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Polygamy in America: How the Varying Legal Standards Fail to Protect Mothers and Children from Its Abuses

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POLYGAMY IN AMERICA: HOW THE VARYING LEGAL STANDARDS FAIL TO PROTECT MOTHERS AND CHILDREN FROM ITS ABUSES

INTRODUCTION

Once seventeen-year-old Flora Jessop was finally able to flee the fundamentalist Mormon sect that was her childhood home, she ran for her life, fearing that church members would hunt her down.[1] The sect had "strict rules, especially for girls: no pants, haircuts, drugs, booze or boys; just 'keep sweet' and obey."[2] Although it was terrifying to give up the life she was taught was the only path to salvation, Jessop said "she would rather wage the battles she faces on 'the outside' than live a life of submission and abuse."[3] Running away enabled her to escape from a culture that she felt was backward and malevolent. She expressed that many children in her situation would feel the same way if given a choice. "The pain got so bad in heaven that I was willing to damn myself to hell to escape it," she explained.[4]

Or consider Miss Kingston, a sixteen-year-old girl from Utah.[5] Her father, a member of a fundamentalist Mormon sect based in Salt Lake City, Utah, pulled her out of school and forced her to become the fifteenth wife of his brother, the girl's thirty-two-year-old uncle.[6] Kingston tried to escape twice but was caught each time.[7] After the second escape she fled to her mother for protection, who refused to listen to her daughter and promptly turned her over to her father.[8] She was then taken to a remote ranch used as a "reeducation camp" for misbehaving wives and disobedient children.[9] There, in the back of a barn, her father whipped her savagely with a belt and left her to suffer.[10] She

1. Eliott C. McLaughlin, *Ex-Sect Members Escape Polygamy but Not Pain*, CNN NEWS, Apr. 17, 2008, http://www.cnn.com/2008/CRIME/04/16/polygamy.escapes/index.html.

2. *Id.*

3. *Id*.

4. *Id.*

5. JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH 18 (2003).

6. *Id.*

7. *Id*.

8. *Id*.

9. *Id.*

10. KRAKAUER, *supra* note 5, at 18.

limped five miles along a dirt road until she found a gas station where she could call the police.[11]

In 2008, over 400 children were removed by state officials from a ranch run by a sect of the Fundamentalist Church of Jesus Christ of Latter Day Saints (hereinafter "FLDS"), after an alleged phone call was received from a sixteen-year-old girl claiming to have been physically and sexually abused.[12] The Texas Department of Family and Protective Sources was "[c]oncerned that the community had a culture of polygamy and of directing girls younger than eighteen to enter spiritual unions with older men and have children."[13] The state action elicited an understandable outcry from the mothers of the children, arguing that the removal was a mass violation of their human and constitutional rights.[14] Images of the devastated mothers in tears summon feelings of empathy and perhaps outrage, but at the same time there remains an uncomfortable but crucial question: do their tears truly outweigh the deep concern for the abuse their children are enduring? As Professor Marci Hamilton pointed out, "[T]he boys were being groomed to be rapists, the younger girls were being groomed to be victims, and the adolescents were being sexually assaulted on a regular basis."[15] Returning the children without conditions for their protection, as the FLDS leaders claim is their right, could be construed as permission to continue the community practice of sex and marriage to children as young as twelve years old.[16]

Although polygamy is clearly being practiced in shadowed corners, it is a long-established criminal act in the United States.[17] As a result, polygamy has always had an impact on child custody proceedings when practiced by one or both parents.[18] Its controversial presence has had a strong yet varying effect on child custody rulings, as courts struggle to weigh the child's best interests against parental rights and the freedom to practice one's own religion.[19] A highly-publicized recent battle is the *In re Texas Department of Family & Protective Services* case, for which final custody proceedings are still

11. *Id.*

12. *In re* Tex. Dep't of Family & Protective Serv., 255 S.W.3d 613, 613–14 (Tex. 2008).

13. *Id*.

14. Brief for American Civil Liberties Union & American Civil Liberties Union of Texas as Amici Curiae in Opposition to Relator's Petition for Mandamus at 1–2, *In re* Tex. Dep't of Family & Protective Serv., 255 S.W.3d 613 (Tex. 2008) (No. 08-0391).

15. Marci Hamilton, *Why the Texas Supreme Court's Ruling Regarding the FLDS Mothers Is Significantly More Protective of the Children Involved than the Media Have Painted It to Be*, FINDLAW, June 3, 2008, http://writ.news.findlaw.com/hamilton/20080603.html.

16. *Id.*

17. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1879).

18. Lauren C. Miele, Note, *Big Love or Big Problem: Should Polygamous Relationships Be a Factor in Determining Child Custody?*, 43 NEW ENG. L. REV. 105, 128 (2008).

19. *Id.* at 133–34.

pending.[20] This Note examines the ways courts have balanced these interests and why, what impact this most recent Texas case has on polygamy's standing in the United States, and where the legal stance on polygamy should be headed. Part I focuses on the problem: how much of an impact *should* the practice of polygamy have on a child custody ruling? Fleshing out this question requires analyzing the history of the FLDS, the impact the FLDS has on mothers, and the malleable, varying "best interests of the child" tests. Part II examines the impact of the recent Texas polygamy case, discussing the majority stance and the distinction made by its concurring opinion. Part III turns to a 1955 Utah Supreme Court case that exemplifies the position the United States once had towards polygamy. Part IV then compares the recent Texas ruling to the older Utah Supreme Court decision, examining the dangers of the current standard and emphasizing why courts should revert back to taking a stronger stand against polygamy. The illegality of polygamy and its abusive impact on children outweigh a mother's right to raise her children and practice her religion in an FLDS polygamous sect more often than courts acknowledge. The Utah decision should be strongly considered in future child custody rulings involving polygamy as it signifies a better balance between religious freedom, parental rights, and child custody than the current legal standard.

I. ADDRESSING THE POLYGAMY PROBLEM

A. Custody Battles: Why Balancing Parental Rights Against Child Interests Is Difficult

It is well established that persons engaging in polygamy do not have a First Amendment right to do so.[21] Although the Free Exercise Clause does provide some protection for those engaged in practices stemming from their religious beliefs, the right to engage in those actions "is not totally free from legislative restrictions."[22] While the government may not interfere with mere religious belief or opinion, it may interfere with practices.[23] Activities of individuals, even when religiously based, must bow to "regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."[24] To allow otherwise would "in effect . . . permit every citizen to become a law unto himself."[25]

20. 255 S.W.3d 613.

21. *Reynolds*, 98 U.S. at 166.

22. State v. Fischer, 199 P.3d 663, 667 (Ariz. Ct. App. 2008) (quoting Sherbert v. Verner, 374 U.S. 398, 403 (1963)).

23. *Id.* (citing *Reynolds*, 98 U.S. at 166).

24. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

25. *Fischer*, 199 P.3d at 667 (quoting *Reynolds*, 98 U.S. at 166–67).

Bigamy and polygamy are crimes according to the laws of many countries, not only the United States.[26] Religious belief cannot be accepted as a justification for committing an overt criminal act.[27] To extend exemption from punishment for such crimes would "shock the moral judgment of the community."[28] As the Utah Supreme Court pointed out: "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country."[29]

Nonetheless, child custody battles where polygamous activity is a factor are not so clear-cut. Despite the illegality of polygamy and lack of Free Exercise Clause protections, there is no *per se* rule that a mother must lose custody of her children if she practices polygamy, because courts must also consider and balance the needs of the children involved.[30] Justice Scalia has referred to situations such as child custody disputes as presenting a "hybrid situation,"[31] subject to strict scrutiny.[32] Cases of child custody require a more complicated analysis, as constitutional protections beyond the Free Exercise Clause also come into play.[33] State supreme courts have noted that parents have a constitutionally protected parental right to direct the education and religious upbringing of their children.[34] Since custody cases involve a Free Exercise claim made in conjunction with other constitutional protections, a higher level of scrutiny and consideration is often necessary.[35]

Justice Scalia's hybrid approach may simply muddle the factors considered in a custody battle even further. And state courts are split over whether heightened scrutiny should be applied in the context of parental rights and the Free Exercise Clause.[36] Federal circuit courts have split on whether a hybrid rights claim should exist and if it does, determining, what qualifies as a hybrid

26. *In re* State in Interest of Black, 283 P.2d 887, 903–04 (Utah 1955).

27. *Id.* at 902.

28. *Id.* at 904.

29. *Id. See also* State v. Holm, 137 P.3d 726 (Utah 2006) (stressing that irrevocable ordinance of state constitution prohibiting polygamous or plural marriages did not merely prevent legal recognition of polygamy, but required its prohibition).

30. Miele, *supra* note 18, at 134.

31. Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 882 (1990).

32. Shepp v. Shepp, 906 A.2d 1165, 1172 (Pa. 2006). This decision reaffirmed a higher level of scrutiny for cases involving a Free Exercise claim made in conjunction with other constitutional protections, such as the right of a parent to direct the upbringing and education of his child. *Id.*

33. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); *see also* Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (stating the right of parents to direct the education and upbringing of their children is a constitutionally protected right).

34. *Yoder*, 406 U.S. at 213–14.

35. *Id.* at 214.

36. Ariana S. Cooper, Note, *Free Exercise Claims in Custody Battles: Is Heightened Scrutiny Required Post-*Smith*?*, 108 COLUM. L. REV. 716, 716 (2008).

right.[37] For example, where polygamy is present, should the First Amendment protection drop out, causing the hybrid situation to dissolve? Moreover, it is unclear what the strict scrutiny analysis actually means and how it should be applied.[38]

As a result, courts have struggled to establish polygamy's weight in a child custody ruling, creating a variety of almost arbitrary "best interests of the child" tests and failing to uniformly define what degree of harm suffered by a child in a polygamous context warrants the removal of the child from his or her natural parents. In attempts to define the standard of harm required and determine custody, it is essential and important for courts to focus in-depth on both the mothers' rights and the children's needs. In examining the mothers, courts should consider the impact polygamy has on their ability to raise a child. For the children's rights and needs, courts should take into consideration the impact polygamous practice has on a child's health and safety, including whether or not polygamy should warrant *per se* removal of children since it is a crime. Closely considering all the factors may help decide the best solution, both for the mothers and the children at stake, as exemplified in the Texas polygamy case. First, the parent side of the scale will be examined in the framework of the FLDS culture. Second, the issues in defining what is in the "best interests of the child" will be examined.

B. The History and Membership of the FLDS

1. Defining the FLDS

In order to shed light on the ability of a mother in an FLDS polygamous sect to be a fit parent, it is necessary to understand and consider the FLDS structure and the role women have in it.[39] "'Mormon Fundamentalism' denotes the beliefs and practices of contemporary schismatic groups" of the Mormon Church, such as the FLDS, that "follow the teachings of the Prophet Joseph Smith."[40] In the mid-1800s, Smith established the foundation for what is considered the FLDS Church today.[41] The roots of his theology come from his interpretation of the Book of Mormon combined with the Old Testament.[42] Among other spiritual experiences, Smith claimed to receive a revelation that it was God's will for Mormons to be married by Mormon elders, not secular civil

37. *Id.* at 722.

38. *Id.* at 724.

39. Not all polygamous families reside in a sect community; this Note focuses almost exclusively on FLDS sects because it is the situation addressed in *In re Texas* and that scenario seems the most detrimental to the women and children in polygamous environments.

40. Shepp v. Shepp, 906 A.2d 1165, 1166 n.2 (Pa. 2006).

41. IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 24 (1996).

42. *Id.*

authorities or ministers of other gospels.[43] He "perceived God's vision of marriage to be superior to federal and state regulations of marriage."[44]

Mormon Fundamentalists believe that God requires all "true" believers to abide by the principle of polygamy, regardless of Church mandate.[45] The FLDS view is that plural marriage is "the most holy principle ever revealed to man."[46] Smith stated that a man and woman could bond in a spiritual way as husband and wife.[47] Smith explained that God is an exalted man and that mortal existence is a testing ground for men to begin their progress toward exalted godhood for themselves, surrounded by their multiple wives and children.[48] Men who reject polygamy "not only forfeit godhood, but [are] damned."[49] Additionally, women need to be married or sealed to "worthy" or "righteous" men to earn themselves a proper place.[50] Essentially, the salvation of women depends on their union with a "righteous"—by definition, polygamous—man, and is fully dependant on the earthly behavior of this husband.[51] Because there are few truly "righteous" men, several women must "be yoked to the same man in order to secure their salvation."[52]

Although there are considerable variations from case to case, the typical marriage in polygamous families takes place when husbands are about twenty-one years old and wives are in their late teens.[53] Each family averages about two-dozen children, depending on the number of wives.[54] A single wife will have, on average, five to six children, with some having many more; almost 18% of the wives in one study had eleven to nineteen children.[55] According to the FLDS belief system, a man should have a minimum of three wives in order to achieve the highest form of salvation, and wives are required to be subordinate to their husbands.[56]

43. Kristen A. Berberick, Comment, *Marrying into Heaven: The Constitutionality of Polygamy Bans Under the Free Exercise Clause*, 44 WILLAMETTE L. REV. 105, 108 (2007).

44. *Id.*

45. *Id.* at 110.

46. J. MAX ANDERSON, THE POLYGAMY STORY: FICTION AND FACT 1 (1979).

47. Berberick, *supra* note 43, at 110–11 (also called a "celestial marriage").

48. *Id.* at 111.

49. *Id.*

50. *Id.* at 111–12. Under the "law of priesthood," a man "could have ten virgins given unto him" by the law, and it would not be adultery because the virgins belong to him. 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, 10 (2007).

51. *See* Berberick, *supra* note 43, at 111.

52. *Id.* at 112.

53. ALTMAN & GINAT, *supra* note 41, at 83.

54. *Id.* at 83–84.

55. *Id.* at 84.

56. Julian Coman, *Three Wives Will Guarantee You a Place in Paradise. The Taliban? No: Welcome to the Rebel Mormons*, TELEGRAPH, Oct. 19, 2003, at A1; *see also* Bonnie Ricks,

Men are often advised by Church leaders "to add new wives to their families."[57] Wives are also "pressured to accept another wife and encourage their husbands to enter into plural marriages on religious grounds."[58] When a young woman reaches marriageable age, the church places her with a husband according to a revelation from God to the Church prophet leader.[59] The leader elects to take and give wives to and from men according to their worthiness, which is also called the "law of placing."[60] Most practicing spouses "refer[] fervently to their 'religious beliefs and faith,' 'reaching salvation,' 'following the teachings of Joseph Smith,' [and] achieving the 'fullness of the gospel'" in defending a polygamous family life.[61]

2. A Life of Abuse

The belief system of an FLDS sect results in the men in polygamous families abusing the women and children that are a part of the sect and their family, among a host of other problems. Fundamentalist sects "foster incest, underage marriage, sexual abuse, rape, physical abuse, nonconsensual marriage, birth defects, welfare fraud, poverty, and a deprivation of education and other opportunities."[62] The problem of sexual abuse in the FLDS is a "prevalent" by-product of polygamy.[63] "The combination of polygamy and the law of placing often results in a shortage of available women within the church community."[64] The FLDS counters this by bonding older men to child brides and sometimes "excommunicating young boys and men to reduce the competition for wives."[65] The FLDS sanctions this incest and child abuse, defending the practice as its constitutional right under the Free Exercise Clause.[66] Utah Attorney General Mark Shurtleff has linked child abuse and polygamy, claiming that "the FLDS belief system and lifestyle—including

Review: The Sixth of Seven Wives: Escape from Modern Day Polygamy, INST. FOR RELIGIOUS RESEARCH, http://www.irr.org/mit/sixth-of-seven-wives-br.html (reviewing Mary Mackert's book recounting a young girl's experiences with polygamy) (last visited Mar. 20, 2010).

57. ALTMAN & GINAT, *supra* note 41, at 92.

58. *Id.* at 93.

59. *See* ALTMAN & GINAT, *supra* note 41, at 89 ("[T]he prophet plays a strong role in arranging marriages."); *see also* Ricks, *supra* note 56.

60. Julie M. Arnold, Note, *"Divine" Justice and the Lack of Secular Intervention: Abrogating the Clergy-Communicant Privilege in Mandatory Reporting Statutes to Combat Child Sexual Abuse*, 42 VAL. U. L. REV. 849, 857–58 (2008).

61. ALTMAN & GINAT, *supra* note 41, at 93.

62. Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love is a Many Splendored Thing,"* 15 DUKE J. GENDER L. & POL'Y 315, 316 (2008).

63. Arnold, *supra* note 60, at 857.

64. *Id*. at 858.

65. *Id.*

66. *Id.*

polygamy and the overall treatment of women—enable what amounts to institutionalized child rape and other forms of abuse."[67]

Courts and commentators have discussed "a number of harms associated with the practice of polygamy, ranging from the imposition of patriarchy to the abuse and neglect of women and children."[68] The Utah Supreme Court detailed some of the harms associated with polygamy. The court explained that polygamy "often coincides with crimes targeting women and children, [including] incest, sexual assault, statutory rape, and failure to pay child support."[69] Utah cases *State v. Green* and *State v. Holm* illustrate some of the harms implicated in, or resulting from, polygamous relationships.

Information shared by some women of the FLDS sect reveals that "backbreaking labor is the norm at FLDS compounds (even for children), and physical violence is . . . routine."[70] Sister wives frequently punish each other for transgressions by beating the children of the offending wife.[71] Mothers giving birth to babies with disabilities are deemed "sinful mothers" and are encouraged to let the baby die.[72] Additionally, mothers are encouraged to keep many of their children at arm's length—hugging, kissing, and signs of affection are frowned upon.[73] Young men can be excommunicated for simply showing interest in a girl, and all members of the FLDS community are permitted almost no contact with the outside world.[74] The FLDS life is one ruled by church leaders and "punctuated by oppression and emotional abuse."[75]

67. Jaime M. Gher, *Polygamy and Same Sex-Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 580 (2008) (citing John Gibeaut, *Violation or Salvation?: Prosecutors Say It's a Sex Crime, Polygamist Leader Warren Jeffs Says It's Counseling His Flock*, A.B.A. J., Feb. 2007, at 26, 29).

68. Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 LAW & INEQ. 59, 88 (2008); *see also* State v. Green, 99 P.3d 820, 830 (Utah 2004) (listing crimes that are usually attendant to polygamy practice).

69. Strasser, *supra* note 68, at 88–89 (quoting State v. Green, 99 P.3d 820, 830 (Utah 2004)). *Green*, 99 P.3d at 830 (asserting Utah's bigamy statute serves State interest "in protecting vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children"); State v. Holm, 137 P.3d 726, 743 (Utah 2006) ("[The case] raises important questions about the State's ability to regulate marital relationships and prevent the formation and propagation of marital forms that the citizens of the State deem harmful.").

70. Maureen Ryan, *FLDS Polygamy Sects Get a Closer Look—And It's Chilling*, CHICAGO TRIBUNE, April 28, 2008, http://featuresblogs.chicagotribune.com/entertainment_tv/2008/04/flds-polygamy-s.html.

71. *Id*.

72. *Id*.

73. *Id*.

74. *Id.*

75. *Senator: Polygamous Sects Are 'Form of Organized Crime,'* CNN NEWS, July 24, 2008, http://www.cnn.com/2008/CRIME/07/24/polygamy.hearing/index.html.

Some commentators emphasize that the men in polygamous community sects are essentially preying on "little girls who, from the cradle, know no other life but polygamy."[76] The mothers raise their daughters to marry within the sect, and the fathers raise their children to marry as children.[77] "People . . . simply do not understand, and have not understood for fifty years, the devastating effect that the practice of polygamy has on young girls in our society."[78] States have claimed the interest of protecting children from sexual abuse as a compelling interest justifying polygamy prohibitions. In *State v. Green*, "the Utah Supreme Court reasoned that child abuse coincides with polygamy, and because of the closed nature of polygamous communities, child abuse prosecutions are [hard to pursue.]"[79] This is a problem, as no "reasonable person would disagree that extinguishing such abuse is a compelling interest."[80]

Reacting to the evidence of abuse occurring on sect compounds, states such as Utah have decided to focus law enforcement efforts on crimes occurring within polygamous communities, such as child abuse, domestic violence, and fraud.[81] But is the move towards strengthening enforcement enough?

3. America's Historical and Current Attitude Toward Polygamy

History shows that America's position on polygamy has changed over time, leaning more and more towards tolerance of the practice. In the 1800s, the United States federal system fought strongly against plural marriage. Legislation to outlaw polygamy was first passed in 1862 under President Lincoln.[82] Over time, Congress also enacted laws criminalizing bigamy and polygamy, such as the Morrill Act of 1862,[83] the Edmunds Act of 1882, and the Edmunds-Tucker Act of 1887.[84] In 1890, Woodruff Wilson issued the First Manifesto, declaring that his advice to the FLDS was "to refrain from contracting any marriages forbidden by the law."[85] Courts paralleled the

76. *See* KRAKAUER, *supra* note 5, at 22.

77. *Id.*

78. *Id.* at 23.

79. Berberick, *supra* note 43, at 126.

80. *Id.*

81. Bronson v. Swensen, 500 F.3d 1099, 1109 (10th Cir. 2007).

82. ALTMAN & GINAT, *supra* note 41, at 33.

83. *See* Reynolds v. United States, 98 U.S. 145 (1879). The Morrill Act provided the opportunity for the Supreme Court to bless the nation's polygamy ban in its 1879 decision. Gher, *supra* note 67, at 575.

84. Gher, *supra* note 67, at 575–76.

85. Mary K. Campbell, Comment, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854–1887*, 13 YALE J.L. & FEMINISM 29, 51 (2001).

legislature, punishing polygamy whenever it came before the court:[86] essentially, "polygamists were thieves."[87]

Nevertheless, a small group of followers "kept the fundamentalist spirit alive."[88] The modern fundamentalist movement was born in 1929 after fundamentalists endured increasing waves of hostility from the main Mormon Church for their practice of plural marriage.[89] This caused a schism, and the fundamentalist sects began to split from their Church of Latter Day Saints roots.[90] The movement also led to a variety of legislative, criminal, and civil actions during the 1930s and 1940s, especially in Utah, Arizona, and Idaho.[91]

Despite multiple attempts to exterminate polygamy, today the FLDS community is still "reasonably well-off, growing, and extending [its] influence into other communities."[92] The United States has taken a softer, less aggressive stance in recent years, as exemplified in more recent cases on polygamy. By the middle of the twentieth century, the criminalization of polygamy had begun to take a noticeable turn.[93] As the American public faced pictures of government officials taking fundamentalist children from the arms of their grief-stricken mothers, "the pendulum began to swing in favor of polygamists."[94] The era of persecution and over-prosecution was over, and the era of under-enforcement began.[95] "[C]ourt battles vindicated the fundamentalists, finding gross violations of [their] due process rights."[96] Since 1953 and the raid of a polygamous sect in Short Creek, Arizona, there have not been any major efforts to prosecute polygamists.[97]

Today, although polygamy is outlawed across the nation, "prohibitions against polygamy are not being enforced in any systematic way."[98] The current anti-polygamy laws tend to be lax, especially when "compared to the thousands of prosecutions and imprisonments of polygamous couples" that took place during the nineteenth century.[99] Prosecutors and police are generally pursuing legal action against polygamous families in much smaller

86. United States v. Peay, 14 P. 342 (Utah 1887); *Reynolds*, 98 U.S. at 168.

87. Campbell, *supra* note 85, at 30.

88. ALTMAN & GINAT, *supra* note 41, at 44.

89. *Id.*

90. *Id*. at 47.

91. *Id.* at 46.

92. *Id.* at 53.

93. Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 110 (2006).

94. *Id.*

95. *Id.*

96. *Id.* at 139.

97. *Id.*

98. Sigman, *supra* note 93, at 140.

99. *See* Gher, *supra* note 67, at 579.

numbers.[100] Enforcement is one part in the ongoing political battle over how polygamists should be dealt with.[101] The change in attitude towards the FLDS practices and enforcement of polygamy laws forces us to consider: Is the current trend the right one, or is it time for courts to take a stronger stance against polygamy, especially in the context of child custody? With these considerations in mind, the issue requires further examination of the mothers' position and the needs of the children.

C. The Rights of Mothers in a Polygamous Setting

There are two extremes in the spectrum of opinion regarding whether women who practice polygamy are fit to keep their children. One extreme advocates that women in polygamous settings are self-assured, independent individuals. Thus, a mother's choice to engage in polygamy does not make her an unfit parent; in fact, her independence makes her a strong, dependable mother. The other extreme argues that these women are not making a choice, but rather, are brainwashed victims. Their state of mind, parenting skills, and subordination to their husbands make them unfit parents. Ultimately, this Note takes the position that in consideration of the precarious situation of the mothers and the impressive need to protect the children, courts should lower the standard required to remove children from mothers who choose to maintain their FLDS polygamous lifestyle.

1. Women as Warriors: The Mothers Deserve Custody

The women's rights perspective, seeking to establish a woman's right to choose and exist as an individual free to make all her own decisions, argues strongly for the mothers' right to keep their children.[102] Arguably, polygamy is not always immoral, and it is a woman's right to choose to be married to a man who has more than one wife.[103] These women should be respected for acting in accordance with their beliefs and for following their own convictions.[104] "Polygamy does not compel them to do this," but rather permits them to do it if they so desire.[105] Viewing the woman's choice as her own, proponents of this position argue that she can engage in polygamy and still be a fit parent.

100. *See* Sigman, *supra* note 93, at 140.

101. *Id.* at 141–42.

102. Discussion on an international scale of the rights of women in polygamous relationships is beyond the scope of this article. Views on the traditional practices of Islam, for example, are highly distinguishable because it occurs in an area where such practice is a widely accepted cultural norm. *See* Michéle Alexandre, *Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?*, 18 HASTINGS WOMEN'S L.J. 3, 5 (2007).

103. A PLEA FOR POLYGAMY 24 (Panurge Press 1929).

104. *Id.* at 25.

105. *Id.* at 54.

In *Sanderson v. Tryon*,[106] the parents had three children, two of whom were born while they were practicing polygamy.[107] After leaving the polygamous relationship with her husband, the mother entered another plural marriage, while the father abandoned it.[108] Except for the practice of polygamy, the lower court presented no findings to support the conclusion that the best interests of the children would be served by awarding custody to the father.[109] The Utah Supreme Court reversed, holding that "a parent's extra-marital sexual relationship alone is insufficient to justify a change in custody", and therefore, evidence the mother is practicing polygamy is insufficient on its own to support the lower court's finding.[110] Instead, the court found "polygamous practices should only be considered as one among many other factors regarding [a child's] best interests."[111]

Polygamous mothers also have their parental rights to lean on. Generally, a parent deserves "authority in her own household and in the rearing of her children."[112] Justice Rutledge acknowledged that "[t]he parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters."[113] It is cardinal to the Court that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[114] "There is a presumption that [it is] in the best interest and welfare of [a] child to be reared under the custody and control of its natural parent."[115] But the inclination for the natural parent is only a preference: the presumption may still be rebutted when criminal acts are involved.[116]

In the FLDS, it is the women who "have largely had to assume a public mantle these past months, making court appearances, trying to defend both their faith and their lifestyle in the face of deep skepticism."[117] The Supreme Court of Utah emphasized in one opinion that "[t]he fact that our constitution requires the state to prohibit polygamy does not necessarily mean that the state

106. 739 P. 2d 623 (Utah 1987).

107. *Id*. at 624.

108. *Id.*

109. *Id.* at 626.

110. *Id.* at 627.

111. *Sanderson*, 739 P. 2d at 627.

112. Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

113. *Id.*

114. *Id.* at 166.

115. *In re* Black, 283 P.2d 887, 907 (Utah 1955).

116. Over the last twenty years "several states have implemented statutory and common law presumptions against child custody for persons convicted of selected crimes." Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737, 754 (2000). *See also infra* Part I.D.

117. Sara Corbett, *Children of God*, N.Y. TIMES MAG., July 27, 2008, § 6, at 39.

must deny any or all civil rights and privileges to polygamists."[118] It is important to determine if the mother is the only one who can give the children "the reasonable nurture, care, guidance, and love as a foundation for realizing their highest potential as human beings."[119] "*In re Adoption of W.A.T.* illustrates the Utah court's realization that the rights of individuals within polygamous systems are still worthy of protections despite the illegality of polygamy."[120]

2. Women as Victims: The Mothers Should Lose Custody

The opposite view is that women in polygamous relationships chose a lifestyle that is unacceptable for children to endure, especially in light of the attitude such women have towards their children and themselves. Letters written by Catharine Cottam Romney to her parents in 1873 of her decision to "marry" into polygamy reveal some of the weaknesses these women exhibit. She wrote, "You may think that if I had a disposition to do as you would like, I should have given him up. I have tried many times to bring my mind and feelings to it but have failed . . . I know I am weak and foolish."[121] Also, as explained above, there are often reports of the physical abuse suffered by FLDS women. One former polygamist wife "recalls seeing her father, Vergel, smack her mother for expressing jealousy over his second wife, Mae."[122] A former FLDS woman emphasized that many plural wives were born into the polygamous sect and "do not know any other lifestyle."[123] These women have "never experienced the freedom to think for themselves or to freely question their leaders."[124] The women stay sweet and quiet "to sacrifice their feelings for the greater 'good.'"[125]

As the dissent in *In re W.A.T.* argues, polygamous practice has a detrimental effect that is both harmful to the child and a red flag concerning the fitness of the parent.[126] Scholars argue that the impact of the Fundamentalist polygamous lifestyle on the autonomy, integrity, and equality

118. *In re* Adoption of W.A.T., 808 P.2d 1083, 1085 (Utah 1991).

119. *Id.* at 1087 (Zimmerman, J., concurring).

120. Michéle Alexandre, *Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse so as to Include De Facto Polygamous Spouses*, 64 WASH. & LEE L. REV. 1461, 1473 (2007).

121. LETTERS OF CATHARINE COTTAM ROMNEY, PLURAL WIFE 10 (Jennifer Moulton Hansen ed., 1992).

122. *See* MCLAUGHLIN, *supra* note 1, at A1.

123. Kathy Jo Nicholson, *On Polygamy: Former FLDS Member Speaks Out*, CNN NEWS, Apr. 16, 2008, http://ac360.blogs.cnn.com/2008/04/16/on-polygamy-former-flds-wife-speaks-out/.

124. *Id.*

125. *Id.*

126. *See In re* Adoption W.A.T., 808 P.2d 1083, 1089 (Utah 1991).

of adult women is "sufficiently troubling."[127] Although removing the children from their mothers is a harsh remedy, essentially burdening the mothers and children with the sins of the husbands and fathers, the genuine interest in the public welfare and childrens' welfare outweighs the concern.[128] As the *Black* court lamented, "How much more inexcusable for these parents to hide behind this religious cover while subjecting their children to what must be reasonably anticipated as an entrapment into this system."[129]

"Religion—the reason these women say they stay . . . is also used to validate the brainwashing and, in some cases, physical abuse employed to keep women and children submissive," said Marci Hamilton, a law professor and author who has studied polygamist sects for ten years.[130] "The women are wholly dependent on the patriarchal community."[131] The primary responsibility of women in these communities is to serve their husbands, conceive as many children as possible, and "raise those children to become obedient members of the religion."[132] They often lack education, have few marketable skills and are told of "terrible forces outside the compound," namely "evil people" who want to and will harm them if they leave.[133] Hamilton also emphasizes that there is always the prospect of eternal damnation: "It's not only physically dangerous to leave, you're also risking your soul."[134] Staying amidst the emotional, mental, and even sexual abuse "may look like a smarter choice to a lot of these people."[135]

Kathy Jo Nicholson, a former FLDS member, shared many of these struggles.[136] As she viewed one of their male leaders in chains facing criminal charges, she "couldn't help but think about the many women and children still bound in psychological chains inside the FLDS."[137] Nicholson stated that "these mothers . . . need to stop enabling these men to hurt their children."[138] She continued, "Women who are trapped in abuse are often unable to see the damage that it is doing to their children."[139] Nicholson emphasized that the women in polygamous cultures need to seek help and counseling for

127. Eve D'Onofrio, *Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States*, 19 INT'L J.L., POL'Y & FAM. 373,373 (2005).

128. *In re* Black, 283 P.2d 887, 909 (Utah 1955).

129. *Id.* at 910.

130. *See* MCLAUGHLIN, *supra* note 1, at A1.

131. *Id.*

132. *See* KRAKAUER, *supra* note 5, at 31.

133. *See* MCLAUGHLIN, *supra* note 1, at A1.

134. *Id.*

135. *Id*.

136. Nicholson, *supra* note 123.

137. *Id.*

138. *Id.*

139. *Id.*

themselves in order to then be able to protect their children.[140] She explained that the husbands and leaders in the Texas case are guilty of wrongdoing, but the mothers are responsible, too: "Wake up women of the FLDS! These are your children! And you have contributed to their abuse!"[141]

Whether the mothers are seen as warriors, victims, or even abusers, courts must also focus on the best interests of the children. Parental power, even when linked to a Free Exercise claim, may be subject to limitation if it appears the health or safety of the child is in jeopardy, or if there is potential for significant social burdens.[142] The Supreme Court has noted that "neither rights of religion nor rights of parenthood are beyond limitation."[143] The preference for a child to remain with his or her natural parents must be weighed against the harm the child is experiencing while living with the parents. Within the FLDS' polygamous setting, courts need to lower the best interest test's harm threshold for necessity to remove a child from parental custody—the polygamous lifestyle exposes the children to far too much emotional, physical, and sexual abuse.

D. Child Custody and Polygamy: The Best Interests of the Child

Society has an interest in protecting the welfare of its children.[144] It is in the best interest of youths and the entire community that children be "both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[145] The Supreme Court stated in *Prince* that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."[146] Although it is highly desirable for children to be raised by their natural mothers, it is "more desirable that they be brought up as law-abiding citizens in righteous homes. The price is too great to require these children to continue under the same influences they have been exposed to."[147] Courts asserted that the practice of polygamy should be "weeded out" and that children should not be exposed to "its evil influence and environment" because it is sufficiently reprehensible "without the innocent lives of children being seared by [its] evil influence."[148]

140. *Id*.
141. Nicholson, *supra* note 123.
142. Shepp v. Shepp, 906 A.2d 1165, 1173 (Pa. 2006).
143. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
144. *Id.* at 165.
145. *Id.*
146. *Id.* at 167.
147. *In re* Black, 283 P.2d 887, 913 (Utah 1955).
148. *Id.*

1. The Best Interests of the Child

In defining how to best protect the needs of children, courts developed varying "best interests of the child" tests. Most employ a "best interests of the child" factors test, where a parent's religious practice is one of the many factors considered.[149] Courts have discretion in this decision, as there is seemingly no hard-line definition for what is in the "best interests" of a child; rather, it is something to be discerned from the particular circumstances of each case.[150] There are in fact a "myriad of factors [a] court may properly consider in determining a child's best interests."[151] Unfortunately, this wide disparity in factors that courts consider highlights the lack of clear guidance concerning what factors should be considered or how each factor should be weighed.

In the recent Texas appellate case *In re J.J.S.*, the factors that were addressed included the desires of the child, the physical and emotional needs of the child, the danger to the child now and in the future, parental ability, plans for the child, stability of the home, acts or omissions by a parent that show the parent–child relationship is not proper, and any excuse for the acts of the parent.[152] The court held that the requisite endangerment to warrant removal may be found if the evidence showed a course of conduct by the parent that exposes a child to loss, injury, or jeopardizes their safety or well-being.[153] Other relevant circumstances courts consider include the available alternatives for the child, the actual nature and content of the lifestyle, the existence and quality of an ongoing relationship between the parent and child, and any special needs of the child.[154] As exemplified by *In re Texas*,[155] some courts are

149. *In re* Marriage of Short, 698 P.2d 1310, 1313 (Colo. 1985) (en banc) Courts applying the "best interests of the child" standard can take into consideration the parents' religious practices, though acknowledging that even in those cases, "[C]ourts are precluded by the free exercise of religion clause from weighing the comparative merits of the religious tenets of the various faiths or basing its [*sic*] custody decisions solely on religious considerations." *Id.*; Rogers v. Rogers, 490 So. 2d 1017, 1018 (Fla. Dist. Ct. App. 1986) (holding that the court may "consider a parent's religious beliefs or values as one of several factors aiding in its child custody determination"); LeDoux v. LeDoux, 452 N.W.2d 1, 5 (Neb. 1990) (concluding that "[t]he paramount consideration in all cases involving the custody or visitation of a child is the best interests of the child," and that the parents' religious practices may be considered when determining what is in the child's best interests).

150. Sanderson v. Tryon, 739 P.2d 623, 627 (Utah 1987) ("[A] determination of the children's best interests turns on numerous factors, each of which may vary in importance according to the facts in the particular case.").

151. *Id.*

152. *In re* J.J.S., 272 S.W.3d 74, 81 (Tex. App. 2008).

153. *Id.* at 78.

154. *Id.* at 81–82.

155. *In re* Texas Dep't of Family Protec. Servs., 255 S.W.3d 613 (Tex. 2008). *In re Texas* is discussed further in Part II of this Note.

examining the level of "imminent harm" to the child as an almost decisive factor.

Court analysis becomes even more complicated depending on whether or not the "best interests" test is examined under strict scrutiny. Under a strict scrutiny analysis, finding in favor of removing a child from the mother's custody is difficult because it demands a showing of "substantial" harm from exposure to the religion.[156] Even if the "best interests of the child" test indicates that removal is warranted, it does not satisfy the requirements of heightened scrutiny to remove custody from the parent on its own, because in some cases the child can be adequately protected by a standard that encroaches less on religious conduct.[157]

To make things even more difficult for the state asserting custody, the "actual or likely harm" factor was born and coupled with the "best interests" standard, making deprivation of parental child custody even harder to achieve.[158] Changing the "best interests of the child" test "in this way means that some level of harm must be shown to result from the parent's religiously motivated conduct before the parent can be deprived of parental rights on that basis alone."[159] The level of harm a child experiences is a strong factor, if not the deciding factor, in many decisions. The issue is in determining what is considered harm sufficient to warrant removal from the natural parents. "Preventing intolerable harm to others is a compelling interest that justifies regulation of religion on even the most protective theory of free exercise."[160] The disagreement is over how to strike the balance.[161]

The "harm" requirement may have only added further confusion to the "best interests of the child" standard. Whether or not a court chooses to apply heightened scrutiny, the level of harm that must be shown is a highly debated matter. "While some courts have required a showing of actual harm to the child, other courts require only some likelihood of harm to the child."[162] One scholar notes that these cases are defined by four levels of risk: actual harm; a substantial threat of harm; only some risk of harm; or no risk—but religion is always a factor.[163] Clearly, trying to balance a parent's right to practice

156. *See* Cooper, *supra* note 36, at 731–32.

157. *See In re* Black, 283 P.2d 887, 910 (1955).

158. *See* Quiner v. Quiner, 59 Cal. Rptr. 503, 516 (Cal. Ct. App. 1967) (demanding a showing of harm to the physical, emotional, or mental health of the child); Bonjour v. Bonjour, 592 P.2d 1233, 1240 (Alaska 1979) (construing state statute as being limited to cases where it is shown religious practices would result in actual physical, emotional or mental injury to the child).

159. Cooper, *supra* note 36, at 728.

160. Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1172 (2007).

161. *See* cases cited *supra* note 149 and accompanying text.

162. Cooper *supra* note 36, at 728–29.

163. Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1632 (1998).

religion with adequate protection of the child's needs is not an easy task and one that courts disagree on as they attempt to apply varying, unstable tests and standards.

As courts struggle to determine the relevant factors, choose the level of scrutiny to apply, and consider the level of harm necessary for removal, the "best interests of the child" results in recent years seem to be shifting in favor of child custody regardless of religious practice. Some scholars go so far as to suggest that courts cannot decide child custody cases based on free exercise arguments for religious reasons and must find either "a neutral basis for a ruling or refuse to intervene."[164] Others take a more middle-ground approach in asserting that custody rights should not be diminished for a parent's religious beliefs unless it is both against the "best interests" of the child and "actually likely to cause the child significant secular harm."[165]

Polygamy, however, plays an uncomfortable role in the realm of religious belief since it is a crime. Although courts seem to be leaning towards tolerance of polygamy, some have considered whether polygamy should be a crime detrimental enough to constitute *per se* loss of child custody.

2. The Crime of Polygamy: No *Per Se* Removal

Certainly a very strong factor and indicator of harm to a child is criminal activity in the household. "To cut off association with such a [criminal] as a condition to the child custody would be entirely reasonable."[166] But this has not been established as a *per se* rule. "Polygamous sects . . . throughout the United States" have been identified as "a form of organized crime" by Senate Majority Leader Harry Reid, who has spoken in support of measures to curb the practice.[167] He further emphasized that the "lawless conduct of polygamous communities in the United States deserves national attention and federal action."[168]

But despite polygamy's criminal status, most courts do not want to establish a *per se* rule, finding that illegal parental conduct is not "a threshold determination," but rather, that such conduct is "subsumed by the interest of the child standard."[169] In *In re Adoption of W.A.T.*, a polygamous couple from

164. Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 548 (2004).

165. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1299–1300 (2005).

166. N.K.M. v. L.E.M., 606 S.W.2d 179, 183 (Mo. Ct. App. 1980).

167. *Senator: Polygamous Sects are 'Form of Organized Crime,'* CNN NEWS, July 24, 2008, http://www.cnn.com/2008/CRIME/07/24/polygamy.hearing/index.html.

168. *Id* (internal quotations omitted).

169. *In re* Adoption of W.A.T., 808 P.2d 1083, 1086 (Utah 1991).

an FLDS church sought to adopt six children.[170] The district court dismissed the petition to adopt.[171] The Utah Supreme Court reversed, disagreeing with the finding that "the alternative lifestyle of these prospective adoptive parents *per se* made them ineligible to petition for adoption."[172] It held that illegal or unconstitutional conduct is not a "threshold determination" in an adoption petition, but rather is just a factor under the "best interest" test.[173] The Pennsylvania Supreme Court also rejected the argument "that a court may prohibit a parent from discussing religious beliefs with a child" solely because acting on them would be a crime.[174] It emphasized that "the illegality of the proposed conduct on its own is not sufficient to warrant the restriction."[175]

On the other hand, it may also be argued that even if strict scrutiny is applied, where evidence of substantial harm to the child due to a religious practice is required, an illegal religious practice should always be enough to hurdle the harm requirement and remove the child. Carl E. Schneider emphasized that critics of the "best interest" test seem most worried about how factors such as religion and sexual misconduct are used in custody decisions.[176] He argued that these bases for decision "can easily, clearly, and cheaply be attacked by direct prohibitions."[177] Thus, courts or the legislature could fashion a rule that the practice of polygamy is strictly prohibited and parental custody is lost automatically, rather than trying to determine how it weighs against many other factors.

The *In re Adoption of W.A.T.* dissent also indicated that the presence of polygamy should be a *per se* denial.[178] It emphasized that it was difficult to "conceive of any factor or combination of factors favorable to an adoption . . . which would outweigh the detrimental effect of felonious conduct engaged in by them."[179] In the child custody context, Justice Henriod's *In re Black* concurrence seems to agree: parents should be deprived of child custody if they practice and teach their children to commit a felony.[180] In addressing whether "*any* felony" should be *per se* exclusion, the court admits that "[w]here children and parents and religion are involved, the answer to the

170. *Id.* at 1083, 1083 n.2.

171. *Id.*

172. *Id.* at 1085.

173. *Id.* at 1086.

174. Shepp v. Shepp, 906 A.2d 1165, 1173 (Pa. 2006).

175. *Id.* at 1174. However, this case merely afforded the father his First Amendment right to speech; it was not a custody case. *Id.* at 1165.

176. Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2296 (1991).

177. *Id.*

178. *See Adoption of W.A.T.*, 808 P.2d at 1088 (Howe, J., dissenting).

179. *Id.* at 1089.

180. *In re* Black, 283 P.2d 887, 914 (Utah 1955) (Henriod, J., concurring).

question tends to stick in our throats, but we are duty bound to utter it when confronted with it."[181]

The question then becomes what criminal activities are or should be *per se* denials of child custody, and whether the practice of polygamy falls within that category. Is polygamy so detrimental that the mother should be completely deprived of child custody?[182] This potentially harsh outcome may be why courts are hesitant to make polygamous activity a *per se* denial of child custody, since it raises the difficult and perhaps delicate question of what felonies are severe enough to warrant removal.

This Note does not take the position that evidence of polygamy should result in *per se* denial of custody since that could result in loss of custody in some cases where it is not deserved. Instead, courts need to reconsider how high the "harm" bar has been raised in the "best interests" factors analysis. It is time to lower that bar in order to better protect the children in polygamous sects. Most fundamentalists of any faith seek to adhere unfailingly to their god's true commandments.[183] We live in a country where the freedom to practice one's religion is a respected right; so it is important to establish that harm is actually occurring in order for the state to interfere with the practice. As a result, not all polygamous relationships may be harmful enough to warrant loss of child custody. This Note argues, however, that the harm requirement should almost always be met in an isolated, fundamentalist sect setting.

II. IMPACT OF IN RE *TEXAS*

A. The Custody Continuum

A court's stance on child custody falls along a continuum, with the *Texas* majority, the *Texas* concurrence, and *In re Black* emphasizing three important points. On one end of the spectrum is the *Texas* majority stance, holding that all the children should be returned to the mothers.[184] Courts on this end of the spectrum avoid critical analysis of the potential for abuse in the polygamous setting, deferring instead to the local investigation agencies.[185] In the middle is the *Texas* concurrence: The pubescent girls should remain in state custody, but the younger girls and the boys should be returned to the mothers.[186] This middle stance attempts to fumble through the difficult "best interests of the child" analysis and determine if there is harm sufficient to warrant removal.[187]

181. *Id.*
182. *Id.*
183. *See* KRAKAUER, *supra* note 5, at 138.
184. *In re* Texas Dep't of Family Protec. Servs., 255 S.W.3d 613, 615 (Tex. 2008).
185. *Id.*
186. *Id.* at 618 (O'Neill, J., concurring in part).
187. *Id.* at 617.

The other end of the spectrum, discussed *infra* Part IV, is the stance of the Utah Supreme Court: evidence of polygamy should constitute removal of all the children from their mothers, removing some of the pressure of the "best interests" analysis and lowering the harm requisite for removal unless the mothers agree to stop practicing polygamy and leave the sect.[188] Each stance will be examined to determine the best way to respect the mothers' rights and protect the children.

B. In re Texas: Facts and Analysis

In re Texas had two potential outcomes: either it would crack down on polygamy and deny the mothers of child custody, spurring a legal movement back towards intolerance of the practice, or it would join the current legal trend, showing continued leniency towards polygamists and award the mothers child custody despite the evidence of polygamous practice. The majority opinion followed the latter trend, further extending leniency to parents engaging in polygamy.[189]

On March 29, 2008, the Texas Department of Family Protective Services received a telephone call from a sixteen-year-old girl named Sarah who alleged she was "being physically and sexually abused" at the Yearning for Zion ranch, a place associated with the FLDS.[190] Four days later at around 9:00 p.m., investigators and police officials entered the ranch and interviewed the adults and children residing there throughout the night.[191] Concerned about polygamous marriages involving minor girls, the Department took possession of all the children at the Ranch without a court order.[192]

In the interviews, the Department learned there were many polygamist families at the ranch and a number of girls under eighteen were either pregnant or already mothers themselves.[193] "[T]he ranch's religious leader, 'Uncle Merrill,' had the unilateral power to decide when and to whom [the girls] would be married."[194] The families' expert witness confirmed that the FLDS church accepts the age of first menstruation as the age of eligibility for "marriage."[195] Child psychologist Dr. Bruce Duncan Perry testified that the underage pregnancies on the Ranch were "the result of sexual abuse because children at the age of fourteen, fifteen, or sixteen are not sufficiently

188. *In re* Black, 283 P.2d 887, 913 (Utah 1955).

189. *Texas Dep't of Family Protec. Servs*., 255 S.W.3d at 615 (holding that removal of the children was unwarranted and directing the district court to vacate the order).

190. *Id*. at 613; *In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *1 (Tex. App. May 22, 2008).

191. *Texas Dep't of Family Protec. Servs.*, 255 S.W.3d at 613.

192. *Id.* at 613–14.

193. *Id.* at 616 (O'Neill, J., concurring in part).

194. *Id.*

195. *Id.*

emotionally mature to enter a healthy consensual sexual relationship or a 'marriage.'"[196] The underage girls were not legally married but rather spiritually married, sharing the husband with multiple other spiritual wives.[197]

Thirty-eight mothers filed a writ of mandamus requiring the district court to vacate its temporary orders naming the Department as sole managing conservator of their children, which did not include all the parents of all the children involved.[198] The appellate court reversed the district court, finding the Department failed to carry its burden of showing an immediate danger to the physical health or safety of the children as demanded by Texas Family Code section 262.201(b)(1).[199] The Texas Supreme Court affirmed, vacating the temporary custody orders and remanding the case for further Suits Affecting the Parent–Child Relationship (SAPCR) proceedings[200] and a final custody ruling.[201]

The Texas Supreme Court specifically shied away from addressing the substantive issues, noting that although the custody proceedings "involve important, fundamental issues concerning parental rights and the State's interest in protecting children, it is premature for us to address those issues."[202] The majority reasoned that based on the record, disturbing the court of appeals' decision and removing "the children was not warranted."[203] Rather than turning the analysis on the extent of any harm present, the court agreed with the appellate court, finding that the Texas statute required a showing of "imminent" harm to determine whether the children were in danger and needed to be removed.[204] Texas Family Code section 262.201(b)(1) provides that a child must be returned to the parent unless sufficient evidence shows that "there was a danger to the physical health or safety of the child which was

196. *Texas Dep't of Family Protec. Servs.*, 255 S.W.3d at 616.

197. *Id.*

198. *In re* Steed, 2008 WL 2132014, at *1.

199. *Id*. at *3. Texas Family Code § 262.201(b) provides:

> At the conclusion of the full adversary hearing, the court shall order the return of the child to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian entitled to possession unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that: (1) there was a danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child.

TEX. FAM. CODE ANN. § 262.201(b) (2008).

200. *In re* Texas, 255 S.W.3d at 615. SAPCRs are "suits affecting the parent-child relationship." *Id.* at 614. Here the suit was a request for emergency removal of the children from their parents and limited parental access, as well as requested appointment to be temporary sole managing conservator of the children. *Id.*

201. *Id.* at 615.

202. *Id.*

203. *Id.*

204. *Id.* at 616.

caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child."[205]

The court ruled that the requisite danger in the statute did not exist unless the need for protection was *urgent* and warranted *immediate* removal.[206] Evidence that children raised in the FLDS environment "may someday have their physical health and safety threatened" was not imminent enough to invoke the "measure of immediate removal prior to full litigation."[207] Although the majority acknowledged that the SAPCR investigation would continue and the children could ultimately be removed, it refused to uphold the immediate temporary removal of the children.[208] The Relator's Writ was granted conditionally, and pending the district court's vacating its temporary custody of the children, the children were returned to their mothers.[209]

C. The Concurrence Opinion: Split Child Custody

In the Texas Supreme Court opinion in *In re Texas*, Justice O'Neill presented her own views in a concurrence, seeking a middle ground.[210] Justice O'Neill proposed that the boys and pre-pubescent girls should return to their mothers, but that the pubescent girls should remain in state custody because the evidence of imminent danger to them was sufficient.[211]

Justice O'Neill agreed with the majority in finding an "imminence" requirement in the Texas statute.[212] She also joined the majority opinion in finding that there was no evidence of imminent danger to the physical health or safety of the boys or pre-pubescent girls to justify their removal from the YFZ ranch.[213] Unlike the majority position however, Justice O'Neill felt the Department should retain temporary custody over the pubescent girls, potentially ready for "spiritual" marriage, "until such time as a permanency plan designed to ensure each girl's physical health and safety could be approved."[214] She argued that the state had presented adequate evidence of a danger to the physical health or safety of pubescent girls on the ranch based on evidence of a pattern or practice of sexual abuse and the condoning of such sexual abuse.[215] The pattern of sexual abuse was enough to satisfy the

205. TEX. FAM. CODE § 262.201(b)(1) (2008).

206. *In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014 at *3 (Tex. App. May 22, 2008) (emphasis in original).

207. *Id.*

208. *Id*. at *4.

209. *Id.*

210. *Texas Dep't of Family & Protec. Servs.*, 255 S.W.3d at 616. (O'Neill, J. concurring).

211. *Id.* at 617.

212. *Id.* at 616.

213. *Id.*

214. *Id.*

215. *Texas Dep't of Family & Protec. Servs.*, 255 S.W.3d at 616–17.

assertion that all the girls of the same age and older at the ranch were also at risk.[216] "'[T]he urgent need for protection required the immediate removal' of those girls."[217]

Justice O'Neill's concurrence is further on the continuum towards removing the children from the mothers than the majority opinion, which held *all* the children should be returned pending final SAPCR proceedings.[218] It is still very much in line with the majority opinion analytically, however, since she focuses on the imminence of danger rather than engaging in a "best interests" analysis.[219] Justice O'Neill also quotes the Texas code regarding the "danger" standard, noting that it "includes exposure of the child to loss or injury that jeopardizes the physical health or safety of the child without regard to whether there has been an actual prior injury to the child."[220] She referred to a prior holding which found that "it is not necessary that the conduct be directed at the child or that the child actually suffers injury."[221] Despite these points that seem to head towards a lower harm threshold to warrant removal, Justice O'Neill still did not find the requisite harm had been met for all of the children.[222]

III. THE OTHER END OF THE SPECTRUM: *IN RE BLACK* AND CONDITIONAL CUSTODY

Years ago, the *In re Black* Utah Supreme Court opinion voiced reasoning opposite to the views of the Texas Supreme Court, refusing to tolerate the polygamous lifestyle. On July 24, 1953, Arizona law enforcement officers raided the isolated polygamous village straddling the Utah–Arizona border where the Blacks lived and took the mothers and children away from the vicinity.[223] Mr. Leonard Black had fathered three families and a total of twenty-six children.[224] The petition alleged that the dependent children were not receiving "proper subsistence, . . . medical care and other support . . . necessary for their well-being."[225] It also alleged that the parents were teaching and encouraging the children to believe in the practice of polygamy

216. *Id.*

217. *Id.* at 616.

218. *Id*. at 615.

219. *Id*. at 616.

220. *Texas Dep't of Family & Protec. Servs.*, 255 S.W.3d at at 617 (O'Neill, J., concurring) (quoting TEX. FAM. CODE § 262.201(b)(1) (2008)).

221. *Id.*; *cf.* Tex. Dep't of Human Servs. v. Boyd, 727 S.W.2d 531, 533 (Tex. 1987) (finding the definition of "endangered" would include imprisonment, as compared to *Texas Dep't of Family and Protec. Servs.*, where the actions at the YFZ ranch in regards to pubescent girls were determined to be "dangerous").

222. *In re* Texas, 255 S.W.3d at 618.

223. *In re* Black, 283 P.2d 887, 888 (Utah 1955).

224. *Id.*

225. *Id*. at 889.

and encouraging them to engage in it, injuring the morals and welfare of the children.[226] Mr. Black vehemently denied the allegations, asserting his children "are healthy and strong, well dressed and well clothed and have always been well fed."[227]

The Utah Supreme Court affirmed the lower court and held that parents who, on religious principles, entered an illegal polygamous marriage, were properly deprived of the right of custody and control of their children.[228] The parents were "charged with knowledge of the existence of the laws prohibiting polygamy" and, by violating them, were neglecting the moral well-being of their children.[229] The court it acknowledged,

> It is true that taking these children from their parents does seem harsh, and visits the sins of this father upon these children . . . but unless we are genuinely concerned for the welfare of these children and for the public welfare and apply the harsh treatment required and stop the spread of this immoral and illegal practice the sins of this father will be visited upon the children of these children to the third and fourth generations.[230]

Unlike the Texas Supreme Court, the Utah Supreme Court did not consider or discuss the "imminence" of the danger to the children, but instead assumed it existed.[231] The court acknowledged that "it is not certain that these children will follow in the footsteps of the parents" but held that is not reason enough to deny justification, because "when they enter upon the pattern set for them it will be too late for the protective arm of the state to help."[232]

The Utah court cited the Supreme Court's attitude towards polygamy, namely that "[f]ew crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment."[233] It emphasized that religious practices "must be subordinate to the criminal laws of the country."[234] Because the parents violated the law in practicing polygamy and advocated its correctness to their children, they forfeited the right to have their children.[235]

Unlike the Texas Supreme Court, the statute addressed by the Utah Supreme Court used a "best interests of the child" factors test to determine if

226. *Id.*

227. *Id.* at 889 (internal quotations omitted).

228. *Black*, 283 P.2d at 888.

229. *Id.* at 894.

230. *Id.* at 909.

231. *Id.* at 891 (finding that the mother and father had "knowingly failed and neglected to provide for said children the proper maintenance, care, training and education . . . and the welfare of the children requires the right of custody and control over said children be taken from their parents").

232. *Id.* at 910.

233. *Black*, 283 P.2d at 904 (citation omitted).

234. *Id.* at 904.

235. *Id.* at 909.

the children were "neglected."[236] The factors considered included the "home environment, history, associations, and general condition of [the] children," and any necessary physical and mental examinations made by competent physicians and psychologists.[237] The court also found a much lower threshold of harm to justify removal—sexual or physical abuse was not an issue and never discussed in the opinion.[238] Under Utah law, the court emphasized a "neglected child" was one "who lacks proper parental care by reason of the faults or habits of the parent," "whose parent . . . neglects or refuses to provide proper or necessary . . . morals or wellbeing," or a child "who is found in a disreputable place or who associates with vagrant, vicious or *immoral* persons."[239] It was enough to the court that polygamy was practiced in the presence of the children and that they were encouraged to believe and engage in plural marriage.[240] The parents forfeited the right to have custody of the children because they "affirmatively and knowingly provided the children with the care, training and education violative of law and morals."[241]

Although the Utah court found that it was in the best interests of the children to place them in state custody, it also held that the children could remain in the custody of their parents if certain conditions were met.[242] The parents had to comply with the laws of Utah relating to marriage and sexual offenses, refrain from counseling, encouraging or advising their children to violate the laws of Utah relating to marriage and sexual offenses; encourage them to abide by the law; report once a month to a probation officer; and submit a monthly written sworn statement to the court stating whether or not he or she had complied with the conditions set forth.[243] If the parents did not accept the conditions, they would be permanently deprived of custody rights and the children would be placed for adoption since the best interests of the children would not be served if trained in the way of immorality and crime.[244] Since the parents refused to meet the conditions, the judgment of the juvenile

236. *Id.* at 895. *See also In re* State Interest of Graham, 170 P.2d 172, 175 (Utah 1946). UTAH CODE ANN. § 55-10-6 (1953) provided:

> In all cases relating to the delinquency, neglect, dependency or other cases of children and their disposition . . . the court . . . may adopt any form of procedure in such cases which it deems best suited to ascertain the facts relating to such cases and to make a disposition in the best interest of such children and of the public.

237. *Black*, 283 P.2d at 893 (internal quotations omitted).

238. *See id.* at 900.

239. *Id.* at 895 (internal quotations omitted).

240. *Id.* at 901.

241. *Id.* at 909.

242. *Black*, 283 P.2d at 892.

243. *Id.* at 892.

244. *Id.*

court was upheld, and the Blacks were deprived of the right of custody and control of their children.[245]

IV. TIME TO RETURN TO INTOLERANCE OF POLYGAMY

This Note takes the position that in considering the best interests of the children and the mothers, the Texas Supreme Court fails to reach a viable solution. The majority opinion of *In re Texas* is far too lenient, turning its head to the side in the face of child abuse. Justice O'Neill's concurrence is simply a band-aid for the underlying problems, not an effective long-lasting solution. If only the girls of thirteen-years and older are removed, the twelve-year-old girls who will experience that same imminent danger in one year are simply abandoned by the court to await their abusive fate. What is the point in delaying removal if it is clear that, at some point, each child will be in imminent danger under the *Texas* standard? Attempts to determine what is considered "imminent danger" simply delay the inevitable and avoid the acknowledgement that the harm is present for all the children, whether it is in the present or in the foreseeable future. As stated by the Utah Supreme Court, "If we now ignore our duty to the state, to society, to decent citizenship and to these children and to others who will undoubtedly be born to these [people], if no bars are put in place, the task will be still more difficult for our successors to cope with."[246] Courts that refuse to rule on the inevitable are shutting their eyes to what is before them and effectively allowing child abuse to continue. "[B]y turning a blind eye to polygamy's negative ramifications, state governments indirectly condone and thus perpetuate abuse and neglect."[247]

The Utah Supreme Court's *In re Black* opinion offers a much better direction than the *In re Texas* case to guide the modern legal stance toward polygamy. The Utah Supreme Court found loss of custody justified solely on evidence of children being raised in an "immoral environment" and taught to believe in the practice of polygamy.[248] That justification for loss of custody should be vastly magnified when there is evidence of physical, emotional, and sexual abuse. Children raised in the presence of polygamy were deemed sufficiently harmed to warrant their removal by the 1955 Utah court. Courts need to reexamine what is demanded as sufficient harm to remove children. Recent precedents have set the bar too high, subjecting innocent children to undeserved abuse from which they must be protected.

Additionally, the Utah Supreme Court did not go so far as to decide that evidence of polygamy warrants *per se* loss of child custody. Both the Texas and Utah courts displayed concern for the mothers, seeming to understand the

245. *Id.* at 913.
246. *Id.* at 909.
247. Duncan, *supra* note 62, at 316.
248. *Black*, 283 P.2d at 900–01.

brutal impact their decisions would presumably have on them. Noting that the children "could have been no worse off had they been without a father,"[249] the Utah Court did not view the mothers in the same light. The Utah opinion, however, differed from the Texas stance in a very important way: the Utah case did not automatically return the children to the mothers, but rather, imposed a condition. It instructed the lower court, if it saw fit, that "the children be allowed to remain with the mother . . . but on the specific condition that [the husband] desist from living with her."[250] The court emphasized the "complete cessation" of the relationship, stating that if it remains in any capacity the court "should take the children from appellants permanently" and that custody should not be left with the father or both parents in any event.[251] This balance allows the mothers the option to assert their parental rights and retain custody of their children.

It is important that courts understand the need to reevaluate the harm standard in the "best interests of the child" test. As scholar Douglas Laycock points out, "[B]elievers have no constitutional right to inflict significant harm on nonconsenting others."[252] Another scholar, Marci A. Hamilton, emphasizes that "the legislature should weigh, on the one hand, the importance of respect and tolerance for a wide panoply of religious faiths, and on the other hand, whether the harm that the law was intended to prevent can be tolerated in a just society."[253] It is well-established that sexual abuse is a harm the United States finds intolerable.[254] Time will demonstrate that the practice of polygamy in fundamentalist sects "is abusive to children, is abusive to women, is abusive to society."[255]

The fairest compromise and balance of the children's needs and the mothers' rights is the Utah standard. Under the Utah standard, the children must be protected from the FLDS practices, but the mothers can choose to abandon their lifestyle and retain custody of their children if they so desire. The *Texas* concurring opinion is too lenient, allowing the pre-pubescent children to be returned to the polygamous setting. Utah effectively lowers the harm requirement, finding the requirement met when FLDS polygamous practices are occurring and taught to children. By allowing the mothers to

249. *Id.* at 911.

250. *Id.* at 913.

251. *Id.*

252. Laycock, *supra* note 160, at 1171.

253. MARCI HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 297 (2005).

254. *See, e.g.*, TEX. FAM. CODE ANN. § 262.104(a) (Vernon 2008): "[A]n authorized representative of the Department of Family and Protective Services . . . may take possession of a child without a court order . . . (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."

255. *See* KRAKAUER, *supra* note 5, at 23.

eliminate the harm, however, it also rightly acknowledges the value of keeping natural families together.

CONCLUSION

When considering child custody rulings regarding children in polygamous sects, courts should thoroughly review the *In re Black* decision. The trend towards more lenient custody standards is not in the best interests of the children or the mothers. However, adopting a *per se* rule denying custody to the parents would stretch too far, netting situations when removal is not warranted. The *In re Black* approach is appropriate because it provides the mothers with the power to choose between a criminal lifestyle and their children, while taking a firmer stance against the practice of polygamy at the same time. The mothers should be dictating whether or not they retain custody over their children, but within the legal standards to which they must adhere. Courts should be more reluctant to allow children to remain in a polygamous FLDS sect setting, but provide an option for the mothers to decide to end the polygamous relationship and keep their children. This rule would destroy the imminence requirement read into the Texas statute and help eliminate the problems with the variable "best interests of the child" standards, making the requisite harm to warrant removal lower and much clearer. It is a much better balance between religious rights, respecting the rights of the mothers, and doing what is in the best interests of the children.

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