

PROTECTING THE UNPROTECTED:
CONFLUENCE BETWEEN CHILDREN AND RELIGION

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INTRODUCTION

Recently the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) has been the focus of intense government and media scrutiny regarding the practice of plural marriage involving under-age girls. Girls, as young as fourteen when their prophet proclaims that God has commanded them to marry men (in some cases three times their age), are also forced to have sexual relations with their husbands. These girls, and their parents, submit to the command believing their prophet's words are, in fact, the words of God.

Similarly—and just as tragically—boys in the FLDS community, some as young as thirteen, are placed in compromising and dangerous situations. While it is difficult to determine the exact number, as many as 1,000 boys have been expelled from the community for breaking its strict standards since Warren Jeffs became the prophet.¹ Breaking these standards involves doing things as simple as wearing short-sleeved shirts, listening to CDs, watching movies and TV, staying out past curfew and having a girlfriend.² According to experts, these “lost boys”³ are banished from their community *primarily* in order to minimize competition for older men seeking to marry child-brides.

This article's primary thesis is that male and female children alike are victims of child abuse and neglect⁴ in the name of FLDS religious doctrine. While many have addressed ‘terror in the name of God’⁵

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¹ Julian Borger, *The lost boys, thrown out of US sect so that older men can marry more wives*, The Guardian UK, June 14, 2005, <http://www.guardian.co.uk/world/2005/jun/14/usa.julianborger>

²David Kelly, *Polygamy's 'Lost Boys' expelled from only life they knew*, The Boston Globe, June 19, 2005, http://www.boston.com/news/nation/articles/2005/06/19/polygamys_lost_boys_expelled_from_only_life_they_knew/

³The term lost boys refers to teenage boys who have been asked to leave, or have voluntarily left the FLDS community. According to Anderson Cooper 360 Degrees (CNN television broadcast Feb. 28, 2007) the lost boys prefer to be called “Children of Diversity,” but this term is not widely used.

⁴ The Juvenile Court Act of 1996, U.C.A. 1953 § 78A-6-105 section (1) (a) defines abuse as (i) nonaccidental harm of a child, (ii) threatened harm of a child, (iii) sexual exploitation; or (iv) sexual

(attacking internal and external targets alike) child endangerment in the religion paradigm is, I suggest, fundamentally different: it is the deliberate injury to *one's own* child predicated on religious faith, in particular religious extremism. To that end, this article will focus on the danger to members of an internal community (members of a particular faith) rather than to an external community (members of other faiths).

Though God tested Abraham⁶ when Abraham willingly sacrificed his son, Isaac⁷, the sacrifice (thankfully, never brought to fruition) was the result of a direct interaction between God and Abraham. The modern day religion predicated endangerment of children is not between the divine and man; rather it is between man and man when one of the two *purports to act in the name of God*. This is fundamentally and philosophically different from the original sacrifice. Unlike Abraham who ultimately did not sacrifice Isaac for God (as articulated by the Angel), religious extremists *do* endanger their children. While our emphasis in this article is primarily child-brides, understanding the institution of polygamy is essential. For that reason, the sections below explain—at some length—the history and context of plural marriage in the Mormon Church though the Church ultimately banned polygamy. From a theological perspective, polygamy as practiced by FLDS is an essential tenet of the faith. In that vein, the FLDS Church perceives itself as the ‘true’ Mormon Church for its members practice what the prophet Joseph Smith *truly* believed. The practice of child-brides in plural marriages is essential in ensuring obedience and subservience; needless to say the practice involves sexual contact between adult males and under-age girls. Sexual contact is, unequivocally, illegal and should result in criminal liability; the trial of Warren Jeffs is a clear manifestation of that.⁸ However, as discussed in this article the practice is *not* limited to Mr. Jeffs, other FLDS members also violate the law when they have sexual relations with underage girls –the child brides.

As discussed in this article, FLDS parents *do* endanger their children⁹; this raises profoundly important legal, moral and theological questions pertaining to the essence of two relationships: parent-

abuse. Section (25)(a) relevant sections define neglect as (i) abandonment of a child (iii) failure or refusal of a parent, guardian, or custodian to provide proper or necessary subsistence, education, or medical care, or any other care necessary for the child's health, safety, morals or well-being.

⁵ While Prof Jessica Stern entitled her book, “Terror in the Name of God’ (Ecco; 2003) the term has literally become generic.

⁶ http://www.rationalchristianity.net/abe_isaac.html, last viewed May 27, 2009

⁷ <http://www.apocalipsis.org/Abraham.htm>, last viewed May 27, 2009

⁸ *State of Utah v. Jeffs*, (Utah Dist. Ct. April 5, 2006).

<http://news.findlaw.com/hdocs/docs/polygamy/utjeffs40506crinf2.html>

⁹This is, undoubtedly, a relative point for people of faith who engage in practices (related to their children's health, safety and welfare) who would argue that their actions are in accordance with their faith whereas the State attaches criminal liability to those same practices. For further comment on this issue see Adam Lamparello *Taking God Out of the Hospital: Requiring Parents to Seek Medical Care for their Children Regardless of Religious Belief*, 6 TXFCLRC 47 (2001), Jennifer L. Hartsell, *Mother May*

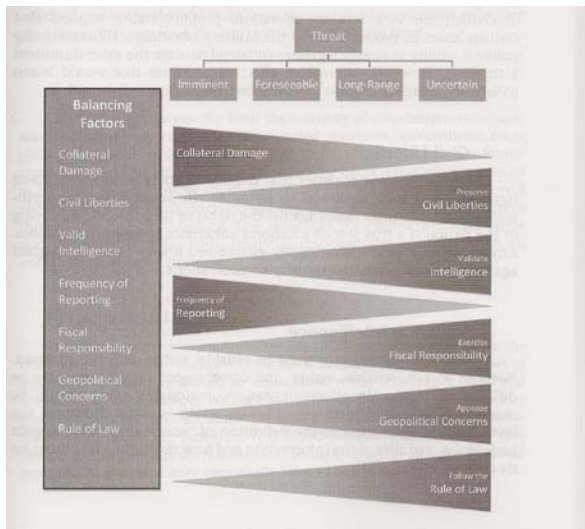
child and State-individual. The question before us is who protects the otherwise unprotected¹⁰; the question which is complicated in and of itself is exponentially more complex when framed in a religious paradigm. ‘Who owes what duty to whom’ is this article’s subtext; addressing the extraordinarily combustible confluence between religious authority, criminal law and the most vulnerable members of society—its children—is my fundamental intent. The intellectual, philosophical and constitutional premise of this article is that the State owes a duty and obligation to children regardless of their parents’ faith. That is neither to delegitimize faith nor to cast aspersions on people of faith; it is however, to articulate the position that the State has the proactive, positive responsibility to protect children. This is perhaps particularly true when the threat¹¹ to the child is faith-based.

While this is neither the first, nor tragically last time, this issue will require resolution it is one that urgently requires candid examination and analysis. The May 15, 2009 decision of Brown County (Minnesota) District Judge John Rodenberg that Daniel Hauser has been ‘medically neglected’¹² by his

I...Live? Parental Refusal of Life-Sustaining Medical Treatment For Children Based on Religious Objections, 66 Tenn L. Rev. 499, 502 (1999).

¹⁰ The Juvenile Court Act of 1996, U.C.A. 1953 § 78A-6-317 (4), specifies: In every abuse, neglect, or dependency proceeding...the court shall order that the child be represented by a guardian ad litem, in accordance with Section 78A-6-902. The guardian ad litem shall represent the best interest of the child, in accordance with the requirements of that section, at the shelter hearing and at all subsequent court and administrative proceedings, including any proceeding for termination of parental rights in accordance with Part 5, Termination of Parental Rights Act.

¹¹ For an analysis of ‘threat’ see Amos N. Guiora, *Fundamentals of Counterterrorism*, Aspen 2008.



¹² The Minnesota Criminal Code, M.S.A. § 609.378 Neglect or endangerment of child Subdivision 1 specifies that a person is guilty of neglect or endangerment when (a)(1) A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and the deprivation harms or is likely to substantially harm the child's physical, mental, or emotional health is guilty of neglect of a child and may be sentenced to imprisonment for not

parents, Colleen and Anthony Hauser, who refused to provide him with the appropriate medical treatment and was in need of child protection services¹³ is but the latest manifestation of this issue. Whatever the religious context this is an issue that will continue to confront the public, the courts and people of faith.

This article is divided into four sections: section one is a historical examination of the FLDS¹⁴; section two addresses government intervention with respect to Church leadership and membership. The section also discusses how limited contact has impacted members' perceptions of the outside world and how that affects criminal prosecutions. Section three addresses the concept of child neglect and abuse in the FLDS context; section four provides policy makers and law enforcement officials with concrete recommendations for how to more effectively protect these children, particularly in the context of Rousseau's social contract theory.

SECTION ONE: HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

According to the Church of Jesus Christ of Latter-Day Saints (Mormon Church) its founder, Joseph Smith, had revelations and visions that he was ordained as a prophet of God leading his followers to believe that he had a relationship with God and was his spokesman and prophet on earth. Unquestioning obedience to the latter day prophet was regularly taught to Church members who believed that the only way to heaven was to follow his commandments. Followers' faith was tested in the 1830's as Smith gradually began introducing polygamy claiming that it was a divinely inspired practice.

However, it was not until 1852, eight years after Smith's death, that the Church officially acknowledged the practice of polygamy under the leadership of the new prophet, Brigham Young. Young, led the Mormons across the continent ultimately settling in Utah in order to escape the intense persecution members faced because of their unique religious beliefs. As members of the Church began to live in Utah, polygamy became a part both of their culture and religion. While Utah quickly developed into a unique frontier theocracy under Young's guidance Church leaders understood the benefit of becoming a state. However, the US government strongly opposed polygamy and refused to grant statehood unless the practice was rescinded. Outside pressure to forbid polygamy increased as the Church grew in Utah. In 1856 the newly created Republican Party declared that, "It is the duty of Congress to

more than one year or to payment of a fine of not more than \$3,000, or both. If the deprivation results in substantial harm to the child's physical, mental, or emotional health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both. If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is "health care," for purposes of this clause.

¹³ http://news.yahoo.com/s/ap/ap_on_he_me/us_med_forced_chemo, last viewed May 27, 2009

¹⁴ Much of this section is based on Amos Guiora, *Freedom from Religion* (OUP, 2008) and in particular, the appendix written by Brady Stuart addressing FLDS history.

prohibit in the territories those twin relics of barbarism, polygamy and slavery.”¹⁵ True to its promise, the federal government sent law enforcement officials to Utah to end polygamy, confiscating land and possessions of those who practiced plural marriage.

A. LEGAL HISTORY OF POLYGAMY

From the beginning, polygamy has not only been at odds with mainstream values, but also the law. The Republican Party first compared polygamy to slavery in 1856; in 1862 Congress passed the Morrill Act for the Suppression of Polygamy (the “Morrill Act”). Section One of the Morrill Act stated:

Every 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.¹⁶

However, the Morrill Act proved to be ineffective against the practice of polygamy, primarily because it is difficult to prosecute as those involved are also key witnesses who generally have no interest in cooperating with the prosecution. Additionally, “no grand jury in Utah would indict Church leaders for violating the [Morrill] Act, so the Act was never used or challenged in court.”¹⁷

In 1878 the question of polygamy reached the Supreme Court for the first time in *Reynolds v. US*. George Reynolds was a member of the Church of Jesus Christ of Latter-day Saints charged with bigamy under the Morrill Act, after he married Amelia Jane Schofield while still married to his first wife. Reynolds was originally convicted in the District Court for the 3rd District of the Territory of Utah. He argued before the Supreme Court that his conviction should be overturned for a number of reasons including that the statute exceeded Congress’ legislative power, his challenges to jurors in the original case were improperly overruled, that the testimony from his second wife should not have been permitted, and most significantly that he had a constitutional right to engage in polygamy because it was part of his religious duty.¹⁸

Justice Waite distinguished between government control of beliefs and government control of actions. He concluded that “laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”¹⁹ An example of this is if one believed that human sacrifice was an integral part of worship, the government could validly restrict this religious

¹⁵ *Republican Convention of 1856 in Philadelphia*, July 4, 1995, http://www.ushistory.org/gop/convention_1856.htm

¹⁶ Morrill Act, ch. 126, 12 Stat. 501 at § 1 (1862).

¹⁷ 16 CNLJLPP 101, at 119

¹⁸ *Reynolds v. US*, 98 U.S. 145 (1878).

¹⁹ *Id.* at 166.

practice. Justice Waite concluded that to permit these illegal practices in the name of religion would be “to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”²⁰

Nevertheless, problems in prosecuting under the Morrill Act persisted; therefore, in 1882 Congress passed the Edmunds Act, making it significantly easier to prosecute polygamy as prosecutors did not need to prove actual marriage rather only co-habitation, which the act prohibited.²¹ Additionally, the act allowed prosecutors to strike jurors who practiced polygamy, as well as those who did not practice polygamy, but believed it was acceptable.²² Nearly 1,300 polygamists were prosecuted under various anti-polygamy statutes after the Edmunds Act.²³

On October 6, 1890 the Church’s then prophet, Wilford Woodruff, issued an official declaration stating that the Church would obey the laws of the federal government and cease the practice of polygamy. Woodruff explained to Church members that he had spoken with God and had been shown a vision in which the Church would be destroyed if the practice of polygamy were to continue. Most Church members followed the new commandment from Woodruff; others believed he was a fallen prophet who had succumbed to pressure from the United States. Shortly after the official renunciation of polygamy, Utah became a state in 1896. As a condition to statehood, Utah included in its constitution a provision that “polygamous or plural marriages are forever prohibited.”²⁴

B. FUNDAMENTALISM—THE BREAK OFF

Those that refused to give up polygamy, believing it was an eternal principle, were the predecessors of the Fundamentalist Church of Jesus Christ of Latter-Day Saints. FLDS members claim that in 1886, four years before the Church’s renunciation of polygamy, the then prophet and president of the Church, John Taylor received a very different revelation. According to FLDS historians, in Taylor’s revelation the Lord declared that polygamy was an everlasting covenant, and that God would never revoke it. Lorin C. Woolley, who later became a FLDS leader, testified that he was outside Taylor’s room during this vision when he saw a light appearing from beneath the door. Woolley claims to have heard three distinct voices coming from the room, which Taylor later told him was the Lord and the deceased prophet Joseph Smith coming to deliver the revelation of eternal polygamy. FLDS members claim that the following morning Taylor placed five men under covenant to practice polygamy as long as they lived, and gave them power to ordain others to do the same.

²⁰ *Id.* at 167.

²¹ Edmunds Act, ch. 47, §3, 22 Stat. 30 (1882)

²² Edmunds §5

²³ 16 CNLJLPP 101 at 128

²⁴ Utah Const. art. III

For some time those practicing polygamy stayed in Salt Lake City, alongside the Mormons who renounced plural marriage. However, as polygamy became less acceptable in mainstream Utah, many polygamists went into hiding. Eventually Short Creek, Arizona (now known as Colorado City), became a strong hold for polygamists. FLDS members felt comfortable in this remote area surrounded by desert, over a hundred miles away from law enforcement and believed they could safely practice polygamy unbothered by the outside world.

SECTION TWO: GOVERNMENT INTERVENTION AND FLDS ISOLATION

FLDS belief that law enforcement would tolerate their polygamist practices was mistaken; government officials have conducted a number of raids on FLDS compounds dramatically affecting the outside world's opinion of the Church. One of the most traumatic raids is known as the 'Short Creek Raid.'

In the summer of 1953, over a hundred Arizona police officers and National Guardsmen descended on the FLDS compound in Short Creek. The reason given for the raid by Arizona Governor John Pyle was to stop a pending insurrection by the polygamists. Pyle accused FLDS members of being involved in the "foulest conspiracy you could possibly imagine" designed to produce white slaves. The Governor even invited reporters to witness the raid with him.

However, the attempt to demonize those practicing polygamy failed. Church members had been tipped off to the impending raid. As law enforcement entered the compound they found the community's adults congregated in a schoolhouse singing hymns, while their children played outside. Instead of reporting on the evils of polygamy, the media focused on the over-reaction of government officials. Regardless of the media reaction, the government removed over 236 children from their families at Short Creek. It took more than two years for 150 of those children to be reunited with their families.

In 2004, the government once again began to pursue the FLDS; the current prophet, Warren Jeffs, was prosecuted. In 2004 several of Jeffs' nephews alleged that Jeffs and his brothers sodomized them in the late 1980s, leading to a lawsuit against them. In 2005, Jeffs was charged with sexual assault on a minor and with conspiracy to commit sexual misconduct with a minor for arranging a marriage between a fourteen-year-old girl and her nineteen-year-old first cousin. In late 2005 Jeffs was placed on the FBI's most wanted list; he was wanted on charges in both Utah and Arizona. While a fugitive Jeffs, nevertheless, continued to perform marriages between underage girls and older men.

The FLDS Church faced additional difficulties at a second compound, the Yearning for Zion Ranch, near Eldorado, Texas. On April 16, 2008, Texas state authorities entered the community after they

had received several calls²⁵ claiming to be an abused child from the ranch. Child Protective Services determined that the children required protection from forced underage marriages and 416 children were removed from the FLDS compound while over a hundred adult women chose to leave the ranch in order to accompany their children. The state determined that of fifty-three girls aged fourteen to seventeen; thirty-one have children or are pregnant. On May 22, 2008 after a state court ruled that there was insufficient evidence to justify holding the children in custody they were returned to their families within ten days.

The Short Creek Raid became a rallying cry for FLDS members; a manifestation of the secular world's desire to destroy God's chosen people. The memory of losing their children further isolated members from the outside world. This isolation was dramatically increased by Jeffs' orders.

The isolation from the secular world and the extraordinary power a latter-day prophet possessed was manifested when Warren Jeffs came to power after the death of Rulon Jeffs, his father in 2002. Warren Jeffs declared his actions sanctioned by God. Shortly after his father's death Jeffs married all but two of Rulon's twenty wives, increasing the number of his wives to approximately seventy, according to some ex-members. Jeffs claimed that this was necessary to ensure the preservation of his sacred bloodline. As the only person who possessed the authority to perform marriages, and assign wives, Jeffs often used this power to discipline members by reassigning their wives, children and homes to another man. This was demonstrated in 2004 when Jeffs exiled twenty male members from the community and assigned their wives to more worthy men. Similar to his predecessors, Jeffs teaches that it is only through plural marriage that a man may enter heaven; to that extent, Jeffs has taught that any worthy male member should have at least three wives, and the more wives a man has the closer he is to heaven.

SECTION THREE: CHILD ABUSE AND NEGLECT

The essence of the parent-child relationship is the 'duty to care' obligation the former owes the latter. That duty, obligation and responsibility has been one of the core essences of the human condition since time immemorial:

'But if any provide not for his own, and specially for those of his own house, he hath denied the faith, and is worse than an infidel.'²⁶; 'And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord'²⁷, "if anyone puts a stumbling block before one of these little ones (a child) who believe in me, it would be better for you if a great millstone were fastened around your neck and you were drowned in the depth of the sea."²⁸

²⁵ Subsequently understood to be 'hoax' phone calls impersonating an abused child.

²⁶ 1 Timothy 5 King James Bible, http://kingj bible.com/1_timothy/5.htm; last viewed May 28, 2009

²⁷ Ephesians 6:4, <http://www.biblegateway.com/passage/?search=Eph%206:4&version=9>; last visited May 28, 2009

²⁸ Matthew chapter 18:1-6

Herein lays a fundamental tension: while Scripture unequivocally articulates parental responsibility with respect to children, people of faith are endangering their children. That endangerment violates both the criminal law and religious scripture. Nevertheless, rather than adhering and respecting law and scripture FLDS members who either marry their daughters to adult men or who themselves marry under-age children are violating both the law and scripture. They are doing so in accordance with the religious teachings of an individual claiming to articulate a particular interpretation of faith. That interpretation however endangers their children which both scripture and the law obligate them to protect. That said, “many states let parents rely on prayer, rather than medicine, to heal sick children.”²⁹

While in *Employment Division v. Smith*,³⁰ the Supreme Court held “The Free Exercise Clause permits the State to prohibit sacramental peyote use,” thereby not granting religious actors an exemption with respect to respect to the law. The concept that a parent’s religious beliefs do not justify denial of medical care to their children has been widely upheld in state court.³¹ In *Commonwealth v. Barnhart*, the Superior Court of Pennsylvania upheld the conviction of parents, whose son died of cancer when they did not seek medical treatment, for involuntary manslaughter and endangering the welfare of a child.³² The trend has been overwhelmingly towards criminal prosecution and the conviction of parents whose children die resulting from a lack of medical treatment due to religious beliefs.³³ These cases are highly publicized; and with disturbing frequency parents are prosecuted for denying their children proper medical care. In the most recent case Leilani Neumann was convicted of second-degree homicide in Wisconsin, after her daughter died from her diabetic condition whose symptoms Neumann had ignored and refused to take her to a hospital predicated on her religious beliefs.³⁴

However, while criminal prosecution of parents is common in medical neglect cases, the state has failed to adequately prosecute FLDS parents whose children suffer abuse and neglect, specifically sexual abuse and child abandonment. The Utah child abuse and neglect laws³⁵ are similar to other state abuse and neglect laws, and are used for medical neglect, but are not sufficiently applied to FLDS parents whose actions endanger their children. While state authorities have been and are fully aware of ‘on the

²⁹ <http://www.rickross.com/reference/cscience/cscience28.html>, last visited May 28, 2009

³⁰ 494 U.S. 872 (1990).

³¹ 51 Ohio St. L.J. 1429

³² *Commonwealth v. Barnhart*, 497 A.2d 616 (1985)

³³ In *Hall v. State* the Indiana Supreme Court upheld the parent’s reckless manslaughter conviction who died of pneumonia after treatment by spiritual means did not work. 493 N.E.2d at 436 (1986).

³⁴ <http://abcnews.go.com/Health/DiabetesResource/Story?id=4536593&page=1>;

<http://www.wausaudailyherald.com/article/20090601/WDH0101/906010588/1981/WDHOpinion>

³⁵ The Juvenile Court Act of 1996, U.C.A. 1953 § 78A-6-105 section (1) (a) defines abuse as (i) nonaccidental harm of a child, (ii) threatened harm of a child, (iii) sexual exploitation; or (iv) sexual abuse. Section (25)(a) relevant sections define neglect as (i) abandonment of a child (iii) failure or refusal of a parent, guardian, or custodian to provide proper or necessary subsistence, education, or medical care, or any other care necessary for the child’s health, safety, morals or well-being.

ground reality’ they have, in most cases, failed to take action. Although a number of suggestions have been offered as to ‘why’—some legal, others a combination of policy and culture—the impact on the unprotected is extraordinary. It has been suggested that the lack of action is predicated on insufficient basis for introducing informants into FLDS compounds; others have argued that county prosecutors were hesitant—even if evidence was admissible—because of an underlying empathy with the community based on geographical proximity and political considerations.

While state courts have acted in the spirit of *Smith*, this action is not a truly meaningful test. Rather, the fundamental point of inquiry is whether prosecutors (local and federal) have been sufficiently aggressive in enforcing the law through criminal prosecutions. Available numbers suggest that the policy—historically—has been to largely turn a blind eye to the endangerment of children. That is, the fundamental failure has not been in the judiciary (*Smith* articulated a clear limit on the practice of religion), but rather the failure to protect the otherwise unprotected reflects unwillingness to aggressively, consistently and uniformly bring the wrongdoer before the courts. While the criminal law paradigm requires probable cause it is equally true that the state has a law enforcement obligation and responsibility. In practical terms this requirement suggests that seeking to infiltrate FLDS communities—when the matter of child brides and lost boys is understood to be widespread and ‘open’—meets constitutional standards and is in accordance with the state’s primary duties.

This lack of aggressiveness to enforce the law—in protecting children—has left girls and boys similarly unprotected. While the state has failed to protect child brides it has *also* failed to take action regarding the abandonment of the lost boys. However, in *comparison* to the sexual abuse suffered by girls living in the closed and isolated community it may be easier to prosecute those responsible for the neglect of boys who no longer live in that community as they have been, literally, forced to leave.

A. FORCED MARRIAGE OF DAUGHTERS

Adolescent girls are the best known victims of polygamy in the FLDS community because teenage girls are forced to marry significantly older, married, men. These girls lack a meaningful choice in deciding whether to get married; they have been taught the world outside their community is evil. Furthermore, avoiding the marriage by leaving is extraordinarily difficult as FLDS communities are physically isolated, making escape nearly impossible. By example: Jane Kingston was forced by her father, Daniel Kingston, to marry her uncle, sixteen years her senior, and therefore became his fifteenth wife.³⁶ When Jane tried to escape the marriage her father captured her and beat her until she was unconscious.³⁷ When she woke up from the beating, Jane walked seven miles to a gas station and called

³⁶ 12 YJLH 89 at 100; (All three are FLDS members)

³⁷ *Id*

911.³⁸ While Jane’s uncle, David Ortell, was charged and convicted of incest and unlawful sexual conduct with a minor, he was not charged with bigamy.³⁹

Although there is no doubt that many underage girls, such as Jane, are forced into marriage with much older men, prosecuting the crime is difficult because of significant evidentiary barriers. First, the key witnesses usually have no interest in aiding the prosecution as children are taught that authorities are not to be trusted and if they cooperate by testifying, they could be placed in foster care.⁴⁰ Girls have been taught that the outside world is evil; there is no one safe for them to turn to when they do not want to enter into a marriage. Furthermore, because of the remote physical location of these communities, the victim must go to extreme lengths to escape the abuse, as Jane did by walking seven miles to seek help after being beaten unconscious. In addition, typically only the first marriage of a polygamist is recorded with the state; subsequent marriages are not therefore the state has no paper trail of the other marriages. Finally, as the FLDS community is located on both sides of the Utah-Arizona border prosecutors have difficulty proving in which state the abuse occurred and thus are hard pressed to determine the appropriate jurisdiction for prosecution purposes.⁴¹ While the young girls in these FLDS communities suffer from abuse, the boys are more likely to suffer from neglect.

B. THE LOST BOYS

Over 1,000 children between the ages of thirteen and twenty-three have left the FLDS community, either by being banished and becoming a “Lost Boy” or in the case of the girls, choosing to run away to escape underage marriage.⁴² Male members are taught that they should have at least three wives, and the more wives one has the closer he is to heaven. Because roughly equal numbers of boys and girls are born into any community, polygamy unavoidably leads to a shortage of girls and a surplus of boys. Critics of the FLDS maintain that the boys, known as the “Lost Boys,” are kicked out of the community so that older established men have less competition for the young wives. The community tells the boys that they are being banished for not meeting the rigorous FLDS religious standards. This misbehavior ranges from wearing short-sleeved shirts, listening to CDs, watching movies and TV, staying out past curfew and having a girlfriend.⁴³

³⁸ 16 CNLJLPP 101 at 179

³⁹ *Id*

⁴⁰ *Id at 180*

⁴¹ 15 DUKEJGLP 315 at 324

⁴² New Frontiers For Families, *The House Just Off Bluff*, (2007)
<http://www.newfrontiersforfamilies.org/bluffhouse.asp>

⁴³David Kelly, *Polygamy’s ‘Lost Boys’ expelled from only life they knew*, The Boston Globe, June 19, 2005,

Once expelled, the boys are not allowed contact with their former community. The Church forbids parents from visiting their banished sons, and violating the rule can result in eviction from their Church-owned homes.⁴⁴ This means that the boys have no emotional and financial support from their former communities and they suddenly find themselves in the outside world, which they have been taught is “evil.”

Learning to live in this outside world is difficult because they have been taught to distrust others, so they do not seek help and “most have no money, no real education and nowhere to live.”⁴⁵ Not surprisingly, many of the boys turn to drugs and alcohol. Often as many as twenty boys will band together and find an apartment, but the lack of adult supervision allows them to engage in criminal behavior, including the underage use of alcohol, drugs and smoking.⁴⁶

Although there are state laws preventing child abandonment and neglect, Utah and Arizona authorities have yet to systematically enforce them. Additionally authorities have not sought child support from FLDS members who abandon their sons.⁴⁷ Similar to the prosecution of polygamy, prosecution against parents for child abandonment has comparable evidentiary challenges primarily because the lost boys are largely unwilling to testify against their parents. According to Utah Attorney General, Mark Shurtleff, “the kids don't want their parents prosecuted; they want us to get the number one bad guy -- Warren Jeffs. He is chiefly responsible for kicking out these boys.”⁴⁸

However, in 2006 a group of six lost boys filed a landmark suit against Warren Jeffs and the FLDS for “unlawful activity, fraud, and breach of fiduciary duty, and civil conspiracy.”⁴⁹ The suit alleged that the boys were kicked out of the community so that it would be easier for the older men to marry the younger girls, because without the boys there would be less competition. The suit was settled outside of court, and the lost boys received \$250,000 for housing, education and other assistance to help boys who leave the FLDS community.⁵⁰

http://www.boston.com/news/nation/articles/2005/06/19/polygamys_lost_boys_expelled_from_only_life_they_knew/

⁴⁴*Id.*

⁴⁵ Dan Simon, Amanda Townsend, *Warren Jeffs' "lost boys" find themselves in strange world*, Sept. 7, 2007, <http://www.cnn.com/2007/US/09/07/lost.boys/index.html>

⁴⁶ <http://www.newfrontiersforfamilies.org/bluffhouse.asp>

⁴⁷ 16 CNLJLPP 101 at 183

⁴⁸ http://www.boston.com/news/nation/articles/2005/06/19/polygamys_lost_boys_expelled_from_only_life_they_knew/

⁴⁹ 16 CNLJLPP 101 at 182, citing Complaint, supra note 557

⁵⁰ Dan Simon, Amanda Townsend, *Warren Jeffs' "lost boys" find themselves in strange world*, Sept. 7, 2007, <http://www.cnn.com/2007/US/09/07/lost.boys/index.html>

In 2006 Utah Governor Jon Huntsman signed House Bill 30, also known as “The Lost Boys Law,” which allows minors to petition to district court judges on their own behalf for emancipation.⁵¹ The lost boys, and other homeless youth faced numerous hurdles surviving because of the fact that they are minors. Everyday concerns, such as signing leases, and receiving health care are difficult for this population as legally they are minors and cannot represent themselves.⁵² While the effects remain to be seen, the bill is undoubtedly represents an effort to facilitate the lost boys’ integration into society.

SECTION FOUR: RECOMMENDATIONS: CIVIL SOCIETY OR RELIGIOUS SOCIETY?

Membership and participation in civil democratic society explicitly demands that citizens respect that the rule of law is supreme. According to the logic of Rousseau, as citizens of a society we are all signatories to the grand social contract; in essence, we give up any truly *absolute* rights for the safety and comfort that government can provide. We agree to be subject to laws and regulations imposed by a civil society including regulations on religion, regardless of the fact that we typically consider religious rights to be absolute.

That is not to minimize the importance, relevance or centrality of religion in the lives of untold millions. We simply must recognize that civil society is a society whose essence is civil law rather than religious law. Some people of faith—particularly those for whom religion is the essence of their temporal existence—may find this perspective objectionable; however, civil society cannot endure if religious law is found to be supreme to state law.

Civil society owes an obligation to protect its otherwise unprotected, particularly children who are its most vulnerable members. Religious belief and conduct cannot be used as justification for placing children at risk; government, law enforcement and the general public cannot allow religion to hide behind a cloak of ‘religious immunity.’ The focus of a religious extremist is single-minded dedication and devotion to serving his God. Based on innumerable conversations with terrorists and members of the intelligence community alike I have written elsewhere of the extraordinary hardships imposed on wanted terrorists. I have come to the conclusion that those hardships, when understood in the context of the terrorists serving their God, are both “explainable” and “tolerable.” While difficult, these hardships are not nearly as foreboding as the alternative, according to their worldview, as they believe it. For them it is better to incur physical discomfort than to incur the wrath of God.

⁵¹ H.B. 30, 2006 Leg., (UT 2006). Which can be found at <http://www.le.state.ut.us/%7E2006/bills/hbillenr/hb0030.htm>

⁵² For further discussion see *The “Lost Boys” of Polygamy: Is Emancipation the Answer?*, 12 JGRJ 127, and *Deserted in Deseret: How Utah’s Emancipation Statute is Saving Polygamist Runaways and Queer Homeless Youths*, 10 JLFS 213

Where does that leave the secular State? Precisely because of the absolutism of the religious extremist the state has no choice but to respond accordingly. Perhaps the fundamental weakness of my argument is that I am suggesting that the State restrict the rights of citizens. Perhaps society in response to the examples discussed above—in order to protect the unprotected—may have no choice but to consistently and aggressively monitor and prosecute religious extremists who endanger their children. The specific danger posed by religious extremists not only justifies but actually demands that law enforcement and prosecutors fundamentally re-articulate their approach to child endangerment in a religious paradigm.

To suggest that the judiciary (state or federal) is acting in the spirit of *Smith* is, at best, only ‘half the battle’ with respect to child-brides and lost boys. Both require government protection and intervention; the traditional argument that prosecution is difficult as witnesses are hesitant to come forward can be addressed by an aggressive information (intelligence/source based) policy similar to concerted law enforcement efforts with respect to those involved in the manufacturing and supplying of illegal drugs.⁵³ The danger presented by religious extremist to their internal community requires the immediate adoption of this aggressive policy. While there is an undeniable (and understandable) difficulty in convincing child brides and lost boys to testify against their parents and community (akin, perhaps, to children who are victims of sexual abuse committed by a parent or family member)^{54, 55} the state’s obligation to protect the otherwise unprotected requires that intelligence gathering be aggressive. This is particularly the case when relevant state agencies cannot plead ‘ignorance’ with respect to the specific endangerment to which FLDS children are subjected in their internal communities (compounds).

Intelligence gathering is an arduous, complicated process that requires patience, resources and determination. By analogy it is the ‘heart and soul’ of counterterrorism for without intelligence gathering and analysis the state is largely unable to operationally engage terrorists. In the same vein, intelligence gathering is required to begin assembling the requisite ‘jig-saw puzzle’ required to directly and

⁵³ “In an effort to achieve a ‘drug free society,’ the United States Government approaches its national drug problem through criminal sanctions for the possession, manufacture, sale, transport, and distribution of illegal drugs in the United States; the establishment of a complex law enforcement apparatus at both the federal and state levels with the purpose of reducing drug availability, increasing drug prices, and reducing drug use in America; and the development of drug use prevention and treatment programs that seek to stop drug use and heal drug users.” Margarita Echegaray, *Drug Prohibition in America: Federal Drug Policy and its Consequences*, 75 RJUPR 1215 at 1273 (2006).

⁵⁴ According to the Supreme Court, child abuse is “one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

⁵⁵ Most often, the abuse is not reported because it takes place in the family setting and children do not understand what is happening, fear retribution if they report it, as well as other adult family members failing to report the abuse. Raymond O'Brien, *Clergy, Sex and the American Way* 31 PEPLR 363 (2004).

aggressively respond to child abuse conducted in the name of a religious paradigm. Just as the immunity that society had historically granted to the family with respect to domestic violence and abuse has largely been negated, the immunity granted religion must be immediately rescinded. This is particularly the case when children are at risk for that is a primary responsibility of civil society. It is the essence of the social contract so eloquently articulated by Rousseau. While courts are increasingly intolerant (in accordance with *Smith*) the true test moving forward is how will law enforcement and prosecutors address this issue. *If* the common interest is preserving rights, liberties and protections of societies otherwise unprotected then this concrete policy recommendation will begin the process of enabling society to fulfill that obligation.