A. Free Exercise: Is Accommodation Required?

One of the most striking passages of his opinion was the statement: “Rightly considered, there are no duties belonging to us, by which the public peace of our country is more at hazard than to Madison’s Memorial and Remonstrance Against Religious Assessments (1785).

3. Belief and Conduct: The Mormon Cases

Possibly the most dramatic conflict between the governments of the United States and the institutions of a religion involved the Church of Jesus Christ of Latter-Day Saints, commonly known as the “Mormons.” For a concise description, see Sydney Ahlstrom, A Religious History of the American People 501-509 (1972). In 1827, during a time of religious ferment and revival, a young farmer named Joseph Smith, Jr., reported that he had received a revelation. The angel Moroni, he said, appeared to him in a vision and led him to a set of golden plates written in a then-undeciphered language (“reformed Egyptian” hieroglyphics), which Smith translated through miraculous means. This became The Book of Mormon—the story of three groups of early migrants to the American continent, their travails, and a visit to them by the resurrected Jesus. Soon, Smith began to baptize followers and formed a new church. As Smith’s biographer observed: This “was no mere dissenting sect. It was a religious creation, one intended to be to Christianity what Christianity was to Judaism: that is, a reform and a consummation.” Fawn Brodie, No Man Knows My History (1945).

The Mormon Church gathered converts, but also faced fierce opposition. 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. Most controversially, Smith announced (first privately, later publicly) a revelation requiring the practice of polygamy—the marriage of Mormon men to multiple wives. The group was chased from the location of its first temple in Kirtland, Ohio, to Missouri. Again they clashed with the locals. Smith proclaimed vengeance on their oppressors, and claimed “I will be a second Mohammed.” Soon, however, they were driven from the state. Missouri’s governor issued an order interpreted to authorize the “extermination” of the Mormons, and the Mormons appealed in vain to the President for protection.

They fled across the Mississippi River to Nauvoo, Illinois, where they built a remarkable town of 15,000 residents, the largest and fastest growing city in the Prairie State. Nauvoo was given a charter that made it almost an autonomous theocratic principality. Converts poured in from other lands, especially from the urban poor of England. Smith,
who added the title “King of the Kingdom of God” to his previous titles as prophet and apostle, declared his candidacy for President of the United States. Alas, after he ordered the destruction of an opposition newspaper in Nauvoo without due process, he was seized by the Illinois militia and, on June 27, 1844, killed while awaiting trial in nearby Carthage.

Under the leadership of Brigham Young, the Latter-Day Saints moved again—this time to an area outside the jurisdiction of the United States, in the basin of the Great Salt Lake, arriving in July 1847. They formed the autonomous state of Deseret, encompassing most of what is now Utah and southern Idaho, and stretching as far southwest as San Bernardino, California. In 1850, as a result of the Mexican War, Utah became a territory of the United States, and Young was appointed territorial governor. By this time, however, the Mormon practice of polygamy had become a national political issue. The 1856 Republican Party Platform denounced polygamy and slavery as “twin relics of barbarism.” Cong. Globe 1410 (1860). Young was replaced as governor in 1857, and the region prepared for war. The nation’s largest military encampment perched on the edge of Salt Lake City, prepared for attack, and the Mormons abandoned their home city and moved to the more defensible redoubts of rugged southern Utah. The outbreak of the Civil War postponed the conflict. But in 1862 Congress passed the Morrill Act, 12 Stat. 501, the first of a series of statutes designed to bring the Mormon practice of polygamy to a halt.

There is some debate about how widespread polygamy was. According to one estimate it involved only 7 to 8 percent of Mormon men, mostly those higher up in the church. Thomas O’Dea, The Mormons 246 (1957). Others put the numbers considerably higher. Richard S. Van Wagoner, Mormon Polygamy: A History 91 (2d ed. 1989). In any case, it proved surprisingly difficult to enforce the laws. It was hard to prove the fact of multiple marriages in court: The territory kept no marriage records, weddings took place in the temple before witnesses unwilling to talk, and under territorial law a wife could not testify against her husband even if she was willing. Moreover, the laws setting up the territory left the summoning of juries and the prosecution of most crimes in the hands of local rather than federal officials, and they were naturally more sympathetic to plural marriage than outsiders would be. Snow v. United States, 85 U.S. (18 Wall.) 317 (1873); Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434 (1872). Congress corrected the last two difficulties in the Poland Act of 1874, 18 Stat. 253. That same year George Reynolds, private secretary to Brigham Young, was indicted.
REYNOLDS v. UNITED STATES
98 U.S. 145 (1878)

This is an indictment found in the District Court for the third judicial district of the Territory of Utah, charging George Reynolds with bigamy, in violation of sect. 5352 of the Revised Statutes, which [states]:

Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.

Mr. Chief Justice WAITE delivered the opinion of the court.
[At trial Reynolds] 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 [the refusal to charge that these facts negate criminal intent] 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.

[We can learn much about the meaning of our federal constitutional guarantee, by examining the Bill for Establishment of Religious Freedom drafted by Thomas Jefferson in 1777 and finally enacted in Virginia in 1786.] In the preamble of this act 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. [And] 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, 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 be-
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, and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I, it was punished through the instrumentality of those tribunals. . . . By the statute of 1 James I (c. 11), the offence . . . 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 polygamy be punishable by the laws of this Commonwealth." 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 nec-
essarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com. 81, note (c). 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. [T]he 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? 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, 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 punish-
ment 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. . . .

NOTES AND QUESTIONS

1. The Proper Domains of Law and Religion. Chief Justice Waite
begins his opinion by acknowledging that Congress cannot (ever?) pass
a law prohibiting the free exercise of religion. The question in Reynolds,
as he sees it, is whether polygamy is an "exercise of religion."

(a) Belief and conduct. Waite invokes Thomas Jefferson's help in
separating the portion of human endeavor that is religious from the por-
tion that is not. In the Bill for Establishment of Religious Freedom Jeff-
erson distinguished between "opinion" (or "principles") and "overt
acts." In his letter to the Danbury Baptists he distinguished between
"faith or . . . worship" ("opinions") and "actions." Later in his opinion
Chief Justice Waite contrasts "mere religious belief and opinions" with
"practices." What do these terms signify? Consider first belief (faith,
opinion). At a minimum, this might embrace one's conviction that cer-
tain propositions or writings were true—the New Testament, the Book
of Mormon, the Westminster Confession, the Nicene Creed, etc. Does it
just refer to a kind of interior assent? If so, do we need a First Amend-
ment to protect our right to believe? How would the government pro-
hibit it? Consider Davis v. Beason, below. Why was the government there
concerned with what voters believed? Recall Jonas Phillips's 1787 com-
plaint to the Constitutional Convention (p. 37). Why was Pennsylvania
concerned with what officeholders believed? These cases are a century
or two old. Are these concerns relevant today?

Jefferson distinguished faith from worship. Worship might include
prayer and other liturgical practices—attendance at church or syna-
gogue, masses and sacraments, and so on. Is this something the gov-