

POLYGAMY: NOT “BIG LOVE” BUT SIGNIFICANT HARM

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I. INTRODUCTION

Polygamy is much discussed, sometimes derided, often mocked, occasionally glamorized and frequently misunderstood.

‘Polygamy’ is an umbrella term that refers to the state of having more than one spouse at the same time. It includes both polygyny and polyandry. Polygyny is the practice of a male having multiple female spouses. Polyandry is the converse, a female with multiple male spouses. Over the course of human history, polygyny has been the only form of polygamy practiced on a significant basis. Polyandry has been exceedingly rare and has tended to be a temporary adaptation to environmental stresses or other ecological factors.¹

The history of polygamy is long, “Polygamy has been the norm for most of human history, strict monogamy the exception.”² In the leading contemporary judicial ruling on polygamy, *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (“The Case”), the Supreme Court of British Columbia provides rich and invaluable historical background regarding polygamy, tracing its evolution through human history.

This article is the second in a project we have undertaken examining the relationship between the individual and religion; in the first article we explored the role of gender in religious extremism.³ In this article, we examine polygamy in general and the question of harm in particular. We

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¹ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, paras. 135-36 (Can.).

² *Id.* at para. 148.

³ See Amos N. Guiora & Julia Chamberlin, *Religion and the Status of Women*, (University of Utah College of Law, Paper No. 9, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155886 [hereinafter *Status of Women*]; Amos N. Guiora & Julia Chamberlin, *Religion and the Status of Women*, INTLAWGRRLS (Nov. 9, 2012, 4:30 AM), <http://www.intlawgrrls.com/2012/11/religion-and-status-of-women.html>; Amos N. Guiora, *Protecting the Unprotected: Religious Extremism and Child Endangerment*, 12 J.L. & FAM. STUD. 391 (2010) [hereinafter *Protecting the Unprotected*].

will place emphasis on the relationship between polygamy and the Church of Jesus Christ of Latter-Day Saints (The Mormon Church, hereinafter, “LDS Church”); the Supreme Court of British Columbia’s recent decision defining polygamy as a ‘crime of harm’; and on a series of interviews conducted with former members of the Fundamental Church of Jesus Christ of Latter-Day Saints (“FLDS”).

In focusing on the relationship between the individual and religion we are particularly concerned that the former suffers at the hands of the latter, and we focus on harm caused to otherwise vulnerable individuals in the context of religious extremism. Whether this is an unintended consequence of the “greater good” argument⁴ is a distinct possibility. Nevertheless, we postulate that particular religious practices impose burdens, resulting in harm to individuals who define themselves as people of faith and believe in the Divine. While we do not engage in “religion bashing,” an intellectually vapid exercise of no practical consequence, we voice our continued concern about the harm we identified in certain religious practices.

It is of particular distress to us that some of the practices we address in our project physically endanger women, if not directly contribute to their deaths.⁵ For instance, we examined the growing trend of female segregation in public places among the Hasidic Jewish community, which ultimately creates a sense of female inferiority and harm to women.⁶ Other practices, such as honor killings in Muslim communities, actually kill female family members due to perceived undesirable social behavior that threatens the honor of the family.⁷ While neither of us is a person of faith, we recognize and respect the extraordinary importance religion plays in the lives of hundreds of millions of people worldwide.

In this paper we also focus on polygamy in the FLDS religion; to that end, we incorporate and analyze religious scripture, court testimony, interviews conducted with former FLDS members and relevant scholarship. We do so without an agenda. That being said, we believe that polygamy in the FLDS culture causes harm to women and children alike. While we note the possible harm to men, we did not focus on that aspect of polygamy in this article. In exploring the relationship between polygamy and the FLDS culture, we also examine child brides and lost boys; the former constitutes statutory rape and the latter is child endangerment and abandonment in the name of religious extremism.⁸ We chose to incorporate discussion

⁴ Amy Fry, *Polygamy in America: How the Varying Legal Standards Fail to Protect Mothers and Children From Its Abuses*, 54 ST. LOUIS U. L.J. 967, 979 (2010) (quoting Kathy Jo Nicholson, *On Polygamy: former FLDS member speaks out*, CNN (Apr. 16, 2008, 11:00 AM), <http://ac360.blogs.cnn.com/2008/04/16/on-polygamy-former-flds-wife-speaks-out/>).

⁵ See, e.g., *infra* Part IX, A & B (describing child abuse and child brides).

⁶ Guiora & Chamberlin, *Status of Women*, *supra* note 3, at 13.

⁷ *Id.* at 7.

⁸ Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL’Y 101, 178-84 (2006).

regarding child brides and lost boys to facilitate the reader's understanding of polygamy and the harm it causes.

It is, we believe, inaccurate to focus solely on polygamy when discussing polygamy in the FLDS culture. In that vein, we take note that the British Columbia Supreme Court in its seminal polygamy case also examined child brides and lost boys.⁹ Court testimony from this case highlights the powerful connection between the three harms.¹⁰ Due to the Court's focus on polygamy, child brides, and lost boys, we similarly chose to follow in its analysis.

A tension exists in a project of this nature in general and in this article in particular. This tension is based on our conviction that religious extremism causes harm (in principle) and that the practice of polygamy (the subject of this article) falls within the category of "harm." We are aware both of a different perspective regarding polygamy; it has been expressed to us by scholars and has been depicted in leading TV shows, including HBO's "Big Love" and TLC's "Sister Wives."¹¹

However, we have reached a different conclusion: based on our careful analysis of the British Columbia Supreme Court decision and in-person interviews with individuals who lived in a polygamous culture-community, we believe that polygamy is, indeed, a crime of harm. The victims are the wives and the children. As discussed below, painful and emotional conversations with ex-FLDS members highlighted the harm resulting from non-monogamous relationships.¹² While some have suggested polygamy is akin to the "free love" exalted in some quarters during the 1960's,¹³ a more somber and sober analysis suggests long-term harm pervades polygamous relationships.

We note the vibrant public discussion regarding alternative life-styles; in that vein, we are cognizant of powerful religious voices, particularly in the U.S., strongly opposed to same-sex marriage.¹⁴ Like many others, we

⁹ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 585-87 (Can.).

¹⁰ *Id.*

¹¹ Jessica Ravitz, "Sister Wives" explained: A fundamentalist Mormon polygamy primer, CNN (Oct. 25, 2010, 10:33 AM), <http://religion.blogs.cnn.com/2010/10/25/sister-wives-explained-a-fundamentalist-mormon-polygamy-primer/>.

¹² See *infra* Parts VIII & IX.

¹³ See Todd M. Gillett, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 503 (2000) (quoting JOHN CAIRNCROSS, AFTER POLYGAMY WAS MADE A SIN: THE SOCIAL HISTORY OF CHRISTIAN POLYGAMY 22-28 (1974)).

¹⁴ See generally Brittany Hargrave & Kimberly Railey, *Supreme Court strikes down DOMA, declines to rule on Prop. 8*, USATODAY.COM (June 26, 2013, 5:07 PM), <http://www.usatoday.com/story/news/nation/2013/06/26/gay-marriage-supreme-court-religion/2455165/> (quoting the U.S. conference of Catholic Bishops calling the Supreme Court's decisions a "tragic day for marriage and our nation."); see also Lauren Green, *Religious leaders divided on Obama's gay marriage stance*, FOXNEWS.COM (May 10, 2012), <http://foxnews.com/us/2012/05/10/religious-leaders-react-to-obama-on-gay-marriage> (discussing the

applaud the decision by an increasing number of states recognizing the right of homosexual couples to join in matrimonial union.¹⁵ We join the voices calling on the Supreme Court to recognize this right.

We predicate our position on a belief that consenting adults have the right to make decisions, provided that minors are not involved and a crime is not committed. That belief extends, unequivocally, to a woman's right to choose regarding abortion. Much like the position articulated by former President Clinton, we are not in "favor" of abortion but adamant the decision is the woman's to make.¹⁶ Here, too, we take notice of the public debate regarding abortion and join those calling on the Supreme Court to not reconsider *Roe v. Wade*.¹⁷

Some might point to a contradiction in our position; on the one hand, support for same-sex marriage, on the other hand, opposition to polygamy. While the confusion is understandable, the differences between the two are stark: same sex marriage represents a rational decision predicated on "freedom of choice" by two consenting adults whereas Warren Jeffs exclusively dictates who shall marry whom in the polygamous FLDS culture, regardless of age (the reference is to child brides) and previous marital status (the reference is to the breaking up of families).¹⁸ "Freedom of choice" is the antitheses of the FLDS culture, and to that end polygamy represents another decision made for the individual by the faith leader.¹⁹

The interviews highlight two important points: the lack of free will predicated on absolute obedience to Jeffs (regardless whether he is physically present or incarcerated)²⁰ and the resulting harm from polygamous relations.²¹ The conversations suggested that the "romanticized" versions of polygamy are, just that – romanticized, fictional

views of several religious leaders of varying faiths and an open letter written by such leaders "warning of the peril of legalizing same-sex unions.").

¹⁵ See, e.g., *17 States with Legal Gay Marriage and 33 States with Same-Sex Marriage Bans*, PROCON.ORG (Jan. 6, 2014, 10:33 AM), <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> (a nonpartisan, nonprofit public charity with a list and chart reflecting the dates when the laws recognizing or banning same-sex marriage took effect).

¹⁶ See Robin Toner, *Setting In: Easing Abortion Policy; Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush*, N.Y. TIMES (Jan. 23, 1993), <http://www.nytimes.com/1993/01/23/us/settling-easing-abortion-policy-clinton-orders-reversal-abortion-restrictions.html?pagewanted=all&src=pm>.

¹⁷ *Roe v. Wade*, 410 U.S. 113 (1973), modified by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁸ See Warren Jeffs, JESUS CHRIST MESSAGE TO ALL NATIONS 232 (Fundamentalist Church of Jesus Christ 2012) ("Thus Saith Your Lord Jesus Christ . . . Also to Teach Truth of Pure Way of Judging, of Holy Way of My Eternal Law of Holy Marriage Union of Eternal Union of Plural Celestial Marriage of My Holy Power Authorizing Select Few to Thus Live") (Section Revelation 86).

¹⁹ See *id.*

²⁰ Nicholson, *supra* note 4.

²¹ See generally *Reference re: Section 293 of the Criminal Code of Canada*, 211 BCSC 1588, 663-64 (discussing how the central tenets of Mormon polygamous communities impact adolescents from the community).

accounts.²² The reality is very different: disturbing manipulation, degradation of a “shunned” bride resulting in physical and emotional harm to her and her children, and sexual relations predicated exclusively on the man’s needs and desire (referenced as “sex on demand”).²³

To fully address these issues this paper will be divided into the following sections: History of the LDS Church (II); Joseph Smith’s Use of the Old Testament to Justify Mormon Polygamy (III); U.S. Reaction to Mormonism (IV); the U.S. Supreme Court on Religion (V); The Break From Mormonism: Creation of FLDS (VI); Warren Jeffs and FLDS Life (VII); Interviews (VIII); FLDS Harm (IX); The British Columbia Supreme Court (X); and the Final Word (XI).

II. HISTORY OF LDS CHURCH

The Church of Jesus Christ of Latter-day Saints (LDS) was founded in upstate New York – often quipped “the burned over district” for its numerous religious revivals at the time²⁴ – where two celestial beings appeared to Joseph Smith in a blinding light and implored him to restore the true Church of Christ.²⁵ Three years later, the angel Moroni visited Smith and told him of a golden holy tablet hidden in a hill outside of Manchester, New York, which contained the ancient work of American prophets.²⁶ “[O]n September 22, 1827, after other visitations from Moroni the plates were turned over to Smith. Over the next twenty-four months, Smith and a few trusted associates, using special, ancient, ‘seer’ stones, ‘translated’ the Egyptian hieroglyphics of the plates into English.”²⁷ As a result, Joseph Smith decoded the golden tablets into the Book of Mormon

²² Compare *id.* (describing the harms of polygamy on adolescents), with Ravitz, *supra* note (quoting Anne Wilde, a spokeswoman for a group called Principle Voices that educates the public about polygamy, who explains that not all polygamists are like the FLDS and that people in her group work, are educated, and have lives similar to those of other Americans).

²³ See *infra* Part VIII.

²⁴ Martha M. Ertman, *The Story of Reynolds v. United States: Federal “Hell Hounds” Punishing Mormon Treason*, in *FAMILY LAW STORIES* 51, 60 (Carol Sanger ed., 2008), available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1525&context=fac_pubs.

²⁵ *Joseph Smith*, BBC (Oct. 5, 2009), http://www.bbc.co.uk/religion/religions/mormon/history/josephsmith_1.shtml.

²⁶ *Id.*; Donald Scott, *Mormonism and the American Mainstream*, NATIONAL HUMANITIES CTR., <http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/nmormon.htm> (last visited Jan. 22, 2014).

²⁷ Scott, *supra* note 26.

and founded the Church of Christ²⁸ – renamed as the Church of Jesus Christ of Latter-Day Saints – on April 6, 1830.²⁹

The newly formed LDS Church, sensing persecution by neighbors in upstate New York, moved to Kirtland, Ohio and Independence, Missouri where they formed insular communities.³⁰ Non-Mormons felt threatened by neighboring Mormon settlements, as they often voted similarly, formed independent militias, and conducted business only within their community.³¹ As a result, the surrounding populations in Ohio and Missouri felt threatened by the growing Mormon influence; the neighboring population's attack on the Mormon settlement in Missouri in 1833 and intensifying opposition in Ohio drove 15,000 Mormons into Illinois in 1839.³²

Mormons next settled in Nauvoo, Illinois, where the LDS Church developed into a sophisticated religion, with “a more doctrinally complex and more elaborate and hierarchical religious structure.”³³ As the LDS prophet, Joseph Smith received revelations from God and espoused new holy doctrines throughout his life.³⁴ Joseph Smith's revelations led his followers “[to] believe[] he had a [divine connection] with God and was his spokesman and prophet on earth. Unquestioning obedience to the latter-day prophet was [regularly taught] to [c]hurch members who believed that the only way to heaven was to follow [the prophet's] commandments.”³⁵

Joseph Smith revealed in 1843 the celestial marriage doctrine, also called “The New and Everlasting Covenant of Marriage,” which formed the

²⁸ See *Introduction*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Feb. 21, 2012), <http://www.lds.org/scriptures/bofm/introduction?lang=eng> (“The Book of Mormon is a volume of holy scripture comparable to the Bible. It is a record of God's dealings with ancient inhabitants of the Americas and contains the fulness of the everlasting gospel. The book was written by many ancient prophets by the spirit of prophecy and revelation. Their words, written on gold plates, were quoted and abridged by a prophet-historian named Mormon. The record gives an account of two great civilizations.”).

²⁹ Richard A. Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 227 (2001).

³⁰ Scott, *supra* note 26.

³¹ Ertman, *supra* note 24, at 62.

³² Scott, *supra* note 26.

³³ *Id.*

³⁴ See Jessie L. Embry, *Polygamy*, UTAH HISTORY ENCYCLOPEDIA, http://www.uen.org/utah_history_encyclopedia/p/POLYGAMY.html (last visited Jan. 22, 2014); see also THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE DOCTRINE AND COVENANTS, SECTION 1, available at <http://www.lds.org/scriptures/dc-testament/dc/1?lang=eng> (last visited Jan. 22, 2014) (“Revelation given through Joseph Smith the Prophet, on November 1, 1831, during a special conference of elders of the Church, held at Hiram, Ohio. Many revelations had been received from the Lord prior to this time, and the compilation of these for publication in book form was one of the principal subjects passed upon at the conference. This section constitutes the Lord's preface to the doctrines, covenants, and commandments given in this dispensation.”) [hereinafter THE DOCTRINES AND COVENANTS, SECTION 1].

³⁵ Guiora, *Protecting the Unprotected*, *supra* note 3, at 394.

basis for the church's controversial plural marriage practice.³⁶ Joseph Smith recorded his celestial marriage revelation in *The Doctrine and Covenants of the Church of Jesus Christ of Latter-Day Saints*, which later became Mormon canon.³⁷ In Section 132, Joseph Smith writes:

And again, as pertaining to the law of the priesthood - if any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then he is justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else.

And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him; therefore he is justified.

But if one or either of the ten virgins, after she is espoused, shall be with another man, she has committed adultery, and shall be destroyed; for they are given unto him to multiply and replenish the earth, according to my commandment, and to fulfil the promise which was given by my Father before the foundation of the world, and for their exaltation in the eternal worlds, that they may bear the souls of men; for herein is the work of my Father continued, that he may be glorified.³⁸

Celestial marriage was not only integral to the Mormon faith as a means to reach God in the afterlife, but it also proved critical as a reproductive privilege bestowed upon male members who appeared particularly deserving.³⁹ While Joseph Smith did not codify the celestial marriage doctrine until 1843,⁴⁰ historical evidence shows that Smith received the revelation as early as 1831 as he married his second wife, Fanny Alger, in 1833.⁴¹

III. JOSEPH SMITH'S USE OF THE OLD TESTAMENT TO JUSTIFY MORMON POLYGAMY

Joseph Smith used select passages from the Old Testament in order to justify – and support – his polygamy revelations while disregarding other

³⁶ Reference re: *Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, para. 266 (Can.).

³⁷ *Id.*

³⁸ *Id.* at para. 268; THE CHURCH OF JESUS CHRIST OF LATTER-DAYS SAINTS, THE DOCTRINE AND COVENANTS, Section 132, at Verses 61-63, available at <https://www.lds.org/scriptures/dc-testament/dc/132?lang=eng> (last visited Jan. 22, 2014) [hereinafter THE DOCTRINES AND COVENANTS, SECTION 132].

³⁹ Reference re: *Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, para. 270 (Can.).

⁴⁰ THE DOCTRINE AND COVENANTS, SECTION 132, *supra* note 39.

⁴¹ Todd Compton, *Fanny Alger Smith Custer Mormonism's First Plural Wife*, 22 J. OF MORMON HISTORY 174, 178-79 (1996).

examples of monogamous marriages in the Bible.⁴² The Old Testament reflects the norms of contemporary relationships at the time it was written, and it fails to either condone or condemn plural marriage.⁴³ Men living in ancient times often adopted polygamy in order to assure the preservation of their lineage, their numerous children provided financial security, plural marriage increased one's social status, and it forged political alliances.⁴⁴

As the divine prophet of the LDS Church, Joseph Smith received revelations throughout his life in the form of answers to questions about the Old Testament.⁴⁵ For instance, Joseph Smith asked the Lord why prominent men in the Bible practiced polygamy – such as Abraham, Isaac, Jacob, Moses, David, and Solomon⁴⁶ – and God's answer formed the basis for his celestial marriage revelation and the divinity of plural marriage in the Mormon Church.⁴⁷ Joseph Smith codified his celestial marriage revelation on July 12, 1843, in the *Doctrine and Covenants*.⁴⁸ Only a small number of LDS men – the most holy members of the community – could enter into polygamous unions, and leaders encouraged women to also marry in order to enter the celestial kingdom.⁴⁹ Joseph Smith rewarded select men, as he believed they directly descended from Biblical patriarchs: “Joseph Smith looked to the patriarchs of ancient Israel as justificatory sources for the practice of plural marriage and for the creation of patriarchal family structures.”⁵⁰

Mormon theology rejected the notion of marriage for romance and, instead, valued “large families” “headed by” holy men who propagated Mormon theology by creating “spirit children” – or physical conduits that carried celestial spirits.⁵¹ As such, Joseph Smith's revelation became a central tenet in the LDS Church, as plural marriage proved critical for men to achieve God-like status in the afterlife:

⁴² Joel B. Groat, *Warren Jeffs and Joseph Smith – Polygamy Parallels*, INST. FOR RELIGIOUS RESEARCH (2011), <http://mit.irt.org/warren-jeffs-joseph-smith-polygamy-parallels>.

⁴³ Claire Meckler, *Polygamy from the Perspectives of the Old Testament, the Quran, and Current Muslim Thought*, 2 INT'L J. OF FRONTIER MISSIONS 323, 325-26 (1985), available at http://www.ijfm.org/PDFs_IJFM/02_4_PDFs/2_4Meckler.pdf.

⁴⁴ *Id.* at 326-327.

⁴⁵ Embry, *supra* note 34.

⁴⁶ See, e.g., *Genesis* 16:1-3 (Abraham); 29:23-30, 30:4-9 (King James) (Jacob); *Judges* 8:30 (King James) (Gideon); *1 Samuel* 1:1-2 (King James) (Elkanah).

⁴⁷ *Polygamy (Plural Marriage)*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, http://www.lds.org/ldsorg/v/index.jsp?locale=0&sourceId=9887ec6f164b2110VgnVCM100000176f620a___&vgnnextoid=bbd508f54922d010VgnVCM1000004d82620aRCRD (last visited Jan. 22 2014).

⁴⁸ The DOCTRINE AND COVENANTS is a book of revelations received by Joseph Smith during a conference of elders at Hiram, Ohio, on Nov. 1, 1831. See THE DOCTRINE AND COVENANTS, SECTION 1, *supra* note 35.

⁴⁹ Reference re: *Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, para. 270 (Can.).

⁵⁰ *Id.* at para. 271.

⁵¹ *Id.* at paras. 272-73.

The FLDS view is that plural marriage is “the most holy principle ever revealed to man.” Smith stated that a man and woman could bond in a spiritual way as husband and wife. 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. Men who reject polygamy “not only forfeit godhood, but [are] damned.”⁵²

Despite the centrality of Joseph Smith’s celestial marriage revelation in the Mormon faith, his narrow focus on select passages in the Old Testament discounts the entirety of the Old Testament; it provides a mere thirty-three examples of polygamous unions out of a total of 3,000 men found in the scripture.⁵³ Furthermore, the wealthy elite almost exclusively practiced polygamy, with the only commoner, Elkanah, partaking in the practice because of his wife’s infertility.⁵⁴

The story of Abraham exemplifies the discord over plural marriages in the Bible, when Abraham’s wife, Sarai, failed to conceive a child.⁵⁵ As a result of her infertility, Sarai implored Abraham to have children with her maid, Hagar.⁵⁶ In the Near East during this period, Sarai’s request comported with the norm: “If the marriage proved to be infertile, the husband normally took matters into his own hands, but on certain occasions, the wife was able to present one of her slave girls, sometimes specially purchased, to her husband to produce children for their own marriage.”⁵⁷ As a result, even though Sarai did not conceive Hagar’s children, she still maintained authority over the children.⁵⁸

While figures in the Bible refer to Hagar as Abraham’s wife, God draws a firm distinction of Hagar’s status by repeatedly referring to her as “Sarai’s maid.”⁵⁹ “In the narratives involving the actual practice of polygamy or concubinage, invariably the divinely-inspired narrators place their tacit condemnation of these practices.”⁶⁰ By the Lord’s refusal to bestow Hagar with the status of wife, he indicates that he did not divinely ordain Abraham’s plural marriage.⁶¹ Lastly, God’s “divine disapproval” over Abraham’s plural marriages can be seen throughout the scripture;

⁵² Fry, *supra* note 4, at 972.

⁵³ Richard M. Davidson, *Polygamy in the Old Testament*, in *PATHOLOGY OF POLYGAMY: CROSS-CULTURAL MISSION ON A BIBLICAL BASIS* 9, 40 (Ron du Preez, ed. 2007), available at <http://www.andrews.edu/~davidson/Publications/Polygamy/Polygamy%20in%20OT.pdf>.

⁵⁴ *Id.*

⁵⁵ *Id.* at 13-15.

⁵⁶ *Id.* at 13.

⁵⁷ *Id.* at 13-14.

⁵⁸ *Id.* at 14.

⁵⁹ *Id.*; see *Genesis* 16:8 (King James).

⁶⁰ Davidson, *supra* note 53.

⁶¹ See *Genesis* 16:9 (King James) (commanding Hagar to return to her mistress, Sarai).

Sarai and Hagar's relationship suffers from constant strife,⁶² Sarai and Hagar's kids fight,⁶³ and Abraham shows visible distress over his plural marriage.⁶⁴

1 Kings offers another example of polygamous marriage in the Old Testament, where Solomon married 700 wives and princesses, as well as an additional 300 concubines.⁶⁵ Despite amassing an astounding 1,000 wives, when Solomon reaches old age "his wives turned away his heart after other gods[.]"⁶⁶ As a result, Solomon regrets his life of polygamy and he laments: "[o]ne man among a thousand have I found; but a woman among all those have I not found."⁶⁷

As seen in the two previous examples, every narrative of plural marriages ends in strife and conflict.⁶⁸ Thus, unlike Joseph Smith's celestial marriage revelation, which states that polygamous unions bring adherents closer to God, the Old Testament fails to depict plural marriage as harmonious and divine:

[T]he patriarchs reaped the consequences of their plural marriages. In every narrative description of multiple wives or concubines the consequences were jealousy, bitterness, hatred, competitiveness, trickery, sibling rivalry, complications with inheritance rights, and hostility within the family. When two or more women shared a husband, continuous strife was almost always the apparent result of the man's preference of one wife over another. The Hebrew word for the second wife literally means "rival wife"⁶⁹

Additionally, while the Old Testament featured prominent Biblical figures in plural marriages, it is important to note that the Bible also espouses the sanctity of monogamous marriages, beginning with the creationist story of Adam and Eve.⁷⁰ "Most Biblical scholars contend that the total unity of two persons in marriage, as understood by the expression

⁶² See *Genesis* 16:4-6 (King James) (describing Sarai's anger at Hagar conceiving a child).

⁶³ See *Genesis* 21:9-10 (King James) (describing the conflict regarding which child, Sarai's or Hagar's, should inherit from the father).

⁶⁴ Davidson, *supra* note 53, at 14; see *Genesis* 21:11-12 (King James) (describing Abraham's reaction to the strife as "grievous").

⁶⁵ *1 Kings* 11:3 (King James).

⁶⁶ Davidson, *supra* note 53, at 39; *1 Kings* 11:4 (King James).

⁶⁷ *Ecclesiastes* 7:26-28 (King James); see also Davidson, *supra* note 53, at 39.

⁶⁸ Meckler, *supra* note 43, at 325.

⁶⁹ *Id.*

⁷⁰ Davidson, *supra* note 53, at 9; see also *Genesis* 2-4 (Adam and Eve); *Genesis* 4:17 (Cain and his wife); *Genesis* 7:7, (Noah and his wife); *Genesis* 7:7, 13 (Noah's three sons and their respective wives); *Genesis* 11:29 and 24:15 (Nahor and Micah); *Genesis* 11:29 (Abraham and Sarai); *Genesis* 24, 27, and 49:31 (Isaac and Rebekah); *Genesis* 36:39 (Hador and Mehetabel); *Genesis* 38:6 (Er and Tamar); *Genesis* 41:45 (Joseph and Asenath); *Exodus* 6:20 and *Numbers* 26:59 (Amram and Jochebed); *Exodus* 6:23 (Aaron and Elisheba); *Exodus* 6:25 (Eleazar and his wife); *Exodus* 2:21 and 18:2 (Moses and Zipporah).

'one flesh,' demands monogamy and indissolubility."⁷¹ The Old Testament also supports monogamous marriage when it repeatedly uses the singular form of "wife," rather than the plural version.⁷² "[T]he tenth commandment refers to 'your neighbor's wife . . .' (Exod 20:17) Similarly, the wise man Solomon counsels his son to 'rejoice with the wife [not 'wives'] of your youth' (Prov 5:18); to 'enjoy life with the wife . . . whom you love' (Eccl 9:9)."⁷³

As seen in the scripture containing references to polygamous unions, the Old Testament simply describes the marriage culture of the day, and God fails to condone or condemn the practice. Yet the Old Testament, through its repeated and numerous examples of monogamous marriage and its negative depiction of polygamy, tacitly shows that it supports the norm of monogamy. "Thus the Old Testament shows, on one hand, the departure from the Edenic model of sexuality in actual practice; while, on the other hand this departure is not approved by God, with both narrative and legislation condemning practices that violate the monogamous Edenic norm."⁷⁴ While the Old Testament provides examples of polygamous unions, it certainly does not exalt plural marriages, or make it a religious duty as seen in Joseph Smith's celestial marriage revelation.

IV. U.S. REACTION TO MORMONISM

As Nauvoo continued to prosper and Mormon economic and political influence increased in Illinois, a militia arrested and killed Joseph Smith and his brother in 1844.⁷⁵ Joseph Smith's successor, Brigham Young, relocated the Mormon community to the present day territory of Utah, an area "called the State of Deseret."⁷⁶ As with earlier Mormon communities, the church continued to create a thriving society out west: "In Utah, under the long leadership of Young (1847-1877), building on the precepts of plural marriage and patriarchal, prophetic governance promulgated by Joseph Smith, the Mormons established a unique, cohesive, economically self-sufficient, and thriving society."⁷⁷ Brigham Young acted as a significant proponent for plural marriage; he alone married 27 wives and produced 56 children.⁷⁸

While Mormons practiced plural marriages covertly prior to 1852, they began to conduct polygamy openly after LDS Apostle Orson Pratt

⁷¹ Meckler, *supra* note 43, at 325.

⁷² Davidson, *supra* note 53, at 9.

⁷³ *Id.* at 9-10.

⁷⁴ *Id.* at 40.

⁷⁵ Scott, *supra* note 26.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Ertman, *supra* note 24, at 64. *But see* Jeffrey Ogden Johnson, *Determining and Defining 'Wife': The Brigham Young Households*, 20 DIALOGUE: J. MORMON THOUGHT 57, 57-58 (1987) (analyzing "the ambiguities of the term *wife*" and arguing that Brigham Young actually had fifty-five wives).

publically announced the principle in his “Celestial Marriage” speech.⁷⁹ In this speech, Pratt defended polygamy, stating that the practice permitted women – who he said remained at a large surplus compared to their male counterparts – to fulfill their duty as wives.⁸⁰ Leaders of the church encouraged adherents to practice polygamy, but norms of the practice failed to develop and adoption of polygamy varied widely.⁸¹ In fact, most Mormons failed to assume a polygamous lifestyle: “The number of families involved varied by community; for example, 30 percent in St. George in 1870 and 40 percent in 1880 practiced polygamy, while only 5 percent in South Weber practiced the principle in 1880.”⁸²

After LDS leadership publically endorsed polygamy, the church endured instantaneous backlash from the United States as the government continued to expand west.⁸³ In the second half of the 19th century the U.S. government confronted the following issue: “What was the relation of this expanding, separatist, economically self-sufficient religious community and its sizable turf to the United States?”⁸⁴ America’s obsession with Mormonism came to a head during the 1856 GOP Convention in Philadelphia, where the new Republican Party gathered to select a presidential candidate as the United States stood on the brink of Civil War.⁸⁵

The Convention not only focused on the divisive topic of slavery, but it also criticized the Mormon’s polygamous practice: “It is the duty of Congress to prohibit in the territories those twin relics of barbarism, polygamy and slavery.”⁸⁶ Parallels between polygamy and slavery emerged; the Republican Party associated polygamous husbands with white Southern slaveholders and plural wives to enslaved victims.⁸⁷ Polygamy incited public outrage:

When word of this Mormon policy of polygamy reached Congress, it prompted instant denunciation and a political crusade against the Mormon Church. Not only was their polygamy considered to be a flagrant violation of long cherished norms of American and Western civilization. But word of this exotic new practice came just as the nation was becoming deeply embroiled in bitter

⁷⁹ *Laws Against Polygamy – 1862 (Morrill Anti-Bigamy Act)*, PROBATIONARY STATE BLOG (June 9, 2010), <http://probationarystate.blogspot.com/2010/06/laws-against-polygamy-1862-morrill-anti.html>.

⁸⁰ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, para. 277 (Can.).

⁸¹ Embry, *supra* note 34.

⁸² *Id.*

⁸³ *See id.* (noting that “Congress passed the Morrill Act, which prohibited plural marriage in the territories”).

⁸⁴ Ertman, *supra* note 24, at 63.

⁸⁵ *GOP Convention of 1856 in Philadelphia*, UShistory.org, http://www.ushistory.org/gop/convention_1856.htm (last visited Jan. 22, 2014).

⁸⁶ *Id.*

⁸⁷ Kelly Elizabeth Phipps, *Marriage and Redemption: Mormon Polygamy in the Congressional Imagination, 1862-1887*, 95 VA. L. REV. 435, 439-40 (2009).

battles to abolish slavery and to secure women's rights. It was very easy to castigate polygamy as yet another species of slavery, patriarchy, abuse, and barbarism that needed to be vanquished. A staggering number of speeches, sermons, pamphlets, articles, and books poured forth after the 1850s denouncing polygamy - gradually adducing many of the same arguments about the harms of polygamy that we have sampled from the ancient Roman law and early Church Fathers to the latest Enlightenment philosophers.⁸⁸

As national concern rose, polygamy became a controversial political issue and Republicans accused Democrats of supporting the practice.⁸⁹ Arguments leveled against polygamists extended beyond "rhetoric" to real concern; politicians and judicial bodies focused on the subjugation of women in plural marriages, and the harm polygamy caused to children's development.⁹⁰ Most of the country believed that the Mormon faith was "peculiar and un-American" and the federal government continually denied Utah's petition for statehood.⁹¹

As a result of the growing unease over the Mormon's influence in Utah, President James Buchanan ordered the troops to enter the insubordinate territory and mollify the "Mormon Problem."⁹² In addition to the deployment of 2,500 troops, he issued a new territorial governor to replace Brigham Young, as well as new federal judges.⁹³ In response, Utah formed the Nauvoo Legion militia.⁹⁴ Both sides avoided casualties, and the *New York Herald* reported the results of the Utah War: "Killed, none; wounded, none; fooled, everybody."⁹⁵ Brigham Young accepted President Buchanan's 'Peace Commission' on June 12, 1858, pardoning the Mormon people, and restoring Utah to amity once again.⁹⁶

Against this backdrop of mounting tension between the Mormons and the federal government, the 36th Congress passed the Morrill Anti-Bigamy Act, which President Abraham Lincoln signed into law on July 1, 1862.⁹⁷ The Legislature feared that if Utah attained statehood status, it would legalize plural marriages.⁹⁸ Congress spent very little time discussing the Act introduced by Mr. Morrill of Vermont, as he stated: "I presume there

⁸⁸ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 275 (Can.).

⁸⁹ 1852-1890: *Opposition to LDS Church's Practice of Polygamy*, UTAH DIV. OF STATE HISTORY, <http://www.ilovehistory.utah.gov/time/stories/polygamy.html> (last visited Jan. 22, 2014).

⁹⁰ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 276 (Can.).

⁹¹ Donna G. Ramos, *Utah War: U.S. Government Versus Mormon Settlers*, HISTORYNET.COM (June 12, 2006), <http://www.historynet.com/utah-war-us-government-versus-mormon-settlers.htm>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* (quoting the N.Y. HERALD).

⁹⁶ *Id.*

⁹⁷ *Laws Against Polygamy*, *supra* note 79.

⁹⁸ Maura Strassberg, *Lawyering for the Mentally Ill: The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 359 (2003).

is no member of the House who desires to discuss this measure”⁹⁹ The Act served multifarious purposes; it not only banned polygamy in U.S. territory, but it also limited the LDS church’s property, and disenfranchised the Mormon Church.¹⁰⁰ Chapter CXXVI of the Act states:

That 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, except in cases specified in the proviso to this section, 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 years¹⁰¹

Despite the government’s bigamy ban in United States territories, the Act proved ineffectual in eradicating polygamy in the LDS Church. A myriad of circumstances led to the Morrill Anti-Bigamy Act’s failure: the United States’s recent entrance into a crippling Civil War, the government’s passive attitude,¹⁰² and Utah’s continued isolation from national railroad lines.¹⁰³ 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.”¹⁰⁴

Utah political leaders attempted to repeal the Morrill Anti-Bigamy Act but, instead of overturning the legislation, Congress introduced the Cullom Bill in order to further strengthen anti-polygamy legislation.¹⁰⁵ While the Cullom Bill failed to receive a majority vote, many sections of the Bill later became codified into law.¹⁰⁶ “The battle [over polygamy] lasted another twenty eight years, during which the federal government enacted further legislation making cohabitation a crime and prohibiting polygamists and polygamist sympathizers from sitting on juries or holding public office.”¹⁰⁷ During the second half of the 19th century, Congress successfully passed four federal statutes outlawing polygamy in the United States, such as the

⁹⁹ Robert G. Dyer, *The Evolution of Social and Judicial Attitudes Towards Polygamy*, UTAH B.J. , 35, 35 (1977), available at http://utahbar.org/barjournal/frequently_requested_articles/Vol.%205%20Nos.%201-3.pdf.

¹⁰⁰ Morrill Anti-Bigamy Act of 1862, ch. 126, 12 Stat. 501 (repealed 1910); *see also* Sigman, *supra* note 10 at 118.

¹⁰¹ *Id.*

¹⁰² Embry, *supra* note 34.

¹⁰³ *Events in the West 1860 – 1870*, PBS, http://www.pbs.org/weta/thewest/events/1860_1870.htm (last visited Jan. 22, 2014) (noting that the transcontinental railroad’s golden spike was completed in Utah in 1869).

¹⁰⁴ Sigman, *supra* note 8, at 119.

¹⁰⁵ Embry, *supra* note 34.

¹⁰⁶ *Id.*

¹⁰⁷ Strassberg, *supra* note 98, at 353.

Edmunds Act of 1882.¹⁰⁸ The Edmunds Act dissolved the church, retroactively stated that no religious organization could own more than 50,000 dollars of land, inflicted civil sanctions on polygamists, and made the prosecution of polygamy easier.¹⁰⁹

V. THE U.S. SUPREME COURT ON RELIGION

The Mormon's resistance to anti-bigamy legislation became further frustrated when Brigham Young's secretary, George Reynolds, became the test case for the legality of the Morrill Anti-Bigamy Act.¹¹⁰ George Reynolds grew up in England, and converted to the Mormon Church covertly, against the protests of his parents.¹¹¹ Upon immigrating to Utah in 1865, he married by proxy six dead women, as well as two living women.¹¹² He remained resolutely faithful to the Mormon Church: "We do not feel like being pissing posts for every hell hound that is sent here as governor, judge, marshall [sic], & tc. But we should all, I hope, be on hand to do just when the Lord requires, be it in accord with our feelings or not."¹¹³ His unwavering devotion, coupled with his fresh, youthful image, and his overall character made him an ideal candidate to stand as the defendant in the national battle over the legality of polygamy.¹¹⁴

The federal government previously encountered numerous roadblocks in convicting defendants accused of polygamy, as witnesses often failed to cooperate at trial and records of second marriages remained nonexistent.¹¹⁵ Reynolds' second trial also proved complicated, as both his sister and his wedding officiate attempted to stall the proceedings: his sister stated that she did not know if George and Polly, his first wife, were married, and his wedding officiate said that he could not recall if Reynolds married his second wife, Amelia.¹¹⁶ Yet, unexpectedly the prosecution called Amelia – visibly pregnant at the trial and not privy to the plan of obstruction – who informed the jury of her marriage to Reynolds.¹¹⁷

Reynolds spent two years in prison and received a fine of \$500 for his conviction of bigamy in 1875.¹¹⁸ Reynolds appealed his conviction in the Utah Territorial Supreme Court, but the court dismissed his claim that

¹⁰⁸ Jason D. Berkowitz, *Beneath the Veil of Mormonism: Uncovering the Truth About Polygamy in the United States and Canada*, 38 U. MIAMI INTER-AM. L. REV. 615, 621-22 (2007).

¹⁰⁹ *Id.* at 621-22.

¹¹⁰ Embry, *supra* note 34.

¹¹¹ Ertman, *supra* note 24, at 60-61.

¹¹² Marriage by proxy is the Mormon practice of sealing the spirit of the dead person to the living person in eternity. *See id.* at 61.

¹¹³ *Id.* at 51. (quoting George Reynolds).

¹¹⁴ *Id.* at 70.

¹¹⁵ *Id.* at 74.

¹¹⁶ *Id.* at 73-74.

¹¹⁷ *Id.* at 74-75.

¹¹⁸ *Id.* at 56.

polygamous marriage was an integral tenet of his religious faith.¹¹⁹ He then appealed to the U.S. Supreme Court; he argued that the grand jury was illegal, the court improperly overruled challenges to petit jurors during *voire dire*, his wife Amelia's testimony could not be permitted under a different indictment, and polygamy constituted a religious duty.¹²⁰

In preparation for the Supreme Court's hearing, Reynolds' lawyer filed a fifty-page memorandum, while the government responded in a six-page brief stating: "None of these last mentioned exceptions call for any remark."¹²¹ Despite the government's blatant confidence in the outcome of the case, immediately proceeding oral hearings the Supreme Court remained split – five to four in favor of upholding Reynolds' bigamy conviction.¹²² Yet by January, the justices "issued a unanimous decision affirming Reynolds' conviction."¹²³

The Supreme Court's opinion examined whether Reynolds' duty as a practicing member of the LDS Church justified his disregard for the Morrill Anti-Bigamy Act.¹²⁴ The Justices looked at the First Amendment of the U.S. Constitution, which states that Congress cannot pass a law that interferes with the free exercise of religion.¹²⁵ The Supreme Court found that the creators of the Constitution authoritatively defined religious freedom as: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions"¹²⁶

The Court then examined the history of polygamy, and found that most European states viewed the practice as "odious," and found its roots predominantly in Asia and Africa.¹²⁷ The Court, "building upon its historical analysis of polygamy, then drew the conclusion that since a society practicing monogamous marriage was a civilized society, the practice of polygamy would undermine the 'sacred obligation' of marriage as an institution and lead to societies grounded in despotism."¹²⁸ The Justices, deeming polygamy as "stationary despotism," also connected the threat of polygamy to the institution of slavery, which almost crippled the United States during the Civil War.¹²⁹ The inflammatory opinion in the

¹¹⁹ *Id.*

¹²⁰ *Reynolds v. United States*, 98 U.S. 145, 153 (1878).

¹²¹ Ertman, *supra* note 24, at 56-57.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Reynolds*, 98 U.S. at 162.

¹²⁵ *Id.*

¹²⁶ *Id.* at 164 (quoting Thomas Jefferson).

¹²⁷ *Id.*

¹²⁸ Vazquez, *supra* note 29, at 228.

¹²⁹ Ertman, *supra* note 24, at 64.

U.S. against polygamy led the Court to find that the practice threatened both the stability of the nation and public morality.¹³⁰

The Justices next focused on whether religious duty abrogates citizens of their responsibility to follow the law, and the Court rejected Reynolds' free religious exercise challenge.¹³¹ They posed the following, far-reaching hypothetical:

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?¹³²

The Justices found that the state could regulate "subversive" religious acts such as suicide, murder – and even polygamy.¹³³ As a result, the Court held that when a citizen knowingly breaks a U.S. law: "it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made. No case, we believe, can be found that has gone so far."¹³⁴

The next important Supreme Court case to reexamine the Free Exercise Clause came much later in 1963. In *Sherbert v. Verner*, the appellant filed an unemployment claim in South Carolina after she was fired because of her membership to the Seventh-day Adventist Church and her refusal to work on Saturday.¹³⁵ As a result, the Court "mandated that government action which burdens religious practice should be subject to the rigid standard of strict scrutiny, and invalidated absent a compelling governmental interest."¹³⁶

The Supreme Court reaffirmed this strict scrutiny standard in *Wisconsin v. Yoder*, when members of the Amish religion declined to send their children to school until the obligatory age of 16.¹³⁷ The Amish believe that compulsory education conflicts with their religious duties and jeopardizes their salvation.¹³⁸ The Supreme Court held "that the First and Fourteenth Amendments prevent the State from compelling [Amish parents] to cause their children [who have graduated from the eighth grade] to attend formal

¹³⁰ Vazquez, *supra* note 29, at 229.

¹³¹ *Id.*

¹³² *Reynolds*, 98 U.S. at 166.

¹³³ Berkowitz, *supra* note 108, at 622-23.

¹³⁴ *Id.* at 167.

¹³⁵ 374 U.S. 398, 399-400 (1963).

¹³⁶ Vazquez, *supra* note 29, at 233; *see Sherbert*, 374 U.S. at 403.

¹³⁷ 406 U.S. 205, 207-08 (1972).

¹³⁸ *Id.* at 208-09.

high school to age 16.”¹³⁹ Even religion-neutral statutes that “have the effect of significantly burdening the free exercise of religion must be justified by a state interest which warrants that burden.”¹⁴⁰

The scope of *Sherbert* and *Yoder* was significantly narrowed – and even rejected – in *Employment Division, Department of Human Resources v. Smith*.¹⁴¹ In *Smith*, a private drug rehabilitation organization fired the respondents, Alfred Smith and Galen Black, for consuming peyote during a Native American religious ceremony.¹⁴² Due to their drug use, the respondents failed to receive unemployment compensation for their termination.¹⁴³ The Court circumvented the strict scrutiny test applied in *Sherbert*, instead applying a radically different analysis:

[A] generally applicable, facially neutral criminal statute is enforceable regardless of the burden it places on one’s religious practices. Under the *Smith* analysis, one would ask two questions when analyzing a criminal statute that burdens religious practice: (1) Is the statute facially neutral and generally applicable with regard to religion; and (2) does the statute indicate from its language that it has a primary purpose of burdening religious practice. If a statute is neutral on its face and does not have the primary purpose of burdening religion, the statute would likely stand.¹⁴⁴

Critics lambasted the new Supreme Court decision because it left religious minorities vulnerable to the popular will.¹⁴⁵ The *Smith* decision led congressmen to decry the new free exercise judicial standard and, in response, it passed the Religious Freedom Restoration Act (“RFRA”),¹⁴⁶ which effectively restored the strict scrutiny standard used in *Sherbert v. Verner*.¹⁴⁷ Despite resounding public disapproval of the standard reached in the *Smith* decision,

¹³⁹ *Id.* at 234.

¹⁴⁰ Sandra Ashton Pochop, *Employment Division, Department of Human Resources of Oregon v. Smith: Religious Peyotism and the “Purposeful” Erosion of Free Exercise Protections*, 36 S.D. L. REV. 358, 368 (1991).

¹⁴¹ Vazquez, *supra* note 29, at 236; see *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

¹⁴² *Smith*, 494 U.S. at 874.

¹⁴³ *Id.*

¹⁴⁴ Vazquez, *supra* note 29, at 236; see also *Smith*, 494 U.S. 872.

¹⁴⁵ Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 236 (1998).

¹⁴⁶ See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993). The Supreme Court subsequently ruled that RFRA was unconstitutional, stating that Congress had exceeded its enforcement powers by expanding constitutional protections in violation of § 5 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

¹⁴⁷ Keith Jaasma, *The Religious Freedom Restoration Act: Responding to Smith; Reconsidering Reynolds*, 16 WHITTIER L. REV. 211, 223-24 (1995).

[i]n *City of Boerne v. Flores*, the Supreme Court invalidated RFRA by a six to three vote, at least insofar as it applied to the states. As a result, the states are no longer bound by any federal standard . . . to exempt the religiously devout from neutral laws of general applicability.¹⁴⁸

Since the *Smith* decision, six state supreme courts reaffirmed the strict scrutiny standard, four other states use heightened scrutiny, and an additional fifth of all states created an independent standard of evaluation of the free exercise clause.¹⁴⁹

Even though the Free Exercise Clause has significantly evolved since the *Reynolds* decision, anti-bigamy statutes remain constitutionally valid.

Despite the significant weaknesses of the *Reynolds* decision, and the use of a compelling interest/least intrusive means test from *Yoder* and *Sherbert* in subsequent free exercise cases, laws against polygamy have repeatedly been upheld since *Reynolds*. While courts have alluded to the state interests involved in restricting polygamy, they have never adequately addressed whether prohibiting polygamy is the least intrusive means of forwarding those interests, even though both inquiries were purportedly required in free exercise cases prior to *Smith*. Seemingly, the RFRA mandates such an inquiry.¹⁵⁰

For instance, the Supreme Court reaffirmed its polygamy ban in *Davis v. Beason*, which upheld the constitutionality of an Idaho statute that forced all voters to declare that they did not practice polygamy.¹⁵¹ Additionally, in *Murphy v. Ramsey*, the Court upheld the constitutionality of a Congressional act excluding polygamists from public office and voting.¹⁵² Yet again, in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, the Supreme Court stated that polygamy remains “in a measure, a return to barbarism. It is contrary to the spirit of Christianity, and of the civilization which Christianity has produce in the Western world.”¹⁵³ In sum, contemporary bigamy cases seemingly avoid the difficult constitutional question of whether polygamy constitutes a valid

¹⁴⁸ Crane, *supra* note 145, at 238.

¹⁴⁹ *Id.* at 246-47.

¹⁵⁰ Jaasma, *supra* note 147, at 269.

¹⁵¹ Berkowitz, *supra* note 108, at 623; *Davis v. Beason*, 133 U.S. 333, 342-43 (1890) (“However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.”)

¹⁵² Jaasma, *supra* note 147, at 269-70 (“The Court saw the law, in its encouragement of monogamy, ‘the sure foundation of all that is stable and noble in our civilization,’ as ‘necessary in the founding of a free, self-governing commonwealth’ and ‘the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.’”); *Murphy v. Ramsey*, 114 U.S. 15 (1885).

¹⁵³ *Vazquez*, *supra* note 29, at 231 (quoting *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890)).

exercise of religious freedom under either the contemporary strict scrutiny or facially neutral standard.¹⁵⁴

VI. THE BREAK FROM MORMONISM: CREATION OF FLDS

In 1880, John Taylor, the Church's third president and a practicing polygamist, received a divine revelation from the Lord and Joseph Smith, which reaffirmed polygamy as a fundamental tenet of the Mormon Church.¹⁵⁵ Additionally, Taylor ordered a group of male apostles to continue practicing polygamous marriages, regardless of the fate of the LDS Church.¹⁵⁶ "The battle against Mormon polygamy continued while Taylor was underground, with 1887's Edmunds-Tucker Act forcing women to testify against their husbands, requiring anti-polygamy oaths and laying the groundwork for the U.S. government to seize high-value church properties, including temples."¹⁵⁷

Due to tightening U.S. restrictions on polygamous lifestyles and Taylor's death in 1887, the Church had to "choose between polygamy and its future existence."¹⁵⁸ In 1889, Wilford Woodruff replaced Taylor as the Church's fourth president, and he publically renounced polygamy in an 1890 Manifesto: "I publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriages forbidden by the law of the land."¹⁵⁹ Utah officially achieved U.S. statehood in 1896, after it banished polygamy from its constitution.¹⁶⁰ While numerous offshoots of fundamentalist groups arose after the 1890 Manifesto, the Fundamentalist Church of Jesus Christ of Latter Day Saints ("FLDS") garnered the most media attention.¹⁶¹ "Under the general title of Mormon Fundamentalism, this movement has subdivided and morphed countless times and into countless factions . . . [E]stimates generally exceed 50,000 polygamists in the United States today."¹⁶²

In the 1920's and 1930's, the FLDS community straddled the border of Arizona and Utah, in the twin towns of Colorado City (previously known as "Short Creek") and Hildale.¹⁶³ The FLDS's position on a state boundary proved strategic for their polygamous community; Short Creek remained

¹⁵⁴ Jaasma, *supra* note 147, at 295.

¹⁵⁵ Ravitz, *supra* note 11.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Ertman, *supra* note 24, at 52.

¹⁵⁹ Ravitz, *supra* note 11 (quoting Wilford Woodruff).

¹⁶⁰ Ertman, *supra* note 24, at 52.

¹⁶¹ Ravitz, *supra* note 11.

¹⁶² Gregory A. Prince & Helen C. Whitney, *Mormons and Polygamy: Truths, Lies and Ambiguities*, HUFFINGTON POST (Aug. 27, 2012, 11:48 AM), http://www.huffingtonpost.com/gregory-a-prince-phd/mormons-and-polygamy-trut_b_1833493.html.

¹⁶³ Scott Anderson, *Polygamists*, NAT'L GEOGRAPHIC (Feb. 2010), <http://ngm.nationalgeographic.com/2010/02/polygamists/anderson-text/1#close/modal>.

isolated from law enforcement and other communities, while also providing an easy escape route.¹⁶⁴ The FLDS polygamist enclave also extends to a town called Bountiful, British Columbia – found between the Purcell Mountains and the Kootenay River – which has an additional 700 polygamists.¹⁶⁵ Polygamists fled to Bountiful after the 1890 Manifesto, because of Canada's historical apathy in regard to persecuting bigamy.¹⁶⁶ In 1935, the mainstream LDS Church forced Short Creek residents to choose between plural marriage or excommunication, causing most Short Creek settlers to officially break away from the Mormon Church.¹⁶⁷

Short Creek's perpetuation of polygamy led to numerous clashes with law enforcement, including raids in 1935, 1944, and the infamous raid in 1953, which resulted in 200 women and children held in detention centers as well as 26 men arrested for practicing polygamy.¹⁶⁸ Arizona Governor Howard Pyle ordered the massive police raid in 1953 in order to stop the polygamist insurrection, "[b]ut the raid became a public relations nightmare for Pyle, when people saw newsreels of children separated from their parents. The net result was only one year of probation for 23 polygamist men. But the negative publicity ironically helped Short Creek avoid interference from law enforcement for many years to come."¹⁶⁹ Due to the disastrous consequences of the 1953 Short Creek raid, the police shied away from enforcing federal anti-polygamy statutes until the end of the 1990s.¹⁷⁰

Until 1986, Leroy Johnson and a group of high priests jointly controlled the FLDS Church.¹⁷¹ After Johnson's death, Rulon Jeffs assumed absolute control over the fundamentalist community, which became further solidified in a "theocratic dictatorship" when his son, Warren Jeffs, became the FLDS prophet in 2002.¹⁷² After Rulon Jeffs passed away, Warren Jeffs married several of his father's wives as well as numerous other women – amassing more than 80 wives – and he also assigned numerous women to his close apostles.¹⁷³ As the FLDS divine prophet, Warren Jeffs claimed that God dictated his every minute action, and through him alone God speaks to FLDS members.¹⁷⁴

¹⁶⁴ Rick Ross, *A brief history of the polygamists in Colorado City, Arizona and Hildale, Utah*, THE CULT EDUC. INST. (Apr. 5, 2002), www.culteducation.com/reference/polygamy/polygamy4.html.

¹⁶⁵ Berkowitz, *supra* note 108, at 619.

¹⁶⁶ *Id.*

¹⁶⁷ Anderson, *supra* note 163.

¹⁶⁸ *Id.*

¹⁶⁹ Ross, *supra* note 164.

¹⁷⁰ See Strassberg, *supra* note 98, at 354 (noting that little to no effort was made to enforce polygamy statutes between the 1960's and 1990's).

¹⁷¹ Anderson, *supra* note 163.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

VII. WARREN JEFFS AND FLDS LIFE

Warren Jeffs solidified FLDS segregation from the secular world and reinforced the almighty power that a latter-day prophet possessed after his father, Rulon Jeffs', death in 2002.¹⁷⁵

Warren Jeffs used his prophetic mantle to deem many of his actions as sanctioned by God. . . . 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.¹⁷⁶

For instance, in 2004 “Jeffs exiled [twenty] male members from the community and assigned their wives to more worthy men.”¹⁷⁷

Similar to his predecessors, Jeffs teaches that a man can enter heaven only through plural marriage.¹⁷⁸ To that extent, Jeffs taught “that any worthy male member should have at least three wives,”¹⁷⁹ and the more wives a man accumulates, “the closer he is to heaven.”¹⁸⁰ In 2004, the FLDS – especially the current prophet, Warren Jeffs – began facing trouble from the outside world once again.¹⁸¹

In late 2005, the FBI placed Jeffs on the most wanted list, and charged him in Utah with accomplice to rape and in Arizona with two counts of sexual conduct with a minor and one count of conspiracy to commit sexual conduct with a minor.¹⁸² Jeffs' nephews also publically made allegations against him for rape and sodomy.¹⁸³ While a fugitive, Jeffs nevertheless “continued to perform marriages between underage girls and older men.”¹⁸⁴ In August 2006, law enforcement captured Jeffs in Nevada during a traffic stop,¹⁸⁵ and in September of 2007 convicted Jeffs in Utah of an accomplice to rape charge after he arranged the marriage of a fourteen-year-old girl to her nineteen-year-old half cousin.¹⁸⁶ He was given a sentence of ten

¹⁷⁵ Brady G. Stuart, *Prophets and Polygamy: The Fundamentalist Church of Jesus Christ of Latter-Day Saints*, in AMOS N. GUIORA, FREEDOM FROM RELIGION: RIGHTS AND NATIONAL SECURITY 163, 167 (2d ed. 2013).

¹⁷⁶ Stuart, *supra* note 175.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 166.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ AMOS N. GUIORA, FREEDOM FROM RELIGION: RIGHTS AND NATIONAL SECURITY 87 & n.27 (2d ed. 2013) [hereinafter FREEDOM FROM RELIGION].

years.¹⁸⁷ On July 27, 2010, the Utah Supreme Court, citing deficient jury instructions, reversed Jeffs' convictions and ordered a new trial.¹⁸⁸

Jeffs not only possesses spiritual power over the FLDS community, but also monetary power.¹⁸⁹ "The FLDS Church owns the vast majority of all the real estate and property where the members live[,] and the estimated value of the Church's land exceeds 100 million dollars."¹⁹⁰ Members who want to remain with their families in the community have no choice but to obey every word of their prophet.¹⁹¹ For most FLDS members, "the pressure of losing their heavenly blessing, as well as their entire temporal well being, forces them to obey every word Jeffs utters."¹⁹² "Jeffs further increased the isolation of his members when he told them to remove their children from public schools[,] "¹⁹³ causing the school district population to drop from 1,200 students to merely 250 pupils.¹⁹⁴ "Jeffs ordered the students to be home schooled, where their curriculum consisted of recorded lectures by Jeffs regarding religion and his view of the world, rather than normal topics such as math, English, and science."¹⁹⁵

As the British Columbia Supreme Court highlights, the FLDS community places little to no emphasis on schooling, leaving many residents without adequate life skills to survive outside of their isolated community.¹⁹⁶ During testimony, Susie Barlow exemplified the phenomenon of the FLDS's devaluation of education:

After marrying Leonard I was unable to complete the ninth grade. It was important for me to finish high school, but I found that impossible as a young wife, expected to obediently take care of a FLDS household. My experience was very typical for an FLDS child. In fact I know very few FLDS boys who were able to go beyond eighth grade because they had to go to work to earn money for their families and the Prophet. Most girls don't go much past ninth grade, and some don't make it that far if they get married.¹⁹⁷

¹⁸⁷ Stuart, *supra* note 175, at 166.

¹⁸⁸ Daniel B. Wood, *Warren Jeffs: Utah court overturns polygamist's rape conviction*, CHRISTIAN SCI. MONITOR (July 27, 2010), <http://www.csmonitor.com/USA/Justice/2010/0727/Warren-Jeffs-Utah-court-overturns-polygamist-s-rape-conviction>.

¹⁸⁹ Stuart, *supra* note 175.

¹⁹⁰ *Id.* at 167-68.

¹⁹¹ *Id.* at 168.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, para. 667(l)(i) (Can.). *See* [Affidavit at para. 18].

Carolyn Jessop, another female member of the FLDS community, explains her encounter with the negative stereotyping of members who wish to attain a higher education:

[Q] Now, you mentioned you were originally pulled out of school at 8th grade. Was that typical for the girls in your community?

[A] Oh, very typical. Some of them got pulled out at 12, 7th grade. I mean, education is not really a necessity for a woman. The thing that was really important is understanding how to become a mother, how to raise children, how to raise obedient children, and to make sure that your heart's in the proper place and where it needs to be. Those are the things that really matter. And sometimes fighting for an education is seen as absolute selfishness. It's also viewed as - or can be viewed as contamination, because if you go out into the world to get a college education what - that to me was always referred to as you just walked through a barnyard and you came back into the house with manure all over your feet. And everybody knows it. Everybody knows you've been contaminated in those areas.¹⁹⁸

However, Christine Wayman offered a very different perspective of her upbringing as a child in a polygamous household:

Growing up in a polygamous family did not make me a deprived person, like some people have thought it does. I have parties, play volleyball, soccer and basketball, go to ball games, watch television and have a computer. I received an education and am like any other American citizen. . . .¹⁹⁹

During the same time as the devaluation of education, “Jeffs also formed a group of men known as ‘Helaman’s Army,’ referencing a group of holy soldiers from the scriptures, the *Book of Mormon*. This group [entered] members’ homes and searched for anything deemed unholy or discouraged by the church[,]” such as most secular books, including “children’s books in which animals had human characteristics and, in some cases, radios, TVs, and computers.”²⁰⁰ If “Helaman’s Army” found anything unholy, they disciplined members accordingly.²⁰¹

Jeffs also highly discouraged members from talking with people who were not of their faith.

This intense isolation increased Jeffs’ power.”²⁰² Even those who wished to escape Jeffs’ omnipotent power remained “hundreds of miles from most help,

¹⁹⁸ *Id.* at para. 667(l)(ii). *See* [Transcript, 12 Jan. 2011, p. 8, II. 10-29].

¹⁹⁹ *Id.* at para. 691(b)(i).

²⁰⁰ Stuart, *supra* note 175, at 168.

²⁰¹ *Id.*

²⁰² *Id.*

lacked education outside of Jeffs' curriculum, and had no means of supporting themselves without the church and community.²⁰³

Teresa Wall explains the stifling atmosphere and the extreme secrecy of the FLDS community:

[A] We did not really have anything to do with our neighbours. And - I don't know, I never really had to explain that. We never really had anything to do with anybody outside of the FLDS. So there was no - nobody asking how come you have three moms. We weren't allowed to even play with the neighbour kids, like that was considered you know a big no-no. And for the most part growing up we were terrified that if we spoke to anybody outside of the group that we could get taken away or that our father could get arrested and taken away.

[Q] Why were you terrified? Who was –

[A] In school, in church, Sunday school, teachings from your parents, you know, you're always taught to be very careful and secretive about your family and how many wives your father might have or.

[Q] What were you told about people outside?

[A] That they were gentiles they call them, and I'm sure you've heard several of us talk about them being gentiles and that they were wicked and evil and that they will - all of them will try and hurt you in some way or another. So naturally you know many people have asked me since I've left why do people stay there. Why - like, why do they continue to stay there when they could leave, and it's they're scared.²⁰⁴

Lastly, Brent Jeffs further describes his lack of exposure to the outside world as a member of the FLDS community:

No exposure to the outside world. They didn't want any exposure because having exposure to the outside world meant that you might form a different opinion of the church. You might have any inkling of curiosity that you might want to you know find out what is really out there. So they kept us extremely secluded within those walls to keep our minds narrow and not being able to wander out and figure out what is out there.²⁰⁵

²⁰³ See GUIORA, FREEDOM FROM RELIGION, *supra* note 186, at 63, 132. Whether that threat is more or less, greater or smaller than threats posed by domestic, homegrown Islamic terrorism is a matter of interpretation, speculation and debate. Yet, the Fundamentalist Latter Day Saints religious extremists undeniably posed a threat to their own membership. It is both viable and palpable.

²⁰⁴ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, para. 667(f)(i) (Can.). See [Transcript, 8 Dec. 2010, p.50, I.22 – p. 51, I. 6 (video affidavit)].

²⁰⁵ *Id.* at para. 667(f)(ii). See [Transcript, 5 Jan. 2011, p. 72, II. 2 – 13 (video affidavit)].

VIII. INTERVIEWS²⁰⁶

Over the fall 2012 and winter 2013, Guiora conducted a number of personal interviews with male and female former FLDS members who recently left the Church and relocated to the Salt Lake City area. Their ages ranged from late teens to mid-forties. The conversations, which took place over the course of many hours, were painful, revealing, deeply emotional and immensely important in understanding the regime of fear imposed by Jeffs, regardless of his physical location. The individuals were remarkably forthcoming in their descriptions of the FLDS culture and how they had, prior to leaving, been deeply committed to the faith and its “way of life.” In the meetings, Guiora guaranteed anonymity. In their presence, he took hand-written notes (which he did not share with them) in an effort to capture both the individual’s point and its relationship to previous comments made by other interviewees. All notes are in Guiora’s personal records.

With one exception, all those interviewed indicated that they would never, under any condition, return to the FLDS community. One, in remarkable candor, stated that under the correct circumstance she would weigh with the utmost seriousness the possibility of returning. She stated this in spite of equating—in her own words—Warren Jeffs to Hitler and knowing that friends currently living in the FLDS community describe the atmosphere as resembling “terrorism.” In spite of acknowledging the immense harms Jeffs caused to both her family and the FLDS community, she would willingly go back if her husband, who Jeffs forced to leave the community in order to repent for unspecified sins that he committed, was permitted to return.

As part of the repentance process, the husband cannot contact any family members. Important to note, in spite of Jeffs’ incarceration in Texas and her husband’s probable residence in Idaho, he refuses to contact her because of Jeffs’ “regime of fear.” Thus, her husband ultimately chooses his faith over his family. Nevertheless, in spite of her clearly expressed anger at her husband, the woman refused to reject a possible return to the FLDS community if she could reconcile with her husband.

In seeking to better understand the motivation for willing to engage in conduct that endangers, she made it clear that “in spite all the in spites” her commitment to FLDS (not to Jeffs), remains unwavering. At first blush her willingness came as a surprise; yet upon further conversation with her, other former FLDS members and outside experts, her response makes sense. In contrast to those who suffer from Stockholm Syndrome, FLDS members do not have a normative previous world-view as a distinct point

²⁰⁶ The following section reflects an accurate synopsis of the different perspectives/opinions of ex-members of the FLDS community interviewed [hereinafter Guiora Interviews with Ex-Members of FLDS]. All factual assertions in section VIII come from this interview project.

of reference. As suggested by a thoughtful non-FLDS member who has long studied the community, members only know the FLDS culture and do not have a suitable comparison paradigm.

The FLDS's insularity remains integral to the harm discussion. The inherent danger of insularity is that conduct deemed harmful by "outside" society has been presented to the group as necessary and essential in seeking to please the leader who acts on behalf of the divine. In creating a paradigm predicated on "glory to God" or "honoring the leader," the leader ensures loyalty, subservience and unquestioning conduct. Additionally, FLDS leaders squash any signs of members' emotions, only permitting feelings for religion. Those who have the temerity to question the leader, or are perceived as questioning, are subject to punishment and viewed as apostates who must be educated.

In the FLDS culture, Jeffs punishes members who question his authority; whether the person actually questioned Jeffs' leadership is irrelevant. They are exiled for an unlimited period of time to be determined exclusively by Jeffs. By destroying family units, Jeffs fosters total fear for authority in the FLDS community. Jeffs causes extraordinary social, personal and familial damage; nevertheless, in the "absolute" model Jeffs created, individuals designated for "exile" accept their "sentence" without question, in spite of the unimaginable pain. The woman's pain when her husband informed his family that he had been deemed "unworthy," and therefore must immediately leave, was both stark and graphic.

Nevertheless, pain caused by families torn apart by order of the Prophet fails to convince FLDS members to reject the "unworthy" label and refuse the order to separate. As discussed below, that is, tragically, not the only order that imposes harm on faith members who, in an overwhelming majority of instances, willingly and unquestioningly obey the Prophet's orders even when they result in harm to children and adults alike. In other words, FLDS beliefs result in violations of the law and direct harm to members alike. Furthermore, if parents question Jeffs' authority and the possible harm his dictates could bring to their children, the response to the questioning member is that the "devil is in your brain." Precisely because individual members and the community at large cannot protect themselves, and more importantly their children, from harmful conduct inherent to the FLDS faith as dictated by Jeffs, the state must intercede on behalf of those who are, truly in harm's way.

Jeffs creates steep individual cost to FLDS members when he deems them unworthy, which culminates in the destruction of families. For instance, Jeffs deemed an 18-year-old interviewee unworthy, and her mother, who Jeffs believed worthy, refused to come to her daughter's defense, indicating clear preference for the FLDS church above the well-being of her child. Furthermore, FLDS members exact punishment from an unworthy wife through her children, often physically and mentally abusing

them until the children pressure their mother to change her deviant behavior.

As a result, in the name of obedience to Jeffs' dictates, parents violate their obligation to protect their children and engage in behavior that directly harms them. Parents may suggest their conduct is not intended to harm their children, emphasizing their actions are predicated on devotion to faith and respect for the dictates of their faith leader, although the result is, clearly, harmful.

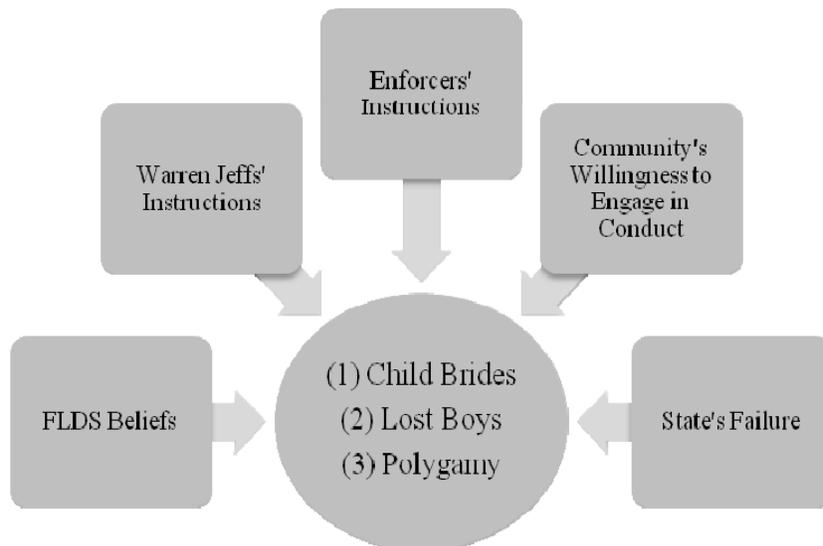
IX. FLDS AND HARM

We identify three distinct harms that pervade modern day FLDS culture: child-brides, lost boys and polygamy. Often FLDS members exact the three distinct harms through verbal, sexual, or physical abuse.²⁰⁷ In addition to causing harm to members, all three distinct harms directly violate the law, yet leaders practice all three with impunity on a regular basis in accordance with FLDS beliefs, Jeffs' instructions, and the imposition of the instructions by enforcers. The willingness of community members to engage in this conduct, and the state's failure to act, in an institutionalized manner, results in an overall failure to protect the vulnerable.²⁰⁸ Extensive interviews with former FLDS members highlighted the powerful convergence between the three distinct harms/crimes and the five steps required for their occurrence.²⁰⁹ We focus on the convergence between the two forces (crimes) and facilitation in the pages to come.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*



The perfect convergence between the three crimes: underage marriage, abandoned sons, polygamy, and the five facilitators pose a clear and present danger to the vulnerable members of a closed group. As codified in child endangerment laws in numerous states, the parent's primary responsibility is to provide for and protect his children.²¹⁰ The laws²¹¹ dictate a clear parental responsibility and the penalties associated with endangering one's child. Legislatures codified child endangerment statutes out of recognition of the failure of many parents to adequately, competently and consistently provide for their children.²¹² The state assumes a risk in penalizing parents; as seen in the Texas raid, evidence proves problematic, and the state is not necessarily equipped to "step into the shoes" of parents who endanger their children.²¹³

The interviews clearly showed the extraordinary control Jeffs exercised over the community, remarkably in spite of the lack of his physical presence. In addressing this issue, one interviewee commented that for many community members hearing his voice (an issue to be subsequently addressed) provided sufficient cause for acting in accordance with his demands and acceding to new Revelations.²¹⁴ These new Revelations espoused an end of the world prophecy on December 31, 2012, the removal of eight-year-old girls from their parents' home in order to prepare them for

²¹⁰ *Id.*

²¹¹ *See infra* Appendix A.

²¹² *See infra* Appendix A.

²¹³ Stuart, *supra* note 175, at 166-67.

²¹⁴ Guiora Interviews with Ex-Members of FLDS, *supra* note 206.

their future role as a sister wife, the transfer of newborn babies to new caretakers who subsequently rename them in order to erase their self-identity, and only fifteen ‘worthy’ men were permitted to impregnate women in the FLDS community (the woman’s husband and others forcibly hold down his wife as one of the fifteen men rapes her).²¹⁵ The willingness to conform is of particular note when it directly harms individuals and families alike; unquestioned obedience culminates in destruction of families, underage marriage and shunning of particular individuals accused of crimes/sins.²¹⁶ As noted by the individuals who Guiora met, the overwhelming majority of faith members accept, unquestioningly, Jeffs’ commands.²¹⁷

Rebellion is, necessarily, highly secretive, furtive and modest. One married couple engaged in sexual relations in spite of Jeffs’ edict that stated only fifteen hand-chosen males could impregnate FLDS women (sexual relations, according to FLDS dictates, are exclusively for the purpose of impregnating women).²¹⁸ Another engaged in foreplay that did not culminate in full sexual relations; others surfed the Internet (strictly forbidden); another (in his words) partied (i.e. consumed alcohol, flirted with non FLDS girls); and others used birth control measures (strictly forbidden).²¹⁹ Important to note, while the married couple felt comfortable in telling me they engaged in full sexual relations using condoms for birth control, they chose not to answer my question regarding how and where they purchased it.²²⁰ The interviewees commented that other members with whom they were acquainted also engaged in “illicit” conduct; that said, they noted that while the conduct contradicted Jeffs’ orders, they were not indicative of widespread, open rebellion.²²¹ They also noted, with irony, the pleasure they received from engaging in such acts, however minor they might seem to an outsider.²²²

That observation highlights, unintentionally, the combination of Jeffs’ control, enforcement by his handpicked “trusted” bishops, and the fear that other community members might “report” conduct that contradicts revelations and orders.²²³

²¹⁵ *See id.* Multiple interviewees and subject matter experts informed Guiora of Jeffs’ most recent Revelations.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

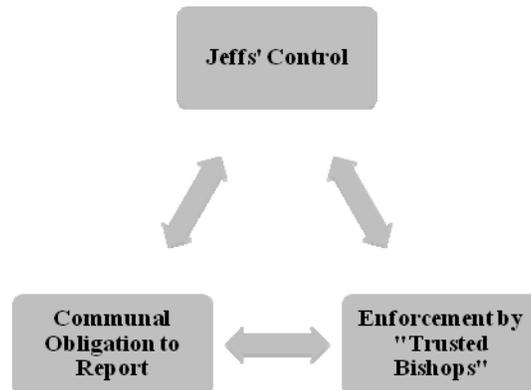
²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*



That triangle ensures obedience and control; the methodology harkens to “reporting” mechanisms implemented by Mao Tse-tung whereby children reported to the authorities regarding parental misdeeds.²²⁴ Those interviewed repeatedly emphasized fear predicated on the all-knowing and all-seeing Warren Jeffs, the constant state of uncertainty regarding correct or incorrect conduct, and the powerful consequences if Jeffs determined an individual “unworthy.”²²⁵

Those interviewed repeatedly emphasized the concept of “unworthy” as essential to understanding the FLDS culture because an individual deemed “unworthy” suffered enormous repercussions: banishment from the community in order to repent without an explanation of the digression or timeframe when one can return (life in limbo), complete alienation from one’s family, loss of ability to buy food in the FLDS “storehouse” (resulting in the unworthy having to shop in real stores where they must pay for their merchandise), denial of food given to them by FLDS members from the “storehouse,” and confinement of women to “houses of hiding” where they remain isolated from the community and it remains unclear whether they reside against their will in a state of sedation.²²⁶ Forty-three women reportedly live in these “houses of hiding.”²²⁷

Due to the ongoing abuses in the FLDS community, interviewees also described the recent phenomenon of members—men and women alike—committing suicide. The suicides often result from an utter sense of helplessness inside of the community, or from their unworthy designation

²²⁴ *Id.* Mao Tse-tung was a “pre-eminent revolutionary theorist, political leader, and statesmen of Communist China.” *Flawed icon of China’s resurgence*, CNN, <http://www.cnn.com/SPECIALS/1999/china.50/inside.china/profiles/mao.tsetung/> last visited (Jan. 26, 2014).

²²⁵ Guiora Interviews with Ex-Members of FLDS, *supra* note 206.

²²⁶ *Id.*

²²⁷ *Id.*

and the accompanying feelings of worthlessness.

A. Child Abuse And Neglect

“The essence of the parent-child relationship is the ‘duty to care’ obligation which the parent owes to the child. That duty, obligation, and responsibility has been one of the core essences of the human condition since time immemorial.”²²⁸

“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.”²²⁹

“And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord.”²³⁰

“But whoso shall offend one of these little ones [a child] which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea.”²³¹

Herein lays a fundamental tension: while Scripture unequivocally articulates parental responsibility with respect to children,²³² some religious extremists . . . endanger[] their children. That endangerment violates both 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 . . . violat[e] both the law and scripture. They do so in accordance with the religious teachings of an individual claiming to articulate a particular interpretation of their faith. [However,] [t]hat interpretation . . . endangers their children, which both scripture and the law obligate them to protect. That [being] said, there are

²²⁸ Guiora, *Protecting the Unprotected*, supra note 3, at 400.

²²⁹ *1 Timothy* 5:8 (King James).

²³⁰ *Ephesians* 6:4 (King James).

²³¹ *Matthew* 18:6 (King James) (emphasis omitted).

²³² “See that you do not despise one of these little ones. For I tell you that in heaven their angels always see the face of my Father who is in heaven.” *Matthew* 18:10 (ESV); “Whoever causes one of these little ones who believe in me to sin, it would be better for him if a great millstone were hung around his neck and he were thrown into the sea.” *Mark* 9:42 (ESV); “Behold, children are a heritage from the Lord, the fruit of the womb a reward.” *Psalms* 127:3 (ESV); “It would be better for him if a millstone were hung round his neck and he were cast into the sea than that he should cause one of these little ones to sin.” *Luke* 17:2 (ESV); “And the King will answer them, ‘Truly, I say to you, as you did it to one of the least of these my brothers, you did it to me.’” *Matthew* 25:40 (ESV); “But whoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone fastened around his neck and to be drowned in the depth of the sea.” *Matthew* 18:6 (ESV).

“obscure laws in many states that let parents rely on prayer, rather than medicine, to heal sick children.”²³³

Though God tested Abraham with respect to the sacrifice of his son, Isaac, the sacrifice (... not brought to fruition)... [r]esult[ed] [from] a direct interaction between God and Abraham. [M]odern day religious extremism [that poses] endangerment [to] children [does] not [exist] 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*[...]. . . [thus, differing it] fundamentally and philosophically . . . from the original sacrifice. Unlike Abraham, who ultimately did *not* sacrifice Isaac—for God ordered him to not do so—religious extremists *do* endanger their children.²³⁴

In addition to the child endangerment posed by polygamy, plural marriage significantly impacts the bonding time between the parents and the child.²³⁵ As seen in the recent British Columbia Supreme Court decision, polygamy in the FLDS religion exposes children to numerous development deficiencies, ranging from child brides, parental neglect, competition for attention, and underage sex.²³⁶ The accumulation of evidence led the British Columbia Supreme Court to summarize the following harm caused by polygamy:

Children in polygynous families face higher infant mortality, even controlling for economic status and other relevant variables. They tend to suffer more emotional, behavioural and physical problems, as well as lower educational achievement. These outcomes are likely the result of higher levels of conflict, emotional stress and tension in polygynous families. In particular, rivalry and jealousy among co-wives can cause significant emotional problems for their children. The inability of fathers to give sufficient affection and disciplinary attention to all of their children can further reduce children's emotional security. Children are also at enhanced risk of psychological and physical abuse and neglect.

Early marriage for girls is common, frequently to significantly older men. The resultant early sexual activity, pregnancies and childbirth have negative health implications for girls and also significantly limit their socio-economic development. Shortened inter-birth intervals pose a heightened risk of problems for both mother and child.

The sex ratio imbalance inherent in polygyny means that young men are forced out of polygamous communities to sustain the ability of senior men to accumulate more wives. These young men and boys often receive limited

²³³ Guiora, *Protecting the Unprotected*, *supra* note 3, at 400.

²³⁴ *Id.* at 392.

²³⁵ See *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, para. 783 (Can.) (describing the inability of fathers to give sufficient attention and affection to all of their children).

²³⁶ *Id.* at paras. 783-86.

education as a result, and must navigate their way outside their communities with few life skills and little social support.

Another significant harm to children is their exposure to, and potential internalization of, harmful gender stereotypes.²³⁷

Furthermore, Dr. Rose McDermott, a professor of political science at Brown University who studied polygyny for ten years, offered further evidence of polygamy's harm to children.²³⁸ After reviewing hundreds of articles and books on polygyny, she resolutely concluded:

Children of polygynous unions have worse outcomes than their monogamously born counterparts, as measured in a variety of ways. They face a higher risk of mortality. Young girls are often married to much older men and engage in early sexual behaviour, which has repercussions for their life expectancy and physical well-being. Where girls give birth frequently, shortened inter-birth intervals pose a heightened risk for various problems which can affect both the mother and the child.²³⁹

The British Columbia decision also brought polygamy's detrimental affect on children to life in numerous, vivid accounts from ex-FLDS members.²⁴⁰ For instance, Sarah Hammon testified about the harmful neglect she experienced as a product of a polygamous relationship in which her father married nineteen wives and produced seventy-five offspring:

[Q] What was your relationship with your father like?

[A] I didn't have a relationship with my dad. He didn't know my name or who my mother was or even that I was his child unless I was in the house with him. And that was for 13 years that I lived with him. . . .

[Q] . . . I wonder if you could speak to again . . . the difficulty of maintaining close relationships in - or developing close relationships in a family as large as the kind of family you grew up with?

[A] Yeah, when you have that many people primary relationship around you all the time - in an average nuclear family there is a mother, the father, and, you know, maybe two or three siblings, and that's a good sized family. And then you know if you've got step-siblings and stuff that's sort of on the fringe, but you've got your nuclear family. When you've got 30 people, 30 siblings and then 11 mothers in one home it's enough to make your brain explode. You cannot develop close bonded relationships with that many people. I have so few, you know, real memories of my full siblings because there's so many distractions, so many other people, so much other stuff going on around me that I never really formed a bond. And today I have trouble developing close

²³⁷ *Id.* (paragraph numbering omitted).

²³⁸ *Id.* at para. 580.

²³⁹ *Id.* at para. 585.

²⁴⁰ *Id.* at paras. 666-67.

relationships with people because I just - it's like I have my bubble. If anyone threatens to pop it I just roll away.

[Q] And did that also impact how you felt in terms of your value as a child?

[A] Absolutely. Yeah. I felt very lost in the family. Like a number more than, you know, a valuable member of it.²⁴¹

Brent Jeffs similarly describes the painful abuse and neglect of his polygamous upbringing, in a household where his father had three wives and a total of twenty children:

[Q] And what was it like living in that house?

[A] For me it was nothing but chaos and yelling and screaming and everyone fighting for attention and never getting it. And - there was a few good times obviously when it was good. My family - my dad always taught early on to - to be yourself and never fall short of that, so we were a little bit different than most families but still there was a lot of chaos and it was extremely hard to try and get any attention from your parents because there were so many of you. And then also you had to deal with the other moms and their jealousy toward the - you know, the other wives, and a lot of the times there was - even for me growing up there was a lot of abuse from the other moms, because they resented me because, you know, I was my mom's kid. So that was extremely tough to deal with in growing up and having the other moms beat me all the time because of who I was.²⁴²

While the above examples depict negative childhood experiences in polygamous families, it is important to note that the Court also offered a few counterexamples of beneficial upbringings within the community. Witness No. 8 stated:

I grew up in a large plural family. I have many mothers, a myriad of brothers and sisters, and one father. And while it would be years before I would hear terms like "traditional family" and the "nuclear family", I grew up in what I would term the "perfect family". Is that to say we were perfect? No, just that together we had something, that as a child, I instinctively knew was special - a camaraderie and bond, a richness of people, an "unloneliness" that when I became an adult and made forays into the broader society I saw was missing in so many of the lives of those I got to know (at para. 7).²⁴³

While we primarily emphasize child brides, understanding the

²⁴¹ *Id.* at para. 667(a)(i). See [Transcript, 8 Dec. 2010, p. 67, II. 5 – 11; p. 83, 1.33 – p.84, I. 14 (video affidavit)].

²⁴² *Id.* at para. 667(a)(iii). See [Transcript, 5 Jan. 2011, p. 65, II. 17 – 40 (video affidavit)].

²⁴³ *Id.* at para. 691(a)(i).

institution of polygamy proves essential to comprehending how religion endangers children. In the FLDS community, children belong to the church.²⁴⁴

From a theological perspective, polygamy as practiced by FLDS is an essential tenet of how FLDS members articulate and practice their faith. The FLDS Church perceives itself as the “true” Mormon Church; and asserts that its members practice what the prophet Joseph Smith *truly* believed.²⁴⁵

Child brides in plural marriages ensure obedience and subservience; “needless to say, the practice involves sexual contact between adult males and under-age girls.”²⁴⁶ Furthermore, according to a former FLDS member who Guiora interviewed, female rape often occurs in the presence of other men.²⁴⁷

Sexual contact with a minor violates the law and should result in criminal liability. “FLDS members violate the law when they [conduct] sexual relations with underage girls—the child brides.”²⁴⁸ As discussed below,

FLDS parents *do* endanger their children, which raises profoundly important legal, moral and theological questions pertaining to the essence of two relationships: parent-child and State-individual. The question before us is[:] who protects the otherwise unprotected[?] [T]he question—which is complicated in and of itself [becomes] exponentially more complex when framed in a religious paradigm.²⁴⁹

B. Child Brides

FLDS leaders force adolescent girls, perhaps the best-known victims of polygamy in the FLDS community, to marry significantly older, married men.²⁵⁰ “These girls lack a meaningful choice in deciding whether to get married; they have been [indoctrinated that] the world outside their community is evil.”²⁵¹ Dr. Shoshana Grossbard, an expert witness and

²⁴⁴ See e.g., Guiora, *Protecting the Unprotected*, *supra* note 3, at 391-92 (discussing the ways children’s lives are controlled “in the name of FLDS religious doctrine” within the community).

²⁴⁵ *Id.* at 392.

²⁴⁶ *Id.*

²⁴⁷ Guiora Interviews with Ex-Members of FLDS, *supra* note 206.

²⁴⁸ Guiora, *Protecting the Unprotected*, *supra* note 3, at 392.

²⁴⁹ *Id.* at 392-93.

²⁵⁰ *Id.* at 403.

²⁵¹ *Id.*

Professor of Economics at San Diego State University,²⁵² found that child brides assume an important economic role in polygamous communities, as they are often treated more as commodities rather than human beings.²⁵³ As a result, young women lose all autonomy:

The natural economic consequence of polygamy is increased market value for women, though the women themselves do not realize the economic benefit of their greater value. Rather, women tend to be treated more like commodities in polygamous societies, and their freedom to manage their own economic circumstance and destiny is reduced.²⁵⁴

In addition to the negative economic consequences associated with the practice of child brides, Dr. Rebecca Cook, Chair of International Human Rights Law at the University of Toronto Law School,²⁵⁵ undertook a literature review of the harms of polygyny. She concluded that polygamy creates a natural power imbalance between the sexes:

Based on my review of various international instruments, case law, relevant literature, and case studies, the weight of authority leads to the conclusion that polygyny has detrimental effects on women, and on society more generally. Polygyny structures the marital relationship unequally on the basis of sex. A core right - the right to take additional spouses - is extended to one spouse (the husband), but not the other (the wife). This asymmetry is premised on sex and sex role stereotypes that ascribe to men and women different attributes and characteristics that ostensibly warrant an unequal distribution of rights and obligations in marriage. In addition to these inherent wrongs of discrimination against women, polygyny is often associated with a number of material and health harms, though these harms vary within and across different social and legal contexts.²⁵⁶

Furthermore, escaping from the marriage proves nearly impossible, as FLDS communities remain physically isolated.²⁵⁷ For example, Jane Kingston's father, Daniel Kingston, forced her to marry her uncle who was sixteen years older than her, and thereby became his fifteenth wife.²⁵⁸ "When Jane tried to escape the marriage, her father captured her and beat her until she lay unconscious."²⁵⁹ When Jane revived from the beating, she "walked seven miles to a gas station and called 9-1-1."²⁶⁰ While officials

²⁵² Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 595 (Can.).

²⁵³ *Id.* at para. 595.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at para. 561.

²⁵⁶ *Id.* at para. 602.

²⁵⁷ Guiora, *Protecting the Unprotected*, *supra* note 3, at 403.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

charged and convicted Jane's uncle, David Ortell Kingston, of incest and unlawful sexual conduct with a minor, the authorities failed to charge him with bigamy.²⁶¹

Susie Barlow exemplifies the harmful practice of child brides, when Jeffs forced her to marry a man thirty-five years her senior:

Warren Jeffs assigned me to enter into a "spiritual marriage" with my cousin when I was 16 years old. . . . My Husband, Leonard Barlow Senior, was 51-years old, having been born in 1950. I became his second wife on December 21, 2001. That day was supposed to be the shortest day in the year, but it was the longest for me.²⁶²

Additionally, Carolyn Jessop's parents physically held her under house arrest, in order to assure that she married a man thirty-two years older:

[A] My father and mother were very concerned that I may run and they decided to wake me up at 2:00 in the morning and tell me about the marriage and then not let me out of their sight until the marriage had happened.

. . .

[Q] Now, you've told us that you were assigned to marry Merrill Jessop. How was - how old was he at the time of your wedding?

[A] He was 50. He was 32 years older than me.

[Q] And so you were 18?

[A] I was 18. He was 50.

. . .

[Q] Did you have any thoughts about who was selected for you to marry?

[A] Yes, I did. When I went to high school I went to high school with around ten of his teenage daughters and I guess what you would classify as a clique. We ran in different cliques. . . . There was a lot of friction there. And so I was running in a taboo group to his daughters and all of a sudden one day I become their mother.²⁶³

Lastly, Rowena Mackert testifies about her arranged marriage to her stepbrother, a boy whom she loathed:

[Q] Can you tell us about your marriage, how it came about and how you found out about it?

²⁶¹ *Id.*

²⁶² *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, para. 667(b)(i) (Can.). *See* [Affidavit at para. 12].

²⁶³ *Id.* at para. 667(b)(ii). *See* [Transcript, 12 Jan. 2011, p. 17, ll. 14 – 18, p. 18, ll. 3 - 8, 15 – 20, 24 – 27].

[A] Okay. My father's fourth wife he married when I was 13 and she had a son that was 16. John and I hated each other. It was very clear. Everyone knew. At 3 o'clock in the morning on a Saturday morning - Sunday morning, actually. Saturday night was priesthood meeting for the men. And father got home from it and hours later my mother and he came to my bedroom, woke me up and told me that Uncle Leroy - Leroy Johnson had had a revelation and that I was getting married. I sat there stunned. I didn't want to get married. I just wanted out.

[Q] How old were you?

[A] I was 17. My father - my mother asked don't you want to know who you're supposed to marry, or who you're marrying, and I kind of looked in disbelief, you know, I really didn't want to know. Told me John, and John who, and I'm running down the list of all the Johns that I know and my father said Swaney and it was like a knife was stabbed through my heart. There was no love lost between the two of us. I was really headstrong and he was too.

I didn't get any sleep that night. The next day everyone went to church and I stayed home with John's mother and she rummaged through material to find something to make a wedding dress, and she and I spent Sunday afternoon and Monday morning making my wedding dress. . . . John got home from church probably about 5 o'clock in the afternoon, so I had been up for about 14 hours. And father called everyone down to the living room and told them that we were getting married. We got married the next afternoon.²⁶⁴

Despite the previous examples of harmful, arranged underage marriages, the Court also presented a few examples of positive polygamous marriages. These testimonies highlighted the benefit of having sister wives and simultaneously pursuing a meaningful career. Jennifer Zitting stated:

In addition, while living in a polygamist community, I met women who had the freedom to pursue high powered careers. Many women in the community held masters degrees in teaching and special education. Quite a few women had nursing degrees, the nurse practitioner who ran the clinic was a woman, and there was even a female lawyer. Even the women who stayed home accomplished feats that would amaze the average woman. I know one who raised 24 children, and did it well. I have noticed that these women have freedom that monogamous wives don't have because they are not 100% responsible for the care and feeding of their husbands. Some of the women don't take advantage of that freedom, but others of them take that opportunity and run with it (at para. 6).²⁶⁵

Although undoubtedly FLDS leaders force many underage girls—such as Jane, Rowena, Susie, and Carolyn—into marriage with much older men,

²⁶⁴ *Id.* at para. 667(b)(iii). [Transcript, 8 Dec. 2010, p. 7, II. 8 – 44, p. 8, II. 4 – 10 (video affidavit)].

²⁶⁵ *Id.* at para. 691(c)(i).

prosecuting the crime involves significant evidentiary barriers.²⁶⁶ “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.”²⁶⁷ Girls learn that the outside world is evil, and there is no safe person for them to turn to for help when they want to avoid entering a marriage.²⁶⁸ “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 after being beaten unconscious.”²⁶⁹ In addition, typically polygamists only record their first marriage with the state; therefore, the authorities have “no paper trail of the other marriages.”²⁷⁰ Finally, since the FLDS community straddles 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.”²⁷¹

C. *The Lost Boys*

Polygamy inevitably leads to a surplus of boys and a shortage of girls that has caused over 1,000 boys and men between ages thirteen and twenty-three to leave the FLDS community.²⁷² Critics of the FLDS purport that the banishment of these boys and young men, known as the “Lost Boys,” minimizes competition for young brides.²⁷³ The community explains to the boys that they have failed to meet the rigorous FLDS religious standards.²⁷⁴ The British Supreme Court cites Dr. Rose McDermott’s work on the “Lost Boys” phenomenon:

As for effects on men, Dr. McDermott notes that polygyny causes the proportion of young unmarried men to be high, up to a ratio of 150 men to 100 women. This leads to a need for a polygynist community (at least a closed one) to excise at least half of the junior boys, the so-called “Lost Boys”. “Junior boys who are thrown out of such societies at much greater rates in order to make a sexually asymmetrical system viable, often receive less education and achieve lower levels of employment, as they are forced onto a society with few skills and no social support” (at para. 33).

²⁶⁶ Guiora, *Protecting the Unprotected*, *supra* note 3, at 403.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 403-04.

²⁷³ *Id.* at 404.

²⁷⁴ *Id.*

Junior males who are unable to find wives represent “a class of largely poor, young, unmarried men who are statistically predisposed to violence” (at para. 33).²⁷⁵

Upon expulsion, the boys are unable to contact their parents because the Church prohibits parents from visiting their banished sons.²⁷⁶ The parents would risk eviction from their Church-owned homes if they violated this rule.²⁷⁷ Thus, the boys lack any financial or emotional support from their former communities and they find themselves in a world that they learned was “evil.”²⁷⁸ Furthermore, they lack education, money, and a place to live.²⁷⁹ As a result, many of these boys turn to alcohol and drugs.²⁸⁰ Frequently, up to twenty boys will share an apartment together, but the “lack of adult supervision facilitates their involvement in criminal behavior, including the underage use of alcohol, drugs and smoking.”²⁸¹

In Sarah Hammon’s testimony in front of the British Columbia Supreme Court, she speaks about the heartbreaking reality of the FLDS’s “Lost Boys”:

[A] Any time you have a closed society living in polygamy you’re going to go through these phases of lost boys and child brides. It’s going to have to happen in order to maintain polygamy. You either go towards monogamy or you go through these phases, and I don’t see it how it goes any other way. Because if one man has three wives there’s two men who have none, and that’s just what is going to happen. And, you know, girls and boys of the age that they start developing normal healthy relationships at 15, 16, 17 years old and start learning to relate to each other, the boys you know they can’t - it’s hands off because this girl might belong - potentially belong to a 50-year-old man, and the girls the same thing. I can’t be friends with him because I might get placed with somebody else and that is just going to break my heart. They never - not only are they told not to do it but they just - they never can anyway because it’s just impossible to develop those relationships because they know they’re a dead end.

[Q] And what happens with the boys, the ones that - that can’t get wives?

[A] They end up - you know, I have a theory that even before they know - even before they become a lost boy as a group, lost boys as a group, that they have this sense already there is not going to be a partner for me. There will be no

²⁷⁵ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paras. 586-87 (Can.).

²⁷⁶ Guiora, *Protecting the Unprotected*, supra note 3, at 404.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* (citing Dan Simon & Amanda Townsend, Warren Jeffs “Lost Boys” Find Themselves in Strange World (Sept. 7, 2007), CNN.COM <http://www.cnn.com/2007/us/09/07/lost.boys/index.html>).

²⁸⁰ Guiora, *Protecting the Unprotected*, supra note 3, at 404.

²⁸¹ *Id.*

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partner for me. This guy has five wives, this guy has seven, this guy has eleven.

[Q] And can they exist in your community without a partner?

[A] What normal man would want to? No, there's not an excess of single men in the community. They have to leave, and how devastating. And that's another thing that so many people think the women are the victims, but there's victims everywhere. There's a mesh of victims because of this because the men have been taught since they were little boys that in order to go to heaven they have to have three wives. So here is a man that is damned just because of bad math.

[Q] Right. Right.

[A] How heartbreaking. How heartbreaking for these guys, you know, they have done nothing wrong except for believe this thing that their parents, the people that they trust most, have taught them. And they're going to hell because of bad math. It's wrong.²⁸²

Richard Ream also explains his forced ejection from the FLDS community:

[Q] And you were 19, is that right, Rich, when you left?

[A] I was 19 and a half, I was almost 20.

[Q] And you described to us some of the conflict you'd been having with Warren [Jeffs] right before you left. Is that really what triggered the decision to walk away entirely?

[A] No. Nothing ever triggers that. And that is a life changing decision believe it or not. When you're getting ready to slam the door on everything that is familiar to you, I mean, think about it, that's going to cause some upset up in here. It might make you question your own sanity a little bit down the road too. But there were a few contributing factors, not the least of which is that I felt like I was in a dead-end life, one, because of my previous sins, shortcomings, weaknesses. I was all but told point blank by Warren Jeffs that I was not eligible and would not be eligible for marriage in the FLDS because I had committed fornication. So there's a dead give-away right there, that you ain't going nowhere, you've pretty much climbed as high as you're gonna climb in this society, which wasn't appealing to me. I wanted the wife and the children and all of that what have you.²⁸³

Although state laws prevent 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. Similar to the prosecution of sexual abuse, prosecution

²⁸² Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 667(g)(i) (Can.). See [Transcript, 8 Dec. 2010, p. 80, I. 13 – p. 81, I. 23 (video affidavit)].

²⁸³ Id. at para. 667(g)(ii). See [Transcript, 7 Jan. 2011, p. 25, II. 7 – 37 (video affidavit)].

against parents for child abandonment faces 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.”²⁸⁴

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.”²⁸⁵ The suit alleged that older men kicked out the boys from the community because it would be easier for the older men to marry the younger girls.²⁸⁶ The parties settled the suit out of court:

the ‘lost boys’ received \$250,000 for housing, education and other assistance to help boys who leave the FLDS community. 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. The Lost Boys, and other homeless youth face numerous hurdles to survive 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. While the effects remain to be seen, the bill is [sic] undoubtedly represents an effort to facilitate the Lost Boys’ integration into society.²⁸⁷

X. THE BC SUPREME COURT

The decision by the BC Supreme Court is of immense importance; in an extraordinarily long, detailed and thorough opinion the Court compellingly puts to lie any assertion that polygamy is not a crime of harm. The question before the BC Supreme Court was as follows:

- a) Is section 293 of the *Criminal Code of Canada*²⁸⁸ consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

²⁸⁴ David 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_lif_e_they_knew/?page=full.

²⁸⁵ Sigman, *supra* note 8, at 182 & n. 666 (citing Pamela Manson, ‘Lost Boys’ File Suite Against FLDS Church, SALT LAKE TRIB., Aug. 28, 2004).

²⁸⁶ Sigman, *supra* note 8, at 182 & n.667, 167 n.557 (citing Complaint, Ream v. Jeffs, No. 040918237 (Utah Dist. Ct. Aug. 27, 2004).

²⁸⁷ Guiora, *Protecting the Unprotected*, *supra* note 3, at 405.

²⁸⁸ 293(1) Every one who

(a) practises or enters into or in any manner agrees or consents to practise or enter into
(i) any form of polygamy, or

b) What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?²⁸⁹

The Attorney General argued that polygamy constituted a crime of harm:

The Attorneys General and allied Interested Persons submit that the objective of s. 293 is, and always has been, the prevention of harm.

Parliament is entitled to criminalize conduct where there is a reasoned apprehension that it poses a risk of harm. The evidence on the reference demonstrates that polygamy is associated with significant and substantial harms to individuals, particularly women and children, and to society at large. These harms have been consistently recognized throughout history and across the globe.

The Attorneys General say that s. 293 is consistent with the *Charter*. It does not infringe any of the fundamental freedoms as alleged by the challengers of the law. Alternatively, to the extent that it does, any such infringements are demonstrably justified in a free and democratic society.²⁹⁰

On the alternative, the *Amicus* argued that polygamy did not constitute a crime of harm but, rather, acted as a form of religious freedom:

The *Amicus* and his associated Interested Persons submit that s. 293 is the product of anti-Mormon sentiment and is also intended to mandate a marital norm - monogamy - that has historically been inextricably bound up with mainstream Christianity.

The challengers urge caution in approaching the evidence with respect to harm. They say that what are cast as harms of polygamy are frequently contingent on other factors specific to a particular relationship or community. Care must thus

(ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage; or
(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),
is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or upon the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

See Reference re: Section 293 of the *Criminal Code of Canada*, 2011 BCSC 1588, para. 17 (Can.).

²⁸⁹ *Id.* at para. 16.

²⁹⁰ *Id.* at paras. 128-30 (paragraph numbers omitted).

be taken not to attribute consequences to the practice that over-reach the evidence. Polygamy, they say, is not *per se* harmful.

The challengers collectively contend that s. 293 trenches upon freedom of religion, expression, association, and equality as protected by the *Charter*. It is also inconsistent with the principles of fundamental justice guaranteed by s. 7. These infringements, they say, cannot be justified under s. 1.²⁹¹

As we wrote in the introduction, some suggest that the harm caused by polygamy is exaggerated; whether the source of that misconception stems from Hollywood or from assumptions regarding presumed benefits of “free love” and multiple sexual partners remains unclear. It is also unimportant. Both the Court and interviews conducted with individuals formerly in the FLDS community powerfully articulate that polygamy directly harms women and children.²⁹² Dr. Shoshana Grossbard²⁹³ articulates the inherent harm that accompanies the practice:

[T]he list of undesirable social features is so long that it is hard to escape the conclusion that some of these results are caused by the institution of polygamy. If only part of the undesirable results mentioned above will follow from the legalization of polygamy in Canada, it is sufficient reason to strongly oppose a legalized polygamy that may cause significant harm to women, children, and the men who love them.²⁹⁴

While the benefits of multiple sexual partners amongst unmarried individuals or childless couples are a matter of perspective, culture and opinion, the paradigm shifts once children are born. That being said, the harm to women residing in polygamous relationships is no less significant than the harm caused to children.

Men dominate the polygamous culture, which is predicated on strict religious codes and devoid of free will.²⁹⁵ Unlike communes or other alternative life-styles in which adults freely enter into based on rational decision making, the FLDS culture breeds total obedience to the Prophet, defined as articulating and expressing God’s will.²⁹⁶ Discussions with individuals who have left the community highlight the extraordinary difficulty both in leaving and integrating into a world they know little, if anything, about.²⁹⁷ Rearticulated: for the overwhelming majority of FLDS

²⁹¹ *Id.* at paras. 131-33 (paragraph numbers omitted).

²⁹² Fry, *supra* note 4, at 973-75, 981-84.

²⁹³ Section 293 of the *Criminal Code of Canada*, 2011 BCSC 1588, para. 588 (Can.)

²⁹⁴ *Id.* at para. 595(d).

²⁹⁵ See Fry, *supra* note 4, at 971-73 (describing how a man must have three wives for salvation, that a woman must be married to a “righteous man” for salvation, and how the prophet chooses a husband for a woman according to a revelation from God).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 979-81; Guiora Interviews with Ex-Members of FLDS, *supra* note 206.

members, leaving the culture—even if they harbor furtive desire to do so—is all but impossible.

A woman's decision to leave the FLDS community is immensely complicated because of the uncertainty of whether her children will leave with her as well as the constant fear that Jeffs (regardless of his physical location) will order family dissolution, thereby separating spouses because they are "unworthy."²⁹⁸ While this article does not address the FLDS culture, understanding the harm caused by polygamy required a digression into additional aspects of the FLDS way of life. For that reason, it was important to examine both child brides and the lost boys. After all, a clear thread links the triangle that defines much of the FLDS culture: polygamy, child brides and lost boys reflect male dominance and absolute obedience to the Prophet.

Examining polygamy in the FLDS culture without recognizing its relationship to the other two staples misses the larger significance of polygamy. The FLDS not only live a life according to the faith as initially articulated by Joseph Smith and Brigham Young,²⁹⁹ but they must honor the wishes of the modern day Prophet, Warren Jeffs.³⁰⁰ Jeffs' paradigm is predicated on blind and total obedience, brooking no dissent.³⁰¹ An individual's price for ignoring Jeffs wishes comes at a steep personal and family price.³⁰² It is for that reason that we strongly concur with the British Columbia Supreme Court; the relationship between Jeffs mandates and the cost borne by women and children, doubtlessly, results in harm to both.

The testimony we incorporated from the British Columbia Court sheds powerful light on the ramifications and impact of polygamy. The lack of child-father relationship, the absolute subjugation of women to male desires and commands, and punishment meted out to children whose mother has fallen out of favor provide unequivocal affirmation of polygamy's harm.³⁰³ As a result of the harm, evidence presented by the Court shows that eradicating polygamy leads to numerous beneficial effects:

- a) Increased per-child parental investment, with the expected increase in the mental and physical wellbeing of children overall;

²⁹⁸ See Melanie Jones, *Warren Jeffs: Polygamous Leader Manipulates Sect From Prison as FLDS Splinters*, INT'L BUSINESS TIMES (Jan. 16, 2012, 2:56 PM), <http://www.ibtimes.com/warren-jeffs-polygamous-leader-manipulates-sect-prison-flds-splinters-396146> (noting that Willie Jessop, a former FLDS spokesman, has stated that Jeffs has dissolved marriages and split families).

²⁹⁹ See BBC, *supra* note 25 (describing Joseph Smith and Brigham Young in the history of the Mormon religion).

³⁰⁰ Jones, *supra* note 298.

³⁰¹ Nicholson, *supra* note 4.

³⁰² Fry, *supra* note 4, at 979-81.

³⁰³ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, para. 228-33 (Can.).

- b) Reduced social strife, conflict and crime expected from more uneven distribution of the opportunity to marry;
- c) Reduced average age gaps between husbands and wives, increasing equality in marriages;
- d) Reduction in sexual predation on young girls;
- e) Reducing incentives for male control over women and their reproductive capacity; and
- f) Consistency with Canada's international treaty and legal obligations.³⁰⁴

While we advocate, as previously noted, for alternative life-styles including same-sex marriage, we posit that on the condition of free choice. In other words, if two consenting adults of the same sex decide to engage in matrimonial union that is, for lack of better term, their business and their right. The subtext, however, is critical; the test is one of free will and voluntarily engaging in union. When one strips the glamorized version of polygamy as well as the chuckling over the advantages of multiple sexual partners away, the reality is one of dominance, rejection, harm and pain.

Years ago, the NFL star Lance Rentzel wrote an autobiography entitled "When All the Laughter Died in Sorrow".³⁰⁵ The book, painful and poignant, showed a candid assessment of an athlete blessed with extraordinary physical skills, immense charm and stunning good looks.³⁰⁶ However, Rentzel's world came crashing down when police arrested him for indecent exposure; while he played for a few years after his arrest, his career and personal life never truly rebounded.³⁰⁷ Rentzel remained the butt of jokes, perhaps reflecting societal discomfort with a star's weakness, or perhaps enjoying shooting a star down a few notches.

In the same vein as the responses to Rentzel, responses to polygamy range from jokes to discomfort to knowing winks. All three miss the essence, just as all the jokes regarding Rentzel missed the point. Both cases have harm, pain and rejection; there is nothing to smirk about when a polygamous father denies his children food because he wants to punish the mother for not respecting her sister bride. Similarly, the lack of a healthy relationship between a father and child comes at a steep price the latter will carry for life.

While, tragically, human history remains replete with examples of difficult, if not unsatisfying, relations between children and parents, testimony from the British Columbia Supreme Court unequivocally documents the inherent unhealthy — seemingly non-relationship — of

³⁰⁴ *Id.* at para. 1316.

³⁰⁵ J.R. Eggert, *Lance Rentzel: The Laughter Hasn't Died*, THE HARV. CRIMSON (Feb. 8, 1973), <http://www.thecrimson.com/article/1973/2/8/lance-rentzel-the-laughter-hasnt-died/>.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

polygamy. That harm analysis extends to the relationship between the spouses; both crucial expert testimony as well as interviews recounted in this article highlight the absolute control exercised by the male over his wives. The inevitable competition between sister-brides seeking to curry favor with the “father” significantly enhances the absolute domination of the man. The hierarchy is clear, as are the costs of questioning, much less disobeying the clear ground rules. The ground rules are, ultimately, at the core of the “polygamy as harm” argument; we note the absolute lack of free will at the heart of our analysis, which leads us to agree that the British Columbia Supreme Court correctly interprets the troubling reality of polygamy.

XI. FINAL WORD

While polygamy has long been defined as a crime, the British Columbia Supreme Court found it to be a “crime of harm.”³⁰⁸ To that end, we call on law enforcement officials, prosecutors and courts to recognize their responsibility to protect crimes’ victims. Polygamy is not abstract; it is a concrete crime with clear consequences for those forced to participate in it. Self-governance is not a viable option, and the state cannot turn a “blind eye” and leave insular communities the freedom to determine how to conduct their own affairs. That is particularly the case when the primary motivation for community behavior is predicated on total obedience to the Prophet who claims to speak on behalf of God. The extraordinary burden of obedience becomes powerfully exacerbated when punishment for disobedience is so extraordinarily steep and painful.

When state authorities fail to fulfill their obligation, they knowingly fail their duty; after all, it is the vulnerable who the state has the duty to protect even at the “cost” of impacting how religious people practice their faith.

[T]he salutary effects of the prohibition far outweigh the deleterious. The law seeks to advance the institution of monogamous marriage, a fundamental value in Western society from the earliest of times. It seeks to protect against the many harms which are reasonably apprehended to arise out of the practice of polygamy.³⁰⁹

In a balancing discussion, protecting the rights of “at risk” individuals is more important than protecting freedom of religion when that freedom so blatantly limits the freedoms and rights of individuals.

³⁰⁸ See generally *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (Can.).

³⁰⁹ *Id.* at para. 1350.

Appendix A

State Statute	Definition of Child Endangerment	Exceptions	Punishment
<p>California:³¹⁰ § 270. Failure to provide; parent; punishment; effect of custody; evidence; applicability of section; artificial insemination; treatment by spiritual means</p>	<p>If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child. . . This statute shall not be construed so as to relieve such parent from the criminal liability defined herein for such omission merely because the other parent of such child is legally entitled to the custody of such child nor because the other parent of such child or any other person or organization voluntarily or involuntarily furnishes such</p>		<p>[H]e or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.</p>

³¹⁰ CAL. PENAL CODE § 270 (West 2008).

	<p>necessary food, clothing, shelter or medical attendance or other remedial care for such child or undertakes to do so.</p>		
<p>Iowa:³¹¹ § 726.6. Child endangerment</p>	<p>1. A person who is the parent, guardian, or person having custody or control over a child or a minor under the age of eighteen with a mental or physical disability, or a person who is a member of the household in which a child or such a minor resides, commits child endangerment when the person does any of the following:</p> <p>a. Knowingly acts in a manner that creates a substantial risk to a child or minor’s physical, mental or emotional health or safety.</p> <p>b. By an intentional act or series</p>		<p>4. A person who commits child endangerment resulting in the death of a child or minor is guilty of a class “B” felony. Notwithstanding section 902.9, subsection 2, a person convicted of a violation of this subsection shall be confined for no more than fifty years.</p>

³¹¹ IOWA CODE ANN. § 726.6 (West Supp. 2012).

	<p>of intentional acts, uses unreasonable force, torture or cruelty that results in bodily injury, or that is intended to cause serious injury.</p> <p>c. By an intentional act or series of intentional acts, evidences unreasonable force, torture or cruelty which causes substantial mental or emotional harm to a child or minor.</p> <p>d. Willfully deprives a child or minor of necessary food, clothing, shelter, health care or supervision appropriate to the child or minor's age, when the person is reasonably able to make the necessary provisions and which deprivation substantially harms the child or minor's physical, mental or emotional health. For purposes of</p>		<p>5. A person who commits child endangerment resulting in serious injury to a child or minor is guilty of a class "C" felony.</p> <p>6. A person who commits child endangerment resulting in bodily injury to a child or minor or child endangerment in violation of subsection 1, paragraph "g", that does not result in a serious injury, is guilty of a class "D" felony.</p>
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	<p>this paragraph, the failure to provide specific medical treatment shall not for that reason alone be considered willful deprivation of health care if the person can show that such treatment would conflict with the tenets and practice of a recognized religious denomination of which the person is an adherent or member. This exception does not in any manner restrict the right of an interested party to petition the court on behalf of the best interest of the child or minor.</p> <p>e. Knowingly permits the continuing physical or sexual abuse of a child or minor. However, it is an affirmative defense to this subsection if the person had a reasonable apprehension that any action to</p>		<p>7. A person who commits child endangerment that is not subject to penalty under subsection 4, 5, or 6 is guilty of an aggravated misdemeanor.</p>
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	<p>stop the continuing abuse would result in substantial bodily harm to the person or the child or minor.</p> <p>f. Abandons the child or minor to fend for the child or minor's self, knowing that the child or minor is unable to do so.</p> <p>g. Knowingly permits a child or minor to be present at a location where amphetamine, its salts, isomers, or salts of isomers, or methamphetamine, its salts, isomers, or salts of isomers, is manufactured in violation of section 124.401, subsection 1, or where a product is possessed in violation of section 124.401, subsection 4.</p> <p>h. Knowingly allows a person custody or control of, or unsupervised access to a child or a</p>		
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	<p>minor after knowing the person is required to register or is on the sex offender registry as a sex offender under chapter 692A. . . .</p>		
<p>Minnesota:³¹² § 609.378. Neglect or endangerment of child</p>	<p>Subdivision 1. Persons guilty of neglect or endangerment. (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 (2) A parent, legal guardian, or</p>	<p>(b)(2) . This paragraph does not prevent a parent, legal guardian, or caretaker from causing or permitting a child to engage in activities that are appropriate to the child’s age, stage of development, and experience, or from selecting</p>	<p>(b)(2) . If the endangerment 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,</p>

³¹² MINN. STAT. ANN. § 609.378 (West 2009).

	<p>caretaker who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.</p> <p>(b) A parent, legal guardian, or caretaker who endangers the child's person or health by:</p> <p>(1) intentionally or recklessly causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death;</p> <p>or</p> <p>(2) knowingly causing or permitting the child to be present where any person is selling,</p>	<p>health care as defined in subdivision 1, paragraph (a).</p>	<p>or both.</p>
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	<p>manufacturing, possessing immediate precursors or chemical substances with intent to manufacture, or possessing a controlled substance</p> <p>(c) A person who intentionally or recklessly causes a child under 14 years of age to be placed in a situation likely to substantially harm the child’s physical health or cause the child’s death as a result of the child’s access to a loaded firearm is guilty of child endangerment and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.</p>		
<p>New York:³¹³ § 260.10</p>	<p>A person is guilty of endangering the welfare of a child when:</p>	<p>3. A person is not guilty of the</p>	<p>Endangering the welfare of a child is</p>

³¹³ N.Y. PENAL LAW § 260.10 (McKinney Supp. 2013).

<p>Endangering the welfare of a child</p>	<p>1. He or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his or her life or health; or</p> <p>2. Being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he or she fails or refuses to exercise reasonable diligence in the control of such child to prevent him or her from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," as those terms are defined in articles ten, three and</p>	<p>provisions of this section when he or she engages in the conduct described in subdivision one of section 260.00 of this article: (a) with the intent to wholly abandon the child by relinquishing responsibility for and right to the care and custody of such child; (b) with the intent that the child be safe from physical injury and cared for in an appropriate manner;</p>	<p>a class A misdemeanor.</p>
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	seven of the family court act.	(c) the child is left with an appropriate person, or in a suitable location and the person who leaves the child promptly notifies an appropriate person of the child's location; and (d) the child is not more than thirty days old.	
<p>Tennessee:³¹⁴</p> <p>§ 39-15-402. Aggravated child abuse and neglect; or child endangerment</p>	<p>(a) A person commits the offense of aggravated child abuse, aggravated child neglect or aggravated child endangerment, who commits child abuse, as defined in § 39-15-401(a); child neglect, as defined in § 39-15-</p>	<p>(c) Nothing in this part shall be construed to mean a child is abused, neglected, or endangered, or abused, neglected</p>	<p>(b) A violation of this section is a Class B felony; provided, however, that, if the abused, neglected or endangered child is</p>

³¹⁴ TENN. CODE ANN. § 39-15-402 (LexisNexis Supp. 2010).

	<p>401(b); or child endangerment, as defined in § 39-15-401(c) and:</p> <p>(1) The act of abuse, neglect or endangerment results in serious bodily injury to the child;</p> <p>(2) A deadly weapon, dangerous instrumentality, controlled substance or controlled substance analogue is used to accomplish the act of abuse, neglect or endangerment;</p> <p>(3) The act of abuse, neglect or endangerment was especially heinous, atrocious or cruel, or involved the infliction of torture to the victim.</p>	<p>or endangered in an aggravated manner, for the sole reason the child is being provided treatment by spiritual means through prayer alone, in accordance with the tenets or practices of a recognized church or religious denomination by a duly accredited practitioner of the recognized church or religious denomination, in lieu of medical or</p>	<p>eight (8) years of age or less, or is vulnerable because the victim is mentally defective, mentally incapacitated or suffers from a physical disability, the penalty is a Class A felony.</p>
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		surgical treatment.	
<p>Utah:³¹⁵</p> <p>§ 76-5-112.5.</p> <p>Endangerment of a child or vulnerable adult</p>	<p>(1) As used in this section:</p> <p>(a)(i) “Chemical substance” means:</p> <p>(A) a substance intended to be used as a precursor in the manufacture of a controlled substance;</p> <p>(B) a substance intended to be used in the manufacture of a controlled substance; or</p> <p>(C) any fumes or by-product resulting from the manufacture of a controlled substance.</p> <p>(ii) Intent under this Subsection (1)(a) may be demonstrated by:</p> <p>(A) the use, quantity, or manner of storage of the substance; or</p> <p>(B) the proximity of the substance to other precursors or to</p>		<p>(2) Unless a greater penalty is otherwise provided by law:</p> <p>(a) except as provided in Subsection (2)(b) or (c), a person is guilty of a felony of the third degree if the person knowingly or intentionally causes or permits a child or a vulnerable adult to be exposed to, inhale, ingest, or have contact with a controlled</p>

³¹⁵ UTAH CODE ANN. § 76-5-112.5 (LexisNexis Supp. 2012).

	<p>manufacturing equipment.</p> <p>(b) "Child" means a human being who is under 18 years of age.</p> <p>(c) "Controlled substance" is as defined in Section 58-37-2.</p> <p>(d) "Drug paraphernalia" is as defined in Section 58-37a-3.</p> <p>(e) "Exposed to" means that the child or vulnerable adult:</p> <p>(i) is able to access or view an unlawfully possessed:</p> <p>(A) controlled substance; or</p> <p>(B) chemical substance;</p> <p>(ii) has the reasonable capacity to access drug paraphernalia; or</p> <p>(iii) is able to smell an odor produced during, or as a result of, the manufacture or production of a controlled substance.</p> <p>(f) "Prescription" is as defined in Section 58-37-2.</p>		<p>substance,</p> <p>chemical</p> <p>substance, or drug paraphernalia;</p> <p>(b) except as provided in Subsection (2)(c), a person is guilty of a felony of the second degree, if:</p> <p>(i) the person engages in the conduct described in Subsection (2)(a); and</p> <p>(ii) as a result of the conduct described in Subsection (2)(a), a child or a vulnerable adult</p>
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	<p>(g) "Vulnerable adult" is as defined in Subsection 76-5-111(1).</p>		<p>suffers bodily injury, substantial bodily injury, or serious bodily injury; or</p> <p>(c) a person is guilty of a felony of the first degree, if:</p> <p>(i) the person engages in the conduct described in Subsection (2)(a); and</p> <p>(ii) as a result of the conduct described in Subsection (2)(a), a child or a vulnerable adult dies.</p>
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		<p>(3) It is an affirmative defense to a violation of this section that the controlled substance:</p> <p>(a) was obtained by lawful prescription; and</p> <p>(b) is used or possessed by the person to whom it was lawfully prescribed.</p> <p>(4) The penalties described in this section are separate from, and in addition to, the penalties and enhancements</p>
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			described in Title 58, Occupations and Professions.
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