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Tolerating extremism : to what extent should intolerance be tolerated?

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CHAPTER FOUR

Religious Extremism: Causes and Examples of Harm

I. State Law vs. Religious Law

In liberal Western democracies, religion - while important - is not superior to state law. Religion must not be granted unlimited powers or special rights; this need be the case both theoretically and practically for practitioners of faith and theologians alike. An individual accused of violating state law must find little recourse in claiming before a court of law that the illegal conduct was premised on adherence to religious law. Despite this premise, which need be at the core of the modern nation state, the concept of the supremacy of state law is met with resistance in numerous quarters.

The resistance is particularly acute when lives of 'at risk' individuals are at risk. That is, when the tension between religious law and state law moves from the abstract and philosophical to the concrete and real. While the state is obligated to respect faith it must never tolerate extreme manifestations of faith that endanger vulnerable members of closed, religious communities. As the case law discussed in this chapter highlights, the risk posed to children in the context of religious extremism reflects the tension between state law and religious law. That tension, simply put, cuts to the issue to whom does the state owe a duty and whether religious doctrine, regardless of the harm it potentially causes, is to receive precedence over state law intended to protect vulnerable members of society.

In many ways, child endangerment laws intended to ensure the safety and welfare of children represent the state's efforts to protect society's most vulnerable members. As discussed in this chapter, the harm caused to children in the name of religious extremism is, tragically, a reality that must be directly confronted by law enforcement and larger society alike. To suggest that religious law has precedence and, therefore, injury to children is justified is a clear violation of the social contract that must be extended, unequivocally, to children. Otherwise, children at risk resulting from their parents belief will be abandoned by the state, vulnerable and helpless in the face of harm based on religious extremism.

As both child endangerment and case law suggest the duty owed is to the 'at risk' child, not the relevant harmful belief system. However, the state fails to consistently meet this obligation; 'turning a blind eye' describes the actions of some officials who, doubtlessly, understand the harm that stands to befall children. While laws are clear, their implementation requires state officials understand that limits need be imposed on religious extremism; otherwise, harm is inevitable.

Civil laws have been imposed on citizens in order to protect individual rights and

society alike. Change in these laws is inevitable; that is how society progresses reflecting modernity and changes in society and culture. Protecting the democratic process is the obligation of government; the rule of law is based on due process and equal protection. Checks and balances and separation of powers ensure change reflect protection of civil and political rights; otherwise, rights - created by man for man - will be "trampled on" threatening the very essence of civil democratic states.

Conversely, religious law is governed by God and may not be altered by man who is obligated to live in accordance with God's laws. That is, it is not for man to question God whose infallibility is unquestioned. As the conversation with my airplane seatmate²³⁸ made clear people of extremist faith are convinced both of the supremacy of their faith and the infallibility of their God. Questioning God's laws is, therefore, akin to heresy for the obligation of man is to respect and accept, unquestioningly, God's laws. In many ways, that is the essence of religious extremism: the requirement to live in absolute accordance with God's laws which cannot be questioned by man whose sole obligation is to respect those laws in full. Religious law dictates how people of faith live their lives. Civil democratic regimes are endangered when religious extremists - violently or through dangerous intimidation - seek to impose religious law on civil society.

It is critical to recognize the difference between civil law and religious law, as well as the difference between democratic speech and religious speech. Unlike democratic values, which are inherently broad and liberal, religious extremists aspire to impose a narrow, dogmatic interpretation of religious scripture both on civil society and their co-religionists. To that end, there is significant danger to civil society when absoluteness dictates the conduct of religious extremists. Tolerance of religion is a core value of democracies; however, that tolerance must not be unlimited or otherwise harm may befall innocent members of society.

Does this suggestion correctly identify the primary source of potential danger facing civil society? It may be suggested that religion is a convenient scapegoat and that other significant dangers are lurking around the proverbial corner. In discussing the question of religious-based violence, the inevitable comparison to non-religious violence is raised. Is the supremacy of faith different than the supremacy of mass movements? Is death in the name of a god different than death in the name of ideology? Is religion another form of "absolutism" undistinguishable from mass movements that have wreaked well-documented havoc throughout history?

The Rev. Dr. John Lentz wisely observed:

In general religion is not, by definition, another form of absolutism. However, any religious perspective that seeks to control behavior of believers, limits the access to other points of

²³⁸ See Introduction.

view, and demands strict adherence to a particular world-view, code of ethics, or manner of living moves along the trajectory toward absolute control and is hardly distinguishable from other forms of political or social absolutism.²³⁹

II. Harm Caused by Religious Extremism

There is no intention to engage in "religion bashing;" it is important to recall that millions have been killed for purely non-religious reasons. Obvious examples include Nazism, Italian Fascism, Pol Pot (Cambodia) and the Cultural Revolution (China); all four regimes were marked by absolute loyalty, in particular to a national leader. In fulfilling real or perceived loyalty requirements, citizens of those regimes committed mass murder on an unparalleled scale.

Deaths Caused by Non-Religious Regimes

	Nazism	Italian Fascism	Pol Pot	Cul. Rev.(China)
Estimated Deaths	17 million ²⁴⁰	1-2 million ²⁴¹	1.7-2.5 million ²⁴²	7.73 million ²⁴³

²³⁹ Email correspondence with the author, email in author's records.

²⁴⁰ According to Donald Niewyk (Donald L. Niewark and Francis R. Nicosia, *The Columbia Guide to the Holocaust*, Columbia University Press, 2000, pp. 45-52) Nazism caused the mass murder, using the broadest definition, of roughly 17 million people. Estimates of the death toll of non-Jewish victims vary by millions, partly because the boundary between death by persecution and death by starvation and other means in a context of total war is unclear. Overall, about 5.7 million (78 percent) of the 7.3 million Jews in occupied Europe perished (Gilbert, Martin. *Atlas of the Holocaust* 1988, pp. 242–244). This was in contrast to the five to 11 million (1.4 percent to 3.0 percent) of the 360 million non-Jews in German-dominated Europe. (MELVIN SMALL AND J. DAVID SINGER, *RESORT TO ARMS: INTERNATIONAL AND CIVIL WARS 1816–1980* (SAGE Pub. 1982); MICHAEL BERENBAUM, *A MOSAIC OF VICTIMS: NON-JEWS PERSECUTED AND MURDERED BY THE NAZIS* (N.Y. Univ. Press, 1990).

²⁴¹ Mussolini's Fascist dictatorship was responsible for over a million premature deaths. These deaths resulted from political violence during the regimes rise to power, its violence needed to maintain power, and its domestic policies that favored certain social classes. However most of the deaths during the regime's reign were in its empire and wars abroad. While 'restoring order' in Libya, the regime allowed 50,000 to die in camps and generally did nothing to halt the appalling decline of the Libyan population, which had fallen from some 1.2 million on Italy's invasion in 1911 to 800,000 by the mid-1930s. Italian historians have never bothered to tally the death toll produced by the invasion and subsequent annexation of Ethiopia from 1935-41, but Ethiopians estimate that between 300,000 and 600,000 perished.

²⁴² Pol Pot was a Cambodian Maoist Revolutionary who came into power in the 1970's. During his reign he imposed agrarian socialism forcing urban dwellers to relocate to the countryside to work in collective farms and forced labor projects. The combined effects of forced labor, malnutrition, poor medical care, and executions resulted in the deaths of approximately 21% of the Cambodian population. ("The Cambodian Genocide Program". *Genocide Studies Program*. Yale University. 1994-2008.) In all, an estimated 1.7 to 2.5 million people (out of a population of slightly over 8 million) died as a result of the policies of his three-year premiership. Heuveline, Patrick (2001). "The Demographic Analysis of Mortality in Cambodia." In *Forced Migration and Mortality*, eds. Holly E. Reed and Charles B. Keely. Washington, D.C.: National Academy Press. Marek Sliwinski, *Le Génocide Khmer Rouge: Une Analyse Démographique* (L'Harmattan, 1995). Banister, Judith, and Paige Johnson (1993). "After the Nightmare: The Population of Cambodia." In *Genocide and*

Is the absolutism that characterized certain non-religious regimes similar to murder committed in the "name of God?" The doctrine of certitude²⁴⁴ proposes that religious actors are (1) certain of a deity and (2) certain that they are acting in the name of that deity. The certitude, then, is a two-step process that requires the believer to fully internalize both belief in a higher power and belief in action on behalf of a higher power. Otherwise, the religious belief is not absolute. Furthermore, religious belief is predicated on the notion that its deity (or deities) is supreme.

The concept of supremacy has led individuals of faith throughout history to commit horrific acts of violence against two categories of "non-believers" - those who are nominally members of the same faith, but whose fervency is doubted by the actor, and those of other faiths. Does that differ from individuals who believe in the supremacy of a secular belief, such as communism? Is there something specific about religious supremacy that significantly distinguishes it from secular movement supremacy?

Perhaps the more appropriate question is this: given the choice between absolute devotion to a secular cause and absolute certainty in extremist religious beliefs, which of the two presents the greatest danger to society today? Given that the vast majority of recent terrorist attacks in the surveyed nations have been carried out in the name of God, not in the name of non-religious causes - I propose that religious extremism currently poses a greater threat to civil society. That is not to gainsay the horrors caused by secular regimes throughout history or to automatically dismiss the possibility that secular extremism may, in the future, replace religious extremism as the most important cause of violence and terrorism. It is, however, to emphasize the current threat posed to contemporary

Democracy in Cambodia: The Khmer Rouge, the United Nations and the International Community, ed. Ben Kiernan. New Haven, Conn.: Yale University Southeast Asia Studies.

²⁴³ The Cultural Revolution was a social-political movement that took place in the People's Republic of China from 1966 through 1976. Set into motion by Mao Zedong, then Chairman of the Communist Party of China, its stated goal was to enforce socialism in the country by removing capitalist, traditional and cultural elements from Chinese society, and to impose Maoist orthodoxy within the Party. The widespread phenomenon of mass killings in the Cultural Revolution consisted of five types: 1) mass terror or mass dictatorship encouraged by the government – victims were humiliated and then killed by mobs or forced to commit suicide on streets or other public places; 2) direct killing of unarmed civilians by armed forces; 3) pogroms against traditional "class enemies" by government-led perpetrators such as local security officers, militias and mass; 4) killings as part of political witch-hunts (a huge number of suspects of alleged conspiratorial groups were tortured to death during investigations); and 5) summary execution of captives, that is, disarmed prisoners from factional armed conflicts. The most frequent forms of massacres were the first four types, which were all state-sponsored killings. The degree of brutality in the mass killings of the Cultural Revolution was very high. Usually, the victims perished only after first being humiliated, struggled and then imprisoned for a long period of time. Owing to difficulties that scholars in and outside China encounter in accessing "state secrets," the exact figure of the "abnormal death" has become a recurring debate in the field of China studies. Estimates by various scholars range from one-half to eight million. According to Rummel's 1991 analysis of, the figure should be around 7.73 million (R. J. RUMMEL, CHINA'S BLOODY CENTURY : GENOCIDE AND MASS MURDER SINCE 1900 (Transaction Publishers 1991).

²⁴⁴ Phrase used in private conversation with author, details in author's records.

society by religious extremism. To that end, religious extremists pose a danger that must be responded to legislatively, politically, and, if need be, forcefully in order to protect the innocent. That, after all, is the nation state's primary obligation.

The FLDS Church has, recently, been the focus of intense government and media scrutiny regarding the practice of plural marriage involving under-age girls. Girls, as young as fourteen, when their prophet proclaims that God has commanded them to marry men (in some cases three times their age), are forced to engage in full sexual relations with their husbands. These girls, and their parents, submit to the command based on a belief that the prophet's words are, in fact, the words of God.

Similarly—and just as tragically—boys in the FLDS community, some as young as thirteen, are placed in compromising and dangerous situations. While it is difficult to determine the exact number, as many as 1,000 boys have been expelled from the community for breaking its strict standards after Warren Jeffs became the prophet.²⁴⁵ Breaking these standards involves doing things as simple as wearing short-sleeved shirts, listening to CDs, watching movies and TV, staying out past curfew and having girlfriend.²⁴⁶ According to experts, these “lost boys”²⁴⁷ are banished from their community *primarily* in order to minimize competition for older men seeking to marry child brides. Simply put, male and female children alike are victims of child abuse and neglect in the name of FLDS religious doctrine.²⁴⁸

While others have addressed “terror in the name of God”²⁴⁹ attacking internal

²⁴⁵ Julian Borger, *The Lost Boys, Thrown Out of US Sect so that Older Men Can Marry More Wives*, GUARDIAN, June 14, 2005, <http://www.guardian.co.uk/world/2005/jun/14/usa.julianborger>.

²⁴⁶ David Kelly, *Polygamy's 'Lost Boys' Expelled From Only Life They Knew*, BOSTON GLOBE, June 19, 2005, http://www.boston.com/news/nation/articles/2005/06/19/polygamys_lost_boys_expelled_from_only_life_they_knew/.

²⁴⁷ The term “lost boys” refers to teenage boys who have been asked to leave, or have voluntarily left the FLDS community. According to The Diversity Foundation, the lost boys are also referred to as the “Children of Diversity.” The Diversity Foundation, *Strengthening and Aligning Global Communities*, available at <http://www.smilesfordiversity.org/cod.php> (last visited Jan. 8, 2013).

²⁴⁸ 4 The Juvenile Court Act of 1996, UTAH CODE ANN. § 78A-6-105(1)(a) (2006) defines abuse as “(i) nonaccidental harm of a child, (ii) threatened harm of a child, (iii). Electronic copy available at: <http://ssrn.com/abstract=1659783>

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²⁴⁹ JESSICA STERN, TERROR IN THE NAME OF GOD (Harper Perennial 2004); Seibert, Eric A., *The Violence of Scripture: Overcoming the Old Testament's Troubling Legacy*, Fortress Press, Minneapolis 2012; Avalos, Hector, *Fighting Words: The Origins of Religious Violence*, Prometheus Books, Amherst, New York 2005; Cliteur, Paul B., “Religion and Violence or the Reluctance to Study this Relationship”, in: *Forum Philosophicum* 15 (2010), pp. 205-226; Hoffmann, Joseph R., ed., *The Just War and Jihad: Violence in Judaism, Christianity, & Islam*, Prometheus Books, Amherst, New York 2006; Juergensmeyer, Mark, *Terror in the Mind of God: The Global Rise of Religious Violence*, Third Edition, Revised and Updated, University of California Press, Berkeley / Los Angeles/London

and external targets alike, child endangerment in the religion paradigm is, I suggest, fundamentally different. Simply put, it is the deliberate injury to *one's own* child predicated on religious faith, in particular religious extremism. Though God tested Abraham²⁵⁰ with respect to the sacrifice of his son, Isaac,²⁵¹ the sacrifice (thankfully, never brought to fruition) was the result of a direct interaction between God and Abraham. The modern day religious extremism predicated endangerment of children is not between the divine and man; rather, it is between man and man when one of the two *purports to act in the name of God*.

This is fundamentally and philosophically different from the original sacrifice. Unlike Abraham, who ultimately did *not* sacrifice Isaac—for God ordered him to not do so—religious extremists *do* endanger their children.²⁵² From a theological perspective, polygamy as practiced by FLDS is an essential tenet of how FLDS members articulate and practice their faith. Members believe that plural marriage is a requirement for exaltation and entry into the highest “degree” of the Celestial Kingdom (the highest of the three Mormon heavens).²⁵³ The FLDS Church perceives itself as the “true” Mormon Church; and asserts that its members practice what the prophet Joseph Smith *truly* believed. The practice of child brides in plural marriages is essential in ensuring obedience and subservience; needless to say, the practice involves sexual contact between adult males and under-age girls. Sexual contact with a minor is illegal and should result in criminal liability. FLDS parents *do* endanger their children,²⁵⁴ which raises profoundly important legal, moral and theological questions pertaining to the essence of two relationships: parent-child and individual-faith/father. The question before us is who protects the otherwise unprotected²⁵⁵; the question,

2003; Midlarsky, Manus I., *Origins of Political Extremism: Mass Violence in the Twentieth Century and Beyond*, Cambridge University Press, Cambridge 2011.

²⁵⁰ *Why Did God Tell Abraham to Sacrifice Isaac?*,

http://www.rationalchristianity.net/abe_isaac.html (last visited Jan. 31, 2010).

²⁵¹ *See generally Abraham's Sacrifice of Isaac*, <http://www.apocalipsis.org/Abraham.htm> (last visited Jan 8, 2013).

²⁵² *See generally* Gen. 22:5 & 8; *Why Did God Tell Abraham to Sacrifice Isaac?*,

http://www.rationalchristianity.net/abe_isaac.html (last visited Jan. 8, 2013); *Id.*

²⁵³ JOHN KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* 6 (Anchor 2003).

²⁵⁴ This is, undoubtedly, a relative point for people of faith. Those who engage in practices related to their children's health, safety and welfare would argue that their actions are in accordance with their faith whereas the State attaches criminal liability to those same practices. *See generally* Adam Lamparello, *Taking God Out of the Hospital: Requiring Parents to Seek Medical Care for their Children Regardless of Religious Belief*, 6 TEX. F.

ON C.L. & C.R. 47 (2001); Jennifer L. Hartsell, *Mother May I . . . Live? Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499 (1999).2010] PROTECTING THE UNPROTECTED 393.

²⁵⁵ The Juvenile Court Act of 1996, UTAH CODE ANN. § 78A-6-317(4) (2008), specifies: In every abuse, neglect, or dependency proceeding . . . the court shall order that the child be represented by a guardian ad litem, in accordance with Section 78A-6-902. The guardian ad litem shall represent the best interest of the child, in accordance with the requirements of that section, at the shelter hearing and at all subsequent court and administrative proceedings, including any proceeding for termination of parental rights in accordance with Part 5, Termination of Parental Rights Act.

complicated as it is, is exponentially more complex when framed in a religious paradigm.

‘Who owes what duty to whom’ is the subtext of this chapter; the intellectual, philosophical and constitutional premise must be that the State owes a duty and obligation to children *regardless* of their parents’ faith. That is neither to delegitimize faith nor to cast aspersions on people of faith; it is however, to articulate the position that the State has the proactive, positive responsibility to protect children. This is particularly true when the threat to the child is faith based. While this is neither the first, nor tragically the last time this issue will require resolution, it is one that urgently requires candid examination and analysis.

III. History of the Church of Jesus Christ of Latter-Day Saints

According to the Church of Jesus Christ of Latter-Day Saints (Mormon Church), its founder, Joseph Smith, had revelations and visions that he was ordained as a prophet of God. Smith’s followers believed that he had a relationship with God and was his spokesman and prophet on earth. Unquestioning obedience to the latter day prophet was instrumental to Church members who believed that the only way to heaven was to follow Smith’s commandments. That faith was tested in the 1830s as Smith gradually began introducing polygamy,²⁵⁶ claiming that it was a divinely inspired practice. Brigham Young led the Mormons across the continent ultimately settling in Utah in order to “escape the intense persecution members faced for their unique religious beliefs.”

As members of the Church began to live in Utah, “polygamy became a part of their culture and religion.” While Utah quickly developed into a unique frontier theocracy under Young’s guidance, Church leaders understood the benefit of becoming a state. However, the U.S. government strongly opposed polygamy and refused to grant statehood unless the practice was rescinded. Outside pressure to forbid polygamy increased as the Church grew in Utah. In 1856, the newly created Republican Party declared that, “[i]t is the duty of Congress to prohibit in the territories those twin relics of barbarism, polygamy and slavery.”²⁵⁷ True to its promise, the federal government sent law enforcement officials to Utah to end polygamy, confiscating land and possessions of those who practiced plural marriage.

IV. History of Polygamy

The Republican Party first compared polygamy to slavery in 1856;²⁵⁸ in 1862,

²⁵⁷ 1 NATIONAL PARTY PLATFORMS 1840-1956, at 27 (Donald B. Johnson & Kirk H. Porter, eds., 1973). Cf. HENRY CHARLES LEA, BIBLE VIEW OF POLYGAMY BY MIZPAH 1 (n.d.) (asserting the American liberty to possess “as many slaves as Abraham, and as many wives as Solomon.”).

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

Congress passed the Morrill Act for the Suppression of Polygamy (the “Morrill Act”). Section One of the Morrill Act states:

Every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall . . . be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years.²⁵⁹

However, the Morrill Act proved to be ineffective in outlawing the practice of polygamy primarily because those involved are also key witnesses who, generally, have no interest in cooperating with the prosecution. Additionally, “no grand jury in Utah would indict Church leaders for violating the [Morrill] Act, so the Act was never used or challenged in court.”²⁶⁰

In 1878, the question of polygamy reached the Supreme Court for the first time in *Reynolds v. United States*. George Reynolds, a member of the Church of Jesus Christ of Latter-day Saints, was charged with bigamy under the Morrill Act after he married Amelia Jane Schofield while still married to his first wife. Reynolds was originally convicted in the District Court for the 3rd District of the Territory of Utah. Before the Supreme Court, Reynolds argued that his conviction should be overturned for a number of reasons: the statute exceeded Congress’ legislative power; his challenges to jurors in the original case were improperly overruled; testimony from his second wife should not have been permitted; and most significantly, he had a constitutional right to engage in polygamy as it was part of his religious duty.²⁶¹

Justice Waite distinguished between government control of beliefs and government control of actions. He concluded that “[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”²⁶² An example of this is, if one believes that human sacrifice is an integral part of worship, the government can validly restrict the religious practice. Justice Waite concluded that to permit illegal practices in the name of religion would be “[t]o make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”²⁶³ Nevertheless, problems in prosecuting under the Morrill Act persisted; therefore, in 1882 Congress passed the Edmunds Act, making it significantly easier to prosecute polygamy as prosecutors did not need to prove actual marriage but only cohabitation, which

²⁵⁹ Morrill Act, ch. 126, § 1, 12 Stat. 501 (1862).

²⁶⁰ Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. PUB. POL’Y 101, 119 (2006).

²⁶¹ Reynolds, *supra* note 124 at 155.

²⁶² *Id.* at 166.

²⁶³ *Id.* at 167.

the act prohibited.²⁶⁴ Additionally, the act allowed prosecutors to strike jurors who practiced polygamy, as well as those who did not practice polygamy, but believed it acceptable.²⁶⁵ Nearly 1,300 polygamists were prosecuted under various anti-polygamy statutes after the Edmunds Act.²⁶⁶

On October 6, 1890, the Church's then prophet, Wilford Woodruff, issued an official declaration stating that the Church would obey the laws of the federal government and cease the practice of polygamy. Woodruff explained to Church members that he had received a revelation from God and had been shown a vision in which the Church would be destroyed if the practice of polygamy were to continue. Most Church members followed the new commandment from Woodruff; others believed he was a fallen prophet who had succumbed to pressure from the United States. Shortly after the official renunciation of polygamy, Utah became a state in 1896. As a condition to statehood, Utah included in its constitution a provision that "polygamous or plural marriages are forever prohibited."²⁶⁷

V. Fundamentalism—The Break Off

Those that refused to give up polygamy, believing it an eternal principle, were the predecessors of the FLDS Church. FLDS members claim that in 1886, four years before the Church's renunciation of polygamy, the then prophet and president of the Church, John Taylor received a very different revelation. According to FLDS historians, in Taylor's revelation the Lord declared that polygamy was an everlasting covenant, and that God would never revoke it. Lorin C. Woolley, who later became a FLDS leader, testified that he was outside Taylor's room during this vision when he saw a light appearing from beneath the door. Woolley claims to have heard three distinct voices coming from the room, which Taylor later told him was the Lord and the deceased prophet Joseph Smith delivering the revelation of eternal polygamy. FLDS members claim that the following morning Taylor placed five men under covenant to practice polygamy as long as they lived, and gave them power to ordain others to do the same. For some time those practicing polygamy stayed in Salt Lake City, alongside the Mormons who renounced plural marriage. However, as polygamy became less acceptable in mainstream Utah, many polygamists went into hiding.

Eventually Short Creek, Arizona (now known as Colorado City), became a strong hold for polygamists. FLDS members felt comfortable in this remote area surrounded by desert, over a hundred miles away from law enforcement and believed they could safely practice polygamy unbothered by the outside world.

VI. Government Intervention and FLDS Isolation

²⁶⁴ Edmunds Act, ch. 47, § 3, 22 Stat. 30 (1882).

²⁶⁵ *Id.* at § 5.

²⁶⁶ Sigman, *supra* note 255, at 128.

²⁶⁷ 39 UTAH CONST. art. III, § 1.

The FLDS's belief that law enforcement would tolerate their polygamist practices was mistaken; government officials have conducted a number of raids on FLDS compounds dramatically affecting the outside world's opinion of the Church. One of the most traumatic raids is known as the 'Short Creek Raid.' In the summer of 1953, over a hundred Arizona police officers and National Guardsmen descended on the FLDS compound in Short Creek. The reason given for the raid by Arizona Governor John Pyle was to stop a pending insurrection by the polygamists. Pyle accused FLDS members of being involved in the "foulest conspiracy you could possibly imagine" designed to produce white slaves.

The Governor even invited reporters to witness the raid with him. However, the attempt to demonize those practicing polygamy failed. Church members had been tipped off to the impending raid. As law enforcement entered the compound they found the community's adults congregated in a schoolhouse singing hymns, while their children played outside. Instead of reporting on the evils of polygamy, the media focused on the over-reaction of government officials. Regardless of the media reaction, the government removed over 400 children from their families at Short Creek.²⁶⁸ It took more than two years for 150 of those children to be reunited with their families. The Short Creek Raid became a rallying cry for FLDS members; a manifestation of the secular world's desire to destroy God's chosen people.

Shortly after his father's (the previous prophet) death Jeffs married all but two of Rulon's twenty wives, increasing the number of his wives to approximately seventy, according to some ex-members. Jeffs claimed that this was necessary to ensure the preservation of his sacred bloodline; important to recall that Jeffs decreed that his actions were sanctioned by God. As the only person who possessed the authority to perform marriages, and assign wives, Jeffs often used this power to discipline members by reassigning their wives, children and homes to another man. This was made clear in 2004 when Jeffs exiled twenty male members from the community and assigned their wives to more worthy men.

Similar to his predecessors, Jeffs teaches that it is only through plural marriage that a man may enter heaven. To that extent, Jeffs has taught that any worthy male member should have at least three wives, and the more wives a man has, the closer he is to heaven. In 2004, the FLDS, especially the current prophet, Warren Jeffs, began facing trouble from the outside world once again. In 2004, several of Jeffs' nephews alleged that Jeffs and his brothers sodomized them in the late 1980s, leading to a lawsuit against them.²⁶⁹ In 2005, Jeffs was charged with sexual assault on a minor and with conspiracy to commit sexual misconduct with a minor for arranging a marriage between a fourteen-year-old girl and her

²⁶⁸ See *Texas takes legal custody of 401 sect children*, CNN (Apr. 7, 2008), <http://web.archive.org/web/20080411050954/http://www.cnn.com/2008/CRIME/04/07/texas.anch/>;

²⁶⁹ David Kelly & Gary Cohn, *Insider Accounts put Sect Leader on the Run*, SEATTLE TIMES, May 16, 2006, http://seattletimes.nwsourc.com/html/nationworld/2002996905_secttwo16.html.

nineteen-year-old first cousin.²⁷⁰

In late 2005, Jeffs was placed on the FBI's most wanted list;²⁷¹ he was charged in Utah with rape as an accomplice and in Arizona with two counts of sexual conduct with a minor, one count of conspiracy to commit sexual conduct with a minor and unlawful flight to avoid prosecution.²⁷² While a fugitive, Jeffs nevertheless continued to perform marriages between underage girls and older men.²⁷³ In August 2006, Jeffs was captured in Nevada during a traffic stop²⁷⁴ and, in September of 2007, Jeffs was convicted in Utah for the accomplice to rape charge.²⁷⁵ He was given a sentence of 10-years-to-life.²⁷⁶ On July 27, 2010 the Utah Supreme Court, citing deficient jury instructions, reversed Jeff's convictions and ordered a new trial.²⁷⁷

The FLDS Church faced additional difficulties at a second compound, the Yearning for Zion Ranch, near Eldorado, Texas. On April 16, 2008, Texas state authorities entered the community after they had received calls²⁷⁸ from an individual claiming to be an abused child from the ranch. Child Protective Services determined that the children living in the compound required protection from forced underage marriages. As a result,²⁷⁹ 416 children were removed from the FLDS compound while over a hundred adult women chose to leave the ranch in order to accompany their children. The state determined that of fifty-three girls aged fourteen to seventeen thirty-one have children or are pregnant. On May 22, 2008 after a state court ruled that there was insufficient evidence to justify holding the children in custody they were returned to their families within ten days.²⁸⁰ One year after the raid only one child remained in state custody, though twelve of the men from the group were indicted on a variety of sex charges, including assault and bigamy.²⁸¹ On August 9, 2011, Jeffs

²⁷⁰ Christine Hauser, *Man Near Top of Most-Wanted List is Captured*, Aug. 29, 2006, http://www.nytimes.com/2006/08/29/us/30jeffscnd.html?_r=1&ref=us&oref=slogin.

²⁷¹ *Have You Seen This Man? FBI Announces New Top Tenner*, available at <http://www.fbi.gov/page2/may06/jeffs050606.htm>.

²⁷² *Id.*

²⁷³ Brooke Adams & Pamela Manson, *Polygamist Sect Leader Warren Jeffs Arrested in Las Vegas*, S.L. TRIBUNE, Sept. 30, 2007, http://www.sltrib.com/polygamy/ci_4254653.

²⁷⁴ *Id.*

²⁷⁵ John Dougherty & Kirk Johnson, *Sect Leader is Convicted as an Accomplice to Rape*, N.Y. TIMES, Sept. 26, 2007, http://www.nytimes.com/2007/09/26/us/26jeffs.html?_r=1.

²⁷⁶ See Ben Winslow, *Jeffs is now an inmate at Utah State Prison*, DESERET NEWS, Nov. 22, 2007, <http://www.deseretnews.com/article/695229917/Jeffs-is-now-an-inmate-at-Utah-State-Prison.html>.

²⁷⁷ See Dan Frosch, *Polygamist Convictions Overturned*, N.Y. TIMES, July 27, 2010, <http://www.nytimes.com/2010/07/28/us/28jeffs.html>.

²⁷⁸ Subsequently, these calls were discovered to be "hoax" phone calls impersonating an abused child. Ryan Owens, *Polygamist Sect Marks First Anniversary of Texas Ranch Raid*, ABC NEWS (Apr. 3, 2009), <http://www.abcnews.go.com/TheLaw/Story?id=7252149&page=3>.

²⁷⁹ Susan Duclos, *Polygamist Group, FLDS Children to be Placed in Foster Homes this Week*, DIGITAL JOURNAL (Apr. 20, 2008), <http://www.digitaljournal.com/article/253535>.

²⁸⁰ Ismael Estrada, *Returning the Children, with Conditions*, AC360 (May 30, 2008), <http://ac360.blogs.cnn.com/2008/05/30/returning-the-children-with-conditions/>.

²⁸¹ Owens, *supra* note 221.

was convicted on two counts of sexual assault of a child and sentenced to life in prison.²⁸² During the sentencing phase his nephew testified to have been raped since he was 5 years old and his niece testified as to have been raped since she was 7 years old.²⁸³

VII. Forced Marriage of Daughters

Adolescent girls are the best-known victims of polygamy in the FLDS community as they are forced to marry significantly older, married men. These girls lack a meaningful choice in deciding whether to get married; they have been taught the world outside their community is evil. Furthermore, avoiding the marriage by leaving is extraordinarily difficult as FLDS communities are physically isolated, making escape nearly impossible. By example: Jane Kingston was forced by her father, Daniel Kingston, to marry her uncle sixteen years her senior, and therefore became his fifteenth wife.²⁸⁴ When Jane tried to escape the marriage, her father captured her and beat her until she was unconscious.²⁸⁵ When she woke up from the beating, Jane walked seven miles to a gas station and called 9-1-1.²⁸⁶ While Jane's uncle, David Ortell Kingston, was charged and convicted of incest and unlawful sexual conduct with a minor, he was not charged with bigamy.²⁸⁷

Although there is no doubt that many underage girls, such as Jane, are forced into marriage with much older men, prosecuting the crime is difficult because of significant evidentiary barriers. First, the key witnesses usually have no interest in aiding the prosecution as children are taught that authorities are not to be trusted and if they cooperate by testifying, they could be placed in foster care.²⁸⁸ Girls have been taught that the outside world is evil; there is no one safe for them to turn to when they do not want to enter into a marriage. Furthermore, because of the remote physical location of these communities, the victim must go to extreme lengths to escape the abuse, as Jane did by walking seven miles to seek help after being beaten unconscious. In addition, typically only the first marriage of a polygamist is recorded with the state; thus, the state has no paper trail of the other marriages. Finally, as the FLDS community is located on both sides of the Utah- Arizona border, prosecutors have difficulty proving in which state the abuse occurred and, thus, are hard pressed to determine the

²⁸² See Lindsay Whitehurst, *Warren Jeffs gets life in prison for sex with underage girls*, SALT LAKE TRIB., Aug, 10, 2011, <http://www.sltrib.com/sltrib/news/52354441-78/jeffs-sexual-child-jurors.html.csp>.

²⁸³ See *Nephew, niece allege polygamist sect leader Warren Jeffs abused them*, CNN (Aug. 6, 2011), http://articles.cnn.com/2011-08-06/justice/texas.polygamist.jeffs_1_warren-jeffs-alta-academy-polygamist-sect-leader?s=PM:CRIME.

²⁸⁴ Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89, 100 (2000).

²⁸⁵ *Id.*

²⁸⁶ Sigman, *supra* note 255, at 179.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 180

appropriate jurisdiction for prosecution purposes.²⁸⁹

VIII. The Lost Boys

Another group of children/individuals that have suffered from FLDS extremism are a group of male children known as the “Lost Boys.” Over 1,000 male children between the ages of thirteen and twenty-three have left the FLDS community, typically by being banished and becoming a “Lost Boy.”²⁹⁰ Critics of the FLDS maintain that the boys, known as the “Lost Boys,” are kicked out of the community so that older, established men have less competition for the young wives.²⁹¹ The community tells the boys that they are being banished for not meeting the rigorous FLDS religious standards.²⁹² Once expelled, the boys are not allowed contact with their former community. The Church forbids parents from visiting their banished sons, and violating the rule can result in eviction from their Church-owned homes.²⁹³ This means that the boys have no emotional and financial support from their former communities and they suddenly find themselves in the outside world, which they have been taught is “evil.” Furthermore, “most have no money, no real education and nowhere to live.”²⁹⁴

Not surprisingly, many of the boys turn to drugs and alcohol. Although there are state laws preventing child abandonment and neglect, Utah and Arizona authorities have yet to systematically enforce them. Additionally, authorities have not sought child support from FLDS members who abandon their sons.²⁹⁵ Similar to the prosecution of sexual abuse, prosecution against parents for child abandonment has evidentiary challenges primarily because the Lost Boys are largely unwilling to testify against their parents.

According to former Utah Attorney General, Mark Shurtleff, “the kids don't want their parents prosecuted; they want us to get the number one bad guy—Warren Jeffs. He is chiefly responsible for kicking out these boys.”²⁹⁶ However, in 2006 a group of six lost boys filed a landmark suit against Warren Jeffs and the FLDS for “unlawful activity, fraud, and breach of fiduciary duty, and civil conspiracy.”²⁹⁷ The suit alleged that the boys were kicked out of the community so that it would be easier for the older men to marry the younger girls, because without the boys there would be less competition.²⁹⁸ The suit was settled out of court; the ‘lost

²⁸⁹ Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: “Love Is A Many Splendored Thing”*, 15 *Duke J. Gender L. & Pol’y* 315, 324 (2008).

²⁹⁰ Borger, *supra* note 240; New Frontiers for Families, *The House Just off Bluff: Pilot Proposal*, <http://www.newfrontiersforfamilies.org/bluffhouse.asp> (last visited Jan. 8, 2013).

²⁹¹ Borger, *supra* note 240.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Dan Simon & Amanda Townsend, *Warren Jeffs “Lost Boys” Find Themselves in Strange World*, CNN (Sep. 7, 2007), <http://www.cnn.com/2007/US/09/07/lost.boys/index.html>.

²⁹⁵ Sigman, *supra* note 255, at 184.

²⁹⁶ Kelly, *supra* note 2.

²⁹⁷ Sigman, *supra* note 255, at 182 (citing Complaint, *Ream v. Jeffs*, No. 040918237(Utah Dist. Ct. Aug. 27, 2004)).

²⁹⁸ *Id.*

boys' received \$250,000 for housing, education and other assistance to help boys who leave the FLDS community.²⁹⁹

In 2006, Utah Governor Jon Huntsman signed House Bill 30, also known as "The Lost Boys Law," which allows minors to petition to district court judges on their own behalf for emancipation.³⁰⁰ The Lost Boys, and other homeless youth face numerous hurdles to survive because of the fact that they are minors. Everyday concerns, such as signing leases, and receiving health care are difficult for this population as legally they are minors and cannot represent themselves.³⁰¹ While the effects remain to be seen, the bill is undoubtedly represents an effort to facilitate the Lost Boys' integration into society.

IX. Who Defines the Best Interest of the Child?

The May 15, 2009 decision of Brown County (Minnesota) District Judge John Rodenberg, that thirteen-year-old Daniel Hauser was "medically neglected"³⁰² by his parents, Colleen and Anthony Hauser, who refused to provide him with the appropriate medical treatment and was also in need of child who refused to provide him with the appropriate medical treatment and was also in need of child protection services, is but the latest manifestation of this issue.³⁰³ The parents, who religiously believe in natural healing, cited their beliefs as the principle reason for refusing treatment.³⁰⁴ Daniel, who's cancer has a 85-90% success rate when treated, was determined to have a "rudimentary understanding at best" of his condition and simply went along with his parents beliefs.³⁰⁵ Rodenberg, in describing the state's interest, stated "the state's

²⁹⁹ Simon & Townsend, *supra* note 289.

³⁰⁰ H.R. 30, 2006 Gen. Sess. (Utah 2006), *available at* <http://www.le.state.ut.us/%7E2006/bills/hbillenr/hb0030.htm>.

³⁰¹ For further discussion, see Brienne M. Billie, Note, *The "Lost Boys" of Polygamy: Is Emancipation the Answer?*, 12 J. GENDER RACE & JUST. 127, 138 (2008), and T. Christopher Wharton, Statute Note, *Deserted in Deseret: How Utah's Emancipation Statute is Saving Polygamist Runaways and Queer Homeless Youths*, 10 J.L. & FAM. STUD. 213, 220 (2007).

³⁰² Minnesota Criminal Code, MINN. STAT. ANN. § 609.378 (2010) specifies that a person is guilty of neglect or endangerment when:(a)(1) A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and the deprivation harms or is likely to substantially harm the child's physical, mental, or emotional health is guilty of neglect of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both. If the deprivation results in substantial harm to the child's physical, mental, or emotional health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both. If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is "health care," for purposes of this clause.

³⁰³ Amy Forliti, *Minnesota Judge Rules Teen Must See Cancer Doctor*, NEWVINE (May 15, 2009), http://www.newsvine.com/_news/2009/05/15/2819712-minn-judge-rules-teen-must-see-cancer-doctor.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

interest in protecting the child overrides the constitutional right to freedom of religious expression and a parent's right to direct a child's upbringing."³⁰⁶

In *re Clark*, a three-year-old child suffered third degree burns over forty percent of his body. As the child's blood condition deteriorated his parents, Jehovah Witness', were asked to consent to blood transfusions if such became necessary to save his life. The parents refused. The doctor then petitioned a local court for permission to administer blood transfusions if such became medically necessary. The court granted the petition citing Ohio's Juvenile Code,ⁱ which provided for emergency medical and surgical care for children, as well as the courts' right under common law to act in behalf of the interests of the child. The child's condition gradually improved, and it appeared that a blood transfusion would not be necessary.

The parents then attempted to vacate the outstanding court authorization -- contending that Kenneth's was not an emergency situation. Judge Alexander rejected the argument and addressed the duty of the state—" The child is a citizen of the State. While he 'belongs' to his parents he belongs also to his State... When a religious doctrine espoused by the parents threatens to defeat or curtail such a right of their child, the State's duty to step in and preserve the child's right is immediately operative."³⁰⁷ He stressed that the parents have an absolute right to believe that Holy Scripture forbids blood transfusions and to act in accordance with that belief, but that "this right of theirs ends where somebody else's right begins."³⁰⁸

However, in *Newmark v. Williams*, the court limited this right when state action had a low chance of actually benefiting the child. In that case the court grappled with the proposed treatment of a three-year-old suffering from Burkitt's Lymphoma when his Christian Scientist parents wanted to refuse medical intervention. The parents argued that removing the child from their home violated their First Amendment right to freedom of religion and that the Delaware abuse and neglect statutes exempted those who treat their children's illnesses "solely by spiritual means." The court ruled in favor of the parents because the state sought to administer, against the parents' wishes, an "extremely risky, toxic, and dangerously life threatening medical treatment offering less than a 40% chance for success."³⁰⁹

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

³⁰⁶ Id.

³⁰⁷ *In re Clark*, 185 N.E.2d 128, 132 (Ohio Com. Pl. 1962).

³⁰⁸ Id.

³⁰⁹ *Newmark v. Williams*, 588 A.2d 1108 (Del. 1991)

“But if any provide not for his own, and specially for those of his own house, he hath denied the faith, and is worse than an infidel.”

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

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

Herein lays a fundamental tension: while Scripture unequivocally articulates parental responsibility with respect to children, some religious extremists are endangering their children.³¹⁰ That endangerment violates both the criminal law and religious scripture.

Nevertheless, rather than adhering and respecting law, FLDS members who either marry their daughters to adult men or who themselves marry under-age children are violating both the law and scripture. They are doing so in accordance with the religious teachings of an individual claiming to articulate a particular interpretation of their faith. That interpretation however endangers their children, which both scripture and the law obligate them to protect. That said, there are “obscure laws in many states that let parents rely on prayer, rather than medicine, to heal sick children.”³¹¹

In *Employment Division v. Smith*,³¹² the Supreme Court held that the state, consistent with the Free Exercise Clause, could “prohibit sacramental peyote use” thereby not granting religious actors an exemption with respect to the requirements of the law.³¹³ The concept that a parent’s religious beliefs do not justify denial of medical care to their children has been widely upheld in state

³¹⁰ “Take heed that ye despise not one of these little ones...” *Matthew* 18:10 (King James); “And whosoever shall offend one of *these* little ones that believe in me, it is better for him that a millstone were hanged about his neck, and he were cast into the sea.” *Mark* 9:42 (King James); “Lo, children *are* an heritage of the Lord: *and* the fruit of the womb *is* his reward.” *Psalms* 127:3 (King James); “It were better for him that a millstone were hanged about his neck, and he cast into the sea, than that he should offend one of these little ones.” *Luke* 17:2 (King James); “And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done *it* unto one of the least of these my brethren, ye have done *it* unto me.” *Matthew* 25:40 (King James).

³¹¹ Suzanne Sataline, *A Child’s Death and a Crisis for Faith*, WALL STREET JOURNAL, June 12, 2008, available at <http://www.rickcross.com/reference/cscience/cscience28.html>.

³¹² *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990), *superseded by* Religious Freedom Restoration Act of 1993, P.L. 103-41, 107 Stat. 1488, 42 U.S.C. § 2000bb (Nov. 16, 1993).

³¹³ *Id.* at 872, 890.

courts.³¹⁴ While state courts have acted in the spirit of *Smith*, this action is not a truly meaningful test. Rather, the fundamental point of inquiry is whether prosecutors (local and federal) have been sufficiently aggressive in enforcing the law through criminal prosecutions. Available numbers suggest that the policy—historically—has been to largely turn a blind eye to the endangerment of children. That is, the failure has not been in the judiciary (*Smith* articulated a clear limit on the practice of religion), but rather the failure to protect the otherwise unprotected reflects a fundamental law enforcement and prosecutorial unwillingness to aggressively, consistently and uniformly bring the wrongdoer before the courts.

While the criminal law paradigm requires probable cause it is equally true that the state has a constitutional obligation and responsibility. In practical terms, the state is constitutionally required to infiltrate FLDS communities when the matter of child brides and lost boys is a matter of public knowledge. Protecting the endangered is a state responsibility and obligation. While it is constitutional for states to make laws that may slightly infringe on religion, taking children away from their parents because of religious beliefs is a tougher legal subject.

In *Wisconsin v. Yoder*, the Supreme Court “held that the First and Fourteenth Amendments prevent a state from compelling Amish parents to cause their children, [who have graduated from the eighth grade], to attend formal high school to age sixteen.”³¹⁵ Under *Yoder*, the “power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”³¹⁶ In *Santosky v. Kramer*, the Supreme Court held that under the Fourteenth Amendment’s Due Process Clause the state must support its allegations with “at least clear and convincing evidence” before terminating parental rights.³¹⁷

There are at least two categories of private interests at stake in parental rights termination proceedings: the fundamental liberty interest of the parents in the care and custody of their children,³¹⁸ and the parents’ and children’s shared interest in preventing an “erroneous termination” of their natural relationship.³¹⁹ “Consequently, courts could consider both the parents’ and the children’s rights when determining the state’s burden of proof at the best interests stage.”³²⁰ The lack of aggressiveness to enforce the law in protecting children has left girls and boys similarly unprotected. While the state has failed to protect child brides it has *also* failed to take action regarding the abandonment of the “lost boys.”

³¹⁴ See Judith English Scheiderer, *When Children Die as a Result of Religious Practices*, 51 OHIO ST. L.J. 1429 (1990).

³¹⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

³¹⁶ *Id.* at 233-24.

³¹⁷ *Santosky II. v. Kramer*, 455 U.S. 745, 746 (1982).

³¹⁸ *Id.* at 753.

³¹⁹ *Id.* at 760.

³²⁰ Brian C. Hill, *The State’s Burden of Proof at the Best Interests Stage of a Termination of Parental Rights*, 2004 U. CHI. LEGAL F. 557, 567 (2004).

However, in *comparison* to the sexual abuse suffered by girls living in the closed and isolated community it may be easier to prosecute those responsible for the neglect of boys who no longer live in that community as they have been, literally, forced to leave.

Jamie Heimlich, author of *Breaking Their Will: Shedding Light on Religious Child Maltreatment* explained that abuses often go unreported and that the state should take a proactive approach in reaching out to the children.

Children in religious authoritarian cultures greatly need the help that is offered by secular agencies, such as law enforcement and child protective services. But, for a host of reasons, adults living in those cultures are unlikely to reach out to those agencies. Many distrust anything related to government. Some even believe such agencies work for the devil. Therefore, it is imperative for police, social workers, and government officials to reach out to faith communities that they suspect are abusing children to try to bridge what has been a very big gap of mistrust and miscommunication. I interviewed two state attorneys general who are doing just that, and they have seen improvement. One is Utah's Mark Shurtleff who decided that fundamentalist Mormon groups would no longer be prosecuted just for practicing polygamy, unless they stand accused of abusing children. Shurtleff has also offered these groups psychological counseling. One of the counselors told me that there have been reports of child abuse, whereas before, no one would have reported abuse. Also, Oregon's John Foote has tried to make inroads with a sect that was allowing children to get very sick and die because of members' zealous beliefs in faith healing. Foote told me how one member of the group, a father, even called Foote to get advice on what he should do if his children got sick. Of course, Foote told the man, who did not give his name, that he should call a doctor.³²¹

X. Recommendations: Civil Society or Religious Society?

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

That is not to minimize the importance, relevance or centrality of religion in the

³²¹ Valerie Tarico, *Confronting Religion and Child Abuse: Interview with Interview with Janet Heimlich*, HUFFINGTON POST (May 10, 201, 6:48 PM), http://www.huffingtonpost.com/valerie-tarico/religion-child-abuse_b_858996.html.

lives of untold millions. We simply must recognize that civil society is a society whose essence is civil law rather than religious law. Some people of faith—particularly those for whom religion is the essence of their temporal existence—may find this perspective objectionable. However, civil society cannot endure if religious law is found to be supreme to state law. Civil society owes an obligation to protect its otherwise unprotected; particularly children who are its most vulnerable members. Religious belief and conduct cannot be used as justification for placing children at risk; government, law enforcement and the general public cannot allow religion to hide behind a cloak of “religious immunity.” The focus of a religious extremist is single-minded dedication and devotion to serving his God.

Based on innumerable conversations with terrorists and members of the intelligence community alike, I have written elsewhere of the extraordinary hardships imposed on wanted terrorists. I have come to the conclusion that those hardships, when understood in the context terrorists serving their God, are both *explainable* to the terrorist and *tolerable* by the terrorist. While difficult, these hardships are not nearly as foreboding as the alternative, according to their worldview. For them it is better to incur physical discomfort than to incur the wrath of God. Where does that leave the secular State? Precisely because of the absolutism of the religious extremist, the state has no choice but to respond accordingly.

Perhaps the fundamental weakness of my argument is that I am suggesting that the State restrict the rights of citizens even at the cost of curtailing otherwise guaranteed rights. Perhaps society in response to the examples discussed above—in order to protect the unprotected—may have no choice but to consistently and aggressively monitor and prosecute religious extremists who endanger their children. The specific danger posed by religious extremists not only justifies but also demands that law enforcement and prosecutors re-articulate their approach to child endangerment when occurring in a religious paradigm. To suggest that the judiciary (state or federal) is acting in the spirit of *Smith* is, at best, only “half the battle” regarding child brides and lost boys. Both require government protection and intervention.

The traditional argument that prosecution is difficult as witnesses are hesitant to come forward can be addressed by an aggressive information (intelligence/source based) policy similar to concerted law enforcement efforts with respect to those involved in the manufacturing and supplying of illegal drugs.³²² The danger presented by religious extremists to their internal

³²² “In an effort to achieve a ‘drug free society,’ the United States Government approaches its national drug problem through criminal sanctions for the possession, manufacture, sale, transport, and distribution of illegal drugs in the United States; the establishment of a complex law enforcement apparatus at both the federal and state levels with the purpose of reducing drug availability, increasing drug prices, and reducing drug use in America; and the development of drug use prevention and treatment programs that seek to stop drug use and heal drug users.” Margarita Mercado Echegaray, Note, *Drug Prohibition in America: Federal Drug Policy and its Consequences*, 75 REV. JUR. U.P.R. 1215, 1273 (2006).

community requires the immediate adoption of this aggressive policy. While there is an undeniable (and understandable) difficulty in convincing child brides and lost boys to testify against their parents and community (akin, perhaps, to children who are victims of sexual abuse committed by a parent or family member),³²³ the state's obligation to protect the otherwise unprotected requires that intelligence gathering be aggressive. This is particularly the case when relevant state agencies cannot plead "ignorance" with respect to the specific endangerment to which FLDS children are subjected in their internal communities (compounds).

While religious extremism presents a significant threat to contemporary society, this does not mean that all religions or all people of religious faith present a threat. Far from it. It does, however, suggest that religious extremism needs to be analyzed, discussed and understood. It is not religion, but extreme religion as understood, articulated and practiced by extremists that draw our greatest concern and attention. While the distinction is critical, otherwise "guilt by association" and "round up the usual suspects" is an inevitable byproduct, the role of religion cannot be denied. Precisely because of that reality, the debate as to whether limits should be imposed on the practice of religion is legitimate.

If viewed on a spectrum or sliding scale, belief is the most private and intimate of the three aspects of religiosity and, therefore, the least subject to the imposition of limitations. Conversely, speech and conduct - if outside the intimacy of the home - are the most public manifestations of religion. However, with respect to speech and conduct, the home, as previously discussed, is not immune from the imposition of limitations. Crimes committed within the home in the name of religion³²⁴ are punishable and justice must be meted out to the perpetrators. While clear distinctions are drawn between private and public religion, the home - the essence of private religion - is not immune from law enforcement, even if the motivation for the crime is religion.

Religion and violence have gone hand-in-hand for thousands of years. A casual perusal of religious texts of Christianity, Judaism and Islam makes this readily apparent. While the teachings of Jesus emphasized peacefulness and "love thy neighbor," not to mention "turn the other cheek," the pages of history and scriptures alike are filled with untold victims of Christianity. The Crusaders are the obvious examples of extraordinary violence in the name of Christianity; clearly, they are not the only guilty ones. The Old Testament is imbued with countless victims of violent battles.³²⁵ The Koran, while stressing that Islam is the

³²³ According to the Supreme Court, child abuse is "one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). Most often, the abuse is not reported because it takes place in the family setting and children do not understand what is happening, fear retribution if they report it, as well as other adult family members failing to report the abuse. Raymond C. O'Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 377 (2004).

³²⁴ Honor killings are a prime example of religious-based crimes committed within the home.

³²⁵ A classical source on this is: Paine, Thomas, *The Age of Reason*, 1794, in: Thomas Paine, *Collected Writings*, The Library of America, New York 1995, pp. 665-885. See also: Nelson-

religion of peace, exhorts its followers to be uncompromising in attacking those that deny Islam. While controversy rages as to whether jihad, or warfare on behalf of Islam, is defensive or offensive, the reality is that the Koran is very clear with respect to a fundamental message: kill the non-believer (external) and the hypocrite (internal).³²⁶

In the American context, a discussion regarding imposing potential limits on the freedom of speech was warranted in response to the terrible demagoguery of Senator Joseph McCarthy and the vicious anti-Semitism of Father Charles Coughlin. Did the terrible words - truly beyond the pale - of both McCarthy and Coughlin not endanger in a manner similar to danger potentially posed by a hate-spewing Christian cleric today? After all, both men articulated unbridled hatred, which clearly threatened otherwise innocent citizens who fell victim to the consequences of the views espoused by McCarthy and Coughlin.³²⁷ While the Senate ultimately censured McCarthy, the damage had already been done - individuals were stigmatized and lives destroyed.³²⁸ Did that not pose a danger to American society that justified First Amendment limitations?

My answer is unequivocally yes. However, the fact that the relevant authorities shied away from directly addressing McCarthy's and Coughlin's incitement does not justify nor warrant avoiding asking the questions this Article seeks to address. President Eisenhower failed a test of leadership by refusing to directly rebut McCarthy. However, that does not proscribe today's relevant law enforcement authorities or legislators from acting either proactively or reactively regarding contemporary dangers to society - even if those dangers are faith based.

In proposing that limits be imposed, it is essential to clearly and candidly address what I propose limiting. It is neither faith itself nor beliefs of particular faiths that I propose limiting: it is how extremism is articulated and practiced that must be limited. Limits must not be blindly imposed devoid of standards, criteria and review. Such an approach would reflect government action best described as arbitrary and capricious resulting in denial of due process before the law. The

Pallmeyer, Jack, *Is Religion Killing Us? Violence in the Bible and the Quran*, Trinity Press International, Harrisburg 2003; Copan, Paul, *Is God a Moral Monster? Making Sense of the Old Testament God*, Baker Books, Grand Rapids 2011.

³²⁶ See REUVEN FIRESTONE, *JIHAD: THE ORIGIN OF HOLY WAR IN ISLAM* 63 (Oxford Univ. Press 1999); Harris, Lee, *The Suicide of Reason: Radical Islam's Threat to the West*, Basic Books, New York 2007;

³²⁷ Coughlin was never charged, but after 1936, Coughlin began supporting an organization called the Christian Front, which claimed him as an inspiration. In January 1940, the Christian Front was shut down when the FBI discovered the group was arming itself and "planning to murder Jews, Communists, and a dozen Congressmen and eventually establish, in J. Edgar Hoover's words, "a dictatorship, similar to the Hitler dictatorship in Germany." Coughlin publicly stated, after the plot was discovered, that he still did not "disassociate himself from the movement," and though he was never linked directly to the plot, his reputation suffered a fatal decline.

³²⁸ See ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 133-34 (Princeton Univ. Press 1999).

requirement to impose limits subject to constitutional protections must not deter policymakers from limiting the rights of those who endanger society even if the basis for that endangerment is religion.

The Supreme Court's holding in *Reynolds v. United States*³²⁹ that federal law prohibiting polygamy did not violate the Free Exercise Clause of a Mormon who claimed polygamy a fundamental tenet of his faith³³⁰ is of enormous importance in this discussion. The same is true with respect to *In Employment Division, Department of Human Resources of Oregon v. Smith*³³¹ as the Supreme Court ruled that even if peyote were used as part of a religious ceremony and if the Oregon Supreme Court prohibited religious use of peyote, it was proper to deny unemployment benefits to those fired for using the drug.³³²

These cases are, in many ways, the constitutional basis for recommending that limits be imposed on how religion is practiced and what are the parameters of tolerable religious conduct. To that end, I propose religious belief be protected but that religiously inspired conduct, when harmful, not be protected. A proposal to proactively limit otherwise guaranteed protections must, necessarily, extend to speech that incites to violence. Freedom of speech advocates will argue that expanding *Brandenburg* results in an unjustified narrowing of tolerable and protected speech.

They are, of course, correct; such a recommendation violates one of the core values and principles of democracies. However, as this chapter makes clear protected speech directly contributes to harmful conduct. Obviously, not all protected speech directly contributes to harm; to argue that would be engaging in unconscionable exaggeration devoid of any basis in reality. Nevertheless, as history has repeatedly shown failure to limit speech that incites poses risks that society need not tolerate. The instinctual responses that free speech is a 'holy grail' (maybe 'the' holy grail) of civil democratic society are justified and understandable. However, given the clear danger posed by extremist speech exploring limits on free speech and conduct reflects government responsibility to larger society.

In suggesting that some religious based conduct be limited, the answers lie in the essence of modern day religion.³³³ Whether religious extremism is a function of the manipulation of religion or an extremist understanding of sacred scripture is an important question. It is, however, not the critical question. While hundreds of millions practice their faith without imposing themselves on their fellow citizens and neighbors or endangering co-religionists others, in the name of

³²⁹ 98 U.S. 145 (1878).

³³⁰ *Id.* at 166

³³¹ 485 U.S. 660 (1988).

³³² *Id.* at 672.

³³³ In many cases modern day religion has become more and more extreme as evidenced in the ideology that accompanied the Iranian revolution, where leaders such as Khomeini believed that everyone (not just Muslims) required "guardianship" in the form of rule or supervision by the leading Islamic jurists. See HAMID DABASHI, *THEOLOGY OF DISCONTENT* 443 (Transaction Pub. 1993).

religion, commit egregious crimes. It is this category that is our primary concern and that warrants our greatest attention. Sadly, government willingness to address this issue is, at best, hesitant and perhaps better described, unfortunately, as facilitating conduct that directly contributes to harm.