Kidnapped from that Land II: A Comparison of Two Raids to Save the Children from Polygamy

Linda F. Smith, University of Utah

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Abstract
In the spring on 2008 America watched as over 400 children were removed from their polygamist parents on the Yearning for Zion Ranch in rural west Texas. That raid was eerily reminiscent of the Short Creek Raid of 1953, meant to rescue the children from the same polygamist group in Arizona and Utah. This article compares and contrasts the two raids in light of changes to child protection law in the intervening years. Despite advances in our understanding of child development and in our respect for constitutional rights, the Texas raid repeated and compounded the mistakes of the Short Creek raid. Ultimately the article explores why child protection laws are inappropriately used to attempt the rescue of children from authoritarian religions.

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Kidnapped from that Land: II
A Comparison of Two Raids to Save the Children from the Polygamists

By Linda F. Smith

In Spring, 2008 America watched with fascination as over 400 children, in prairie dresses and overalls, were removed from their polygamist parents who lived on the Yearning for Zion Ranch in Texas. The press and public wondered at the strange practices of this group; many hoped that society would be able to rescue these children and give them proper lives.

While most of the public watched with curiosity, observers familiar with the FLDS (Fundamentalist Latter Day Saints) saw this as an unexpected replay of the 1953 Short Creek Raid. In 1953 hundreds of children were removed from this same group of polygamist parents in Arizona and Utah. The Utah Supreme Court held that parents who practiced polygamy were neglectful and the juvenile court was justified in removing their children from their care. Courts in both states extracted promises from the mothers to give up polygamy. Nevertheless, all the families were ultimately reunited and most continued to practice plural marriage.

Over 50 years later, the Texas trial court justified this intervention by pointing to a culture of underage polygamous “marriages” of girls to older men.

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But the Texas appellate courts held that most of these removals were unjustified and today all of the children have been returned to their families.

These two cases provide an excellent basis from which to understand the changes in child protection law over the last half century. This article describes both cases and the different constitutional and statutory frameworks that ordained different holdings.\(^2\) Despite advances in psychological understanding of children, the 1953 Raid was more protective of their needs. And because of increased respect for procedural rights, the excesses of the 2008 Raid were reigned in by the appellate courts. Finally, this article briefly explores the unchanged motivations that may have lead to both cases, the errors that continue to be made, and the challenges society faces in dealing with extremist religious groups with unusual child-rearing practices.

I.  BACKGROUND

C.  Mormon Polygamy

Polygamy was not one of the original tenets of the Church of Jesus Christ of Latter Day Saints (the LDS Church or Mormons). But by 1843 Joseph Smith, founder and prophet of the church, had a revelation that God’s plan included plural marriage (polygamy). Smith called for a restoration of the marriage patterns of the patriarchs Abraham, Isaac and Jacob. Doctrine provided that

husbands and wives would be bound together for all eternity in “celestial marriages” and plural marriages were a uniquely exalted form of celestial marriage.\(^3\)

The patriarchal aspects of plural marriage were also important, as the husband must be the central authority and the sister wives must work together to build a society upon which the kingdom of God on earth could be founded. In addition, plural marriage advanced the cause of procreation, permitting even more spirits to be born into the faith and providing bountiful posterity for the patriarch of the family.\(^4\)

Joseph Smith secretly practiced polygamy, and shared his revelation only with his closest advisers in the early 1840s. After Smith’s death in Illinois, there was a split among the followers and Brigham Young, lead the faithful to Utah in 1847. It was not until 1852, under Young’s leadership, that the Mormons publicly acknowledged the practice.\(^5\)

Despite the importance of the doctrine of plural marriage, it is estimated that fewer than twenty percent of all Mormons practiced it during the 19th century.\(^6\)

\(\textbf{D. Governmental Opposition to and Action Against Polygamy}\)

\(^3\) BRADLEY, supra note 1 at 2. GORDON, SARAH BARRINGER, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA, 22 (2002).

\(^4\) \textit{id. See also} LAWRENCE FOSTER, RELIGION AND SEXUALITY: THREE AMERICAN COMMUNAL EXPERIMENTS OF THE NINETEENTH CENTURY 139 (1981)

\(^5\) BRADLEY, supra note 1 at 2; GORDON, supra note 3 at 25-27. FISHER, 183, 199-204.

\(^6\) BRADLEY, 4.
Public sentiment was strongly opposed to the practice of polygamy and the federal government took various steps to stamp it out. During the campaign of 1856 the Republicans equated polygamy with slavery, calling them the "twin relics of barbarism." Congress adopted the Morrill Anti-Bigamy Act in 1862, the Poland Act of 1874 and the Edmunds Act of 1882. The U.S. Supreme Court decided the test case of Reynolds v. U.S. affirming convictions for bigamy and determining that there was no religious liberty right to practice polygamy contrary to the enacted laws of the land. Indeed, as the majority wrote, "polygamy has always been odious among the northern and western nations of Earth." Between 1884 and 1893 more than 1000 judgments for unlawful cohabitation and 31 for polygamy were issued against the early Mormons, each resulting in a prison sentence.

Given governmental opposition to plural marriage, in 1890 LDS Church President Wilford Woodruff presented the Manifesto recommending that plural marriages no longer be practiced. This Manifesto was instrumental in permitting Utah to join the Union as a state, and the Utah State Constitution prohibited polygamy forever. However, the Manifesto created substantial confusion among the faithful, especially because doctrine continued to condone and recognize plural marriage in the hereafter. Most members of the LDS Church ceased to practice plural marriage after the Manifesto, and in subsequent years

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7 Id. 3, GORDON, 55.
8 98 U.S. 145 (1878).
9 98 U.S. at 164
the Church itself began to excommunicate members who entered into or officiated at plural marriages.\textsuperscript{10}

Some “fundamentalists” were convinced that the mainline church had simply buckled to political pressure. They intended to continue to practice plural marriage as the church founders had ordained. One of these groups settled in the Short Creek community on the border of Utah and Arizona.\textsuperscript{11}

During the 1900s the fundamentalists (both in Short Creek and elsewhere) continued to experience governmental intervention and attack. After the “Kingman (Arizona) Raid” in 1935, two men and one woman were convicted of open and notorious cohabitation and the men served prison terms.\textsuperscript{12} In 1944 U.S. Attorney for Utah Boyden and Utah General Attorney sought to end polygamy through a massive roundup and series of federal and state prosecutions (the “Boyden Raids”). Polygamists with wives in both Utah and Arizona were convicted of violating the federal White Slave Trade (or Mann) Act for taking women across state lines for immoral purposes (polygamous marriages).\textsuperscript{13} In Utah state courts fifteen fundamentalists were convicted of unlawful cohabitation.\textsuperscript{14} Other aggressive federal prosecutions were not successful.\textsuperscript{15} Utah’s attempt to prosecute thirty-three

\begin{flushright}
\textsuperscript{10} BRADLEY 6-16.
\textsuperscript{11} Id. 16.
\textsuperscript{12} Id. 61-63.
\textsuperscript{13} Cleveland v. United States, 329 U.S. 14 (1944) affirming convictions of the polygamist men.
\textsuperscript{15} Indictment for mailing obscene literature dismissed because magazine editorializing in favor of polygamy was not lewd within meaning of the act. U. S. v. Barlow, 566 F. Supp. 795 (D. Utah, 1944). Federal charges of kidnapping a 15-year-old girl with cognitive impairments were not proven where she ran away from juvenile authorities to join her polygamous “husband” and there was no evidence she was “held for ransom or reward or otherwise.” U.S. v. Chatwin, 326 U.S. 455 (1946).
\end{flushright}
fundamentalists for “conspiracy to commit acts injurious to public morals” (for recruiting others to the lifestyle) ultimately failed when the statute was declared void for vagueness.\textsuperscript{16} Despite a series of cases, convictions and prison sentences in the 1930s and 1940s, the fundamentalists did not abandon their practice of plural marriage.

Then, in 1953, the state of Arizona decided to launch a definitive assault on the community using not only the criminal law, but child protection law as well.

II. The Short Creek Raid of 1953

A. The Raid and Cases in Arizona

Arizona’s Governor Howard Pyle was the prime mover in instigating the Short Creek Raid. He had become convinced that he needed to take action to protect the women and children from being enslaved in the polygamous lifestyle.\textsuperscript{17} His radio message announcing the raid explained his concern more fully:

They have arrested almost the entire population of a community dedicated to the production of white slaves who are without hope of escaping this degrading slavery from the moment of their birth. Highly competent investigators have been unable to find a single instance in the last decade of a girl child reaching the age of 15 without having been forced into a shameful mockery of marriage. . . .

\textsuperscript{16} State v. Musser, 223 P.2d 193 (Utah, 1950). This holding had been preceded by a decision affirming the conviction of 20 defendants in State v. Musser, 175 P. 2d 724 (Utah 1946) which was vacated and remanded by the U. S. Supreme Court to address the issue of whether the statute was void for vagueness in State v. Musser, 333 U.S. 95 (1948).

\textsuperscript{17} BRADLEY 113.
Here is a community – many of the women, sadly right along with the men – unalterably dedicated to the wicked theory that every maturing girl child should be forced into the bondage of multiple wifehood with men of all ages for the sole purpose of producing more children to be reared to become mere chattels of this totally lawless enterprise.\textsuperscript{18}

The Arizona government obtained warrants to arrest 36 men and 86 women for crimes ranging from statutory rape to bigamy. Arizona law enforcement staged a midnight raid on July 26, 1953 to make these arrests and to rescue 263 children.\textsuperscript{19} The entire community was rounded up before a magistrate’s court in the schoolhouse after which the women were released to temporarily go home with their children and the men released on bond until they could be taken to jail.\textsuperscript{20}

A few days later Arizona welfare workers took custody of 153 children and bused them, together with their mothers, to Phoenix and Mesa first to the YMCA or Armory.\textsuperscript{21} From there the mothers and children were placed together with foster families who had been recruited for this cause.\textsuperscript{22} “From the government’s point of view, the raid provided Short Creek’s children with their first glimpse of civilization”\textsuperscript{23} as the children began to attend school and became exposed to typical Arizona society. Their treatment varied considerably, with some mothers later permitted to move into their own apartments with their children. But they

\textsuperscript{18} BRADLEY 113, 208, 210, citing Radio address, 26 July 1953, KTAR Radio, Phoenix, Arizona.
\textsuperscript{19} BRADLEY 131.
\textsuperscript{20} BRADLEY 133.
\textsuperscript{21} BRADLEY 137-38.
\textsuperscript{22} BRADLEY 141.
\textsuperscript{23} BRADLEY 142.
were still kept apart from one another and from their husbands as the Arizona welfare authorities decided what would be their ultimate fate.\textsuperscript{24}

Arizona judge Lorna Lockwood initially heard individually the cases involving each child and in October, 1953 entered temporary orders ruling that the mothers could retain physical custody on the conditions that 1) they not return to Short Creek, 2) they refrain from teaching their children to violate Arizona laws, 3) they not consort with the father of their children, and 4) they be supervised by the welfare department.\textsuperscript{25} Judge Lockwood saw the mothers as excellent caretakers except for their commitment to polygamy. She concluded that it was unlikely the mothers would be converted to a belief in monogamy, but that their children must be taught “the laws of God and the state.”\textsuperscript{26}

Over the course of the next two years each child’s case was individually adjudicated to determine if the child was neglected and if sufficient evidence had been presented to justify removing the child from his parents’ care. By March 1955 the Arizona Superior Court ordered that the necessary steps be taken so that all the children would be returned to their respective parents. As each of their separate juvenile court cases was concluded, the fundamentalist parents and their children returned to their homes in Short Creek.\textsuperscript{27} Because the parents had ultimately prevailed in the Superior Court and retained custody,

\textsuperscript{24} BRADLEY 143.
\textsuperscript{25} BRADLEY 154-55.
\textsuperscript{26} BRADLEY 155-56.
\textsuperscript{27} BRADLEY 157.
there were only Superior Court orders, and no published opinion analyzing the legal issues adjudicated.

B. The Utah Case(s) – In re: Black

Arizona officials had hoped for a two-state raid, but Utah’s governor was not inclined to participate.28 Arizona officials informed Utah’s attorney general of their plans29 but neither the Utah attorney general nor the U.S. Attorney for Utah saw prosecution as viable, though LDS church leaders were prepared to be supportive.30 Arizona officials had calculated that 99 or the 263 children born to plural wives in Short Creek lived on the Utah side of town.31

Once Arizona prosecutions were underway, Utah officials were asked to serve Arizona warrants and cooperate in extradition of persons on the Utah side of the border, and they did so.32

However, immediately after the July 1953 raid, the attorney general of Arizona telephoned the juvenile court judge with jurisdiction over the Utah families, and indicated his concern about the “neglect” of the 80 children living on the Utah side of town.33 The judge organized meetings with juvenile probation and welfare officials to investigate and decide if court action was appropriate.34 It appears that the first court cases were filed on August 1, 195335

28 BRADLEY 119.
29 BRADLEY 120.
30 BRADLEY 124-25.
31 BRADLEY 137.
32 BRADLEY 139.
33 BRADLEY 165-66.
34 BRADLEY 166-67.
and throughout the autumn Juvenile Court Judge Anderson held a series of meetings with the polygamists and their attorneys. In December twenty separate petitions were filed alleging that all 80 children in Utah were neglected because their parents failed to teach them proper moral principles but instead taught them to practice polygamy. The judge informed the parents that each case would be handled individually and parents given the chance to submit sworn statements that they would discontinue practicing polygamy. Then, the Utah juvenile court decided to make a test case of Leonard Black and his second wife Vera, who had eight children together. (The other two wives of Leonard Black lived on the Arizona side of the border.)

The petition alleged that Leonard and Vera Black’s children were neglected; testimony included evidence that the couple was committed to the practice of plural marriage and taught it to their children. Six of Mr. Black’s daughters with his first wife had married before age 18 (one at age 15) and five of the six were in polygamous marriages. None of the Black children had gone to high school. The trial judge concluded that Leonard and Vera Black’s home was an “immoral environment for the rearing of children” due to the practice and advocacy of plural marriage. In May, 1954 the juvenile court ordered the Black children be placed in foster care for a year, during which time their

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36 BRADLEY 166.
37 BRADLEY 168.
38 In re: State in Interest of Black, 283 P.2d at 891, 896.
parents could cease their practices and regain custody.\textsuperscript{39} In June the Blacks brought a petition for a writ of habeas corpus and regained custody of their children until the Utah Supreme Court decided their appeal. In May 1955 the Utah Supreme Court affirmed the juvenile court’s judgment.\textsuperscript{40} The juvenile court’s order that the Black children be placed in foster care was finally executed in December, 1955 and the Black children again placed in foster care. In June, 1956 Vera Black signed the oath renouncing polygamy, both she and Leonard Black said that they had not lived as husband and wife since the 1953 raid and would teach their children to obey the laws of the land. Vera Black was then reunited with her children. However, she and Leonard Black returned to the life of plural marriage afterwards.\textsuperscript{41}

The case against the Blacks rested upon their practice of plural marriage and their teaching their children that God’s laws were superior to man’s laws. The juvenile court concluded that because the parents had knowingly provided an “immoral environment” for rearing children, the custody of their children, aged 2 to 17 years, should be removed from the parents.\textsuperscript{42}

The parents’ appeal challenged whether this finding was justified under the statute protecting neglected children, whether their civil liberties and right to practice their religion were violated and whether the evidence justified their loss

\textsuperscript{39} BRADLEY 171.
\textsuperscript{40} BRADLEY 172 and In re: State in Interest of Black, 283 P.2d at 887.
\textsuperscript{41} BRADLEY 178-79.
\textsuperscript{42} In re: State in Interest of Black, 283 P.2d at 891.
of custody.\textsuperscript{43} Justice Worthen, writing the lead opinion for the Utah Supreme Court, firmly concluded that the children were “neglected” within the meaning of the statute due to the parents’ immoral practices and instruction, there was no constitutional right to practice one’s religion that could permit polygamy contrary to the constitutional and statutory prohibition and that the trial court was justified in removing custody from parents who instructed their children to pursue such a life style and to consider God’s law above the law of man.\textsuperscript{44} Two concurring justices wrote more narrowly to affirm the juvenile court’s order based on the parents’ teaching their children to practice any felony (Henriod) and on the parents’ defiance of the court’s reasonable order to comply with the law (Crockett). (A fourth justice concurred in the result and the fifth justice did not participate.)\textsuperscript{45}

The case of \textit{In re: Black} stood as a significant warning to fundamentalists in Utah that they practiced polygamy at their peril and could, on that basis alone, lose custody of their children to the state.

Despite the ringing assertion that the juvenile court was justified in removing these children from their parents, both the trial judge and the Supreme Court hinted at the possibility that such a strategy was too little too late. The juvenile court judge had written privately that he thought the family ties were so strong “it would be virtually impossible for most of these children to

\textsuperscript{43} \textit{In re: State in Interest of Black}, 283 P.2d at 892-93.
\textsuperscript{44} \textit{In re: State in Interest of Black}, 283 P.2d at 899-911.
\textsuperscript{45} \textit{In re: State in Interest of Black}, 283 P.2d at 913-14.
make a satisfactory adjustment to other homes” and that harsh prosecution of the fathers would be the only way to effectively resolve the issue. Juvenile Court Judge Anderson wrote: “I can’t escape the feeling that going ahead with these cases will do more harm than good to the children, and will amount to punishing the parents through the children.” Justice Worthen wrote:

“If we set aside the judgment of the Juvenile Court and permit this condition to continue, we will probably have the same arguments and the same excuses when these children are brought before the court to determine their right to custody of their children resulting from the continuation of this system. The 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 Vera and the seven born to her younger sister Lorna, since that time from this immoral and illegal relationship. . . .It is true that taking these children from their parents does seem harsh, and visits the sins of this father upon these children . . . .but unless we . . . apply the harsh treatment required and stop the spread of this immoral and illegal practice the sins of this father will be visited upon the children of these children to the third and fourth generations.47

Of course, these musings foreshadowed the results.

C. The End Result.

The Short Creek raids did not wipe out polygamy in either Arizona or Utah. The group continued to grow at the same rate it had since 1930.48 The law enforcement agencies adopted a practice of ignoring polygamy per se and bringing court cases only when some additional harm (child sexual abuse, 46 BRADLEY 167.
47 In re: State in Interest of Black, 283 P.2d at 908-09.
48 BRADLEY 182.
welfare fraud) was occurring.\textsuperscript{49} Notably in 2006 Utah indicted Warren Jeffs, the leader of the FLDS, as an accomplice to rape in 2001 when he officiated at the “marriage” of a 14-year-old girl to a 19-year-old man, and encouraged their relationship even after the girl told him that she did not want to have a marital relationship.\textsuperscript{50} Jeffs was convicted in 2007 and sentenced to five years to life in prison.\textsuperscript{51}

III. THE YEARNING FOR ZION RANCH RAID

Over fifty years later, the scenario of being “kidnapped from the land” was repeated, to a very large extent, when Texas welfare officials removed over 400 children from the custody of their FLDS parents.

A. Founding the YFZ Ranch

In 2003 the FLDS Church members bought 1300 acres outside Eldorado Texas and began building the Yearning for Zion Ranch. Prior to the purchase, the “YFZ Land LLC” indicated it would use the land for a corporate hunting retreat; but once construction was underway it became clear that the FLDS


\textsuperscript{50} Winslow, Ben Warren Jeffs charged Deseret News, April 6, 2006 at http://www.deseretnews.com/article/print/635197532/Warren-Jeffs-ch . It may be worth noting that this was not a polygamous union, but contrary to the law given the age of the girl and the fact that Utah law did not sanction marriages of minors less than 16 year of age and criminalized sexual relationships between older adults and minors.

were building a set of buildings there, perhaps as a refuge.\textsuperscript{52} The FLDS themselves remained apart from the locals, and constructed, in addition to various other buildings, the first ever FLDS Temple.\textsuperscript{53}

From the beginning, dissident former members warned about the ranch: “This new encampment is going to make it easier for them . . . to traffic girls to Mexico, the same as they have been doing to Canada.”\textsuperscript{54} In response, Texas changed its laws to raise the age for marriage from 14 to 16 and to increase the penalty for statutory rape, with Utah’s Attorney General testifying in favor of those changes.\textsuperscript{55} The Texas locals were also wary, fearing that “this was another Waco, another Davidian with a leader like David Koresh.”\textsuperscript{56}

\textbf{B. The Raid in Texas}

While the Short Creek raid was investigated and strategically planned, the record of the YFZ raid officially began with a series of telephone calls to a local family violence shelter.\textsuperscript{57} The caller, claiming to be “Sarah Jessop,” or “Sarah Barlow”, a 16-year-old girl forced to be the seventh wife of a middle-aged man,

\begin{footnotes}
\item[52] Perkins, Nancy \textit{Do polygamists own Texas site?}, \textsc{Deseret News}, March 25, 2004 \newline http://www.deseretnews.com/article/print/595051412/Do-polygamists and Perkins, Nancy, \textit{FLDS leaders are creating Texas refuge}, \textsc{Deseret News}, May 3, 2004 \newline http://deseretnews.com/article/print/595060554/FLDS-leaders-a
\item[54] Id. March 25, 2004.
\item[55] O’Donoghue, Amy Joi, \textit{This won’t be ‘another Short Creek’} \textsc{Deseret News}, April 28, 2008, at http://www.deseretnews.com/article/print/695274455/This-wont-be-another-Short-Creek.html
\item[56] Id. May 3, 2004
\item[57] FLDS and critics claim that the Texas authorities were simply waiting for an excuse to intervene in this community, having been encouraged to do so by disaffected former members who advocated for such actions.
\end{footnotes}
claimed he forced her to have sex, impregnated her, beat her, and would not let her leave the YFZ Ranch with her baby. The family violence shelter forwarded this information to law enforcement officials and to the Department of Family and Protective Services (DFPS). Because the caller would have to have conceived her 8-month-old baby when she was, at most, 15 years old, law enforcement asserted that the felony of sexual assault of a child had occurred and sought a warrant.  

The trial court issued a Search and Arrest Warrant ordering the officers to seize various items of evidence (birth records, medical records, photographs, etc.) relating to the 16-year-old caller and to arrest Dale Barlow, the alleged perpetrator. Texas state troopers and child welfare investigators spent three days on the Ranch investigating the facts and searching for “Sarah.” This particular individual has not been found and likely did not exist. Instead, “police have linked the calls . . . to Rozita Swinton, a 33-year-old Colorado Springs, Colo., woman” who has a history of assuming different personalities and calling for help claiming abuse.

While “Sarah” was not found, the DFPS workers reported they “observed a number of young teenage girls who appeared to be minors and appeared to be pregnant, as well as several teenage girls who already had given birth and

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60 Rosetta, Lisa, Woman Linked to FLDS Calls Troubled, SALT LAKE TRIBUNE, June 1, 2008 at A.1.
had their own infants."\(^{61}\) The officer also asserted that a dependable confidential informant had advised that “adult male FLDS church members . . . . engage in the practice of marrying multiple wives, at the initial time of marriage, the bride is often under the age of sixteen years.”\(^{62}\)

Instead of filing protective cases regarding the girls who appeared to be pregnant teens or young teenage mothers, DFPS began “the largest child protection case documented in the history of the United States” by taking emergency custody of all the children on the Ranch without a court order.\(^{63}\) First teenage girls were taken into custody to be interviewed.\(^{64}\) Ultimately all the children – over 400 -- were removed over a three-day period. DFPS workers justified taking custody of all the children because the children were “unable or unwilling to provide information” such as their correct names, birth dates, and parents’ names.\(^{65}\) The Director of the Children’s Advocacy Center explained “When children live in a pretty secluded environment it is difficult to get them to open up . . . . If you give them a little space you are more likely to get them to open up to you.”\(^{66}\)


\(^{62}\) Long supra note 59, April 6.

\(^{63}\) In re: Texas DFPS, 255 S.W. 3d 613, 614 (Texas Sup. Ct. 2008).


\(^{65}\) Adams, Brooke FLDS Teen Whose Call Sparked Texas raid said she feared for her life from physically abusive husband, SALT LAKE TRIBUNE, April 8, 2008 (electronic, on file with author).

\(^{66}\) Adams, Brooke, 401 FLDS Kids in Custody, SALT LAKE TRIBUNE, April 8, 2008 at A1.
Initially, as with the Arizona raid, the children’s mothers were permitted to accompany them, first to interview sites in San Angelo and then to the Fort Concho historic site where they would be temporarily housed.\^{67}

C. The Trial Court Takes Emergency Custody after Ex Parte Hearings

DFPS filed “suits affecting the parent-child relationship” (SAPCR) of these 400+ children and sought ex parte emergency custody orders based on the Affidavit of Investigative Supervisor recounting the call from “Sarah” and asserting that “further investigation” had “unearthed additional information concerning other minor residents of the YFZ Ranch.”

Investigators determined that there is a widespread pattern and practice among the residents of the YFZ Ranch in which young minor female residents are conditioned to expect and accept sexual activity with adult men at the ranch upon being spiritually married to them. Under the practice, once a minor female child is determined (sic) by the leaders of the YFZ Ranch to have reached child bearing age (approximately 13-14 years old) they are then “spiritually married” to an adult male member of the church and they are required to then to engage in sexually activity with such male for the purpose of having children. . . . (T)here is a pervasive pattern and practice of indoctrinating and grooming minor female children to accept spiritual marriages to adult male members of the YFZ Ranch resulting in them being sexually abused. Similarly, minor boys residing on the YFZ Ranch, after they become adults, are spiritually married to minor female children and engage in sexual relationships with them resulting in them becoming sexually perpetrators. This pattern and practice places all of the children located at the YFZ Ranch, both male and female, to risks of emotional, physical and/or sexual abuse.\^{68}

Tracking the requisite statutory conclusions, the McFadden Affidavit asserted that “an immediate danger exists to the physical health or safety of the children who live at the YFZ Ranch and/or that the children “are the victims of

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\^{67} Kovach, supra note 58.

\^{68} McFadden Affidavit, supra note 61.
neglect and/or sexual abuse.” The Affidavit referred to the YFZ Ranch as “the household” and stated that the children’s continuing to reside on the YFZ Ranch would be contrary to their “welfare.” It concluded that there was “no time” for an adversary hearing, that “all reasonable efforts” had been made to “prevent or eliminate the need for removal of the child” but that it was not “in the child’s best interest to return to child to the parents’ home at this time.” Based on these allegations, trial court Judge Walther gave emergency custody of all 401 children to DFPS on April 6. It appears that no more than an ex parte hearing was held on Monday April 7, confirming DFPS’s custody.

Under Texas statute, a full adversary hearing must be held within 14 days of emergency custody being taken from the parents. Accordingly, the adversary hearing for all 400-plus children was scheduled for April 17 and 18.

**D. DFPS Begins Placing Children in Foster Care**

In the meantime, and before the adversary hearing, DFPS began separating the children from their mothers. On Monday April 14, mothers were separated from the 100 children ages six and older. The mothers and the 300 children age five and under were permitted to stay together for the time being. DFPS began taking the older children to foster and group homes throughout the state of Texas. DFPS spokesperson Marleigh Meisner explained:

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70 Adams, Brook and Kristen Moulton. Our Children Need Us: FLDS women accuse state of breaking up families, SALT LAKE TRIBUNE, April 15, 2008 at A1. The mothers of the older children were taken to a room to “get some information.” At that point police officers and child welfare workers surrounded these women and read a court order that the children would be taken from them and placed in foster care. The women were required to leave the building and invited to
This was in the best interests of these children . . . It was also in the best interest of the investigation. . . . We believe that children who are victims of abuse or neglect, and particularly victims at the hands of their parents, are certainly going to feel safer when they don’t have a parent there coaching them.71

E. The Testimony in the Trial Court Adversary Hearing

Despite enormous logistical challenges, Texas officials went forward with the adversary hearing as scheduled and within the 14-day limit, on April 16 and 17. Given the numbers of parents and children involved, only a limited number of their attorneys were permitted to cross-examine, call witnesses, or present arguments. Many of the mothers had to watch the proceedings on television from a distant location.

DFPS relied upon the testimony of the investigating social workers that “there is a culture of young girls being pregnant by old men” and she had found evidence that “more than 20 girls, some of whom are now adults, have conceived or given birth under the age of 16 or 17.”72 There was “a pattern of girls reporting that there was no age too young for girls to be ‘spiritually married.’ . . . (and ) a pervasive belief that when ‘Uncle Merrill’ decided for them to be married, they would be married. . . . No age was too young to marry, and they wanted to have as many babies as they could.” Several victims of sexual abuse go to a domestic violence center or back to the ranch. Perkins, Nancy, FLDS mothers say Texas official lied to them, DESERET NEWS. April 15, 2008. Retrieved June 24, 2008. (http://www.deseretnews.com/article/content/mobile/1,5620,695270583,00.html?printView=true)

71 Moulton, Kristin, Texas defends taking children from polygamous compound, SALT LAKE TRIBUNE. April 15, 2008. (electronic, on file with author).

were specifically identified: a sixteen-year-old girl who has a five month old baby, a seventeen-year-old girl with a year-old son, and entries in the Bishop Records of girls being pregnant at ages 15 and 16.\textsuperscript{73}

Dr. Bruce Perry, a child psychiatrist, testified that the pregnancies of the YFZ children were the result of sexual abuse and that children aged 14, 15, and 16 were not emotionally mature enough to consensually enter into a healthy relationship of marriage. Dr. Perry testified that free choice was not really possible under the FLDS belief system that required obedience to the father and the prophet or eternal damnation would result.\textsuperscript{74} He focused on the limited choices available to the FLDS children and characterized the environment to be “authoritarian.” The children were at risk “because their brain development could be impeded by an authoritarian atmosphere that discourages independent thinking.”\textsuperscript{75}

To support the argument that all the children were victims of abuse, DFPS supervisory investigator Angie Voss testified that the residents of the YFZ Ranch “explained that they are one big family,” all the mothers are called mothers to all the children and all the children call each other brother and sister and all have the same belief system. She concluded that all the children “are potential

\textsuperscript{73} In re: Texas DFPS Petition for Writ of Mandamus, 3-4 in the Supreme Court of Texas, No. 03-08-00235-CV, (May 23, 2008) (on file with author).
\textsuperscript{74} Id. 5.
\textsuperscript{75} Adams, Brooke and Kristen Moulton., Judge says FLDS children will stay in custody, order DNA tests, SALT LAKE TRIBUNE, April 19, 2008 at A1.
victims.” When asked why babies needed to be removed, Voss said, “ . . . what I have found is that they are living under an umbrella of belief that having children at a young age is a blessing and therefore any child in that environment would not be safe . . . . when you find one child that’s a victim in a home, you have concerns for all of them. And the ranch is considered one large home, one large community, I would have concerns for any children there.” Dr. Perry similarly testified that the pervasive belief system that underage marriage and sexual abuse of girls is okay creates a danger to all the children. It develops people who have a high potential of replicating sexual abuse of young children as part of their belief system.

Lawyers for the parents argued that pregnancy by itself is not evidence of child abuse. They presented a “theological expert” on the FLDS, William John Walsh. He testified that the church did not have a doctrine advocating the marriage of under-age girls to older men. While the church’s prophets decide when a couple is ready to marry, there was no doctrine favoring under-age marriage but it was more a matter of matchmaking involving the parents as well as the girl.

Four mothers testified. Merylin Jeffs, age 29, offered to move away from the ranch if necessary to protect her 7-year-old daughter from whom she had never been apart, and stated that she would not allow her daughter to marry

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76 In re: Texas DFPS Petition, 4.
77 In re: Texas DFPS Petition, 4-6.
78 Johnson and Dougherty, supra note 72.
79 Adams and Moulton April 19, supra note 75.
before age 18. Lori Jessop, age 25 and in a monogamous marriage to a 27-year-old man, said she had wed at age 18 and was also concerned that girls became brides at age 15 or 16. Lucille Nielsen testified that she married at age 20 and plead to permit her 2-year-old son to say with her. Linda Musser, age 56, volunteered to leave the ranch if necessary to regain custody of her 13-year-old son.  

Neither side presented detailed evidence about the individual children seized in the raid. However, DFPS investigator Voss also testified that the Department’s investigation had been thwarted by misinformation from the children and adults as to their identities, ages, and family relations. Indeed there were 20 or 30 young mothers DFPS believed to be minors who claimed to be adults.

F. The Trial Court’s Findings after the Adversary Hearing

At the conclusion of two days of testimony, Judge Barbara Walther entered findings that tracked DFPS’s allegations --that all the children were in danger of abuse and needed to be immediately removed from their parents’ care in order to protect them. She made the requisite finding that reasonable efforts had been made to eliminate the need for removal but that the danger remained.

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80 Id.
81 In re: Texas DFPS Petition, 2.
82 Adams and Moulton April 15, supra note 71.
Judge Walther also ordered that all the children and parents undergo DNA testing, to definitively identify the parents of each child.83

G. Mandamus to the Court of Appeals

Texas law does not provide for an appeal to challenge the findings of fact or the order of temporary custody that is made after the adversary hearing. The law provides the right to appeal only after the permanency hearing and a final order terminating parental rights (or otherwise giving permanent custody to someone else).84 Texas law does permit a party to file for the extraordinary writ of mandamus in the appellate court to challenge what happened in the adversary hearing. 85

The trial judge made her oral ruling on Friday April 18 and by Wednesday April 23 lawyers from Texas Rio Grande Legal Aid had filed a petition for a writ of mandamus and an emergency motion for a stay of the court’s order. The motion asked the appellate court to prevent DFPS from separating the youngest children from their mothers, as that separation had not yet occurred. The

83 Johnson, Kirk and John Dougherty supra note 72.
84 Tex. Fam. Code § 263.405 (2008). Prior to that final order there would have been hearings over a 12 – 18 months period regarding the service plans developed by DFPS to rehabilitate the parents and attempt to return the children to their homes.
85 For example, parents have successfully filed for “mandamus” when the trial court did not hold the adversary hearing on time, and have obtained orders that the trial court promptly hold the hearing. In re: B.T. 154 S.W. 3d 200 (Tex. App. 2 Dist. 2004). A mandamus order can be entered if the trial court had insufficient evidence that there was a danger to the child’s health or safety and that it abused its discretion in giving custody to DFPS. In re: Cochran, 151 S.W. 3d 275 (Tex. App. 6 Dist. 2004).
The appellate court denied the motion for a stay of the trial court’s order and DFPS began placing the youngest children in foster care. The appellate court did grant a hearing on the petition.

Texas Rio Grande Legal Aid represented thirty-eight women; none of these women were parents of any of the girls who had become pregnant as minors. Their petition argued that there was no evidence that their children were in danger of sexual abuse, and therefore the trial judge had acted unlawfully in giving custody of their children to DFPS. They further argued that the state had failed to prove an “urgent need for protection” that required “immediate removal” and that the state had not made “reasonable efforts” to eliminate the need to remove the children. The petition argued in the alternative that even if DFPS was entitled to legal custody, the trial judge should have allowed the parents physical custody or visitation with their children.

Legal Aid of North Texas filed a similar Petition for Mandamus on behalf of three other mothers adding the arguments that the mass hearing denied the mothers due process of law, given the lack of notice, of access to counsel, remote viewing, and inability to attend the hearing without surrendering custody of their infants to DFPS. This Petition added the argument that the only

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87 In re: Sara Steed, Amended Petition for Writ of Mandamus, 2008 W.L. 2340322 (Tex. App.-Austin, April 30, 2008)
conceivable basis for the court’s order was the unconstitutional goal to alter the religious education of the children. 88

DFPS opposed both petitions; amicus curiae briefs were filed by a lawyer involved in children’s advocacy, supporting DFPS, and by the Liberty Legal Institute, a legal advocacy group for religious freedom and parental rights. 89

On May 22, 2008 the Texas Court of Appeals for the Third District at Austin issued its opinion unanimously agreeing with the 38 mothers on all three primary points. The Court wrote:

Removing children from their homes and parents on an emergency basis before fully litigating the issue of whether the parents should continue to have custody of the children is an extreme measure. . . .[I]t is a step that the legislature has provided may be taken only when the circumstances indicate a danger to the physical health and welfare of the children and the need for protection of the children is so urgent that immediate removal of the children from the home is necessary. 90

The Appellate Court held that DFPS failed to “present any evidence of danger to the physical health or safety of any male children or any female children who had not reached puberty” and that the alleged “belief system” did not, by itself, put the children in “physical danger.” Secondly, the Appellate Court held that DFPS failed to establish the need for protection was “urgent and required immediate removal.” The Court noted that there were five minor girls who were pregnant, but they were not the children of the mothers bringing this

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88 In re: Bradshaw, Petition for Writ of Mandamus, (Tex App.-Austin, May 9, 2008) with Appendix including excerpts from Trial Transcripts( on file with author)
mandamus. There was no evidence that these mothers had allowed or were going to allow their children to be victims of sexual abuse. “Evidence that children raised in this particular environment may someday have their physical health and safety threatened is not evidence that the danger is imminent enough to warrant invoking the extreme measure of immediate removal prior to full litigation of the issue. . . .” The Court also concluded that the evidence did not justify treating the entire Ranch as one “household.” Finally, the Appellate Court held that there was “no evidence” that DFPS “made reasonable efforts to eliminate or prevent the removal” of any of these women’s children. The Court concluded that because the evidence of DFPS was “legally and factually insufficient” to support the findings required by the statute, the trial court had “abused its discretion.” The Court of Appeals directed the trial court to vacate its order with respect to the children of these 38 women.

The Court issued a one-paragraph Memorandum Opinion in the Bradshaw case, indicating that the material facts were identical and the same relief would be ordered.91 The court did not address the constitutional claims raised in either case.

Once the opinions were issued, these women, their lawyers, and many others in the FLDS community began to rejoice. However, their joy was cut short when DFPS decide to further appeal the case.

H. Mandamus to the Texas Supreme Court

The very next day, May 23, 2008, DFPS filed a Petition for Writ of Mandamus and Motion for Emergency Relief in the Texas Supreme Court. DFPS argued that the Court of Appeals had abused its discretion by inappropriately granting mandamus and judging the facts for itself.\textsuperscript{92} No further proceedings would take place in the trial court until the Texas Supreme Court resolved the matter.

The ACLU of Texas weighed in with an amicus curiae brief urging the Texas Supreme Court to uphold the Court of Appeal’s decision. The ACLU argued that parents could be deprived of their fundamental rights to custody of their children only after “due process of law” which required individual determinations for each child and the mass hearings denied due process. It further argued that separating children from their parents solely on the parents’ beliefs (rather than their acts) would violate the First Amendment.\textsuperscript{93}

On May 29, 2008 the Supreme Court of Texas issued its \textit{Per Curiam} opinion denying DFPS’s petition, explaining: “Having carefully examined the testimony at the adversary hearing and the other evidence before us, we are not inclined to disturb the court of appeals’ decision. On the record before us, removal of the children was not warranted.”\textsuperscript{94} The Supreme Court noted that the case involved only 38 mothers and their 126 children (117 of whom were under age 13) and addressed DFPS’s claims that these children could not be protected if

\textsuperscript{92} In re: Texas DFPS Petition, \textit{supra} note 73.
\textsuperscript{93} In re: Texas DFPS Brief of Amicus ACLU, 2008 WL 2307381 (Texas, May 29, 2008).
DFPS did not have custody of them. The Court referenced the statues providing for investigations of child abuse and of “suits affecting the parent-child relationship” and noted:

(T)he Family Code gives the district court broad authority to protect children short of separating them from their parents and placing them in foster care. The court may make and modify temporary order ‘for the safety and welfare of the child’, including an order ‘restraining a party from removing the child beyond a geographical area identified by the court.’ The court may also order the removal of an alleged perpetrator from the child’s home and may issue orders to assist the Department in its investigation. The Code prohibits interference with an investigation, and a person who relocates a residence or conceals a child with the intent to interfere with an investigation commits an offense. While the district court must vacate the current temporary custody orders as directed by the court of appeals, it need not do so without granting other appropriate relief to protect the children, as the mothers involved in this proceeding conceded.95

The Texas Supreme Court declined to address the constitutional issues, calling it “premature” to do so.

Three of nine Supreme Court justices filed a concurring and dissenting opinion, agreeing the trial court abused its discretion by removing boys and pre-pubescent girls from their mothers’ custody. But they did not agree with respect to “the demonstrably endangered population of pubescent girls.”

I. On Remand to the Trial Court

The lawyers who had litigated the Mandamus met and hammered out an agreement for the return of the children but a continuation of the investigation, including parenting classes and a requirement to remain in the state for at least

95 Id.
90 days. Judge Walther “tweaked” that agreement adding conditions such as psychological testing and 24-hour access to the children, saying it would permit the return of all the children. The lawyers who had won the mandamus objected to such restrictions where there had been no evidence that their clients’ children were abused or neglected. New agreements were drafted and also rejected by the judge. Ultimately Judge Walther’s order released all the children (except one 16-year-old whose attorney claimed she was a victim of sexual abuse) but kept the children under the supervision of DFPS indefinitely, required parents to be photographed, fingerprinted and “ID’ed” when they picked up their children, attend standard parenting classes, not interfere with DFPS’s ongoing investigation and allow DFPS workers to visit, question and examine the children, both medically and psychologically. Parents were prohibited from leaving Texas and required to give notice of any moves and certain travel. The lawyers who had won the mandamus decided to accept the Order and their clients began travelling to be reunited with their children.

J. Reunions, Continuing Child Protection Investigations and Services

The tearful reunions of parents and children began as soon as Judge Walther signed her order. Thus, 61 days after the first children were removed, all but one of the children scattered throughout the state of Texas were being

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96 Adams, Brooke and Julie Lyon, *State Supreme Court says that district judge’s April 18 order must be vacated*, SALT LAKE TRIBUNE, May 30, 2008 at A1.
99 Adams, Brooke, *Parent rush to pick up kids, agree to let the state keep tabs on FLDS Ranch*, SALT LAKE TRIBUNE, June 3, 2008 A1.
reunited with their parents. By Thursday June 5 all of these children had been returned to their parents. However, many of the families “settled into apartments and homes away from the ranch to await the results of a child welfare investigation.”

By July 4, a month after the return of the children, DFPS was beginning to arrange parenting classes for the FLDS parents. By late July Judge Walther had ordered the massive child protection case broken up into various cases grouped by mothers and by August DFPS had moved to dismiss the cases regarding 32 children where there was no evidence of underage marriages or their parents agreed to take appropriate steps to protect the children.

One child -- the 16-year-old daughter of Warren Jeffs -- returned to her mother with certain conditions. Attorney ad litem Natalie Malonis told Judge Walther that she believed her client had been spiritually united with an older man and had a child by him. Judge Walther ordered that Warren Jeffs and FLDS spokesperson Willie Jessop not contact the girl. The girl, for her part,

100 Adams, Brooke, All FLDS children reunited with parents, SALT LAKE TRIBUNE, June 5, 2008 at A8.
101 Lyons, Julia and Brooke Adams, Trauma of raid may linger for FLDS Kids: Parents hope love, patience will heal wounds, SALT LAKE TRIBUNE, June 6, 2008 at B.1.
104 Adams, Brook, Texas wants 8 FLDS kids back in foster care, SALT LAKE TRIBUNE, August 6, 2008 at A. 1.
denied that she had been a victim of sexual abuse and had petitioned the judge to assign her a new lawyer.\textsuperscript{106} The girl’s CASA (Court-Appointed Special Advocate) filed a report with the court opining that the girl was “at risk for continued sexual abuse” because, indeed, she had been “married” to a 34-year-old man the day after she turned 15. Attached to the report was the girl’s own diary entry, dated December 27, 2006: “The Lord blessed me to go forward in marriage July 27, 2006, the day after I turned 15 years old.”\textsuperscript{107}

On the one-year anniversary of the Raid only one child remained in DFPS custody, a 14-year-old girl who was allegedly spiritually united with Warren Jeffs at age 12.\textsuperscript{108} The entire case was concluded in July, 2009 with an agreement that this girl’s aunt have permanent custody and her parents (Ranch leader Merril Jessop and Barbara Jessop) have visitation at the aunt’s discretion and the court’s oversight end.\textsuperscript{109}

In December 2008, DFPS issued a lengthy report regarding the “Eldorado Investigation”\textsuperscript{110} indicating that it had identified twelve girls (of the 43 teen girls) who were victims of sexual abuse, their having been “spiritually married”

\textsuperscript{107} Tribune Staff and Wire Services, \textit{Records: Jeffs conducted teen daughter’s wedding}, SALT LAKE TRIBUNE, July 19, 2008 at A8.
\textsuperscript{109} Winslow, Ben, \textit{Texas FLDS custody case officially ends}, DESERET NEWS July 24, 2009 at A2.
between ages 12 and 15.\textsuperscript{111} DFPS’s website asserts that the FLDS children “are safer today” due to its efforts, including having educated mothers and girls about sexual abuse.\textsuperscript{112} The Report indicates that the costs to DFPS totaled over $12 million.\textsuperscript{113} Reporter Brooke Adams cites a total cost to Texas state agencies of over $15 million.\textsuperscript{114}

K. The Criminal Cases Begin

DNA reports matching parents and children were delivered to Judge Walther’s court, based on her mid-April, 2008 order for these tests in the protective case.\textsuperscript{115} Hours after signing an order releasing FLDS children from state custody, Judge Barbara Walther swore in a grand jury to consider criminal indictments.\textsuperscript{116} DFPS reported that it would try to use the DNA evidence it collected in the criminal investigation.\textsuperscript{117} In late June a number of FLDS women, including Warren Jeffs’ 16-year-old daughter, made brief appearances before the grand jury, as did the girl’s attorney Natalie Malonis.\textsuperscript{118}

\begin{thebibliography}{9}
\bibitem{112} http://www.dfps.state.tx.us/default.asp
\bibitem{113} ELDORADO INVESTIGATION, supra note 110 at 21.
\bibitem{114} Adams, Brook, Back on the Ranch, SALT LAKE TRIBUNE March 29, 2009 at A1. Costs include $12,400,000 for DFPS, $1,390,262 Department of Public Safety, $756,042 court-appointed lawyers, $256,330 travel and meals, $164,896 investigation and prosecution, $58,420 Attorney General for DNA testing.
\bibitem{115} Adams, Brooke, DNA results arriving in Texas, SALT LAKE TRIBUNE, June 4, 2008 at A1.
\bibitem{116} Adams, Brooke, Parent rush to pick up kids, agree to let the state keep tabs on FLDS Ranch, SALT LAKE TRIBUNE, June 3, 2008 at A1.
\bibitem{117} Adams, Brooke, All FLDS children reunited with parents, SALT LAKE TRIBUNE, June 5, 2008 at A8.
\bibitem{118} Reavy, Pat, FLDS grand jury ends for the day, DESERET NEWS, June 25, 2008 at http://www.deseretnews.com/article/1,5143,700237823,00.html
\end{thebibliography}
On July 22, 2008 the grand jury met again and indicted Warren Jeffs and four other men for sexually assaulting girls under the age of 17.\(^{119}\) The four other men -- Raymond Jessop, 36, Merrill Jessop, 33, Allan Keate, 56, and Michael Emack, 57 -- turned themselves in to authorities on July 28; all are charged with first degree felonies and face five years to life in prison.\(^{120}\) The sexual assaults of minors allegedly occurred in 2004 and 2006; the cases appear to be based on the births of four children who would have been conceived by underage girls and one additional sexual assault in 2006. Warren Jeff’s daughter is not among the victims, though her “husband” is a defendant charged for assaulting a different girl.\(^{121}\) It is not clear whether any of the alleged victims are still minors.

The grand jury charged a fifth man – Lloyd Barlow, the Ranch’s doctor – for failing to report child abuse when he oversaw the births of children to minors on October 14, 2006, December 20, 2006 and May 20, 2007.\(^{122}\)

By March, 2009 a dozen men faced Texas state-court indictments on charges ranging from sexual assault to bigamy to performing an illegal marriage. In addition, a federal grand jury had begun to investigate FLDS church members.\(^{123}\) During the summer of 2009 defense attorneys argued to Judge Walther that the evidence should be suppressed, because the search warrants were not based on probable cause, but on a hoax call which law


\(^{120}\) Ramshaw, Emily, *5 FLDS men, facing charges, turn selves in*, THE DALLAS MORNING PRESS reprinted in SALT LAKE TRIBUNE July 29, 2008 at A9.


\(^{122}\) Id.

\(^{123}\) Winslow, Ben, *Fight over FLDS evidence delayed until at least May*, DESERET NEWS, March 9, 2009 Retrieved June 23, 2009 (http://www.deseretnews.com/article/1,5143,705289715,00html)
enforcement used “as an excuse for staging a massively intrusive raid upon a disfavored religious group.”\textsuperscript{124} Testimony showed officials knew the alleged abuser, Dale Barlow, was not on the ranch and erroneously alleged that DFPS investigators had been denied access to the ranch. Defendants also argued that the search warrant was overly broad in failing to list which of 19 residences could be searched and treating the entire ranch as one “household.” Texas argued that the defendants had no expectation of privacy and hence no standing to object to the search and that evidence of child abuse was in plain view. Once pre-trial matters are resolved the trials are scheduled to begin in October, 2009.\textsuperscript{125}

IV. WHAT WAS DIFFERENT / WHAT REMAINED THE SAME

Between 1953 and 2008 sea changes have occurred in family and child protection law, including the evolution of constitutional protection of the parent-child relationship, federalization of standards for state intervention into the family, identification of the battered child syndrome, greater understanding about sexual abuse, and increased reliance upon and refined understanding of children’s psychological needs. Similarly there have been sweeping social changes in most of society – from the steep increase in the divorce rate to the

\textsuperscript{124} Winslow, Ben, Search warrants challenged, DESERET NEWS, April 15, 2009 Retrieved June 23 (http://www.deseretnews.com/article/print/7055297703/Search-warrant

\textsuperscript{125} Adams, Brooke, Defense attorneys try to suppress FLDS evidence, SALT LAKE TRIBUNE, July 14, 2009 at B.5.
explosion of out-of-wedlock births, to the acceptance of gay and lesbian marriages.

Yet despite these many changes, the Raid of the YFZ Ranch initially seemed “déjà vu all over again”126 to anyone familiar with the Short Creek Raid. The legal resolution of the cases, however, differed because of changes in the law. Whether the ultimate outcomes will vary at all remains to be seen. Here I compare and contrast these two raids.

A. Changes in Constitutional and Statutory Standards

When the courts of Arizona and Utah intervened to protect the FLDS children in 1953, they were operating under general statutes authorizing the state to protect children from harm based on the state’s parens patria role. For example, the Utah statute defined a “neglected child” as one “who lacks proper parental care by reason of the fault or habits of the parent... whose parent... neglects or refuses to provide... care necessary for his health, morals or well-being...”127 Such general, vague language was typical throughout the country at that time, and could be used to justify intervention based primarily on parental behavior and without any proof of harm to the child.128

While constitutional law already recognized a parent’s fundamental right to direct the up-bringing of her child129 as well as the limits that civil law imposed

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126 Yogi Berra is credited with originating this phrase.
127 Utah Code Ann. § 55-10-6 (1953)
129 Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters 268 U.S. 510 (1925), recognize the parent’s right to direct her child’s education.
upon some parental choices, it was much later that the United States Supreme Court made it clear that custody could not be removed from a parent without a hearing on the parent’s fitness and that parental rights could not be terminated without clear and convincing evidence that the parent was unfit.

Statutory changes also occurred throughout the nation, driven by scientific findings, robust debate about the appropriate standards for state intervention and ultimately federal sponsorship of child welfare and state intervention in the family.

In 1962 Dr. Henry Kempe identified the “battered-child syndrome” that could be diagnosed by medical professionals. This recognition lead all states, spurred on by federal funding for child welfare, to enact a system for reporting and investigating suspected child abuse and neglect. The federal statute requires that states respond to reports of child abuse by taking action appropriate to the level of risk of harm.

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131 Stanley v. Illinois, 442 U.S. 584 (1979) unwed father denied due process and equal protection when deprived of custody without a hearing to determine his fitness. Litigation at the state level similarly established constitutional limits for removing children from the custody of their parents.


133 See e.g. Wald, supra note 128 and references cited therein.


136 Id. at 149. 42 U.S.C.A.§ 5101 et. seq.
In 1980 Congress enacted the Adoption Assistance and Child Welfare Act requiring that state agencies that accept federal funding make “reasonable efforts” to prevent the removal of the child from the home and to reunify the family. This reform effort sought to “stem the flow of children into the foster care system” by requiring reasonable efforts to keep the children with their families by providing services to intact but troubled families. Beginning in 1983 the Act required “reasonable efforts” to reunify separated families for a limited period of time (up to 18 months). Then, the law required a “permanency” plan be put in place and provided financial incentives for adoption of hard-to-place children. In 1997 Congress slightly altered this scheme by passing the Adoption and Safe Families Act (ASFA) which reaffirmed family preservation as a goal but provided for exceptions: a) with serious child abuse that has resulted in criminal conviction or where a parent has previously lost parental rights, reasonable efforts at family preservation need not be made, and b) state may identify “aggravated circumstances” that would eliminate the need for family preservation or reunification services.

Finally, in 1999 The Chafee Foster Care Independence Act was passed to assist older children in foster care who experience “high rates of homelessness,

137 Id. at 145. 42 U.S.C.A. § 670-676
138 Id. at 152.
139 Id.
140 Id. at 153. 42 U.S.C.A. § 671(a)(15)(D)(ii); see 45 C.F.R. 1356.21(b)(3).
non-marital childbearing, poverty, delinquent or criminal behavior . . . (and are) target(s) of crime.”  

B. Changes in Expert Thinking regarding Child Welfare

Not only was the recognition of the “battered child syndrome” instrumental in focusing intervention on this extreme danger to the child, but psychological theories and studies drove other changes.

While some argued that the state should play a more intrusive role in guaranteeing each child a healthy home life, others argued that state intervention often did more harm than good and should be limited to the most serious situations. Experts also pointed out that we had very little evidence of what predicts healthy adult adjustment based on childrearing practices. Between 1973 and 1986 Goldstein, Solnit and Freud published their influential trilogy of books regarding “the best interests” of the child. They argued that a child’s attachment to a primary caretaker(s) (“psychological parent”) was crucially important and should not be disturbed unless absolutely necessary. This argument was based on Bowlby’s theories of attachment and studies of

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141 Id. at 164-65; Pub. L. No. 106-169, § 1.
142 See e.g. SANFORD KATZ, WHEN PARENTS FAIL (1971), Foster & Freed, A Bill of Rights for Children 6. FAM. L. Q. 343 (1972).
143 WALD, supra note 128.
144 Id. at 992 citing S. ESCALONA & G. HEIDER, PREDICTION AND OUTCOME (1950) and A. SKOLNICK, THE INTIMATE ENVIRONMENT, EXPLORING MARRIAGE AND THE FAMILY (1973).
146 JOHN BOWLBY, CHILD CARE AND THE GROWTH OF LOVE 13 – 20 (2nd ed. 1965). The studies of children harmed by separation from a primary caretaker predated the Short Creek Raids. However, it is not clear whether these studies or commonsense notions of the importance of the mother-child bond lead the Arizona judges to keep the children with their mothers even as they were placed in the legal custody of the state.
psychological harms visited on children when removed from their primary caretakers.\textsuperscript{147} This trilogy became very influential with social workers, courts, and policy makers, helping lead to changes in the law discussed above, both limiting the removal of children from primary caretakers who were amenable to services, and requiring reasonable prompt efforts to reunify the family.

Similarly, critics urged that the typical statutory scheme which focused primarily on parental behavior\textsuperscript{148} and often justified intervention based on “immoral” or aberrant lifestyles\textsuperscript{149} be abandoned in favor of statutes that focused on actual or very likely serious physical or emotional harm.\textsuperscript{150} With respect to removals based on the parents’ immoral behavior, including that motivated by religious beliefs or political ideology, Wald wrote:

\begin{quote}
Since the basic purpose of the proceeding is to condemn and punish the parent, the children are usually removed from the home despite the harms caused by such action. A policy that attempts to increase socialization at the cost of increasing emotional damage should be unacceptable.

Moreover, if the child does identify with the parents, it is unlikely that his views can be changed by removal. As John Bowlby has stated, “efforts made to ‘save’ the child from his bad surroundings and to give him new standards are commonly of no avail, since it is his own parents who, for good or ill, he values and with whom he is identified.”

It is unlikely that child neglect laws can be used successfully to enforce social norms that society in general cannot enforce. More importantly, it is unconscionable to use children as pawns to achieve these ends. For all
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{147}] See e.g. N. Littner, \textit{Some Traumatic Effects of Separation and Placement} (1956).
\item[\textsuperscript{148}] See Thomas, \textit{Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and social Perspectives}, 50 N. C. L. REV. 293, 299-313 (1972) for a description of the traditional statutory scheme.
\item[\textsuperscript{150}] Wald, \textit{supra} n.128 at 1037-1041.
\end{enumerate}
\end{footnotesize}
of these reasons, the morality of the parents and the type of upbringing they provide should not constitute a basis for state intervention.151

As a result, most states redrafted their statutes to more clearly define when the juvenile court was justified in intervening into the family and to focus on actual or highly likely harm to the child. The Texas statutes were drafted to comport with the various federal requirements.

C. Comparing the YFZ Ranch Raid and the Short Creek Raid

2. The Investigations

The Short Creek raid occurred before the advent of statutes requiring investigations of suspected child abuse. Instead, the raid was planned by the Arizona governor and investigated by a Los Angeles detective agency pretending to be a movie company scouting the site and looking for “extras” thus photographing everyone in the community.152 While the Governor’s speech announcing the raid highlighted the sexual abuse of young girls, the raid and subsequent cases were not limited to or even focused upon this group. It exemplified that era’s attempt to impose acceptable moral behavior through child welfare cases which has since been decried by critics. It also serves as an example of early child welfare cases targeted to correct the poor or other disempowered groups.

151 Id. 1034.
152 Bradley, supra note 1 at 119.
In contrast, the YFZ Ranch Raid was, ostensibly, a response to a call reporting abuse. Given the federal and Texas state requirements for abuse/neglect investigations, the social workers were right to investigate based on “Sarah’s” call. Texas’s statute requires that any person “having cause to believe” that “a child’s physical or mental health or welfare has been adversely affected by abuse or neglect by any person” is required to make a report. Accordingly, the shelter that received the calls from “Sarah” was obligated to make the initial report to either a law enforcement agency or the DFPS.

DFPS is required to “make a prompt and thorough investigation” of reported child abuse or neglect “allegedly committed by a person responsible for a child’s care, custody or welfare” and must involve law enforcement if the report alleges conduct that constitutes a crime that poses an immediate risk of physical or sexual abuse. DFPS may defer to law enforcement and need not investigate alleged abuse by someone other than the child’s parent or guardian. “Sarah’s” alleged physical and sexual abuse by her “spiritual husband” was solely a case for law enforcement. And indeed, search warrants and arrest warrants were simultaneously issued to law enforcement to obtain evidence in order to prosecute Sarah’s “husband.”

However, it was also a child protection case because Sarah claimed her parents induced her to accept this sexual relationship when she was only 15, were not currently protecting her, and were about to send her younger sister to

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the YFZ Ranch, intending her to be spiritually united with an older man as well.\textsuperscript{155} This made a claim of parental neglect or abuse.

Even though it appears that “Sarah” did not exist, the DFPS workers were not wrong to look for her. Texas statute addresses anonymous reports and requires a preliminary investigation “to determine whether there is any evidence to corroborate the report.”\textsuperscript{156} While “Sarah” was not found, the DFPS workers shifted to investigating other girls who appeared to be young and pregnant or with their own babies. They justified this continuation in their investigation based not only upon their personal observations but on the reports of a “dependable confidential informant” about adult male FLDS church members marrying under aged brides.

While pregnant teenagers are not necessarily evidence of child abuse or child neglect, there are clear reasons that DFPS was properly concerned about these girls – the definition of sexual abuse, the criminal law, the allegation that the parents of minor girls induced them to become teen “brides” and healthy psychological development.

Experts Ruth and C. Henry Kempe define child sexual abuse as “the involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend, to which they

\textsuperscript{155} Long Affidavit, supra notes 58 and 59, and Kovach, supra note 58.
are unable to give informed consent . . .”¹⁵⁷ This definition could well fit young teens induced to accept older men as “spiritual husbands.”

Texas, like Utah¹⁵⁸ today, criminalizes sex with minors based upon the age difference between the minor and the sexual perpetrator. Sexual intercourse is an illegal “sexual assault” if the victim is a child under age 17; but if the victim is 14 years old or older and the perpetrator is not more than three years older, there is no crime.¹⁵⁹ Accordingly, a 15-year-old pregnant by her 18-year-old boy friend would not involve criminal conduct. But if a 16-year-old girl had a sexual relationship with a man 20 years old or older, the adult man would be guilty of a felony.¹⁶⁰ In sum, if these minor teenagers had become pregnant by middle-aged men (as was reportedly the practice in the community), they were victims of a crime. If their parents had promoted their relationships with these older men, they were victims of parental abuse or neglect as well.

The Texas statute requiring investigations of child abuse defines abuse broadly to include harm to a child’s mental health as well as physical or sexual abuse:

(1) “Abuse” includes
   (A) mental or emotional injury to a child that results in an observable and material impairment of the child’s growth, development or psychological functioning;
   (B) . . . permitting the child to be in a situation in which the child sustains a mental or emotional injury . . .

(E) sexual conduct harmful to a child’s mental, emotional or physical welfare . . .

(F) failure to take reasonable effort to prevent sexual conduct harmful to a child.161

Mental health professionals consider adolescence a time of identity formation when youth develop more abstract conceptions of who they really are and how they fit into their world.162 While puberty is an important change in adolescence, the youth’s developing cognitive abilities are also important to permit the youth to “establish autonomy and identity,” the “normative developmental tasks of adolescence.”163 Accordingly, parents must walk the fine line between maintaining consistent boundaries and rules while permitting the adolescent to become more self-sufficient and independent.164 Forcing 15-year-old girls into “spiritual unions” with older men is abusive in denying them the time and freedom to develop an autonomous identity.

Attorney Haralambie and clinical psychologist Klapper warn that parents may inappropriately attempt to control the child’s emerging sexuality. They raise the example of gay and lesbian youth being denied the right to develop their identity, noting that as a result “gay and lesbian youth are more likely to be abused and rejected” and many run away, attempt suicide and abuse

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163 Steinberg, Laurence and Jennifer S. Silk, Parenting Adolescent, pp. 103-133 in Handbook of Parenting, 2nd ed, 103-133 (Bornstein, ed. 2002).
substances. The charge that the FLDS force their daughters into early sexual unions is, psychologically, the same sort of inappropriate and unhealthy attempt to control the adolescent’s emerging self but carries with it the additional risk of pregnancy and burden of teenage parenthood.

In sum, because of modern statutes that define abuse more specifically and that require investigations of suspected abuse, one would have expected the Texas intervention to be more precise than was the Short Creek Raid and to target identified victims -- the child “brides.”

3. The Emergency Custody Orders

In Arizona, the Short Creek raid began as combined cases for child protection and criminal prosecution. Criminal charges included counts for rape, statutory rape, carnal knowledge, polygamous living, cohabitation, bigamy, and adultery; some adults were also charged with having induced minor female children to participate in such unlawful conduct. The protective cases were also brought en masse before two judges holding court in the schoolhouse, and within three days the women and children had been shipped out of the community. These cases were intended to “rescue 263 children from virtual bondage . . . from a life-time of immoral practices without their ever having had

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165 Id 69.
166 RADLEY supra note 1 at 131-32, citing arrest warrants.
an opportunity to learn of or observe the outside world and its concepts of a decent living.”

While Utah authorities served Arizona arrest warrants on adults living in Utah, there was no similar mass roundup of women and children. Instead, the various juvenile court cases were more deliberatively processed during the fall of 1953.

Among the significant changes in child protection law since 1953 have been added both procedural and substantive protections for parents and children. Today states generally permit social service workers to take children into custody in an emergency situation without a court order or permit courts to issue an order after an ex parte hearing attended only by DFPS if the child is likely to be in danger of imminent harm. In either case, under Texas law, within 1 to 3 days the parents should get an expedited “shelter” or “emergency” or “preliminary” hearing to address the removal and the danger to the child. Texas statute gives parents the procedural right to a court hearing “no later than the first working day after the date the child is taken into possession.” However that “initial hearing” may be held with only the DFPS workers and the judge and

167 Id. quoting Arizona Daily Star, 27 July 1953
168 Id. at 139
169 Recognition of the child’s due process rights can be traced to In re: Gault, 387 U.S. 1 (1967), dealing with the alleged juvenile delinquent, but also influencing thinking about the juvenile court’s role in child protection and children’s due process rights in these cases.
the proof may be only the sworn petition and affidavit. Such an ex parte hearing is permitted “if a full adversary hearing is not practicable.”

It appears that no more than such an ex parte hearing was held on Monday April 7, confirming DFPS’s custody and setting the full adversary hearing for April 17 and 18. Since the mothers were present and even accompanied their children to the first “shelter” at Fort Concho, it would have been “practicable” for them to participate in the emergency hearing (except for the fact that there were so many mothers). The fact that these parents were denied any right to be heard within 1 to 3 days of the removal of their children, which was arguably permitted under Texas statute, may well have violated their constitutional rights. At a minimum it failed to follow standard national practice in protective cases.

With respect to the parents’ substantive rights to custody, Texas statute authorizes an “emergency order” for “possession” of the child in limited situations:

(a) Before a court may, without prior notice and a hearing, issue a temporary restraining order or attachment of a child in a suit brought by a governmental entity, the court must find that:

1. there is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child’s welfare;
2. there is no time, consistent with the physical health or safety of the child and the nature of the emergency, for a full adversary hearing under Subchapter C; and

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(3) reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for removal of the child.

(b) In determining whether there is an immediate danger to the physical health or safety of a child, the court may 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. . . .

Many child protection cases do present themselves as emergencies (e.g. the child is living in a “meth” house and in immediate danger and the parents are arrested) and DFPS must take the child into care and then seek judicial authorization. Here, for the under-aged girls who were accepting of sexual relationships with much older men, emergency removal may have been justified in order to protect them. However, it is difficult to square the statutory language with an emergency custody order for the boys and pre-teen girls. Not only was there no “immediate” danger to them, but there certainly was time to make “reasonable efforts” to correct the problem and protect them. The only basis on which their removal could be justified would be under (b) by considering the entire Ranch a “household” in which another child had been sexually abused.

Similarly, DFPS’s taking emergency custody of the young children may also have violated their rights, except for the fact that these young children were not actually separated from their mothers at that point.

This is another unusual aspect of the case -- the mothers were permitted to accompany their children who were taken in to DFPS custody. Perhaps this

occurred because the investigative interviews morphed into an emergency custody situation or the mothers were welcomed because taking custody of so many children would have been impossible without the mothers’ assistance. It may be that DFPS workers hoped some mothers might assist by attesting to the abuse and victimization they suffered once they were away from the Ranch. Whatever the reason for this unusual situation, it was exactly the same scenario as occurred in Short Creek in 1953 with all of the women and children being bused away from their homes!

Then, Texas’s surprise separation of half of the families just days before the adversary hearing, raises other questions. (Since Judge Walther had given DFPS legal custody of these 400 children on April 7, DFPS had the legal right to decide where they would be placed.) If the children were endangered by being with their mothers, why was it initially permitted? Since they had been together for 8 to 10 days with no incidents of harm being reported, why was it necessary to separate them? Perhaps DFPS decided to place the older children before the adversary hearing so that situation would be the status quo once the parents got their day in court.

In sum, it is not clear why DFPS took this comprehensive and emergency approach here where only the teenage girls were at immediate risk of sexual abuse. Perhaps DFPS’s standard operating procedure was to take custody in order to get the parent’s attention and signal the seriousness of this case. Or perhaps DFPS sought to “encourage” the women and/or children to cooperate
in the investigation by this approach. Or perhaps DFPS was simply re-enacting the Short Creek approach of attempting to stamp out polygamy once and for all.

4. **The Adversary Hearing Process**

Throughout the nation, and in accordance with federal law, when a protective case is begun, the state must hold an adjudicatory (fact-finding) hearing as soon as practicable, often within 60 days.\(^{176}\) Texas law provides that when a child is taken into possession by DFPS, the “full adversary hearing” must be held in court within 14 days.\(^{177}\) This is a very short time period to investigate and be prepared to try a case on the merits. If the hearing is not held in time, the trial court may be ordered to hold a hearing, but the case is not dismissed.\(^{178}\) If the hearing needs to be delayed, the order for temporary removal of the children stays valid.\(^{179}\) In this case DFPS endeavored to go forward with the adversary hearing regarding all 400+ children on the scheduled hearing dates of April 17 and 18.

Prior to the adversary hearing in Texas it was patently obvious that the choice to file protective cases on over 400 children opened “a Pandora’s box of legal and logistical issues” including “enormous courtroom management

\(^{176}\) Badeau, Sue, et. al., supra note 179 at 213-233; National Council of Juvenile and Family Court Judges, supra note 171.

\(^{177}\) Tex. Fam. Code §§262.109, 262.201 (2008)


\(^{179}\) In re: Stellpflug, 2001 WL 2412476 unreported (App.4 Dist. 2003)
problems.” University of Texas Law Professor Jack Sampson said “you won’t just need a hundred lawyers to represent the children . . . You’ll need dozens of judges if the state is going to try these cases. . . . the mechanics of holding scores of trials in rural West Texas is virtually incomprehensible.”

While some commentators suggested that the cases be parceled out among various judges throughout Texas, Judge Walther decided to hear one mass case in only two days. As a result only limited numbers of attorneys for parents and children could cross examine DFPS witnesses or call their own witnesses. The individual circumstances of each child were simply not considered.

Although the constitutionality of this process was never determined, it surely violated the rights of the parents and children under both the Texas statutory scheme and the constitution. The statute deals with an individual child and that child’s parent. It is not enough that there is a danger to a child’s “physical health or safety.” The state must show that the danger “was caused by an act or failure to act of the person entitled to the possession” of the child -- in other words, by the child’s parent. Because the U. S. Constitution recognizes that a parent has a fundamental liberty interest in the care and custody of her

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181 Id.
child, an individualized determination of each parent’s rights to her child is also constitutionally mandated.

It is striking, therefore, that in the 1953 Short Creek Raid the parents and children were afforded substantially more “due process.” The initial decision to take custody of all 153 Arizona children was made by two judges after two days of hearings. Thereafter one of these judges heard “individually the cases involving each child” over a number of months. On the Utah side of the border, no children were taken from their parents until the test case against Leonard and Vera Black had been fully tried, appealed to the Utah Supreme Court, and affirmed. It is doubtful that Utah and Arizona were simply more advanced in their understanding of due process than was Texas half a century later. Probably Utah and Arizona had learned from years of litigation about polygamy that it was no simple matter to end this practice and attempting to do so could create more problems than it solved. Perhaps big, bold Texas authorities were simply acting their stereotypical roles.

5. The Legal Outcomes on the Merits

In Arizona Superior Court Judge Lockwood ruled that the mothers could retain custody if they stayed away from Short Creek and stopped practicing and teaching their children polygamy. The mothers retained the care and custody of their children, away from Short Creek, throughout the process. The

183 Stanley v. Illinois, supra note 131.
184 Bcadeley supra note 1, at 132-33.
185 Id. 155.
cases were all ultimately dismissed usually after the parents agreed to these terms. There was no appeal that challenged the court’s right to have taken legal custody of the children, so all that remains are reports on individual cases, some of which lasted for years. Ultimately, most of the parents returned to Short Creek and to their polygamous lifestyle. Thus, the law was enforced, but had no effect on their practice of polygamy.

In Utah the trial court’s judgment was that the Black children were “neglected” under the statute due to their parents’ polygamous lifestyle.\(^{186}\) The applicable statute, as was typical at the time, focused on bad acts of the parent rather than harm to the child. It defined a “neglected child” as one “who lacks proper parental care by reason of the fault or habits of the parent . . . whose parent . . . neglects or refuses to provide . . . care necessary for his health, morals or well-being . . . (or) who . . . associates with . . . immoral persons.”\(^{187}\) The FLDS children were “neglected” because their parents practiced and advocated polygamy. This ruling was appealed and the Utah Supreme Court (in an interestingly split decision) affirmed the juvenile court’s finding. The children were removed from Vera Black, and then later returned to her when she committed to give up polygamy. (Of course, she too, returned to the polygamous lifestyle with her children.) As in Arizona, the law was enforced but ineffective in changing the community’s commitment to this life.

\(^{186}\) *In re: in the Interest of Black*, *supra* note 35.

\(^{187}\) Utah Code Ann. § 55-10-6 (1953).
Subsequent Utah cases, however, show that today merely living and teaching polygamy would not constitute parental unfitness and would not justify removing custody from polygamous parents. In one case the mother (and primary custodian) was a plural wife while the father had abandoned polygamy. The Utah Supreme Court held that the mother’s polygamous lifestyle alone was insufficient to justify an award of custody to the father. More recently the Utah Supreme Court decided that a couple seeking to adopt children should not be barred from doing so due to their polygamous lifestyle. Instead, the individual best interests of the children must be determined, with the polygamous lifestyle of the proposed adoptive parents being one factor among many.

The Texas cases were decided under the modern, federally-compliant statute that more precisely defines when the state is justified in removing custody from a parent. The statute is written to require that the child be returned to the parent at the conclusion of the adversary hearing unless the court finds sufficient evidence of three things:

- “there is a danger to the physical health or safety of the child which was caused by an act or failure to act” of the parent and “for the child to remain in the home is contrary to the welfare of the child”
- “the urgent need for protection required the immediate removal of the child and reasonable efforts, consistent with the circumstances and

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188 Sanderson v. Tryon, 739 P.2d 623 (Utah, 1987).
189 In re: Adoption of W.A.T., Johanson v. Fischer, 808 P.2d 1084 (Utah 1991). The children had been raised by a polygamous family in a polygamous community and their mother, dying, relinquished them for adoption to a polygamous couple in the community. The Utah State Legislature has since negated this ruling by statutorily prohibiting adoption by any person cohabiting with another to whom he or she is not lawfully married, outlawing both polygamous and gay adoption. § Utah Code Ann. 78B-6-177 (2009).
providing for the safety of the child, were made to eliminate or prevent the child’s removal; and”

• “reasonable efforts have been made to enable the child to return home, but there is substantial risk of a continuing danger if the child is returned home.” 190

The statute further notes that “in determining whether there is a continuing danger to the physical health or safety of the child, the court may consider whether the household to which the child would be returned includes a person who: . . . has sexually abused another child.” 191 DFPS’s theory of the case (and the trial judge’s findings) justifying the removal of all the children from all their parents was entirely dependent upon the standard for determining that there was a “continuing danger” and upon seeing the YFZ Ranch as one “household” inhabited by men who had sexually abused other children. However, the statutory authority allowing the judge to consider such a “continuing danger” did not define how the sexual abuse of others should be weighed, and did not address the prior criteria: that the danger was caused by the child’s parent and that there was an “urgent need for protection” which “required the immediate removal” of the child and that “reasonable efforts” had been made to permit the child to say or return home. 192 It was this failure to apply the statutory

192 Tex. Fam. Code § 262.201 (2008) Moreover, if it was clear which men were assaulting underage girls, one might question why DFPS had not acted to remove the men, since Texas statute permits that approach in order to avoid removing the child from the home. Tex. Fam. Code § 262.1015 (2008) provides: “(a)If the department determines after an investigation that child abuse has occurred and that the child would be protected in the child’s home by the removal of the alleged perpetrator of the abuse, the department shall file a petition for the removal of the alleged perpetrator from the residence of the child rather than attempt to remove the child from the residence.”
standards about the imminent danger to each individual child that ultimately resulted in the appellate courts finding that Judge Walther abused her discretion when she found for DFPS after the adversary hearing.

Thus, despite updated federal standards that require a more precise focus on harm to the individual child, as well clarifications in constitutional law regarding the fundamental parent-child relationship, and increased respect for the parent-child bond in psychology, the Texas trial court took even more intrusive action than did either the Arizona or Utah courts of the 1950s. In Texas all the children and babies were separated from their mothers. Judge Walther’s and DFPS’s actions appeared to ignore the psychological and emotional needs of the youngest children. Mental health professionals Bross and James-Banks explain:

(A)ny attorney who has represented infants and very young children is aware that time can be of the essence in the secure attachment of children. In other words, it is not good for children to be moved from one caregiver, parent, or foster parent to another for more than a very limited time, generally measured in hours of infants and days for toddlers, without very important reasons of safety or, in some very limited circumstances, a clear diagnostic purpose. Every move must have an impact on the child and, unless carefully considered, may cause the child to experience a sense of loss and even depression. (emphasis added)

It is difficult to explain why the Texas trial court, in 2008, put at risk the healthy development of the many babies, toddlers and young children.

193 In Arizona, mothers and children were not separated; in Utah only Vera Black’s children were removed once the trial court’s orders were affirmed on appeal.

Perhaps Texas was simply reverting to the more general approach to child welfare that used to be the law. It might be relevant that Judge Walther was not a juvenile court judge with a focus on child welfare, but sat on a court of general jurisdiction, and thus would not have the orientation to child development issues that a juvenile court would typically possess. Perhaps the child welfare aspect of this case always took a back seat to the criminal prosecutions which were simultaneously being planned. Or perhaps Texas was inclined to take extreme action against these members of an unusual religion in order to stamp out their practices or drive them out of town, having learned so little from the Waco fiasco. This settlement did, initially, remind Texans of the Branch Davidians who settled in Waco and Texas and Texas relied upon the same psychiatric expert as it had in mounting the raid of the Davidians. (Thankfully the FLDS cooperated with the Texas authorities; half of the Davidian children and most of the adults died in the raid when law enforcement assaulted their home.)

195 Utah, home of the Mormons who practiced polygamy until 1890, would certainly have been less inclined to imagine evicting the FLDS as a viable solution and more inclined to believe the fundamentalists could be converted to their practices.
196 See Perkins, supra note 52.
Another possibility was that the social workers and judge were confusing the sexual abuse of some pubescent girls with the danger that a pedophile poses to the community. Pedophilia is defined by the DSM IV as involving sexual urges, fantasies or behaviors involving prepubescent children (generally under 13 years of age). Individuals with this condition are, tragically, sexually oriented to prepubescent children, sometimes exclusively, and can pose a danger to minor children in their community. (Other adults who are not pedophiles may sexually offend against young children out of improper responses to stressful situations.) However, there was no argument that the FLDS men were pedophiles or sexually assaulting pre-pubescent children. Indeed, the practice of spiritually marrying a girl after she had entered puberty does not involve pedophilia or any other abnormal psychological condition. While inducing a young teenage girl to enter into a sexual union may constitute sexual abuse because it curtails or inhibits her sexual self-determination, it is not evidence of abnormal sexual orientation or proof that such men cannot be deterred from that practice.

A more charitable analysis might be that DFPS and the trial court were simply trying to create a more psychologically healthy environment for all the FLDS children. While DFPS is charged with investigating cases involving

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200 Haralambie, supra note 164 at 26.
201 Aggrawal, supra note 199 at 48.
emotional harm (see above), and termination of parental rights can be based upon intentional emotional endangerment (see above), for DFPS to retain physical custody of a child requires proof of danger to the “physical health or safety” of the child. (Moreover, Texas statute does not cleanly anticipate a child welfare case where the children remain in the physical custody of their parents while legal custody is given to DFPS and the court retains oversight.)

Texas’s choice to leave cases of emotional harm out of the statutory scheme for child protection is not a universal choice by states. For example, Utah’s statutory scheme for neglect and abuse provides for oversight if “a parent . . . engages in or threatens the child with unreasonable conduct that causes the child to suffer emotional damage.” While Utah law does not appear to have further defined “emotional damage,” medical and mental health professionals have attempted to define both emotional abuse and emotional neglect. The American Academy of Pediatrics Committee on Child Abuse and Neglect has defined “psychological maltreatment”:

A repeated pattern of damaging interactions between parent(s) and child that becomes typical of the relationship (and) . . . occurs when a person conveys to a child that he or she is worthless, flawed, unloved, unwanted, endangered, or only of value in meeting another’s needs. The perpetrator may spurn, terrorize, isolate or ignore or impair the child’s socialization.

202 The statutory focus on removing children and then either retaining them in foster care or returning them to their parents is, no doubt, why DFPS argued that there would be no way to protect the children if they were returned. The Texas Supreme Court clarified, consistent with the petitioner’s argument, that DFPS would still have its SAPCR (suits affecting the parent-child relationship, garden variety custody case) pending and judicial oversight of its investigation. 203 Utah Code Ann. § 78A-6-302(1)(b) (2009). 204 Steven W. Kairy et. al, The Psychological Maltreatment of Children—Technical Report, 109 PEDIATRICS 68 (2002) cited in Halarambie supra note 164 at 28-29.
Psychological maltreatment may occur by behaviors that are “exploiting or corrupting” that encourage a child “to develop inappropriate behaviors.” Such “corrupting” behavior may be seen as a form of child abuse.

Had Texas included psychological maltreatment in its statute, DFPS might well have been able to make out a case of “corrupting” behavior or behavior that told girls they were only “of value in meeting” the needs of the proposed spiritual husband where the parents of teen girls were inducing and pressuring them to become “spiritual wives” of older men. This approach might have slightly expanded the subjects of protective action from currently pregnant girls. However, even this approach would not have justified custody of young children and boys. It is similarly difficult to make a case against young mothers who had only pre-teen children and thus had never faced the issue of whether to encourage or oppose a child’s sexual relationship/spiritual marriage.

6. Post-Trial Proceedings

After the initial hearings in Arizona and Utah, further proceedings were held in which the parents were encouraged to confront their illegal life styles and commit to abandon polygamy. Ultimately they all did so, and this was what led to the reunifications.

205 Halarambie supra note 164.
Texas law, consistent with today’s federal requirements, provides that after an adversary hearing that commits a child to the legal custody of DFPS, a “service plan” must be established within 45 days and a court status hearing must be held within 60 days to review the situation. The service plan must set forth its goal (whether return of the child to the parent, termination of parental rights and placement for adoption, or other out-of-home care) as well as the steps necessary to return the child to a safe environment. Then, a “permanency plan” for the child must be developed and a “permanency hearing” be held within 180 days of the initial custody order. The court needs to have begun a “trial on the merits” within one year after temporary custody was removed from the parents and given to DFPS. Texas law does not provide for an appeal to challenge the findings of fact or the order of temporary custody that is made after the adversary hearing. The law provides the right to appeal only after the permanency hearing and a final order terminating parental rights (or otherwise giving permanent custody to someone else.)

It may be that the Texas authorities were poised to proceed as had the Arizona authorities, extracting commitments from mothers to abandon polygamy in order to be able to regain custody of their children. Texas, however, had the added leverage of having removed all the children from their

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mothers’ care, as did the Utah court with Vera Black’s children. But, as the Utah juvenile court judge commented privately, “I can’t escape the feeling that . . . these cases will do more harm than good to the children, and will amount to punishing the parents through the children.”\textsuperscript{212} Indeed, given the federally mandated requirement to attempt reunification in most cases, and the increased cognizance of how important attachment is to the healthy development of young children, it is surprising and disturbing that Texas would risk the emotional well-being of babies and toddlers to stamp out forced teenage marriages.

A more sinister possibility was that Texas imagined that it need not provide reunification services and could conceivably place the young children for adoption. In accordance with the Adoption and Safe Families Act, Texas statute does not require reunification services if the child has been a victim of “sexual abuse inflicted by . . . another person with the parent’s consent” or if the parent’s parental rights have been terminated with regard to another child for knowingly allowing the child to remain in surroundings which (or with people who engage in conduct which) endangers “the physical or emotional well-being of the child.”\textsuperscript{213} Thus, reunification services would not be required for the “teen brides” that were rescued. And, once the parental rights for these young women had been terminated, their parents would not be entitled to reunification services for the younger siblings either. Although this strategy would

\textsuperscript{212} BRADLEY \textit{supra} note 1 at 167.
have been unavailing for the parents who brought the Mandamus action since these young mothers had never pressured a teen-aged daughter into an underage “marriage,” perhaps the Texas authorities were not reading the statutes with this precision.

A second disturbing aspect of Texas’s statutory scheme is that no appeal is permitted from the crucial decision at the adversary hearing, but only after the “permanency hearing” held six months later. This structure puts great confidence (and power) in the trial judge who decides if the parent has caused a danger to the child’s physical health or safety, if reasonable efforts have been made to maintain the child in the home, and if there is, nevertheless, and urgent need for immediate removal. Since very young children are harmed by removal itself, it seems unwise and unfair that there should be no appeal from the custody decision itself. Indeed, there is an argument that the absence of a right to appeal at this crucial stage violates the child’s and parent’s right to procedural due process.\(^{214}\) Nor is the absence of a right of appeal at this stage typical. Many states permit interlocutory appeals as of right from any order that involves some parts of the merits or affects substantial rights.\(^{215}\) Since modern child welfare law has relied upon children’s developmental needs and evolved

\(^{214}\) See *Mathews v. Eldridge* 424 U.S.319 (1976) which holds that the procedures which are due will depend upon the nature of the private interest affects, the risk of an erroneous deprivation through the procedures used and the probable value of the proposed safeguards and the governmental interest, including expense.

notions of constitutional rights, it is surprising and disturbing that a right to appeal was not afforded at the conclusion of the adversary hearing.

While the Utah *In re: Black* case awaited an appeal before the trial judge moved to separate the children from their parents, the Texas families were benefited by the proactive representation provided by the Texas Rio Grande Legal Services, which represented many mothers who had not consented to under-aged marriages of their children. Fortunately for these women, their lawyers filed a petition for an extraordinary writ of mandamus to challenge what happened in the adversary hearing.

7. **Appellate Decisions**

In Arizona there was no appellate case. Instead, the mothers cooperated with the social services provided to them and their children, lived away from Short Creek, and agreed to abandon polygamy. After individual hearings and over a two year period, the Arizona judges ultimately dismissed all the cases.

In Utah there was the trial and appeal of a test case, *In re: Black*. Consistent with the general statute of the day and the child protection orientation of the time to focus on parental behavior rather than harm to the child, the Utah Supreme Court affirmed the juvenile court’s judgment. In 1953, in Utah, living a polygamous lifestyle and teaching it to your children was child neglect and justified the state removing children from their parents’ custody.
In Texas, the case was never expressly about polygamy, but ostensibly about protecting children from sexual abuse perpetrated when girls were induced to become teen “brides.” Texas Rio Grande Legal Aid represented only 38 mothers, none of whom had ever consented to her child becoming a teen “bride.” Finally, at the appellate level, the modern structure of child protection law held sway. Citing the precise language of the statute, and focusing only on the children of these mothers, the Court of Appeals held there was no evidence of “danger to the physical health or safety” or of an urgent need that required “immediate removal” or that DFPS had “made reasonable efforts” to prevent the need for removal. The Court also held that the Ranch was not a “household” under the statute. The Texas Supreme Court essentially affirmed, agreeing that removal of these children from their mothers “was not warranted.” Both courts relied upon the strict language of the statute without discussing children’s developmental needs except to call removal from the home “an extreme measure.” Neither court addressed any of the constitutional claims.

Both appellate courts agreed, however, that some measure of child protection would be justified. The Court of Appeals noted that there were five minors who were pregnant (though not children of the petitioners) suggesting that their removal might be justified. The Court of Appeals also conceded that there was evidence that children raised in this particular environment may someday have their physical health and safety threatened, just not evidence
that the threat to these children was immanent enough to justify removal. The Supreme Court sketched out a variety of approaches that DFPS and the trial court might use to further investigate abuse or protect the children, including removal of perpetrators from the premises.

While DFPS’s sweeping actions and the trial judge’s wholesale approval of them raised questions about the focus of the intervention, the appellate courts took at face value that the problem was sexual abuse of minor girls and applied the strict statutory language accordingly. The statutes did not justify removing children from parents who had never abused or neglect a child by inducing her to accept an under-aged “marriage.”

8. Further Proceedings

Because the basis of the appellate cases was that DFPS had failed to present evidence that the petitioner mothers had ever consented to their children engaging in under-aged sexual unions (or “spiritual marriages”), the trial court could be justified in continuing DFPS custody of the five pregnant girls if the court received evidence that would meet the standard set out by the appellate courts. If DFPS had evidence that these pregnant girls were victims of sexual abuse and their mothers refused to protect them from that abuse, DFPS could retain custody. And, under Texas statute, their siblings could also be justifiably kept in DFPS custody.

It was incumbent upon the trial judge only to un-do the orders that were not justified and that separated children from parents who had not personally
approved under-aged sexual unions. Accordingly, it was surprising that Judge Walther decided to lump all the children together and return custody of them all.

Just as the trial judge’s initial order had been overbroad in sweeping up all the children, the final order was under-protective in sending all the children back – even minors who were pregnant or young mothers. Perhaps the initial order had sprung from a desire to protect everyone from a lifestyle thought to be harmful and the order on remand was the judge throwing up her hands regarding this secretive and recalcitrant community. Perhaps DFPS had no evidence of particular teens at risk because their mothers condoned underage unions. If so, this suggests just how weak the initial case was. Perhaps DFPS judged that it would be better able to provide services to the adolescent girls if they were in their homes with their mothers. Neither the judge nor DFPS attempted targeted protective intervention at the outset. Having been corrected by the appellate courts, DFPS and the judge again failed to target these few girls for protective intervention.

Instead, pursuant to a “SAPCR” (“suit affecting parent-child relationship”) case, a garden variety custody case that any parent or adult might bring, and a statute that prohibits interfering with an investigation of abuse or neglect and permits court orders if parents refuse to consent to certain inquiries, the trial judge entered far-reaching orders requiring photographs, DNA tests,

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fingerprinting, ability to interview and test the children, parenting classes and protection plans. While the trial judge’s orders were over-reaching, they were probably not subject to appeal, and the parents’ cooperation ultimately resulted in all but one case being dismissed.

Again, DFPS and the court chose to treat all the parents as equally culpable and in need of instruction. DFPS asserts that the FLDS children are safer today due to its efforts to educate mothers and girls about sexual abuse. It bears considering whether DFPS would have been more successful if it had targeted the pregnant teens and their parents exclusively, filing protective cases only regarding them, and not removing children from parents who had never consented to a daughter’s sexual abuse. DFPS’s own report shows that over two thirds of the teen-age minors were not victims. Press coverage as well as some trial testimony indicated that there were adults in the community who had married after age 18 and others who opposed under-aged unions. Given that DFPS was attempting societal change, it might have had greater success by making allies rather than enemies of these adults.

9. Criminal Prosecutions

In both Arizona and Utah various crimes were prosecuted, from bigamy to statutory rape. Yet long sentences were never served and criminal prosecution did not end polygamy.

218 Adams, June 3, supra note 99.
The Texas prosecutions all target underage unions and carry the possibility of severe sentences. Such severe, life-time sentences may have been designed to protect the community from pedophiles who have committed child sexual abuse, recognizing that their orientation to children cannot be altered and presents a serious danger to the community. Interestingly, the Utah juvenile judge had initially suggested that severe criminal sentences would be the only way to correct the situation, thinking, no doubt of the general deterrence such prosecutions would bring. It is unclear exactly how the criminal prosecutions will proceed or what effect they may have.

However, it may be that the problem has been largely corrected and deterrence accomplished. Arizona’s and Utah’s charges against Warren Jeffs for arranging under-age marriages, filed in 2005 and 2006, may well have precipitated the FLDS “statement on marriage”: “(T)he church commits that it will not preside over the marriage of any woman under the age of legal consent . . . .” Although Willie Jessop began publicizing the statement June 2, 2008, he indicated that the policy had been in place for 18 months (thus since at least January, 2007). Given that all of the Texas criminal charges stem from sexual assaults in 2004 and 2006 (or births in 2006 and 2007) perhaps the FLDS had changed their ways after Jeffs was indicted. Even Utah Attorney General Mark

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Shurtleff appears to believe that the practice of under-age marriages has been halted.\textsuperscript{222}

If this is the case, one might contemplate the purposes of harsh prosecutions in 2009, and query how the attitudes of the victims, now probably adults, will be factored in to the case.

V. CHILD PROTECTION AND AUTHORITARIAN RELIGIONS

While Texas claimed to be intervening to protect teen girls from sexual abuse, its extreme approach of removing all the children and its experts’ explanations suggested a larger agenda – rescuing children from an authoritarian religion. Dr. Perry, testifying as to why the children, even pre-teen boys, should not be returned to their mothers, said:

\ldots If they return \ldots to that \ldots environment, it reinforces this belief that they hold about the community and God and so forth. And so I think that \ldots the more their life before this happened is replicated, the more they’ll believe like they did before the experience. \ldots \textsuperscript{223}

\ldots The major source of authority in the community are the men, the father of the household and the elder of the community. And when they are not around those individuals, then the formal presentation of those elements of the belief system are not as powerfully reinforced. \textsuperscript{224}

Wherever these kids go, they can’t be traditional foster care. It needs to \ldots have incredible training about the FLDS community, about issues of trauma maltreatment, about creating opportunities for these children to

\textsuperscript{222} Shurtleff: Child bride polygamous marriages appear to have stopped, July 14, 2009 at http://www.ksl.com/index.php?nid=481&sid=7159092
\textsuperscript{223} Bradshaw Petition Appendix, Transcript of Hearing, Volume 5, p. 131, line 1-7
\textsuperscript{224} Bradshaw Petition Appendix, Transcript, Volume 5, p. 140, line 24 – p. 141 line 3
be exposed to similar but not destructive belief systems so they can begin to have an opportunity to create free choice about a variety of things.\textsuperscript{225}

While mental health professionals attest that “authoritative” parenting is healthier than “authoritarian” parenting, this hardly justified removing custody from authoritarian parents or from parents who belong to authoritarian religious communities.

In fact, society has too often confounded its concern with unusual religions with a perceived need to take protective action to save the children from the religious culture in which they are being reared. This is invariably a mistake. Child protection law is inadequate and inappropriate as a method to correct or change unusual religious cultures.

With respect to the FLDS, Martha Bradley reports how the Short Creek Raid “located the FLDS experience in a long history of religious martyrs and gave meaning to their difficult lives at the edge of mainstream society and in the context of religious community.”\textsuperscript{226} The Raid itself confirmed for the FLDS that they were a chosen people, devoted to their religious convictions, and helped establish and maintain their religious identities. Vera Black, defendant in the Utah juvenile court test case, said as much herself:

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\textsuperscript{225} Bradshaw Petition Appendix, Transcript, Volume 5, p. 143, line 18-24

This is the most faith promoting experience I had, . . . It is never to be forgotten. Little do we realize what an extra blessed people we are.

The FLDS came to understand the 1953 raid as the battle between good and evil which they would overcome if they remained faithful and true. The YFZ Ranch Raid is now seen in the same way – a trial or test that binds the community closer together.228 Had the governmental officials contemplated that they would be strengthening the force of the religion through their intervention, it is unlikely that either the Short Creek Raid or the YFZ Ranch Raid would have been handled as it was.

The FLDS children have not been the only ones that governments have tried to save. Yet these attempts at child protection have often been ineffectual, as sociologists and historians point out. Sociologists Gary and Gordon Shepherd compare the FLDS cases with those of the Family International and the Branch Davidians. All three groups “were subjected to armed police interventions . . . based on criminal allegations that emphasized serious sexual abuse of children . . . primarily bolstered by accounts of crusading ex-members.”

Regarding the Family International (formerly Children of God), they write:

Close to 500 minor children . . . were removed from Family homes in five different countries . . . over a period of four years (1989-1993) and placed in state protective custody. . . . An additional 140 children . . . were also intensively examined during this same time period but were not placed into protective custody. Over 100 Family adults were incarcerated . . .

228 Id. citing Fred Jessop.
What was the net result...? Not a single case against Family adults was upheld in courts of law within the various counties involved. Not one of the more than 600 children examined by doctors and psychologists in these countries was found to have been abused. In every country, in every case, parents and children were released from custody for lack of evidence and eventually reunited.²²⁹

The Davidians, of course, faced the most tragic fate with 21 children dying (as well as 59 adults dead) in the ultimate assault by the Bureau of Alcohol, Tobacco, and Firearms (BAFT) and Federal Bureau of Investigation (FBI) agents.²³⁰ Afterwards Dr. Bruce Perry examined 19 of the 21 surviving children, but found no evidence of either physical or sexual abuse.²³¹ Historian Lawrence Foster similarly points out that the Davidians, a Seventh-day Adventist splinter sect, had been quietly living in the Waco area for 60 years prior to the raid and had previously been cleared of child abuse and statutory rape charges.²³²

What leads governments to dysfunctional over-intervention when dealing with such unconventional religious communities? Constitutional law scholar Marci Hamilton argues that authoritarian religions can be especially dangerous to children, and when they misuse their religious authority to abuse children the law must be enforced over religious entities.²³³ While persons in authority have

²³⁰ Id.
²³¹ Id. at note 21.
power which may be misused, and religious leaders have even more such power, that is neither proof of actual abuse nor extensive or universal abuse. So why have governments believed that all the children are victims and chosen mass intervention?

One possibility is the way in which the media covers the most deviant aspects of these groups when a scandal arises, but does not provide equivalent coverage of the mundane or favorable information about them. Sociologist James Beckford writes: “Knowing that the public has a very poor opinion of NRMS (new religious movements), largely as a result of stereotyping in the mass media, police officers do not take much of a risk if they take high-handed action against these unpopular movements.”234 Similarly, disaffected former members have often written scandalous accounts of their travails in these groups235 which may influence public opinion.

Sociologists Gary and Gordon Shepherd propose the following mistakes that governmental officials have made in dealing with unconventional religious communities. First, government officials adopt the view that these are fraudulent, quasi-criminal groups, who are, in fact, guilty of the allegations against them (especially child abuse) and the leaders are exploiting members for their own selfish purposes and using “brainwashing.” These assumptions

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reflect wide-spread stereotypes about religious cults which are reinforced by sensationalized media accounts, by accounts from disaffected ex-members (often with personal disputes) and by so-called cult experts. Government officials fail to consider the possibility that members may be motivated by sincere religious conviction and thus a different tactical approach called for. Officials also fail to seek more balanced information from scholars who conduct actual research about the groups in question and fail to study or reflect upon the history of similar state-religious group conflicts. Instead, official proceed with their rescue mission in the absence of unbiased, verified evidence and often suspend the application of normal legal procedures.236

Had the Texas authorities taken heed of such advice, they would have limited their inquiry and their intervention to minor girls who were pregnant or teen mothers. When Texas DFPS decided to remove all the children from the FLDS community, I wrote that their approach was too broad.237 The state should have left the young children with the families who had never consented to underage sexual unions of their daughters. In that way there might have been greater community support for the intervention to end what was clearly unhealthy for the teenage girls. During October, 2008 at a debate about polygamy and child protection, two audience members who were polygamous men submitted the following questions to the debaters:

236 Shepherd & Shepherd, supra note229.
237 Smith, Linda F. Child protection law and the FLDS: There’s a better way, SALT LAKE TRIBUNE MAY 11, 2008 AT O6.
As a fundamentalist Mormon (polygamist) dad who is absolutely against abuse, and who will not give up polygamy, what would you suggest as far (as) creating an environment where abuse can be reported without being fearful of being prosecuted for bigamy? There are many like me who want abuse to stop, but not plural marriages among consenting adults. There are already many eyes in plural communities who will report abuse should their consenting adult relationships not be put in jeopardy.

In a nation where gay marriage is becoming legal, where killing an unborn child is legal – why can I not live my beliefs as long as I 1) do not commit incest, 2) do not marry a child, 3) pay my taxes (not live off the “system”) 4) do not marry someone against their will. 5) AND I – Love, respect honor and take care for all of my family 6) AND allow them, to make their own choice to live the same lifestyle or not.238

As these men’s questions made clear, there were members of the polygamous community who opposed underage marriages. The over-reaction of law enforcement results in these individuals being silenced rather than being empowered to take appropriate protective action in their community.

Child protection experts recognize that they must understand the culture and sub-cultural context of the families they encounter.239 The officials should have tried to understand the children’s experiences in the context of their culture. DFPS should not have attacked aspects of their culture unnecessarily.

The fact that the FLDS expect women to play a supportive role and to bear many children is neither that unusual nor necessarily exploitive or abusive. Many “traditional” religious groups have similar attitudes. It was not necessary or useful for DFPS to attack this belief. The fact that this group lives communally

238 Note cards with audience questions from Fordham Debate, Resolved: The State shall prosecute polygamous parents and remove their children from the home. University of Utah College of Law, October 22, 2008, on file with author.
239 See Howze, Karen Aileen Cultural Context in Abuse and Neglect Practice: Tips for Attorneys in CHILD WELFARE LAW AND PRACTICE, 95 (Ventrell & Duquette, eds. 2005).
and asks “sister wives” to share a husband, while unusual, does not necessarily involve child abuse. While most “progressive” people and cultures would see this life as undesirable, DFPS needed to know that adult women do choose this life in the absence of coercion.\footnote{See Daynes, Kathryn, Differing Polygamous Patterns: Nineteenth Century LDS and Twenty-First Century FLDS Marriage Systems in Modern Polygamy in the United States: Historical, Cultural, and Legal Issues Surrounding the Raid on the FLDS in Texas (Jacobson & Burton, eds. forthcoming, 2010) noting the most polygamous wives remained loyal to their beliefs; even Carolyn Jessop’s adult daughter returned to the FLDS community after having lived outside it for three years. See Jessop, Escape 411-12; Bennion, Janet, The Many Faces of Polygamy” An Analysis of the Variability in Modern Mormon Fundamentalism in the Intermountain West, in Modern Polygamy in the United States: Historical, Cultural, and Legal Issues Surrounding the Raid on the FLDS in Texas (Jacobson & Burton, eds. forthcoming, 2010). Also see Batchelor, Mary et. al, Voices in Harmony: Contemporary Women Celebrate Plural Marriage (2002).}

It should have been incumbent upon DFPS to focus on the risks to the teen girls and to put their experiences in context. It would also have been useful to contemplate these girls’ situations as compared to the experiences of other teens and to their psychological needs.

The FLDS are not unusual in hoping that their children will affirm their upbringing and continue to be members of the religious community in which they were reared. This is a typical parental desire and probably an ardent goal of any parent who understands his religion to be the one true faith. The Jewish mother hopes her daughter finds “a nice Jewish boy” to marry and Roman Catholic parents advocate that their grandchildren be baptized in their faith.

This is a more challenging situation for members of unconventional religions. They additionally hope that their children will also reject the outside world as they hew to their faith community. The desire to keep their children
within the community, and to prepare them primarily for the lives of farmers and
housewives, was what motivated the Amish parents to remove their children
from schooling after the eighth grade, a choice ultimately permitted by the U.S.
Supreme Court.\textsuperscript{241} While the Supreme Court waxed eloquent regarding the
values of the Amish, the desire of Amish parents to limit their children’s contact
with the outside world and to keep them in the faith is the same sort of desire
motivated by the same sincere religious belief as one finds with fundamentalist
Mormons practicing polygamy.

Nor are the FLDS unusual in hoping their children comply with their
religious-sexual attitudes. Many members of conservative religions hope, expect
and insist that their children will be heterosexual and condemn and ostracize
anyone who pursues a “gay lifestyle.” Indeed, members of such mainstream
religions may voice such ardent disapproval of homosexuality that the
psychologically healthy development of their gay teenage children is put at risk.
While forcing a teenager to become a teen bride and mother can severely
restrict life choices, preaching the religious value of plural marriage and of
bearing many children is not, developmentally, different than preaching that
homosexuality is a perversion and heterosexual marriage is God’s universal plan.

It is unrealistic to expect every parent’s religious convictions to comport,
entirely, with her child’s needs. Just as gay children should be given space to

this “the worst Religion Clause case” for permitting parental rights to trump children’s needs and
society’s needs for an educated population. See \textit{Hamilton, God vs. Gavel}, 131, supra note 233.
explore their individuality, so should children in polygamous communities have time and space to discover who they want to be before they are encumbered with pregnancy and a permanent relationship with a partner. Had DFPS seen its role as ensuring minor teens would have this right decide about their life choices as adults, the intervention would have been less threatening to the community and more effective.

In the future, child protection agencies would do well to remember Professor Wald’s assertion that child neglect laws cannot be used “to enforce social norms that society in general cannot enforce. More importantly, it is unconscionable to use children as pawns to achieve these ends.”

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242 Wald, supra note 128 at 1034.