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ARTICLE

TEXAS POLYGAMY AND CHILD WELFARE

*Martin Guggenheim**

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I. INTRODUCTION

The history of polygamy in the United States has been told many times.¹ Polygamy was a central feature of life for members of the Mormon Church in the nineteenth century.² The widespread practice through several western territories created a major political problem as the country expanded. The federal government’s power proved considerably greater than that of the relatively small group of religious adherents and Congress insisted that no territory would be added as a State unless the practice of polygamy was made illegal.³

Though the territories’ leaders agreed to these conditions in order to gain the advantages of statehood, practitioners of polygamy continued to believe they had the right to form families according to the dictates of their religion. The major test on the ban against polygamy came in 1878 in *Reynolds v. United States*.⁴ In that case, the Supreme Court upheld the prohibition of polygamy against a constitutional challenge based on freedom of religion. In doing so, the Court famously remarked that certain practices are simply out of bounds in the kind of “civilized” society which the United States intended to form and maintain.⁵ *Reynolds* held that,

1. See, e.g., Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 573–77 (2008) (reviewing the historical regulation of polygamy in modern America) ((MOD)); Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 308–09 (1965) (cataloging the origins of the practice of polygamy in the Church of Jesus Christ of Latter-day Saints) ((MOD)); Shayna M. Sigman, *Everything Lawyers Know About ((EDS)) Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL’Y 101, 110–15 (2006) (chronicling the migration of the Mormon movement to Utah territory and the subsequent antebellum political discourse).

2. See David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 62 (1997) (stating that marital plurality was encouraged within the Church). ((MOD))

3. Specifically, Congress required anti-polygamy provisions within Arizona, New Mexico, Oklahoma, and Utah’s ((VSF)) constitutions as a condition to statehood, and Idaho adopted a similar constitutional prohibition on its own accord. Ariz. Enabling Act, ch. 310, 36 Stat. 557, 569 (1910) (prohibiting polygamous or plural marriages); N.M. Enabling Act, ch. 310, 36 Stat. 557, 558 (1910) (same); Okla. Enabling Act, ch. 3335, 34 Stat. 267, 269 (1906) (same); Act of Admission of Idaho, Pub. L. No. 105-296, 26 Stat. L. 215 (1890) (approving the Constitution of the State of Idaho in which civil and political rights are denied for acts of polygamy) ((MOD)); Idaho Const. art I, § 4 (denying civil and political rights for acts of polygamy); see also *Romer v. Evans*, 517 U.S. 620, 648–49 (1996) (Scalia, J., dissenting).((MOD))

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

5. *Id.* at 165–66. The Court observed that “[p]olygamy has always been odious among the

because of the family's role in inculcating values, the form of marriage is a basic state question. Concluding that plural marriages tend to lead to patriarchal political principles and eventually despotism, the Court comfortably upheld the prohibition against polygamy.⁶

Soon after, the Mormon Church made peace with itself and the country by officially denouncing polygamy.⁷ But many families within the church continued the practice, eventually going underground by removing themselves from communities which included those who refused to practice polygamy. Ever since, a small, but significant number of fundamentalist adherents to Mormon ideology have continued the practice of men taking multiple wives and living together in communities largely closed off from the rest of society. In 1991, they formally established the Fundamentalist Church of Jesus Christ of Latter Day Saints ("FLDS").⁸

FLDS members today tend to live in communities in which most members practice polygamy themselves and all members tolerate its practice even if they do not themselves participate in it. They live in isolated communities in Utah, Arizona and Texas. Though their existence has long been known to local officials, their way of life has only rarely been interfered with.⁹ Two very well known attempts to eradicate these communities have been undertaken. The first was in Arizona in 1953.¹⁰ Police led the way in this attempt to arrest and prosecute individuals who were violating the criminal law. The second was in Texas in 2008.¹¹ This time it was led by child protective workers and was an attempt to remove children from their families because they were leading an immoral and illegal lifestyle.

There have been many law review articles devoted to polygamy in recent years.¹² The topic has become important for political reasons

northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people." *Id.* at 164.

6. *Id.* at 166–67.

7. R. Michael Otto, "Wait 'Til Your Mothers Get Home": Assessing the Rights of Polygamists as Custodial and Adoptive Parents, 1991 UTAH L. REV. 881, 895 (1991). ((MOD))

8. D. Michael Quinn, *Plural Marriage and Mormon Fundamentalism*, in FUNDAMENTALISMS AND SOCIETY 252, 254 (Martin E. Marty & R. Scott Appleby eds., 1993).

9. See Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment*, 38 FAM. L.Q. 711, 719–20 (2004) (citing almost fifty years of relative freedom from state interference after the Short Creek raid).

10. See Otto, *supra* note 7, at 897–902 (detailing the events of the raid on Short Creek where between 200 to 350 Fundamentalists were arrested, separating parents from children and setting the stage for *In re Black*, 283 P.2d 887 (Utah), *cert. denied*, 350 U.S. 923 (1955)). ((MOD)) ((EDS))

11. *In re Tex. Dep't of Family and Protective Servs.*, 255 S.W.3d 613, 613 (Tex. 2008). Interestingly, no similar effort has ever been undertaken in Utah, where most FLDS members continue to live. See Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love Is A Many Splendored Thing"*, 15 DUKE J. GENDER L. & POL'Y 315, 326 (2008) (quoting Terry Goddard, Arizona's Attorney General, on the Texas raid: "The last time something of this scale happened was Short Creek . . .").

12. See *infra* note 19 and accompanying text. ((MOD))

because the effort to secure same-sex marriage has become of great national importance. Most of these articles have a normative focus, intending to justify the continued prohibition against polygamy or advancing the case for making it lawful. This Article will address these issues only tangentially. Its principal focus, instead, is on the means by which state officials seek to enforce polygamy laws and to destroy communities that practice polygamy.

This Article will explain why the child welfare process was used in the 2008 Texas raid and argue that the criminal justice, not child welfare, system should be the preferred means by which state officials attempt to prevent the practice of polygamy. The criminal justice system contains many more time-honored protections of civil liberties. It also better constrains the exercise of discretion by state officials. In addition, using the child welfare system contains one additional danger: the contamination and expansion of child welfare law to permit coercive intervention, authorizing state officials to remove children from families based on notions of morality. As this Article will suggest, the ultimate danger of the San Angelo, Texas raid in 2008 is that child welfare interventions will become too much about the (mis)behavior of parents, with a particular emphasis on conduct that is criminal or “immoral,” and too little about what should always remain the central inquiry: whether children are in danger.

Part II of this Article describes recent changes in federal constitutional law that broadly implicate the right to engage in intimate behavior. Part III will connect these changes to the important subjects of same-sex marriage and polygamy, revealing some important contrasts between the two that are not commonly discussed in the literature. Part III will also consider limits on the power to forbid adultery under modern constitutional norms. Part IV will address polygamy itself and an important 2005 Utah case prosecuting a polygamist. Part V takes a look at various ways children’s interests are used as a justification for limiting family formation. Part VI builds on the previous section and looks more carefully at the state’s articulated interest in forbidding polygamy by examining the interest first in protecting women and then in protecting children. Part VII then describes and contrasts the two efforts in American history to break up polygamous communities. Part VIII sets forth specific theories of child protection interventions in polygamous families and explains why those concerned with the development of this area of the law should be reluctant to rely on child welfare laws to remove children living with parents who are in polygamous relationships.

II. THE RAPIDLY CHANGING CONSTITUTIONAL LANDSCAPE IN FORMING INTIMATE RELATIONS

One of the most important Supreme Court decisions protecting an individual’s freedom to develop intimate relations is the 2003 case of

Lawrence v. Texas, in which the Court struck down Texas's criminal sodomy law as unconstitutional.¹³ In the years since, many scholars have considered how far *Lawrence's* reach ought to go. Justice Scalia's dissent in *Lawrence* undoubtedly stimulated at least some of this scholarship with his famous warning that the Court's decision necessarily calls into question "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."¹⁴

Justice Scalia's language is likely mere hyperbole calculated to warn of dangers in the future and demean the majority's decision. "Slippery slope" arguments are, of course, regularly placed in front of efforts to change the law in a particular context. Considering how far the implications of a new rule will take us is more than an interesting exercise. In the context of the new world wrought by *Lawrence*, it is very reasonable for Justice Scalia to say that all of the examples he provided are now called into question. This hardly means, of course, that all of the examples he used will fail under constitutional review even when faithfully applying the principles of *Lawrence*. But it does mean that all of these laws should be reconsidered in light of *Lawrence*.

For enthusiasts of constitutional (and family) law, these are interesting times. If subsequent Supreme Court cases remain faithful to the principle of *Lawrence*, it is no longer sufficient to uphold a law restricting intimate behavior or associations between consenting adults based on concepts of morality. The post-*Lawrence* question is no longer whether some believe the prohibited act is immoral. It is whether there is a compelling justification for the ban *other than some people's conceptions of morality*. Proper constitutional analysis post-*Lawrence* requires reasons grounded in the real world for state restrictions on how adults live their lives.¹⁵

This is a remarkable change in the law from merely a few years ago. Sodomy laws were upheld as constitutional as recently as 1986 for no better reason than that judges concluded that a majority of voters believed that engaging in sodomy is immoral and that legislators acted within their authority by forbidding the majority's view of immorality.¹⁶ We now live in a world where considerably more justification is required. In a society committed to the rule of law, reason—not moral beliefs—should prevail. *Lawrence* sent us quickly into the era of reason. The challenge today for defenders of laws prohibiting incest, bigamy, prostitution, and even polygamy is to come up with reasons that these laws should be sustained

13. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

14. *Id.* at 590 (Scalia, J., dissenting).(((MOD)))

15. *See id.* at 577–78 (majority opinion) (requiring more than traditional views of immorality by the governing majority as reason to prohibit intimacy by same-sex consenting adults) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).(((MOD)))

16. *Bowers*, 478 U.S. at 196 (majority opinion) (a pre-*Lawrence* decision in which the Court admits that the law is based on the idea of morality, and refusing to invalidate homosexual sodomy statutes).(((MOD)))

without relying on morality.

III. SAME SEX MARRIAGE AND POLYGAMY

Perhaps the most remarkable challenge to tradition in the family law area over the past decade has been the challenge to marriage statutes restricting state-sanctioned marriage to one man and one woman. In some instances, these challenges predate *Lawrence*.¹⁷ Many more challenges have been brought since 2003. No court hearing such a challenge after 2003 could avoid citing *Lawrence* and deciding the case in its wake.¹⁸

The attempt to permit same-sex marriage has received the bulk of attention, both in the literature and in case law. A remarkably large number of people link polygamy and same-sex marriage.¹⁹ Some have done this to bolster their case against granting marital status to same-sex partners.²⁰

17. *E.g.*, *Baehr v. Lewin*, 852 P.2d 44, 48–49 (Haw. 1993) (making way for a constitutional challenge to a ban on same-sex marriage).

18. *See, e.g.*, *In re Marriage Cases*, 183 P.3d 384, 421, 453 (Cal. 2008) (considering the substantive constitutional question of the issuance of marriage licenses to same-sex couples); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948, 969 (Mass. 2003) (holding that the prohibition of marriage benefits to homosexual couples violates the Massachusetts Constitution). *But cf.* *Hernandez v. Robles*, 855 N.E.2d 1, 9–10, 12 (N.Y. 2006) (citing *Lawrence* but refusing to recognize same-sex marriages under the New York Constitution).

19. *E.g.*, NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 219 (2000) (“[M]ore often the fear was expressed that licensing same-sex marriage would start the descent down a slippery slope to licensing polygamy . . .”); Chambers, *supra* note 2; Jeffery J. Ventrella, *Square Circles?! Restoring Rationality to the Same-Sex “Marriage” Debate*, 32 HASTINGS CONST. L.Q. 681, 694 (2005) (“The true analogue to same-sex ‘marriage’ is not interracial marriage, but rather polygamy . . .”); Amy L. Wax, *The Conservative’s Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1081 (2005) (“Traditionalists warn that sanctioning same-sex marriage will inevitably lead to the legalization of other suspect forms of conduct, including polygamy, group marriage, incest, and bestiality.”); Stanley Kurtz, *Beyond Gay Marriage*, WEEKLY STANDARD, Aug. 4, 2003, at 26 (“Among the likeliest effects of gay marriage is to take us down a slippery slope to legalized polygamy and ‘polyamory’ (group marriage).”); *see also* Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage*, 30 CAP. U. L. REV. 221, 237 (2002) (“[O]pponents of same-sex marriage suggest if one traditional restriction on marriage falls, the others will fall as well—particularly prohibitions against incestuous and polygamous marriage.”); Cheshire Calhoun, *Who’s Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy From the History of Polygamy*, 42 SAN DIEGO L. REV. 1023 (2005); Jeffrey Michael Hayes, *Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists*, 3 STAN. J.C.R. & C.L. 99, 109 (2007) (“[M]edia outlets . . . have suggested that polygamists are attempting to link the fortunes of their cause to the gay rights movement.”); Charles P. Kindregan, Jr., *Religion, Polygamy, and Non-Traditional Families: Disparate Views on the Evolution of Marriage in History and in the Debate Over Same-Sex Unions*, 41 SUFFOLK U. L. REV. 19 (2007); Judith E. Koons, “Just” Married?: *Same-Sex Marriage and a History of Family Plurality*, 12 MICH. J. GENDER & L. 1 (2005); Elizabeth Larcano, Note, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065, 1098–99 (2006) (arguing that the states may not have an adequate interest in regulating polygamy based on the reasoning in *Lawrence*); *But see* Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131, 150–51 (2004) (explaining that polygamy and homosexual sex are distinguishable under the compelling state interest test).

20. *See, e.g.*, Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex*

Like Justice Scalia, they have strategically made the argument that unless the line is drawn at “one man, one woman” for marriage purposes, efforts to outlaw polygamy are almost certain to fail.

Supporters of same-sex marriage have tended to argue this from the other side. Caring little about polygamists, and not wishing to lose potential supporters of same-sex marriage, these scholars have argued that drawing the line at two people is relatively easy, thereby arguing that same-sex couples should be able to marry but multiple partners should not.²¹ Others, more neutrally, write to clarify that state sanctioned marriage is a more complicated subject than may have been appreciated a generation ago.²²

Despite the connections being made between same-sex marriage and polygamy, the differences between these relationships and the way in which they interface with state power are considerable. Even more, closer examination yields the counterintuitive conclusion that it is more difficult to justify the main claim supporters make for same-sex marriage than to deny the main claim made by polygamists.

This rather startling conclusion needs to be explained. It turns out that there are considerably more differences than similarities involved in the demand for same-sex marriage made by gay and lesbian people and the modern practice of polygamy in the United States.

Polygamy, once lawful in the United States, was banned more than one hundred and forty years ago.²³ Same-sex marriages have never been recognized as valid until a very few years ago.²⁴ Heterosexual relationships

Marriage, 1996 BYU L. REV. 1, 47 (1996) (“If same-sex marriage must be legalized to accommodate the subjective, identity-defining sexual-intimacy preferences of gays and lesbians, it would be very difficult to refuse to recognize consanguineous marriage, polygamy, and other prohibited marriages on a principled basis.”); see also EVAN WOLFSON, WHY MARRIAGE MATTERS 71 (2004) (“Slippery-slope diversions are what opponents of equality try when they don’t have a good reason to justify ongoing discrimination, the equivalent of a lawyer with no arguments and no evidence pounding the table.”).
 ((EDS)))

21. See, e.g., WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 149 (1996) (“[A]llowing a man to take two wives might create or exacerbate hierarchical structures within the marriage. . . . Because the husband would have to deal with at least twice as many wives, it is probable that he would establish a more authoritarian structure for the marriage.”).

22. See Calhoun, *supra* note 19, at 1037 (“Disestablishing a single state form of marriage would . . . open the doors to state recognition of polygamous marriages.”); Chambers, *supra* note 2, at 77 (arguing that the present generation values the quality of human interaction over the traditional structures of the past); Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1170 (2005) (“[I]f the public accepts the notion that tradition isn’t a good enough reason to reject same-sex marriage, it will be harder to argue that tradition is a good enough reason to reject polygamous marriage.”).

23. See *Reynolds v. United States*, 98 U.S. 145, 168 (1878) (noting that Congress made “bigamy a crime in the Territories” in 1862). ((MOD))

24. The first time same-sex marriage was recognized as being entitled to state recognition was in 1993. See *Baehr v. Lewin*, 852 P.2d 44, 47, 67 (Haw. 1993) (declaring unconstitutional a state statute that “denies same-sex couples access to the marital status and its concomitant rights and benefits”). Since 1993, the highest courts of Massachusetts, California, Connecticut, and Iowa, in that order, have held that there is a right to enter into same-sex marriages. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); ((MOD)) *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008); *Varnum v.*

that include more than one man and one woman are, throughout the world, imaginably part of the category of “marriage,” even if they are not accepted in many countries. In contrast, same-sex partnerships were, until very recent times, outside of most people’s vision of what can be “marriage.” When same-sex couples first advanced the claim of their right to marry, it was met with a response that what is being sought is oxymoronic. It was said that marriage, by definition, means the legal joining of opposite-sex partners. The United States’ response to polygamy is the opposite. Polygamy has always been around, flourishing in many societies. Banishing polygamy from the category of lawful marriages was seen as enlightenment: a more civilized choice.²⁵ Most importantly, it was understood to be a choice. Polygamy was outlawed, and polygamists made criminals, after living in a society in which their behavior was lawful. Homosexual couples seeking marriage were told, in contrast, that they must continue to endure the status quo.

Considering how long American society assumed without thinking that same-sex marriage was an incoherent concept, the same-sex marriage movement has made progress at lightning speed. This progress is the reflection of an amazing transformation of American values (outside of the law) regarding issues surrounding what it means to be gay or lesbian. This transformation is best seen when Americans’ views of gay and lesbian rights are divided by age. For Americans under forty, the matter is quite clear: Gay and lesbian people ought to enjoy identical rights to form relationships with people they love as straight people. Furthermore, to the degree that gay and lesbian people demand the right to enjoy state sanctioning of their relationships on the same terms as the state chooses to sanction heterosexual relationships, Americans under forty are strongly in support.²⁶ Most Americans over forty are opposed to such changes.²⁷ The skirmish currently under way in courts to secure legal recognition of these relationships is fascinating, but it is manifest that time is on the side of change. As the older generation leaves the stage of public debate, the claim for equality will become overwhelming. Isolated victories now being won in a few state courts will be won virtually everywhere and, in a great many states, even in the legislatures.²⁸

Brien, 763 N.W.2d 862, 907 (Iowa 2009); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

25. *Reynolds*, 98 U.S. at 165–66 (“[T]here never has been a time in any State of the Union when polygamy has not been an offence against society . . .”). ((MOD)) ((EDS))

26. The Field Poll, conducted in California in 2008, found that 68% of persons aged eighteen to twenty-nine and 58% of those aged thirty to thirty-nine approve state recognition of same-sex marriage. MARK DICAMILLO & MERVIN FIELD, FIELD RESEARCH CORPORATION, RELEASE # 2268: GROWING TREND IN SUPPORT OF ALLOWING SAME-SEX MARRIAGE IN CALIFORNIA 4 (2008), <http://www.field.com/fieldpollonline/subscribers/RIs2268.pdf>. ((EDS))

27. *Id.* For those between the ages of fifty to sixty-four, only 47% approve of same-sex marriages, and for those sixty-five and older, support drops to 36%. *Id.*

28. See Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y.

Polygamy is another matter entirely. It continues to be disfavored by a large percentage of the population.²⁹ Whereas support for same-sex relationships is especially prominent among progressives, many progressives comfortably joined social conservatives in their condemnation of polygamy because of the extent to which women are disadvantaged by the practice of polygamy.

Wholly apart from the historical reaction to these disparate claims, same-sex marriage activists seek the opposite from what many polygamists living within the FLDS community are willing to accept. Although some have argued that the state must sanction polygamy by issuing marriage licenses whenever a couple seeks one, regardless of their marital status, many individuals practicing polygamy today make more narrow demands. They desire simply to be able to form relationships outside of state oversight and without state approval. Gay and lesbian people, in contrast, insist upon their right to have the state recognize their relationship as a marriage. These changes, in part, reflect the gains gay and lesbian people have achieved through *Lawrence*.

Perhaps most interesting of all, however, is contrasting the state's reactions to these different situations. The individuals' reactions are a combination of strategic and practical. But the state's responses are the most remarkable of all. The state insists it possesses two powers: to refuse to recognize relationships as "marriage" when it prefers that result, *and* to declare relationships to be a "marriage" when it chooses to do so, despite what the individuals themselves choose to call it.

In the years following *Lawrence*, states have forsaken efforts to punish gay and lesbian people for entering into relationships. Thus, all that some states currently say in response to same-sex relationships is that it is the state's—not the individual's—prerogative to recognize a relationship. Gay and lesbian people may be free to enter into their relationships, but, for those states opposed to anything more, they may not insist that the state recognize them.

At the same time, when same-sex partners announce publicly in newspapers that they are getting "married," even when they live in a state that forbids such marriages, they are not breaking any kind of law.³⁰ Gay and lesbian people may promise to their significant other the same things that the state expects of people who do marry. And they may commit

TIMES, Apr. 8, 2009, available at <http://www.nytimes.com/2009/04/08/us/08vermont.html>. ((MOD))
On May 6, 2009, Maine became the fifth state to legalize gay marriage, joining Massachusetts, Connecticut, Vermont, and Iowa. ((VSF)) California recognized gay marriage in 2008 until a ballot initiative changed the law, at least temporarily. A challenge to the legality of the ballot initiative was before the California Supreme Court as of May 2009. *Id.* ((VSF))

29. Lydia Saad, *The Cultural Landscape: What's Morally Acceptable?*, in THE GALLUP POLL: PUBLIC OPINION 2004 249, 249 (Alec M. Gallup & Frank Newport eds., 2004).

30. The only possible violation here is misstating the legal meaning of the relationship or usurping the state's monopolistic ownership of the term "marriage." These are non-sanctionable events.

themselves to their partner in a formal ceremony without running afoul of the law. What they cannot do, at least yet in the United States, is insist that the state recognize the marriage.

But when the state responds to polygamous relationships, it insists upon the right to treat a relationship as a marriage, even when the affected individuals are content simply to have the state ignore them. Now that same-sex partners are protected by the Constitution to form intimate relationships on their own terms with consenting adults, with the only limitation being that the state is not obliged to officially recognize the relationship, the question arises whether communities are also free to establish intimate relationships among consenting adults beyond the state's power to control—again, on the understanding that the state need not recognize the relationship.

Long before *Lawrence*, adults in the United States have been free to procreate without regard to marital status. Not only is it lawful for a man to procreate outside of marriage, unwed fathers have constitutional rights to the children they help produce.³¹ This suggests that a man has the right to be the father of children born to more than one woman, whether or not the man is married to any of them. And, of course, what is true for men is even truer for women who, if anything, possess greater constitutional rights to procreate than do men.³²

Thus, the question becomes, what limits, if any, may the state impose on what adults call each other, so long as they understand their labels may not have meaning when the state becomes involved? Although *Lawrence* has encouraged some members of the FLDS community to challenge the formal restrictions on polygamy,³³ seeking formal recognition of their familial relationships is more than most insist upon.³⁴

The connection between same-sex marriage and polygamy would be considerably closer if states sought to prevent same-sex partners from holding themselves out as married—either on a theory of fraud or because of some form of copyright infringement on the use of the word “marriage.” Imagine, for example, enacting a law prohibiting anyone from claiming

31. See *Lehr v. Robertson*, 463 U.S. 248, 267–68 (1983) (recognizing equal parental rights where the mother and father demonstrate an equal relationship with the child, but holding against the father's right to veto adoption in this case because of his lack of interest in the child's upbringing); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (concluding that children could not be removed from a parent's custody without first affording the parent a fitness hearing).

32. Women may terminate pregnancies without consultation or consent of the would-be father. See *Planned Parenthood v. Casey*, 505 U.S. 833, 895–96 (1992) (proclaiming that, between man and woman, the mother is more directly affected by the choice of abortion and should therefore make the decision); *Planned Parenthood v. Danforth*, 428 U.S. 52, 70 (1976) (holding that the spouse cannot unilaterally veto the wife's decision to terminate her pregnancy).

33. See, e.g., *Bronson v. Swensen*, 500 F.3d 1099, 1103–04 (10th Cir. 2007) (noting plaintiff's challenge to the district court's decision to uphold precedent).

34. See *Rower*, *supra* note 9, at 717 (“In order to avoid prosecution, many Fundamentalist men legally marry only their first wife and ‘spiritually marry’ their subsequent wives.”).

publicly to be “married” without first having the relationship formally recognized as a marriage by the state. This would raise a number of issues including First Amendment rights to use ordinary words as one wants. Such a regime would also have important connections to the military’s Don’t-Ask-Don’t-Tell policy in that the prohibited act is speech.³⁵ It would also turn on its head the status of common law marriages recognized in the majority of states.

But what is significant about this, for these purposes, is that no state seems to have the slightest interest in prohibiting such conduct, at least in the context of same-sex relationships. Many states, of course, have an interest in prohibiting the behavior—as distinct from the use of a label. But *Lawrence* took away the state’s power to act on that interest. In support of their claimed authority to decide who is lawfully married, states are entirely satisfied to refuse to recognize the relationship as a marriage when it comes to same-sex relationships. *Purporting* to be married is no violation—at least if one is not already married.

Now contrast this with polygamists. One hundred and thirty years ago, Mormons and others asserted their right to state recognition of their plural families. But, having lost that legal battle soundly,³⁶ thousands of current members of the FLDS who continue to live in plural families have chosen to do so underground.³⁷ They seek the opposite of what same-sex marital proponents currently demand. These pluralists seek nothing more than what same-sex partners have enjoyed in recent years outside of the law: the freedom to declare their commitment to partners, even if the public declaration is perceived by state officials as little more than a game of “pretend.”

In the gay marriage context, consenting adults complain that the state *must* recognize their relationships and that the state’s failure to do so demeans and disadvantages them. The state’s response is straightforward: we do not wish to recognize the relationship you have formed and we are not compelled to do so. In the polygamy context, this gets turned on its head. The consenting adults are not seeking state approval. They wish simply to be left alone to live and cohabit with whomever they want without state interference. The state responds by insisting that these relationships must be recognized as marriages and, because these forms of marriage are prohibited, anyone who maintains one is subject to criminal

35. See 10 U.S.C. § 654(b) (2006). Under current law, members of the military in the United States are forbidden, under penalty of being removed from the military, from publicly declaring the truth about their personal relationships. *Id.* ((MOD)) This rule is a peculiar compromise between those who would bar gay and lesbian people from serving in the military and those who would forbid taking into consideration an individual’s sexual orientation in the first place. This compromise results in the punishment of truthful speech.

36. See *Cleveland v. United States*, 329 U.S. 14, 19 (1946); *Reynolds v. United States*, 98 U.S. 145, 166 (1878).((MOD))

37. See *Duncan*, *supra* note 11, at 315–16.

penalties. To say the least, these disparate claims are difficult to reconcile.

A. Adultery

Adultery is another excellent example testing Justice Scalia's suggestion that one's sense of morality is sufficient by itself to justify criminalizing behavior. Laws criminalizing adultery were long defended as prohibiting offenses against morality.³⁸ Although *Lawrence* held that morality no longer constitutes a sufficient state interest to justify intrusion into the private lives of individuals, it seemingly left room for the continued state regulation of some private consensual sexual activity.³⁹ In particular, *Lawrence* left open the possibility of upholding state intrusion into personal relationships that involve "injury to a person or abuse of an institution the law protects."⁴⁰

Adultery, however, may not always be said to harm anyone. Certainly, many examples of adultery exact substantial harm on the unknowing spouse and the children of the marriage.⁴¹ Moreover, adultery often leads to divorce.⁴² However, many cases of adultery involve the other spouse's consent, express or implied.⁴³ When the state arrests and prosecutes someone for criminal adultery in the name of protecting the rights of the innocent spouse, it is denying the spouse the freedom to establish the terms of her intimate relationships. The spouse is declared a victim by the state, even when the spouse does not agree he or she is a victim of any kind. Even more, it deprives the spouse of the power to forgive or forget his or her spouse. In recognition of this, some states authorize prosecution only upon the spouse's request.⁴⁴

38. See Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 48 (1991) (explaining Puritan anti-adultery laws aimed at safeguarding community morals); Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 225–26 (1986) (discussing development of colonial adultery prohibitions).

39. See *Lawrence v. Texas*, 539 U.S. 588, 577–78 (2003) (holding immorality alone as insufficient justification for prohibition under limited circumstances); Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2227 (2005) ("Lawrence does not, of its own force, confer a right upon same-sex couples to marry.").

40. *Lawrence*, 539 U.S. at 567.

41. See *Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1484 (D. Utah 1995) (discussing adultery's social costs).

42. Infidelity is the most cited reason for obtaining a divorce. Paul Amato & Denise Previti, *People's Reason's for Divorcing: Gender, Social Class, the Life Course, and Adjustment*, 24 J. FAM. ISSUES 602, 614–15 (2003); ((MOD))

43. See Mark Strasser, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 783 (2000) (noting some couples claim adulterous relationships have strengthened their marriages).

44. ARIZ. REV. STAT. ANN. § 13-1408(B) (2009); MINN. STAT. § 609.36(2) (2009); N.D. CENT. CODE § 12.1-20-09(2) (1997); ((MOD)); OKLA. STAT. tit. 21, § 871 (2009); see *State v. Ronek*, 176 N.W.2d 153, 156 (Iowa 1970) (upholding Iowa adultery statute allowing prosecution only upon spousal request); see also RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 103–10 (1996) (describing adultery laws in each state).

The American Law Institute's Model Penal Code decriminalized adultery in 1962, and several states were quick to follow suit.⁴⁵ According to Gabrielle Viator, “[a]lthough legislation has been introduced to repeal criminal statutes in numerous other states, many legislators have found decriminalization too symbolically problematic or politically unpopular to undertake.”⁴⁶

Almost half of the nation continues to recognize adultery as a crime.⁴⁷ The majority of states that maintain the crime of adultery criminalize even a single act of extramarital sexual intercourse.⁴⁸ In some jurisdictions, however, the offense requires more.⁴⁹ Interestingly, because of its connection to the crime of polygamy, five states treat adultery as a crime only when the relationship is “open” or “open and notorious.”⁵⁰

Somewhat oddly, more states have kept criminal adultery laws on the books than have maintained civil “heart balm” statutes, which allow a tort claim for damages paid to the injured spouse.⁵¹ Maintaining a civil tort remedy for any injuries associated with adultery would directly vindicate the interests of an injured spouse without running the risk of violating *Lawrence*.⁵²

Before *Lawrence*, these statutes tended to withstand constitutional

45. Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK L. REV. 837, 842 & n.42 (2006) (noting that California, Iowa, Kansas, Kentucky, Maine, Nebraska, New Jersey, Oregon, South Dakota, Vermont and Washington have decriminalized adultery); see also *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring) (“The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct.”).

46. Viator, *supra* note 45, at 842–843.

47. *Id.* at 837 n.6, 843; see also Jennifer A. Herold, *A Breach of Vows But Not Criminal: Does Lawrence v. Texas Invalidate Utah’s Statute Criminalizing Adultery?*, 7 J.L. & FAM. STUD. 253, 253 & n.5 (2005). (“Nevertheless, Utah, and twenty-two other states and the District of Columbia currently maintain criminal laws against adultery.”)

48. Viator, *supra* note 45, at 843 & n.47 ((MOD)) (citations omitted).

49. *Id.* at 843 n.48 (citing ALA. CODE § 13A-13-2(a) (LexisNexis 2005) (criminalizing adulterous cohabitation); FLA. STAT. ANN. § 798.01 (West 2007) (defining the offense as living in open state of adultery); 720 ILL. COMP. STAT. 5/11-7(a) (2009) (criminalizing adultery when open and notorious)). ((MOD)) In addition, Oklahoma limits prosecution to instances when either the conduct is open and notorious, or the offended spouse has complained. OKLA. STAT. tit. 21, § 871 (2002). ((MOD))

50. Viator, *supra* note 45, at 843 nn.49–51 (citing ALA. CODE § 13A-13-2(a) (LexisNexis 2005) (criminalizing adulterous cohabitation); FLA. STAT. ANN. § 798.01 (West 2007) (defining offense as living in “open state of adultery”); 720 ILL. COMP. STAT. 5/11-7(a) (1993) (requiring “open and notorious” behavior to constitute crime of adultery) ((MOD)); MISS. CODE ANN. § 97-29-1 (West 1999) (criminalizing unlawful cohabitation, but not requiring proof that the parties dwelled together publicly as husband and wife) ((MOD)); N.C. GEN. STAT. § 14-184 (2007) (defining the offense as lewdly and lasciviously associating, sleeping, and cohabiting)).

51. See Jennifer E. McDougal, Comment, *Legislating Morality: The Actions for Alienation of Affections and Criminal Conversation in North Carolina*, 33 WAKE FOREST L. REV. 163, 172–73 (1998) ((MOD)).

52. See William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 991, (2001) ((MOD)).

challenge as a reasonable state regulation that did not infringe upon any liberty interest.⁵³ Thus, in 1994 a federal district court upheld the constitutionality of Utah's adultery statute as applied to sanctions imposed against a police officer for a violation of the statute.⁵⁴ In *Oliverson v. West Valley City*, after the police department learned that a married police officer had sexual relations with an unmarried adult, the officer was suspended from duty for thirty days without pay even though the extramarital affair was consensual and occurred in private.⁵⁵

Since *Lawrence*, the debate over whether adultery may continue to be made a crime has been reinvigorated.⁵⁶ *Lawrence* stands for the simple rule that a single person has the constitutional right to have intimate contact with another consenting adult.⁵⁷ Enforcing adultery laws means that a married person lacks the identical constitutional right single persons possess. There are only two bases for upholding such a restriction. One involves a notion of waiver. Under this view, adults have the right to have sex with other consenting adults, but they waive the right by agreeing to the conditions of a marriage contract. The second basis has already been identified: enforcing a rule to prevent "injury to a person or abuse of an institution the law protects."⁵⁸ But the disjunctive in this important sentence from *Lawrence* is misleading. Abuse of an institution the law protects—meaning abuse of the terms of a marriage contract—ought not to count as a legitimate state interest apart from the idea that the abuse injures the person the contract intended to protect in the first place. Thus, adultery after *Lawrence* should be proscribable, if at all, only upon the request of the other spouse. When both parties to a marriage agree to permit the other to behave in a certain way, the law has no role to play to forbid the formation

53. Kraus v. Village of Barrington Hills, 571 F. Supp. 538, 541 n.2 (N.D. Ill. 1982) ("[A] state may make adultery a criminal act without violating the constitutional rights of the adulterers . . ."); Johnson v. San Jacinto Junior Coll., 498 F. Supp. 555, 575 (S.D. Tex. 1980) (stating that a right to privacy does not protect adulterous conduct); Oliverson v. W. Valley City, 875 F. Supp. 1465, 1467–68 (D. Utah 1995) (holding adultery statute constitutional as reasonable state regulation of sexual behavior); Suddarth v. Slane, 539 F. Supp. 612, 617 (W.D. Va. 1982) (holding that First Amendment rights do not include protection for adultery); State v. Ronek, 176 N.W.2d 153, 157 (Iowa 1970) (upholding adultery as crime against society and public); Commonwealth v. Stowell, 449 N.E.2d 357, 360–61 (Mass. 1983) (holding adultery statute does not violate fundamental privacy right); City of Sherman v. Henry, 928 S.W.2d 464, 471, 473 (Tex. 1996) (concluding adultery is not a protected fundamental right nor is there a constitutional right to commit adultery).(((MOD)))

54. *Oliverson*, 875 F. Supp. at 1486.(((MOD)))

55. *Id.* at 1469.

56. Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 962–65 (2004) (discussing broad potential impact of *Lawrence* holding on various consensual sex crimes); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27–33 (2004) (articulating breadth of interpretations regarding sexual privacy and moral-based law); David M. Lieber, *Is Adultery Still a Crime After Lawrence?*, 6 SEC. REV. MASS. BAR ASSOC. No. 2 at 14, 14–15 (2004) (discussing potential impact of holding on criminal adultery statutes).

57. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).(((MOD)))

58. *Id.* at 567.

of casual and consensual intimate relationships (unless they are independently proscribable, such as incest and prostitution). When one of the parties to the marriage objects to the adultery, prosecuting the adulterer criminally to vindicate the rights of the non-offending spouse should be held to be beyond the proper reach of government power because it interferes with the private relationship of the parties involved.

Even after *Lawrence*, some courts have upheld various instances of punishing someone for engaging in sex despite a claim that the Constitution forbids such punishment. Some have done so without meaningful analysis, simply noting that *Lawrence* only barred criminalizing “adult consensual sexual intimacy in the home,”⁵⁹ emphasizing that *Lawrence* did “not involve minors [nor] . . . persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It [did] not involve public conduct or prostitution.”⁶⁰ For these courts, it is manifest that until the Supreme Court says otherwise, the Constitution does not prevent states from criminalizing engaging in sex in a public place or engaging in prostitution.⁶¹

Other courts have undertaken the analysis *Lawrence* ought to require: a meaningful search for a compelling state interest. Thus, *Beecham v. Henderson County* suggested that terminating a county employee’s at-will position for engaging in an adulterous relationship would not offend the Constitution, in spite of *Lawrence*.⁶² *Beecham* held that the employee was properly fired for entering into a “romantic relationship” even if the couple did not engage in sexual relations when they moved in together because it was rational for employer to fire the employee when the relationship was interfering with the office’s capacity to perform its work.⁶³

59. *Id.* at 564.

60. *Id.* at 578.

61. *See, e.g.,* *Singson v. Commonwealth*, 621 S.E.2d 682, 687 (Va. Ct. App. 2005) (stating that the solicitation of sex acts in a public bathroom is not protected behavior under *Lawrence* because *Lawrence* only protects right of “adults to engage in [] private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution” (quoting *Lawrence*, 539 U.S. at 564)) ((MOD)); *see also* *State v. Thomas*, 891 So. 2d 1233, 1238 (La. 2005) (solicitation of another with intent to engage in “unnatural carnal copulation” for compensation is unprotected conduct despite *Lawrence*); *State v. Pope*, 608 S.E.2d 114, 116 (N.C. Ct. App. 2005) (finding that because *Lawrence* “expressly excluded prostitution and public conduct from its holding,” it did not render North Carolina’s crime against nature statute unconstitutional); *Tjan v. Commonwealth*, 621 S.E.2d 669, 672 (Va. Ct. App. 2005) (solicitation of oral sodomy is not constitutionally protected despite the holding in *Lawrence*) ((MOD)).

62. *Beecham v. Henderson County*, 422 F.3d 372, 375–76 (6th Cir. 2005).

63. *Id.* at 378 ((MOD)); *see also* *Anderson v. City of LaVergne*, 371 F.3d 879, 881–82 (6th Cir. 2004) (a dating relationship between a police officer and an administrative assistant for the police department qualified as an intimate association because the two were monogamous, had lived together, and were romantically and sexually involved); *Marcum v. McWhorter*, 308 F.3d 635, 643 (6th Cir. 2002) (upholding dismissal of deputy sheriff for engaging in adulterous relationship). *Marcum* held that “the adulterous nature of the relationship does not portray a relationship of the most intimate variety afforded protection under the Constitution.” *Marcum*, 308 F.3d at 640. ((MOD)) However, it was decided pre-*Lawrence* and relies heavily on *Bowers v. Hardwick*. *Id.* at 641–42. ((MOD)) This made it

IV. POLYGAMY AND THE
PROSECUTION OF RODNEY HOLM

On its face, one would imagine that polygamists are less deserving of being branded criminals than adulterers. They are not cheaters who sleep with someone without their spouses' knowledge or consent. Nor do they lightly enter into casual relationships. They mean to enter into enduring relationships.

Under current United States law, where fornication is no longer a crime, same-sex and opposite-sex couples may cohabit without being subject to any kind of state sanction. Opposite-sex couples may even raise children if they wish and the state is perfectly willing to cooperate in their efforts by allowing them to become foster or adoptive parents. Same-sex couples also have the right to raise children in all states, with the exception of some states in which they are ineligible to be foster parents or to adopt children.⁶⁴ Given all of this, we face the remarkable prospect that Americans have the constitutional right to enter into casual intimate relationships with other consenting adults, but may be criminally punished when they seek to treat their relationships as more than casual.

The fascinating prosecution of Rodney Holm in *State v. Holm*⁶⁵ for polygamy and other related crimes provides an opportunity to bring much of this background law into sharper focus. As a member of the FLDS Church, Holm participated in a "religious marriage ceremony" with his wife's sixteen-year-old sister after he was legally married. The three lived together in the same household. By the time the second wife turned eighteen, she had conceived two children. Holm was charged with three counts of unlawful sexual conduct with a minor and one count of bigamy, all felonies. He was convicted on all counts⁶⁶

The Utah Supreme Court rejected Holm's claims that his actions were protected under *Lawrence* since he did not insist that the state recognize his relationships. The Utah Supreme Court held that *Lawrence* does not deny states the power to punish married individuals for entering into additional relationships which "purport[] to marry" another.⁶⁷ The court concluded that Holm was properly convicted of bigamy, which makes it illegal for married people to enter into either "legally recognized marriages [or] those

rather simple to reason that, like sodomy, adultery has long not been accepted behavior. *Id.* (((MOD)))

64. See ARK. CODE ANN. § 9-8-304 (2009) (((MOD))); UTAH CODE ANN. § 78B-6-117(3) (2008) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.")

65. *State v. Holm*, 137 P.3d 726 (Utah 2006).

66. *Id.* at 730-32.

67. *Id.* at 743. Holm was not charged with the crime of adultery, a Class B misdemeanor in Utah punishable by a maximum sentence of six months confinement and a fine not exceeding \$1,000. UTAH CODE ANN. §§ 76-7-103, 76-3-301 (2008).

that are not state-sanctioned.”⁶⁸

Holm raised both a statutory and constitutional defense to his prosecution. First, he argued unsuccessfully that the word “marry” in the statute refers only to a legally recognized marriage. Under this analysis, one could be guilty of a crime in Utah only if a married person purports “to enter into a legally valid marriage.” The Utah Supreme Court, finding no ambiguity in the statute, and consistent with its legislative history and purpose, held the term to apply to all relationships that the individual “purports” to be any kind of marriage, legally valid or otherwise.⁶⁹ This means that Utah will punish married individuals whenever they “purport” to marry another.

But Holm’s defense deserves careful analysis. Because Utah law does not recognize or consider a relationship between an already married person and someone else to constitute a “marriage,” and because (unlike certain bigamists) Holm neither denied nor hid the existence of his first marriage; his defense was that he cannot be said to have “purport[ed]” to get married a second time under Utah law because he knew perfectly well that Utah law forbids bigamy.⁷⁰ The court’s response was that everyone understands what Utah prohibits.⁷¹ Although Utah refuses to recognize the second marriage as a marriage, it will do so for the limited purpose of ruling that a crime was committed when the married person announces a second marriage or holds him- or herself out as being involved in a second marriage.

This is drastically different from how same-sex partners are treated. Same-sex partners are permitted by the state to “pretend” they are married. The state only draws the line when same-sex partners insist on official state recognition of the relationship and acceptance of it as a marriage. Holm would have been perfectly contented to be treated the same as same-sex partners and be allowed to enter into consensual adult relationships outside of any kind of state involvement.

Holm also challenged the constitutionality of his conviction on religious grounds, arguing that *Reynolds v. United States*⁷² should be overturned as “nothing more than a hollow relic of the bygone days of fear, prejudice, and Victorian morality.”⁷³ A majority of Utah’s Supreme Court had little difficulty turning back this challenge, ruling that “the Utah Constitution offers no protection to polygamous behavior and, in fact, shows antipathy towards it by expressly prohibiting such behavior. . . . [The Constitution’s] language . . . unambiguously removes

68. *Holm*, 137 P.3d at 733, 752; UTAH CODE ANN. § 76-7-101 (2008).

69. *Holm*, 137 P.3d at 733.

70. *Id.* at 773 (Durham, C.J., concurring in part and dissenting in part). ((MOD))

71. *Id.* at 755. ((MOD))

72. *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (holding that religious duty is not a defense to a crime).

73. *Holm*, 137 P.3d at 741.

polygamy from the realm of protected free exercise of religion.”⁷⁴

Chief Justice Durham wrote a lengthy separate opinion raising important questions about the appropriate bases for punishing polygamists in a post-*Lawrence* context.⁷⁵ She concurred in upholding Holm’s conviction only because Holm engaged in unlawful sexual conduct with a minor after he married in a non-state-sanctioned ceremony.⁷⁶

It remains to grasp fully the state’s interest in punishing anyone who purports to marry a second time while still legally married. When polygamous relationships are contracted without everyone in the relationship having full knowledge of the other participants⁷⁷ and without following legal requirements like formally divorcing one spouse before attempting to marry another, there is a manifest justification for punishing the act. It is one thing when bigamy laws are enforced to protect innocent spouses and prevent misrepresentation bordering on fraud. But FLDS members do not engage in this kind of surreptitious behavior. They mislead no one when they marry more than once. Instead of insisting that the state recognize their multiple relationships, they are content with the opposite. They seek, but are unable to secure, the right to be left alone and to form multiple relationships with consenting partners without state regulation.

Prosecuting a wayward spouse for breaking the terms of the marital

74. *Id.* at 738. Holm also asserted that the term “marry,” as used in Utah’s bigamy statute and unlawful sexual conduct with a minor statute, was unconstitutionally vague. *Id.* at 741. ((MOD)) This, too, was rejected by the court. *Id.* at 746–47. ((MOD)) For a discussion on the history of Utah’s ban on polygamy, see generally Laura Elizabeth Brown, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 MCGEORGE L. REV. 267 (2008) ((MOD)).

75. *Holm*, 137 P.3d at 758, 779 (Durham, C.J., concurring in part and dissenting in part).

The Supreme Court in *Lawrence* . . . rejected the very notion that a state can criminalize behavior merely because the majority of its citizens prefers a different form of personal relationship. . . . [The protection] described in *Lawrence* . . . encompasses not merely the consensual act of sex itself but the “autonomy of the person” in making choices “relating to . . . family relationships.”

. . . [T]he Court’s statement in *Lawrence* that a state may interfere when such an institution is “abuse[d],” together with its holding that the sodomy statute was unconstitutional, leads me to infer that, in the Court’s view, sexual acts between consenting adults and the private personal relationships within which these acts occur, do not “abuse” the institution of marriage simply because they take place outside its confines.

. . . .

I am concerned that the majority’s reasoning may give the impression that the state is free to criminalize any and all forms of personal relationships that occur outside the legal union of marriage. While under *Lawrence* laws criminalizing isolated acts of sodomy are void, the majority seems to suggest that the relationships within which these acts occur may still receive criminal sanction. Following such logic, nonmarital cohabitation might also be considered to fall outside the scope of federal constitutional protection. Indeed, the act of living alone and unmarried could as easily be viewed as threatening social norms.

Id. at 777–78 (citations omitted).

76. *Id.* at 758.

77. *E.g.*, *State v. Geer*, 765 P.2d 1, 2 (Utah Ct. App. 1988) (discussing wife who apparently did not know that her husband had married other women without divorcing any of them).

agreement may be seen as a form of specific contract enforcement. But when all parties wish to enter into the polygamous relationship, prosecutions lead to the opposite result: they deny individuals the right to create private contracts.

For the FLDS community, a crucial issue becomes the continuing validity of adultery laws, at least as applied to cases in which the legally married spouse consents to the adulterous behavior. If adultery laws as applied to these situations cannot survive constitutional challenge post-*Lawrence*, the validity of bigamy prosecutions becomes that much more difficult to defend.⁷⁸ But an additional fact about Holm's second relationship changes the equation considerably, and it was very likely the reason the case was brought in the first place and also the reason he was convicted. His second "wife" was sixteen years old when he purported to marry her. This resulted in Holm's conviction of two felonies: bigamy and unlawful sexual conduct with a minor.⁷⁹ Indeed, this second felony was especially serious because it involved unlawful sexual conduct with a minor who was more than ten years younger than Holm.⁸⁰ But this separate conviction for sexual abuse is also beguiling.

If Holm had been married legally to the sixteen-year-old girl, he would not have committed any offense, because in Utah sixteen-year-olds may marry with parental consent.⁸¹ In Holm's case, the girl's father had given his consent for the marriage, and the plural marriage was also recognized by Holm's religious community.⁸² Holm, a religious person who never intended to have extramarital sex, meant only to take his wife's then-sixteen-year-old sister as his second wife. Utah, of course, would not allow him to marry for a second time and therefore refused to recognize the relationship. Thus, Utah treated the relationship as extramarital and Holm was punished twice for the same act: first, for purporting to take a second wife, and second, for having sex with a minor whom the state refused to recognize as his wife.

The Spring 2008 raid of an FLDS community,⁸³ discussed below, occurred outside of San Angelo, Texas. Unlike Utah, the term "polygamy" does not appear in Texas's annotated code. But, like Utah, Texas

78. See Viator, *supra* note 45, at 838–39, 854 (concluding that criminal statutes prohibiting adultery would likely not survive *Lawrence* and noting Justice Scalia's concern that *Lawrence* would undermine laws prohibiting bigamy).

79. *Holm*, 137 P.3d at 730–31.

80. UTAH CODE ANN. § 76-5-401.2 (2008) (making sexual activity with a minor sixteen or seventeen years old a third degree felony for persons ten or more years older than the minor).

81. UTAH CODE ANN. § 30-1-9(2) (2008).

82. *Holm*, 137 P.3d at 730–31, 751. ((MOD))

83. See *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *1–2 & n.2 (Tex. App.—Austin May 22, 2008, orig. proceeding) (reviewing district court's grant of temporary sole managing conservatorship of FLDS children to the Department of Family and Protective Services, which removed 468 children from the FLDS community on an emergency basis), *mand. denied sub nom. In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 615 (Tex. 2008). ((EDS))

criminalizes bigamy, and it is very likely that the plural relationships entered into by the FLDS adult community constitute a violation of Texas's bigamy statute. In Texas, a legally married person commits a crime if that person:

- (A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage; or (B) lives with a person other than his spouse in this state under the appearance of being married⁸⁴

Texas, however, is a common-law marriage state, which means that even relationships that have not been formally cemented are legally recognized as a "marriage" when "the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married."⁸⁵ Since this would appear to fit the adult relationships of FLDS adherents, it is almost certain that they may be criminally liable for a violation of Texas's bigamy statute.

More needs to be said about why the state may regulate adult relationships involving more than two consenting adults to a considerably greater degree than they may regulate adult relationships between two consenting adults. Among the many reasons given to ban polygamy is that such relationships are bad for children, and that states possess an inherent power to proscribe conduct inimical to the well-being of children.⁸⁶ Thus, we should turn to focus on the children. Above all else, this is the link between same-sex marriage and polygamy that brings together the major cases on same-sex marriage and the child welfare raid in Texas. Both focus on children as the excuse for state intervention. The same-sex cases use children as the justification for refusing to permit these relationships to form in the first place. The Texas polygamy raid in 2008 used children as the justification for breaking up a fully formed community.

V. THE USE OF THE STATE'S INTEREST IN CHILDREN TO JUSTIFY EFFORTS TO RESTRICT FAMILY FORMATION

It is by now a familiar theme that states seek to justify limiting marriage to an opposite-sex couple on grounds that such a relationship is best for children. With every challenge to a state's limitation of marriage to opposite-sex couples, the state defends its scheme on the grounds, among

84. TEX. PENAL CODE ANN. § 25.01(a)(1) (Vernon 2007).

85. TEX. FAM. CODE ANN. § 2.401(a)(2) (Vernon 2007).

86. See Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 LAW & INEQ. 59, 88, 94 (2008) ("Courts and commentators have discussed a number of harms associated with the practice of polygamy, ranging from the imposition of patriarchy to the abuse and neglect of women and children.").

others, that limiting marriage to such couples serves the best interests of children.

Thus, in the first major test of same-sex marriage limitations in 1993,⁸⁷ Hawaii officials defended the state's choice to limit marriage to opposite-sex couples because "the optimal development of children is most likely to occur if . . . children are raised by their mother and father."⁸⁸

This set the theme for all subsequent cases. Washington state was next when it defended its opposite-sex marriage limitation on the grounds that "rearing children in a home headed by their opposite-sex parents is a legitimate state interest furthered by limiting marriage to opposite-sex couples because children tend to thrive in families consisting of a father, mother, and their biological children."⁸⁹ The Washington Supreme Court, demonstrating great deference to the Legislature, held that "the legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a 'traditional' nuclear family where children tend to thrive," and that "limiting marriage to opposite-sex couples furthers the State's legitimate interests in procreation and the well-being of children."⁹⁰

Similarly, in *Goodridge v. Department of Health*,⁹¹ which struck down Massachusetts's ban on same-sex marriage, one of the state's primary rationales for the ban was "that confining marriage to opposite-sex couples ensures that children are raised in the 'optimal' setting."⁹² The Supreme Judicial Court had no difficulty conceding that "[p]rotecting the welfare of children is a paramount State policy."⁹³ It nonetheless ruled that limiting marriage to opposite sex couples "cannot plausibly further this policy."⁹⁴ Predictably, the dissent stressed the crucial relationship between the state's sanctioning of marriage and the well-being of children. In his dissent, Justice Cordy stressed that "[p]aramount among its many important

87. See *Baehr v. Lewin*, 852 P.2d 44, 48–50, 67 (Haw. 1993) ("[W]e hold that sex is a 'suspect category' for the purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution . . ."), *superseded by statute*, 1997 Haw. Sess. Law H.B. 117 § 2, at 1247 ((MOD)); see also Jeffrey A. Williams, *Re-Orienting the Sex Discrimination Argument for Gay Rights after Lawrence v. Texas*, 14 COLUM. J. GENDER & L. 131, 134 (2005) ("In *Baehr v. Lewin*, the Supreme Court of Hawaii became the first court to embrace the sex discrimination argument in addressing same-sex marriage.").

88. Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2753 (2008) (citing Transcript of Trial at 5, *Baehr v. Miike*, No. 91-1394-05, 1996 WL 694235 (Haw. Cir. Ct. Sept. 10, 1996)) ((ILL)).

89. *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006).

90. *Id.* at 983, 990; see also Lynne D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 860–61 (1997) ("Parents are important as role models for their children of the same gender because [c]hildren learn to be adults by watching adults." (quotation omitted)).

91. *Goodridge v. Dep't of Health*, 798 N.E.2d 941 (Mass. 2003).

92. *Id.* at 962, 969.

93. *Id.* at 962.

94. *Id.*

functions, the institution of marriage has systematically . . . ensured a stable family structure in which children will be reared, educated, and socialized.”⁹⁵ He emphasized that “[t]he marital family is also the foremost setting for the education and socialization of children,” and that:

[c]hildren learn about the world and their place in it primarily from those who raise them, and those children eventually grow up to exert some influence, great or small, positive or negative, on society. The institution of marriage encourages parents to remain committed to each other and to their children as they grow, thereby encouraging a stable venue for the education and socialization of children. . . . More macroscopically, construction of a family through marriage also formalizes the bonds between people in an ordered and institutional manner, thereby facilitating a foundation of interconnectedness and interdependency on which more intricate stabilizing social structures might be built.⁹⁶

Given marriage’s prominent utilitarian role in forming the next generation of citizens, Justice Cordy explained that “[i]t is difficult to imagine a State purpose more important and legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children.”⁹⁷ For this reason, the dissent concluded that it was rational for Massachusetts to believe that limiting marriage to couples of the opposite sex “furthers the legitimate purpose of ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children.”⁹⁸

Both the majority and dissent in *Goodridge* agreed on the importance of marriage as an institution to children’s well-being, and on the state’s legitimate interest in advancing children’s interests. Their most prominent disagreement was over who should carry the burden of proof on whether same-sex marriage had the potential to harm children. The majority’s concern was that, because there was “no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children[. t]here is thus no rational relationship between the marriage statute and the . . . goal of protecting the ‘optimal’ child rearing unit.”⁹⁹ The dissent countered that the relatively limited research on the impact of being raised by parents who publicly acknowledge their homosexuality meant that

[t]he Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social

95. *Id.* at 995 (Cordy, J., dissenting).

96. *Id.* at 996.

97. *Id.* at 997.

98. *Id.* at 998.

99. *Id.* at 963 (majority opinion).

structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm.¹⁰⁰

Justice Cordy's ultimate view was that at least until "there is unanimous scientific evidence, or popular consensus, or both, that such changes can safely be made," the Legislature is well within its boundaries to strive to "promot[e] and support[] the best possible social structure in which children should be born and raised."¹⁰¹

Several years later, New York's highest court reached a conclusion in line with Justice Cordy's dissent. In upholding New York's ban on same-sex marriage, the Court of Appeals in *Hernandez v. Robles* concluded that "the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships."¹⁰² The court remarked:

The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—but the Legislature could find that the general rule will usually hold.¹⁰³

In 2008, the California Supreme Court reached an opposite conclusion and struck down California's ban on same-sex marriage. Even so, the court acknowledged the prominence of the state's interest in child welfare and in establishing the rules for sanctioning marriages. In *In re Marriage Cases*, the court observed:

Society is served by the institution of civil marriage in many ways. Society, of course, has an overriding interest in the welfare of children, and the role marriage plays in facilitating a stable family setting in which children may be raised by two loving parents unquestionably furthers the welfare of children and society. In addition, the role of the family in educating and socializing children

100. *Id.* at 999–1000 (Cordy, J., dissenting) (footnote omitted); *see also* *Baker v. State*, 744 A.2d 864, 884 (Vt. 1999) ("It is conceivable that the Legislature could conclude that opposite-sex partners offer advantages in th[e] area [of child rearing], although . . . experts disagree and the answer is decidedly uncertain.").

101. *Goodridge*, 798 N.E.2d at 1003 (Cordy, J., dissenting).

102. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

103. *Id.*

serves society's interest by perpetuating the social and political culture and providing continuing support for society over generations.¹⁰⁴

Another area of the law in which courts are inclined to give significant weight to a legislature's view of what is optimal for the conditions of child rearing involves court challenges to bans on gays or lesbians adopting children or becoming foster parents. Very few states have such restrictions and, as a result, there are fewer cases on this subject than on same-sex marriage bans.¹⁰⁵ By far, the most important case is the 2004 decision of the Eleventh Circuit Court of Appeals in *Lofton v. Secretary of the Department of Children and Family Services*,¹⁰⁶ which upheld a Florida law that prohibited gays or lesbians from adopting foster children. In defending the constitutionality of the statute, Florida officials not only argued that dual-gender parenting plays a "vital role . . . in shaping sexual and gender identity," but that it is also crucial "in providing heterosexual role modeling."¹⁰⁷ Finding it rational to conclude that heterosexuals "are better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence," the Eleventh Circuit upheld the ban.¹⁰⁸

Florida justified its restrictive adoption law principally as furthering the best interests of children by placing them in families with married mothers and fathers. Two claims are being made here. The first, and most basic, is that states may consider the impact on children when creating rules respecting family formation. This claim is the least contentious. The more contentious claim is that Florida believes that "the presence of both male and female authority figures" is "critical to optimal childhood development and socialization."¹⁰⁹ Florida asserted in *Lofton* "that dual-gender parenting plays [a vital role] in shaping sexual and gender identity and in providing heterosexual role modeling."¹¹⁰ In addition to this claim, which focuses on the impact of same-sex parenting on children, Florida also asserted its legitimate "interest in promoting public morality both in the context of child rearing and in the context of determining which types of households should be accorded legal recognition as families."¹¹¹ The Eleventh Circuit did not reach this last claim, upholding the Florida law based on its conclusion that prohibiting homosexuals from adopting is rationally related

104. *In re Marriage Cases*, 183 P.3d 384, 423 (Cal. 2008) (footnote omitted). ((MOD))

105. *See supra* note 64 and accompanying text.

106. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

107. *Id.* at 818.

108. *Id.* at 822, 827.

109. *Id.* at 818.

110. *Id.*

111. *Id.* at 819 n.17.

to the state's interest in furthering children's best interests.¹¹²

The first claim—that the state has a legitimate interest in formulating laws with a view towards their impact on children—is universally accepted. As the *Lofton* court put it, “Florida clearly has a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children.”¹¹³ To buttress this conclusion, the court cited both *Palmore v. Sidoti*¹¹⁴ and *Stanley v. Illinois*.¹¹⁵ Reasoning that “[i]t is chiefly from parental figures that children learn about the world and their place in it, and the formative influence of parents extends well beyond the years spent under their roof, shaping their children's psychology, character, and personality for years to come,” *Lofton* stressed that:

[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society—particularly when those future citizens are displaced children for whom the state is standing *in loco parentis*.¹¹⁶

Ultimately, *Lofton* held that, in light of the “sum of experience” of history,¹¹⁷ “it is rational for Florida to conclude that it is in the best interests of adoptive children, many of whom come from troubled and unstable backgrounds, to be placed in a home anchored by both a father and a mother.”¹¹⁸

VI. THE STATE'S INTERESTS IN FORBIDDING POLYGAMY

A principal basis for banning polygamy when the United States was still growing geographically in the 1880s was that it threatened American democracy.¹¹⁹ As Maura Strassburg has written, however, “contemporary polygyny can no longer be said to threaten our national ambitions.”¹²⁰ It is

112. *Id.*

113. *Id.* at 819.

114. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years.”).

115. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (“[P]rotect[ing] the moral, emotional, mental, and physical welfare of the minor” is a “legitimate interest[], well within the power of the State to implement.”) (quotation omitted).

116. *Lofton*, 358 F.3d at 819.

117. *Id.* at 820 (“Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.”) (citing PLATO, *Book V*, in *THE REPUBLIC* 138–141 (Allan Bloom trans. 1968); SIMONE DE BEAUVOIR, *THE SECOND SEX* 696–97 (H.M. Parshley ed. & trans., Alfred A. Knopf 1964) (1949)).

118. *Id.*

119. Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 356 (2003).

120. *Id.*; see also Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy*

one thing when the question was whether the United States could afford to permit an entire state to embrace polygamy. It is another when we are speaking of small groups, unlikely to grow in very large numbers. Even if we accept the proposition that our brand of democracy requires a critical mass of monogamous relationships, does it require full compliance? Vaccines, for example, are effective when a critical mass of the population receives them. Full compliance is unnecessary to protect everyone.¹²¹ A similar set of questions was raised when the Supreme Court exempted the Amish from full compliance with compulsory education laws in 1971 in *Wisconsin v. Yoder*.¹²² How, precisely, is modern society threatened by polygamy?

A. *The Protection of Women*

A striking characteristic of the justifications for bans on polygamy is a claimed interest in protecting women.¹²³ A Texas legislative committee in 2005 was told that women living within the FLDS community are “treated like chattel, dressed in clothes from head to foot even in warm weather, denied education, kept in the compound except for occasional group trips to Wal-Mart, and forced to work long hours performing manual labor.”¹²⁴ According to Roseanne Piatt, Texas legislators were warned that “[t]he most egregious wrong inflicted upon the women was their subjugation to polygamist marriages, often when they were very young, with the expectation that they would produce many children for the group.”¹²⁵ Among the bases for forbidding polygamous relationships is that women in such relationships suffer higher risks of low self-esteem,¹²⁶ tend to enjoy

and Same-Sex Marriage, 75 N.C. L. REV. 1501, 1576–77 (1997) (“Monogamous marriage is uniquely capable of producing free-thinking and independent individuals who also are capable of choosing to be loyal and trusting citizens. Monogamous marriage harnesses the connecting forces of sex and love for the production of modern, self-conscious individuals, who will become citizens in a state only as individuals, not as family members.”).

121. Sylvia Law, *Human Papillomavirus Vaccination, Private Choice, and Public Health*, 41 U.C. DAVIS L. REV. 1731, 1761–62 (2008) (describing “herd immunity,” where an entire community is protected against a contagion because a sufficiently large percentage of the group is immune).

122. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (concluding that allowing Amish parents to keep their children out of public high school does not endanger the children’s welfare or, more generally, the public well-being).

123. See Richard A. Vazquez, Note, *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, 239–40 (2001) (suggesting that the prevention of abuse of women and children justifies polygamy bans); see also *State v. Green*, 99 P.3d 820, 830 (Utah 2004) (justifying Utah’s bigamy statute on the grounds that polygamous practices “often coincide[] with crimes targeting women and children”).

124. Rosanne Piatt, *Overcorrecting the Purported Problem of Taking Child Brides in Polygamist Marriages: The Texas Legislature Unconstitutionally Voids All Marriages by Texans Younger Than Sixteen and Criminalizes Parental Consent*, 37 ST. MARY’S L. J. 753, 758–59 (2006) (citations omitted).

125. *Id.* at 759 (quoting Utah Attorney General Mark Shurtleff). ((MOD))

126. Alean Al-Krenawi & Vered Slonim-Nevo, *The Psychosocial Profile of Bedouin Arab*

less marital satisfaction,¹²⁷ and are more likely to experience depression than women in non-polygamous relationships.¹²⁸

If we assume, however, that women enter into these relationships voluntarily (an assumption that will be challenged shortly), then prohibiting polygamous relationships denies adults the opportunity to live the life they choose. I know far too little about these communities to have an opinion on how accurate the claims are that they are misogynistic or worse in their treatment of women or that they mistreat both girls and boys. One thing is clear, however: some have wondered whether these claims are accurate¹²⁹ and others have suggested that even in the bad old days, things were often exaggerated to make the men in these communities appear worse than they were.¹³⁰

David Chambers reminds us that the evidence respecting the negative impact on women and children living in polygamous relationships is, at best, mixed. “[O]n the whole,” Chambers writes:

these women and their children seem to have lived lives that were as satisfying as the lives of most of their contemporaries. The most exhaustive study of the living conditions of Mormon plural-marriage families in the late nineteenth century . . . concluded that, in general, plural wives established harmonious relationships with each other and tolerable relations with their husbands. Many children, perhaps most, had relationships with their fathers typical of other children of their era. Commonly, the children formed close relationships with both their mothers and their fathers’ other wives. Women in plural marriages were motivated by the sacred function of plural marriage to strive to make the complex and awkward familial relationships succeed. They often shared tasks and provided each other comfort. And, though many of the women bore large numbers of children, research suggests that the number of children born to women in polygamous marriages was smaller, on average, than the number of children born to comparable women in single-wife families.¹³¹

Women Living in Polygamous and Monogamous Marriages, 89 FAMILIES IN SOCIETY 139, 144–46 (2008). ((MOD))

127. *Id.* ((MOD))

128. F.O. Fatoye, A.B. Adeyemi & B.Y. Oladimeji, *Emotional Distress and Its Correlates Among Nigerian Women in Late Pregnancy*, 24 J. OBSTETRICS & GYNAECOLOGY 504, 506–508 (2004). ((MOD))

129. See Irwin Altman, *Husbands and Wives in Contemporary Polygamy*, 8 J. L. & FAM. STUD. 389, 392 (2006) (“Some of these and other stereotypes and caricatures are still used today, with polygamous men labeled as selfish, controlling, and exploitive of women. . . . As with many stereotypes, such qualities are applied to whole populations, are often exaggerations, and are based on a limited number[] of cases.”).

130. Strasser, *supra* note 43, at 783 (positing that the Texas court in *Sherman v. Henry* exaggerated its description of adultery by stating adultery intrinsically undermines the marital relationship and arguing to the contrary).((MOD))

131. Chambers, *supra* note 2, at 66–67 (citing JESSIE L. EMBRY, MORMON POLYGAMOUS FAMILIES (1987)) (other citations omitted); accord IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS

In any event, the dilemma involved in protecting women is fine tuning the state's legitimate interest in preventing certain relationships from forming because of a paternalistic belief that the relationship is inimical to the well-being of women. Such a rule not only denies women an important measure of autonomy, it also becomes difficult to know where the state's interest ends. Certainly there are countless women who have entered into unacceptable, even dangerous, monogamous relationships with men. And some of the time, at least, it would have been possible to predict the problem the women might face if they married. If prohibiting polygamy is justifiable to prevent women from entering into relationships with a high probability of oppression or violence, or of living an unfulfilled life, would a law that categorized some men as ineligible to marry because of a prior history also be permissible? Apart from the obvious point that such a law would almost certainly be an unconstitutional interference with the right to marry,¹³² it would also deny women their right to choose their mate even against the odds that the man will change or the woman will be able to take care of herself. When we consider how common it is for women to want to marry notorious murderers and how many women have attempted to marry the likes of O.J. Simpson or Scott Peterson, we recognize that we are entering very complicated territory.¹³³

Others oppose polygamy on a different ground: the relationship is structurally unequal and disadvantages women as compared to men. Martha Nussbaum regards polygamy as a "structurally unequal practice,"¹³⁴ at least when it permits men, but not women, to marry more than one person at a time.¹³⁵

Although there has been little progress to make polygamy formally legal in the United States, the topic is perhaps more in public conversation today than at any time since Utah became a state.¹³⁶ Some of this

FAMILIES IN CONTEMPORARY SOCIETY (1996) (discussing the social-emotional and family relationships of contemporary polygamous families based on two hundred interviews with twenty-four families living in two separate polygamous communities) ((MOD)).

132. *Turner v. Safley*, 482 U.S. 78, 96, 98 (1987) (holding unconstitutional a law prohibiting the right of an inmate to marry a civilian because the right of marriage remains fundamental even within the prison system); *Zablocki v. Redhail*, 434 U.S. 374, 375, 383, 388 (1978) (holding unconstitutional a law restricting marriage based on nonpayment of child support, reasoning that the right to marry is fundamental and may not be impinged upon unless provisions of a statute are narrowly tailored to legitimate state interests). ((MOD)).

133. See SHEILA ISENBERG, *WOMEN WHO LOVE MEN WHO KILL* 34 (iUniverse.com, Inc. 2000) (1991) ("Unbelievable as it may seem, there is a population of women who are deeply drawn to men who have murdered. . . . Some, who are infatuated, write fan/love letters to celebrity killers . . .").

134. MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 98 (1999) ("Polygamy, insofar as it continues to exist, is a structurally unequal practice: Plural marriages are unavailable to women.").

135. MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE* 197 (2008) (suggesting that a potential compelling state interest in prohibiting polygamy may be the promotion of gender equality: men are permitted plural marriages, while women are not).

136. Angela Campbell, *How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis*, at 26 (2005), available at

conversation is the direct result of *Lawrence*. Politics, of course, is another reason polygamy is a hot story today. As we have seen, as same-sex marriage has become a matter of public debate, polygamy is, once again, an important political issue. When these issues become public grist, they also lead local law enforcement officials to test the waters.

B. The Protection of Children

In addition to the state's professed concern for the well-being of women, states commonly emphasize the negative effects of polygamy on children as a separate basis for opposing polygamy. It is valuable to see how various courts consider the state's interest in children when addressing the validity of state rules limiting the conditions under which it will authorize families to come into being. Cases involving polygamy, however, are of an entirely different sort. Indeed, the differences are so great that these earlier cases are of practically no benefit.

Both the same-sex marriage cases and *Lofton* tend to hold that the essential question before the courts is whether the legislative choice being challenged is rational. This is, of course, the lowest possible standard of review and is calculated to lead to upholding most schemes. Thus, in *Lofton*, the Eleventh Circuit simply found that "the Florida legislature could have reasonably believed that prohibiting adoption into homosexual environments would further its interest in placing adoptive children in homes that will provide them with optimal developmental conditions."¹³⁷ It further concluded:

It is not irrational to think that heterosexual singles have a markedly greater probability of eventually establishing a married household and, thus, providing their adopted children with a stable, dual-gender parenting environment. Moreover, . . . the legislature could rationally act on the theory that heterosexual singles . . . are better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence.¹³⁸

Under this rational basis test, even studies that purport to show that children raised in same-sex environments have fared as well as children raised in opposite-sex households are unable to carry the day for challengers to same-sex marriage bans because the evidence they marshal

<http://ssrn.com/abstract=1360230> (noting that despite prohibition of polygamy under Utah's Constitution, plural marriages continue to exist throughout the state and polygamists are rarely prosecuted for such practices).¹³⁷

137. *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 820 (11th Cir. 2004).

138. *Id.* at 822. In support of this proposition, the court added a footnote referencing the New Hampshire Supreme Court decision, *In re Op. of the Justices*, 530 A.2d 21, 25 (N.H. 1987), concluding that New Hampshire's prohibition on homosexual adoption "was rationally related to the state's desire 'to provide appropriate role models for children' in the development of their sexual and gender identities." *Lofton*, 358 F.3d at 822 n.19.

“does not establish beyond doubt that children fare equally well in same-sex and opposite-sex households.”¹³⁹ When courts apply a rational basis test to the challenged legislation, the challenge fails even when serious questions are raised about the presumptions behind the legislation, so long as the court is able to conclude that it was not irrational for the legislature to make the assumptions it did. In addition, courts like to stress that “until recently few children have been raised in same-sex households, and there has not been enough time to study the long-term results of such child-rearing.”¹⁴⁰

The rational basis test also permits legislatures to operate “on the commonsense premise that children will do best with a mother and father in the home.”¹⁴¹ Reasoning that “sufficient time has not yet passed to permit any scientific study of how children raised in those households fare as adults,” the Eleventh Circuit comfortably concluded that “it is [not] irrational . . . to proceed with deliberate caution . . . in an alternative, but unproven, family structure that has not yet been conclusively demonstrated to be equivalent to the marital family structure that has established a proven track record spanning centuries.”¹⁴²

But these examples are imperfect precedents when state officials seek to remove children from families where adults are engaged in a polygamous relationship. In *Lofton*-like cases, the question only is whether the state is required to place children with certain putative parents.¹⁴³ In *Hernandez*, it is whether the state is obliged to recognize and endorse the family relationship already established.¹⁴⁴ These questions permit courts to use the rational basis test. Conservative courts, such as *Lofton*, have done so with the kind of weight on the scale as to guarantee that whatever the state says will be sufficient to carry the day. But, importantly, the court is required only to conclude that someone could rationally take the position the state has taken.

In child welfare cases, the state seeks to break up the family unit by removing the children (or some of the adults). This is considerably harder to justify and these precedents are much weaker than they sound. Indeed, the legal inquiry is polar opposite from *Lofton*-like questions: whether it is

139. *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

140. *Id.* The court then concluded that “there are rational grounds on which the Legislature could choose to restrict marriage to couples of opposite sex. Plaintiffs have not persuaded us that this long-accepted restriction is a wholly irrational one, based solely on ignorance and prejudice against homosexuals.” *Id.*

141. *Id.*

142. *Lofton*, 358 F.3d at 826.

143. *See id.* at 806–09 (rejecting equal protection and due process challenges to a Florida statute prohibiting adoption by any homosexual person, brought by homosexual foster parents and legal guardians attempting to adopt the children for whom they had cared).

144. *Hernandez*, 855 N.E.2d at 7 (“[A] rational legislature could decide that [the benefits of state recognized marriage] should be given to members of opposite-sex couples, but not same-sex couples.”).

necessary to forbid a child from living in the home. Child welfare officials, and courts implementing child welfare interventions, may remove children from their homes only in extreme circumstances. When forming families, states may consider what they believe would serve a child's best interests. When breaking up families already formed outside of state involvement, the inquiry is whether the child faces such grave danger that his removal is necessary to protect him from grave risk of harm.¹⁴⁵

The remaining inquiry in this Article is which system is best suited to address polygamous relationships when children are involved: the criminal justice or child welfare systems. My interest here is outside of any normative argument in favor of or against polygamy. Indeed, I am willing to assume for these purposes that the state is not obliged to recognize polygamous relationships and even may forbid them. I mean to examine only the means by which they ought to be broken up, assuming the law may attempt to break them.

I advocate for the use of the criminal law rather than child welfare law for several reasons. First, criminal law affords the accused greater protection against the use of state force both in the investigative and prosecutorial function. Second, using child welfare law to break up polygamous families creates a danger of expanding the use of child welfare prosecutions in a pernicious direction. My argument is straightforward: when local officials wish to break up polygamous families, they should do so through the criminal process not the child welfare process.

VII. THE TWO MASSIVE RAIDS ON POLYGAMOUS COMMUNITIES IN AMERICAN HISTORY

A. *The Short Creek Raid in 1953*

The only two massive raids on polygamous communities in United States history provide an ideal contrast. The first was the 1953 Arizona raid on Short Creek, a community composed of Mormon fundamentalists on the border of Arizona and Utah. Arizona state police officers and soldiers from the National Guard entered Short Creek (which has since been renamed Colorado City) and took virtually everyone into custody. The raid was organized by Arizona's Governor who expected to gain strong political support for it. But the efforts backfired and the raid was largely condemned by the media in the United States.¹⁴⁶ The criminal prosecutions were

145. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (striking down the Illinois child custody scheme, where children of unmarried fathers are declared dependant children without a hearing on parental fitness and without proof of neglect).

146. *Chambers*, *supra* note 2, at 69–70. Specifically, the proceedings following the Short Creek raid:

turned into a political disaster for the Governor of Arizona. He had announced at the beginning of the raid that he was rescuing the 263 children of Short Creek from the “foulest conspiracy” and from “bondage” and the mothers and children from “white slave[ry].” But

abandoned entirely when members of the community refused to cooperate.¹⁴⁷

Interestingly, one child welfare prosecution followed the criminal raid at Short Creek when Utah child welfare officials intervened to protect the children of a polygamous Mormon couple living on the Utah side of the border.¹⁴⁸ In 1955, the Utah Supreme Court in *In re Black*¹⁴⁹ upheld the termination of a polygamous couple's parental rights to their eight children in what appears to be the first termination of parental rights case in the United States based on the parents' polygamous relationship.¹⁵⁰ The justification for the termination order was straightforward: because the practice of polygamy is immoral and children should not be exposed to an "evil" influence, removing the children from their parents' custody and permanently severing all parent-child ties was necessary to further the children's interests.¹⁵¹

In *Black*, the father had three wives and twenty-six children ranging from two to seventeen years old. The crucial charge in the petition was that "the parents of said children have and do now teach and encourage said children to believe in the practice of polygamy or plural marriage and that the children should enter into plural marriage in violation of the laws of Utah, all of which is injurious to the morals and welfare of said children."¹⁵²

At trial, the court found that the Blacks lived as part of a religious

the press and the public, in large numbers, came to view the raid as an attack by an overreaching government on a group of generally law-abiding citizens.

Id. at 70 (footnote omitted).

147. *Id.* ("None of the children were found to be neglected, most mothers were not the least bit grateful for having been rescued, and every one of the accused fathers was released by a trial judge the Governor himself had appointed.")

148. See Otto, *supra* note 10, at XXX (noting that Short Creek was raided by Arizona law enforcement officers). Leonard Black, who was arrested as a result of the raid, had two families in Arizona and another in Utah. Black's wife in Utah, Vera Johnson, and their eight children were not disturbed by the raid. "Shortly after the raid, however, a [Utah] county juvenile court terminated Black's and [Vera] Johnson's parental rights, finding that their children were not receiving adequate food or medical care and were living in an environment injurious to their morals and welfare." *Id.* ((MOD))

149. *In re Black*, 283 P.2d 887, 888, 913 (Utah 1955) (affirming judgment of the Utah Juvenile Court in finding the "appellant children to be neglected children, [thus] depriving the parents . . . of the right to custody and control over the children, making the children wards of the Juvenile Court and awarding the right of custody and control over said children to" the state).

150. Anne Taylor, *In Re Kingston Children: The Best Interests of Polygamous Children*, 8 J. LAW & FAM. STUD. 427, 430 (2006) (recognizing the child welfare prosecution following the Short Creek raid as the first termination of parental rights case dealing with polygamous parents in Utah). ((MOD))

151. *In re Black*, 283 P.2d at 913 ("[T]he practice of polygamy and unlawful cohabitation should be weeded out and [] children should not be subjected to its evil influence and environment. The practice of polygamy, unlawful cohabitation and adultery are sufficiently reprehensible, without the innocent lives of children being seared by their evil influence. There must be no compromise with evil.")

152. *Id.* at 889.

order “requiring men to take and live with more than one wife and that failure to do so constitutes a breach of religious duties.”¹⁵³ The court also found that the parents:

have at no time counseled or advised any of their children to abide by the laws of Utah regarding polygamy, but on the contrary by their (the parents’) own conduct and example in living in polygamy and by associating themselves with a religious group whose members practice and advocate polygamy have encouraged their children to become polygamists when they become of marriageable age.¹⁵⁴

Finally, the trial court found that five of Black’s daughters were themselves plural wives who married, with their father’s consent, men who practiced polygamy. From these facts, the trial court made the crucial finding of law and fact that the parents’ home “is an immoral environment for the rearing of said children,” and that the parents “neglected to provide for said children the proper maintenance, care, training and education contemplated and required by law and morals.”¹⁵⁵

Despite these findings, the trial court was content to permit the children to return to their parents’ custody from foster care on the simple condition that they agree to “comply with the laws of Utah relating to marriage and sexual offenses, . . . refrain from counseling, encouraging and advising their children to violate the laws of Utah relating to marriage and sexual offenses, . . . [and to] counsel and advise the children to obey the laws of Utah relating to marriage and sexual offenses.”¹⁵⁶ If the parents submitted sworn statements to this effect, and committed to obey these conditions, the court would send the children home. If the parents refused, the court warned it would enter an order terminating their parental rights. The parents refused, and the court kept its promise.¹⁵⁷ The Blacks then appealed to the Utah Supreme Court. Stressing that six of Black’s children were under 18 when they married and one was fifteen when she married,¹⁵⁸ the court affirmed the termination order. It took pains to distinguish between advocating a religious belief without overt action, which it took to be constitutionally protected conduct, and raising children in an immoral environment.¹⁵⁹ The court stated that the judgment terminating the parents’ rights would be wrong only if “public welfare and the best interest of these children will be served by training them in the way of immorality and crime.”¹⁶⁰

153. *Id.* at 891.

154. *Id.*

155. *Id.*

156. *Id.* at 892.

157. *Id.*

158. *Id.* at 896.

159. *Id.* at 907.

160. *Id.* at 908.

Perceiving its role as protecting children from being trained to live a criminal life, the court explained that:

[t]he great tragedy of it all is that this proceeding was not commenced eighteen years ago when the first child of this polygamous relationship was born. Had that been done, we might not now be concerned with the other seven born to [one of the mothers] and the seven born to her younger sister . . . since that time from this immoral and illegal relationship.¹⁶¹

The court paused when it acknowledged that removing the children “does seem harsh,” and, even worse, “visits the sins of this father upon these children.”¹⁶² But it explained that only by “stop[ping] the spread of this immoral and illegal practice” in this case could the court prevent “the sins of this father [from being] visited upon the children of these children to the third and fourth generations.”¹⁶³ Because the parents “positively taught their children that the law of plural marriage and the practice of plural marriage was right,” and because they “encouraged their children to teach, preach and practice it,”¹⁶⁴ they forfeited their right to be the children’s parents.

Ultimately, the Utah Supreme Court went beyond the trial court, chastising it for being “too lenient on these parents.”¹⁶⁵ The court held it was error even to consider sending the children home to their parents merely upon a promise not to violate the law again or to encourage the children to do so. Instead, the only order the Supreme Court would permit, other than terminating parental rights, is one returning the children to the *mother* on condition that she desist from living with the father. Failing that, the complete severance of all parental ties was the only outcome the court would authorize.¹⁶⁶

One Justice, concurring only in the result, stressed a distinction which has become particularly salient since *Lawrence*. Justice Henriod refused to base his vote on any finding or conclusion that polygamy was *immoral*. He stressed that polygamy “is neither morally nor legally wrong in Turkey and elsewhere. It is questionable whether it was morally or legally wrong in Utah Territory in the 19th Century, and I like to think, at least, that my great-grandfather was not only a law-abiding citizen, but was not immoral according to the mores of his time.”¹⁶⁷ But Justice Henriod, recognizing that polygamy is illegal in Utah, believed there was a simpler basis upon which to support terminating the parents’ rights. “Our decision,” he wrote,

161. *Id.* at 909.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 913.

166. *Id.*

167. *Id.* at 914 (Henriod, J., concurring in judgment).

“can be resolved by answering a most simple question: Do the statutes of our state constitutionally permit the Juvenile Court to deprive parents of the custody of their children, if such parents practice and teach their children to practice a felony,—*any* felony?”¹⁶⁸ He answered in the affirmative, clarifying that “there would be little difficulty in answering it if the felony being taught to the children were murder, rape, armed robbery, burglary and the like.”¹⁶⁹

The *Black* court stressed that permitting children to live in a polygamous home places them in an environment which flaunts the law and runs the risk of teaching them “a disrespect for observance of other laws.”¹⁷⁰ An additional concern, of course, is that polygamous relationships commonly also include both underage marriage and child sexual abuse.¹⁷¹

But the question of what the state may do, beyond prosecuting parents for committing criminal acts, when they “practice and teach their children to practice any felony” deserves more careful attention. Several Utah court decisions decided in recent years may have undermined the continued validity of *Black* or, perhaps more precisely, its reasoning. First, in the 1987 case of *Sanderson v. Tryon*, the Utah Supreme Court ruled that a parent’s polygamous lifestyle, standing alone, is insufficient to deny a child custody award.¹⁷² Then, in 1991, in *In re Adoption of W.A.T.*, the same court ruled that polygamists cannot be disqualified automatically as adoptive parents.¹⁷³

Most recently, in 2004, another polygamous family became enmeshed with the child welfare system, albeit under unusual circumstances. After a thirteen year-old girl ran away from home, child welfare officials began an investigation into the girl’s claim that her father threatened to beat her for getting her ears pierced.¹⁷⁴ Before the case was over, the trial court found that the girl and her nine siblings had been abused by their father and neglected by their mother.¹⁷⁵ The trial court concluded that there was a

168. *Id.*

169. *Id.*

170. *Johanson v. Fischer (In re Adoption of W.A.T.)*, 808 P.2d 1083, 1089 (Utah 1991) (Howe, C.J., dissenting); see *In re Black*, 283 P.2d at 911 (finding that the children living in a polygamous home were subjected to the illegal practice of polygamy and taught it was above the laws of man).

171. *Rower*, *supra* note 9, at 715 (noting the prevalence of child abuse and the coercion of underage girls into marriage because they have no other options).

172. *Sanderson v. Tryon*, 739 P.2d 623, 627 (Utah 1987).

173. *In re Adoption of W.A.T.*, 808 P.2d at 1086 (holding neither the constitution nor public policy justifies blanket exclusion of polygamists from being eligible to adopt).

174. *Taylor*, *supra* note 148, at 427 & n.2 (recapitulating the background of *In re Kingston Children*, where a complaint was made by two sisters who were threatened with abuse by their father for getting their ears pierced, leading to an investigation conducted by the Division of Child and Family Services). ((MOD))

175. *Id.* at 428 (describing the abuse of the Kingston children, as two of the Kingston sisters were thrown down the stairs by their father, and all of the Kingston children were hit on more than one occasion by him).

“‘familial pattern’ of abuse by the father and unwillingness or inability of the mother to protect the children.”¹⁷⁶ After a year in foster care, eight of the children were returned to the ‘mother’s custody. Both parents, however, relinquished their rights to the thirteen year old and to her fifteen-year-old sister.¹⁷⁷

Between 1953 and the end of the twentieth century, religious practitioners of polygamy were largely left to themselves without any serious effort to prosecute them. Emboldened by their relative freedom to live their lives as they saw fit, the community formally established the FLDS Church in 1991.¹⁷⁸ Beginning in the late 1990s, isolated individuals began to be prosecuted.¹⁷⁹ In 2006, FLDS Church leader Warren Jeffs was

176. *Id.*

177. *Id.* at 429 (citing Brooke Adams, *Kingston Kids Go Home*, SALT LAKE TRIB., Aug. 24, 2005, at A1, A10; Linda Thomson, *Kingston Pair Gives Up 2 Teens*, DESERET MORNING NEWS (Salt Lake City), Oct. 15, 2005, at B1). ((MOD))

Sometimes, courts are asked to consider very closely related questions in the context of post-divorce contests. A recent case from Pennsylvania is instructive in this regard. In *Shepp v. Shepp* (*Shepp II*), 906 A.2d 1165 (Pa. 2006), a fundamentalist Mormon wished to instruct his stepdaughter in his religious views after his divorce from the child’s Mormon mother. *Id.* at 1166–67. For an extended discussion of this decision, see Jeffrey Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation, and the Best Interests of the Child*, 53 VILL. L. REV. 173, 177–92 (2008) ((MOD)). Specifically, Shepp told his thirteen-year-old stepdaughter that if she did not practice polygamy when she grew up, she would go to hell. *Shepp*, 906 A.2d at 1168 (“Manda Lee (Manda), Mother’s daughter from a previous marriage, testified that when she was thirteen years old, Father . . . told her ‘that if you didn’t practice polygamy or you didn’t agree with it, but mostly if you didn’t practice it, that you were going to hell.’” (citation omitted)). Although the trial court issued an order prohibiting the father from teaching his daughter about polygamy, the Pennsylvania Supreme Court ultimately reversed, holding that “the Commonwealth’s interest in promoting compliance with the statute criminalizing bigamy is not an interest of the ‘highest order’ that would supersede the interest of a parent in speaking to a child about a deeply held aspect of his faith.” *Id.* at 1173. Both the trial court and the intermediate appellate court concluded that the father should be barred from indoctrinating his daughter in a criminal practice. *Shepp v. Shepp* (*Shepp I*), 821 A.2d 635, 638 (Pa. Super. Ct. 2003). The intermediate appellate court found that the father went further than merely informing his daughter of certain religious tenets (which would amount to sharing information with her) and crossed the line into instructing her how to behave. Since the behavior he was advocating is illegal, the father’s “promotion of his beliefs to his stepdaughter involved not merely the superficial exposure of a child to the theoretical notion of criminal conduct, but constituted a vigorous attempt at moral suasion and recruitment by threats of future punishment. The child was, in fact, warned that only by committing an illicit act could she comply with the requirements of her religion.” *Id.* The court reasoned that advocating that a child engage in polygamy is no different from teaching her to use drugs or to become a prostitute. *Id.*

The Pennsylvania Supreme Court disagreed, finding that this kind of indoctrination in criminal conduct did not pose a grave threat of harm and, accordingly, there was “insufficient basis for the court to infringe on a parent’s constitutionally protected right to speak to a child about religion as he or she sees fit.” *Shepp II*, 906 A.2d at 1174.

178. *See Otto*, *supra* note 10 at 883 (stating that during the thirty years prior to 1991, “criminal prosecutions against polygamists have ceased and for most people, polygamy is a quaint relic of a now internationally established religion”); *Inside the Polygamist Church*, CHI. TRIB., April 20, 2008, at XXX (discussing polygamist communities and FLDS since the Short Creek raid in 1953). ((MOD))

179. *Inside the Polygamist Church*, *supra* note 178, at XXX. (describing the spotlight cast onto previously ignored FLDS groups when Tom Green was convicted for bigamy after boasting on national news in 1999 that he lived with five wives and had twenty-four children). ((MOD))

placed on the FBI Ten Most Wanted List; he was arrested and convicted in 2007 of being an accomplice to rape for performing a wedding between a nineteen-year-old man and his fourteen-year-old cousin.¹⁸⁰

B. The San Angelo Raid in 2008

When Texas child welfare officials raided the FLDS community living near San Angelo on April 3, 2008, they removed every person under the age of eighteen.¹⁸¹ The justification for this wholesale removal was that all of the children were probably neglected or abused by their parents and needed to be separated from them, at least until the investigation was completed.¹⁸²

Local officials decided to intervene after a Spring 2008 telephone call to a Texas hotline reporting alleged widespread child sexual abuse and rape at a community of FLDS members near San Angelo, Texas. But this time the raid was led by case workers and was handled through the child welfare system. The case workers removed every child found in the community and placed them into foster care. An emergency court proceeding followed. The trial judge ruled that all of the children were properly removed, and authorized their continued placement in foster care.¹⁸³ Again, the public reaction to the state's action was extremely negative.¹⁸⁴ An appeal was promptly sought after the trial court's emergency removal order and in May 2008 the trial judge was sharply rebuked for issuing what the Texas appeals court held were illegal removal orders of 439 children.¹⁸⁵ Since then, 438 children were returned to their parents' custody. By April 2009, all but one of the cases had been nonsuited.¹⁸⁶ In their place, local prosecutors have largely taken over, and "twelve FLDS members have been indicted on charges ranging from felony bigamy and sexual abuse of a child to misdemeanor failure to report abuse."¹⁸⁷ These prosecutions are still

180. John Dougherty & Kirk Johnson, *Sect Leader is Convicted as an Accomplice to Rape*, N.Y. TIMES, Sept. 26, 2007, available at <http://www.nytimes.com/2007/09/26/us/26jeffs.html>. ((MOD))

181. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *4 (Tex. App.—Austin May 22, 2008, orig. proceeding), *mand. denied sub nom. In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 613–14 (Tex. 2008). ((EDS))

182. *See In re Steed*, 2008 WL 2132014, at *1–2 (stating children were taken into custody “based on allegations . . . that there was immediate danger to the physical health or safety of the children”). ((MOD))

183. *See In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d at 613–15.

184. *See* Jenny Hoff, *Polygamist Raid: The Battle Continues*, KXAN.COM, Apr. 3, 2009, http://www.kxan.com/dpp/news/polygamist_raid_the_battle_continues (describing the negative aftermath of the FLDS community raid near San Angelo, Texas). ((MOD))

185. *In re Steed*, 2008 WL 2132014, at *4 (holding the district court abused its discretion by failing to return the children to their families because the Department failed to meet the burden of proof required under the relevant Texas statute).

186. *See* Hoff, *supra* note 184. ((MOD))

187. Paul A. Anthony, *Sect Files Massive Motions to Suppress Evidence in Criminal Cases*, (Apr.

pending as of May 2009.

VIII. THEORIES OF CHILD PROTECTION INTERVENTIONS IN POLYGAMOUS FAMILIES

As we have seen, there are two legal systems from which states can choose to enforce polygamy's prohibition: prosecutors can charge adults with criminal law violations, or state officials can employ the child protective system and seek to remove children from "unfit" homes. When children's well-being is made a principal focus of the state's interests, it is perhaps unsurprising that child welfare civil prosecutions would be considered instead of criminal prosecution of polygamists.

But we would lose an important insight if we failed to appreciate that child welfare prosecutions are often undertaken in ways that criminal court judges would not tolerate because they have far better inculcated the rule of law in monitoring practice. Child welfare practice, in contrast, is often driven by striving to do what is perceived to be best for children, with considerably greater discretion left to officials to make as-applied decisions designed to serve a particular child's best interests. This is one of the dangerous qualities of these prosecutions.

Criminal law is monitored by officials committed to the rule of law or who have been trained to become so committed. Whether the result of oversight by federal courts through habeas corpus review of improper state prosecutions,¹⁸⁸ the vigorous application of federal constitutional principles in state-developed criminal procedure,¹⁸⁹ or some combination thereof, state officials recognize that when they invoke state apparatus through the criminal process, federal constitutional norms must be obeyed. But a considerably more lax set of rules applies in child welfare cases. Sometimes, the laxness is a direct consequence of the difference between criminal and child welfare systems.¹⁹⁰ More often, however, the rules

16, 2009), <http://www.gosanangelo.com/news/2009/apr/16/sect-files-massive-motions-to-suppress-evidence/>. ((MOD))

188. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L. J. 1035, 1041 (1977) (recognizing habeas corpus as a remedy to ensure constitutionally sound outcomes). ((MOD))

189. E.g., *Terry v. Ohio*, 392 U.S. 1, 12–13 (1968) (applying federal constitutional standards to the state evidentiary procedures). ((MOD)); *United States v. Wade*, 388 U.S. 218, 238 (1967) (finding a constitutional right to counsel for criminal defendants) ((MOD)); ((MOD)); *Miranda v. Arizona*, 384 U.S. 436, 491 (1966) (finding that no legislation or rule can abrogate the Fifth Amendment right secured by the Constitution); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (finding the Sixth Amendment's guarantee of counsel is a fundamental right made obligatory upon the States by the Fourteenth Amendment); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court"). ((MOD))

190. Compare *Wyman v. James*, 400 U.S. 309, 325–26 (1971) ((MOD)) (finding that non-criminal home visits by social workers did not violate the rights guaranteed by the Fourth Amendment), with *Camara v. Mun. Court*, 387 U.S. 523, 540 (1967) (finding that appellant had a constitutional right

respecting when and how officials may invade someone's home to conduct an investigation or to remove children for protection-related reasons are the same whether the officials are the police or agents of the local child protection agency.¹⁹¹ Nevertheless, judges sitting in child protection courts too often issue orders that judges sitting in criminal courts would refuse to sign. One unsurprising result is that child protection officials chose to invade the San Angelo FLDS community in April 2008 by seeking judicial approval to do so.

Even though it was "well established" in Texas long before 2008 "that the Fourth Amendment regulates social workers' civil investigations,"¹⁹² the trial court presiding over the San Angelo raid ordered state officials to go into the homes of everyone in the community and seize every child under the age of eighteen. This is a stunning order, deeply incompatible with living in a free society.¹⁹³

Not only are judges within the child welfare system inclined too often to blink at well established constitutional safeguards in the pursuit of child protection, caseworkers and their supervisors in too many parts of the United States have little incentive to faithfully respect constitutional norms. Even when courts rule that the actions are illegal, these individuals can expect to be given immunity when courts declare that their illegal actions were not clearly established at the time.¹⁹⁴ Federal courts generously protect child welfare workers even when these workers violate the Constitution by giving them qualified immunity, declaring that the specific violation was not plainly established at the time the workers acted.¹⁹⁵ Moreover, it is insufficient to show that some or even many courts have previously held the challenged conduct unconstitutional. The pertinent question becomes whether the federal court of appeals in the controlling circuit has ruled on the matter.¹⁹⁶ Some day we may live in a world where

to insist that housing inspectors obtain a warrant to search appellant's home).

191. See, e.g., *Gates v. Tex. Dep't of Child Protective & Regulatory Servs.*, 537 F.3d 404, 421–22 (5th Cir. 2008) ("A statutory command to investigate allegations within twenty-four hours is not a license to ignore the Fourth Amendment . . .").

192. *Id.* at 420–21 (citing *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 401 (5th Cir. 2002)).

193. See Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 459 (2005) (stating the Fourth Amendment gives "concrete expression to a right of the people which 'is basic to a free society'" (quoting *Camara*, 387 U.S. at 528)). ((MOD))

194. E.g., *Gates*, 537 F.3d at XXX ((MOD)) (finding individual defendants entitled to qualified immunity if the "law was not clearly established at the time of the alleged constitutional violation").

195. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (finding that a constitutional right must have been clearly established before further inquiries into qualified immunity can be made); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (holding that a "clearly established" right depends on what a reasonable official would understand the law to be).

196. *Gates*, 537 F.3d at 426 (finding the court had not yet "established the constitutional standard for entering a home for purposes of investigating child abuse") The Tenth Circuit reached a different conclusion in *Roska ex rel Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003). In *Roska*, government

these illegal actions are clearly known everywhere. But we have not yet reached that place.

Criminal law prosecutions are preferable to child protection prosecutions when state officials mean to eradicate polygamy for more reasons than the protection of Americans' civil liberties. Prosecuting polygamous parents in child welfare cases based on their "unfitness" will also distort the essential inquiry in these cases.

Two bases were asserted to show that all of the children living in San Angelo were neglected or abused. The first is based on the theory of "derivative neglect." Pursuant to this theory, the children of parents who have demonstrated a fundamental flaw in their parenting abilities are endangered even when a child has not yet suffered any harm, directly or indirectly. Thus, the children of fathers who have committed sex abuse with girls under 18 are endangered (regardless of their gender or age) because they are being raised by parents who have manifested a fundamental flaw in their understanding of what constitutes proper parenting. So, too, the theory goes, children of mothers or fathers who have given their permission for their minor daughters to become the "wife" of an adult man are being raised by parents who have demonstrated parental unfitness so broadly that they cannot be trusted to continue to raise their children.

The second is connected to the first, but is even broader. Whereas the derivative neglect theory limits prosecutions to families in which the parent is a sex abuser, the second basis for child welfare intervention is that because the community accepts polygamy as a way of life, the community is a sort of criminal enterprise—an environment in which children are being raised to perceive child sexual abuse as fair and proper. Both theories are broad in that they permit the removal of children from their families even when they have never suffered any harm. But derivative neglect cases, at least, are limited to families in which the parents have committed or allowed sex abuse of their own children. The even broader second theory stresses the unacceptable lifestyle of the community, particularly its definition of family, and is a direct attack on the community's support for polygamy (even though not all members of the community practice polygamy). This broader theory invites courts to find that children are endangered even when their parents are not polygamists and they have never committed an act of sex abuse. What they *have* done, which is unacceptable, is expose their children to an immoral and criminal

officials entered a house without a warrant and removed a child suspected of being abused. The Tenth Circuit determined that there were no exigent circumstances justifying the warrantless entry into the home. The court based its decision on the fact that the defendants were aware that various doctors had suspected for some time that the child was a victim of abuse, there was nothing particularly unusual about the child's condition at the time he was removed, and the child's attending physician told the defendants it would be a mistake to remove the child. In that case, the removal took place two days after the school reported its suspicions to child protective services. *Id.* at 1238–41.

community. The remainder of this Article addresses these two grounds for declaring the children in San Angelo to be endangered.

A. *Derivative Neglect*

The state's power to remove children from a parent's home is necessary even when the child has not been harmed, but this power must be carefully circumscribed. A rule requiring that state officials must always wait until a child is actually harmed before intervening would mean that too many children would end up harmed even when knowledgeable people could have anticipated the harm.¹⁹⁷ Thus, under Texas law, "although 'endanger' means 'more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the conduct be directed at the child or that the child actually suffers injury.'" ¹⁹⁸

But allowing children to be removed to prevent anticipated, unrealized harm unleashes power to destroy families. Thus, one of the most important constraining principles when derivative neglect is used as the basis for intervention is how closely the link between the fact of abuse or neglect towards one child and its connection to a yet-unharmed sibling should be.

After receiving a report that some girls in the San Angelo FLDS community between the ages of sixteen and eighteen had sexual relations with adult men, child welfare officials chose to remove every child, regardless of gender, under the age of eighteen.¹⁹⁹ Though no one claimed that the pre- or post-pubescent boys were at risk of being victims of any kind of sexual abuse, they were nonetheless among the children removed from their parents because they were "derivatively abused." Similarly, the pre-pubescent girls were not in any kind of immediate danger of harm. But because they too were "derivatively abused," they were also removed.²⁰⁰

197. See *In re Kasey C.*, 586 N.Y.S.2d 163, 164 (N.Y. App. Div. 1992) (mem. op.) ("Child protective authorities need not wait until harm actually befalls a child before they may intervene, and the children may be deemed to be neglected by dint of predicted future conduct on the part of the parent or other custodian, so long as the risk to the children is 'imminent.'" (citations omitted)).

198. *Lumpkin v. Dep't of Family & Protective Servs.*, 260 S.W.3d 524, 528 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citation omitted); see *In re T.N.S.*, 230 S.W.3d 434, 439 (Tex. App.—San Antonio 2007, no pet.); *In re B.C.*, No. 2-06-180-CV, 2007 WL 939642, at *4 n.5 (Tex. App.—Fort Worth Mar. 29, 2007, no pet.) (mem. op.) ("Even though O.C. was not yet born at the time that B.C. was endangered, a parent's conduct with regard to the other parent or children can be used to support a finding of endangerment even against a child who was not yet born at the time of the conduct.").

199. See Hoff, *supra* note 184 (stating that after a girl called in to report abuse, a total of 246 children were eventually removed from the ranch). (((MOD)))

200. See *Comm'r of Soc. Servs. v. Gretchen C. (In re Christina Maria C.)*, 453 N.Y.S.2d 33, 34 (N.Y. App. Div. 1982) (mem. op.) (finding the evidence sufficient to show derivative abuse of the one-year-old sibling because the parents had "distorted notions of how to discipline children" and because the baby, as she grew older, would be "in danger of similarly harsh punishment for any disobedience on her part," just as her seven-year-old half-brother had been).

Moreover, there was no claim that the children were endangered because of any emotional harm that resulted from witnessing sexual abuse.

Some states have developed case law regarding what constitutes “derivative neglect” or “derivative abuse.” These states allow courts to enter orders protecting children who have not been harmed after finding the parents were unfit towards siblings or other children in their care. New York’s case law on derivative neglect is perhaps the most developed in the country. For this reason, it is instructive to consider it briefly.

The relevant New York statute provides that “proof of abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent.”²⁰¹ “Derivative neglect,” as it is termed by the courts of New York, is applied to children living in the same household as children who were the “target” of the parent or guardian’s abuse or neglect. “Essentially, a child is derivatively neglected if a parent’s actions toward another child are deemed so irresponsible that all other children in that parent’s care should be classified as neglected as well.”²⁰²

The core of the “inquiry to determine whether derivative neglect is present is whether the evidence of abuse or neglect of one child indicates a fundamental defect in the parent’s understanding of the duties of parenthood.”²⁰³ Other cases require a finding that “the parent demonstrated such an impaired level of parental judgment with respect to one child so as to create a substantial risk of harm to any child in that parent’s care.”²⁰⁴ New York law is clear, however, that it is insufficient that one child in the home was abused or neglected. The rule is plain that “there is no per se rule that the child of a parent who abuses one sibling is automatically a derivatively abused or neglected child.”²⁰⁵

A recent New York case suggests there are no easy answers to the question of when a parent’s misbehavior in connection with someone who is not his or her child should become the basis for finding unharmed

201. N.Y. FAM. CT. ACT § 1046(a)(i) (McKinney 2009). ((MOD))

202. Robert May, Note, *Derivative Neglect in New York State: Vague Standards and Over-Enforcement*, 40 COLUM. J.L. & SOC. PROBS. 605, 608 (2007).

203. Dutchess County Dep’t of Soc. Servs. *ex rel.* Douglas E., III v. Douglas E., Jr., 595 N.Y.S.2d 800, 801 (N.Y. App. Div. 1993) (citations omitted); *see* May, *supra* note 202, at 612–13 (reviewing case law and stating that the “standard is whether the parent’s conduct demonstrates a fundamental defect in his or her parental understanding”).

204. *In re Rosy S.*, 863 N.Y.S.2d 65, 67 (N.Y. App. Div. 2008). ((MOD))

205. *Douglas E.*, 595 N.Y.S.2d at 801 (citing *In re Rasheda S.*, 586 N.Y.S.2d 522, 522 (N.Y. App. Div. 1992)); *see In re Lisa Z.*, 699 N.Y.S.2d 810 (N.Y. App. Div. 1999) (finding that younger child was derivatively neglected because evidence showed father had repeatedly sexually abused the older child) ((MOD)); *In re Amanda LL.*, 600 N.Y.S.2d 298, 300 (N.Y. App. Div. 1993) (“[E]vidence of the sexual abuse of one child, standing alone, does not, *ipso facto*, establish a prima facie case of derivative abuse or neglect against others.”) (citations omitted); *DSS ex rel. Moria I. v. Manuel S.*, 563 N.Y.S.2d 592, 595 (N.Y. Fam. Ct. 1990) ((EDS)) (“It has been held that proof of abuse or neglect of one child, without more, constitutes neither prima facie nor presumptive evidence of abuse or neglect of another child.”) (citing *In re T.C.*, N.Y.S.2d 604, 608 (N.Y. Fam. Ct. 1985)). ((MOD))

children to be derivatively neglected. In *In re Kole HH.*,²⁰⁶ the trial court dismissed charges of neglect brought on behalf of a father's two boys. The basis for the charges was that the father had sexually abused a nine-year-old learning disabled girl who was related to his wife. Nonetheless, the trial court concluded that the act of sex abuse could not be used as a basis for a finding of neglect because the child the father abused was not someone for whom he was legally responsible to care. The appellate court reversed, concluding that his wrongful conduct "reveal[ed] a fundamental and profound flaw in respondent's understanding of his parental responsibilities and 'demonstrate[d] such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his] care.'"²⁰⁷

Utah, a state in which a high percentage of practitioners who engage in polygamy in the United States live, also authorizes intervention to protect siblings of children who have been abused by their parents even though the siblings have not been.²⁰⁸ Utah's statutory definition of a neglected child includes someone "'who is at risk of being a neglected or abused child . . . because another minor in the same home is a neglected or abused child as defined in this chapter.'"²⁰⁹ Utah courts refer to these children as "siblings at risk."²¹⁰

Utah courts repeatedly find siblings of neglected and abused children to be "at risk" because parents are incapable of changing (shown by a track record of consistent behavior), or unwilling to change their parenting behavior. This issue arises frequently in cases where the parent is a drug abuser who has been unable to stay in treatment or get clean. For example, one court terminated a mother's parental rights "based upon her excessive and habitual use of drugs and its effects, both actual and potential, on the children, as well as her refusal for more than one year to deal with her drug problem so that she could become a fit parent."²¹¹ In another Utah case, the appellate court emphasized how unlikely it was that the parent would

206. *In re Kole HH.*, 876 N.Y.S.2d 199 (N.Y. App. Div. 2009).

207. *Id.* at 202 ((MOD)) (quoting *In re Ian H.*, 840 N.Y.S.2d 202, 205 (N.Y. App. Div. 2007)); see *In re Jewle I.*, 844 N.Y.S.2d 145, 146 (2007) (stating derivative neglect is appropriate where a parent's judgment is shown to pose a substantial risk of harm to any child in his or her care) ((MOD)). But see *In re Cindy JJ.*, 484 N.Y.S.2d 249, 251 (N.Y. App. Div. 1984) ("As to respondent's two sons, however, we agree with [the] Family Court that dismissal of the petition was required by the lack of proof. There is no evidence that respondent's aberrant behavior toward his daughters was directed at his sons, or that they were aware of or affected by his misconduct.").

208. *T.W. v. State ex rel. S.H.*, No. 20080116-CA, 2008 WL 888547, at *1 (Utah Ct. App. Apr. 3, 2008) ("Each individual child need not be exposed to the actual effects of drug-impaired parents in order to warrant termination based on unfitness. Rather, the neglect or abuse suffered by one child is relevant to the termination of parental rights to a sibling at risk." (citations omitted)).

209. *S.S. v. State ex rel. E.H.*, 106 P.3d 758, 759 (Utah Ct. App. 2005) (quoting UTAH CODE ANN. § 78-3a-103(1)(s)(i)(E) (2002)).

210. *Id.* at 759; *K.K. v. State ex rel. E.K.*, 913 P.2d 771, 774 (Utah Ct. App. 1996) (stating that a "child conceived and born after another child in the home has been abused or neglected" can be considered "at risk").

211. *D.G. v. State ex rel. D.G.*, 938 P.2d 298, 302 (Utah Ct. App. 1997).

change her behavior: “Because the record reflects no substantial changes in Mother’s circumstances, and based on the minimal amount of time that elapsed between the first termination proceeding and the second, the juvenile court’s conclusion that [the other child] was at risk was correct.”²¹² What is key is that a parent, “while she may have loved her children, was simply unable or unwilling to remedy the circumstances that led to the children being removed in the first instance.”²¹³

Under Texas law, child “endangerment” is defined as “to expose to loss or injury, to jeopardize.”²¹⁴ Texas lacks any parallel to the Utah and New York family codes. Nonetheless, Texas law authorizes courts at both the emergency removal and the temporary removal stages to consider “whether the child’s household includes a person who has (1) abused or neglected another child in a manner that caused serious injury to or the death of the other child; or (2) sexually abused another child.”²¹⁵ In addition, Texas allows courts to terminate parental rights simply on a showing that termination is in the child’s best interests or whenever a court has previously ordered the termination of parent–child relationship to a sibling for endangerment.²¹⁶

212. E.B. v. State *ex rel.* J.B., 53 P.3d 958, 963 (Utah Ct. App. 2002).

213. M.B. v. State *ex rel.* A.M., No. 20050752-CA, 2005 WL 3315298, at *2 (Utah Ct. App. Dec. 8, 2005) (unpublished mem. op.).

214. *In re* J.T.G., 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.) (citations omitted). ((MOD))

215. TEX. FAM. CODE ANN. § 262.102(b) (Vernon 2008) (emergency removal stage), TEX. FAM. CODE ANN. § 262.201(d) (Vernon 2008) (temporary removal stage).

216. TEX. FAM. CODE ANN. § 161.001(1)–(2) (Vernon 2008); *see In re* T.N.S., 230 S.W.3d 434, 439 (Tex. App.—San Antonio 2007) (“To support a finding of endangerment, the parent’s conduct does not necessarily have to be directed at the child nor is the child required to actually suffer injury.” (citation omitted)) ((MOD)); *In re* E.W.A., No. 2-07-135-CV, 2008 WL 1867144, at *10 (Tex. App.—Fort Worth Apr. 24, 2008, no pet.) (mem. op.) (“The prior termination of a parent–child relationship based on a finding that the parent violated paragraph (D) or (E) of section 161.001(1) is grounds for the subsequent termination of a parent’s relationship with another child.”) (citing TEX. FAM. CODE ANN. § 161.001(1)(M) (Vernon 2008)). *But see In re* Cochran, 151 S.W.3d 275 (Tex. App.—Texarkana 2004, no pet.). The question in *In re Cochran* was whether parents were entitled to the custody of their newborn child pending a termination of parental rights proceeding after Texas courts had terminated their rights to the newborn’s nine siblings. The court held that the parents were entitled to the child’s custody, even though the termination case would proceed. In 2002, the mother’s rights to her first eight children were terminated when the trial court found she had knowingly allowed them to remain in a dangerous setting. Her rights to a ninth child, born after the previous termination, were terminated when the court found that the parents knowingly placed the child in surroundings which endangered him. After the tenth child was born, the Department removed the newborn from the parents’ home, where the child had been delivered by a midwife. At the first court appearance to determine the validity of the removal, a caseworker testified that the child appeared to be in good health at birth, and that there were no signs of physical or sexual abuse or neglect. The caseworker conceded that the risk to the child was principally based on the prior terminations. *Id.* at 276–77, 280. The appellate court reversed the trial court’s removal order, expressly disagreeing with the trial court’s “finding that there was a danger to the physical health or safety of the child caused by an act or failure to act by the parents.” *Id.* at 280. The court reasoned that at least fourteen months had passed since a previous order of termination had been issued and, “[i]n the absence of any *current* conditions or actions that would constitute a danger to [the child]’s health or safety, the trial court could not have

As the New York cases suggest, there is no clear line of demarcation for determining when a parent's (mis)conduct ought to count in deciding when the parent is legally unfit (an alternative way of saying when a child is legally endangered). The application of derivative neglect theory to polygamous communities runs the risk that a court charged with protecting children will overextend its powers to condemn a parent who has engaged in conduct considered by the decisionmaker to be unacceptable.

Some polygamists, like the father in *In re Kole HH.*, will have committed sex abuse crimes against minors. But there is a powerful difference between the father in *In re Kole HH.* and Rodney Holm, the FLDS member convicted of sex abuse for impregnating Ruth Stubbs, who he had married when she was sixteen and who had conceived two children with Holm before she was eighteen.²¹⁷ Holm is a religious man who is aware that he was violating the law by engaging in sexual intercourse with the sixteen-year-old girl he and his community consider to be his wife. He would not have sex with someone he did not himself consider to be his wife. The father in *In re Kole HH.*, in contrast, is much more likely to deny that he had sex with the young girl, as he denied it in his case, than to defend his choice as a moral one. Thus, the father in *In re Kole HH.* would very likely concede (once the question of whether he committed the act is proven) that he knew at the time he committed sex abuse that he was engaging in unacceptable conduct with a child. The only plausible conclusion to reach under such circumstances is that the father is unable to control himself. Once the father is regarded as unable to control himself, courts reasonably may conclude that he is a danger to his own children precisely because he has demonstrated an impaired level of parental judgment.

Alternatively, the father might dispute that there is anything wrong with having sex with a nine-year-old girl. This rejection of the claim that adult men ought to be forbidden from engaging in sex with a minor may appear to be very similar to what Rodney Holm might say. But it would be wrong to equate these similarly sounding responses. The adult man who claims the right to have sex with a nine-year-old girl is essentially asserting the right to engage in sex with children, regardless of their age or circumstances, for no reason other than self gratification. Under such circumstances, courts sensibly will be unable to trust his assessment of what parental conduct is out of bounds, even with respect to raising boys. Thus, either because a parent has engaged in conduct which could lead a court to conclude a parent could not control himself from doing something to a child the parent knows is wrong, or because the parent has demonstrated an inability to know right from wrong, fathers like the one in *In re Kole HH.* are reasonably found to be unfit parents even as to their

reasonably based its findings on the prior terminations alone." *Id.*

217. State v. Holm, 137 P.3d 726, 730-31 (Utah 2006).

own unharmed children.

Neither of these concerns applies to Rodney Holm, however. Holm shares society's norms that young girls may not be sexually abused. Holm's dispute is very specific and contextualized. He disagrees only that he ought to be forbidden from taking a girl to be his wife and, once having married her, engaging in sexual intercourse with her. This is a highly cabined act which ought not lead to the broader conclusion that Holm cannot control himself or fails to know the difference between appropriate and inappropriate conduct. The kind of danger that the *In re Kole HH.* father poses is of an entirely different order. Based on what he did, it is entirely reasonable for a court to worry that he will also do something inappropriate towards his children. Holm's dispute with principles of childrearing is quite specific. He disagrees with state officials over how many wives a man ought to be allowed to have. But there is almost nothing else that distinguishes Holm from all other fit parents.

The only way to enforce society's deep commitment to the protection of families against overreaching by state officials acting in the name of furthering children's interests is to require that courts strictly construe child welfare laws and place limits upon officials' authority to break up families. The crucial inquiry should always be into endangerment.²¹⁸ How, then, might state officials press the claim that Holm is a danger to his children? There is nothing to suggest that he would ever harm any of his sons. This is in contrast to what can reasonably be said about Kole HH.'s father. We rightly fear that he may harm his sons because we lost confidence in his judgment as a parent. We do not have any basis to feel the same way about Holm. State officials may disagree with Holm about what the law is or ought to be. Holm's actions might reveal that he is a criminal who willingly breaks the law without guilt. But none of this even suggests that he is a danger to his children.

The only possible basis to conclude otherwise is that Holm very likely would consent to his daughters becoming the unlawful wife of an adult man once they reach age 16. Anticipating this, state officials could argue that Holm is unfit to raise his daughters because a foreseeable act of abuse looms in the future.

B. Communal Immorality

The derivative neglect theory is, as this Article has suggested, not a very good fit to apply to the San Angelo FLDS community. The strongest basis for a finding of derivative abuse or neglect is that the behavior of the parent towards another child reflects a fundamental and profound flaw in

218. *Nicholson v. Scoppetta*, 820 N.E.2d 840, 845 (N.Y. 2004) ("The first statutory element requires proof of actual (or imminent danger of) physical, emotional or mental impairment to the child." (citation omitted)).

his or her understanding of the duties and responsibilities of parenthood. But the FLDS adherents are otherwise fine parents whose disagreement with state officials is over something not properly conceived as being about the parameters of parenting. For this reason, we run the risk of contaminating child welfare law by applying it to this situation.

If the theory of derivative neglect is a poor fit, the second theory advanced by child welfare officials in *Steed*²¹⁹ is extremely pernicious. In essence, the officials claimed they had the power to remove children from the San Angelo community because it was a den of iniquity. This focus is less on any instances of child abuse and more on an alleged criminal parenting philosophy that was being passed down to the next generation. The theory of state child welfare officials when they raided the FLDS community in San Angelo was that the entire community of children living there was “endangered” within the meaning of Texas law.²²⁰

Texas officials intervened because they accused the parents of “groom[ing] boys to be perpetrators of sexual abuse” and girls to be “victims of sexual abuse.”²²¹ The officials reasoned that the FLDS community was built upon an unacceptable “‘pervasive belief system’ that condones marriage and child-rearing as soon as females reach puberty.”²²² This line of reasoning distorts the appropriate inquiry in child protection cases and should not be condoned. Properly seen in context, it creates inappropriate opportunities to target disliked members of the community who happen to be parents and “get” them, Al Capone-like, on a lesser charge.

Criminals should not lose custody of their children through child welfare intervention based on the theory that they, as parents, are bad role models for their children. The way to separate children from criminal parents is to prosecute and incarcerate the parents for their crimes. Even more directly, if it is a criminal act to allow children to become victims of child abuse, and if it is criminal for a parent to consent to his or her

219. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014 (Tex. App.—Austin May 22, 2008, orig. proceeding), *mand. denied sub nom. In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613, 615 (Tex. 2008).

220. *Id.* at *2 (stating that authorities believed there to be a “‘pervasive belief system’ among the residents of the ranch that it is acceptable for girls to marry, engage in sex, and bear children as soon as they reach puberty, and that this ‘pervasive belief system’ poses a danger to the children”) ((MOD)); see *In re T.N.S.*, 230 S.W.3d at 438–39 (“Endangerment is defined as exposing to loss or injury, to jeopardize. Under subsection 161.001(1)(D), the inquiry is related to whether the environment of the children is the source of endangerment to the children’s physical or emotional well-being. . . . The inquiry under subsection 161.001(1)(E) relates to whether the endangerment of the child is the direct result of the parent’s conduct. . . . And, termination under subsection (E) must be based on, not just a single act or omission, but a voluntary, deliberate, and conscious course of conduct by the parent.” (citations omitted)) ((MOD)); *In re H.H.*, No. 2-07-345-CV, 2008 WL 2854611, at *5 (Tex. App.—Fort Worth July 24, 2008) (mem. op.) (finding mother’s drug use and failure to provide a safe environment for her children endangered them). ((MOD))

221. *In re Steed*, 2008 WL 2132014, at *2.

222. *Id.* at *3.

daughter “marrying” an adult man with the explicit understanding that they will engage in sexual intercourse when the child is below the legal age to do so outside of a legally recognized marriage, then criminal prosecutors should address the matter, not child welfare officials.

Once we begin using child welfare to break up families because parents are engaging in prohibited conduct, the list could grow exponentially. Not only would this flood an already overloaded child welfare system, it would distort child welfare’s core purpose. When parents are engaged in a regular course of criminal conduct, there are powerful reasons to insist that we rely exclusively on the criminal justice system to regulate their behavior. In many areas of the law, local prosecutors wisely use a combination of civil and criminal remedies to go after those who operate outside of the law. Common examples are civil injunctions, efforts to collect taxes, and the like. But child protection interventions should not be added to the prosecutor’s arsenal.

As we have already seen, child welfare prosecutions are not well known for fidelity to the rule of law. Even where manifest rules forbid state officials from doing certain things, such as removing children from their families without court order except under extreme circumstances necessary to protect children from imminent danger, caseworkers routinely ignore the law.²²³ Their intention to do what is best for children often leads them to regard the law as an obstacle to serving children’s interests. These officials are not trained to regard fidelity to the rule of law as a child affirming act. Instead, they see the law and children’s interests as in tension. Because their training stresses children’s interests, child protection interventions commonly lead to over-intervention.²²⁴

Beyond this, however, child welfare prosecutions as a substitute for criminal prosecutions would constitute any prosecutor’s dream. Once we begin down this road, there would be no sensible place to draw the line. Consider its meaning as applied to Tony Soprano’s children, when they were young. Surely they would be sensible candidates for child welfare intervention once we start down the line of skirting criminal prosecutions and using child protection efforts whenever we have reason to believe the parents are engaged in conduct inimical to the children’s well being. But now, none of the protections afforded to defendants would even apply.

223. See *Nicholson*, 820 N.E.2d at 847 (describing an “agency-wide practice of removing children from their mother without evidence of a mother’s neglect and without seeking prior judicial approval” (quoting _____, 203 F. Supp. 2d ___, 215 (____)) ((MOD)); *In re Steed*, 2008 WL 2132014, at *1 (holding the department failed to “establish a danger to physical health or safety of the children” and “failed to establish an urgent need for protection”). ((MOD))

224. See Martin Guggenheim, *How Children’s Lawyers Serve State Interests*, 6 NEV. L.J. 805, 820 n.54, 823–24 (2006) (describing an unlawful “safer course” doctrine applied for 30 years in New York which was a “heavily skewed doctrine in favor of intervention . . . [so] that for most of the modern history of child welfare practice in New York City, the overwhelming occasions on which the agency requests a child’s removal or opposes a parent’s application for return, children remain in foster care”).

Instead of securing a grand jury indictment, providing Tony with discovery and a jury trial, and subjecting the prosecution to proof beyond a reasonable doubt, child welfare officials could go into court and inform the judge that reliable informants have told them that Tony is in the mob, is engaged in rackets and extortion, and is the target of mobsters who want to kill him. Not only are his children at risk of serious harm if he happens to take them to the wrong diner for dinner, but their values are being shaped by the mind of a criminal. The children are likely to grow up as criminals themselves. In the child welfare context, this justification would be sufficient to forcibly remove the children from Tony's custody.

Finally, if the core theory of the child protection prosecution shifted from protecting children from a criminal enterprise to an immoral environment, things will only go from bad to worse. Once inquiry into morality is fair game, who is to say what would become the proper limits of the inquiry? Parents might be interviewed to reveal their deepest thoughts and opinions about a wide range of matters. Even worse, because there is no right to remain silent in these proceedings, a parent's failure to cooperate could be used against them in the investigation and in court, and their failure to testify or to answer certain questions would even permit the finder of fact to draw negative inferences against them.²²⁵

In short, we best preserve civil liberties by insisting that child protection interventions be limited to core child protection purposes. Regulating the behavior of adults who are not directly harming their children should not be permitted.

CODA: THE PROBLEM OF CONTINUING TO "MARRY" MINORS

Having said all of this, one feature of FLDS behavior continues to remain a legitimate concern of state officials, both criminal and child welfare. Modern constitutional rights, post-*Lawrence*, strongly suggest that the safest way for the FLDS community to continue practicing polygamy without risk of either criminal or child welfare prosecution is to eliminate the practice of taking new brides while they are minors. If the community ceased allowing women to become brides before they turned eighteen, they would remove an important basis for criminal prosecution: sex abuse or statutory rape. On the understanding that *Lawrence* may never be extended so far as to require that the state recognize the relationship between a man

225. See, e.g., *In re Welfare of J.G.W.*, 433 N.W.2d 885, 886 (Minn. 1989) (The father's Fifth Amendment privilege against compelled self-incrimination protects him from an order to comply with children's therapist's demand that he admit sexual abuse as a prerequisite to obtaining visitation. The privilege, however, does not protect the father from the risk of being denied visitation due to unsuccessful treatment which might result from his failure to admit abuse.); *In re Welfare of J.W.*, 415 N.W.2d 879, 883 (Minn. 1987) (Court held a disposition order requiring parents to undergo psychological evaluations which were to include explanation of the child's death violates their Fifth Amendment rights. The Fifth Amendment privilege, however, does not prevent possible adverse consequences of failure to undergo effective rehabilitative therapy.).

and his second or third “wife,” the defendant’s defense that he had state-sanctioned sex with a minor because it was within a marriage will not succeed. For this reason, if members of the FLDS community continue to take girls as other than first brides when they are underage, they will continue to be subject to criminal prosecution as in *Holm*.

The FLDS could avoid all of this by only taking adult women as “brides.” I recognize, of course, that this choice may be unacceptable to the FLDS community, either for religious or practical reasons. To the extent the community believes that sixteen is the appropriate age to become a bride, the community is unlikely to agree to raise the age to correspond with the secular law’s conception of the age when girls may consent to engage in sex with men (particularly men considerably older than them). Practical obstacles may also prevent any change in behavior. It just may be that the key to the community’s continued vitality lies in turning sixteen-year-old girls into wives and, if they waited until they were eighteen, there may not be enough women willing to continue in the community’s ways.

If this is true, then there may be no way for the FLDS community to avoid attacks by the state. The widespread practice of older men engaging in sexual intercourse with underage girls is very likely something the outside community will continue to find unacceptable. The community’s defense that this practice has nothing to do with promiscuity or abuse, and is actually only undertaken within the sacred confines of a religiously sanctioned marriage, will almost certainly continue to be rejected by state officials and the community they represent.

If the FLDS community concludes that allowing girls as young as sixteen to become brides in polygamous relationships is essential for the community to survive, then courts will face a question which has not been presented as crisply since *Wisconsin v. Yoder*.²²⁶ whether a community must perish because the conditions it requires to survive are deemed unacceptable to the rest of society. Polygamy is more than merely an aspect of the FLDS religion; Utah’s Attorney General explains it to be “centerpiece of their religion.”²²⁷

Men of any age may marry girls as young as 16 in Utah with permission from the girl’s parents. Within the FLDS community, such permission is regularly given. But because Utah will not recognize the polygamous relationship as a marriage, it is irrelevant that the girl’s parents have consented to it. Parents are not authorized to consent to their children engaging in acts that constitute sex abuse. Indeed, when parents “allow” their children to be sexually abused, the parents themselves may be

226. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (posing the question whether Amish children should be forced to be exposed to worldly influences that substantially interferer with the religious development of the Amish child and his integration into the way of life of the Amish faith community).

227. Piatt, *supra* note 124, at 757 (quoting Utah Attorney General Mark Shurtleff testifying before the Texas House Committee on Juvenile Justice and Family Issues on April 13, 2005 ((MOD)))

prosecuted either criminally or civilly. Thus, the man who “marries” the minor may be prosecuted for sex abuse, as Rodney Holm was. But, equally, the girl’s parents are even at risk of prosecution. A criminal charge of aiding and abetting, an accessorial crime, could be brought.²²⁸ In addition, the parents could be charged within the child welfare system with child abuse. A successful prosecution for such a charge could result not only in the loss of custody of the girl who was to be “married,” but of any other children the parents might have on the theory of derivative neglect or abuse.

The *Yoder* defense—a community’s assertion that it cannot survive unless it is given an exemption from the reach of otherwise valid laws—is almost certainly doomed under current American law. This is where the real fight between the FLDS and state officials can be waged and would be won by the state. The state will almost certainly be able to prevail in charging men with child sex abuse when they have had sexual contact with minors who are not their legal spouse. Prosecutors who indict such men will likely easily prevail in securing convictions for statutory rape or criminal sexual abuse. Even without cooperation from members of the community, proof of parenthood through DNA tests, together with proof of the age of the mother at the time of birth, will almost surely guarantee conviction beyond a reasonable doubt.

However, child welfare officials may also wish to become involved in this activity. And this is where I fear child welfare policy will be negatively influenced. If child welfare officials begin to charge parents with neglect because they allowed their daughter to become a victim of child abuse, courts might employ the derivative neglect doctrine—otherwise appropriate in certain contexts—to remove children from loving, caring, deeply religious parents having been judged to possess a “fundamental flaw” in their parenting.

228. TEX. FAM. CODE ANN. § 2.102(h) (Vernon 2006 & Supp. 2008) (making it a crime for the parents of girl under the age of 16 to consent for her to get married); TEX. FAM. CODE ANN. § 6.205 (Vernon 2007 & Supp. 2008) (forbidding marriage involving girls under the age of 16).