beings who are chosen by God. Ibn Khaldun listed signs of inspired human beings, which included the prestige they have among their people:

> That means that (such a man) has group feeling/ᶜasabiyya and influence which protect him from harm at the hands of unbelievers, until he has delivered the messages of his Lord and achieved the degree of complete perfection with respect to his religion and religious organization that God intended for him (I, 188).

[91] Quotations in this section are from Rosenthal's translation of *The Muqaddimah*. I will use both his original "group feeling" and ᶜasabiyya to highlight the concept. Page numbers are to the three-volume work/abridged version.

The implication seems to be that an individual may be imbued with group feeling/ᶜasabiyya, rather than being protected because the community has it.

Ibn Khaldun related group feeling/ᶜasabiyya to the blood relationship "or something corresponding to it (I, 264)." When connection through common descent is clear, it evokes a natural affection (I, 265). When extended to neighbors, clients and allies, it produces a sense of shame when any of them is humiliated (I, 264). However, if the fact of common descent is known only from genealogy, it becomes a matter of scientific knowledge and no longer moves the imagination. "It has become useless" (1, 265). Although group feeling/ᶜasabiyya may be extended to clients and allies, Ibn Khaldun did not believe that those individuals will feel the same close connection to the group as those born into it. They would never be able to lead the group, because leadership is "transmitted in one particular branch that has been marked for superiority through group feeling/ᶜasabiyya" (I, 270).

Ibn Khaldun distinguished group feeling/ᶜasabiyya from pedigree, prestige, or nobility. Pedigree is the result of common descent. However, nobility and prestige are personal qualities. Prestige means that one has forefathers "who had good (personal) qualities and who mingled with good people and (that, in addition, they) try to be as decent as possible" (I, 274). Nobility may come either from birth or from service to the ruling dynasty. Each of these qualities is powerful when combined with group feeling/ᶜasabiyya.

According to Ibn Khaldun, this interaction of prestige with descent and nobility was mischaracterized in Ibn Rushd's commentary on Aristotle's *Rhetoric*.

> "Prestige," he states, "belongs to people who are ancient settlers in a town. … I should like to know how long residence in a town can help (anyone to gain

> prestige), if he does not belong to a group that makes him feared and causes others to obey him. (Averroes,) in a way, considers prestige as depending exclusively on the number of forefathers. Yet, rhetoric means to sway the opinions of those whose opinions count, that is, the men in command. It takes no notice of those who have no power. They cannot sway anyone's opinions, and their own opinions are not sought. … It is true that Averroes grew up in a generation (group) and a place where people had no experience of group feeling and were not familiar with the conditions governing it. Therefore, (Averroes) … did not refer to the reality of group feeling and its influence among men. (I, 275-276).

When discussing succession in leadership of the community, Ibn Khaldun connected group feelings/ᶜasabiyya with the restraining influence of government and religion. During the time of the first four caliphs, "royal authority as such did not yet exist, and the restraining influence was religious" (I, 433). Group feeling/ᶜasabiyya "which determines unity and disunity in the customary course of affairs" was not as important then as it was to be later because religious unity was very strong (I, 433).

During the time of the Umayyad and Abbasid dynasties, the group feeling/ᶜasabiyya of the Arabs approached the final goal of royal authority. However, the restraining influence of religion had weakened, so the influence of government and group was needed.

> If, under those circumstances, someone not acceptable to the group had been appointed as successor, such an appointment would have been rejected by it. The (chances of the appointee) would have been quickly demolished, and the community would have been split and torn by dissention" (I, 433).

Differences in the relationship among government, group, and religion vary by civilization. "Times differ according to differences in affairs, tribes, and group feeling/ᶜasabiyya, which come into being during those times" (I, 434).

In addition to being a restraining influence on groups, group feeling/ᶜasabiyya is a unifying and inspiring factor. When discussing tactics in war, Ibn Khaldun addressed external

factors, such as: the number of soldiers, the number and quality of weapons, and proper tactics. Then, he discussed hidden factors resulting from human trickery, such as spreading alarming news to cause defections, attacking from high points, or hiding in thickets or rocky terrain. These hidden causes produce fear and confusion, which can result in routs. He credited Muhammad's victory over more numerous polytheists to "terror in the hearts of their enemies," concluding that the most effective tactics are hidden from men's eyes (I, 229).

Ibn Khaldun disagreed with a proposal that victory may result from one side having more famous heroes than the other, which is an external factor.

> What is the fact proven to make for superiority is the situation with regard to group feeling/ᶜasabiyya. If one side has a group feeling comprising all, while the other side is made up of numerous different groups, and if both sides are approximately the same in numbers, then the side with a united group feeling/ᶜasabiyya is stronger than, and superior to, the side that is made up of several different groups (II, 87).

So, group feeling/ᶜasabiyya may be held by individuals within groups, by groups within groups, and by the overall group.

Dynamic difference

Ibn Khaldun used the concept of ᶜasabiyya to describe a cyclical process through which civilizations become stronger or weaker. His observations focused on the interplay between Bedouins and sedentary people, both natural groups that exist "by necessity" (I, 250). Bedouins are prior to sedentary people, because they have only the bare necessities of life.[92]

[92] He lists as Bedouins: "In the West, the nomadic Berbers and the Zanatah … in the East, the Kurds, the Turkomans, and the Turks" (I, 252).

> Bare necessities, in a way, are basic, and luxuries secondary. Bedouins, thus, are the basis of, and prior to, cities and sedentary people. Man seeks first the bare necessities. Only after he has obtained the bare necessities does he get to comforts and luxuries. The toughness of desert life precedes the softness of sedentary life (I, 252).

Bedouins are more courageous than sedentary people, because they must defend themselves. They have no walls or gates or militias, but must always carry weapons and pay attention to any noise. “Fortitude has become a character quality of theirs, and courage their nature” (I, 258).

To survive in the desert requires strong group feeling/ᶜasabiyya. The conditions are harsh, which requires mutual cooperation. Anyone without a group affiliation would perish from the elements, lack of food and other resources, or attack. Human beings have inclinations to both good and evil. Evil qualities are injustice and mutual aggression. In cities, mutual aggression is controlled by governmental authority. Aggression from outside is averted by walls and government troops. Within Bedouin tribes, mutual aggression is restrained by the tribal leaders, on the basis of the veneration of members. Aggression from outside is repelled by strong group feeling/ᶜasabiyya, which both “makes for mutual support and aid, and increases the fear felt by the enemy” (I, 263).

While sedentary people do not wish to live in the desert, Bedouins work to achieve the luxuries of urbanization. “When he has obtained enough to be ready for the conditions and customs of luxury, he enters upon a life of ease and submits himself to the yoke of the city” (I, 253). The goal of group feeling/ᶜasabiyya is royal authority, but once it is reached, the leader no longer relies upon members of the group. This inevitably causes a dissipation of group feeling/ᶜasabiyya and decline of civilization. To be restored, the Bedouins must return to the

desert “the basis and reservoir of civilization and cities” (I, 252). The strength of the Bedouin group feeling/ᶜasabiyya as nourished by the desert is the animating force of civilization.

Ibn Khaldun’s cyclical theory of decline and renewal in civilizations is supported by a theory of generations. Upon a return to the desert, it takes time to shed the meekness acquired in urban living, and to allow a new group feeling/ᶜasabiyya to arise. He sets forty years as the shortest period for generational change. Ortega also made use of a theory of generations in his political philosophy. However, I propose to abstract the concept of ᶜasabiyya from its original role in civilizational or generational cycles and examine its cohesive and motivational nature. Ibn Khaldun’s identification of this societal force may then be applied in a much broader context than al-Andalus and the Maghreb.

Situated selves in society

One paragraph of Ibn Khaldun’s discussion on leadership demonstrates the complete inadequacy of the term “group feeling” to capture the individual and communal aspects of ᶜasabiyya. This is the paragraph in Rosenthal’s translation:

> *Leadership over people who share in a given group feeling cannot be vested in those not of the same descent.*
> This is because leadership exists only through superiority, and superiority only through group feeling. Leadership over people, therefore, must, of necessity, derive from a group feeling that is superior to each individual group feeling. Each individual group feeling that becomes aware of the superiority of the group feeling of the leader is ready to obey and follow him (I, 269).

The repeated use of “group feeling” obscures the meaning of concentric interactions among individual leadership qualities, lineage, and community. However, since group feeling/ᶜasabiyya has no commonly-agreed-upon English definition, we may as well use X instead to focus the analysis.

> *Leadership over people who share in a given X cannot be vested in those not of the same descent.*
> This is because leadership exists only through superiority, and superiority only through X. Leadership over people, therefore, must, of necessity, derive from a X that is superior to each individual X. Each individual X that becomes aware of the superiority of the X of the leader is ready to obey and follow him.

Where X contains these characteristics:

- component of civilization
- influence that protects one from harm
- natural affection
- produces sense of shame when allies are injured
- moves the imagination
- restraint upon actions similar to religion or government but separate from them
- unifies and inspires groups
- motivation to provide mutual support and aid
- instills fear in enemies
- determines unity/disunity in ordinary course of affairs
- restrains mutual aggression
- repels aggression from outside
- change is inherent in the process

These characteristics share a dynamic quality that motivates action without analysis – an instinctive response to recognition of affiliation. Mohammad Talbi defines ᶜasabiyya as: the cohesive force of the group, the group's **conscience of itself** and ambitions, and the group's drive to seek power through conquest. Jon Anderson considers ᶜasabiyya to be a relation of sameness that sets itself apart from both state and religion.

> A careful reading of Ibn Khaldun, of the *'Ibar* and *the Ta'rif* (the '*Ibar*'s autobiographical tailpiece) as well as the *Muqadimmah*, shows that Ibn Khaldun did not think of ᶜ*asabiyya* as being a monopoly of the nomad, nor did he think that blood relationship was the only form of ᶜ*asabiyya* bonding. Clients of tribal groups may acquire ᶜ*asabiyya*. Urban groups, such as the Mamluks of fourteenth-century Cairo, could constitute an effective and cohesive group (*isaba*). … [A] Mamluk corps infused with an artificial ᶜ*asabiyya* could provide a ruler with renewed strength (internal citations omitted)(Irwin, 472).

These readings support the project of abstracting ᶜasabiyya as technical term to apply more broadly in philosophical analysis. They attempt to capture what it is as how it works in groups. However, they do not address the manifestation of ᶜasabiyya in individuals and its interaction within multiple levels of associations.

A return to the original use of ᶜasabiyya helps to focus the concept, which may then be used to flesh out an aspect of identity that is under-theorized in Ortega's situated selves discussed in the previous chapter. The Arabian concept of tribe identified those linked by paternal descent. In addition to familial relations, what else does this idea capture? It includes: geographic location, language, religion, race/ethnicity, sex/gender, common customs, and traditions. We are born into this milieu, which forms our perspective of the world.

Ortega takes note of our embeddedness in culture, of our necessity to choose among the mute things seeking our attention. However, he does not fully address the aspects of our selves that are not chosen, but through which we encounter the world – such as sex/gender and race/ethnicity. Many of the most impactful aspects of our identity are not self-selected, they are imposed by the bodies and cultures into which we are born. Women, at nearly all points of history, had fewer things available than men from which to select in the task of building their lives. The same is true for non-white individuals in the United States, and minority populations worldwide. To return to Talbi's definition of ᶜasabiyya, it may be possible for members of the dominant culture to have an ᶜasabiyya of which they are not conscious. However, it is not possible for a members of a minority group to be unaware of their social/cultural identity, of their ᶜasabiyya. Indeed, the shared self-identity may differ from that imposed by culture or presumed by majority populations.

The relevant aspect of my identity, my situated self, depends upon the context. When in a gathering of Muslim women, I am a member of the group of women, but not of the Islamic population. We women would all be denied entry to the men's section of any mosque. It is less likely that I would be denied entry to the United States in an airport. If we take ᶜasabiyya to be the primary source of social or cultural identity in a given situation, it can capture the dynamic and concentric nature of the concept. This is not to say that the group itself has an identity, but rather it is a collection of individuals who share an identity.

Contemporary philosopher Ridha Chennoufi takes note of concentric community identity:

> What first permits to establish a given space, are the standards of individual and collective action – at family, corporatist, local, and national level – that are accepted and complied with by those who live in that space. Those standards are in turn based on the values that structure all the economic, juridical, moral, cultural, and political spheres of social life. However, each space is always inside another larger space to which it must constantly cooperate with and adapt (3).

Speaking of political changes in Tunisia, Chennoufi says the significance of the revolution is "the way that those who experience it look upon their own existence and the image they formed over time of their collective identity"(4). Change had to be cast as Islamic, but in the Maghreb, Islam alone could not define ᶜasabiyya. "[A]ny political movement, including one that claims to be a universal religion, does not have a chance of enlisting the support of a people unless it takes account of the specific character of their space" (4). Chennoufi reads Ibn Khaldun's theory of ᶜasabiyya as a general principal that is always grounded in specific events: "Indeed, in order to make sense, a thought must express the spirit of its times, but as spiritual expression, it must cross all times" (4).

Political parameters

The founders of the United States described their shared identity in both defined and unspecified terms. The Declaration of Independence identified them as residents of the colonies of Great Britain in the Americas.

> We, therefore, the Representatives of the UNITED STATES OF AMERICA, in General Congress, Assembled, appealing to the Supreme Judge of the World for the Rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, Free and Independent States; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and the State of Great-Britain, is and ought to be totally absolved; … (Declaration, n.p.)

What was not explicitly stated is that the "good People" did not include the original inhabitants of the Americas, nor those brought here involuntarily as slaves. That was made more evident in the Constitution, which apportioned representatives and taxes according to the population of the States "which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons" (Article I, Section 2, U.S. Constitution).

The reference to "the Supreme Judge of the World" came after the claim in the first paragraph of the Declaration to "the separate and equal Station to which the Laws of Nature and of Nature's God entitle them." The appeal to a single Supreme Judge, and the presumption that Man can know the laws of Nature's God, are rooted in a Christian/Deist view of the world. Rather than identify the nature of the cosmology, however, the foundational documents are silent as to the religious identity of the colonists. The idea that no citizen should have to declare religious affiliation tracks with the Constitutional prohibition of a religious test for holding

public office (and with the historical memory of the colonists). However, the silence obscures the perspective of the authors.

The colonial (white, male) founders signed on to the idea that the new nation would permit all religions, even though implementation has been predictably problematic. While their expressed intent was to found a nation open to all believers, their sense of what was permissible -- their social/cultural identity (ᶜasabiyya) -- was Christian/Deist. The goal was easier to articulate with imaginary Muslims than confraternal cousins. The LDS Church, through the *Reynolds* test case, presented a challenge to this powerful, but unstated, shared identity. White men claiming to follow Christ demanded protection for their practice of polygamy under the First Amendment. The intensity of the opposition demonstrated both the motivational and cohesive nature of ᶜasabiyya. It was not necessary to consult with the community or arrive at a consensus of leaders – the opposition to Mormons was spontaneous and negative in every state they entered, as well as in the Supreme Court, and Congress.

Toleration again

Morocco provides a contrasting way of dealing with the interaction among religion, state, and shared identity. As a result of its social/cultural identity, the country takes a different approach to polygamy that begins with the Constitution and continues through the Family Code. Although it is able to deal with Islamic polygamy, the polygamist marriages practiced by members of the early LDS Church would present a challenge. Nonetheless, the different approach suggests a possible path forward for religious expression in the United States.

Constitutional community

Morocco adopted a new Constitution in 2011. In contrast with the U.S., the document was completely re-written by a commission empaneled by the King, rather than being subjected to periodic amendments. It is also far more detailed, running to 180 articles. In keeping with an Islamic approach, the focus is on justice rather than rights.

The preamble to the constitution set as its goal to develop "a society of solidarity," and for the first time described the national identity.

> A sovereign Muslim State, attached to its national unity and to its territorial integrity, the Kingdom of Morocco intends to preserve, in its plentitude and its diversity, its one and indivisible national identity. Its unity is forged by the convergence of its Arab-Islamist, Amazigh (Berber) and Saharan-Hassanic components, nourished and enriched by its African, Andalusian, Hebraic and Mediterranean influences. The preeminence accorded to the Muslim religion in the national reference is consistent with the attachment of the Moroccan people to the values of openness, of moderation, of tolerance and of dialogue for mutual understanding between all the cultures and civilizations of the world (Ruchti, 3).

This articulation of national identity addressed two of the most controversial issues in the debate over the adoption of the constitution: the place of Islam in the Moroccan state, and whether to recognize Tamazight (spoken by Amazigh) as an official language (Ottaway, n.p.).

Article Three set Islam as the religion of the State, "which guarantees to all the free exercise of religious practices" (Ruchti, 5). This contains two concepts of note: first, the religion of Islam itself is the guarantor of free exercise of religion (rather than the State) and second, Islam is the religion of the State, rather than the State religion. This differs from constitutions of other Islamic countries, which make Islam the sole source of legislation, or a foundational source of legislation (Egypt and Iraq). It may reflect that Morocco is a Muslim state "in the sense that

the vast majority of its nationals are Muslim: … the contours of the Moroccan people overlap with those of the Muslim community established on the territory" (Madani, et al, 19).

Equating the citizens of Morocco with a shared Muslim identity sets the parameters of what is acceptable behavior. Examples were presented in the discussion of how to accommodate non-Muslim religions. Some argued for recognition of a freedom of conscience, as acknowledged in many European nations, rather than a guarantee that people of other religions are able to perform religious practices. This was "vehemently denounced by the general secretary of the PJD[93] as opening the way to unacceptable and provocative behavior such as public display of homosexuality and violating in public the Ramadan fasting" (Ottaway, n.p.). Although not requiring that non-Muslims must fast or refrain from same-sex relationships, the public demonstration of either is offensive to the national social/cultural identity.

The King guarantees the free exercise of beliefs as the Commander of the Faithful, detailed in Article 41 (Ruchti, 13). The 2011 Constitution separates this power from his position as head of state, now in Article 42. Religious issues are decided in consultation with the Superior Council of the Ulemas, while civil matters are referred to the judiciary. Even though Islam is the religion of the state, and most citizens are Muslim, civil laws are neither made nor enforced by religious leaders.

The Constitutional Reform Advisory Committee never considered removing Islam as the religion of the country, or the King as the Commander of the Faithful. Rajae Naji Mekkaoui, law

[93] The Justice and Development Party (PJD) has been the leading Islamist party in Morocco since 1998. It is considered to be politically moderate but socially conservative (Maghraoui, n.p.).

professor and member of the committee, said they were aware of threats to boycott the referendum if the text did not clearly state the pre-eminence of Islam. Despite the explicit role of Islam, the law also guarantees freedom of religion. "The Jewish community has always played a part in Moroccan society," Mekkaoui said, and was represented on the constitutional committee. "A moderate and tolerant form of Islam prevails in Morocco, which is why Moroccans do not tolerate certain forms of extremism or fanaticism" (Ali, n.p.)

Polygamy in practice

The distinction between religious and civil regulations is demonstrated in how Morocco's Family Code deals with polygamy. The *Moudawana* was revised February 5, 2004. Although there were protests, including a march against it in 2002, the reform effort was led by the King, who guaranteed its Islamic credentials. "It was he who intervened to ensure that the Family Code was adopted, by setting up a committee made up of ulemas and experts in various fields," said Reda Hnaui, a professor of Islamic education (Ali, n.p.).

The reform raised the legal age for girls in all marriages from 15 to 18 (although judges may make exceptions). Women were also given the right to choose their spouse and an equal right to property in divorce. The preamble set the contemporary attitude toward polygamy in Morocco.

> Concerning polygamy, we took into consideration the commitment to the tolerant principles of Islam in establishing justice, which the Almighty requires for polygamy to take place, as it is plainly stated in the Holy Koran: He said '…and if you fear that you cannot do justice (to so many) then one (only).' And since the Almighty ruled out the possibility for men to do justice in this particular case, He said: 'You will not be able to deal equally between (your) wives, however much you wish (to do so),' and he thus made polygamy quasi impossible under Sharia (religious law).

> We further adhered to the distinguished wisdom of Islam in allowing men to legitimately take a second wife, but only under compelling circumstances and stringent restrictions, with the judge's authorisation, instead of illegitimate polygamy occurring if we prohibit it entirely (Moroccan Family Code, n.p.)

Two concerns are addressed: as an Islamic country, Morocco cannot ban polygamy and attempting to do so would drive it underground (as has happened in the United States).

However, this does not mean that the state must keep hands off. As with other marriages, the Moudawana addresses specific harms. Article 40 prohibits polygamy when there is a "risk of inequity" between the wives, or when the marriage contract with the first wife stipulates that the husband may not marry again. Article 41 states that the court will not authorize polygamy unless a "exceptional and objective justification" is proven and the husband demonstrates the ability to provide for two families equally. Articles 42 – 46 outline the procedure to be followed. The husband must petition the court describing the justification, attaching a financial statement. The court summons the first wife and a hearing is conducted with both parties present. The court may approve polygamy if it accepts the justification and "puts into place conditions benefiting the first wife and her children." If the first wife does not approve, she may receive a divorce and financial settlement that must be paid within seven days. If the court approves the polygamy petition, the second marriage may not take place until the judge has informed the future wife that the husband is already married and she consents (Moroccan Family Code, n.p.).

While polygamy is permitted in Islam, and Morocco is an Islamic country, the practice is rare. Only one percent of marriages is now polygamous (Rubin, n.p.). On the range of permitted/prohibited practices in Islam, it could be seen as permitted but discouraged (makruh).

The approach in Morocco draws a distinction between what is legal and what is required or admired.

Polygamy is a practice that is permitted, but not required, by Islam. There is no metaphysical implication either way, unlike the polygamy of the early LDS Church or current practitioners with Mormon roots. Islam also traditionally limits additional wives to four, which the language of the Moudwana seems to reduce further with provisos that legal criteria are met to take a second wife. Mormon polygamy does not limit the number of wives.

Philosophical principles

In the section of the *Reynolds* opinion cited at the beginning of this chapter, the Court created a false binary: "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" (*Reynolds* at 166). It is possible to encourage monogamy and discourage polygamy without outlawing either, as demonstrated in Morocco. Legality does not necessarily equate to endorsement.

Further, the limitations of a constitution are not the most powerful restriction on governmental action. Outrage over public violation of the Ramadan fast in Morocco is an expression of social/cultural identity, regardless of whether it is enforced by law. It is similar to Ibn Khaldun's comment about a leader who does not have the same ᶜasabiyya as the group: "the community would have been split and torn by dissention" (Mukaddimah, 168). It aligns with Thomas Jefferson's concern "that it is time enough for the rightful purpose of civil government

for its officers to interfere when principles break out into overt acts against peace and good order" (quoted in Reynolds at 165).

The enactment and enforcement of laws illuminate the boundaries of ᶜasabiyya but do not create or sustain it. At the time of *Reynolds*, the social/cultural identity of the United States did not include members of the LDS Church, even though the Church was founded in the U.S., and its followers were white and of Western European heritage. Many were recent immigrants from England, as the founding colonists had been. Their open challenge to the nature of Christ, God, humans, and eternity was theologically unacceptable and the practice of polygamy solidified aversion. Yet in 2017, one of the impediments to judicial recourse for Kody Brown is that laws against bigamy are no longer enforced and he is unable to demonstrate a credible threat of harm. The social/cultural identity of the United States is no longer offended by personal relationships that involve multiple partners, even though laws restricting them remain on the books. Social/cultural aversion rooted in religious identity was the basis of the ban on polygamy. But current adherents are unable to demonstrate in court that this aversion no longer exists, which means there is no longer any jurisprudential justification for the ban.

Refocus recap

To recap the argument of this chapter: (1) social/cultural groups contain a dynamic that both identifies and motivates members (ᶜasabiyya). (2) Political nations contain many social/cultural identities, such as race/ethnicity, sexual orientation, and religion. (3) All individuals hold simultaneously many social/cultural identities, some selected while others are imposed (sex/gender, race/ethnicity). The momentary importance is determined by the identity at risk. That is why it is possible for white Christian males to be relatively unaware of their societal

relationship in the United States but more conscious of that status in Morocco. (4) Social/cultural identity changes over time, in relationship with neighbors and itself. On Ibn Khaldun's strong view: each ᶜasabiyya contains within it the inevitability of destruction and the need for renewal. On a weak view: societal standards are not static, but rather relational. It is inevitable that change will occur in community mores over time, especially as the definition of political community is expanded to include additional members (such as non-white men, and women of every ethnicity).

The framework for evaluating religious free expression then is: situated, encultured individuals with differing eternal identities have a First Amendment protection for religious practices in the United States. When the free exercise of those practices seems to violate current social/cultural identity, the government adopts an attitude of ontological agnosticism that is content-neutral as to the underlying religious belief. Laws adopt epistemic perspectivism to accommodate the fullest possible exercise from the perspective of the impacted believer. Contained within any restriction religious exercise is the necessity for review as conditions change. If the reason for restricting religious practice is social/cultural identity (ᶜasabiyya), then the law loses its justification when those conditions/attitudes change.

The next chapter considers these questions: does the framework I propose better resolve free expression challenges that arise from Islamic practices? What limits may social/cultural identity impose and how can change in social/cultural identity be recognized in the legal analysis of the free expression of religion? Finally, what could the *Reynolds* Court have done differently?

CHAPTER FOUR: *REYNOLDS* REFOCUSED

[T]he question is raised whether religious belief
can be accepted as a justification of an overt act
made criminal by the law of the land.
-- Reynolds v. United States at 162

One of the most visible symbols of contemporary religious identity is the head covering worn by some Islamic women. The headscarf, or veil, has sparked controversy in secular nations such as France, in Islamic countries like Iran and Saudi Arabia, and in Turkey, where a secular civic commitment remains at odds with the religious identity of much of its citizenry.[94] The resolution in each depends upon the relationship between government and religion as competing normative authorities. In this work, I argue that this relationship in the United States is one of tolerance between church and government. However, government is to accommodate its citizens and their religious eternal identities. Nevertheless, the Islamic veil has served as a barrier to women in employment, education, and having their day in U.S courts.

This chapter applies the framework developed in Chapter Three to issues that arise with religious head coverings in the United States as an example of how religious identity is to be accommodated. My analysis rejects the approach in this chapter's opening quotation of considering these belief/acts as exceptions to laws of the land. It considers a possible negative impact of using social/cultural identity (ᶜasabiyya) as the outer limit of toleration for belief/acts.

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[94] See discussion of which term to use for religious head coverings in the Introduction.

To determine how to accommodate social/cultural change, it reconsiders how the law could have answered the question of polygamy as a religious practice by Mormons in the United States in the late 1800s. It first situates the question in the jurisprudential, religious, and social/cultural context of the time. It then applies the framework outlined in the previous chapter, and finally considers what approaches would have been viable and their implications for current jurisprudence.

Veil as belief/act

An Islamic woman sued Enterprise Rent-A-Car in Michigan small claims court in 2006. When called to give testimony, the judge asked Ginnah Muhammad to remove her veil, which covered her face except for an opening for her eyes. Judge Paul J. Paruk told her that was necessary so that he could evaluate her credibility: "unless you take that off, I can't see your face and I can't tell whether you're telling me the truth or not …" (Schwartzbaum 1534).[95] Muhammad said she could remove the veil before a female judge, but otherwise could not comply with his order. Judge Paruk said he was the only judge available, and that he understood from conversations with other Muslim women that wearing the veil was a custom, but not a religious obligation. Muhammad insisted that she wore the veil out of respect for her religion, saying "I will not take off my clothes … [T]his is part of my clothes so I can't remove them when I'm in court." The judge dismissed her case.

A few years earlier, a Muslim woman wearing a similar face-covering veil sued the state of Florida for revoking her driver's license because she would not provide a photo revealing her

[95] Transcript of Record *Muhammad v. Enter. Rent-A-Car*, No. 06-41896 (Dist. Ct. Mich. Oct. 11, 2006), quoted in Schwartzbaum.

face. Sultana Freeman had been given a license with a photo in her veil, but the state reviewed its database following the 9/11 terrorist attacks and suspended her license until she appeared for a photo without the veil. In the 2003 trial and appeal, expert witnesses on Islamic law were called by both sides to determine whether wearing the veil is an optional, cultural practice or religious obligation.[96]

In both cases, judges considered as relevant both the centrality of the belief/act to religious theology, and whether there was divergence of practice within the community. However, the Supreme Court has eschewed both inquiries. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds" (*Hernandez v. Comm'r*, 490 US. at 699).

> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, **it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation** (*Thomas v. Review Board,* 450 U. S. at 7165-6, emphasis added).

In neither case was there a suggestion that the women were feigning belief. Focusing on the validity of the belief that veiling is a religious obligation merely confuses the question. It is not uncommon for religious practices to hold great significance to believers regardless of their

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[96] Trial and appellate court rulings are quoted in Moore, 246-7.

centrality to theology in any religion. Such an inquiry is especially fraught in a religion with as many different schools of law and cultural influences as Islam.

Following Ginnah Muhammad's rental car case, the Michigan Supreme Court changed the state's rules of evidence in 2009 to require that the judge or jury be able to observe the demeanor of parties and witnesses (Clerget, 1035).[97] Sean Clerget argued that this rule of evidence fails as a neutral law in that it has the effect of targeting only the religious exercise of Muslim women who wear a veil (Clerget, 1037). Further, it was enacted shortly after Muhammad's case gained media attention. Nothing had been done to regulate the behavior in question before her case. In fact, the trial judge in an earlier criminal case had allowed a witness to testify while wearing a full mask. The court of appeals reversed the mask case on Confrontation Clause grounds.[98] However, no change in the rules of evidence was discussed following that case.

In Georgia, a woman attempting to enter a courtroom as an observer was jailed for wearing a veil in 2006. Lisa Valentine was accompanying her nephew to a traffic citation hearing when officials stopped her at the metal detector and told her she would not be allowed in the courtroom with the veil. She was ordered to serve ten days in jail for contempt of court but was released when the Washington-based Council on American-Islamic Relations (CAIR) urged

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[97] Michigan Rule of Evidence 611(b) "The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons."

[98] The accused has the right to be confronted with witnesses against him. U.S. Constitution, Amendment VI.

federal review of her case and another in Georgia where a veiled woman was denied entry to a courtroom (U.S. Judge Jails Muslim Woman over Headscarf, n.p.). In neither of these cases was the woman a participant as either plaintiff, defendant, or witness so credibility was not an issue.

Roots of exemption

The construction of religious practices as exceptions to "neutral" laws automatically favors citizens who are members of majority groups and religions, as discussed in Chapter One. It also places the burden on those seeking to perform belief/acts to justify an exception. In ruling against Freeman's appeal of her driver's license suspension, the court said, "we recognize the tension created as a result of choosing between following the dictates of one's religion and the mandates of secular law … as long as the laws are neutral and generally applicable to the citizenry, they must be obeyed" (Moore, 247). This construction echoes the *Reynolds* quotation from the opening of this chapter, but was not created by that court.

Sixty-seven years before the *Reynolds* court was presented with its Constitutional challenge, a court in New York City considered the first recorded free exercise case in U.S. history (DeLise 120).[99] During confession, a man revealed to his parish priest that he had received stolen property.[100] It is a practice of the Catholic Church that anything revealed in confession must not be disclosed by the priest. The priest instructed the man to perform penance, including returning the stolen property. Parishioner Daniel Phillips gave the property to his confessor, Father Anthony Kohlmann, who returned the items to their owner, who reported the

[99] *People v. Philips*, N.Y. Ct. Gen. Sess. (1813), cited in McConnell (2006).

[100] Now called the Sacrament of Reconciliation, the ritual provides that sins confessed to a priest are forgiven if the individual truly repents and performs the prescribed penance.

theft to the police. The New York Court of General Sessions subpoenaed Father Kohlmann to testify under oath about the theft. He appeared in court but refused to divulge details of the confession.

> In *Phillips*, the central question under examination was whether a government entity could enjoin a priest to divulge information obtained during the sacrament of Reconciliation (during confession), as forcing a priest to reveal such information would unequivocally violate the priest's conscience, the principles of his church, and the requirements of his position. Furthermore, Father Kohlmann's contravention of the church tenets under examination would have most assuredly resulted in his dismissal from the priesthood and, possibly, his excommunication from the church. Father Kohlmann had to decide between observing his religious scruples—**his identity as a Catholic**—and serving jail time for refusing to testify (DeLiss, 120, emphasis added).

The unanimous opinion of the court was delivered by Judge De Witt Clinton. The court identified the law of general applicability to be: a person must relate all that he (or she) knows when compelled to testify in a court of law. It then considered exemptions that already existed, such as spouses could not be compelled to testify against one another. The court then applied the New York State Constitution's provision that the "free exercise and enjoyment of religious profession and worship" is to be allowed except where the profession and worship interfere with the peace or safety of the state or result in the sanctioning of licentious acts. The court found that exempting Father Kohlmann from the general requirement of full and truthful testimony would not endanger the public peace or safety, or result in licentiousness.

This framing of the question has pre-Constitutional roots, according to James DeLise. As an example, he cited the Charter of Carolina, revised in 1665, which expressly authorized authorities to grant "indulgences" or "dispensations" as they saw "fit and reasonable."

> Conflict between general laws and religious conviction commonly arose in three areas: military conscription, oath requirements, and religious assessments. When

> conflict arose in these areas, "the colonies and states wrote special exemptions into their laws." (DeLise 121, citing McConnell 1990 at 1472).

DeLise relied heavily upon Mitch McConnell's reading of historic religious exercise to argue that the underlying theory also supports race-based disparate impact policies. I consider this approach misguided in both applications, preferring accommodation of all personal identity components, including race, gender, and eternal identity. I point to his historical review to give context to the judicial environment in which *Reynolds* arose.

When Chief Justice Waits framed the question before the court as seeking a religious exemption from a general law, he was reflecting the common construction of the time. US Supreme Court cases since then have followed the same approach. The focus of inquiry has been upon whether a law that appears to be neutral either has a disparate impact upon some religion or is a veiled attack upon it; how much a religious exercise is burdened by the general law; and the strength of the government's interest in refusing the requested exemption.

The analytic framework that I propose rejects this construction of the issue. On my framework, the personal identity of citizens is accommodated to the fullest extent possible, bounded only by social/cultural identity. Both the "religious exemption to a neutral law of general application" and the belief/action dichotomy are rejected as inappropriate to resolving performance of belief/acts.

Evaluating veils

On the evaluative framework that I propose, women who are wearing the veil as a belief/act should be accommodated as a default. If their wearing of the veil seems to violate social/cultural identity, the government adopts an attitude of ontological agnosticism that is

content-neutral as to the underlying religious belief, and adopts the epistemic perspective of the impacted believer. However, the two situations with veils that cover the face present different concerns for the social/cultural context. From a philosophical perspective, the cases demonstrate that (1) centrality to dogma/theology should not matter, but (2) community tolerance may.

In Muhammad's small-claims case, the concern was evaluating her credibility as a witness. A simple accommodation would be to provide a female judge. No larger community concern was presented.[101] Similar accommodations are now made where identification is important, such as female officers to screen prison visitors or travelers in airports. The state had offered to provide a female photographer for Freeman's driver's license photo.

However, the review that flagged Freeman's license was specifically linked to terrorism, not her ability to drive. The state of Florida cited security concerns with the driver's license as a primary means of identification. The judge agreed, ruling that while Freeman "most likely poses no threat to national security, there likely are people who would be willing to use a ruling permitting the wearing of full face cloaks in driver's license photos by pretending to ascribe to religious beliefs in order to carry out activities that would threaten lives" (Moore, 247). The ruling has been criticized for linking a woman who was not suspected of any crime with the threat of terrorism solely on the basis of her appearance.

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[101] Schwartzbaum questioned whether the judge's desire to assess credibility would offset a religious claim, citing much evidence on the unreliability of credibility assessments based on facial expressions. An appeal of the small claims court ruling was filed but then dropped, so there was no judicial review of the issues.

Contours of accommodation

The linkage of Freeman's driver's license with terrorism arises out of a generalized fear of Muslims in the post 9/11 United States, which was and is a social/cultural concern. When surveying regulation of Islam in American law in 2007, Kathleen Moore noted that the Islamic veil accentuated the increasing visibility of Muslims in the United States. "Especially after 9/11, the heightened daily concern over an "Islamic threat" to the United States has made objects associated with Muslim-ness, such as the *hijab*, the displaced locus of debates over the social reality of contemporary America and the global war on terrorism" (Moore, 240). Sixteen years after the attack on the twin towers, anti-Muslim hostility frequently includes not only concern over terrorist attacks, but also denial that the faith and American identity are compatible.

> At another [military] base, the wife of a combat-decorated Muslim U.S. Naval officer, who was wearing a Muslim headscarf, was surrounded in the commissary and spat upon and cursed as not being a "true American and being a spy and a terrorist." She was with her children at the time (Burleigh, n.p.).

The phenomenon of "Islamophobia" in post 9/11 United States illustrates a concern with using social/cultural identity as an outer boundary for tolerating belief/acts. Does this approach leave open the possibility of reading mob rule into religious accommodation?

> CAIR issues a quarterly report on anti-Muslim incidents.
>
> "The presidential election campaign and the Trump administration have tapped into a seam of bigotry and hate that has resulted in the targeting of American Muslims and other minority groups," said Zainab Arain, coordinator in CAIR's Department to Monitor and Combat Islamophobia. "If acts of bias impacting the American Muslim community continue as they have been, 2017 could be one of the worst years ever for such incidents."

The third most common trigger (15%) was a Muslim woman's veil. As noted throughout, the religions who must seek protection from the courts are generally minority, and frequently

disliked, faiths. Rather than facing judges who normalize their biases as neutral, must citizens now face the court of hostile public opinion?

Limits of social/cultural identity

The first consideration is the strength of the opposition that is needed to limit accommodation. Ibn Khaldun described a challenge to ᶜasabiyya as something that would tear apart the community – not merely break out into violence, but such that community members might not follow the tribal leader. In U.S. history, a parallel is the long struggle to remove the remnants of slavery. As with Jim Crow laws restricting the lives of African-Americans, the relevant community is the entire nation.[102] An example is the removal of "separate but equal" segregation of the nation's schools. Rulings of the Supreme Court on forced school bussing to achieve racial integration were challenged by a Governor on the steps of his State Capitol and mobs in the streets. But they were supported by the other two branches of government, and much of the broader community.

Ability to enforce

The limit of community toleration of belief/acts I propose is the point that a Supreme Court ruling would neither be supported by the overall community nor enforced by Congress and the President. The Supreme Court got a glimpse of that boundary early on. It had claimed the right to rule upon the constitutionality of acts of the legislative and executive branches in

[102] I have written on Black Codes and their resurgence in "Jim Crow Laws" and "Segregation – de facto and de jure" in *Multicultural America: A Multimedia Encyclopedia*, Carlos Eliseo Cortés, J. Geoffrey Bolson, editors, Thousand Oaks, CA: SAGE Publishing, 2013.DOI: http://dx.doi.org/10.4135/9781452276274.n686

Marbury v. Madison. (1803). However, the Court had (and has) no independent police force nor standing army. President Andrew Jackson is said to have observed, "John Marshall has made his decision, now let him enforce it," in ignoring a ruling on seizure of lands held by American Indians a few decades before *Reynolds*.[103] While the comment may be more legend than fact, it arose from a potential Constitutional crisis.

In 1832, Chief Justice John Marshall announced the decision of the Supreme Court that declared unconstitutional all laws of Georgia over the Cherokee Nation (*Worchester v. Georgia* (1832). The courtroom was packed with observers, but lacking attorneys for the state of Georgia, which had no intention of complying with an adverse ruling (Miles 527). Two days later, the high court sent its order to the Georgia Supreme Court. President Jackson is alleged to have made a number of comments indicating that he would not enforce any order that became final. Edwin Miles detailed the negotiations that then took place with the plaintiffs, two Congregationalist missionaries who had violated a Georgia law forbidding the "unauthorized residence of white men within the Cherokee Nation" (Miles 519). They were visited by prominent Georgians who feared civil war if an attempt was made to enforce the ruling. The missionaries were urged to accept a pardon to avoid a "possible bloody conflict between state and federal authorities." The missionaries did not wish to accept a pardon, as that would imply an admission of guilt. They eventually decided to instruct their attorney not to pursue the case due to "considerations of public interest" (Miles 540).

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[103] Horace Greely attributed the remark to Jackson in his two-volume history of the "Great Rebellion" of 1860-64 (Miles, 519).

> Though Wirt thought that it "gives one but mournful presages of the strength and durability of the union, when it can only be kept together by means like these," the settlement of the quarrel between Georgia and the Supreme Court undoubtedly helped make possible the preservation of the Union in 1833 (Miles 543).

The Union was preserved at the expense of the Cherokee Nation, soon removed from its lands by the force of public opinion. This result points to the second consideration in limiting accommodation of belief/acts.

Necessity to reconsider

Even when a Supreme Court ruling enjoys the support of the President, Congress, and community, it may produce an unjust result. As Ortega insists, every perspective is grounded in a specific place and time. If the justification for a limit on accommodation of belief/acts is social/cultural identity, then a change in that identity requires a review of the limitation. The fact that laws (such as bigamy) are no longer being enforced would then be relevant evidence of a change in social/cultural identity, rather than a barrier to consideration. This is discussed further in the context of contemporary polygamy below.

Accommodating veils

Whether veiling in Islam is considered to be a religious or cultural practice, it is one deeply connected to the personal identity of the women. Adam Schwartzbaum drew a parallel to cases on access to courts. One was brought by two paraplegics against the state of Tennessee for refusing to make courts handicap-accessible. Lane had to crawl up the stairs to reach the courtroom. The Supreme Court held that "a State must afford to all individuals a meaningful opportunity to be heard in its courts" (*Tennessee v. Lane,* 2004 citing *Boddie v. Connec*ticut, 1971).

> For a religious Muslim woman like Muhammad, the ban on the *niqab* in Michigan courtrooms is the functional equivalent of a courthouse without a ramp or an elevator for a paraplegic. Though she can technically enter by removing her veil, this would be an affront to her dignity and integrity as a human being … For a woman like Muhammad, religious obligations are just as intrinsic to her personhood and as out of her control as Lane's disability (Schwartzbaum, 1556).

This argument points to religion as a component of personal identity, and to accommodation as the appropriate approach. It looks to precedent with physical handicaps, rather than relying upon the First Amendment.

In some cases, women wearing veils have been successful if accommodation, rather than exception, is the goal. This legal strategy was successful in the case of a sixth-grade student who was twice suspended from school for wearing a veil. Nashala Hearn had been permitted to wear the veil and was given time to pray in the early afternoon. However, another teacher compared her veil to a bandana or handkerchief, which are both banned by the school system dress code. She was suspended and her parents brought suit in 2003. The U.S. Justice Department filed a motion in support, arguing that the school district violated the equal protection clause of the 14th Amendment by applying the dress code in a discriminatory manner (Moore, 244). The school agreed to change its dress code to accommodate clothing worn for religious reasons.

When the legal mandate is framed as accommodating religious believers, the result is more accepting of difference than when it is framed as tolerating religion. Muslim women in the workplace have successfully forced accommodation for veils by appealing to Title VII of the Civil Rights Act of 1964, which requires employers to accommodate religious needs of employees. Samantha Elauf's suit against Abercrombie & Fitch went to the Supreme Court. The retail clothing store location in Tulsa, Oklahoma, refused to hire her, saying her scarf clashed

with the company's "Look Policy" (Liptak, n.p.). The company argued that Ms. Elauf did not tell them she wore the scarf for religious reasons. "This is really easy," Justice Antonin Scalia said in announcing the 8-1 vote in Elauf's favor. Scalia said the decision not to hire her was motivated by a desire to avoid accommodating her religious practice. The lone vote in opposition, Justice Clarence Thomas, dissented because the company dress code was "a neutral policy that could not be the basis for a discrimination lawsuit" (Liptak, n.p.).

The antipathy of some citizens and groups toward Muslims, generally, and the veil, specifically, fails to challenge community identity to the extent that accommodation could not be enforced. Further, the examples above show that the judicial and executive branches have supported women who wear the veil. To recap, the belief/act act of wearing a veil for religious reasons is assumed to be permissible as the free exercise of religion. If social/cultural identity is in opposition, courts adopt an attitude of ontological agnosticism – presuming that the religious belief is true – from the perspective of the believer (epistemic perspectivism). The belief/act is accommodated unless social/cultural identity is so opposed that rulings permitting the belief/act cannot be enforced, and only for so long as that condition persists. With this framework established, we return to consider whether it can provide a result for George Reynolds that does not have such a severe impact upon his religion. If not, can it at least provide a result that does not create a permanent bar to judicial relief for Kody Brown.

Reynolds **revisited**

The treatment of polygamy as a religious practice differs in several significant ways from Mormons in 1800 United States to Muslims in 21st Century Morocco. Morocco's approach in the revision of the Family Code was to shift the perspective on polygamy from tolerance by the

government for religion as a competing normative authority to its impact on participants as individual citizens. It also shifted the Constitutional concern from whether religion provides a husband with a right to defy a governmental limit on polygamy to the conditions of wives in polygamy as equal citizens. This shift in perspective is compatible with my revised framework for evaluating religious expression. It takes the perspective of the individual impacted by any limit on religious expression. It preserves the intent that religion is tolerated, while seeking to accommodate citizens with eternal identities.

Could the United States Supreme Court have taken a similar approach to Mormon polygamy as practiced by George Reynolds? To determine the feasibility of this approach, it is necessary to return to the social/cultural context of the polygamy ban and the boundaries of tolerance that existed at the time. Social/cultural identity not only concerned attitudes toward Mormons, but also the way that marriage and interpersonal relationships were viewed, generally.

Reynolds context

The political situation of the LDS Church in 1800s U.S. was reviewed in Chapter One. However, an equally-important context is the status of marriage at the time. Marriage was between one man and one woman and sexual activity outside marriage was illegal. Adultery as well as bigamy could result in criminal charges, as could homosexual status or activity. The practice of polygamy by the LDS Church had become public by the time it was a territory, even though it was suspected much earlier. This is the social/cultural environment in which the *Reynolds* opinion would be received.

Marriages traditionally fell under colonial and then state laws that could have varying legal requirements (such as the age of consent) [104] and formalities (such as recognition of common law marriages).[105] Upon marriage, women ceased to exist as a legal entity under the doctrine of coverture – the two became one, and that was the husband.

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french a feme-covert . . . under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. . . . (English Jurist William Blackstone, cited in *Zaher*, 459).[106]

The wife's person and property belonged to her husband. Any income from property she brought into the marriage was controlled by her husband, and any wages she earned outside the home belonged to him. If he contracted debts, her property went to cover his expenses. Similarly, fathers had complete rights to the labor of children as head of household. Custody of children went to the father in the case of divorce; a woman could also lose her children in the event of widowhood, sexual impropriety, or illegitimacy.

This legal fusion produced odd and unfortunate results. A husband and wife could not

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[104] The age of consent in the colonies had not changed by 1880, it was generally from 10 to 12 years of age. Delaware had a low of 7; no state had an age of consent higher than 12.By 1920, the age had risen to 16-18 in most states, although marriage with parental consent was still allowed at younger ages.

[105] This section drawn from Basch, Hartog, Murry and Zaher.

[106] William Blackstone delivered a series of lectures on English law that were published as four volumes of *Commentaries* between 1765 and 1769. They were read by most American colonial lawyers. Jefferson and other framers of the Declaration of Independence and Constitution broke with him in creating some U.S. laws but and his books were considered an authoritative collection of common law doctrines and English law (Alschuler, 4-7).

steal one another's property, nor conspire together. Neither could sue the other for a civil wrong (tort). A husband could not rape his wife because of the legal fiction. This is also the source of the principle that wives could not testify against their husbands. "[I]n trials of any sort they are not allowed to be evidence for, or against, each other: partly because it is impossible their testimony should be different, but principally because of the union of person. . . ." (Blackstone in *Zaher*, 460).

Divorces were possible, but rare and difficult to obtain, especially for women. For example, the Massachusetts Bay Colony legalized divorce in 1629 on grounds of adultery, desertion or husbandly cruelty, but wives had to prove they had not provoked the attack by nagging or otherwise failing their duties. To obtain a divorce, a woman generally needed multiple grounds, although a man could divorce on the claim of adultery alone. Until the late 1800s, New York allowed divorce only on grounds of adultery, with the guilty party forbidden to ever remarry.

The first Married Women's Property Act was adopted in Mississippi in 1839, primarily to allow husbands to shield their property from creditors by placing it in the wife's name. New York passed what became a model act nine years later, allowing women to retain ownership and control of real and personal property that they brought into the marriage. In 1855, Massachusetts gave married women the right to own real or personal property, sell, contract, sue or be sued, make a will, and have full control over their own earnings. However, other states followed slowly; as late as 1887, a third of states still did not allow women to control their own earnings.

Eight states formed from areas originally controlled by France or Spain encoded community property customs, rather than coverture: California, Idaho, Texas, Washington,

Arizona, Louisiana, Nevada, and New Mexico.[107] Although wives had property rights, husbands retained control over management and disposition. Women had no greater civil liberties in marriages in these states. Since divorce was similarly severely limited, the primary difference was in inheritance.

When the U.S. Supreme Court finally ended the marriage relationship of a dominant male to a subordinate female, it was on a challenge from a community property state. In 1981, the court struck down Louisiana's Head and Master Rule in *Kirchberg v. Feenstra*. The wife had filed a criminal complaint against her husband for molesting their minor daughter. While in jail, the husband used the family home as collateral on a mortgage to pay his defense attorney. His wife was not informed of the mortgage because the law gave her husband exclusive control over their community property. She learned of the mortgage two years later, when his defense attorney threatened to foreclose because the husband had defaulted on the promissory note that had financed his defense.

Sexual activity

At the time of *Reynolds*, all sexual activity outside marriage was proscribed, although rarely enforced with the zeal directed toward Mormons. Laws against adultery and fornication had been enacted in the colonies by Puritan settlers, who used criminal sanctions to force conformity with their religious views. Massachusetts hanged a man and woman for their adultery in 1644. Other punishments commonly included branding, whipping, and public shaming, such

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[107] Wisconsin adopted community property by statute in 1986.

as being put in the stocks. Over time, many of these laws have been repealed, however about half of the states still have laws on the books against adultery.

> More common than criminal prosecutions for adultery are job terminations, sanctions or demotions. The military can discharge or prosecute soldiers for infidelity, and courts have permitted dismissals or discipline of police officers, librarians, fire department employees, and FBI trainees based on marital infidelity that had no demonstrable connection to their job performance. Adultery also figures as a factor in allocating property and custody in divorce cases, although it isn't necessarily relevant to parental fitness or financial need (Rhode, n.p.)

Although largely unenforced, removing these laws can prove to be difficult. In Minnesota, it is still illegal for a married woman to commit adultery or for a single woman to engage in fornication, although there is no similar penalty for men. An attempt to remove the law failed in 2011, when the Minnesota Family Council campaigned to, instead, have it apply to both men and women.

Race and relationships

A few years after *Reynolds*, the same Court upheld a law that forbade couples to intermarry if they were "a white person and a negro" in *Pace v. Alabama*, 106 U.S. 583 (1883). The law imposed penalties on any man and woman who lived together in fornication or adultery: a minimum of one hundred dollar fine and not more than six months imprisonment or hard labor for a first offense, a second offense (with the same person) carried a minimum three hundred dollar fine and a year of imprisonment or hard labor, a third conviction (with the same person) resulted in a two year imprisonment or hard labor. However, for mixed-race couples (who could not marry), the penalties were increased to two to seven years of imprisonment or hard labor for the first offense. After citing the Civil Rights Act, Chief Justice Fields denied the claim that the Alabama statute caused any racial discrimination:

> The two sections of the Code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same (106 U.S. at 585).

It was not until 1964 that the reasoning of *Pace* was rejected in *McLaughlin v. Florida*. The Court struck down a Florida criminal statute that prohibited an unmarried interracial couple from living together. By that time, there was no law against the same conduct among members of the same race.

> Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose -- in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded. That question is what *Pace* ignored, and what must be faced here (379 U.S. at 191).

The Florida Supreme Court had relied upon *Pace* to find no legal discrimination. At the U.S. Supreme Court, the State argued that the legislative purpose of the statute was to prevent breaches of the basic concepts of sexual decency. The Supreme Court accepted that purpose, but wrote, “We find nothing in this suggested legislative purpose, however, which makes it essential to punish promiscuity of one racial group and not that of another” (379 U.S. at 193). The Court considered but left standing Florida’s law against interracial marriage. Marriage between white and non-white spouses was permitted nationwide in 1967 (*Loving v. Virginia*, 388 U.S. 1).

Rewriting Reynolds

The Morrill Anti-bigamy Act was passed by Congress and signed into law by President Lincoln on July 2, 1862. On its face, it is neutral among religions as a rule of action for all those residing in the Territories. In a speech to the House of Representatives, however, Representative Justin Smith Morrill of Vermont attacked the idea that Utah could pass laws permitting polygamy under the protection of the First Amendment.

> Under the guise of religion, this people has established, and seek to maintain and perpetuate, a Mohammedan barbarism revolting to the civilized world … As well might religion be invoked to protect cannibalism or infanticide. … Could a man, charged with burglary or rape, find privilege and excuse before any of our courts on a plea that it was an act in accordance with the religion of the prophet Mercury or the prophet Priapus, and that our Constitution permits the *free exercise* of religion? (Vitale 267-8)

Morrill's comparison of (Muslim or Mormon) polygamy with cannibalism or infanticide sets it outside practices that the community was able to tolerate. As detailed in Chapter One, the unpopularity of Mormon polygamy had been manifested at every level. Citizens of the states where they moved attacked violently, while local authorities either turned a blind eye or openly supported the mobs.

Another pragmatic consideration was the potential vulnerability of the body politic. Many debates on polygamy drew parallels to the threat to the nation from the south and that threat potentially posed by Brigham Young's theocracy to the west. Legislation after *Reynolds* moved more directly against the LDS church itself, dissolving its legal corporation, seizing property and business interests. While polygamy was presented as a religious practice, it was also laden with political implications.

When Mormons began to practice polygamy, they did not limit the number of possible

wives (unlike Islam). The LDS Church has acknowledged that Joseph Smith had as many as 40 wives, in various forms of marriage – some sealed to him after he had died. Brigham Young had at least 55, including 30 who were sealed to him for eternity only, meaning that he would not share an earthly life with them. In cases such as these, women who were sealed in some forms of Mormon marriage did not live with their husbands.

Plural marriages could take several forms, including: spiritual wifery, proxy relationships, spouses without conjugal relations or cohabitation. Even plural wives in familial arrangements were encouraged to be self-sufficient. Some pursued careers in medicine, enabled by having sister wives who shared child-care duties. Others worked as telegraph operators, teachers, or business managers (Gillett, 2000). By necessity, they had greater independence than women in monogamous marriages. Plural wives who were journalists and writers defended the practice, saying that polygamy "gives women the highest opportunities for self-development … more independent of thought and mind" (Harmer-Dionne, 1998).

Although the LDS church discouraged divorce, women were able to initiate divorce proceedings and the church was liberal in granting them. There was no barrier or stigma to remarriage for women as either plural wives or in monogamous marriage.

Morocco model

As noted above, the approach that Morocco has taken to polygamy in the 2011 Constitution and Family Code revision is compatible with the framework I propose in this work. It establishes religion and government as competing normative authorities (with the King as leader of each). It recognizes the religious identity of citizens and seeks to accommodate the

traditional practice of polygamy while adding safeguards for the safety and security of women as equal citizens.

However, the religious and societal attitudes of the community for polygamy as practiced by Muslims in Morocco differs from the community tolerance for polygamy as practiced by some Mormons in the United States in the 1800s and by some non-LDS fundamentalists today. Even if a U.S. court adopted the epistemic perspectivism of George Reynolds, or Kody Brown, would be limited by a different social/cultural identity. The U.S. social/cultural identity of the time and the viability of the Morocco model to each case is discussed below.

Opinion of the Court

The refocused approach to the free expression of religion begins with the two baseline requirements for any successful evaluative framework.

(1) the Court adopts an attitude of ontological agnosticism, which removes all of the *Reynolds* court arguments regarding the superiority of monogamy to societal culture and the odiousness of the practice of polygamy; and

(2) the Court adopts epistemic perspectivism, examining the belief/act from the perspective of the participants, George Reynolds and his two wives.

The *Reynolds* court did recognize the importance of the practice to the participants, saying they believed that not practicing polygamy when approved by the LDS church "would be punished, and that the penalty for such failure and refusal would be damnation in the life to come" (*Reynolds* at 161).

To apply the framework that I propose, we begin by saying that the belief/act of

polygamy is part of the eternal identity of the members of the LDS Church. At that time in history, citizens other than white men were just beginning to have a legally-recognized identity. There were no protections for women, for same-sex orientations, or any conduct of sex outside monogamous marriage. So, this is a thin claim.

Next, we attempt to accommodate the belief/act as a default – saying that polygamy is permissible unless limited by social/cultural identity so opposed that it would rupture the fabric of society. Unlike contemporary Morocco, polygamy had no support in either cultural or non-LDS religious tradition in 1800's United States. Carving out a space for polygamy that protected women would not find popular support, either, as monogamous marriage did not recognize their legal existence. Laws forbade any sexual relationship outside monogamous marriage, so a ruling that polygamy was possible but discouraged would also have been infeasible. Similarly, there was no space to say that polygamous marriages are religious only, and not seek state protection.

Opinion options

This social/cultural boundary of toleration is precisely the situation faced by the *Reynolds* court. Utah had made polygamy the default marital relationship and society fought back at every level:, rioting citizens, Governors, Congress, and the President -- before it got to the Court. The options available to the *Reynolds* court seem to be these:

(1) Permit the practice of religious polygamy by members of the LDS Church as an exception to the law anywhere in the United States and its territories.

This would be necessary if Mormons were to travel outside Utah with their extended families, or attempt to reside in other states. It is undoubtedly the result that Brigham Young and church

elders expected in bringing their legal challenge to the Morrill Anti-bigamy law under the plain wording of the First Amendment.

(2) Allow polygamy in Utah, in deference to territorial authority.

Territorial laws had been established to deal with inheritance, divorce, property ownership: a complete network of regulations that supported plural marriage. The hazard was that other states would not recognize these marriages, so it would be a barrier to mobility and to eventual statehood. It could even be a barrier to remaining as a territory.

This approach was suggested by Mormons who pointed out that the Democratic Party had passed a resolution before the Civil War that "Congress has no power under the Constitution to interfere with or control the domestic institutions of the several States, and that all such States are the sole and proper judges of everything appertaining to their own affairs not prohibited by the Constitution." The target of that resolution was slavery. As the Mormons pointed out, if states could claim the right to permit slavery, then they could also claim the right to permit polygamy.

Lincoln addressed this as a contradiction in the position of the Democratic Party and the public positions taken by its candidate, Senator Stephen A. Douglas.

> [I]it is very plain the Judge evades the question the Republicans have ever pressed … in regard to Utah. That question the Judge well knows to be this: 'If the people of Utah shall peacefully form a State Constitution tolerating polygamy, will the [Democrats] admit them into the Union?' there is nothing in the United States Constitution or law against polygamy; and why is it not part of the Judge's

> "sacred right of self-government" for that people to have it, or rather *keep* it, if they choose?[108] (Vitale 267)

Although Lincoln signed the Morrill Anti-bigamy Act into law, he was reluctant to enforce it. He needed Utah's support for the war, and had authorized Brigham Young to raise his own army to protect telegraph and mail routes through the territory until Federal troops were available.[109] Other Presidents were less equanimous and Congress grew increasingly impatient. "The specter of Mormon polygamy was cast as an urgent political crisis, an imminent threat to the emergent nation's system of political governance and racial destiny …" (Deinke, 853). The prospect of the state sanctioning polygamy gave rise to 55 proposed constitutional amendments on marriage between 1879 and 1924.

Any ruling short of full support for the anti-bigamy law would have been unpopular and unenforceable. It would have been strong enough to challenge the social/cultural identity of the nation.. The LDS Church presented a threat to the self-image of the United States as a white, Protestant-Christian nation. As a powerful theocracy, it posed a potential threat to the continued existence of the nation, still dealing with the ravages of war and reconstruction of the south.

This meets the first criteria for proscribing/limiting a belief/act on my framework. That

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[108] From a speech in response to Douglas, 26 July 1857 in Springfield, Illinois.

[109] Lincoln is said to have provided this explanation for not enforcing the law against polygamy:

"Occasionally [in clearing timber from a field] we would come to a log that had fallen down. It was too hard to split, too wet to burn, and too heavy to move, so we ploughed around it. That's what I intend to do with the Mormons. Tell Brigham Young that if he will let me alone, I will let him alone."

Attributed to an interview with T.B.H. Stenhouse, who was editor of the Deseret Tribune in Salt Lake City (Vitale 269).

leaves us with how to prohibit polygamy for George Reynolds in a way that does not create a conundrum in 2017: a ban that does not outlast the outrage that justified it.

(3) Prohibit polygamy as a religious practice that cannot be tolerated by current social/cultural norms.

The question is not framed as an exemption to a law that applies to everyone, as the law clearly targeted Mormons. It does not claim that prohibiting religious practices does not infringe upon belief. In acknowledging the social/cultural identity – the ʿasabiyya -- of the nation, it relies upon the Madison/Jefferson approach cited in the original *Reynolds* opinion:

> **['I]t is time enough for the rightful purpose of civil government for its officers to interfere when principles break out into overt acts against peace and good order' (*Reynolds* at 165).**

The 'overt acts against peace and good order' were committed against Mormons, as well as in conflict between Mormons and their neighbors. However, they were indicators of boundaries of tolerance. In chronicling the events leading up to the Utah War, David Roberts said "To look back at this episode now is to see the nation at the brink of civil war in 1857 and 1858—only to pull back" (Roberts, n.p.)

Protected practices and cultural change

The century following *Reynolds* has seen profound societal changes. A line of Supreme Court cases has established that the relationship between individuals is due the same Constitutional protection whether recognized as marriage or not. It began when the Court protected the right of married couples to contraceptives (*Griswold v. Connecticut*, 1965). In a

decision extending the protection to unmarried couples, the Court held there was no reason to treat married and unmarried persons differently, saying they share a right to privacy.

> [W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike ... the married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child (*Eisenstadt v. Baird*, 405 U.S. at 454 (internal citations omitted).

The interpersonal association itself was accorded status. The Court recognized that relationship was eligible for the same sort of privacy accorded the marital status.

The court found a similar protection for same-sex couples in *Lawrence v. Texas*, 2003). To reach its decision, the court distinguished its earlier ruling in *Bowers v. Hardwick* (1986). In that case, a Georgia statute made sodomy illegal for both heterosexual and same-sex couples. The court observed that although the statute seemed just to prohibit a certain sexual act, the impact is more severe for same-sex couples. It again accorded individuals the right to establish a protected interpersonal relationship.

> Their penalties and purpose, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private or places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals (539 U.S. at 567).

In that same vein, the Virginia and Georgia have struck sodomy and fornication laws, relying upon *Lawrence v. Texas.*[110] However, a handful of states still have such statutes, even though they are Constitutionally-suspect (Sweeny, 129).

Brown context

When Kody Brown brought his lawsuit in 2013, the cultural climate had changed such that the reality television program chronicling his marriage was a curiosity, not social scandal. The lead counsel on his law suit certainly saw it falling in the line of cases protecting private personal conduct among consenting adults.

> The case was never about the recognition of multiple marriages or the acceptance of the religious values underlying this plural family. It was about the right of consenting adults to make decisions for themselves and their families. Judge Clark Waddoups, a conservative George W. Bush appointee, ruled that the criminalization of cohabitation clearly violated the due process clause and the free exercise clause of the United States Constitution (Turley n.p.).

The Tenth Circuit Court of Appeals disagreed. "We do not address the merits of the Browns' claims. The district court should not have done so, either" (Brown v. *Buhman*, 17).

The Court of Appeals would not evaluate whether or not religious polygamy should be permitted in the United States in 2016. It refused to consider the merits of the case because it did not believe the Brown family would be arrested for practicing polygamy. The court's request to attorneys for both sides that they file supplemental briefs was a signal of the direction it would take. The court asked counsel to argue whether the Brown family had standing when the suit was filed, and if so, whether their claims were rendered moot when the Utah County Attorney's

[110] *Martin v. Ziherl*, 607 S.E.2d 36 7(Va. 2005), *La. Electorate of Gays & Lesbians, Inc. v. Connick*, 902 So. 2d 1090, 1096 (La. Ct. App. 2005)

Office (UACO) adopted a policy of not prosecuting polygamy as a crime unless another crime was involved, such as fraud or abuse.

The issues of standing and mootness are threshold considerations. They determine whether the federal court has the jurisdiction to consider the case. Standing concerns whether the person bringing the complaint has a "case or controversy" at the time that the suit is filed. Mootness concerns whether it is still a live concern at the time of judgment. "[T]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)" (Tenth Circuit opinion citing *Arizonans for Official English*, 520 U.S. at 68 n. 22).

The Court assumed that the Browns had standing when they filed the case -- a credible threat of prosecution -- due to the investigation initiated by Utah County Attorney Jeffrey Buhman. But the case became moot when Buhman announced the UACO policy of not prosecuting polygamy as a separate offense in May, 2012. Brown's attorney argued that the next county attorney could change the policy, which would make them again liable for arrest, and questioned whether the DA had adopted the policy as a tactical maneuver to moot the case. The appellate court was not convinced. Neither was the U.S. Supreme Court, which refused to hear the case. The Brown family was denied their day in court because the state promised not to enforce its law - a law required by the state constitution, which state attorneys swear an oath to uphold.

Polygamy as a religious practice was prohibited because of community outrage in 1879. A lack of community outrage made it impossible to mount a successful legal challenge to the prohibition in 2017. If *Reynolds* had been decided on the grounds suggested above, refusal to

prosecute polygamy would be evidence that the ban is no longer justified, rather than a barrier to entry. This is the final part of the new framework that I propose: change is relevant to any ruling based on social/cultural identity. The burden is on the ban to demonstrate its continued viability.

Barriers to justice

Just as the veil worn by Ginnah Muhammad prevented her from presenting her case in court, the bridal veils of Meri, Janelle, Christine, and Robyn Brown not only subject them to jeopardy but also deny them judicial relief. In 2017 United States, the Utah cohabitation statute is not thought to apply to a man with multiple intimate relationships, nor one legal marriage and additional sexual relationships. As demonstrated by Judge Waldroups in the series of scenarios quoted in Chapter One: "Court: so it's the expression of the fact that the person is a wife that makes it illegal. State: yes" (*Brown* at 59-62).

Each "case or controversy" is necessarily connected to a specific place and time. The refusal of the appellate and Supreme Courts to hear this case at this time perpetuated two harms, which are seen more clearly from the perspective of the impacted wives. The first is the characterization of the injury. As noted above, the framing of the question often determines its legal resolution. The second is a missed opportunity to address some of the social and cultural harms of plural marriage.

Legal outcasts

The court of appeals characterized the harm as threat of arrest. It was convinced the threat no longer existed when the Utah county attorney adopted an official policy of not prosecuting polygamy unless other violations of law were present (which did not apply to the Brown family).

However, in the case of same-sex marriage, the Court considered it to be a harm that citizens were denied the opportunity to marry – even though criminal penalties had been removed. "But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. **Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty**" (*Obergfell* at 14, emphasis added).

The Court rejected applying liberty in a circumscribed manner rooted in historic practices:

> [I]t is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right (internal citations omitted). That principle applies here. **If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied** (Obergfell at 18, emphasis added).

Consider the contrast between asking for a religious exemption from the Utah cohabitation statute for polygamy, or claiming either (1) plural marriage as right to marriage among consenting adults (in the precedents cited by *Obergfell*), or (2) plural marriage as undistinguished from the other multiple intimate relationships condoned in contemporary society (in the precedents cited by *Lawrence*). In either sense, the underlying conduct is not legally proscribed and does not engender societal outrage. The conduct/practice of multiple, simultaneous, intimate partners is now only problematic when it is associated with religious belief.

Further, the *Obergfell* court specifically linked marriage with identity: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, **to define and express their identity**. The petitioners in these cases seek to find that liberty by marrying …" (*Obergfell* at 2, emphasis added). On my framework, the belief/act of polygamy is assumed to be permissible as the free exercise of religion. If social/cultural identity is CURRENTLY in opposition, courts adopt an attitude of ontological agnosticism – presuming that the religious belief is true – from the perspective of the believer (epistemic perspectivism). The belief/act is accommodated as a component of personal identity unless social/cultural identity is so opposed that rulings permitting the belief/act cannot CURRENTLY be enforced, and only for so long as that condition persists. Religious eternal identity, as expressed through plural marriage, can be accommodated within the boundaries of social/cultural identity in the United States in 2017.

Missed opportunity

While Morocco's legal and philosophical approach to polygamy may have been infeasible at the time of *Reynolds*, it would address several concerns raised by contemporary religious polygamy in the United States. To borrow the Islamic regulation of human actions, polygamy would no longer be forbidden. It could be considered disliked but legal, or permitted (but not recommended or obligatory). At this time in United States, many citizens feel that same-sex marriage falls into this category. Their religious beliefs cause them to oppose marriage for same-sex couples, even though such marriages are now legal.

Removing the criminal sanctions would go one step toward improving the lives of women in polygamist communities that now insulate themselves to avoid prosecution. The focus

of most concern with polygamy is not on families who have their own reality television shows. It is with those who live in remote compounds or isolated communities to avoid notice. Girls often marry young, have little education, and less opportunity to exit (Bennion 2012, 259). Given the history of legal prosecution, fundamentalist communities in Utah might be forgiven a lack of confidence in the county attorney's promise not to prosecute. Not all such communities are in Utah, and families in states such as Texas do not even have that thin assurance.

Other safeguards inspired by Morocco's approach would go even farther to protect plural wives, such as: verification of age and consent, official notice to the wives of the additional marriage, availability of divorce, and financial provision for exiting wives. Even if most plural marriages remain unofficial – religious ceremonies with no state license or recognition – the availability of legal protections for wives would give them the ability to seek improved conditions without leaving their religion (Bennion & Joffe, 228).

Refocus recap

This chapter applies the new framework I have developed to evaluate permissibility of belief/acts in the United States. In previous chapters, I have shown how the division of belief from practice is impossible for religiously-motivated actions. This chapter also rejects the approach of considering belief/acts as exceptions to general laws that apply to everyone. While appearing to be neutral among religions, each of these criteria further privilege religions of majority groups that are already accommodated in law.

This chapter further develops the idea that religion is a component of personal identity through consideration of veils worn by Muslim women. In it, I consider the potential hazard of using social/cultural identity as an outer boundary for community toleration. I suggest two

constraints: the threat to social/cultural identity must be unenforceable due to opposition by the community and government, and any ban based in that concern must be reviewed. When community aversion changes such that toleration is possible, any prohibition of belief/acts loses its justification.

The court cases of Mormon polygamy involving George Reynolds and Kody Brown illustrate the boundaries of community toleration and how they have changed over time. I conclude that the approach to polygamy taken by Morocco would not have been an option for the *Reynolds* court, but would have produced a more just result if implemented in the case of the Brown family as exemplars of contemporary plural marriage. The refocus I have proposed would bring coherence to Supreme Court jurisprudence in the area of religious free exercise and better protect the religious identity of U.S. citizens.

CONCLUSION

The only defence of the accused in this case is his belief
that the law ought not to have been enacted.
It matters not that his belief was a part of his professed religion:
it was still belief, and belief only.

-- Reynolds at 167

This dissertation provides a philosophical grounding for religious belief that can achieve legal recognition. It places religious eternal identity – which includes post and possibly pre-embodiment selves – alongside components of personal identity such as sexual orientation. This move changes the approach from tolerance of doctrine to accommodation of individuals. Adopting this philosophical approach would bring coherence to Supreme Court opinions and some predictability to results. Both are desirable outcomes of legal theory. Equally importantly, it respects the lived experience of religion. Believers experience religion as part of their identity -- often, the most important part.

The fundamental insight that informs this refocusing of the interplay between religion and law comes from my functional definition of religion. Religions make conflicting claims about what exists – the metaphysics of reality. One way to categorize these claims is by asking what happens at death. One option is that the death of the material body is the end of life. A second option is that some sort of non-physical life continues, as a spiritual or energy force, or through reincarnation. A third option is that some sort of individuated life continues, which retains memories of, and perhaps responsibility for, the experiences of the entity before death.

These religious outcomes do more than describe what happens at death, they define who we are as we live. On option one, I am an embodied intelligence that will cease when my body dies. Option two defines me as an intelligence with a spirit or essence that will continue after the death of my physical body. This spirit may, or may not, be impacted by the actions of my physical body during life. Option three makes significant demands upon my embodied existence. As I live each day, I am a body with an intelligence and an eternal essence, or soul. This invisible identity is the most important, because it continues for eternity.

This functional definition of religion grounds my approach of considering religious eternal identity to be a component of personal identity similar to sexual orientation. It also provides an answer to the Reynolds Court question "what is the religious freedom which has been guaranteed?" As I describe in Chapter Two, historians ask different questions than philosophers or faithful believers. This definition is legally-sufficient to evaluate court cases arising from free exercise claims.

The need for a refocusing of religious expression is demonstrated by the conundrum created by the treatment of religiously-motivated polygamy by the Supreme Court. In considering the practice of polygamy by members of the Church of Jesus Christ of the Latter-day Saints, the Court attempted to draw a line between religious belief and practices motivated by that belief. It claimed the right to regulate practices, even though beliefs are protected by the First Amendment guarantee of free expression of religion. This would mean that Mormons could believe that having multiple spouses while embodied in this world is essential to eternal salvation, but they could not actually participate in plural marriages. However, this approach produced the opposite result in 2017. Changes in societal standards over 150 years created the

situation that such relationships are subject to prosecution only if they are practiced due to a religious belief.

> But let's look at how this really works in practice. In practice, there is the marriage, it may not be recognized by the state, but it is a marriage, it's performed, there is a wedding ceremony performed, there are vows exchanged. The problem is proving it. The federal government had that problem in the 1880s. That's why they added cohabitation to the Edmunds Statute. The same thing with the Utah statute. The problem was proving that they were married, so they added cohabitate, but the person has to cohabitate knowing that the other person is married …
>
> Court: so tell me what's different between adultery and what you've just described. State: the one is that they claim to be married. But just because the state can't prove it doesn't mean it hasn't happened. That's what's happening in the [religious] polygamist communities. Court: **so it's the expression of the fact that the person is a wife that makes it illegal. State: yes.** (*Brown* at 59-62, emphasis added)

Absent any religious connotation, multiple simultaneous, intimate relationships among consenting adults are now not prosecuted. Actions that are not illegal absent a religious belief should not be proscribed *because* of a religious connotation.

The first goal of this project was to identify conditions for any philosophically-adequate approach to problems of religious exercise. To accomplish this, I first rejected both the *Reynolds* division of religious belief from practice, and its consideration of religious practices as exceptions to neutral laws. While appearing to be neutral among religions, both of these criteria further privilege religions of majority groups that are often already accommodated in law. I also examined the concept of toleration, determining that government and religion may tolerate one another as competing normative authorities. But it is an inappropriate attitude for the government to take toward its citizens.

I then established two baseline requirements. Because religious claims are beyond current epistemic access, the government must treat each as equally true, adopting an attitude I call *ontological agnosticism*. Any limitation on the practice of religion must not be based on the content of religious beliefs (or judicial biases). This is not a neutral position, but rather a consideration of perspectives as equally valid, inspired by the philosophy of José Ortega y Gasset. The second is that religious metaphysical commitments entail a belief about my present personal identity. The province of courts is my period of embodiment, but a condition of that embodiment is my eternal self. I live in this world as an individual with a race, sex, and religious eternal identity. When considering claims of religious exercise, courts should employ what I call *epistemic perspectivism* – considering the issue from the point of view of the impacted party.

This is the space from which to consider any approaches to religious free expression. The *Reynolds* Court's fear that every citizen will be a law unto himself is answered with perspectivism. No individual or court is objective or neutral, each comes from a point of view. Courts routinely examine witnesses to events to collect perspectives and then decide among them. The concern with relativism in this instance rests in the impossibility of proving which metaphysical reality actually exists. So, the approach is to consider each as true for the purposes of the claim, and to evaluate the permissibility/impact of the claim from the perspective of the impacted believer.

The second goal of this work was to make a case for treating religious exercise as a component of personal identity. Other approaches may be suggested, if they meet the baseline concerns that I have established. However, considering religious eternal identity to be similar to sexual orientation produces advantages for both religious believers and courts attempting to

accommodate them. As I demonstrate with the series of cases on Islamic veils in contemporary United States, the change in perspective simplifies the analysis. There is a body of law on accommodation of race, sex/gender, and orientation that is compatible because those are also components of personal identity.

This also answers two worries that Courts have identified, which I discussed in Chapter One: who decides how to accommodate religious practices and what exactly counts as a religious act. Just as with laws regarding sexual orientation, federal and state governments consider how to accommodate religious identity in creating laws or administrative rules. Courts review them when individuals bring suit. Religious practices are any acts motivated by religious eternal identity. Centrality to theology has already been rejected as an appropriate judicial determination by the Supreme Court.

I applied my framework to the situation underlying the *Reynolds* case, and determined societal norms of the time would not permit a verdict favorable to the LDS Church. This prompted the philosophical concept of social/cultural identity from Ibn Khaldun. This concept works to provide a limit on accommodation, the answer to the Court's concern that human sacrifice would have to be permitted, "Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?" (*Reynolds* at 166). Toleration is employed here between the social/cultural identity and individual eternal identity. Without judging the merits of the belief, it can restrict actions it prompts.

However, as Ibn Khaldun demonstrates, this social condition changes over time, which is what has produced the contemporary conundrum. In response, I flesh out two characteristics of

social/cultural identity when used in legal analysis of free expression claims. First, the community outrage must be to the extent that a judicial opinion would not be supported or enforced and second, any restriction must be reviewed if social conditions change. The burden is upon any restriction to demonstrate that it is still grounded in sufficient social/cultural identity to support an imposition on accommodation.

The fully-articulated framework that I propose would remove the ban on polygamy for the *Sister Wives* family. The fact that anti-bigamy laws are no longer enforced against polygamy would be evidence that the social/cultural identity has changed such that the imposition on their belief/act is no longer justified. I suggest that following the model of Morocco's legalization of polygamy would better protect participants than the harms produced by the U.S. ban.

TABLE OF CASES

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Worchester v. Georgia, 31 U.S. 515 (1832)

APPENDIX

REYNOLDS v. UNITED STATES

98 U.S. 145 (1879)

Supreme Court of United States

*151 Mr. George W. Biddle and Mr. Ben Sheeks for the plaintiff in error.

The Attorney-General and The Solicitor-General, contra.

*153 MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The assignments of error, when grouped, present the following questions:—

1. Was the indictment bad because found by a grand jury of less than sixteen persons?

2. Were the challenges of certain petit jurors by the accused improperly overruled?

3. Were the challenges of certain other jurors by the government improperly sustained?

4. Was the testimony of Amelia Jane Schofield, given at a former trial for the same offence, but under another indictment, improperly admitted in evidence?

5. Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty?

6. Did the court err in that part of the charge which directed the attention of the jury to the consequences of polygamy? These questions will be considered in their order.

1. As to the grand jury.

The indictment was found in the District Court of the third judicial district of the Territory. The act of Congress "in relation to courts and judicial officers in the Territory of Utah," approved June 23, 1874 (18 Stat. 253), while regulating the qualifications of jurors in the Territory, and prescribing the mode of preparing the lists from which grand and petit jurors are to be drawn, as well as the manner of drawing, makes no provision in respect to the number of persons of which a grand jury shall consist. Sect. 808, Revised Statutes, requires that a grand jury impanelled

before any district or circuit court of the United States shall consist of not less than sixteen nor more than twenty-three persons, while a statute of the Territory limits the number in the district courts of the Territory *154 to fifteen. Comp. Laws Utah, 1876, 357. The grand jury which found this indictment consisted of only fifteen persons, and the question to be determined is, whether the section of the Revised Statutes referred to or the statute of the Territory governs the case.

By sect. 1910 of the Revised Statutes the district courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; but this does not make them circuit and district courts of the United States. We have often so decided. American Insurance Co. v. Canter, 1 Pet. 511; Benner et al. v. Porter, 9 How. 235; Clinton v. Englebrecht, 13 Wall. 434. They are courts of the Territories, invested for some purposes with the powers of the courts of the United States. Writs of error and appeals lie from them to the Supreme Court of the Territory, and from that court as a territorial court to this in some cases.

Sect. 808 was not designed to regulate the impanelling of grand juries in all courts where offenders against the laws of the United States could be tried, but only in the circuit and district courts. This leaves the territorial courts free to act in obedience to the requirements of the territorial laws in force for the time being. Clinton v. Englebrecht, supra; Hornbuckle v. Toombs, 18 Wall. 648. As Congress may at any time assume control of the matter, there is but little danger to be anticipated from improvident territorial legislation in this particular. We are therefore of the opinion that the court below no more erred in sustaining this indictment than it did at a former term, at the instance of this same plaintiff in error, in adjudging another bad which was found against him for the same offence by a grand jury composed of twenty-three persons. 1 Utah, 226.

2. As to the challenges by the accused.

By the Constitution of the United States (Amend. VI.), the accused was entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, "be indifferent as he stands unsworn." Co. Litt. 155 b. Lord Coke also says that a principal cause of challenge is

"so called because, if it be found true, it standeth sufficient of itself, without *155 leaving any thing to the conscience or discretion of the triers" (id. 156 b); or, as stated in Bacon's Abridgment, "it is grounded on such a manifest presumption of partiality, that, if found to be true, it unquestionably sets aside the ... juror." Bac. Abr., tit. Juries, E. 1. "If the truth of the matter alleged is admitted, the law pronounces the judgment; but if denied, it must be made out by proof to the satisfaction of the court or the triers." Id. E. 12. To make out the existence of the fact, the juror who is challenged may be examined on his voire dire, and asked any questions that do not tend to his infamy or disgrace.

All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive (Gabbet, Criminal Law, 391); others, that it must be decided and substantial (Armistead's Case, 11 Leigh (Va.), 659; Wormley's Case, 10 Gratt. (Va.) 658; Neely v. The People, 13 Ill. 685); others, fixed (State v. Benton, 2 Dev. & B. (N.C.) L. 196); and, still others, deliberate and settled (Staup v. Commonwealth, 74 Pa. St. 458; Curley v. Commonwealth, 84 id. 151). All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside. Mr. Chief Justice Marshall, in Burr's Trial (1 Burr's Trial, 416), states the rule to be that "light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, *156 brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who

has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.

The challenge in this case most relied upon in the argument here is that of Charles Read. He was sworn on his voire dire; and his evidence,[1] taken as a whole, shows that he "believed" he had formed an opinion which he had never expressed, but which he did not think would influence his verdict on hearing the testimony. We cannot think this is such a manifestation of partiality as to leave nothing to the "conscience or discretion" of the triers. The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality. In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the *157 juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so. Such a case, in our opinion, was not made out upon the challenge of Read. The fact that

he had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed. Under these circumstances, it is unnecessary to consider the case of Ransohoff, for it was confessedly not as strong as that of Read.

3. As to the challenges by the government.

The questions raised upon these assignments of error are not whether the district attorney should have been permitted to interrogate the jurors while under examination upon their voire dire as to the fact of their living in polygamy. No objection was made below to the questions, but only to the ruling of the court upon the challenges after the testimony taken in answer to the questions was in. From the testimony it is apparent that all the jurors to whom the challenges related were or had been living in polygamy. It needs no argument to show that such a jury could not have gone into the box entirely free from bias and prejudice, and that if the challenge was not good for principal cause, it was for favor. A judgment will not be reversed simply because a challenge good for favor was sustained in form for cause. As the jurors were incompetent and properly excluded, it matters not here upon what form of challenge they were set aside. In one case the challenge was for favor. In the courts of the United States all challenges are tried by the court without the aid of triers (Rev. Stat. sect. 819), and we are not advised that the practice in the territorial courts of Utah is different.

*158 4. As to the admission of evidence to prove what was sworn to by Amelia Jane Schofield on a former trial of the accused for the same offence but under a different indictment.

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

In Lord Morley's Case (6 State Trials, 770), as long ago as the year 1666, it was resolved in the House of Lords "that in case oath should be made that any witness, who had been examined by the coroner and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer, that if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the examination might be read; but whether he was detained by means or procurement of the prisoner was matter of fact, of which we were not the judges, but their lordships." This resolution was followed in Harrison's Case (12 id. 851), and seems to have been recognized as the law in England ever since. In Regina v. Scaife (17 Ad. & El. N.S. 242), all the judges agreed that if the prisoner had resorted to a contrivance to keep a witness out of the

way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read. Other cases to the same effect are to be found, and in this country the ruling has been in the same way. Drayton v. Wells, 1 Nott & M. (S.C.) 409; Williams v. The State, 19 Ga. 403. So that now, in the leading text- books, it is laid down that if a witness is kept away by the adverse party, *159 his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence. 1 Greenl. Evid., sect. 163; 1 Taylor, Evid., sect. 446. Mr. Wharton (1 Whart. Evid., sect. 178) seemingly limits the rule somewhat, and confines it to cases where the witness has been corruptly kept away by the party against whom he is to be called, but in reality his statement is the same as that of the others; for in all it is implied that the witness must have been wrongfully kept away. The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.

Such being the rule, the question becomes practically one of fact, to be settled as a preliminary to the admission of secondary evidence. In this respect it is like the preliminary question of the proof of loss of a written instrument, before secondary evidence of the contents of the instrument

can be admitted. In Lord Morley's Case (supra), it would seem to have been considered a question for the trial court alone, and not subject to review on error or appeal; but without deeming it necessary in this case to go so far as that, we have no hesitation in saying that the finding of the court below is, at least, to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest.

The testimony shows that the absent witness was the alleged second wife of the accused; that she had testified on a former trial for the same offence under another indictment; that she had no home, except with the accused; that at some time before the trial a subpœna had been issued for her, but by mistake she was named as Mary Jane Schobold; that an officer who knew the witness personally went to the house of the accused to serve the subpœna, and on his arrival inquired for her, either by the name of Mary Jane Schofield or Mrs. Reynolds; that he was told by the accused she was not at home; *160 that he then said, "Will you tell me where she is?" that the reply was "No; that will be for you to find out;" that the officer then remarked she was making him considerable trouble, and that she would get into trouble herself; and the accused replied, "Oh, no; she won't, till the subpœna is served upon her," and then, after some further conversation, that "She does not appear in this case."

It being discovered after the trial commenced that a wrong name had been inserted in the subpœna, a new subpœna was issued with the right name, at nine o'clock in the evening. With this the officer went again to the house, and there found a person known as the first wife of the accused. He was told by her that the witness was not there, and had not been for three weeks. He went again the next morning, and not finding her, or being able to ascertain where she was by inquiring in the neighborhood, made return of that fact to the court. At ten o'clock that morning the case was again called; and the foregoing facts being made to appear, the court ruled that evidence of what the witness had sworn to at the former trial was admissible.

In this we see no error. The accused was himself personally present in court when the showing was made, and had full opportunity to account for the absence of the witness, if he would, or to deny under oath that he had kept her away. Clearly, enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness

away. Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own. Upon the testimony as it stood, it is clear to our minds that the judgment should not be reversed because secondary evidence was admitted.

This brings us to the consideration of what the former testimony was, and the evidence by which it was proven to the jury.

It was testimony given on a former trial of the same person for the same offence, but under another indictment. It was *161 substantially testimony given at another time in the same cause. The accused was present at the time the testimony was given, and had full opportunity of cross-examination. This brings the case clearly within the well-established rules. The cases are fully cited in 1 Whart. Evid., sect. 177.

The objection to the reading by Mr. Patterson of what was sworn to on the former trial does not seem to have been because the paper from which he read was not a true record of the evidence as given, but because the foundation for admitting the secondary evidence had not been laid. This objection, as has already been seen, was not well taken.

5. As to the defence of religious belief or duty.

On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church "that it was the duty of male members of said church, circumstances permitting, to practise polygamy; ... that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come." He also

proved "that he had received permission from the recognized authorities in said church to enter into polygamous marriage; ... that Daniel H. Wells, one having authority in said church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been committed, to some woman by the name of Schofield, and that such marriage ceremony was performed under and pursuant to the doctrines of said church."

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he "was married as *162 charged — if he was married — in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be `not guilty.'" This request was refused, and the court did charge "that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right, — under an inspiration, if you please, that it was right, — deliberately married a second time, having a first wife living, the want of consciousness of evil intent — the want of understanding on his part that he was committing a crime — did not excuse him; but the law inexorably in such case implies the criminal intent."

Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining *163 heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration "a bill establishing provision for teachers of the Christian religion," postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested "to signify their opinion respecting the adoption of such a bill at the next session of assembly."

This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix. At the next session the proposed bill was not only defeated, but another, "for establishing religious freedom," drafted by Mr. Jefferson, was passed. 1 Jeff. Works, 45; 2 Howison, Hist. of Va. 298. In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States." Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion (2 Jeff. Works, 355), but was willing to accept it as it

was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. *164 1 Jeff. Works, 79. Five of the States, while adopting the Constitution, proposed amendments. Three — New Hampshire, New York, and Virginia — included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association (8 id. 113), took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, — I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should `make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. 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. After the establishment of the ecclesiastical *165 courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the

ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or poligamy be punishable by the laws of this Commonwealth." 12 Hening's Stat. 691. 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. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of *166 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. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com. 81, note (e). 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.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? *167 To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defence of the accused in this case is his belief that the law ought

not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only.

In Regina v. Wagstaff (10 Cox Crim. Cases, 531), the parents of a sick child, who omitted to call in medical attendance because of their religious belief that what they did for its cure would be effective, were held not to be guilty of manslaughter, while it was said the contrary would have been the result if the child had actually been starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food. But when the offence consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made. No case, we believe, can be found that has gone so far.

6. As to that part of the charge which directed the attention of the jury to the consequences of polygamy.

The passage complained of is as follows: "I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, *168 and there are pure-minded women and there are innocent children, — innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land."

While every appeal by the court to the passions or the prejudices of a jury should be promptly rebuked, and while it is the imperative duty of a reviewing court to take care that wrong is not done in this way, we see no just cause for complaint in this case. Congress, in 1862 (12 Stat. 501), saw fit to make bigamy a crime in the Territories. This was done because of the evil consequences that were supposed to flow from plural marriages. All the court did was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to remind them of the duty they had to perform. There was no appeal to the passions, no instigation of prejudice. Upon the showing made by the accused himself, he was guilty of a violation of the law under which he had been indicted: and the effort of the court seems to have

been not to withdraw the minds of the jury from the issue to be tried, but to bring them to it; not to make them partial, but to keep them impartial.

Upon a careful consideration of the whole case, we are satisfied that no error was committed by the court below. Judgment affirmed.

MR. JUSTICE FIELD.

I concur with the majority of the court on the several points decided except one, — that which relates to the admission of the testimony of Amelia Jane Schofield given on a former trial upon a different indictment. I do not think that a sufficient foundation was laid for its introduction. The authorities cited by the Chief Justice to sustain its admissibility seem to me to establish conclusively the exact reverse.

NOTE. — At a subsequent day of the term a petition for a rehearing having been filed, MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Since our judgment in this case was announced, a petition for rehearing has been filed, in which our attention is called to the fact that the sentence of the *169 court below requires the imprisonment to be at hard labor, when the act of Congress under which the indictment was found provides for punishment by imprisonment only. This was not assigned for error on the former hearing, and we might on that account decline to consider it now; but as the irregularity is one which appears on the face of the record, we vacate our former judgment of affirmance, and reverse the judgment of the court below for the purpose of correcting the only error which appears in the record, to wit, in the form of the sentence. The cause is remanded, with instructions to cause the sentence of the District Court to be set aside and a new one entered on the verdict in all respects like that before imposed, except so far as it requires the imprisonment to be at hard labor.

[1] Supra, p. 147.

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