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LOST CHILDREN: THE ABUSE AND NEGLECT OF MINORS IN POLYGAMOUS COMMUNITIES OF NORTH AMERICA

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I. INTRODUCTION

In May of 2008, 463 children were removed from the Yearning for Zion Ranch in Eldorado, Texas ("YFZ"), a fundamentalist Mormon compound.[1] The YFZ removal was the largest child custody case in United States history and was prompted by a phone call from an anonymous girl residing in the community who described herself as "16 years old, pregnant and forced into a marriage with a much older man."[2] Although the Texas Supreme Court returned the children to their homes shortly after the removal, holding that there was no "imminent risk" to the children of the ranch, *In re Texas Department of Family and Protective Services*[3] brought national attention to a serious, but often overlooked form of abuse: religion-based abuse in polygamous communities.[4]

Child abuse and neglect in polygamous communities is only one manifestation of religion-based abuse.[5] Throughout history, the government has tried to balance its interest in enforcing laws meant to protect the American people with its desire to protect religious liberties.[6] In order to do so, the Supreme Court has gone back and forth in deciding how to interpret the Free Exercise Clause of

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[1] Deborah King, *From San Angelo, TX*, THE HUFFINGTON POST, May 19, 2008, http://www.huffingtonpost.com/deborah-king/from-san-angelo-tx_b_102556.html.

[2] John Moritz, *Texas Supreme Court Deals Blow to CPS in Polygamy Case*, STAR-TELEGRAM, May 29, 2008, *available at* http://www.star-telegram.com/804/story/671453.html.

[3] In re Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008).

[4] In this Note, the term polygamy is used to refer to polygny, a husband taking multiple wives. This form of polygamy is "distinguished from other multiple-partner unions including polyandry and polyamory, because of its gender-discriminatory and patriarchal foundations." Lisa M. Kelly, *Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy*, 65 U. TORONTO FAC. L. REV. 1, 2 (2007). In this note, I will discuss how the popularization of polyamory has affected the criminalization of polygyny.

[5] MARCI HAMILTON, GOD VS. THE GAVEL 12-13 (Cambridge University Press, 2004) (citing examples of religion- based child abuse, including sex abuse by the clergy, medical neglect, and abandonment).

[6] *Id.* at 5.

the First Amendment.[7] Since *Reynolds v. United States*,[8] the first Free Exercise Clause case, the Supreme Court has come up with two conflicting interpretations. The *Reynolds* "dominant" doctrine provides that "religious belief is absolutely protected, but religious conduct is subject to the rule of law"[9] and the second interpretation, stemming from *Sherbert v. Verner*,[10] requires courts to apply a strict scrutiny standard to neutral laws that infringe on one's religious practice.[11]

Professor Marci Hamilton asserts that the *Reynolds* "dominant" doctrine is to be applied when interpreting the Free Exercise Clause; thus, there is no constitutional argument for allowing polygamous conduct in Mormon communities.[12] However, many incorrectly view the *Sherbert* doctrine as the correct legal standard.[13] As a result, when *Employment Division v. Smith*[14] upheld the *Reynolds* doctrine, there was significant public outcry causing Congress to respond by adopting the Religious Freedom Restoration Act ("RFRA").[15] Although the RFRA was overturned as applied to state law,[16] states have adopted their own RFRA statutes, granting exemptions to those who may commit harmful or illegal acts under the guise of religious activity.[17] More importantly, under this doctrine, victims of religious abuse have little hope of vindication in a court of law.[18]

Polygamous behavior has always been considered an unlawful practice. The Supreme Court in *Reynolds*[19] explicitly held that the Free Exercise Clause does not

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[7] *See* Jason D. Berkowitz, *Beneath the Veil of Mormonism: Uncovering the Truth about Polygamy in the United States and Canada*, 38 U. MIAMI INTER-AM. L. REV. 615 (2006-07) (providing an overview on the erratic judicial history of Free Exercise Clause interpretation).

[8] Reynolds v. United States, 98 U.S. 145, 164-67 (1878).

[9] HAMILTON, *supra* note 5, at 205. *Reynolds v. United States*—a nineteenth century case that upheld federal anti-polygamy laws—was the first Supreme Court case interpreting the Free Exercise Clause. Reynolds, 98 U.S. 145. The Court in *Reynolds* quoted Thomas Jefferson, who said: "'[t]he legislative powers of the government reach actions only, and not opinions.' The fact that the conduct arose from belief did not immunize the believer from the force of law." Reynolds, 98 U.S. at 164, *quoted in* HAMILTON, *supra* note 5, at 207.

[10] Sherbert v. Verner, 374 U.S. 398 (1963).

[11] HAMILTON, *supra* note 5, at 216.

[12] *Id.* at 225.

[13] *Id.* The *Sherbert* doctrine stems from *Sherbert* and a "handful" of other cases that applied a strict scrutiny standard to neutral generally applicable laws. HAMILTON, *supra* note 5, at 216-18. *See e.g.* Frazee v. Illinois Dep't of Employment Sec. 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 7070 (1981); Wisconsin v. Yoder, 374 U.S. 398 (1963).

[14] Employment Div. v. Smith, 494 U.S. 872 (1990).

[15] HAMILTON, *supra* note 5, at 226.

[16] City of Boerne v. Flores, 521 U.S. 507 (1997).

[17] HAMILTON, *supra* note 5, at 9-10.

[18] Robert J. Bruno, *Child Protection as a Judicial Burden on Religion and the Impact of Religious Liberty Legislation*, 21 CARDOZO L. REV. 677, 678-79 (1999) (describing the RFRA as applying "not only to the relationship between the religious believer and the government but also to the relationship between the religious belief and the individuals invoking the power of the government for their protection or for the vindication of their rights." The RFRA does this by limiting the ability of an individual to have recourse for religion-based harm in U.S. courts.).

[19] Reynolds v. United States, 98 U.S. 145, 164-67 (1878).

protect plural marriages in the name of religion.[20] Nevertheless, because of the deeply rooted societal notions protecting religious freedom and privacy, attempts to criminalize the unlawful act have failed; practitioners continue to argue that polygamy is protected by the Free Exercise Clause despite court decisions and legislation to the contrary. In the wake of the YFZ incident, state legislatures have again taken a less tolerant approach toward polygamous behavior, specifically because of the widespread abuse and illegal activity that surfaced in fundamentalist Mormon communities throughout the country.[21]

In this Note, I examine religion-based abuse in polygamous communities and how the widespread abuse and neglect of children in Mormon communities of North America is indicative of the conflict between protecting religious freedom and protecting the rule of law.

In an effort to provide a more complete description of the abuses currently plaguing young girls and boys in polygamous communities, I begin this Note with background on the legal issues concerning religion-based child abuse—specifically, parents' rights and the Free Exercise Clause of the First Amendment. Part II provides examples of different types of religion-based child abuse. This section discusses religion-based harm that has been the subject of litigation in the United States and Canada, and the constitutional issues raised by respondents when the state attempts to prosecute. Respondent-parents will often claim violations of their First Amendment Free Exercise rights and their Fourteenth Amendment Due Process liberties. I argue that the allowances granted for religious adherents in child protective procedures are in direct contravention to the widely applied best interests of the child standard.[22]

In the third part of this Note, my focus switches to polygamy in North America. I discuss the origins of Mormonism, modern Mormon doctrine and how abuse in Mormon fundamentalist communities originated. I explore why adequate steps have not been taken by enforcement officials to prevent child abuse and neglect in fundamentalist communities.

The final part of this Note explores the problems inherent in policing and preventing religion-based abuse and how to resolve them; focusing on resolution of the conflict between Free Exercise rights, Due Process liberties and the children's best interests standard, specifically in child welfare cases. This Note concludes that

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[20] *Id.*

[21] *See, e.g.*, Emily Ramshaw, *Three More Indicted in West Texas Polygamist Sect Case*, THE DALLAS MORNING NEWS, Sept. 24, 2008, *available at* http://religionnewsblog.com/22495/flds-indictments (discussing Texas's attempts to prosecute polygamous leaders for the crime of bigamy); *see also* Jeremy Hainsworth, *Canada: Leaders of Polygamist Group Arrested*, THE HUFFINGTON POST, Jan. 7, 2009, http://www.huffingtonpost.com/2009/01/07/ canada-leaders-of-polygam_n_156082.html?page=2&show_comment_id=19494392#comment_19494392 (discussing the arrest of Winston Blackmore, leader of the FLDS community in Bountiful, British Columbia).

[22] When making child custody decisions, the controlling consideration "in determining to whom the custody of a child shall be rewarded is the welfare and best interests of the child." 27C C.J.S. DIVORCE §1000 (2009).

while courts should take a parent's religious beliefs into consideration and allow parents to raise children in accordance with their beliefs, the criminal nature of polygamy cannot be overlooked. Thus, state courts adjudicating child welfare cases should view a parent's polygamous activity as involvement in criminal activity and take that into consideration when deciding whether it is in the best interest of their child to remain in a criminal, polygamous home.

II. BACKGROUND

A. Religion-Based Child Abuse

Although religion is mainly focused on one's beliefs and moral precepts, cultural practice is a deeply engrained element of any religion. Believers engage in ritualistic conduct in order to demonstrate their commitment to their belief system and in doing so, they may provide beneficial services to the public.[23] Although religious entities often contribute charitably and act as moral advocates, some practices may conflict with national secular law or encourage harmful behavior; one example of this harmful behavior is religion-based abuse.[24]

In fundamentalist Mormon compounds, like many religious communities, men often act as leaders and figureheads.[25] Conversely, women and children are the most vulnerable members, and are more frequently victimized.[26] "Children of faith," those raised in accordance with abusive religious tenets, are often victimized as a form of child rearing.[27] Professor Shauna Van Praagh identifies three categories of religion-based child abuse in her article: abuse by isolation, enforcement of community standards, and teachings and practices.[28]

Van Praagh defines "isolation" as the practice of sequestering community members and keeping adherents separated from the outside world.[29] An example of this type of isolation is observable in Mormon fundamentalist communities.[30] Many Mormon fundamentalists in the United States and Canada live in large compounds, removed from the secular world around them.[31] This way of life deprives children of certain necessities, like proper education, health care and life

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[23] HAMILTON, *supra* note 5, at 4.

[24] *Id.* at 5.

[25] *See* Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 397 n 290 (2003) (noting that "only men hold any kind of leadership position in fundamentalist Mormon groups.").

[26] Shauna Van Praagh, *Faith, Belonging and the Protection of "Our" Children*, 17 WINDSOR Y.B. ACCESS TO JUST. 154, 156 (1999).

[27] *Id.* at 179.

[28] *Id.* at 179-82.

[29] *Id.* at 179.

[30] ANDREA MOORE-EMMETT, GOD'S BROTHEL 22 (Pince Nez Press 2004).

[31] *Id.*

skills.[32] Uneducated members of the community often teach children in compound schools and those who enroll in public school are often taken out of the institutions at a young age.[33] By isolating children from secular society, the community, which "defines itself as insular, protective and controlling of its members' way of life, may shield children from needed help."[34] Furthermore, by inadequately preparing children for an autonomous lifestyle in the outside world, religious leaders are engaging in a separate form of abuse that exposes children to potential harm.[35]

The second form of religion-based abuse that Van Praagh mentions—abuse as a means of enforcing religious standards—may occur when a religious parent disciplines a child for failing to comply with the community norms.[36] Failure to comply with set rules can lead to extreme physical abuse as a punitive measure.[37] Parents in polygamous homes more commonly abuse children physically for a transgression.[38] In *In re Kingston Children*,[39] a father in a polygamous household attempted to physically rip his daughters' earrings out after they had pierced their ears without his permission.[40] Unfortunately, the *Kingston* case is only one example of the trend of corporal punishment in polygamous communities of North America.[41]

Finally, Van Praagh's third category of abuse—"teachings and practices"—is defined as, "teachings, practices and norms of the religious community itself" that are deemed harmful.[42] Examples of this form of abuse include female genital mutilation in some African communities and faith healing as a method of medical treatment rather than western medical procedures.[43] Religious practices that are inherently harmful have been a recent source of controversy in North America. Most notably, the practice of using prayer as a substitute for traditional medical

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[32] *See id.* at 50.

[33] *Id.* at 50.

[34] Van Praagh, *supra* note 26, at 179.

[35] *See* Bruno, *supra* note 18, at 683-85; *see also* Jack Douglas Jr., *Sect's Troubled History Includes 'Lost Boys'*, STAR-TELEGRAM, Apr. 15, 2008, *available at* http://www.star-telegram.com/804/v-print/story/592668.html (describing the plight of the "lost boys," young boys cast out of Mormon fundamentalist communities, who are forced to fend for themselves and "know absolute nothing about the outside world.").

[36] Van Praagh, *supra* note 26, at 180.

[37] *Id.*

[38] Anne Taylor, In re Kingston Children: *The Best Interests of Polygamous Children*, 8 J. L. & FAM. STUD. 427, 427-28 (2006).

[39] Linda Thomson, *Kingston Pair Gives Up 2 Teens*, DESERET MORNING NEWS, Oct. 15, 2005, at B1, *quoted in* Taylor, *supra* note 38, at 427.

[40] Taylor, *supra* note 38, at 428.

[41] *See, e.g.*, Catherine Blake, *The Sexual Victimization of Teenage Girls in Utah: Polyamous Marriages versus Internet Sex Predators*, 7 J. L. & FAM. STUD. 289 (2005) (stating that "incest, statutory rape, physical, sexual and emotional abuse, deprivation of education, and forced marriages of young girls are endemic to all of the polygamist communities, and not, as some have proclaimed, no worse than in the general monogamous population . . . ."), *quoted in* MOORE-EMMETT, *supra* note 30, at 90-100.

[42] Van Praagh, *supra* note 26, at 182.

[43] *See id.* at 183-84.

treatment—faith healing—is an area of frequent litigation in both Canada and the United States.[44]

One of the more common examples of the conflict between protecting religious practice and ensuring a child's welfare occurs when the state orders a blood transfusion of a Jehovah's Witness child over a parent's objection.[45] Jehovah's Witness doctrine states that by receiving a blood transfusion, the child's purity is tainted and as a result, his or her eternal salvation is jeopardized.[46] However, courts in both the United States and Canada have held that the state may impose on a party's religious belief in order to further its own interest in promoting the health and welfare of children and protecting them from abuse.[47] For example, the United States Supreme Court held in *Prince v. Massachusetts*[48] that "[p]arents may be free to become martyrs themselves, but it does not follow that they are free in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[49] Similarly, the Supreme Court of Canada held in *Sheena B.*[50] that the government may intervene and order medical services if a child's life is seriously endangered and his or her parents have denied treatment on religious grounds.[51]

B. Legal Issues Concerning Religion-Based Abuse

In the line of cases stemming from *Reynolds*, the Supreme Court has indicated that religious adherents are not granted exemptions from neutrally applicable laws.[52] Thus, it is surprising that courts continue to struggle with the claims of religious adherents arguing that they have the right to engage in religious conduct harmful to others. Despite decisions to the contrary, members of religious communities defend their religious behavior as constitutionally permissible under the Free Exercise Clause of the First Amendment of the Constitution.[53] Moreover, in cases of religion-based child abuse, parents also argue that they have the right to raise their children as they wish with minimal interference from the government, as

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[44] *See* James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1353-54 (1996).

[45] Armand H. Matheny Antommaria, *Jehovah's Witnesses, Roman Catholicism and Neo-Calvinism: Religion and State Intervention in Parental, Medical Decision Making*, 8 J. L. & FAM STUD. 293, 294 (2006) (describing the Jehovah's Witnesses blood transfusion conflict as "[a] paradigmatic case of religion and state intervention in parental medical decision making . . . .").

[46] *Id.* at 295 n.4.

[47] *See* Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

[48] *Id.*

[49] *Id.*

[50] Sheena B., [1995] 1 S.C.R 315 (Can.), *quoted in* Van Praagh, *supra* note 26, at 160-63.

[51] *Id.*

[52] HAMILTON, *supra* note 5, at 207.

[53] Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 384 (2003).

held in *Troxel v. Granville*.[54] For example, within FLDS communities, parents engage in criminal conduct by marrying off their underage daughters to older men, as a means of propagating polygamous unions.[55] Scholar Maura Strassberg asserts that allowing a child to enter into a "plural marriage" as manifestation of Mormon beliefs would be "a religious practice that, barring other concerns, would fall within the constitutional protection of free exercise of religion and parental privacy rights."[56] To explain why religious parenting should not be exempted from neutral and generally applicable laws, I examine the legal history of the Free Exercise Clause, discuss how it conflicts with the children's best interests standard, and analyze how the issue of parents' rights come into play.[57]

i. Free Exercise Clause

The First Amendment confers constitutionally sanctioned religious freedom by stating "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[58] As mentioned above, the Free Exercise Clause has been interpreted in two different ways.[59] Under the *Reynolds* Court, laws that "on their face, have been passed for the general public good, and without reference to religion" are generally upheld.[60] Based on this doctrine, the Court has only struck down laws that are facially discriminatory against religious entities.[61] However, under *Sherbert v. Verner* and some of the case law that followed, a new doctrine was created which subjected neutral and generally applicable laws to strict scrutiny when the laws imposed on religious practice.[62]

Despite later case law, *Reynolds v. United States*[63] provides the definitive interpretation of the Free Exercise Clause.[64] In *Reynolds*, the Supreme Court

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[54] Troxel v. Granville, 530 U.S. 57 (2000).

[55] Strassberg, *supra* note 53, at 366. Strassberg describes the kind of crimes inherent in polygamous communities. She notes that parents, family members and other religious leaders arrange the marriages of girls between the ages of fourteen and sixteen, and much older men. She describes the courtship periods as 'brief, business like' (quoting MICHAEL QUINN, *Plural Marriage and Mormon Fundamentalism*, *in* FUNDAMENTALISMS AND SOCIETY 240, 257 (Martin E. Marty & R. Scott Appleby eds., 1993)). Then "after the older potential husband has been approved for polygynous marriage by the religious hierarchy and by the girl's father" the couple weds. Strassberg, *supra* note 53, at 366.

[56] Strassberg, *supra* note 53, at 384. Strassberg does "not propose to reconsider in . . . [her work] the earlier conclusion that criminalization of polygamy is constitutional." The purpose of her work is to assess whether or not polygamy should be actively criminalized. *Id.* at 359.

[57] *See id.* at 384.

[58] U.S. CONST. amend. I.

[59] HAMILTON, *supra* note 5, at 207-10.

[60] *Id.* at 211.

[61] *Id.* at 210. Hamilton identifies two principles that govern regulations affecting religious conduct. "The first is that religious entities, just as any other citizen, can be forestalled and prohibited from harming others and thus can be made to obey a myriad of laws . . . ." However, "religious entities have not been subjected to laws that are hostile or motivated by animus toward religion in general or any sect in particular." *Id.*

[62] *Id.* at 216.

[63] Reynolds v. United States, 98 U.S. 145 (1878).

[64] HAMILTON, *supra* note 5, at 209.

barred the practice of polygamy and held that the fact that the defendant's activity was an expression of his religious belief was not dispositive.[65] The Court explained that while Congress was unable to pass laws that encumber one's religious beliefs, a statute outlawing polygamy was constitutional because of Congress's power to regulate all "actions which were in violation of social duties or subversive of good order."[66] Furthermore, while the anti-polygamy law was directed at the Church of Latter Day Saints ("LDS") and intended to persecute Mormon believers, the law was applicable to everyone and neutrally constructed; thus, it was construed as non-discriminatory.[67]

In 1940, the Court decided a Free Exercise case, *Minersville School District v. Gobitis*.[68] In *Gobitis*, two children were expelled from public school for refusing to salute the national flag in order to comply with their beliefs as Jehovah's Witnesses.[69] Their father sought to enjoin the local authorities from continuing to enforce mandatory participation in the flag salute; he argued it was an unconstitutional interference with religious activity.[70] The Court held that while the government's intentional interference with religious activity is unconstitutional, accidental interference is allowed.[71] This decision again upheld the *Reynolds* principle that nondiscriminatory laws were almost always upheld. The *Gobitis* decision reasoned,

> [c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.[72]

Reynolds and *Gobitis* were part of a string of cases that upheld facially neutral laws.[73] However, in 1963, *Sherbert v. Verner* signaled the creation of the second interpretation of the Free Exercise Clause.[74] The court found that for the government to limit one's constitutional right to religious exercise, it must show that "some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."[75] The *Sherbert* Court defined a "compelling

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65 *Reynolds*, 98 U.S. at 161-62.

66 *Id.* at 164.

67 HAMILTON, *supra* note 5, at 211.

68 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

69 *Id.* at 591-92.

70 *Id.* at 592.

71 *Id.* at 594-95.

72 *Id.*

73 Hamilton provides examples of cases where the court sustained laws, despite their impact on religious practice. These cases show a "dominant jurisprudence of republicanism and ordered liberty." HAMILTON, *supra* note 5, at 212-13.

74 *Id.* at 216.

75 Sherbert v. Verner, 374 U.S. 398, 406 (1963).

state interest" as "only the gravest abuses, endangering paramount interest." [76] Thus, the court required the application of a strict scrutiny test to the law in question to ensure that religious liberties will be protected, unless the legislation passed is of absolute necessity. *Sherbert* was initially criticized; however, in the 1970s, scholars and religious entities began to view the decision as the dominant principle governing Free Exercise governance.[77]

The *Sherbert* test was upheld nine years later in the case of *Wisconsin v. Yoder*.[78] In *Yoder*, an Amish man refused to comply with a state law that required him to send his child to school until the age of sixteen.[79] The *Yoder* Court assessed whether a state's interest in the education of its citizens was a sufficient interest to outweigh an Amish person's religious interests.[80] By applying the strict scrutiny test established in *Sherbert*, the Court held that only "those interests of the highest order" can outweigh a burden on religious freedoms, and allowed the father to remove the child from school.[81]

The *Sherbert–Yoder* strict scrutiny test was sustained until 1990, when in *Employment Division v. Smith*,[82] the Supreme Court rejected the "compelling state interest" standard and returned to the standard created in *Reynolds*.[83] The *Smith* Court held that one's religious beliefs should not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[84] In *Smith*, the Court replaced the long-applied *Sherbert* test with a standard similar to the *Gobitis* decision: the *Smith* Court held that nondiscriminatory imposition on religious freedoms did not unconstitutionally infringe on one's Free Exercise rights.[85] Furthermore, the Court indicated that it was not the judiciary's responsibility to decide whether a religious adherent could be exempted from a neutral law; that job was left to the legislature.[86]

The *Smith* decision evoked an overwhelmingly critical response.[87] Many felt that the Court overruled a "long-settled doctrine that required strict scrutiny of any law, no matter how neutral, that substantially burdened religious conduct."[88] Now,

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[76] *Id.*

[77] HAMILTON, *supra* note 5, at 218.

[78] Wisconsin v. Yoder, 406 U.S. 205, 207-08 (1972); *see also* Nicholas Nugent, *Toward a RFRA that Works*, 61 VAND. L. REV. 1027, 1040 (2008) (arguing that because the *Yoder* and *Sherbert* tests could have reached the same outcomes "under a less onerous intermediate scrutiny standard, or a balancing test, both cases are taken at their word as adopting the compelling governmental interest test as the standard for resolving accidental interference [in religious practice] claims.").

[79] *Yoder*, 406 U.S. at 207-08.

[80] *Id.* at 213.

[81] *Id.* at 215.

[82] Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

[83] HAMILTON, *supra* note 5, at 220.

[84] *Smith*, 494 U.S. at 879.

[85] Nugent, *supra* note 78, at 1048.

[86] HAMILTON, *supra* note 5, at 221.

[87] Nugent, *supra* note 78, at 1050.

[88] HAMILTON, *supra* note 5, at 223.

even the most trivial legislative interest could potentially impose a significant burden on religious freedoms with no judicial recourse.[89] In 1994, Congress responded to the perceived threat by passing the RFRA, a legislative act that attempted to reinstate the *Sherbert* test.[90] The purposes of the RFRA were stated as:

> to restore the compelling interest test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[91]

However, in 1997, the Court in *City of Boerne v. Flores*[92] held that the RFRA was unconstitutional as applied to state activities, reasoning that under the enumerated powers of the Constitution, Congress does not have the power to regulate state activity.[93] In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[94] the Supreme Court held that the RFRA is deemed constitutional as applied to federal law because Congress has the power to regulate its own laws.[95] In response, states have implemented their own religious protection statutes, using the federal RFRA as a model.[96]

In the aftermath of the RFRA and the *Boerne* and *Gonzalez* decisions, one is still left with ambiguity as to when religious entities are excluded from government regulation. The history of the interpretation of Free Exercise Clause indicates that the scope of the Clause is a perpetually litigated issue, and one that is far from resolved. It is true that some religious behavior should be protected by government regulation because, as previously mentioned, many religious organizations act as humanitarian resources and improve social welfare. However, it must be noted that some of these entities engage in harmful or illegal acts under the guise of religious exercise.[97] At this point, one must ask: to what extent can social welfare be sacrificed to preserve religious practice? As mentioned by the Court in *Boerne v. Flores*, if a religious entity is allowed to circumvent the law, little recourse will be available to those who are harmed by its actions, and as a result, the aggrieved party's rights are jeopardized.[98]

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89 Nugent, *supra* note 78, at 1048.

90 Bruno, *supra* note 18, at 677.

91 Religious Freedom Restoration Act 42 U.S.C. § 2000bb(b) (2000), *quoted in* Nugent, *supra* note 78, at 1050.

92 City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

93 *Id.*

94 Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006).

95 *Id.* at 439, *quoted in* Nugent, *supra* note 78, at 1052.

96 Nugent, *supra* note 78, at 1052.

97 HAMILTON, *supra* note 5, at 5.

98 Bruno, *supra* note 18, at 678-79.

ii. Parents' Rights

In addition to the Free Exercise Clause, parents who are prosecuted for engaging in religious behavior harmful to their children often evoke a second defense: the Due Process Clause of the Fourteenth Amendment. In 2000, the Supreme Court in *Troxel v. Granville* held, "it cannot now be doubted that the Due Process Clause . . . protects the fundamental right of parents to make decisions concerning the care, custody and control over their children."[99]

The Supreme Court has long considered the right of a parent to raise his or her child as he or she pleases to be fundamental under the Due Process Clause. In *Meyer v. Nebraska*,[100] the first parental rights case, a teacher taught a foreign language to a child below eighth grade in contravention to Nebraska state law.[101] The Supreme Court was required to assess whether the statute "unreasonably infringes on the liberty guaranteed to the plaintiff in the Due Process Clause of the Fourteenth Amendment."[102] The Court reasoned that the state statute in question violated the Due Process Clause by arbitrarily depriving its citizens of "liberty;" parents should be able to provide education to their children in the manner they see fit.[103] Prior to *Meyer*, the word "liberty" in the Due Process Clause had not been defined.[104] However, the Court in *Meyer* held that liberty "denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life . . . to marry, establish a home and bring up children."[105]

The notion that parents have the right to raise their children with minimal interference from the state was upheld in *Pierce v. Society of Sisters*,[106] a case in which the Court stated:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children . . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations.[107]

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99 Troxel v. Granville, 530 U.S. 57, 66 (2000).

100 Meyer v. Nebraska, 262 U.S. 390 (1923).

101 *Id.* at 399, 401. Nebraska Laws 1919 c. 249 prohibited teaching of any subject in any language other than English to students below the eighth grade. The appellant in *Meyer* taught a ten-year-old child German, in contravention to the statute. *Id.*

102 *Meyer*, 262 U.S. at 399.

103 Depriving citizens of education, such as barring the ability to learn a foreign language, is deemed a deprivation of liberty. *Id.* at 400.

104 "No state . . . shall deprive any person of life, liberty or property without due process of law." U.S. CONST. amend. XIV.

105 *Meyer*, 262 U.S at 399.

106 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534(1925) (holding that an Oregon statute requiring attendance in public school was a violation of the Due Process Clause and was unconstitutional).

107 *Id.* at 535, *quoted in* Naomi Cahn, *State Representation of Children's Interests*, 40 FAM. L.Q. 109, 111 (2006).

While the *Pierce* decision confirms that a parent has the right to raise a child as he or she pleases, it also stands for the notion that parents have the duty to raise their child adequately, and the state can "dictate the conditions under which the child is thus prepared for adult obligations."[108] A parent's Due Process right to control the upbringing of his or her child becomes subject to regulation if state feels that the parent is unfit and that best interests of the child are in jeopardy.[109]

iii. Hybrid Rights

Following *Pierce*, the *Wisconsin v. Yoder* decision, mentioned above, also stood for a parent's Due Process right to raise their child without state intervention.[110] However, the Court in *Employment Division v. Smith* suggests that the *Yoder* appellant's claim was upheld because it was a "hybrid claim;" the petitioner in *Yoder* alleged two constitutional claims: violations of both the Fourteenth Amendment Due Process Clause and the Free Exercise Clause.[111] Moreover, according to the *Smith* Court, if a claim has two constitutional arguments, as in *Yoder*, the imposing law is subject to strict scrutiny.[112]

In his article, Jeffrey Shulman demonstrates how, in *Yoder*, neither the Free Exercise claim, nor the Due Process claim, would have survived on its own.[113] He notes that previous opinions by the Supreme Court indicate that the Court would probably have rejected the *Yoder* appellant's claim that he had a right to remove his child from school solely based on his Due Process liberties.[114] The notion that compulsory education could be preempted by parental rights might be rejected because of the Supreme Court's fear of setting an undesirable precedent—the outcome could lead to a parent's ability to flout education requirements simply based on non-religious matters.[115]

Furthermore, Shulman argues that it is unlikely the *Yoder* claim would have survived solely on a Free Exercise claim.[116] At the time of the *Yoder* decision, the *Sherbert* "compelling state interest" test—requiring a "compelling state interest . . . [to justify] the substantial infringement of appellant's First Amendment right"[117]—had not yet been applied to questions of religious parenting.[118] The controlling

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[108] Jeffery Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 VILL. L. REV. 173, 184 (2008).

[109] Cahn, *supra* note 107, at 111-13.

[110] Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

[111] Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990).

[112] *Yoder*, 406 U.S. 205.

[113] Shulman, *supra* note 108, at 184, 185-86.

[114] Shortly before the *Yoder* decision, in a dissenting opinion in *Eisenstadt v. Baird*, Chief Justice Burger strongly argued against striking down state legislation based on due process grounds. Shulman, *supra* note 108, at 185 (citing the dissent in Eisenstadt v. Baird, 405 U.S. 438, 467 (1972)).

[115] Shulman, *supra* note 108, at 185-86.

[116] *Id.*

[117] Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[118] *Id.* at 186.

case on Free Exercise and parenting during this period was *Prince v. Massachusetts*,[119] a case that upheld a law prohibiting children from distributing religious literature in the public sphere, despite parental freedom to raise their children as they wish.[120] The *Yoder* Court attempted to distinguish the present case from *Prince*, by stating that in the latter, the "conduct so regulated invariably posed a threat to public safety, peace and order."[121] Whereas *Yoder*

> is not [a case] in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in the evidence.[122]

However, in an attempt to distinguish *Yoder* from *Prince*, the Court referenced the Due Process Clause by stating that *Yoder* "more markedly than in *Prince* . . . involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children."[123] Shulman argued that this allusion indicates that the complainant's First Amendment claim is strengthened by the Due Process argument that parents have a right to decide how to educate and raise their children.[124]

Under the hybrid rights theory, if a parent makes a claim pertaining to religious parenting rights—protected by Free Exercise rights and Due Process liberties—the claim is subject to strict scrutiny.[125] However, many scholars, including Professor Hamilton, reject hybrid rights, stating that "[i]f a law does not deserve strict scrutiny under a single constitutional provision, it makes little sense to impose strict scrutiny simply because two constitutional claims are invoked. Two weak rights do not amount to a strong constitutional right."[126] Furthermore,

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119 Prince v. Massachusetts, 321 U.S. 158 (1944).

120 *Id.* at 166, *quoted in* Shulman, *supra* note 108, at 187.

121 Wisconsin v. Yoder, 406 U.S. 205, 230 (1972).

122 *Id.*

123 *Id.* at 232.

124 Shulman, *supra* note 108, at 187.

125 Religious parenting rights enjoy immunity from customary family law consideration cause such rights are not subject to the rule stated most clearly and emphatically in Employment Division, Department of Human Resources of Oregon v. Smith . . [s]piritual custody cases implicate fundamental rights under both the Free Exercise Clause and the Due Process Clause of the Fourteenth Amendment.

*Id.*at 173.

126 HAMILTON, *supra* note 5, at 223. Hamilton further argues that the *Yoder* decision did not come out as it did because of a hybrid rights theory; rather, it was "driven by admiration or nostalgia for certain religious beliefs, including their biblical basis . . . ." *Id.* at 222. Hamilton quotes the *Yoder* decision to support her assertion:

> [W]e see that record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living . . . . The respondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call 'life style' have not altered in fundamentals for centuries . . . . Their rejection of telephones, automobiles, radios, and television, their

the hybrid rights theory has been rejected in lower courts.[127] While it is clear that the hybrid rights theory is by no means dispositive, the theory provides another example of the tenuous nature of Free Exercise jurisprudence.

iv. Children's Best Interests Standard

State courts have attempted to apply *Smith*'s hybrid rights theory to child custody cases.[128] In doing so, they require a higher showing of harm to a child before imposing restrictions on religious parenting.[129] Specifically, the courts require a "substantial threat of harm to the child . . . before placing any restrictions on exposure to a parent's religious beliefs and practices."[130] The substantial harm standard asks the court to continually subjugate children's rights to those of their parents until the children are placed in a position of imminent harm.[131] In "spiritual custody" cases, courts neglect to interfere with a parent's child rearing unless there is concrete evidence that the parents' religious activities present an "affirmative showing" of substantial harm.[132] Furthermore, some of these courts view intervention without indication of substantial harm to be a judicial abuse of discretion.[133]

The modified "substantial harm" standard employed in "spiritual custody" cases is a significantly higher standard to meet than the widely used "best interests" standard.[134] The best interests standard requires a court to prioritize the child's welfare when making any decision "involving custody or care."[135] If the court finds that the parents are engaging in activity that is not in the best interests of the child and could potentially be harmful, it may take judicial action.[136] The court may evaluate the facts of the case and can take preventative action. However, since the standard in "substantial harm" cases is so high, these state courts must often wait until the child abuse has already occurred.[137]

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mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.

Yoder, 406 U.S. at 879, *quoted in* HAMILTON, *supra* note 5, at 222.

127 HAMILTON, *supra* note 5, at 223 n.78 (citing case law that rejected the hybrid rights theory).

128 Shulman, *supra* note 108, at 173.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* at 193 (describing custody cases involving harm caused by religious activities as "spiritual custody" cases).

133 Shulman, *supra* note 108, at 193.

134 *Id.* at 173.

135 Steven Mintz, *Placing Children's Rights in Historical Perspective*, 44 CRIM. L. BULL. 313 (2008). *See e.g.* 27C C.J.S. DIVORCE §1000 (2009).

136 Shulman, *supra* note 108, at 176 (citing several risk factors to consider when parents engage in behavior that may be deemed harmful and not in the child's best interests).

137 *Id.* at 178 (arguing that "[T]he Yoder standard sets the bar too high, demanding a showing of harm that leaves the child unprotected from the very harms deemed sufficient to justify judicial intervention in cases involving only secular matters.").

III. POLYGAMY IN THE UNITED STATES AND CANADA

Concerns about religion-based child abuse and the limited steps taken by the government have most recently been raised in cases concerning polygamous communities in the United States and Canada. The allegation of sexual abuse on the YFZ Ranch is just one example of the harm that is prevalent in polygamous communities throughout the United States and Canada.[138] Investigations of fundamentalist compounds have also revealed rampant spousal abuse, neglect, molestation and statutory rape.[139]

A. Origins of Mormonism

Although polygamy is a worldwide phenomenon, present in many cultures and communities,[140] the focus of this Note is Mormon polygamous communities, mainly because these communities are the most visible examples of polygamy in North America today.[141] Originally, Mormonism was a polygamist sect of Christianity; however, only the Mormon fundamentalist community currently engages in polygamous behavior and has become the focus of recent allegations of abuse and neglect.[142] In order to understand the fundamentalist doctrine of polygamy and its underpinnings, one must first be acquainted with the origins of Mormonism, the role of polygamy in its early doctrine and the legal repercussions of polygamy in the United States.[143]

In 1820, after receiving the word of God, purported prophet Joseph Smith began preaching the Book of Mormon, the revealed doctrine that proposed a new type of Christianity, distinct from the Old and New Testament.[144] Even before Smith began preaching the doctrine of polygamy, his new religion was widely criticized because many of the ideals he preached were contrary to established customs of the time.[145] Many rejected Joseph Smith's new system of belief and he was forced to move from town to town.[146] While in Illinois, Smith began to preach the doctrine of polygamy, claiming that followers of the doctrine would be rewarded in the afterlife.[147] In 1847, when the Mormons finally settled in Utah,

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138 King, *supra* note 1.

139 *See* Douglas, *supra* note 35.

140 *See, e.g.*, Noor Javed, *GTA's Secret World of Polygamy*, THE STAR, May 24, 2008, *available at* http://www.thestar.com/News/GTA/article/429490 (discussing polygamy in Canada's Islamic communities).

141 Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 109 (2006).

142 *Id.* at 110.

143 MOORE-EMMETT, *supra* note 30, at 11.

144 *See* STEPHAN SINGULAR, WHEN MEN BECOME GODS 8 (St. Martin's Press, 2008).

145 Sigman, *supra* note 141, at 111 (noting that "[s]cholars have described the origin of the Mormon faith as part of a larger conservative counter-movement to the increasingly liberal mores of that era.").

146 *Id.*

147 MOORE-EMMETT, *supra* note 30, at 11.

the practice of polygamy became more commonplace in the community.[148] The Mormon church began to view polygamy as "one of the most sacred credos of Joseph [Smith]'s church—a tenet important enough to be canonized for ages as Section 132 of the Doctrine and Covenants, one of Mormonism's primary scriptural texts."[149]

Despite the fact that Smith and his followers accepted polygamy and viewed it as fundamental to Mormonism, the American public did not readily accept this non-traditional practice.[150] The notion of having more than one spouse did not comport with the commonly-held societal values at the time.[151]

B. Legal Response to Trends in Polygamy

Due to the overwhelming negative public response to polygamous behavior, the federal government took several steps to outlaw the practice. Initially, Congress barred Utah from entering the Union unless polygamy was outlawed in the region.[152] Subsequently, Congress passed a series of acts imposing hardships on those who practiced polygamy.[153] The first act imposed on polygamists was the Morrill Act for the Suppression of Polygamy of 1862, which imposed fines and jail sentences on practitioners.[154] Due to the inefficacy of the Morrill Act, further legislation was attempted to limit polygamous unions.[155] The next act passed was the Poland Act in 1874, "[a]n act in relation to courts and judicial officers in the Territory of Utah."[156] This Act seized power from the state courts in Utah, and vested jurisdiction in the District Courts.[157] Finally, the third act passed was the Edmunds Act of 1887, which effectively forfeited all LDS Church property exceeding $50,000 in value to the federal government, limiting the power of the Mormon community.[158] The Edmunds Act also created a more simplistic

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148 *Id.*

149 JON KRAKAUER, UNDER THE BANNER OF HEAVEN 6 (2003), *quoted in* Berkowitz, *supra* note 7, at 617.

150 Berkowitz, *supra* note 7, at 620.

151 *Id.*

152 Sigman, *supra* note 141, at 117-18.

153 *Id.* at 118.

154 Berkowitz, *supra* note 7, at 621.

> [E]very person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction shall . . . be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years.

Morrill Act, ch. 126, 12 Stat. 501, §1 (1862), *quoted in* Sigman, *supra* note 141, at 118.

155 Sigman, *supra* note 141, at 119.

156 *Id.* at 121.

157 *Id.*

158 *Id.* at 127.

procedural system for prosecuting polygamy, thus taking steps to further criminalize polygamous behavior.[159]

As a reaction to the federal government's hostile and persistent attacks, the Mormon community brought several First Amendment Free Exercise claims to the Supreme Court.[160] In *Reynolds*,[161] the petitioner, George Reynolds, assistant to Brigham Young, Joseph Smith's successor, had been criminally charged with bigamous conduct and argued that the Free Exercise Clause protected his religious practice.[162] The Court responded by stating that "the First Amendment doesn't provide absolute immunity for all religiously motivated conduct."[163] Furthermore, the Court stated that "Congress was free to regulate 'subversive' activities performed in the name of religion."[164]

The constitutionality of anti-polygamy statutes was again questioned in 1890 in *Davis v. Beason*,[165] and again, the Supreme Court held that the First Amendment's scope was not unlimited and did not protect activities unacceptable in modern society.[166] Although polygamy was still deemed an essential tenet of Mormonism, the LDS Church finally acquiesced to governmental pressure in 1890 when the President of LDS, Wilford Woodruff, issued the "Manifesto," renouncing polygamy as unacceptable Mormon religious conduct.[167]

C. Mormonism Today: Fundamentalist Mormonism as Distinct from the Church of Latter Day Saints

Despite the mainstream Mormon rejection of polygamous activities, sects of Mormonism continued to practice polygamy in secret;[168] a small subgroup of Mormons, now known as fundamentalists, refused to abolish polygamy.[169] LDS however, denounced the covert practice and agreed in the 1930s to assist in the criminal prosecution of bigamists.[170] Nevertheless, in the early twentieth century, fundamentalists, known as the Fundamentalist Church of Jesus Christ of Latter Day Saints ("FLDS"), began establishing communities in which polygamy thrived.[171]

Over the span of several decades, the government raided the polygamous compound of Short Creek—what is today known as Hildale, Utah and Colorado

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159 Berkowitz, *supra* note 7, at 621-22.

160 *See* Sigman, *supra* note 141, at 122, 132.

161 Reynolds v. United States, 98 U.S. 145, 150 (1878).

162 Berkowitz, *supra* note 7, at 622.

163 *Id.* at 622-23.

164 *Id.*

165 Davis v. Beason, 133 U.S. 333, 347-48 (1890) (holding that an Idaho statute imposing sanctions on those who engage in polygamous behavior is not unconstitutional).

166 *Id.* at 341.

167 Sigman, *supra* note 141, at 131.

168 *Id.* at 134.

169 *Id.* at 135.

170 *Id.* at 136.

171 *Id.* at 135.

City, Arizona—on the charges of "cohabitation, white slavery . . . mailing obscene literature, and conspiracy."[172] In 1953, the most noteworthy of the Short Creek raids took place.[173] Eighty-five women and 263 children were removed from the premises.[174] The Short Creek raid of 1953 changed the American sentiment towards polygamous communities.[175] The raid was conveyed to the public by images of "children being grabbed from the arms of their parents, and the words of polygamist husbands were printed in *Life Magazine* exclaiming: '[w]hat we are worried about is that we are never going to see our children again' and '[w]hose is the next religion that is going to become unpopular?'"[176] The public now viewed the government's anti-polygamy stance as an intolerant invasion of privacy and a violation of religious freedom rights, despite Supreme Court decisions to the contrary.[177]

IV. CHILD ABUSE IN POLYGAMY

A. Forms of Abuse in Polygamy

As indicated above, the initial rejection of polygamous unions was based on objections to Mormonism in general,[178] as well as the perception that polygamy was an affront to the traditional family structure.[179] However, in the past few years, state and federal governments have begun to enforce anti-polygamy laws for new reasons. In many North American polygamous communities, there are recurrent and diverse incidents of child abuse.[180] Professor Sigman argues that polygamy is not harmful "because it threatens to take over society and redefine what marriage and family is to any significant degree;"[181] rather, polygamy is harmful because "it cannot survive within the United States without deliberate efforts to make it viable in a system that is geared from a demographic, economic, and sociological standpoint toward monogamy."[182] Thus, communities like the FLDS engage in sometimes abusive and harmful activities to make their societies conducive to the propagation of polygamy.[183]

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[172] *See* Sigman, *supra* note 141, at 136-37.

[173] *Id.* at 139.

[174] *Id.* at 138.

[175] *Id.*

[176] *Id.* at 139.

[177] Sigman, *supra* note 141, at 139-40.

[178] *Id.* at 133.

[179] *See* Mark Strasser, *Marriage, Free Exercise and the Constitution*, 26 LAW & INEQ. 59, 61 (2008) (arguing that courts and commentators often equate same-sex unions with polygamous marriages. These critics argue that if one type of unconventional union is deemed acceptable, others will follow suit.).

[180] *See* Sigman, *supra* note 141, at 142.

[181] *Id.* at 167.

[182] *Id.*

[183] *Id.*

The FLDS provides an example of the kind of abuses encouraged in polygamous communities.[184] The FLDS community has several compounds throughout the United States, Canada and Mexico.[185] Its central settlement located in Short Creek, in what is now described as the "twin communities" of Hildale, Utah and Colorado City, Arizona.[186] The FLDS was initially governed by the Priesthood Council, a group of elders from the most influential families of the group.[187] However, when members of the council began to die, Rulon Jeffs, one of the elders, established himself as the new Prophet and unilaterally governed the communities of Hildale and Colorado City.[188]

Although Rulon's leadership signified a shift to a more despotic ruling system, it was under his son, Warren Jeffs, that the criminal conduct occurring within FLDS became more apparent.[189] In addition to facilitating the illicit act of polygamy, Warren Jeffs encouraged and engaged in many of types of religion-based abuse.[190]

For example, the FLDS practice of separating the community's children from the outside world is what Van Praagh defines as "abuse by isolation."[191] Children were often educated in separate FLDS schools, and girls who went to public school were not allowed to attend past junior high school.[192] Under Warren Jeffs's leadership, the xenophobia felt towards non-fundamentalists was amplified.[193] Not only were children deprived of a good education, Jeffs also "ordered families to cut off all ties with modern media—to get rid of television sets, satellite dishes, newspapers, magazines, and Internet connections . . . [h]e banned anything with the color red, children's videos, and musical recordings . . . ."[194] Jeffs hoped that by separating the FLDS community from the outside world, he could "cleanse and perfect the followers of the FLDS" and further the goals of fundamentalist Mormon doctrine.[195]

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184 *See generally* SINGULAR, *supra* note 144.

185 Berkowitz, *supra* note 7, at 617.

186 Sigman, *supra* note 141, at 139-40.

187 SINGULAR, *supra* note 141.

188 *Id.*

189 *See id.* at 45; *see also* Brieanne M. Billie, *The "Lost Boys" of Polygamy: Is Emancipation the Answer?*, 12 J. GENDER RACE & JUST. 127, 135 (2008) (discussing how Warren Jeffs' harsh regime may have led to the emergence of the "lost boys" phenomenon).

190 *See* SINGULAR, *supra* note 141, at 45-48.

191 Van Praagh, *supra* note 26, at 179.

192 *See, e.g.*, Berkowitz, *supra* note 7, at 638 (stating that "polygamists provide minimal education, preparing boys to work on Bountiful [one of the FLDS settlement's] farms and girls to be 'young brides and mothers.'").

193 SINGULAR, *supra* note 144, at 57 (citing a sermon given by Jeffs describing those who are not in the "Priesthood" as "apostate[s]" and pleading with members of the community to stop interacting with such people).

194 *Id.* at 45.

195 *Id.* at 46.

Jeffs also facilitated what Van Praagh describes as abusive "teachings and practices."[196] In order to further polygamous practices, Jeffs would orchestrate forced marriages between underage girls and older men, and sometimes even between family members.[197] He would coerce recalcitrant girls into undesirable marriages by telling them that their future in the FLDS community would be jeopardized, meaning that they would be rejected from the church, their families and their homes.[198] For example, when former FLDS member, Elissa Wall was fourteen, Warren Jeffs forced her to marry her nineteen-year-old first cousin.[199] When Wall discovered she was to be married to her first cousin, she ardently opposed the idea; however, the elders of the community told her that if she did not go through with the marriage, she would be ostracized from the community and left without her family or a place to live.[200]

Young girls are not the only ones who have been victimized within polygamous communities; certain FLDS boys are cast out and left to fend for themselves—they are known as the "lost boys."[201] While there is no definitive explanation for the phenomenon, some attribute the emergence of the "lost boys" to the fact that men are now taking more wives than they did previously under the leadership of Rulon Jeffs.[202] These boys are being cast out because of church leaders' drive to accumulate more wives; the rationale being that by excluding boys from the FLDS community, there would be more women available for fewer men.[203] The "lost boys" are "separated from their families, put out on the streets, and considered 'dead' by their loved ones after drawing the ire of church leaders . . . [o]r simply making them worry that the younger, better looking boys will garner the attention from girls meant to marry older men."[204] These victims of neglect, some as young as thirteen, are often left on the sides of highways or on street corners.[205] Furthermore, because the "lost boys" are raised in isolation and taught nothing about the outside world, they have even more difficulty adjusting to secular life and often end up homeless, uneducated and sometimes turn to substance abuse.[206]

Children who remain in the care of their parents are sometimes deprived of necessary resources.[207] Vicky Prunty, a former Mormon fundamentalist and

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196 Van Praagh, *supra* note 26, at 182-86.

197 *See* SINGULAR, supra note 144, at 33.

198 *Id.* at 64.

199 ELISSA WALL, STOLEN INNOCENCE 1-2 (Harper Collins, 2008).

200 *Id.* at 144.

201 Douglas, *supra* note 35.

202 Billie, *supra* note 189.

203 *Id.*

204 Douglas, *supra* note 35.

205 *Id.*

206 *Id.*

207 Sigman, *supra* note 141, at 172.

activist against polygamy, notes "the children born into polygamous families . . . suffer tremendously. They are deprived of monetary support because the fathers are unable to provide for all their children . . . . In polygamous households, the father invests less time in the upbringing of his children because there are more of them."[208] For example, in the Kingston polygamous group, the men do not support their wives and children; since most wives are not legally wed to their husbands, they "turn to welfare as 'single mother.'"[209] The leaders of the community tell them that they are required to live in dire conditions in order to "'refine their souls' into a more Christ-like existence".[210] Furthermore, they are told if they sacrifice now, "when Christ returns, the wicked will be destroyed and, they will be given the pick of the beautiful homes left behind."[211] Connie, a former Mormon fundamentalist, describes her own personal experience of living in extreme poverty. She recalls:

> We lived on beans, rice, and oatmeal, and late at night my mom and others in the group would raid the dumpsters behind the grocery stores . . . . Some of the men go every night to the dumpsters. They take produce, rotting and all, and demand that wives not let anything go to waste. That's the most support those women get.[212]

Finally, although not explicitly encouraged by Mormon fundamentalists, rampant sexual violence is another type of abuse that occurs in fundamentalist compounds.[213] For example, former FLDS member Laura Chapman Mackert recalled how her father sexually abused her for a prolonged period of time and how her stepbrothers attempted to rape her.[214] She "couldn't say anything about what [her father] did—not to him or to her sisters, who were also being visited in the dark. She didn't dare speak to her mothers, because they'd beat her—or worse."[215] Since fundamentalist women are required to "keep sweet" and obey the wills of their husbands and fathers, this type of abuse is tolerated, even accepted.[216] The patriarchal nature of polygynous communities enables FLDS men to satisfy their

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[208] Richard Posner, *But If Polygamy Were Legal*, CHI. SUN TIMES, Nov. 5, 2006, at B4, *quoted in* Berkowitz, *supra* note 7, at 639.

[209] MOORE- EMMETT, *supra* note 30, at 144.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.* at 51 (noting that "[t]he perversion of the parent-child relationship becomes further deviant with the high incidence of sexual abuse, which includes incest as doctrine in many groups.").

[214] SINGULAR, *supra* note 144, at 21.

[215] *Id.* at 21-22.

[216] *Id.* at 75 (describing the story of former FLDS member Sara Hammon, who, after being sexually abused by her father was told by her mother that she had "no business trying to embarrass the boys by talking about these secret things . . . . [T]hey have a sex drive and that's that."). *But see* Sigman, *supra* note 141, at 143 (discussing that while polygamy can be "oppressive and patriarchal," polygamy in other contexts "can be communitarian and inclusive, allowing women greater participation in the economics and social structure of the family unit.").

sexual desires by abusing the women in the community without any repercussions.[217]

B. Prosecution of Child Abuse in Polygamous Communities

Arguably, polygamy is a patriarchal and misogynistic system; however, the doctrine of polygamy is not inherently abusive or neglectful of children.[218] Nevertheless, leaders of North American polygamous communities have increasingly engaged in abusive behavior in order to sustain their belief system.[219] In the past several years, more incidents of abuse in polygamous communities have surfaced, including the allegations of statutory rape that triggered last year's YFZ raid in Texas[220] and the felony rape charges faced by Warren Jeffs.[221] These examples indicate to authorities that they must protect the children residing in these communities.

State governments are now grappling with how to prevent the abuse committed by polygamists.[222] Some states, such as Utah and Texas, have attempted to prosecute crimes that occur within polygamous communities without prosecuting the act of polygamy itself.[223] While the constitutionality of anti-polygamy legislation is not in question, authorities are still hesitant to enforce anti-polygamy laws because they are concerned about the public perception of these actions.[224] As mentioned above, media footage of the 1953 Short Creek raid in Arizona evoked public outcry against the government's alleged religious persecution of the FLDS church.[225] The public made similar arguments of persecution last year, when Texas' child protective agencies raided the YFZ compound, based solely on abuse allegations and not on the charges of bigamy.[226]

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217 SINGULAR, *supra* note 144, at 75.

218 Sigman, *supra* note 141, at 173.

219 *Id.* at 167.

220 King, *supra* note 1.

221 Warren Jeffs was found guilty of being an accomplice to rape based on the allegations made by Elissa Wall. She asserted that Jeffs conducted a marriage between her, at age fourteen, and her nineteen-year-old cousin. Brooke Adams, *Polygamous Leader Guilty of Being Accomplice to Rape*, THE SALT LAKE TRIBUNE, Sept. 26, 2007, *available at* http://sltrib.com/portlet/article/html/fragments.

222 Berkowitz, *supra* note 7, at 628.

223 *Id.* In Texas, legislation has been passed to regulate marriage and criminalize parental consent. The purpose behind this legislation is to hinder the activity in the YFZ Eldorado compound. This legislation has been the subject of controversy. *See* Rosanne Piatt, *Overcorrecting the Purported Problem of Taking Child Brides in Polygamist Marriages: The Texas Legislature Unconstitutionally Voids all Marriages of Texans Younger than Sixteen and Criminalizes Parental Consent*, 37 ST. MARY'S L.J. 753 (2006).

224 *See* Berkowitz, *supra* note 7, at 627-28 (describing the public response to the Short Creek raid of 1953).

225 *Id.*

226 *See, e.g.*, Suzette Standring, *A Modern Day Inquisition*, THE HUFFINGTON POST, May 20, 2008, http://www.huffingtonpost.com/suzette-standring/a-modern-day-inquisition (arguing that removing children from their parents without proof of widespread child abuse is persecutory. She states, "Just because commentators freely banter words like 'rape,' 'groomed perpetrators,' or 'pedophilia ring,' doesn't make it a fact.").

The Department of Family Services ("Department") received an anonymous tip that the YFZ community had "a culture of polygamy and directing girls younger than 18 to enter spiritual unions with older men and have children."[227] In response, the Department took possession of 468 children living at YFZ without a court-mandated order.[228] The Supreme Court of Texas held that the facts did not warrant a grant of emergency custody to the Department.[229]

Not only was the Texas attempt to prosecute harm in polygamous communities viewed by the public as persecutory, but the Texas Supreme Court held that "Child Protective Services overreached its authority when it seized [the children]," and ordered the children's return to their parents.[230] Justice O'Neil filed an opinion, concurring in part and dissenting in part.[231] While he agreed with the court that there was not sufficient evidence to prove "imminent danger to the physical safety of boys and pre-pubescent girls to justify their removal from the YFZ Ranch," he rejected the holding that the Department of Family and Protective Services abused its discretion by removing the children without a court order.[232] O'Neil stated:

> Evidence presented in the trial court indicated that the Department began investigation of the YFZ Ranch on March 29th, when it received a report of sexual abuse of a sixteen-year-old girl on the property. On April 3rd, the Department entered the ranch along with law-enforcement personnel and conducted nineteen interviews of girls aged seventeen or under as well as fifteen to twenty interviews of adults. In the course of these interviews, the Department learned there were many polygamist families living on the Ranch; a number of girls under the age of eighteen living on the Ranch were pregnant or had given birth; both interviewed girls and adults considered no age too young for a girl to be "spiritually" married; and the Ranch's religious leader, "Uncle Merrill," had the

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227 In re Texas Dep't of Family and Protective Servs., 255 S.W.3d 613, 613 (Tex. 2008).

228 *Id. See* TEX. FAM. CODE ANN. §262.104(a) (2005), *quoted in In re Texas*, 255 S.W.3d at 614 n.1 (allowing for seizure without a court order if "there is no time to obtain a temporary restraining order or attachment before taking possession of a child consistent with the health and safety of the child." The Department of Family and Protective services can then:

> [T]ake possession of a child without a court order under the following conditions, only: (1) on personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health or safety of the child; (2) on information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health and safety of the child; (3) on personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that the child has been the victim of sexual abuse; (4) on information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe that a child has been the victim of sexual abuse . . . .

229 *In re Texas*, 255 S.W.3d at 615.

230 Moritz, *supra* note 2.

231 *In re Texas*, 255 S.W.3d at 616.

232 *Id.*

> unilateral power to decide when and to whom they would be married.[233]

As indicated by the majority opinion, the YFZ Raid provided yet another example of the power of public opinion in legal decision making,[234] as well as the difficulty of obtaining evidence of sexual abuse in these secluded communities.[235]

Allegations of religious persecution are only partially responsible for states' hesitation to criminalize polygamy.[236] Arguments are also being made that polygamy has certain positive implications; Strassberg notes that polygamy is sometimes touted "as a boon to women who wanted to juggle careers and motherhood or to single women who could not find single men who are willing to commit to marriage."[237] Others argue that with the "liberalizing [of] legal treatment" for non-conventional concepts such as "non-marital sex, extra-marital sex, divorce, and same sex relationships," the United States should similarly alter its strict anti-polygamy stance.[238] The recent popularization of polyamory, a practice in which people are involved in committed relationships with more than one person, has also raised the question that if polygyny is outlawed, should polyamory be outlawed as well?[239]

These arguments against the criminalization of polygamy all neglect to discuss how polygamy has transformed in the twentieth and twenty-first centuries. In addition to providing a breeding ground for child abuse and neglect,

> [M]odern Mormon fundamentalist polygyny is also instrumental in the development of small theocratically governed communities that largely evade both regulation by the secular government and economic contribution to the government. The evasion allows modern Mormon fundamentalist communities to shield illegal conduct from governmental observation and prosecution while at the same time making it impossible to divert mainstream resources for the exclusive support and growth of local theocratic institutions.[240]

Unlike other non-conventional unions, polygamy in its modern form has many harmful and criminal effects that reinforce the need for effective anti-polygamy legislation. Furthermore, as Strassberg notes, the isolated and secretive nature of polygamy makes it difficult for outside authorities to regulate the activity that goes on in the compounds.[241] The YFZ Raid provides just one example of a state's failed attempt to govern these confined, totalitarian communities.

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233 *Id.*
234 Berkowitz, *supra* note 7, at 627-28.
235 Strassberg, *supra* note 53, at 358.
236 *Id.* at 354.
237 *Id.* at 354-55.
238 *Id.* at 355.
239 *Id.* at 358.
240 Strassberg, *supra* note 53, at 357.
241 *Id.* at 358.

V. BALANCING CONFLICTING GOALS: FREEDOM OF RELIGION, PARENTS' RIGHTS AND THE PROTECTION OF MINORS

As illustrated above, states are continuing to take steps to prevent child abuse in polygamous communities. However, courts, like state governments, are concerned about conveying an image of religious persecution.[242] While laws that evenhandedly apply to all people and regulate religious practitioners are deemed constitutional, the public perceives any law that even accidentally infringes on a religious adherent's practice as a violation of the Free Exercise Clause.[243] Some courts, when adjudicating child welfare cases where the parent's religious conduct may be harmful, will take into consideration the religious background of the parents, and a parent's right to raise a child as he or she chooses.[244] They apply the above-mentioned substantial harm standard rather than the generally applied child's best interests standard.[245]

Abuse that takes place in these types of polygamous communities creates "additional issues not normally present" in a child welfare proceeding.[246] A court adjudicating a polygamy abuse case is likely to be confronted with media attention that may bias the parties to the case.[247] Nevertheless, state courts should not apply the heightened substantial harm standard to cases in which abuse is committed in the name of polygamy.[248]

Polygamy is a crime, and thus parents engaging in a plural marriage should not have their practices protected at the expense of a child's best interest.[249] The criminal nature of polygamy makes it different from child welfare cases concerning religious practices of the parents. Because polygamy is illegal, the parent's illegal act should be considered when assessing whether it would be in the child's best interests to live with a certain parent.[250] While the fact that a family engages in polygamous behavior should not automatically lead to the removal of a child from a home,[251] the court should consider a parent's involvement in polygamy as it would consider other crimes committed.[252] If application of the best interests

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242 *See* Berkowitz, *supra* note 7, at 627-28.

243 HAMILTON, *supra* note 5, at 225.

244 *See* Shulman, *supra* note 108, at 173.

245 *Id.*

246 Taylor, *supra* note 38, at 427.

247 *Id.* at 428.

248 Shulman, *supra* note 108, at 173.

249 *See* Piatt, *supra* note 223, at 763.

250 Taylor, *supra* note 38, at 428 (arguing that because polygamy is a crime, "teaching it may be detrimental to the child.").

251 In re Black, 283 P.2d 887, 913 (Utah 1955), *quoted in id.* at 430 ([maybe using a gerund like "describing/explaining" rather than starting with "early"]early Utah case which terminated a couple's parental rights to their seven children solely because the parents were polygamists. The court found that "the practice of polygamy was immoral and that children should not be exposed to that 'evil' influence.").

252 Taylor, *supra* note 38, at 430.

standard indicates that despite the polygamous household, the children in the home are being treated well and are not suffering any form of abuse, then the court may consider keeping the children with their family and the crime of bigamy can be dealt with separately.[253] However, family courts cannot ignore that children are living in a household where, by marrying multiple spouses, the parents are engaging in an illegal activity.

Unfortunately, courts have repeatedly refused to adjudicate the criminality of polygamous behavior in the context of a child welfare case; for example, in *In re Kingston*, "[p]rocedurally, the father and mother were to be treated like any unmarried couple who comes into court for their children."[254] The judge in that case decided that the illegality of the polygamous relationship should be addressed in another proceeding.[255] Similarly, while *In re Texas*[256] adjudicated allegations of abuse, the bigamy charges are being dealt with now in a separate proceeding.[257]

By failing to consider the illegality of polygamy, courts are treating this behavior as if it is a constitutionally protected right, which it is not. Because it is practiced in the name of religion, the courts feel uncomfortable attempting to tell people that they cannot express their faith; however, as stated in *Reynolds*,[258] the First Amendment does not provide exemptions for "subversive activities in the name of religion."[259]

VI. CONCLUSION

The Supreme Court has held that polygamy is against the law. The reasoning behind this ban may have changed over the years but the discovery of the mass abuse in these fundamentalist communities gives us even more of a reason than ever to condemn the behavior. Elissa Wall admitted that it was saddening to watch all of these children removed from their families this past year.[260] She claims that whether the children removed from YFZ should have been returned is a "tough question."[261] Nevertheless, she affirms that while the FLDS parents may view the government intervention as a form of religious persecution, they are blind to the fact that there is a "very real risk for the girls in the FLDS [compounds]" and that Texas "cares little about religious persecution and is far more concerned about the

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253 *Id.*

254 *Id.* at 429.

255 *Id.*

256 In re Texas Dep't of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008).

257 *See* Ramshaw, *supra* note 21 (describing the initiation of criminal proceedings against leaders of YFZ for crimes of bigamy).

258 Reynolds v. United States, 98 U.S. 145 (1978).

259 Berkowitz, *supra* note 7, at 623.

260 Elissa Wall, *Warren Jeffs' FLDS Church and What I Left Behind*, THE HUFFINGTON POST, May 17, 2008, http://www.huffingtonpost.com/elissa-wall/warren-jeffs-flds-church_b_102195.html.

261 Elissa Wall, *What the Texas Appellate Court Decision Means for Children of the FLDS and Their Families*, THE HUFFINGTON POST, May 28, 2008, http://www.huffingtonpost.com/elissa-wall/what-the-texas-appellate_b_103937.html.

safety of the FLDS [children]."[262] The concern a state has for the safety of its children must override its concerns about public perception of persecution, especially when this perception is unfounded.

262 *Id.*