TALKSONLAW

When Religious Freedom Harms Children (Part 2)
A Talk with Professor Marci Hamilton

I. Polygamy

A. Federal law
   1. In 1862, the Morrill Anti-Bigamy Act was signed into law, banning bigamy.
      a. It was the first federal law banning polygamy, and it had been specifically intended to curb polygamy among Mormons and limit their property ownership in Utah.
      b. The Supreme Court upheld the law in Reynolds v. United States, 98 U.S. 145 (1879).
   2. In 1882, the Edmunds Act amended the prior provision, making polygamy a felony. In 1887, the Edmunds-Tucker Act imposed more sanctions on polygamists. The Edmunds-Tucker Act was repealed in 1978.

B. State law
   1. Currently, every state in the US has a law prohibiting marriage to more than one person at a time. In most states, it is a felony.
   2. For example, Texas Penal Code § 25.01 provides, in part, "an individual commits an offense if: (1) he is legally married and he: (A) purports to marry or does marry a person other than his spouse... but for the actor's prior marriage, constitute a marriage; or (B) lives with a person other than his spouse in this state under the appearance of being married."

C. Failure to protect children in polygamous enclaves resulting in harm
   1. Historically and in practice, polygamous marriages generally involve one husband and multiple wives. When polygamy is regularly practiced in a community, it necessitates that each man wed younger and younger women and remove younger men from the community.
   2. In 2008, federal authorities raided the Yearning for Zion Ranch, a Fundamentalist Church of Jesus Christ of Latter-Day Saints community, in Texas.
      a. Authorities found that several underage girls were spiritually married to much older men and that there have been cases of sexual assault.
      b. Warren Jeffs, its leader, was convicted of child sexual assault and sentenced to life.

II. Other Conduct Endangering Children

A. Ferguson v. JONAH
   1. Plaintiffs charged that JONAH, Jews Offering New Alternatives for Healing, violated New Jersey's Consumer Fraud Act by fraudulently claiming to be able to cure clients of being gay.

2. After a 3-week trial in 2015, the jury found that the services JONAH claimed could change clients from gay to straight was fraudulent and unconscionable.

III. Expansion of Religious Rights

A. Religious Freedom Restoration Act (RFRA), 42 USC § 2000bb
   1. RFRA provides that government may not substantially burden exercise of religion, even if the burden results from a rule of general applicability.
   2. *City of Boerne v. Flores*, 521 U.S. 507 (1997)
      a. Facts: Archbishop in Texas, Patrick Flores, applied for building permit to enlarge his church in Boerne. The building was located in a historic district. The local zoning authorities denied the permit, citing an ordinance governing additions and new constitution in a historic district. Flores brought suit, challenging the ruling under RFRA. He argued that his congregation had outgrown the structure, rendering the ruling a substantial burden on the free exercise of religion w/o a compelling state interest.
      b. The Court struck down RFRA as it applied to the states. It held that it holds the sole power to define the substantive rights guaranteed by the 14th Amendment and that Congress could not constitutionally enact RFRA because the law was not designed to have "congruence and proportionality" with the substantive rights that the Court had defined.
   3. As a response, Congress amended the RFRA in 2000 by limiting its application to the federal government. It also enacted Religious Land Use and Institutionalized Persons Act (RLUIPA) applying the principles of RFRA to local and state governments. It was designed to protect religious institutions from zoning laws that substantially interfere with their religious exercise.

B. Many states have enacted their own RFRA.
   1. A little less than half the states have state RFRAs. At least seven states have bills pending in 2015 to introduced or expand RFRA protection.
   2. For example, Illinois RFRA states, "Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest. Ill. Comp. Stat. Ann. 35/1-99 (1998).
   3. The contemporary public debate about RFRA is focused on the fact that they are tools for discrimination, but another important issue is the harm done to children under the flag of religious liberty and how RFRA is being used as a defense.

C. Church Autonomy Doctrine
   1. In *Watson v. Jones*, the Supreme Court held that civil courts do not have subject matter jurisdiction to adjudicate church matters. 80 U.S. 679 (1871).
   2. Since then, the Church Autonomy Doctrine has been cited as a defense whenever religious groups seek religious exemptions from the law.

3. Reactionary wave of state RFRAs as a result of recent Supreme Court decision on same-sex marriage, *Obergefell v. Hodges*, 576 U.S. __ (2015).