

**LEGAL CONSTRAINTS ON CHILD-SAVING:  
THE STRANGE CASE OF THE FUNDAMENTALIST  
LATTER-DAY SAINTS AT YEARNING FOR ZION RANCH**

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It may seem counterintuitive, but children in foster care are more likely to achieve permanency if we take the legal rights of their parents seriously. When all state actors—from social workers to judges—consider parental rights before removing children from their families or terminating parental rights, subsequent adoptions are more likely to be insulated from ongoing litigation, or in the worst instance, revocation. I am a strong proponent of children’s rights.<sup>1</sup> In the context of the child welfare system, however, respect for the rights of parents can protect children from unnecessary and frightening disruptions.

The doctrine of *parens patriae*, which justifies state intervention into families to protect children from serious harm, allows the state to pierce the veil of family integrity.<sup>2</sup> When there is a concrete basis for such intervention, the state should consider the child’s need for continuity and stability as it develops case plans. Children, like parents, have a stake in the integrity of their families, whether biological or adoptive.<sup>3</sup> Moreover,

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<sup>1</sup> See, e.g., Catherine J. Ross, *A Place at the Table: Creating Presence and Voice for Teenagers in Dependency Proceedings*, 6 NEV. L.J. 1362 (2006); Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999) [hereinafter Ross, *An Emerging Right*]; Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571 (1996) [hereinafter Ross, *Vulnerability to Voice*].

<sup>2</sup> See generally Naomi Cahn & Catherine J. Ross, *Parens Patriae*, in THE CHICAGO COMPANION TO THE CHILD (forthcoming 2009).

<sup>3</sup> MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 174–78 (2005); Catherine J. Ross, *A Delicate Task: Balancing the Rights of Children and Mothers in Parental Termination Proceedings*, 33 STUD. L. POL’Y. & SOC’Y. 163, 191–96 (2004) [hereinafter Ross, *A Delicate Task*]; Catherine J. Ross, *Families Without Paradigms: Child* (continued)

risks to all children in the system would be diminished if we could move closer to realizing best practices: consistently applying legal standards, following best therapeutic practices, delivering well-targeted services, and reserving removals for the most egregious cases.<sup>4</sup>

This article examines the legal doctrines with which child welfare workers should be familiar when they intervene in family life, especially when they take drastic measures such as removing children from their parents or filing a petition for termination of parental rights. I then argue that taking the legal rights of the parents seriously would have resulted in a more effective response to an incident that received a great deal of national attention in 2008—the allegations of neglect and abuse of hundreds of children in a community of Fundamentalist Latter-Day Saints in Texas.

Part I of this article discusses the role of the foster care system in providing children available for adoption and introduces the concept of wrongful terminations of parental rights that results in adoptions being overturned by courts. Part II summarizes the constitutional doctrine of parents' rights, its application to decisions to remove children from their homes and to terminate parental rights, and the silence of social science literature about the importance of parental liberty interests in children as part of the legal framework that governs the child welfare system. Part III discusses what child welfare workers need to know—but often do not—about the applicable law. Part IV examines how Texas officials responded to reports of child abuse at the Yearning for Zion Ranch outside Eldorado, Texas, as well as the judicial response to the state's actions. Part V proposes a plan of action for the state that would have better respected the rights of the parents and the community while offering more effective protection to the children who needed it.

### I. ADOPTIONS OUT OF THE CHILD WELFARE SYSTEM

In the United States, prospective adoptive parents generally look to three sources for adoptable children: newborns being given up by their birth parents; international adoptions, which are becoming less accessible

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*Poverty and Out-of-Home Placement in Historical Perspective*, 60 OHIO ST. L.J. 1249, 1291–93 (1999).

<sup>4</sup> Issues such as the role of poverty, race, homelessness and cultural difference in the child welfare system are beyond the scope of this paper, but often play a role in decision-making.

as countries of origin impose more restrictions on placement; and children who have been in the child welfare system.<sup>5</sup> My focus here is on the third group.

The Adoption and Safe Families Act of 1997 (ASFA) made permanency “in a safe and stable home, whether it be returning home, adoption, legal guardianship, or another permanent placement” the goal for all children who enter foster care.<sup>6</sup> In keeping with its laudatory goal of moving children quickly out of the child welfare system into a permanent home, ASFA for the first time imposed an innovative federal timeline, intended to insure that no child lingered for years in foster care limbo.<sup>7</sup> ASFA was designed to accomplish two specific reforms: “[p]reventing children from being returned to unsafe homes, and finding safe and loving and permanent homes for children who cannot be reunified with their families.”<sup>8</sup> To accomplish these goals ASFA for the first time mandated that states “shall” move to terminate parental rights in order to place children into adoptive or other permanent homes in two categories: (1) cases where it is apparent from inception or soon thereafter that the child can never return home safely because of “aggravated circumstances” such as torture, felony assault, or the death of another child in the home; and (2) all cases involving children who “have been in foster care under the responsibility of the State for [fifteen] of the most recent [twenty-two] months” (the “15/22 months rule”).<sup>9</sup> Under ASFA the state need not make any efforts to preserve or reunify the family in cases which involve

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<sup>5</sup> See CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADOPTION OPTIONS: A FACTSHEET FOR FAMILIES 2–4 (2003), available at [www.childwelfare.gov/pubs/f\\_adoptoption.cfm](http://www.childwelfare.gov/pubs/f_adoptoption.cfm).

<sup>6</sup> Memorandum on Adoption and Alternate Permanent Placement of Children in the Public Child Welfare System, 32 WEEKLY COMP. PRES. DOC. 2513 (Dec. 14, 1996).

<sup>7</sup> Ross, *A Delicate Task*, *supra* note 3, at 164.

<sup>8</sup> Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First Three Years of the Adoption and Safe Families Act Implementation*, 39 FAM. CT. REV. 25, 25 (2001) (quoting 143 CONG. REC. H2017 (daily ed. Apr. 30, 1997)). For a more detailed discussion of ASFA’s legislative history, design, and impact, see Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL’Y & L. 176 (2004) [hereinafter Ross, *Tyranny of Time*]; Ross, *A Delicate Task*, *supra* note 3.

<sup>9</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a)(3)(E), 111 Stat. 2115, 2118.

aggravated circumstances, but must proceed directly to long-term permanency planning and termination of parental rights.<sup>10</sup>

In the vast majority of cases, those in the grayer areas of physical and emotional neglect and less dramatic physical abuse, ASFA requires concurrent planning for return home or a permanent placement elsewhere, a permanency hearing no later than twelve months after the child enters foster care, and filing of a petition for termination and a hearing on that petition within two years.<sup>11</sup> Exceptions to the requirement that the state seek to terminate parental rights for all children who have been in care for fifteen of the previous twenty-two months exist for only three categories of cases: (1) where the child is in kinship care; (2) where the state can provide the court with a “compelling reason” not to terminate parental rights; and (3) where the state has failed to provide services which its own case plan “deems necessary for the safe return of the child to the child’s home.”<sup>12</sup>

In all other cases, ASFA incorporates a presumption that the child will be better off moving on than waiting and hoping to return home.<sup>13</sup> In doing so, ASFA reflects the drafters’ realization that it is often impossible to be “fair” to both parents and children in difficult child welfare cases and clarifies Congressional intent that the needs of children should be accorded greater weight than the needs of neglectful or abusive parents.<sup>14</sup> ASFA made clear that Congress intended to free more children for adoption out of the child welfare system.<sup>15</sup>

Even before Congress enacted ASFA, a sea of change occurred within the foster care system. Where there had once been a virtually iron-clad rule that foster parents were ineligible to adopt the children they cared for if and when the children became available for adoption (on the grounds that foster parents should not become too attached to their wards), a gradual shift occurred under which adults who wished to adopt learned that

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<sup>10</sup> *Id.*

<sup>11</sup> § 302, 111 Stat. at 2128–29. The definition of the date on which a child enters foster care under ASFA is unclear. *See* Ross, *Tyranny of Time*, *supra* note 8, at 200 n.101.

<sup>12</sup> § 103(a)(3)(E)(i.-iii), 111 Stat. at 2118.

<sup>13</sup> *See* Catherine J. Ross, *Foster Children Awaiting Adoption Under the Adoption and Safe Families Act of 1997*, 9 ADOPTION Q. 121, 123 (2006).

<sup>14</sup> *See id.* (citing Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 649 (1999)).

<sup>15</sup> *Id.* at 121.

welcoming foster children might lead to adoption.<sup>16</sup> Indeed, a whole new category of placements developed: the pre-adoptive foster home in which parents and children expected that if the children did not return to their biological parents, the foster parents and children would be permanently united through adoption.<sup>17</sup>

There is still much room for improvement in adoption planning for children in foster care. In fiscal year 2007, just over 51,000 children were adopted out of the child welfare system's population of about 500,000.<sup>18</sup> In 2006 only three percent of all children in foster care were living in preadoptive homes, even though adoption was identified as the permanency plan for nearly one quarter (twenty-three percent) of the children in care.<sup>19</sup> Over half of the children in the child welfare system were expected to return to their parents or stay in long term kinship care, and fifty-three percent of children who left foster care in 2006 returned to their parents.<sup>20</sup>

Adoptive placement can be difficult to achieve because most of the children in foster care whose case plan includes adoption are not the young, healthy, white children who are easiest to place.<sup>21</sup> Only four percent are infants under the age of one, thirty-four percent are infants and toddlers under the age of five.<sup>22</sup> But thirty-three percent are teenagers,

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<sup>16</sup> *Id.* at 122; see also DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 640 (2000).

<sup>17</sup> See ABRAMS & RAMSEY, *supra* note 16, at 640.

<sup>18</sup> ADMIN. FOR CHILDREN, YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., TRENDS IN FOSTER CARE AND ADOPTION—FY 2002—FY2007, at 1 (2008), [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcarts/trends\\_02-07.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcarts/trends_02-07.pdf). The foster care system served nearly 800,000 children during all of 2006. *Id.*

<sup>19</sup> ADMIN. FOR CHILDREN, YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS. AFCARS REPORT: PRELIMINARY FY 2006 ESTIMATES AS OF JANUARY 2008 (14), at 1–2, available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcarts/tar/report14.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcarts/tar/report14.pdf) [hereinafter AFCARS REPORT] (In 2006, approximately 50,000 children were adopted out of the child welfare system's population of about 510,000. The foster care system served nearly 800,000 children during all of 2006.).

<sup>20</sup> *Id.* at 4.

<sup>21</sup> See Kelly Noonan & Kathleen Burke, *Termination of Parental Rights: Which Foster Children Are Affected?*, 42 SOC. SCI. J. 241, 255 (2005).

<sup>22</sup> AFCARS REPORT, *supra* note 19, at 6.

eleven-years-old or more,<sup>23</sup> who may come with a bundle of problems. On September 30, 2006, about 129,000 children in foster care were labeled “waiting to be adopted.”<sup>24</sup> The parental rights of many of these children had been terminated, and very few of those awaiting adoption were over the age of sixteen.<sup>25</sup> But only thirteen percent or 16,163 of the children “awaiting adoption” were in pre-adoptive homes.<sup>26</sup> The children waiting for adoption had been in foster care for a median of about twenty-nine months, a mean of thirty-nine months<sup>27</sup>—far in excess of the twenty-four months permissible under ASFA. So despite the best intentions of ASFA’s framers, older children and other hard-to-place children continue to linger in foster care after the state has terminated their legal ties to their parents.

## II. PARENTAL LIBERTY INTERESTS AND DUE PROCESS RIGHTS.

ASFA’s presumption about termination under the 15/22 months rule does not mean that child welfare agencies are free to disregard the legal rights of parents. Part II discusses the constitutional dimensions of parental rights.

Even in the context of the modern child welfare system, the constitutional rights of parents frequently subsume the legal rights of their children.<sup>28</sup> The Supreme Court has found a substantive liberty interest in parenting,<sup>29</sup> which “does not evaporate simply because [the parents] have not been model parents or have lost temporary custody of their child to the

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> I have argued elsewhere that minors should and do have legal rights independent of their parents. See Ross, *An Emerging Right*, *supra* note 1, at 224; Ross, *Vulnerability to Voice*, *supra* note 1, at 1572.

<sup>29</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). The *Lassiter* and *Santosky* courts were “unanimously of the view that ‘the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.’” *M.L.B.*, 519 U.S. at 119 (quoting *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting)); see also David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1130–31 (2001).

State. Even when blood relationships are strained, parents retain a vital interest in preventing the irreversible destruction of their family life.”<sup>30</sup> The resulting legal presumption that parents speak for their children does not end once the children come to the attention of a child welfare agency, or even once a child enters foster care. Under this legal regime, as opposed to the therapeutic one in which social workers and mental health professionals operate, information must be considered in a certain order.

Before a court can assume that the child or someone else claiming to speak for the child (such as the state or an appointed guardian ad litem) is in a better position than the parent to present the child’s best interests to the court, the court must determine that the parent has behaved in a way that justifies stripping the parent of his or her presumed identity of interests with his or her child.<sup>31</sup> Only after such a finding may a court determine that the parent no longer speaks for this particular child.<sup>32</sup> Consequently, any legislative initiative designed to elevate the child’s developmental needs over the rights of his or her parents may conflict with generally applicable constitutional principles protecting the family unit as a whole. It is critical, therefore, to understand the scope and strength of the parent’s rights before seeking to explicate the balance of interests between children and their parents in the context of the child welfare system.

At the most general level, the Supreme Court has recognized that parents have a substantive due process liberty interest in their children: the Court last addressed this interest directly in *Troxel v. Granville*.<sup>33</sup> Justice O’Connor, writing for a plurality of the Court, explained:

The liberty interest . . . of parents in the care, custody, and control of their children [ ] is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than [seventy-five] years ago, in *Meyer v. Nebraska*, we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of

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<sup>30</sup> *Santosky*, 455 U.S. at 753.

<sup>31</sup> Jonathan O. Hafen, *Children’s Rights and Legal Representation—The Proper Role of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 423, 424–25 (1993).

<sup>32</sup> *See id.* at 424–25.

<sup>33</sup> 530 U.S. 57 (2000).

their own.” Two years later in *Pierce v. Society of Sisters*, we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” . . .

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. . . . In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.<sup>34</sup>

The substantive due process jurisprudence that governs claims involving a parent’s liberty interest in his or her child requires a court to engage in strict scrutiny of government intervention.<sup>35</sup> In short, any infringement on the parent’s rights must be narrowly tailored to serve a compelling state interest.<sup>36</sup> But while the government’s compelling interest in safeguarding children is rarely questioned, the means the government uses to achieve its goals are frequently the subject of litigation.<sup>37</sup>

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<sup>34</sup> *Id.* at 65–66 (O’Conner, J., plurality opinion) (citations omitted). This is the Court’s strongest statement on the subject, since the statements in both *Meyer* and *Pierce* were not “holdings” though they are frequently referred to as such, but in fact were frequently-cited *obiter dicta*. See, e.g., *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399. *Obiter dicta* are incidental remarks made by a judge or court in an opinion that are not necessary for resolution of the question before the court and that have no binding value as precedent. BLACK’S LAW DICTIONARY 1102 (8th ed. 2004). At least two current Justices reject the doctrine that the Constitution protects parental rights. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring), 91–92 (Scalia, J., dissenting).

<sup>35</sup> See, e.g., *In re H.G.*, 757 N.E.2d 864, 871 (Ill. 2001).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; see also Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 463–68 [hereinafter Ross, *Anything Goes*] (discussing the lack of judicial scrutiny accorded to the state’s claims of a compelling interest in protecting children in the context of regulations on controversial speech).

*A. Termination of Parental Rights*

The liberty interest of parents in their children also mandates procedural protections before a parent's rights may be terminated. In the 1972 case of *Stanley v. Illinois* the Supreme Court held that a state may not deprive a parent of his or her parental rights without an individualized determination of the parent's fitness.<sup>38</sup> Speed and efficiency, the Court declared, may not be allowed to run "roughshod over the important interests of both parent and child."<sup>39</sup> The Supreme Court has not directly addressed the question of what grounds the state must establish before placing a child in foster care, or what substantive charges, if proven, are sufficient to justify termination of parental rights. In a number of cases subsequent to *Stanley*, however, the Supreme Court examined three procedural issues that arise in termination cases: the right to appointed counsel, the standard of proof, and the right to an appeal.

In its 1981 opinion in *Lassiter v. Department of Social Services of Durham County, North Carolina*,<sup>40</sup> the Court held that due process does not require appointment of counsel for parents in all termination proceedings.<sup>41</sup> The *Lassiter* opinion makes clear, however, that an appellate court may reverse a trial court's decision not to appoint counsel if the decision violates fundamental fairness under the facts of the case.<sup>42</sup> In addition, although the Court found that appointing counsel is not constitutionally required in all termination cases, the majority noted that a "wise public policy" would require appointing counsel for parents who cannot afford attorneys at all stages of dependency proceedings.<sup>43</sup>

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<sup>38</sup> 405 U.S. 645, 658 (1972).

<sup>39</sup> *Id.* at 657.

<sup>40</sup> 452 U.S. 18 (1981).

<sup>41</sup> *Id.* at 31–32. While Justice Powell took no part in the consideration or voting in *Stanley*, he voted with the five person majority in *Lassiter*.

<sup>42</sup> *Id.* at 27–28, 31–32 (applying formula set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

<sup>43</sup> *Id.* at 33–34. At the time *Lassiter* was decided, the Court noted that thirty-three states and the District of Columbia provided appointed counsel for indigent parents in termination proceedings, and that nothing suggested that such statutes were other than "enlightened and wise." *Id.* at 34. Since *Lassiter* was decided, the wave of opinion in the states has become even more pronounced. See *Brown v. Div. of Family Servs.*, 803 A.2d 948, 952–53 (Del. 2002) (stating that since *Lassiter*, "there have been substantial dynamic statutory and

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The Supreme Court has ruminated on the high personal stakes that make termination of parental rights something more than an “ordinary civil action” resulting in “mere loss of money.”<sup>44</sup> In *Santosky v. Kramer*,<sup>45</sup> decided the year following *Lassiter*, the Supreme Court held that in light of the stakes in termination proceedings, due process requires that the state support its allegations by an elevated evidentiary standard—“at least clear and convincing evidence”—before it may “sever completely and irrevocably the rights of parents in their natural child.”<sup>46</sup>

Most recently, in *M.L.B. v. S.L.J.*,<sup>47</sup> the Supreme Court held that the due process and equal protection clauses mandate that a state may not deny appellate review to a person whose parental rights have been terminated.<sup>48</sup> The Court held that states must provide every parent with access to the appellate courts following termination of parental rights regardless of the parent’s ability to pay the requisite costs.<sup>49</sup> In the context of a contested step-parent adoption, the *M.L.B.* majority again focused on the substantial and irreparable injury to parents who lose all rights to their children, as well as the potential for judicial error, in holding that “decrees forever terminating parental rights” fall into “the category of cases in which the

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procedural developments” regarding the right to counsel in termination of parental rights proceedings). In 2002, the Supreme Court of Delaware noted that Delaware was one of only five states that have not “established a right for indigent parents to be represented by counsel at State expense in dependency and neglect proceedings . . . [either by statute] or as a matter of state constitutional law.” *Id.* at 955 (footnotes omitted). Nonetheless, like most other states, Delaware “routinely appoints” counsel to indigent parents who request it. *Id.* at 957–58 (holding that Delaware must provide timely notice to parents that they may have a right to representation at the state’s expense in termination proceedings and expressly reserving the question of whether indigent parents are entitled to state-appointed counsel at all stages of dependency and neglect proceedings).

<sup>44</sup> *Santosky v. Kramer*, 455 U.S. 745, 747, 756 (1982).

<sup>45</sup> *Id.* at 745.

<sup>46</sup> *Id.* at 747–48. Some commentators have criticized *Santosky* for placing too much weight on the rights of parents and too little on the needs of children. See, e.g., Rebecca Mandel, *The Evidence is “Clear and Convincing”*: *Santosky v. Kramer Is Harmful to Children*, 26 CHILD. LEGAL RTS. J. 1 (2006).

<sup>47</sup> 519 U.S. 102 (1996).

<sup>48</sup> See *id.* at 124.

<sup>49</sup> *Id.* at 107 (holding the state may not block an appeal by an indigent parent who cannot afford to purchase a copy of the trial transcript).

State may not ‘bolt the door to equal justice.’”<sup>50</sup> The Court, however, did not balance the child’s potential interests against the parent’s rights, and was not confronted with the argument that delay—whether caused by the appellate process or by other contingencies—unjustly prolongs the child’s uncertainty about her fate.<sup>51</sup>

The cases from *Lassiter* through *M.L.B.* establish the parameters of the rights and presumptions that parents bring to termination proceedings. These constitutional protections for parents are critical, especially since the fact-finding stage of a termination proceeding “pits the state directly against the parents.”<sup>52</sup> At this stage, the trial court’s task is limited to determining whether “the natural parents are at fault.”<sup>53</sup> This finding of “fault” is understood to be a prerequisite for the conclusion that these particular “parents are unfit to raise their own children.”<sup>54</sup> Because it is assumed that children are generally best served by remaining with their parents and a finding of fault could lead to their permanent removal from their parents’ care, courts presume that the interests of children converge with the interests of parents at legal proceedings.<sup>55</sup> This presumption remains, even where the facts appear to clearly rebut it.<sup>56</sup> In *Santosky*, for example, the parents’ interests were viewed as converging with their children’s despite the fact that one boy, who had been removed from his parents when he was only three days old, was seven when the case was argued and had never lived with his parents.<sup>57</sup> Yet even on those facts, the Court preserved the legal fiction that parents and child speak with one voice, insisting “until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship;” only after the State proves parental unfitness are the interests of parent and child deemed to “diverge.”<sup>58</sup>

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<sup>50</sup> *Id.* at 124.

<sup>51</sup> *See generally id.* at 102–28.

<sup>52</sup> *Santosky v. Kramer*, 455 U.S. 745, 759 (1982).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 760 (footnote omitted).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; *see also* Ross, *Vulnerability to Voice*, *supra* note 1, at 1579–86.

<sup>57</sup> *Santosky*, 455 U.S. at 751, 760–61 nn.10–11.

<sup>58</sup> *Id.* at 760.

The Supreme Court has expressed doubts about whether “the State constitutionally could terminate a parent’s rights *without* showing parental unfitness.”<sup>59</sup> The grounds for termination are determined by each state’s statutes, and no case raising the question of what grounds are sufficient to justify termination of parental rights has ever reached the Supreme Court.<sup>60</sup> The Court opined:

We have little doubt that the Due Process Clause would be offended “[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.”<sup>61</sup>

Notwithstanding the due process protections accorded the liberty interest of biological parents in their children, once a child enters foster care, the parental rights and responsibilities for that child are apportioned among biological parent, foster parent and the state.<sup>62</sup> The manner of this division resembles nothing so much as the proverbial bundle of sticks well known in introductory law school property classes, reminding us of the long common law history of treating children as property.<sup>63</sup> No matter

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<sup>59</sup> *Id.* at 760 n.10.

<sup>60</sup> In *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, I argued that the mere passage of time under the 15/22 rule as a ground for termination does not give sufficient weight to the rights of parents, and reviewed the approaches taken by the states in response to the ASFA mandate. Ross, *Tyranny of Time*, *supra* note 8, at 198–208.

<sup>61</sup> *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)).

<sup>62</sup> *Smith*, 431 U.S. at 826–28.

<sup>63</sup> The bundle of sticks analogy clarifies the notion that the rights associated with ownership of property can be “unbundled or disaggregated.” JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 2–3 (2d ed. 2005). If the property is a bundle of sticks, the owner may give away one or more sticks while retaining the balance of the bundle. *Id.* at 3. The sticks may represent temporary interests such as a particular usage or a term of years. *Id.* As Joseph Singer explains:

A particular piece of property may have multiple owners of different sticks in the bundle of rights that comprises full ownership. When we are asked to determine who owns a particular stick in the bundle, it may

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how long the child remains in foster care, he or she continues to “belong” to the natural parent in some respects.<sup>64</sup> That natural parent—although stripped of custody and day-to-day decision making once a child enters foster care—retains the sole ability to make decisions regarding surgery and the right to marry or enlist in the armed forces as a minor, among other decisions, and is presumed to represent the child’s legal interests, retaining what amounts to a future interest in the child.<sup>65</sup>

The Supreme Court made it clear in *Santosky* that there is no room at the fact-finding stage of a termination proceeding to weigh either the child’s independent interest or the child’s relationship with a foster family against the rights of the natural parents in the care, custody, and nurture of their child.<sup>66</sup> The focus during fact-finding at a termination proceeding is “emphatically” not on the child, or the other opportunities open to the child, but only on whether “the natural parents are at fault” as the state alleges.<sup>67</sup> There is no room for the child’s perspective—even when there is lack of attachment to the natural parents or positive attachment to current caregivers such as foster parents—until the court turns to disposition.<sup>68</sup> Nor can the court consider the child’s need for protection and safety outside the context of parental fault.<sup>69</sup>

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not help us to know who the ‘owner’ of the land is because ownership of various sticks in the bundle may be spread among several people.

*Id.*

<sup>64</sup> *Smith*, 431 U.S. at 828 & n.20.

<sup>65</sup> *Id.* (quoting ALFRED KADUSHIN, *CHILD WELFARE SERVS.* 355 (1967)). For example, a Michigan court refused to authorize surgery to implant controversial hearing aids in two deaf boys in foster care over the objection of their mother, who the court held retained authority over elective surgery unless and until she loses custody permanently. Jon Hall, *Mich. Judge Rules Deaf Boys Needn’t Undergo Surgery*, *BOSTON GLOBE*, Oct. 5, 2002, at A3.

<sup>66</sup> *Santosky v. Kramer*, 455 U.S. 745, 759 (1982).

<sup>67</sup> *Id.*

<sup>68</sup> *See id.* at 760.

<sup>69</sup> *See* Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 96 (1999) (arguing that child welfare decision-making is “almost always tilted in favor of the parents’ rights at the expense of a child’s protection”); *see also* ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER CARE DRIFT, AND THE ADOPTION ALTERNATIVE* 113 (1999) (“Federal constitutional law gives adults  
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Similarly, lower courts have expressly held that while the best interests of the child should be paramount in all proceedings to terminate parental rights, “a court may not base termination of parental rights solely on the best interests of a child.”<sup>70</sup> In order to terminate parental rights, a court must first find that at least one statutory ground for termination exists.<sup>71</sup> Consistent with the discussion in *Santosky*, state laws governing termination provide for a bifurcated analysis.<sup>72</sup> First, the court must ask whether sufficient statutory grounds have been shown for terminating the parent’s rights (with due consideration to the parent’s constitutional rights).<sup>73</sup> Only then may the court reach the second question: whether termination of parental rights in fact serves the child’s best interest.<sup>74</sup> If the statutory grounds for termination have been well framed and the evidence that those grounds have been met is clear and convincing, the child’s best interests will normally be served by termination, particularly if the state has already identified a permanent or adoptive home for the child.<sup>75</sup> But, as some lower courts have expressly held, “a court may not

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fundamental rights to parent their children, while giving children no rights to *be parented* in a nurturing way.”).

<sup>70</sup> *In re Welfare of M.H.*, 595 N.W.2d 223, 228 (Minn. Ct. App. 1999) (citing *In re Welfare of J.K.*, 374 N.W.2d 463, 467 (Minn. Ct. App. 1985)); see also David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 785–86 (1999).

<sup>71</sup> *M.H.*, 595 N.W.2d at 226–27.

<sup>72</sup> See, e.g., MINN. STAT. ANN. § 260C.301 (West 2007).

<sup>73</sup> *S.L. v. C.A.*, 995 P.2d 17, 29–30 (Utah Ct. App. 1999) (Wilkins, J., concurring).

<sup>74</sup> See MINN. STAT. ANN. § 260C.301(7) (stating that best interests are considered after the court finds that at least one of the statutory criteria for terminating parental rights has been established).

<sup>75</sup> In limited instances in some states, however, a court may use the best interests inquiry to determine that a sound reason exists not to terminate parental rights, even though the court has already determined that the statutory grounds for termination have been satisfied. See, e.g., *State v. Timperly*, 750 P.2d 1234, 1238 (Utah Ct. App. 1988) (opining that the best interests of the child remains a principal consideration in termination proceedings, and in this instance supports termination); Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 136 (1995) (urging judges to “inquire into the child’s best interests and not presume, merely because statutory grounds exist to terminate parental rights, the child’s best interests are served by doing so” particularly where no viable permanent placement is likely).

base termination of parental rights *solely* on the best interests of the child.”<sup>76</sup>

When parental rights are terminated without sufficient grounds or without sufficient procedural protections for the parents, a court may subsequently overturn the termination and any adoption that followed. For example, when Chinese immigrant parents, the Hes, turned their infant daughter over to a nonprofit agency seeking temporary assistance in caring for her due to their lack of financial resources, they executed a document relinquishing parental rights to the foster parents under the impression that this was merely a formality in order to obtain health insurance for the child.<sup>77</sup> The foster parents subsequently ended visitation with the child.<sup>78</sup> To simplify a complex set of facts, the Hes filed a suit for the return of their daughter and immediate visitation, and the foster parents responded by seeking permanent custody and adoption.<sup>79</sup> The court then barred the Hes from having contact with their daughter, and the proceeding was postponed, resulting in the Hes’ inability to visit their daughter for more than four months, the statutory definition of abandonment in the state.<sup>80</sup>

The Supreme Court of Tennessee overturned both the termination of the Hes’ parental rights and the child’s adoption by her foster parents.<sup>81</sup> Holding that the Hes’ failure to have contact with the infant was not “willful” as required by the abandonment statute, the court explained:

It is well established that both the United States and the Tennessee Constitutions protect parents’ rights to the custody and care of their children. Therefore, before a parent’s rights can be terminated by a court, “there must be a showing that the parent is unfit or that substantial harm to the child will result to the child if parental rights are not terminated.”<sup>82</sup>

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<sup>76</sup> *M.H.*, 595 N.W.2d at 228 (emphasis added).

<sup>77</sup> *In re Adoption of A.M.H.*, 215 S.W.3d 793, 797–99 (Tenn. 2007).

<sup>78</sup> *Id.* at 801.

<sup>79</sup> *Id.* at 802.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 810–11.

<sup>82</sup> *Id.* at 809 (citations omitted).

Finding that the parents had been misled into giving up their rights, the court ordered the revocation of the “voluntary” transfer of custody executed by the Hes.<sup>83</sup> Although the child had not seen her parents since 2001, when the court ruled in 2007 it expressly commented:

[T]he only evidence of substantial harm arises from the delay caused by the protracted litigation and the failure of the court system to protect the parent-child relationship throughout the proceedings. Evidence that A.M.H. will be harmed from a change in custody . . . cannot constitute the substantial harm required to prevent the parents from regaining custody.<sup>84</sup>

The court wisely observed that any other ruling might result in intentional delays in future cases, intended to advantage the adults who currently had possession of a child.<sup>85</sup> Finally, the court observed that “mere improvement in the quality of life is not a compelling state interest and is insufficient to justify invasion of Constitutional rights.”<sup>86</sup>

Similarly, an intermediate appellate court in California recently reversed an order terminating the parental rights of a fourteen-year-old mother whose pregnancy resulted from sexual abuse at the hands of her stepfather.<sup>87</sup> The teenage mother, C.F., was the subject of a dependency proceeding based on the abuse she had suffered.<sup>88</sup> The juvenile court appointed an attorney for C.F., but it did not appoint a guardian ad litem (GAL) to safeguard her interests with respect to her own baby until after the child welfare agency had removed her infant from her and ended services designed to reunite her with her baby.<sup>89</sup> The appellate court

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<sup>83</sup> *Id.* at 812.

<sup>84</sup> *Id.* Some authors overlook the existence of parental rights in their zeal to offer children a better life; for instance, see JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 123–69 (2006) (arguing that children have a right from birth to be assigned to loving parents) and my review of his book. Catherine J. Ross, Book Review, 16 *L. & POL. BOOK REV.* 975 (2006), available at <http://www.bsos.umd.edu/gvpt/lpbr/reviews/previous/2006/12/relationship-rights-of-children.html>.

<sup>85</sup> *A.M.H.*, 215 S.W.3d at 812–13.

<sup>86</sup> *Id.* at 813 (quoting *Hawk v. Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993)).

<sup>87</sup> *In re M.F.*, 74 Cal. Rptr. 3d 383, 385 (Ct. App. 2008).

<sup>88</sup> *Id.* at 385–86.

<sup>89</sup> *Id.* at 386.

reasoned that a parent who is a minor is entitled to the same protections as any other parent a court deems “incompetent;” the California statute requires appointment of a GAL for incompetent parents in child welfare hearings.<sup>90</sup> The court distinguished between the appointment of an attorney for C.F. as a *subject* of a dependency proceeding (where appointment of an attorney rendered appointment of a GAL discretionary) and as a *party* to a dependency proceeding in which she stood to lose her baby.<sup>91</sup> Dependency proceedings, the court underscored, “are accusatory in nature to the parent, although not as to the child.”<sup>92</sup> Because the state had not alleged “any direct abuse or neglect of the infant” and C.F. waived significant rights during the proceedings and was absent from the first two hearings while she was in the state’s custody, the absence of a GAL led, in the court’s words, to “a miscarriage of justice,” constituting reversible error.<sup>93</sup> The court expressly noted that it had no choice but to return matters to “square one” even though it was aware of the implications for the “stability of and permanence” of her infant who had already been placed for adoption.<sup>94</sup> Nonetheless, the court stated: “[W]e are compelled to ensure that C.F. is afforded the protections to which she is entitled before her parental rights with the infant are forever lost.”<sup>95</sup>

As the stories of the Hes and C.F. make clear, failure to respect the procedural and substantive rights of parents exposes children to grave risks of instability and discontinuity even after the state has imposed the extreme sanction of terminating their parent’s rights. The next portion of this Section turns to the first step in the road to termination—the initial decision to remove a child from his or her home. Of course many children who are removed ultimately return to their families. But children’s relationships with their parents are never legally severed unless the children have first been taken away. Each removal has the potential to lead to termination.

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<sup>90</sup> *Id.* at 387.

<sup>91</sup> *Id.* at 387–88.

<sup>92</sup> *Id.* at 388 (quoting *In re Charles T.*, 125 Cal. Rptr. 2d 868, 871 (Ct. App. 2002)).

<sup>93</sup> *Id.* at 389–90.

<sup>94</sup> *Id.* at 390.

<sup>95</sup> *Id.*

*B. Removal and Entrance Into Foster Care*

To avoid the sort of injustices described above—which significantly disrupt the life and attachments of the child at the heart of the controversy—it is imperative that the state respect the legal significance of family autonomy from the inception of every child welfare case. For this reason, keeping children as our focus, an expert working group, convened by the U.S. Department of Health and Human Services to advise the states on implementation of ASFA, recommended that “[l]awyers become involved in child welfare cases whenever legal proceedings are contemplated or actually initiated.”<sup>96</sup> In particular, the Guidelines this group crafted urged that legal counsel for the parties become involved “very early in the State intervention process, but no later than the point at which legal proceedings are initiated;”<sup>97</sup> that is, when the agency seeks court approval to remove a child from his or her home. It is particularly important that parents have counsel at the earliest juncture because the state agency normally holds all the cards—it structures the way the case unfolds and the services provided as well as creating the written record about the case. The agency’s own attorneys should do more than represent the agency at hearings. Agency counsel should become involved in case planning before and after removal to make sure that the agency complies with ASFA’s procedural and substantive requirements, just as a private attorney would be expected to help a corporate client comply with the requirements of Securities and Exchange Commission filings.

In addition to attorneys for the state and the parents, the Guidelines urge that “all children who are subjects of child protection proceedings be represented by an independent attorney at all stages and at all hearings in the child protection court process.”<sup>98</sup> This recommendation goes beyond

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<sup>96</sup> DONALD N. DUQUETTE & MARK HARDIN, DEP’T OF HEALTH & HUMAN SERVS., GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN VII-1 (1999). In the interests of full disclosure, I chaired the subcommittee on Standards for Legal Representation of Children, Parents and the Child Welfare Agency.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at VII-11. We urged that the states adopt standards for lawyers who represent children. *Id.* at VII-12. Since then, a number of professional groups, including the American Bar Association, have issued standards to which the states may turn. Am. Bar Ass’n Representing Children Standards of Practice Comm., *Proposed Standards of Practice* (continued)

the federal law that requires all states receiving federal child welfare funds to appoint an “advocate” for the child who may or may not be an attorney and who is not required to advocate for the child’s views even if the child is mature enough to express a well-formulated opinion.<sup>99</sup>

The first critical juncture in a child welfare case occurs when the state opens a case file on a family; from that point on, the family is subject to inquiry and intervention from which families outside the child welfare system are sheltered.<sup>100</sup> But the second critical juncture—the decision to remove one or more children from the home—is even more highly charged and is one of the most difficult decisions agency caseworkers confront. On the one hand, every caseworker works daily under the specter of a phone call in the middle of the night announcing that one of the children in her caseload has been seriously injured or killed. On the other hand, caseworkers understand that roughly one in five children removed from their homes will never be returned.<sup>101</sup> Even if they return home at some point, historical data indicate that between twenty percent and forty percent of children who initially return home later re-enter foster care.<sup>102</sup> In most cases where children do not return home the courts will ultimately sever the legal ties between parents and children through termination proceedings.<sup>103</sup> The disruption and harm experienced by children removed from their homes, which social workers weigh against the risks if the child

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*for Lawyers who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995).

<sup>99</sup> Child Abuse Prevention and Treatment Act, 42 U.S.C. §5101a(b)(2)(A)(ix) (2000); see also Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 281–92 (2002) (discussing the failures of the CASA/GAL system in which CASAs both “advocate” for the child and gather information for the court in termination cases in Maryland); Howard Davidson, *Child Protection and Practice at Century’s End*, 33 FAM. L.Q. 765, 768–69 (1999).

<sup>100</sup> Similarly, the lower federal courts are divided on the Fourth Amendment standard that applies to agency efforts to enter a home in order to investigate allegations of child neglect or abuse. See *Gates v. Tex. Dep’t of Protective and Regulatory Servs.*, 597 F.3d 404, 425–26 (5th Cir. 2008).

<sup>101</sup> DUQUETTE & HARDIN, *supra* note 96, at I-2.

<sup>102</sup> Virginia M. DeRoma et al., *Important Risk Factors in Home-Removal Decisions: Social Caseworker Perceptions*, 23 CHILD & ADOLESCENT SOC. WORK J. 263, 265 (2006) (citing a pre-ASFA source).

<sup>103</sup> DUQUETTE & HARDIN, *supra* note 96, at VI-1.

remains in the home, should also factor in the ultimate risk of termination of parental rights.

What is the judicial standard for the initial removal that may initiate the road to termination? The Supreme Court has never considered the issue. Like the substantive grounds for termination, the legal grounds for removal remain unclear, and are determined by each state's laws and regulations.<sup>104</sup> The expert working group that drafted the ASFA Guidelines in 1999 could not reach sufficient agreement to draft standards governing removal.<sup>105</sup> At the very least, it is clear that a child welfare agency may not remove a child from his or her home over the parent's objection unless it can demonstrate a ground for removal under the applicable laws in the state in which it operates.<sup>106</sup> Where a removal is planned, or where time and safety permit, removal is normally preceded by a court order, so the courts have an opportunity to consider whether the state has grounds for the removal before it occurs.<sup>107</sup> When the state acts without a court order—in what are known as emergency removals—the removal of the child is subject to judicial review within days.<sup>108</sup> The standard for emergency removals, like that for planned removals and termination, varies by jurisdiction, but generally involves some variant of imminent harm to the child and circumstances that make it impossible to obtain prior court approval.<sup>109</sup>

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<sup>104</sup> *Id.* at I-1.

<sup>105</sup> Conversation with Mark Hardin, Director, National Child Welfare Resource Center at the American Bar Association's Center on Children and the Law (Sept. 2008).

<sup>106</sup> Not all scholars agree. See Gelles & Schwartz, *supra* note 69, at 102–03; see also BARTHOLET, *supra* note 69, at 96.

<sup>107</sup> DUQUETTE & HARDIN *supra* note 96, at IV-8.

<sup>108</sup> *Id.* at IV-7–IV-9.

<sup>109</sup> See, e.g., *Gates v. Tex. Dep't of Protective and Regulatory Servs.*, 537 F.3d 404, 418–24 (5th Cir. 2008) (summarizing the cases and holding that in the Fifth Circuit general Fourth Amendment standards apply to the seizure of a child from his or her home); *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007) (requiring “reasonable cause to believe that the child is likely to experience serious bodily injury” and inability to obtain a warrant); *Doe v. Kearney*, 329 F.3d 1286, 1297–98 (11th Cir. 2003) (rejecting requirement of inability to obtain a warrant and calling for a balancing of all circumstances); *Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003) (“imminent danger” is the only excuse for failure to obtain a removal warrant); *Hatch v. Dep't for Children, Youth & Their Families*, 274 F.3d 12, 22 (1st Cir. 2001) (reasonable suspicion

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Although emergency removals should be a last resort, the proportion of emergency removals is growing, and once a child is removed, it may be very hard for the parents to gain the child's return.<sup>110</sup> Therefore, when social workers plan a removal in a case on the margins (as opposed to making an emergency removal in a case involving serious physical abuse or abandonment) they should do their best—with advice of agency counsel—to identify a clear legal ground to justify the removal before they proceed.

No one has a harder job than the front line worker in child protection cases. And no one gets less support in doing that job; high case loads, lack of adequate training and so forth are well-documented.<sup>111</sup> In the absence of laws that draw bright lines—a virtually impossible drafting task in the vast majority of child welfare cases which involve neglect rather than physical abuse with injury<sup>112</sup>—we might expect that agencies would promulgate guidelines to help front line workers make difficult decisions. We would hope too that such guidelines would incorporate and comply with the legal standards that apply under federal and state law. Unfortunately, in many instances, state law and agency protocol have not even established guidelines for removal, leading to what many regard as “erratic” decision-making.<sup>113</sup> Concerns about the vast discretion accorded caseworkers have led to efforts to develop reliable risk assessment tools.<sup>114</sup>

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that abuse has occurred or is imminent); *Tenenbaum v. Williams*, 193 F.3d 581, 605 (2d Cir. 1999) (reasonable belief that a child will be subjected to further abuse before a warrant can be obtained).

<sup>110</sup> Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 458–59 (2003).

<sup>111</sup> For a portrait that captures the difficulties social workers face, see Daniel Bergner, *The Case of Marie and Her Sons*, N.Y. TIMES MAG., July 23, 2006, at 28.

<sup>112</sup> Experts have struggled with this issue for roughly three decades. The 1981 standards for removal and return of children by the Department of Children and Youth Services in Connecticut, which I helped to draft, are reprinted in ALBERT J. SOLNIT ET AL., *WHEN HOME IS NO HAVEN: CHILD PLACEMENT ISSUES* 159–66 (1992). I do not know if they are currently being used in Connecticut.

<sup>113</sup> DeRoma et al. *supra* note 102, at 263–64.

<sup>114</sup> *Id.* at 264; see also Paul H. Hartnett, *A Procedure for Assessing Parents' Capacity for Change in Child Protection Cases*, 29 CHILD. & YOUTH SERVS. REV. 1179, 1180 (2007) (citing some of the most useful guidelines including those issued by the American Psychological Association).

As recently as 2003, the Department of Health and Human Services (HHS) reported that “fewer than [fifty percent] of all agencies . . . use a structured decision-making model, safety assessment, or risk assessment.”<sup>115</sup> Of those that claim to use such guidelines, only one in four revised their criteria within the four years preceding the HHS survey.<sup>116</sup> Moreover, as of 2003, only one in fifteen states had procedures in place to insure consultation between a caseworker and supervisor concerning major decisions.<sup>117</sup> As a result, real world “assessments often fail to meet minimal guidelines of best practice.”<sup>118</sup> This makes it even more critical that front line workers become familiar with the legal standards that ultimately govern their decisions.

### III. WHAT FRONT LINE SOCIAL WORKERS SHOULD KNOW ABOUT THE LAW

Front line workers in the child welfare system should have at least a working familiarity with the basic legal principles summarized in the previous section in order to avoid actions they cannot justify in court that disrupt a child’s life. Training should include jurisdiction-specific details about the law in the state in which the agency operates, including relevant statutes and regulations as well as how the state and federal courts in that jurisdiction have interpreted them. Experienced child welfare workers generally accumulate this knowledge on the job, but it may not always be an integral part of training.

Too often, social workers and other non-legal professionals do not understand the imperatives of the legal profession. In working with professionals from other disciplines, I have observed that they frequently are unaware that the ethical duties of attorneys may be very different from the ethical duties of a social worker or psychologist. For example, while an attorney may participate in a group conference on behalf of a client, the

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<sup>115</sup> DeRoma et al., *supra* note 102, at 264. Earlier studies reported that in the 1980s as many as forty-two states had adopted risk assessment tools. Bilha Davidson Arad, *Parental Features and Quality of Life in the Decision to Remove Children at Risk From Home*, 25 CHILD ABUSE & NEGLECT 47, 48 (2001) (citation omitted). It is not my task here to explain this discrepancy.

<sup>116</sup> DeRoma et al., *supra* note 102, at 264.

<sup>117</sup> *Id.* at 265.

<sup>118</sup> Hartnett, *supra* note 114, at 1180.

attorney must always place her client's interests above the interests of every other party, except to the extent that considering the interests of other parties may help craft "settlement" terms to the advantage of the child or parent client.<sup>119</sup> Social workers and mental health professionals need to understand that the lawyers at the table may not be free to seek a holistic solution, or to weigh what is best for other parties if those solutions do not directly advance the interests of the lawyer's client. Emphasis on the ethical norms of the legal profession does not diminish the importance of interdisciplinary collaboration in child welfare cases. Indeed, I strongly agree that "the best practices for foster care can emerge through the collaboration of therapists, social services and the courts"<sup>120</sup> and have participated in interprofessional collaborations myself in several settings.<sup>121</sup>

Recent social science literature concerning decision-making in the child welfare system contains virtually no discussion of the statutory law or constitutional rights and no discussion at all of the legal rights of parents. Significantly, even authors who emphasize how important it is for mental health professionals to understand the legal and policy parameters of the child welfare system do not identify or discuss the foundational legal principles discussed above. For example, McWey et al. argue that even as courts increasingly seek expert advice from therapists, "too few therapists

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<sup>119</sup> See Mary Brabeck et al., *Changing the Culture of the University to Engage in Outreach Scholarship*, in UNIVERSITY-COMMUNITY COLLABORATIONS FOR THE TWENTY-FIRST CENTURY: OUTREACH FOR YOUTH AND FAMILIES 335, 352-53 (Richard M. Lerner & Lou Anna. K. Simon eds., 1998). Many attorneys have correctly pointed out that an adversarial rights-based approach may undermine the real interests of children and families. See, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 33 UCLA L. REV. 637, 673-74 (2006) (endorsing a problem solving approach including family group conferencing). However, once the case is in an adversarial posture, rights are expressly in play. See Baldwin, *supra* note 99, at 290.

<sup>120</sup> Lenore M. McWey et al., *Mental Health Issues and the Foster Care System: An Examination of the Impact of the Adoption and Safe Families Act*, 32 J. MARITAL & FAM. THERAPY 195, 195 (2006) (citing Preston A. Britner & Daniel G. Mossler, *Professionals' Decision-Making About Out-of-Home Placements Following Instances of Child Abuse*, 26 CHILD ABUSE & NEGLECT, 317, 328-329 (2002)).

<sup>121</sup> See Catherine J. Ross, *Including Lawyers in the Mix: The Role of Law, Lawyers, and Legal Training in Child Advocacy*, in 4 HANDBOOK OF APPLIED DEVELOPMENTAL SCIENCE: PROMOTING POSITIVE CHILD, ADOLESCENT, AND FAMILY DEVELOPMENT THROUGH RESEARCH, POLICIES, AND PROGRAMS 353-70 (Richard M. Lerner et al. eds., 2003).

have devoted time to understanding the foster care system, policies, and the implications of such policies on families involved in the foster care system.”<sup>122</sup> McWey et al. observe that agency caseworkers who are expected to evaluate the mental health of parents often lack the training to do so and urge increased collaboration among caseworkers, family therapists, social services and the court.<sup>123</sup> To this end, they provide an “overview” of the foster care system, including a discussion of the major federal statutes, without even alluding to the doctrine of parental rights.<sup>124</sup>

The authors of another article that mentions federal requirements also overlook ASFA entirely.<sup>125</sup> Their discussion of federal statutes focuses on two earlier federal laws, the Adoption Assistance and Child Welfare Act of 1980 and the Family Preservation and Support Act of 1993.<sup>126</sup> Silence about ASFA is striking because the authors discuss the importance of making decisions in a “timely manner” under the two earlier acts, but fail to discuss ASFA’s far more stringent mandatory timelines, including regular review of cases by the courts.<sup>127</sup>

Similarly, two economists who studied cases in which parental rights were terminated report: “[p]rior to the passage of the [ASFA], there was much debate over the rights of parents versus the rights of the children. ASFA was enacted in order to help protect the rights of children by expediting the discharge process.”<sup>128</sup> So far, so good. But the authors’ potent silence suggests that parental rights are a thing of the past, or are somehow no longer applicable under ASFA. As demonstrated above, this is hardly the case. To the contrary, the federal requirement that agencies make “reasonable efforts” to avoid removal and to achieve reunification, initially enacted in 1980, remain part of the legislative framework under ASFA.<sup>129</sup>

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<sup>122</sup> McWey et al., *supra* note 120, at 195 (citations omitted).

<sup>123</sup> *Id.* (citation omitted).

<sup>124</sup> *Id.* at 196–98.

<sup>125</sup> See DeRoma et al., *supra* note 102.

<sup>126</sup> *Id.* at 265–56.

<sup>127</sup> *Id.* at 266.

<sup>128</sup> Noonan & Burke, *supra* note 21, at 243.

<sup>129</sup> Ross, *Tyranny of Time*, *supra* note 8, at 208 (discussing integration of the reasonable efforts requirement with ASFA, 42 U.S.C. § 671(a)(15)(B), (D), which require reasonable efforts except in cases involving aggravated circumstances justifying immediate petition for termination).

Research confirms that, in the absence of clear guidelines and legal principles, even the best intentioned caseworkers trust their instincts. They are more likely to remove children from homes in which the parents are poor, engage in criminal behavior, or are mentally or physically ill than from homes of wealthier, healthy parents, all other things being equal.<sup>130</sup>

It is not reasonable to expect that front line workers who do not understand the doctrine of parental rights and its nuanced requirements will proceed in ways that preserve the rights of parents *and* children. This is a systemic problem, not the fault of individual caseworkers. But it has ramifications for the success of the entire child welfare system, as the case study in Part IV illustrates.

#### IV. APPLICATION OF LEGAL PRINCIPLES TO THE PROBLEM OF THE YEARNING FOR ZION RANCH

Imagine you are a police officer called to a filthy two-bedroom apartment on a report that drugs are being sold there. On arrival, you find that five women—all sisters—live in the apartment, and nineteen children (later discovered to have nearly as many fathers) are crammed into a small space, with one clogged toilet and no hot water. This happened in Chicago on February 1, 1994.<sup>131</sup> All sixteen of the children belonging to the sisters were removed immediately, and never returned (three others were the children of a friend).<sup>132</sup> To be sure, the sisters had plenty of problems, including a history of drug use, other children in foster care, severe poverty and varying levels of capacity.<sup>133</sup> Only one of the children, however, a child with cerebral palsy, showed any signs of physical abuse.<sup>134</sup> A writer who documented the case captured the consensus that the children would never have been removed that night if there had been fewer of them.<sup>135</sup>

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<sup>130</sup> *Id.*; DeRoma et al., *supra* note 102, at 273 (revealing that parents' willingness to cooperate was rated as more important to caseworkers than deficits in parenting skills).

<sup>131</sup> MICHAEL SHAPIRO, SOLOMON'S SWORD: TWO FAMILIES AND THE CHILDREN THE STATE TOOK AWAY 85–86, 281 (1999).

<sup>132</sup> *Id.* at 281.

<sup>133</sup> *Id.* at 95–97.

<sup>134</sup> *Id.* at 88.

<sup>135</sup> *Id.* at 91. Other prominent incidents involving allegations of child endangerment and large numbers of children have involved religious groups including the 1993 raid of the Branch Davidian compound in Waco Texas, and the 1953 raid on a polygamous community of Fundamentalist Latter Day Saints. See JON KRAKAUER, UNDER THE BANNER OF HEAVEN:

(continued)

Initially, no one sorted out which mother went with each child, much less who the absent fathers were, and no individualized findings seem to have been made about each child's well-being or risk.<sup>136</sup> This could be a cautionary tale about how normal procedures are disregarded when unusually large numbers of children from one family unit enter the child welfare system.

Fast forward to Saturday March 29, 2008, when the Texas Department of Family Protective Services (the "Department") received an anonymous telephone call "reporting that a sixteen-year-old girl named Sarah was being physically and sexually abused" at the Yearning for Zion Ranch (the "Ranch") outside Eldorado Texas.<sup>137</sup> The Ranch is a 1,700 acre complex that houses a "large community associated with the Fundamentalist Church of Jesus Christ of Latter Days Saints" ("FLDS"),<sup>138</sup> which will be described in greater detail below. At nine p.m. on the fourth work day after the Department received the tip about Sarah, Department investigators, accompanied by law enforcement officers as required under Texas law, entered the Ranch without a warrant.<sup>139</sup> They interviewed children and adults all night long and conducted a physical search of the Ranch looking for documents that might reveal underage or plural marriages.<sup>140</sup> Without benefit of a court order, the Department seized and removed all 468 children who they found on the Ranch and placed them in temporary emergency care.<sup>141</sup> They never located "Sarah."<sup>142</sup>

#### *A. Polygamy and the FLDS Movement*

Before we turn to the legality of the state's actions at the Ranch, analyzed in light of the legal principles discussed in the previous sections of this article, it is important to place the Ranch in historical context. The Church of Jesus Christ of the Latter-day Saints (the "Church"), popularly

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A STORY OF VIOLENT FAITH 16 (2004); Sue Anne Pressley, *Waco Cult's Children Describe Beatings, Lectures, War Games*, WASH. POST, May 5, 1993, at A01.

<sup>136</sup> SHAPIRO, *supra* note 131, at 88, 91.

<sup>137</sup> *In re* Tex. Dep't of Family & Protective Servs., 255 S.W.3d 613, 613 (Tex. 2008) (per curiam).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 613–14.

<sup>140</sup> *Id.* at 613.

<sup>141</sup> *Id.* at 613–14.

<sup>142</sup> *Id.* at 614.

known as the Mormons (and not to be confused with the FLDS), is a peculiarly American religion, now practiced around the world.<sup>143</sup> Joseph Smith founded the Church in New York during a period of intense religious enthusiasm known as the Second Great Awakening.<sup>144</sup>

Polygamy was not one of Mormonism's founding principles.<sup>145</sup> In 1843 Smith announced his "Revelation on Celestial Marriage" sanctifying plural marriage for men with the consent of their wives, but the doctrine was kept secret from all but Smith's closest circle for nearly a decade.<sup>146</sup> For purposes of this discussion of child welfare, it suffices to say what may well be obvious: the doctrine and practice of polygamy proved central to the animosity that arose between the Mormons and their neighbors, resulting in Smith's death at the hands of a mob, and several cross-country treks by the faithful until they arrived in "Zion," their term for what later became the State of Utah.<sup>147</sup> From early on, Mormons wanted to "step out of the profane world,"<sup>148</sup> and believed in their own special brand of exceptionalism, but polygamy gave them no choice except to live apart. According to one commentator, Mormon separatism, as much as polygamy, fueled the controversy over Mormonism that received so much attention in the second half of the nineteenth century.<sup>149</sup>

As a prerequisite for admitting the Territory of Utah to the Union, Congress demanded that the Church renounce polygamy and that the Territory criminalize plural marriage.<sup>150</sup> Along the way, Congress passed four federal statutes criminalizing polygamy,<sup>151</sup> several of which were

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<sup>143</sup> See Morgan Fife, *Predator in the Primary: Applying the Tort of Negligent Hiring to Volunteers in Religious Organizations*, 2006 BYU L. REV. 569, 574 (2006).

<sup>144</sup> SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 19 (2002).

<sup>145</sup> *Id.* at 22. The Doctrine of Celestial Marriage is recorded in *THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* § 132, Nos. 61–63 (1971), available at <http://scriptures.lds.org/en/dc/132>.

<sup>146</sup> GORDON, *supra* note 144, at 22–23.

<sup>147</sup> *Id.* at 24–25.

<sup>148</sup> *Id.* at 19; see also Martha M. Ertman, *The Story of Reynolds v. United States: Federal "Hell Hounds" Punishing Mormon Treason*, in *FAMILY LAW STORIES* 51, 55 (Carol Sanger ed., 2008).

<sup>149</sup> Ertman, *supra* note 148, at 56.

<sup>150</sup> See *id.* at 51–52, 52 n.3.

<sup>151</sup> *Id.* at 51, 52 n.4.

upheld by the Supreme Court in cases including *Reynolds v. United States*.<sup>152</sup> The defendant in *Reynolds* was secretary to Mormon leader Brigham Young.<sup>153</sup> George Reynolds claimed that he could not be prosecuted for marrying more than one woman in keeping with the tenets of his faith, because such conduct was constitutionally protected under the Free Exercise Clause, an argument which the Court expressly rejected.<sup>154</sup> Under pressure, and in financial disarray, the Church renounced polygamy in 1890, and Utah became a state in 1896.<sup>155</sup> As part of its negotiations for statehood, Utah included language prohibiting polygamy in its Constitution.<sup>156</sup>

Today, the Church condemns the practice of polygamy, which is grounds for excommunication, an option the Church apparently exercises regularly.<sup>157</sup> But the Church's agreement to renounce plural marriage in 1890 proved extremely controversial among Mormons.<sup>158</sup> A number of fundamentalist sects split off, and such movements remain active.<sup>159</sup> The Fundamentalist Church of Jesus Christ of the Latter-day Saints (FLDS) founded in 1935, the largest breakaway group, is estimated to have between ten and fifteen thousand adherents today.<sup>160</sup> Tapestry Against Polygamy, founded by women who have fled polygamist communities, helps other women to leave.<sup>161</sup> It estimates that as many as 100,000 fundamentalist renegade Mormons live in the United States, most of them

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<sup>152</sup> 98 U.S. 145 (1878); *see also* *Late Corp. v. United States*, 136 U.S. 1, 66 (1890) (leading to the seizure of church property by the federal government); Ertman, *supra* note 148, at 52.

<sup>153</sup> Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 122 (2006) (citing GORDON, *supra* note 144, at 114).

<sup>154</sup> *Reynolds*, 98 U.S. at 164–66. Lest there was any doubt about the import or vitality of *Reynolds*, in *Employment Div. v. Smith*, 494 U.S. 872, 878–79 (1990), the Court reiterated the distinction between permissible beliefs and practices based on those beliefs that violate criminal laws of general applicability.

<sup>155</sup> Ertman, *supra* note 148, at 52.

<sup>156</sup> UTAH CONST. art. III.

<sup>157</sup> ANDREA MOORE-EMMETT, *GOD'S BROTHEL* 30 (2004).

<sup>158</sup> GORDON, *supra* note 144, at 220.

<sup>159</sup> *Id.* at 236.

<sup>160</sup> MOORE-EMMETT, *supra* note 157, at 27 (the founders had all been excommunicated from the Church for refusing to abandon polygamy).

<sup>161</sup> *Id.* at 231

in Utah and neighboring states.<sup>162</sup> The Church is adamant that it neither countenances, nor has any connection to, these fundamentalist groups.<sup>163</sup>

A dramatic, highly publicized raid on the polygamous community at Short Creek (now Colorado City) Arizona in 1953 resulted in the removal of some 350 women and children and the arrest of thirty-six men but no criminal convictions; all of the children were ultimately returned to their parents because of lack of evidence.<sup>164</sup> Many observers attributed the governor's failure to win reelection to the unpopularity of the raid, which was seen as intruding on private matters.<sup>165</sup>

After the Short Creek raid, law enforcement officials paid scant attention to polygamists or their communities for nearly half a century, until Tom Green went on national television to flaunt his nine wives and twenty-five children, leading the Attorney General of Utah to prosecute him in 2000.<sup>166</sup> Green's prosecution for rape of his step-daughter, who conceived his child when she was thirteen and "married" Green at age fourteen, received much less popular attention.<sup>167</sup> Since then, warrants and indictments have issued for other highly visible leaders of fundamentalist polygamist communities.<sup>168</sup> In many other instances, however, authorities have turned a blind eye to violations of criminal and civil statutes, even those involving children, despite widespread media reports and rumors.<sup>169</sup>

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<sup>162</sup> *Id.* at 25–26.

<sup>163</sup> *Id.* at 30.

<sup>164</sup> *The Great Love-Nest Raid*, TIME MAG., Aug. 3, 1953, at 16; see also posting of Claire Hoffman to Under God, [http://newsweek.washingtonpost.com/onfaith/undergod/2008/04/polygamy\\_and\\_intrusion.html](http://newsweek.washingtonpost.com/onfaith/undergod/2008/04/polygamy_and_intrusion.html) (Apr. 6, 2008, 20:55 EST).

<sup>165</sup> *J. Howard Pyle Dead; Ex-Arizona Governor*, N.Y. TIMES, Dec. 1, 1987, at D28.

<sup>166</sup> *State v. Green*, 99 P.3d 820, 822–23 (Utah 2004) (upholding conviction and criminal statute barring bigamy).

<sup>167</sup> *State v. Green*, 108 P.3d 710 (Utah 2005).

<sup>168</sup> See, e.g., Press Release, Fed. Bureau of Investigation, Most Wanted Capture: Fugitive Jeffs Arrested in Las Vegas (Aug. 29, 2006) (arrested at traffic stop as accessory to statutory rape for arranging the marriage of an underage girl), available at <http://www.fbi.gov/page2/aug06/jeffs082906.htm>. He was convicted in 2007. Hilary Hylton, *Jeffs' Conviction: A Winning Ploy*, TIME, Sept. 25, 2007, <http://www.time.com/time/nation/article/0,8599,1665547,00.html>.

<sup>169</sup> See David Kelly & Gary Cohn, *Blind Eye to Culture of Abuse*, L.A. TIMES, May 12, 2006, at A1.

*B. The Yearning for Zion Ranch Problem*

In 2004 a group of FLDS members established the Yearning for Zion Ranch near Eldorado Texas, a town of less than 2,000 people.<sup>170</sup> From the moment they arrived, it was hardly a secret that residents of the Ranch practiced polygamy.<sup>171</sup> Indeed, the county sheriff watched the Ranch through binoculars, and Eldorado's local paper kept the Ranch on the front page for months.<sup>172</sup> Tensions mounted when Flora Jessop, who had escaped from Colorado City at age eighteen, held a press conference in Eldorado to warn the residents about the abuse of young girls at the hands of FLDS elders.<sup>173</sup> Yet the Eldorado authorities did nothing, because they claimed to be unaware of any illegal acts at the Ranch.<sup>174</sup>

Officials did not act until they received the anonymous phone call about Sarah on March 29, 2008, some four years after the FLDS members arrived at the Ranch.<sup>175</sup> They waited five full days after receiving the tip and did not seek a warrant to enter the Ranch or to remove any victims of abuse they might find there, as required by law—even though four weekdays on which the courts were open had passed.<sup>176</sup> In other words, the child welfare authorities did not initially act as if they thought the sexual abuse of a minor was an emergency.

When authorities searched the Ranch, they could not find any documentary evidence of multiple marriages or underage marriages.<sup>177</sup> If

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<sup>170</sup> Sylvia Moreno, *Polygamous Sect Moves In, and Texas Town Asks 'Why'?*, WASH. POST, Sept. 7, 2004, at A3; U.S. Census Bureau, American FactFinder, [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (search City: Eldorado, State: Texas) (last visited Mar. 25, 2009).

<sup>171</sup> Simon Romero, *Wary Texans Keep Their Eyes on the Compound of a Polygamous Sect*, N.Y. TIMES, Nov. 14, 2004, § 1, at 20; Moreno, *supra* note 170. Questions concerning the constitutional status of plural marriage, the treatment of women and girls within the FLDS, and whether girls and women in the community have the opportunity to make choices about their life styles are beyond the scope of this article.

<sup>172</sup> Romero, *supra* note 171.

<sup>173</sup> Moreno, *supra* note 170; *see also generally* CAROLYN JESSOP, ESCAPE (2007).

<sup>174</sup> Moreno, *supra* note 170.

<sup>175</sup> *In re* Tex. Dep't of Family & Protective Servs., 255 S.W.3d 613, 613 (Tex. 2008) (per curiam).

<sup>176</sup> Gretel C. Kovach & Kirk Johnson, *Officials Tell How Sect in West Texas Was Raided*, N.Y. TIMES, Apr. 11, 2008, at A19.

<sup>177</sup> *Id.*

they had been prepared, this would not have surprised them. Even in the nineteenth century, Mormons were careful not to record multiple marriages, and witnesses commonly refused to testify or asserted lack of knowledge or memory, making prosecution and conviction very difficult.<sup>178</sup>

Authorities did, however, note the presence of a number of young girls who appeared to be mothers or were pregnant.<sup>179</sup> During interviews several girls reportedly told investigators that “there was no age too young for girls to be married.”<sup>180</sup> Treating all of the residents of the Ranch as one family unit or “household,” the authorities initially removed about 100 children and over the course of three days removed 468 children from the Ranch—all without a prior court order.<sup>181</sup> The Department announced this was “the largest child protection case documented in the history of the United States.”<sup>182</sup> As would later become clear, it was the equivalent of an immigration raid of a large factory without any effort to distinguish workers with documents from those who lacked them.

Like migrant workers hoarded into a bus, the Department deposited all of the children from the Ranch at Fort Concho Historic Landmark and other temporary shelters around the state where they were joined by 139 women Ranchers who accompanied the children voluntarily as officials removed them from the Ranch.<sup>183</sup> Later, however, the Department separated the children from the adult women in order to prevent the mothers from discouraging the children from cooperating with investigators.<sup>184</sup> The children, who did not know anything about life

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<sup>178</sup> Ertman, *supra* note 148, at 74–75.

<sup>179</sup> *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*1–2 (Tex. App. May 22, 2008) (per curiam). The opinion of the court mentions that interviewers ascertained that five minors were currently or had been pregnant. *Id.* at \*2; *see also* ELISSA WALL, *STOLEN INNOCENCE: MY STORY OF GROWING UP IN A POLYGAMOUS SECT, BECOMING A TEENAGE BRIDE, AND BREAKING FREE OF WARREN JEFFS* 429 (2008).

<sup>180</sup> *In re Steed*, 2008 WL 2132014, at \*1.

<sup>181</sup> *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613, 613–14 (Tex. 2008) (per curiam).

<sup>182</sup> *Id.* at 614.

<sup>183</sup> Kovach & Johnson, *supra* note 176.

<sup>184</sup> Kirk Johnson, *Separated from Children, Sect Mothers Share Tears*, N.Y. TIMES, Apr. 16, 2008, at A15.

outside the Ranch, and were homeschooled on the property,<sup>185</sup> may well have regarded investigators with suspicion in any event. In an effort to ease the transition out of Ranch life, caretakers sheltered the children from the ubiquitous signals of modern life such as television and processed food.<sup>186</sup>

The authorities who descended on the Ranch may or may not have been familiar with the growing literature about underage marriages among FLDS polygamists and other reports of abusive behavior in the FLDS community, but days later similar images would form the core of the Department's case against the parents of children seized from the Ranch.<sup>187</sup> Officials may or may not have known that the FLDS teaches that plural marriage is the route to heaven and is a sacramental act.<sup>188</sup> For example, shortly after the raid, a letter in an online posting board explained that "[i]f God had meant a [thirteen] year old girl not to be pregnant he would not have given her the gift of the ability to conceive a child. If God had meant only young men to father children . . . he would have . . . stopped their production of sperm when they became [twenty-five] years of age."<sup>189</sup>

After it removed all of the children from the Ranch, the Department filed several petitions seeking emergency orders of removal and limiting the parents' access to their children, as well as seeking genetic testing of

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<sup>185</sup> Kirk Johnson & Dan Frosch, *Children Face New World in Texas' Care, But Still No TV*, N.Y. TIMES, Apr. 26, 2008, at A1 (describing preparations to receive twenty-two Ranch children at a San Antonio shelter).

<sup>186</sup> *Id.* Authorities also removed everything colored red because some FLDS members believe that Jesus Christ will return to earth wearing red robes and the color is reserved for him alone. *Id.*

<sup>187</sup> See generally JESSOP, *supra* note 173; MOORE-EMMETT, *supra* note 157; WALL, *supra* note 179; see also *Crimes Associated with Polygamy: The Need for a Coordinated State and Federal Response, Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 24 (2008) (statement of Stephen Singular) (noting alleged physical, emotional, and sexual abuse of boys at a school run by Warren Jeffs).

<sup>188</sup> KATHLEEN FLAKE, *THE POLITICS OF AMERICAN RELIGIOUS IDENTITY: THE SEATING OF SENATOR REED SMOOT, MORMON APOSTLE* 42–44 (2004).

<sup>189</sup> Posting by Biological and Social Facts to <http://deseretnews.com/article/1,5143,695268373,00.html> (Apr. 8, 2008, 21:08 MST) (online response to Brian West, *12 Attorneys Are Hired to Defend FLDS Members in Raid Aftermath*, DESERET NEWS, Apr. 8, 2008).

the residents of the Ranch in order to identify parents where necessary.<sup>190</sup> The Texas district court conducted an adversarial hearing on the Department's motions on April 17 through 18.<sup>191</sup> Pandemonium reigned. As the Supreme Court of Texas subsequently described it: "[t]he hearing was attended by scores of attorneys for the parties, attorneys ad litem [for the children], guardians ad litem, Texas Court appointed Special Advocates (CASA), and many others. The hearing was conducted in the courtroom in San Angelo with overflow participants in the city auditorium."<sup>192</sup> According to one observer, about one hundred of the lawyers participating in the hearing were in the overflow room, communicating by videoconference.<sup>193</sup>

Section 262.201 of the Texas Code provides that when any child is taken from the custody of his or her parents without a court order, the court:

shall order the return of the child . . . unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that: (1) there was a danger to the physical health or safety of the child . . . and for the child to remain in the home is contrary to the welfare of the child; (2) the urgent need for protection required the immediate removal of the child and reasonable efforts . . . for the safety of the child, were made to eliminate or prevent the removal of the child; and (3) reasonable efforts have been made to enable the child to return home, but there is a substantial risk of a continuing danger if the child is returned home.<sup>194</sup>

The Department had not yet fully determined which children belonged to which parents. It justified the mass removals predominantly on the basis

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<sup>190</sup> *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 614 (Tex. 2008) (per curiam). A hearing is required within fourteen days of an emergency removal. TEX. FAM. CODE ANN. § 262.201(a) (Vernon 2008).

<sup>191</sup> *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d at 614.

<sup>192</sup> *Id.* at 615.

<sup>193</sup> Kirk Johnson & John Dougherty, *Busy Day at Court Handling Sect's Children*, N.Y. TIMES, Apr. 18, 2008, at A14.

<sup>194</sup> TEX. FAM. CODE ANN. § 262.201(b).

that the Ranch was “essentially one household . . . with a single, common belief system.”<sup>195</sup> The Department’s lead investigator told the court that “due to the ‘pervasive belief system’ of the FLDS, the male children are groomed to be perpetrators of sexual abuse and the girls are raised to be victims of sexual abuse.”<sup>196</sup> More than one witness called by the Department at the hearing pointed to the “pervasive belief system” among Ranch residents “that it is acceptable for girls to marry, engage in sex, and bear children as soon as they reach puberty, and that this ‘pervasive belief system’ poses a danger to the children.”<sup>197</sup> Moreover, the state argued, it had “reason to believe that a child had been sexually abused in the ranch ‘household,’”<sup>198</sup> that is, one single child.

The Department also presented evidence that twenty females living at the Ranch had become pregnant between the ages of thirteen and seventeen.<sup>199</sup> All but five of them were adults by March 29, 2008.<sup>200</sup> The five minors were all above the age of fifteen when they became pregnant, and all were at least sixteen-years-old on March 29, 2008.<sup>201</sup> The Department did not present any evidence regarding the marital status of girls who had become pregnant while minors; nor did it present any evidence that any boy under the age of majority had been physically or sexually abused on the Ranch.<sup>202</sup> Nor did it specifically identify any prepubescent children presumed to be at immediate risk of sexual abuse.<sup>203</sup>

The district court granted all of the Department’s petitions and issued temporary orders continuing the Department’s custody of all of the

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<sup>195</sup> *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*2 (Tex. App. May 22, 2008) (per curiam).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at \*1.

<sup>200</sup> *See id.* at \*2.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* The Texas Court of Appeals expressly noted that “[u]nder Texas law, it is not sexual assault to have consensual intercourse with a minor spouse to whom one is legally married.” *Id.* at \*2 n.7 (citing TEX. PENAL CODE ANN. § 22.011(a), (c)(1)–(2) (Vernon 2003)).

<sup>203</sup> *Id.* at \*2.

children removed from the Ranch and prohibiting visitation with their parents absent the Department's consent.<sup>204</sup>

Thirty-eight women who had been living at the Ranch on March 29 and whose children were taken into emergency custody by the Department filed an appeal, claiming that the Department had failed to meet its burden of proof under section 262.201 and that the statute thus required the immediate return of their children.<sup>205</sup> The Texas Court of Appeals for the Third District granted a writ of mandamus and ordered the district court to vacate its temporary orders granting sole managing conservatorship of the 468 children to the Department.<sup>206</sup> It noted in passing that the exact number of children involved remained uncertain, because the Department was still trying to ascertain the ages of some of the children it had taken into custody.<sup>207</sup>

Alluding to parental rights, the Texas Court of Appeals emphasized that removal on an emergency basis without giving the parents a chance to defend themselves in court is “an extreme measure.”<sup>208</sup> The legislature, it underscored, has authorized such drastic action “only when the circumstances indicate a danger to the physical health . . . of the children and the need for protection is so urgent that immediate removal . . . is necessary.”<sup>209</sup> After reviewing the evidence the Department presented at the hearing, the Court of Appeals concluded that the Department had failed to establish any of the following: a risk of *physical* danger to the children, an urgent need for protection, that the Ranch was one household, or that all of the residents shared a single belief system.<sup>210</sup>

Focusing on the “belief system,” without referencing the Free Exercise Clause, the Court of Appeals stated that “there are differences of opinion among the FLDS community as to what is an appropriate age to marry, how many spouses to have, and when to start having children—much as there are differences of opinion regarding the details of religious doctrine

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<sup>204</sup> *In re* Tex. Dep't of Family & Protective Servs., 255 S.W.3d 613, 615 (Tex. 2008) (per curiam).

<sup>205</sup> *In re Steed*, 2008 WL 2132014, at \*1.

<sup>206</sup> *Id.* at \*4.

<sup>207</sup> *Id.* at \*2 n.6.

<sup>208</sup> *Id.* at \*1.

<sup>209</sup> *Id.*

<sup>210</sup> *See id.* at \*3.

among other religious groups.”<sup>211</sup> But, the court cautioned, even if there was a uniform belief system as the Department alleged, its existence “by itself, does not put the children of FLDS parents in physical danger. It is the imposition of certain alleged tenets of that system on specific individuals that may put them in physical danger.”<sup>212</sup>

The Supreme Court of Texas affirmed the Texas Court of Appeals and remanded to the district court with orders to vacate the temporary orders and to release the 126 children whose mothers were party to the appeal to their parents.<sup>213</sup> The Supreme Court’s brief opinion mildly summed up its view that the Department’s actions in removing the children were “not warranted” and that the Department’s unsupported assertion that it would be unable to protect the children once they returned home was conclusory.<sup>214</sup> But it expressly reminded the district court and the Department that they did not have to dismiss the protective services cases regarding the Ranch children and that they had many other appropriate options at their disposal.<sup>215</sup> The court succinctly noted that the case raised “important, fundamental issues concerning parental rights and the State’s interest in protecting children”<sup>216</sup> but did not address those issues.

Since the Supreme Court of Texas’s ruled in May 2008, many families have left the Ranch, while others have returned.<sup>217</sup> Gradually, the Department closed the case files on more than half the children.<sup>218</sup> Thereafter, Department caseworkers began home visits at the Ranch.<sup>219</sup> But if the concern involves belief systems rather than behavior, it is

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<sup>211</sup> *Id.* at \*3 n.9.

<sup>212</sup> *Id.* at \*3.

<sup>213</sup> *In re* Tex. Dep’t of Family & Protective Servs., 255 S.W.3d 613, 615 (Tex. 2008) (per curiam).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Sarah Corbett, *Children of God*, N.Y. TIMES MAG., July 27, 2008, at 39 (photo essay emphasizing the quaintness of the Ranch population).

<sup>218</sup> Brooke Adams, *Texas Drops Cases Involving 49 More Kids*, SALT LAKE TRIB., Aug. 23, 2008 (to date, authorities have closed cases involving approximately 150 children removed from the Ranch, but roughly 290 cases remain open); Ben Winslow, *‘Mulligan’ Sought Over FLDS Evidence*, DESERET NEWS, Sept. 5, 2008, at A01.

<sup>219</sup> Kirk Johnson & Gretel C. Kovach, *Sect’s Children Returned to Parents, but Inquiry Continues*, N.Y. TIMES, June 3, 2008, at A14.

unclear that the Department may constitutionally attempt to change those beliefs. If beliefs are at the core of the Department's concerns, parenting classes are unlikely to allay the Department's concerns and, if addressed to communications about polygamy, would probably violate the Constitution, as discussed below. As this article goes to press, in September 2008 lawyers representing thirteen Ranch mothers sued to have the entire protective services case dismissed on the grounds that the Department had failed to comply with the district court's July discovery order requiring the Department to turn over its evidence to the parent-defendants.<sup>220</sup> The Department's own attorney conceded that the numbers are overwhelming, and asked for a "mulligan,"<sup>221</sup> a golf term for a do-over, here, a chance to start the case over without prejudice.

#### V. UNANSWERED QUESTIONS

The strange case of Yearning for Zion Ranch raises questions that the Texas courts have not addressed. What if there was an opportunity for a mulligan back to March 29, 2008, one in which sound legal principles were applied? The final section of this article turns to these questions.

##### *A. Unexplored Issues Regarding the Department's Actions*

Neither of the court opinions arising from the removal of the children from the Ranch directly addressed the procedural irregularities of the Department's actions, although it may be inferred that the initial warrantless removals were unjustified from the holding that the Department failed to meet its burden and that its actions violated the rights of the parents and unnecessarily traumatized the children.<sup>222</sup> The decisions of both appellate courts underscore the fundamental nature of the basic

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<sup>220</sup> Winslow, *supra* note 218.

<sup>221</sup> *Id.* In related developments, several FLDS girls entered foster care when their mother refused to limit her contact with men who had underage wives. Gretel Kovach, *Texas Seeking Custody of 8 Children From Sect*, N.Y. TIMES, Aug. 6, 2008, at A17; *Judge Orders Girl in Sect to Foster Care*, N.Y. TIMES, Aug. 19, 2008, at A14 (several FLDS girls entered foster care when their mother refused to limit her contact with men who had underage wives); see also Brooke Adams, *Teen, Allegedly Wed at 12 to FLDS Prophet, Is Returned to State Custody*, SALT LAKE TRIB., Aug. 19, 2008.

<sup>222</sup> *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 614–15 (Tex. 2008); *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*3 (Tex. App. May 22, 2008) (per curiam) (citing TEX. FAM. CODE ANN. § 262.201 (Vernon 2008)).

legal principles concerning the constitutional rights of parents to the care, custody and nurture of their children discussed in Part III above. But several issues implicit in the facts of the Ranch raid remained unexplored by the courts.

The Texas courts did not discuss the significance of the “tip” that the Department received in late March.<sup>223</sup> They failed to comment on the fact that the Department did not respond to the initial tip as an emergency and had several days in which to investigate and seek warrants for removal.<sup>224</sup>

It is likely that the Department would defend its actions by citing the fear that residents of the Ranch would leave the jurisdiction while the Department sought a warrant. But because Texas requires law enforcement officials to accompany child welfare workers,<sup>225</sup> it probably would have been possible to watch the Ranch and intervene on an emergency basis if families suspected of abuse tried to leave.

Several months after the removals occurred, the United States Court of Appeals for the Fifth Circuit issued an opinion in *Gates v. Texas Department of Protective and Regulatory Services*,<sup>226</sup> a case involving the Department but arising from a different set of facts. *Gates* was obviously not available to the Department prior to its actions at the Ranch, but it bears directly on several particulars of the Ranch cases. *Gates* reiterates that the general requirements of the Fourth Amendment govern searches and seizures by child welfare officials in the Fifth Circuit.<sup>227</sup> Under Fourth Amendment jurisprudence, individualized suspicion is required before the government acts either to search or to seize.<sup>228</sup>

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<sup>223</sup> *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d at 613; *In re Steed*, 2008 WL 2132014, at \*4.

<sup>224</sup> *See In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d at 613; *In re Steed*, 2008 WL 2132014, at \*4.

<sup>225</sup> TEX. FAM. CODE ANN. § 262.301.

<sup>226</sup> 537 F.3d 404 (5th Cir. 2008) (parents sued the Department after investigators entered their home in their absence and removed all of their children, including one who was at a school function, all without warrants).

<sup>227</sup> *Id.* at 420 (“[I]t is well established in this circuit that the Fourth Amendment regulates social workers’ civil investigations.” (citing *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 401 (5th Cir. 2002))). This is the most forgiving standard used in any of the circuits.

<sup>228</sup> *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

Even if the Department treated the Ranch as one residence for purposes of investigation, it never distinguished among the children who might reasonably be considered at imminent risk and those who were not at risk,<sup>229</sup> a point that will be developed further below. The doctrine of parental rights, combined with the Fourth Amendment analysis applicable in Texas, surely means that there must be individualized suspicion of each parent before his or her child is removed.

*Gates* clarifies that under Fourth Amendment analysis, “an anonymous tip regarding child abuse will rarely be sufficient to justify the seizure of a child.”<sup>230</sup> As described above, the Department entered the Ranch and seized children on the basis of an anonymous tip.<sup>231</sup> *Gates* explains that “before seizing a child on the basis of an anonymous tip, [the Department] must sufficiently corroborate the tip” through its own investigation, including interviews “or perhaps visual inspection of any injuries that can be seen without the removal of the child’s clothing.”<sup>232</sup> This means that the law bars a full search of the child’s body. Under these terms, it is far from clear that the Department developed sufficient corroboration before removing children from the Ranch.

*Gates* also addressed the issue of warrantless entry to investigate suspected child abuse. Holding that the government was immune from liability in *Gates* because the law had not been clear prior to its ruling, the court announced the standard for warrantless removals in child welfare cases:

[T]he government may not seize a child from his or her parents absent a court order, parental consent, or exigent circumstances. Exigent circumstances in this context means that, based on the totality of the circumstances, there is reasonable cause to believe that the child is in imminent danger of physical or sexual abuse if he remains in his home.<sup>233</sup>

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<sup>229</sup> *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d at 613.

<sup>230</sup> *Gates*, 537 F.3d at 433.

<sup>231</sup> *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d at 613.

<sup>232</sup> *Gates*, 537 F.3d at 433.

<sup>233</sup> *Id.* at 429 (footnote omitted).

If this standard had been established at the time authorities entered the Ranch, it should have been clear to the Department that the conditions at the Ranch did not satisfy the standard of imminent danger—at least for most of the children on the Ranch. Perhaps the Department could have argued that girls considered of marriageable age by the FLDS were at imminent risk, but it is unlikely a court would have found even this narrower argument persuasive in the absence of more specific evidence.

Testimony at the trial in *Gates* included statements by several employees of the Department that “they never obtain court orders before removing children from their homes.”<sup>234</sup> Because the Fifth Circuit did not receive evidence regarding whether other removals in the state involved parental consent or exigent circumstances, the court declined to hold that the Department persistently violated the constitutional rights of parents.<sup>235</sup> Shortly after the opinion issued, in response to cautionary language in the *Gates* opinion, the Department issued an “urgent legal advisory” to all personnel.<sup>236</sup> The new standard requires caseworkers to obtain parental consent or a court order before removing children ““unless life or limb is in immediate jeopardy or sexual abuse is about to occur.””<sup>237</sup> If this standard had been operative, it is unlikely that children would have been removed from the Ranch.

Finally, the new standard expressly requires that child welfare workers must weigh the risk of abuse to *each* child in the household before removing that child, a distinct break from the Department’s prior “practice of removing all children in a household when abuse was suspected on any single child.”<sup>238</sup> In *Stanley v. Illinois*,<sup>239</sup> where the Supreme Court held that an unmarried father must be given a hearing before losing his rights to his children,<sup>240</sup> the Court observed, “[p]rocedure by presumption is always cheaper and easier than individualized determination.”<sup>241</sup> But, it warned,

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<sup>234</sup> *Id.* at 437.

<sup>235</sup> *Id.* at 436–37.

<sup>236</sup> Janet Elliott, *Removing Kids Made Harder for CFS; Investigators Must Seek Court Order in All but Dire Situations*, HOUSTON CHRON., Aug. 27, 2008, at A-1.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> 405 U.S. 645 (1972).

<sup>240</sup> *Id.* at 657–58.

<sup>241</sup> *Id.*

efficiency cannot be permitted to run “roughshod over the important interests of both parent and child” in maintaining family integrity.<sup>242</sup> So too, where the state suspects abuse.

*B. Parental Rights to Advocate Illegal Behavior*

Because the Texas courts found that the Department had not met its burden to show that the emergency removals from the Ranch were justified, the courts never analyzed the claims that polygamous residents of the Ranch might have made in defense of their lifestyle.<sup>243</sup> They would likely have argued that they had a right under the Free Exercise Clause and the doctrine of parental rights to introduce their children to the concept of polygamy by discussion and example. While avoiding doctrinal analysis, the Texas Court of Appeals chided the Department for disregarding potential Free Exercise Clause claims.<sup>244</sup> In this respect, the court echoed, though it did not cite, the Supreme Court of Pennsylvania which held that a court may not prevent a parent from communicating to his child his religious belief in an illegal act, including his belief in polygamy, absent a showing “that advocating the prohibited conduct would jeopardize the physical or mental health, or safety of the child, or have a potential for significant social burdens.”<sup>245</sup>

In *Shepp v. Shepp*, a Mormon couple divorced due to the father’s nascent fundamentalism, including a desire to practice polygamy, and received joint custody of their daughter.<sup>246</sup> The Church excommunicated the father.<sup>247</sup> After the divorce, the father remarried, and his new wife agreed that he could seek a second spouse.<sup>248</sup> When the father told the daughter to prepare to have another mother through a plural marriage, the mother sued for sole custody (the father in turn cross-petitioned for primary physical custody).<sup>249</sup> The trial court apparently believed the father’s assurances that he would not try to marry his daughter into a

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<sup>242</sup> *Id.* at 657.

<sup>243</sup> *In re Steed*, No. 03–08–00235–CV, 2008 WL 2132014, at \*6–7 (Tex. App. May 22, 2008) (per curiam).

<sup>244</sup> *See id.* at \*3.

<sup>245</sup> *Shepp v. Shepp*, 906 A.2d 1165, 1174 (Pa. 2006).

<sup>246</sup> *Id.* at 1167.

<sup>247</sup> *Id.* at 1166.

<sup>248</sup> *Id.* at 1167.

<sup>249</sup> *Id.* at 1166–67.

polygamous relationship, but that he wanted her to understand his views and have choices about her own life.<sup>250</sup> The trial court awarded joint custody but “specifically prohibited” the father from teaching his daughter “about polygamy, plural marriages or multiple wives.”<sup>251</sup> The trial court heard testimony from a step-daughter of the father’s (the mother’s daughter from a previous marriage) that when she was thirteen, the father told her she would go to hell if she did not agree with or practice polygamy.<sup>252</sup> She testified that he also told her that she could marry legally in Pennsylvania at age fourteen and suggested that since “we were already related . . . it would be a good idea for us to be married.”<sup>253</sup> The father denied the accusation that he had proposed a polygamous relationship to his step-daughter.<sup>254</sup> He appealed to the superior court, which affirmed the order barring the father from discussing his views on plural marriage with his daughter.<sup>255</sup>

On appeal from the superior court, the Supreme Court of Pennsylvania correctly analyzed the problem under the hybrid claims doctrine enunciated by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>256</sup> Under *Smith*, a neutral law of general application (such as a law criminalizing the use of peyote or the practice of polygamy) may be enforced against an individual who claims that it overrides the demands of his religion.<sup>257</sup> If the Free Exercise claim is combined with another constitutional claim, however, specifically the fundamental right of parents to raise their children, a hybrid claim results.<sup>258</sup> *Smith* does not apply to hybrid claims.<sup>259</sup> Instead, courts are instructed to apply strict scrutiny to the government regulation.<sup>260</sup> In *Shepp v. Shepp*, the Supreme Court of Pennsylvania concluded that because the trial court had not found that the father’s teachings alone posed a grave

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<sup>250</sup> *Id.* at 1167.

<sup>251</sup> *Id.* at 1168.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> 494 U.S. 872 (1990).

<sup>257</sup> *Id.* at 885.

<sup>258</sup> *Id.* at 881.

<sup>259</sup> *Id.* at 882.

<sup>260</sup> *Id.* at 894.

threat to his daughter, the Superior Court erred in upholding the restriction on the father's speech and religious practice.<sup>261</sup> The Supreme Court emphasized:

[T]he illegality of the proposed conduct on its own is not sufficient to warrant the restriction. Where, as in the instant matter, there is no finding that discussing such matter constitutes grave threat of harm to the child, there is insufficient basis for the court to infringe on a parent's constitutionally protected right to speak to a child about religion as he or she sees fit.<sup>262</sup>

A parent's constitutional right to the care and custody of a child includes the right to inculcate the child in the parent's beliefs.

*C. What Should the Department Have Done?*

In Part V.C, I show how applying the legal principles and procedural protections set out in previous sections would have led to a better outcome at the Ranch. If caseworkers and other decision-makers had respected family integrity, and the legal procedures and clinical practices that flow from that respect, they would have been more likely to prevail in court. More important, the outcome for the children needlessly removed from the Ranch, who were likely traumatized by their initial contact with the outside world and the separation from their mothers, would have been better as well.

Three critical results would have flowed from a more refined approach to the investigation. First, respect for parental and individual rights would have diminished the risk of the overreaching that led to a sweep of all the children on the Ranch without distinction. The Department's failure to identify which children were at the greatest risk exposed the Department to charges that it proceeded based on the religious beliefs and cultural practices of the adult residents, not on verified risks to individual children,

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<sup>261</sup> 906 A.2d 1165, 1173 (Pa. 2006); see also Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 674 (2006).

<sup>262</sup> *Shepp*, 906 A.2d at 1174. But see *id.* at 1178 (Baer, J., dissenting) (expressing concern that on these facts the father's discussion with the step-sister crossed the line to conduct, and that the court ignored the "substantial threat" to social order that is also part of the analysis under *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972)).

as required by law. Second, invocation of family integrity, followed by individualized identification of at-risk children would have promoted reliance on standard clinical practices and made standard procedural protections for family members more likely. Third, to the extent that normal practices and procedures proved inadequate to the challenges posed by the Ranch, reliance on the legal norms of child protection would have insulated the children from trauma and perhaps led to some of the alternative approaches described below.

It should be obvious from the discussion in the preceding section that the Department radically overextended its reach by assuming that all minors at the Ranch were at imminent risk of harm. Remember that the anonymous tip concerned only one girl named Sarah. If the Department had not been aware of the allegations that had swirled around the Ranch since the FDLS community had arrived, it would normally have corroborated the tip and obtained a warrant before visiting the Ranch if it thought that an emergency existed and anticipated removing any children. If agency caseworkers did not think there was an emergency, they would have proceeded with an orderly investigation.

The Department should only have responded on an urgent basis to children who fell in the demographic group deemed most at risk based on the tip it had received: pubescent girls. There were no allegations of physical, sexual, or emotional abuse directed at infants, younger girls or boys of any age.<sup>263</sup> The Texas Supreme Court noted that the 126 children whose removal was at issue in the case it heard included 117 children under the age of thirteen, several whose ages were unknown, and four boys at least two of whom were teenagers.<sup>264</sup> The court did not develop the significance of this observation: the group of 126 included at most five girls who could be expected to have reached puberty and who might thus be at imminent risk if the Department's suspicions proved justified. The court did not state what should be transparent. If the Department was worried about forced underage marriages or statutory rape of girls able to conceive, it need only have removed those five girls and any other girls over the age of twelve or thirteen whose mothers were not parties to the action against the Department.

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<sup>263</sup> See *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 613–15 (Tex. 2008) (per curiam).

<sup>264</sup> *Id.* at 615.

Once the Department proceeded prudently, limiting the scope of its urgent inquiry to pubescent girls, many of the obstacles to investigation, proper handling of evidence, and the risks of mass justice would have been eliminated. If the demographics of the plaintiffs' children in the case that reached the Texas Supreme Court are representative of the Ranch population, then the Department would have only opened about twenty case files involving teenage girls at the Ranch.<sup>265</sup> This caseload could have been managed in a more orderly, thoughtful, and defensible manner.

The Department had many options short of removal if it was correct that there was a basis for its apparent assumption that the pervasive views of the FLDS endangered teenage girls. Like all protective services agencies, the Department has a wide range of tools in its arsenal, none of which it used before raiding the Ranch. These include investigatory home visits, followed where necessary by continuing oversight in the home, parent education, counseling for parents and children and other services.<sup>266</sup> With court permission it can also obtain medical examinations to confirm past physical or sexual abuse (or pregnancy) before removing a child. Investigations and services would also help identify any issues concerning the other children in the families who might require the Department's attention. These tools may be intrusive, but they are much less invasive of family privacy than removal. The Department should have relied on these routine tools in the first instance given the absence of a genuine emergency.

The Department apparently departed from standard practices because it feared that delay could place other girls at risk. Institutional limitations may have exacerbated the almost panicked way that the Department responded to the tip it received. Nothing in its experience had prepared the

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<sup>265</sup> As this article was going to press, the Department released the results of its internal investigation. It concluded that forty-three girls ranging in age from twelve to seventeen were removed from the Ranch, of whom twelve were subsequently "confirmed victims of sexual abuse and neglect because they were married at ages ranging from [twelve] to [fifteen]." TEXAS DEP'T OF FAMILY & PROTECTIVE SERVS., ELDORADO INVESTIGATION 3 (2008), [http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22\\_Eldorado](http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22_Eldorado) [hereinafter ELDORADO INVESTIGATION]. Many details including dates, numbers and other facts, differ slightly from those reported in other sources including court opinions, but no effort has been made to revise this article just before going to press.

<sup>266</sup> Before closing the cases involving ninety-six percent of the children removed from the Ranch, the Department belatedly used many of these tools. *See id.*

county child welfare workers to handle a complex, high profile case. In defending its actions after the fact, the Department implied that the sheer numbers of children at the Ranch overwhelmed the local agencies. Schleicher County, in which Eldorado is located, had “only [nineteen] reports of abuse of neglect” assigned for investigation during all of 2007.<sup>267</sup> Nor is Schleicher County alone in its lack of preparedness to deal with a very complex child welfare case.

Imagine how differently things might have gone if an experienced inter-professional team of consultants had been available at short notice to consult with local authorities before they approached the Ranch and as they attempted to decipher the situation. Such a team would include experts on law, doctors, psychologists and social workers with expertise in abuse and neglect. Some child welfare departments have contracts with such teams, but they are expensive and fairly rare. If the federal government retained teams of consultants for difficult cases, and it was easy to reach them, perhaps the level of anxiety within the Department could have been defused (in part because responsibility would be shared) and some of the approaches suggested below would have been put in place instead of mass removals.

Even if this hypothetical dream team were available, experts would still find it difficult or impossible to establish that any particular girl was at risk of imminent “celestial marriage.” Punishing past conduct is a much more straightforward proposition. The state should have relied on the criminal code to penalize violations that had already occurred at the Ranch. Removing and prosecuting adults may have rendered removal of teenage girls unnecessary, or at least have created the circumstances in which planned removals with warrants could have replaced ill-thought-out, warrantless emergency removal.<sup>268</sup>

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<sup>267</sup> *Id.* at 10.

<sup>268</sup> Approximately four months after the Department removed children from the Ranch, a Grand Jury indicted six men from or associated with the Ranch, and another three were indicted the following month. Brooke Adams, *Jeffs, Two Others Face Bigamy Charges in Texas*, SALT LAKE TRIB., Aug. 23, 2008. Charges included sexual assault based on underage marriage and bigamy. *Id.* The grand jury indicted twelve male residents of the Ranch on charges ranging from “sexual assault of a child” and “aggravated sexual assault” to bigamy and “failure to report abuse.” ELDORADO INVESTIGATION, *supra* note 265, at 15.

The grounds for prosecution are not complicated. Under Texas law, girls between the ages of sixteen and eighteen can marry with parental consent.<sup>269</sup> But girls under the age of sixteen may not marry under any circumstances. Marriages of underage girls are void ab initio.<sup>270</sup> Statutory rape is a crime, but in Texas consensual sex with an underage spouse is not considered sexual assault.<sup>271</sup> Bigamy is also a crime.<sup>272</sup> Therefore, if the Department could prove that underage girls conceived at the Ranch and could establish paternity by genetic testing, the state could prosecute all fathers who were “married” to more than one person at the time of conception, and all men who fathered children by girls under the age of sixteen regardless of claimed marital status. As long as the statute of limitations has not run, it should not matter how old the girls are now.<sup>273</sup>

Reliance on the criminal code—*before* rather than *after* removing vulnerable children—would have had the additional benefit of deterrence: discouraging future celestial marriages.<sup>274</sup> Since criminal conduct in pursuit of religious beliefs is subject to penalty, once the state established a pattern of illegal acts at the Ranch, it might have been able to define, with at least a modicum of precision, a reasonable stage prior to consummation of the crime (and in this instance, the marriage) when it would be justified in intervening to protect the innocent prospective victim. Of course, any girl could voluntarily enter an illegal plural union if she chose to do so after reaching the age of majority.

Continued oversight to protect girls as they mature is critical in the likely event that deterrence is not effective. The compulsory education

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<sup>269</sup> TEX. FAM. CODE ANN. §§ 2.101–2.103 (Vernon 2006).

<sup>270</sup> *Walter v. Walter*, 433 S.W.2d 183, 191 & n.1 (Tex. Civ. App. 1968).

<sup>271</sup> TEX. PENAL CODE ANN. § 22.011(a), (c)(1)–(2) (Vernon 2003).

<sup>272</sup> *Id.* § 25.01.

<sup>273</sup> The appellate court noted that fifteen of the twenty girls who became pregnant at the Ranch are now adults. *In re Steed*, No. 03–08–00235–CV, 2008 WL 2132014, at \*2 (Tex. App. May 22, 2008) (per curiam). This is irrelevant to criminal prosecution, since the state has an interest in punishing the illegal conduct regardless of the views of the mothers.

<sup>274</sup> I am not unaware of the risk that residents of the Ranch would leave Texas for another jurisdiction. The Texas Department, however, could follow the movements of such a large group of people (assuming the community was important to them and they did not scatter) and alert child welfare officials in the state to which the residents relocated to follow up.

laws provide a rich avenue for oversight.<sup>275</sup> The Ranch children apparently do not attend public school.<sup>276</sup> Home schooling is legal in Texas, as in every other state, subject to satisfaction of certain criteria.<sup>277</sup> Schools traditionally perform as an early warning system of child abuse, like the canary in the coal mine, because teachers and other school officials are required to report suspected abuse to child welfare authorities for investigation.<sup>278</sup> In a case involving allegations like those brought against the Ranch, where the state has ongoing concerns, including whether young girls will be “married” in the future, one effective way to supervise the children informally would be to require that they attend public school. The state would be justified in requiring children from the Ranch to attend school in Eldorado in order to ensure that the schools were not under the control of the FLDS.

In the public schools, health education classes provided for all students in the district could be used to make the girls aware of their right not to have a sexual relationship or enter a “marriage” arranged by others without singling out the Ranch residents for special instruction. Teachers and other school personnel could, however, pay especially close attention to girls from the Ranch as they approached and entered puberty to be alert for signs of change or distress. In addition, physical distance from the Ranch on a regular basis would provide the children from the Ranch with an opportunity to seek help if they chose to do so, something that is extremely difficult, if not impossible, while confined in a closed and closely-supervised community.

Courts in other jurisdictions have expressly held that regulation of home schooling does not violate parental free exercise rights.<sup>279</sup> In a case involving allegations of child neglect, one appellate court recently held that “permission to home school may constitutionally be overridden in order to protect the safety of a child who has been declared dependent” and in order

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<sup>275</sup> TEX. EDUC. CODE § 25.085 (Vernon 2006).

<sup>276</sup> See Moreno, *supra* note 170.

<sup>277</sup> See, e.g., *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 435 (Tex. 1994).

<sup>278</sup> TEX. FAM. CODE. § 261.101 (Vernon 2008).

<sup>279</sup> *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 235 & n.5 (3rd Cir. 2008).

to keep the child in “regular contact with mandated reporters of abuse and neglect.”<sup>280</sup>

The mess that the Department made of the cases against the Ranch families was completely unnecessary. The state has a legitimate interest in protecting teenage girls from sexual abuse and exploitation, even if done in the name of religion. By ignoring the substantive and procedural rights of parents, the Department may have set back the cause of public intervention in fundamentalist polygamous communities. In addition to squandering an opportunity for reasoned intervention, the Department squandered over \$12 million that could have been applied to services and prevention for children on the Ranch and elsewhere in Texas.<sup>281</sup> Instead of waiting another fifty years to engage in child protection within the walls of separatist sects, authorities should learn from the debacles in Eldorado and, years earlier, in Chicago.

Child welfare agencies serve children best when they proceed with finesse and respect legal doctrines. The mistakes made in Texas underscore why it is so important for child welfare workers to apply legal standards before acting. Those mistakes also remind us why best practices require that agencies conduct thorough investigations, provide well-targeted services where needed, and use targeted removals only as a last resort and in accordance with all applicable legal requirements including judicial supervision. These principles apply well beyond the unusual circumstances at Yearning for Zion Ranch.

## VI. CONCLUSION

Mass child protection efforts, like all attempts at mass justice, violate the basic requirement of individualized fault and tend to rely on stereotypes rather than evidence and analysis. Episodes like the ones in Chicago in 1994 and at the Ranch in 2008 are particularly dramatic. They

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<sup>280</sup> *Jonathan L. v. Super. Ct. of L.A. County*, 81 Cal. Rptr. 3d 571, 576 (Ct. App. 2008) (dependency courts may issue a wide range of orders to protect children, including imposing limits on educational choices) (footnote omitted).

<sup>281</sup> The Department concluded that the cost of caring for the children from the time of the raid until they were allowed to return to their families was \$12,436,310. *ELDORADO INVESTIGATION*, *supra* note 265, at 20–21. This does not include the cost of the judicial proceedings or the contributions of scores of volunteer lawyers who represented the children and parents.

stand out in the numbers involved, the press attention received, and the influx of legal representation for parents and children. But in other ways, these cases typify what happens in child welfare matters every day in every part of the country. They remind us that suspicion of those who live differently may impermissibly threaten important constitutional values and harm individual children.

The case of *Yearning for Zion Ranch* may seem *sui generis*, but it powerfully illustrates what happens to children when child protective services workers disregard—or do not understand—the principles of family integrity and parental rights. Procedural protections for parents entangled in the child welfare system reflect the high value our Constitution places on family. Children in the child welfare system may or may not have legal interests in common with their parents, depending on very specific circumstances. There may be unintended risks to children when the state disregards the constitutional rights of parents. And it bears repeating that there is little risk in following the strictures of the law. Children who are removed from their families without sufficient basis or process, and subjected to disruption and instability, both temporary (as in the case of the Ranch children) and long-term (when adoptions are overturned) suffer unnecessarily as a result of state action. Gratuitous disregard of parents' rights does not serve vulnerable children well, whether the household contains one child or roughly 468.