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“Can They Do That?”: Why Religious Parents and Communities May Fear the Future Regarding State Interests and Custodial Law

I. INTRODUCTION

“To rip up hundreds of parents and children and put them in a makeshift prison while you investigate to see if they did anything wrong is un-American,” according to attorney Dick DeGuerin.¹ “You shouldn’t be allowed to search a whole village on the basis of a phone call[,] and not only search the area where there might be evidence but search every residence in the village[.] That’s never happened in American jurisprudence,” stated Tucson attorney Mike Piccarreta.² These comments referenced the State of Texas’s April 2008 actions toward the Fundamentalist Church of Jesus Christ of Latter-day Saints (“FLDS”), where Texas law enforcement officers and the Texas Department of Family and Protective Services (“DFPS”) raided the FLDS’s Yearning for Zion Ranch (“YFZ Ranch”) location in search of an allegedly sexually abused 16-year-old female.³ Although the supposed victim was never found, Texas officials eventually took 468 children⁴ from the YFZ Ranch, allegedly because of an “immediate” and “urgent” need for removal⁵ based upon the community’s common belief system and living style.

1. William M. Welch, *Papers Detail Alleged Abuse at Sect’s Compound*, USA TODAY (Apr. 9, 2008), http://www.usatoday.com/news/nation/2008-04-08-polygamy_N.htm (quoting Dick DeGuerin because of his past experience with private religious communities, including negotiating on behalf of David Koresh with federal authorities during the Branch Davidian standoff in Waco, Texas).

2. Guy Murray, *Texas Authorities Release FLDS Raid Affidavit*, MESSENGER AND ADVOCATE (Apr. 9, 2008, 6:37 AM), <http://messengerandadvocate.wordpress.com/2008/04/09/texas-authorities-release-flds-raid-affidavit/> (Mike Piccarreta’s interview with Arizona media outlet KVOA).

3. *Timeline of Raid on FLDS-Owned YFZ Ranch*, DESERET NEWS (May 23, 2008), <http://www.deseretnews.com/article/700228439/> [hereinafter *Timeline*].

4. Jessica Dixon Weaver, *The Texas Mis-Step: Why the Largest Child Removal in Modern U.S. History Failed*, 16 WM. & MARY J. WOMEN & L. 449, 452 (2010).

5. TEX. FAM. CODE ANN. § 262.201(b)(1)–(3) (West 2010) (setting forth Texas’ statutory requirements regarding child removal, including urgent and immediate need for removal when the child’s health or safety is in danger).

DFPS's invasion of the YFZ Ranch community constituted an almost unprecedented child removal operation. Although past attempts against similar communities have occurred,⁶ this focus on child removal apart from polygamy⁷ was unique and may cause parental concern regarding state removal and termination actions within a religious context.⁸

Undoubtedly, physical, sexual, and psychological child abuse constitute deplorable activities, and suspected occurrences should be investigated and potentially prosecuted.⁹ A child found within that situation should be assisted and provided protection (within constitutional statutory guidelines).¹⁰ However, are state actions toward protecting children from potential abuse (as happened at YFZ Ranch) justified in an immediate removal of virtually *all* children living within a religious community upon the basis that the potential practice of the community's "pervasive belief system" perpetuates an abusive situation and can be imputed to every parent within the community?¹¹

6. See, e.g., MARTHA SONNTAG BRADLEY, *KIDNAPPED FROM THAT LAND: THE GOVERNMENT RAIDS ON THE SHORT CREEK POLYGAMISTS* 48–96 (1993) (describing significant government action in arresting polygamous individuals and taking over 200 children into state custody); BRIAN C. HALES, *MODERN POLYGAMY AND MORMON FUNDAMENTALISM: THE GENERATIONS AFTER THE MANIFESTO* 272–73, 309–18 (2006) (discussing 1953 Arizona state action to arrest Mormon fundamentalists living in polygamous relationships within Short Creek, Arizona); see also Ken Driggs, *"This Will Someday Be the Head and Not the Tail of the Church": A History of the Mormon Fundamentalists at Short Creek*, 43 J. CHURCH & ST. 49 (2001) (describing the establishment of Short Creek, Arizona by polygamous families).

7. Weaver, *supra* note 4, at 534 ("Texas did not enter the YFZ Ranch with the express intent of arresting all the adults for the crime of polygamy as Arizona did in 1953 . . .").

8. Although this Comment could look at removal standards based solely on polygamous behavior, it instead will focus on removal standards relating to religion in general.

9. See, e.g., Tara Dodrill, *Texas Polygamy Case Should Spur Changes in Child Removal Across the Nation*, ASSOCIATED CONTENT (June 27, 2008), <http://tinyurl.com/78dxg26> ("If even one child suffers as a result [of sexual or physical abuse], then by all means . . . remove the young person from the abusive household environment.")

10. Out of fear of being misunderstood, I would like to repeat for emphasis: Removal and termination actions by accountable agencies (utilizing unambiguous statutory procedures and guidelines) can be applauded where truly warranted by actual sexual, mental, or physical abuse. This Comment is only intended to explore the possibility of unjust removal actions involving religious parents and what possible recourse they may have. It is not intended to justify perpetrators of sorrow who hurt the most vulnerable and precious members of our society.

11. Weaver, *supra* note 4, at 452. Another problematic element that could be considered is the unsubstantiated phone call supposedly warranting the initial invasion and

Other religious parents and communities may be understandably concerned with the potential for similar governmental actions and accompanying justifications focused on religious belief. These parents and communities may wonder how DFPS actions comport with typical child removal and termination standards, and how these standards apply in a religious context.¹² There may be legitimate fear that child removal and termination of parental rights could occur based on specific religious beliefs seen as “pervasive” throughout a religious community.¹³ This fear may escalate if a religious community’s pervasive beliefs could be assumed as belonging to every parent within the community, thus implying that each parent will practice every tenant of those beliefs, especially if this created an immediate and urgent need for child removal in the eyes of the State. In other words, can a child be removed, and parental rights terminated, for religious reasons?

This Comment explores child removal and parental right termination standards in order to determine whether either action can overtly or covertly occur under a religious pretext, and what potential protections religious parents and communities would have in such a situation. Ultimately, this Comment concludes that, although DFPS’s actions at the YFZ Ranch could cause alarm for religious parents and communities, parents’ religious beliefs and actions concerning their children likely will not warrant removal and/or termination absent a clear and convincing showing that the

serving as the catalyst of the removal process for minors not involved with the call or its contents.

12. There are additional, relevant questions unaddressed by this Comment regarding child removal based on a parent’s religious beliefs impacting the child, each of which would alter the analysis. These include whether state action is influenced depending on the religious community involved, the sect’s popularity level, or the context of doctrinal application (e.g., blood transfusions, vaccinations, home schooling, corporal punishment, etc). See, e.g., Jennifer E. Chen, *Family Conflicts: The Role of Religion in Refusing Medical Treatment for Minors*, 58 HASTINGS L.J. 643 (2007) (exploring the intersection between interests and rights involved in a religious parent refusing medical treatment for their child); Howard Friedman, *Church Leaders, Parents Charged with Child Abuse in “Biblical Punishment” of Their Children*, RELIGION CLAUSE (Mar. 23, 2011, 7:10 AM), <http://religionclause.blogspot.com/2011/03/church-leaders-parents-charged-with.html> (discussing parents in a Wisconsin church being charged with abusing their children for using rods to spank them out of a religious belief in punishment).

13. Weaver, *supra* note 4, at 500–01 (discussing the State’s expert witness’s comments regarding the FLDS belief system’s troubling aspects including emphasis on beliefs of obedience, faith, honoring God, and eternal reward).

effect of such belief causes significant abuse.¹⁴ Therefore, judicial and legislative protections are in place to determine whether removal and termination can occur under perceived arbitrary state action within a religious context.¹⁵ However, despite these protections, religious parents may maintain some apprehension because removal and termination actions for religious reasons could potentially still be justified under broad statutory definitions and judicial interpretations based on potential subjectivity often inherent in terms such as “abuse,” “social good,” “welfare,” and “aggravated circumstances.”¹⁶ To protect from this potential subjectivity, relevant child welfare statutes should be enhanced with specific definitions for prospectively ambiguous terminology regarding state removal actions.

Part II of this Comment details the history, facts, and motivations behind DFPS’s raid of the YFZ Ranch, delineating three general justifications used for removal and the inferences creating potential fear in religious parents and communities. Part III provides an analytical framework for discussing removal in the religious context by briefly describing general legal standards for child removal, termination of parental rights, and judicial tensions between constitutionally protected parental rights and state interests in protecting children. It also briefly addresses the potentially irreversible damage that results to children when unjustifiably removed from parental care. Part IV discusses the role of religion in the removal and termination process, arguing that usually religion only becomes a factor in removal proceedings when the belief system directly results in actual child mistreatment. In addition, it outlines potential protections religious parents receive from judicial review of removal actions for statutory compliance, as demonstrated by the court system’s ultimate rejection of DFPS’s mass removal action. Part V summarizes dangerous inferences that could be made based on DFPS’s removal reasoning and the legal protections religious parents may receive in such circumstances. It concludes by exploring the potential dangers of judicial activism and statutory ambiguity if removal becomes a pretext for religious hostility.

14. *See infra* Part III.

15. *See infra* Part III. These protections include (but ultimately are not limited to) due process concerns, high evidentiary standards, strictly construed statutory requirements, etc.

16. *See infra* Part IV and Part V.

II. "DEEP IN THE HEART OF TEXAS": RESCUE FROM A RELIGIOUS COMMUNITY

The FLDS church initially purchased the 1700-acre YFZ Ranch in 2004 and renovated it into a relatively small community, including "orchards, gardens, a school, dairy,"¹⁷ a temple, a 29,000-square-foot house for their "prophet,"¹⁸ and "multi-story residential household complexes."¹⁹ DFPS's initial investigation of the YFZ Ranch was prompted by several phone calls received from an allegedly 16-year-old female²⁰ currently living within the community.²¹ On March 29–30, 2008, this supposed teenaged mother telephoned a local family shelter multiple times expressing a desire to leave "her current living situation."²² The individual declared her involvement in a plural "spiritual marriage" at the age of 15 with an adult male over thirty years her senior,²³ resulting in her having given birth to one child and being pregnant with a second child.²⁴ The caller described the abusive situation she lived under at the ranch, including that she had been beaten, choked, sexually abused, and kept against her will.²⁵

Because accusations of child sexual abuse are considered a "priority one" situation, DFPS and police responded within twenty-four hours in a joint investigation.²⁶ Based on these telephone calls,

17. Nancy Perkins, *FLDS Struggle Beyond YFZ Ranch Borders*, DESERET NEWS (Aug. 25, 2008, 12:15 AM), <http://www.deseretnews.com/article/700253581/FLDS-struggle-beyond-YFZ-Ranch-borders.html>.

18. Thomas Korosec, *West Texas Polygamist Compound Worries Some*, HOUSTON CHRONICLE (Mar. 6, 2005, 6:30 AM), <http://www.chron.com/dispatch/story.mpl/metropolitan/3069543.html>.

19. Aff. in Supp. of Original Pet. for Protection of a Child in an Emergency and for Conservatorship in Suit Affecting the Parent-Child Relationship at 2 (51st Dist. Ct. Schleicher County, Tex. Apr. 6, 2008) [hereinafter Affidavit].

20. Don Teague, *Polygamist "Girls" Surprise Investigators*, MSNBC.COM (May 21, 2008, 6:33 PM), http://fieldnotes.msnbc.msn.com/_news/2008/05/21/4377396-polygamist-girls-surprise-investigators (noting that the caller was considered a real person in the investigation up until May 18, 2008, at which point authorities acknowledged she did not exist and began investigating the hoax calls as potentially being made by a Colorado adult "with a history of making false reports").

21. Affidavit, *supra* note 19, at 2–4.

22. *Id.* at 3.

23. *Timeline*, *supra* note 3; *see also* Affidavit, *supra* note 19, at 3.

24. Affidavit, *supra* note 19, at 2–3.

25. *Id.* at 3.

26. Weaver, *supra* note 4, at 459–60 (describing the procedures and statutes authorizing combined agency and state police action in child abuse situations).

DFPS obtained orders and authorization to investigate the YFZ Ranch concerning these child abuse allegations, including interviewing and transporting children from the ranch.²⁷ On April 3, 2008, Texas law enforcement officers and DFPS officials entered the FLDS's YFZ Ranch in search of the 16-year-old female caller.²⁸ While searching for and interviewing individuals possibly connected to the caller, investigators observed numerous "young" girls who "appeared to be" pregnant minors or minors who had already given birth.²⁹

In addition, DFPS purportedly discovered patterns potentially placing children at the YFZ Ranch at risk of "emotional, physical and/or sexual abuse."³⁰ FLDS practices allegedly placing the children in immediate danger included the determination that minor female children were indoctrinated and groomed "to accept spiritual marriages" and sexual relationships with adult men after reaching "child bearing age."³¹ In addition, "minor boys" were allegedly taught to become "sexual[] perpetrators" by entering spiritual marriages and sexual relationships with minor females after reaching adulthood.³²

Because of perceived neglect, sexual abuse, and immediate danger to the children's health and safety, DFPS determined that continued residence at the YFZ Ranch was contrary to the welfare of *all* female and male minors currently residing there.³³ Eventually, 468 children were taken from the location and placed into Texas's "temporary managing conservatorship."³⁴ DFPS justified broad-reaching removal of virtually every child at the location because it viewed the YFZ community as constituting "one household" with a common, "pervasive belief system" condoning underage marriage

27. Affidavit, *supra* note 19, at 4.

28. *Timeline*, *supra* note 3.

29. Affidavit, *supra* note 19, at 5. *See* Murray, *supra* note 2 (suggesting problems regarding agency action based on the "appearance" of pregnant minors without factual verification; however, this problem is partially created by the community's avoidance of answering agency questions about age, family status, etc.).

30. Affidavit, *supra* note 19, at 5.

31. *Id.*

32. *Id.*

33. *Id.*; *cf.* Teague, *supra* note 20 (noting that DFPS's actions occurred despite its eventual acknowledgment that the original caller/victim did not actually exist).

34. Weaver, *supra* note 4, at 452.

and sexual activity.³⁵ According to DFPS, the FLDS belief system (combined with finding, during its investigation, five minor females who became pregnant between age fifteen and sixteen) created a danger warranting urgent protection and immediate removal of all children from their parents and homes.³⁶

Therefore, according to DFPS, the YFZ Ranch community's assumed belief structure evidenced an immediate need for removal of any endangered children, and these beliefs could be inferred as applying to every person currently living within the community.³⁷ As stated by DFPS's lead investigator, "living under an umbrella of belief that having children at a young age is a blessing" created an environment where no child would be considered safe.³⁸ This broad-sweeping removal action was taken despite a lack of evidence (as acknowledged by DPFS) indicating that any prepubescent males or females were victims, or in danger of being victims, of actual physical or sexual abuse.³⁹

At first glance, many observers felt DFPS's actions were warranted and well-justified.⁴⁰ However, as time progressed and media attention proliferated, questions arose regarding the agency's process and justifications for such seemingly broad actions.⁴¹ A second look at the situation uncovered a potentially disturbing realization: a mass child removal action had occurred because of a religious community's tight-knit culture and commonly held beliefs.

35. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *1, *2-3 (Tex. App. May 22, 2008); *see also* TEX. FAM. CODE ANN. § 262.107(b), 201(d) (West 2010) (indicating a court may consider whether a household includes a person who has "sexually abused another child" in determining whether there is continuing danger to the child's physical health or safety).

36. *Steed*, 2008 WL 2132014, at *3.

37. Affidavit, *supra* note 19, at 5. ("Based on the [investigation, DFPS] determined that an immediate danger exists to the physical health or safety of the children who are residents of the YFZ Ranch . . . and that their continuing [residence on the Ranch] would be contrary to the children's welfare.").

38. *Steed*, 2008 WL 2132014, at *3 n.8.

39. *Id.* at *2.

40. *See, e.g., Trouble in the Hills*, THE DAILY BEAST (Apr. 9, 2008, 8:00 PM), <http://www.newsweek.com/2008/04/09/trouble-in-the-hills.html> (quoting the Eldorado First Baptist Church Pastor as saying the raid would enable numerous people to have a better life, and that the raid was "worth it" even if only "one person could be salvaged from child abuse").

41. Weaver, *supra* note 4, at 489 & n.359 (explaining that many media members posed the question of whether "this case [was] more about the disapproval of a particular religion or the alleged abuse of children").

This common belief system, and ascription of the term “family” to a community of believers, supposedly warranted taking every parent’s child within the community without regard as to whether or not those particular children were *actually* at risk.⁴² This reasoning and quick assertion of agency power chilled some observers who reasoned by analogy that if broad child removal could occur in this situation, then it could potentially occur in a number of other situations involving theological beliefs within similar religious communities.⁴³

Thus, the YFZ Ranch case demonstrates potential for a child removal action to hinge on a determination that: 1) a church’s “pervasive belief system” can perpetuate an abusive situation through the potential future practice of the belief, 2) a community of believers can be considered the same as a “family unit” and thus the “pervasive belief system” can be inferred to be held by every member of the religious community, and 3) a belief system can necessitate the urgent need for immediate removal of minor children from their parents.⁴⁴

III. JUDICIAL TENSIONS AND LEGAL STANDARDS FOR REMOVAL ACTIONS

A. *Parental Rights to Raise v. State’s Right to Intervene*

The YFZ Ranch situation involves constitutionally important (albeit judicially uncommon) competing interests and a philosophical clash between a parent’s fundamental right to raise his or her

42. *Id.* at 494–95.

43. *See, e.g.*, Jeff Lindsay, *Don’t Mess With the Reich of Texas: The Abuse of Children by the State*, MORMANITY (Apr. 15, 2008, 8:32 PM), <http://mormanity.blogspot.com/2008/04/dont-mess-with-reich-of-texas-abuse-of.html> (acknowledging, in blog post and comments, troubling aspects within FLDS culture, but questioning the dangerous precedent of such a “heavy-handed community-wide” action potentially justifying child removal for other religious groups considered “strange”); *see also* Lee Benson, *Texas Raid Violating U.S. Rights*, DESERET NEWS, (Apr. 9, 2008, 1:04 AM), <http://www.deseretnews.com/article/695268584/Texas-raid-violating-US-rights.html> (expressing astonishment that such an occurrence happened in 21st century America, while generating minimal, general outrage); Janet, *Tabs on Texas*, FEMINIST MORMON HOUSEWIVES (Apr. 15, 2008), <http://www.feministmormonhousewives.org/?p=1747> (“To a frightening degree, we’re caught in a large scale ‘he said, she said’ debate between competing cultures.”).

44. *Steed*, 2008 WL 2132014, at *2. An additional issue left for future exploration concerns how an unsubstantiated phone call can warrant investigation and removal if the situation “appears” harmful.

children and the state’s interest in the societal impact of a child’s welfare and upbringing.⁴⁵

1. The federal level

The Supreme Court has spoken on these issues in several landmark cases, which help to outline the adversarial nature of this topic and define the “playing field” for state removals and terminations. These cases are significant because recognition of parental rights as “fundamental” ensures due process protection of such rights before they can be abridged by government action.⁴⁶ Child removal heavily involves a parent’s substantive due process rights.⁴⁷ Even in strained relationships, the Court has declared that individuals facing “dissolution of their parental rights” possess a critical need for “fundamentally fair procedures.”⁴⁸ Although the YFZ Ranch case never escalated to the level of having to examine removal in light of Fourteenth Amendment due process concerns, the Supreme Court’s previous rulings declare that religious parents receive due process (and, to a degree, First Amendment⁴⁹) protection of the right to raise their children with particular religious beliefs without worrying that those beliefs may be arbitrarily adjudicated as abusive and deserving of termination.

First, in *Meyer v. Nebraska*, the Court held that parents have Fourteenth Amendment due process rights pertaining to the upbringing of their children.⁵⁰ The Court specifically stated that

45. Brittany Nilson, Note, *Yearning for Zion Ranch Raid: Lowering the Standard of Proof for the Termination of Parental Rights*, 75 BROOK. L. REV. 305, 307 (2009).

46. See Rebecca Bonagura, *Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York*, 18 COLUM. J. GENDER & L. 175, 210–12 (2008); Nilson, *supra* note 45, at 310. But see James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CALIF. L. REV. 1371, 1427, 1447 (1994) (arguing that courts should recognize the “illegitimacy of the parents’ rights doctrine” because parent rights generally trump state intervention “simply because there is a long tradition of letting parents do what they want . . . absent a threat of grievous harm”).

47. Bonagura, *supra* note 46, at 211 (stating that a parent’s substantive due process rights are implicated in removal action because of parental rights and interests in the companionship and custody of their child).

48. *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982).

49. See *Wisconsin v. Yoder*, 406 U.S. 205, 234–36 (1972) (holding that both the First and Fourteenth Amendments prevent the State from forcing Amish parents to send their children to high school).

50. 262 U.S. 390, 399 (1923); see also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (asserting that the right to raise one’s children is a civil right “far more precious . . . than property rights”); Nilson, *supra* note 46, at 308–09.

“[w]ithout doubt,” liberty denotes freedom to establish a home and raise children.⁵¹ As such, state interests are balanced against fundamental rights of personal liberty (including parental rights).⁵² The Court also acknowledged a parent’s due process right in *Troxel v. Granville*.⁵³ Although a plurality decision, *Troxel* fell in line with case law determining that parents have a constitutional right to raise, nurture, and educate their children without undue state influence.⁵⁴ The *Troxel* plurality opinion concludes that the State is not justified in questioning a “fit” parent’s ability to make decisions concerning the rearing of his or her children.⁵⁵

Additionally, in *Pierce v. Society of Sisters*, the Court held that a statute regulating parents’ educational choices for their children unreasonably interfered with parents’ liberty to direct their children’s upbringing.⁵⁶ The Court pontificated that a child was “not the mere creature of the state”; instead, nurturers (and those directing the child’s destiny) possess the right and duty to prepare the child for life’s obligations.⁵⁷

Federal circuit courts have also consistently upheld parents’ fundamental due process rights where child custody is involved. The First Circuit notes that this liberty interest is protected by the Due Process Clause’s substantive and procedural aspects guaranteeing “fair process” and constraining governmental interference.⁵⁸ Regarding child removal actions lacking parental consent and judicial authorization, the Second Circuit held that a mother’s parental liberty interest trumped state interests because of a lack of “notice

51. *Meyer*, 262 U.S. at 399.

52. *Id.* at 399–400 (“[L]iberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”).

53. 530 U.S. 57, 65–66 (2000) (plurality opinion).

54. *Id.* at 95 (Kennedy, J., dissenting) (declaring that the Court has perpetually considered *Pierce* and *Meyer* to include a Fourteenth Amendment right for parents to care for and nurture their child “free from state intervention”); *see, e.g., id.* at 67 (plurality opinion).

55. *Id.* at 68–69 (plurality opinion).

56. 268 U.S. 510, 534–35 (1925).

57. *Id.* at 535.

58. *Suboh v. Dist. Attorney’s Office*, 298 F.3d 81, 91 (1st Cir. 2002) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)); *see also Hatch v. Dep’t for Children, Youth & Their Families*, 274 F.3d 12, 20 (1st Cir. 2001).

and an opportunity to be heard.”⁵⁹ Moreover, the Third,⁶⁰ Fourth,⁶¹ and Sixth⁶² Circuits have held similarly.

However, the Supreme Court has held that fundamental liberties associated with parenthood can be limited in proportion to significant state interests. In *Prince v. Massachusetts*, the Court outlined the “no man’s land” between parental and state conflict over child control, which takes on extraserious implications when religious conviction enters the equation.⁶³ The Court held “the family itself is not beyond regulation in the public interest, as against a claim of religious liberty . . . [or] rights of parenthood.”⁶⁴ The Court, previous to *Prince*, suggested potential areas of exemption from absolute free exercise rights because of secular society’s specific needs and interests; these include “the protection of the family, the promotion of health, the common defense, [and] the raising of public revenues to defray the cost of government.”⁶⁵

In *Prince*, the Court determined that the state, as *parens patriae*,⁶⁶ may restrict parental control, freedom, and authority regarding issues affecting a child’s welfare, including matters where a parent asserts authority “to control the child’s course of conduct on religion or conscience.”⁶⁷ The Court reasoned that state intervention can be justified because the entire community has an interest in safeguarding children from abuses and giving them “opportunities for growth.”⁶⁸ In concluding the *Prince* opinion, the Court attempted to leave the parental liberty and state intervention battlefield untouched by declaring the *Prince* ruling as not extending

59. *Duchesne v. Sugarman*, 566 F.2d 817, 825–26 (2d Cir. 1977).

60. *Croft v. Westmoreland Cnty. Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997) (stating that parents have a “constitutionally protected” liberty interest in the custody and care of their children).

61. *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 342 (4th Cir. 1994) (noting that state removal of a child triggers Fourteenth Amendment procedural protection).

62. *Hooks v. Hooks*, 771 F.2d 935, 941 (6th Cir. 1985) (“It is well-settled that parents have a liberty interest in the custody of their children.”).

63. 321 U.S. 158, 165 (1944).

64. *Id.* at 166.

65. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 596 (1940).

66. See BLACK’S LAW DICTIONARY 1221 (9th ed. 2009) (defining *parens patriae* as “the state in its capacity as provider of protection to those unable to care for themselves”).

67. *Prince*, 321 U.S. at 166.

68. *Id.* at 165. This view is based on the belief that a democratic society’s continuance rests “upon the healthy, well-grounded growth of young people into full maturity as citizens, with all that implies.” *Id.* at 168.

beyond its facts.⁶⁹ The Court readily declared its holding as neither laying a foundation for state intervention in a child's religious indoctrination and participation under the guise of "health and welfare," nor giving state justification for limitations on a child's religious activities and training.⁷⁰

Thus, tension between parental rights and significant state interests continues to be determined on an almost case-by-case basis.⁷¹ This determination is subject to individual states' statutory guidelines and judicial proceedings regarding removal and termination in light of constitutional due process considerations.⁷² Although the inherent tension between these two legal doctrines may reside within a nebulous middle ground dependent on multiple variables, federal courts generally give due process rights serious consideration.⁷³ Therefore, religious parents will be provided Fourteenth Amendment due process protection at the federal level when unjust removal proceedings occur.

2. *The state level*

States also provide statutory and judicial due process defenses for parents and for individual children. For example, as pertaining to the YFZ Ranch situation, Texas's Family Code requires "a full adversary hearing" be held within fourteen days after a government agency removes a child.⁷⁴ The statute also refers to "child" in the singular when laying out guidelines for immediate removal, judicial hearings, and potential return.⁷⁵ Accordingly, the State is required to provide due process for each particular child when abuse allegations arise.⁷⁶ Thus the State "cannot lump sexual abuse, or risk of sexual abuse, on all" children living within a household or a community (regardless of how the term household may be defined by that particular state)

69. *Id.* at 171.

70. *Id.*

71. *See* Weaver, *supra* note 4, at 535 (arguing that the current state of the law leaves state courts with unresolved questions regarding weighing physical and mental harm to children and the state's power to intervene against a parent's religious rights).

72. *See id.*; *infra* Part III.A.2.

73. *See* Fuentes v. Shevin, 407 U.S. 67, 81 (1972) (declaring that due process protections reflect the high value, embedded in constitutional history, which society places on a person's rights).

74. TEX. FAM. CODE ANN. § 262.201(a) (West 2010).

75. *Id.* § 262.201(b).

76. *See id.* § 262.201(b)(2); Weaver, *supra* note 4, at 497.

without “sufficient evidence.”⁷⁷ The Texas Court of Appeals regarded this portion of the Texas Family Code as being in place particularly to “afford parents the opportunity to challenge [an agency’s] right to retain any children whom [the agency] has taken into custody under an ex parte order from the court.”⁷⁸

However, a potential obstacle preventing due process principles from protecting religious parents, as demonstrated in the YFZ Ranch scenario, derives from whether the parent will be viewed as separate from the community to which they belong. Arguably, “parents” (in the traditional sense) did not exist at the YFZ Ranch because DFPS viewed them as being controlled by the larger community, and thus DFPS imputed to each individual all aspects of the community’s collective theological system and doctrinal actions.⁷⁹ This became a major problem during the hearing required by Texas state law to be within fourteen days of the action.⁸⁰ Because of the sheer number of children, and the predominate view that the YFZ Ranch constituted one household, the initial due process hearing took place en masse⁸¹ on behalf of all the children involved. The majority of the attorney ad litem (AAL) were of the opinion the State had not carried its burden.⁸² Many of these AALs (representing children who wanted to return to their parents)⁸³ expressed frustration that each child was not getting an individual hearing.⁸⁴ When time came for limited questioning, each age group was given a representative to ask questions on behalf of all AALs representing children within that group.⁸⁵

Another potential obstruction of due process protection for religious parents arises within state juvenile courts, where opportunities to challenge custody orders can be ignored or delayed.

77. Weaver, *supra* note 4, at 497 (quoting FAM. § 262.201(b)).

78. *In re E.D.L.*, 105 S.W.3d 679, 688 (Tex. Ct. App. 2003).

79. See Weaver, *supra* note 4, at 495 (detailing CPS supervisor Angie Voss’s explanation that her concern for every child in the community derived from ranch residents telling her that they were all part of “one big family and that they all share[d] the same belief system”).

80. FAM. § 262.201(a).

81. See Weaver, *supra* note 4, at 478 (noting that each child did not receive an individual hearing).

82. See *id.* at 477–78.

83. *Id.* at 477.

84. *Id.* at 478.

85. *Id.* (detailing how Judge Walther allowed the representative AALs “just ‘a few questions’ of the witnesses”) (citation omitted).

In *Pamela B. v. Ment*, a group of concerned parents of children who “had been or might be seized by the state department of children and families” brought an action against state administrators.⁸⁶ The group was seeking declaratory judgment and injunctive relief regarding temporary state child custody hearings.⁸⁷ The court’s opinion detailed serious allegations of due process violations against the Superior Court for Juvenile Matters in Hartford, including the practice of commonly holding “continuing orders of temporary custody for . . . up to several months, without requiring or permitting testimony and based solely upon hearsay statements contained in affidavits and other documents.”⁸⁸ The state supreme court eventually held it as “imperative that parents be given a prompt and meaningful opportunity to challenge an order of temporary custody.”⁸⁹

In addition, juvenile courts are often permitted to ignore the constitutional rights of “nonoffending parents.”⁹⁰ These purportedly “unfit,” nonoffending parents are defined as individuals the State has not made allegations against, who have not violated any statutory requirement, and whose only wrong appears to be having “a child in common with a parent who allegedly abused or neglected [a] child.”⁹¹ These considerations could come into play in situations like YFZ Ranch where parental roles morph into the “household-as-the-community” view,⁹² or in situations where only one parent adheres to the beliefs of the community. Consequently, due process protections are available at the state level, but may be difficult to realistically achieve within every local agency and court system.

B. Removal and Termination Standards

Actual child removal and termination of parental rights constitute the most extreme measure used to protect state interests

86. 709 A.2d 1089, 1093 (Conn. 1998).

87. *Id.*

88. *Id.* at 1095.

89. *Id.* at 1100.

90. Vivek S. Sankaran, *Parans Patriae Run Amuck: The Child Welfare System’s Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 55 (2009) (discussing how non-offending parents are often deprived of parental rights based solely on admissions of child maltreatment from the other parent).

91. *Id.* at 57.

92. *See supra* note 78 and its accompanying text.

and a child’s welfare.⁹³ Courts usually decline to terminate parental rights “unless rehabilitation of the parent is hopeless.”⁹⁴ Grounds for child removal and parental right termination vary among state statutes,⁹⁵ but normally a combination of abuse, neglect, abandonment, drug or alcohol dependency, or parental failure to abide by a state proscribed treatment plan for child return may warrant state intervention.⁹⁶ Each state has separate procedures for categorizing a child as being neglected or abused and for categorizing a parent as dependent.⁹⁷ These statutory standards can serve as tools for state removal actions to preserve or restore a child’s safety, health, or well-being.⁹⁸

In general, states follow a two-step process to determine whether a situation requires intervention.⁹⁹ This process consists of an agency finding *statutory justification* for removal.¹⁰⁰ The first step is accomplished through a court hearing to establish whether the child falls within that particular state’s statutory definitions of abuse, neglect, dependency, or other elements requiring state involvement. This is followed by step two: a dispositional hearing “to determine whether the child should remain with the parent.”¹⁰¹ If these two steps affirm that intervention is necessary and requires removal of the child from the home, the next phase involves an agency *establishing a plan* for either family reunification or parental right termination.¹⁰² The agency creates this plan by conducting additional hearings to

93. LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 608 (2d ed. 2006).

94. *Id.*

95. For example, Georgia uses a two-pronged approach. *See, e.g.*, GA. CODE ANN. § 15-11-94(a) (“In considering the termination of parental rights, the courts shall first determine whether [absent extreme circumstances] there is present and convincing evidence of parental misconduct or inability . . . [and] whether termination . . . is in the best interest of the child”).

96. *See, e.g.*, WARDLE & NOLAN, *supra* note 93, at 608; CHILD WELFARE INFORMATION GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION 2 (2010), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf.

97. SCOTT E. FRIEDMAN, THE LAW OF PARENT-CHILD RELATIONSHIPS 121 (1992); *see also* CHILD WELFARE INFORMATION GATEWAY *supra* note 96, at 2.

98. FRIEDMAN, *supra* note 97, at 121.

99. ROBERT E. OLIPHANT & NANCY VER STEEGH, EXAMPLES & EXPLANATIONS: FAMILY LAW 459 (3d ed. 2010).

100. *Id.*

101. *Id.*

102. *Id.*

decide whether the child should enter foster care, be returned to the parents, or placed in a specified institution.¹⁰³

This process can take an accelerated pace when an immediate and urgent need arises necessitating removal, such as when the child is in danger of imminent death, serious injury, or sexual abuse.¹⁰⁴ When allegations of child abuse and neglect arise in emergency situations, states generally follow a three-pronged approach in determining whether immediate removal is appropriate.¹⁰⁵ In this situation, the State is required to 1) demonstrate “proof of imminent danger,” 2) decide if nonremoval would be contrary to the child’s welfare, and 3) make reasonable efforts to prevent removal.¹⁰⁶

Despite state statutory variance, the United States Supreme Court and Congress have given general guidelines for states to follow for removal and termination actions. In *Santosky v. Kramer*, the Supreme Court declared the evidentiary standard applicable in these state actions.¹⁰⁷ The Court held that before “completely and irrevocably” severing parental rights, due process requires a State to “support its allegations by at least clear and convincing evidence.”¹⁰⁸ This elevated evidentiary standard requires asserted facts to have a high probability of being true¹⁰⁹ and is most often applied when fundamental rights are at risk.¹¹⁰ However, it is left to state courts

103. *Id.*

104. *Id.* at 459–60.

105. Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL’Y & L. 247, 269 (2011).

106. *Id.*

107. 455 U.S. 745, 747–48 (1982).

108. *Id.* Clear and convincing evidence is an intermediate evidentiary standard, viewed as a higher hurdle than “preponderance of the evidence” but still a notch below the “beyond a reasonable doubt” standard required for criminal convictions. *See* *Addington v. Texas*, 441 U.S. 418, 424–25 (1979) (discussing the Court’s use of the three evidentiary standards and noting the distinct differences between them); *see also* *Wilson v. Workman*, 577 F.3d 1284, 1298 (10th Cir. 2009) (highlighting the long history of the clear and convincing standard “as an intermediate burden of proof somewhere between ‘preponderance of the evidence’ and ‘beyond a reasonable doubt’”) (citing *Addington*, 441 U.S. at 424–25).

109. *Lopinto v. Haines*, 441 A.2d 151, 155–56 (Conn. 1981) (declaring the clear and convincing standard as requiring evidence that induces a “reasonable belief” in the trier that asserted facts “are highly probably true” and thus “substantially greater than the probability” of the facts being false).

110. Nilson, *supra* note 45, at 312 (citing *In re Polk License Revocation*, 449 A.2d 7, 13 (N.J. 1982)).

and legislatures to make exact determinations of the burden surrounding this standard.¹¹¹

In addition to judicial evidentiary guidelines for removal procedures, Congress has also indirectly addressed this issue legislatively through the Adoption Assistance and Child Welfare Act of 1980 (“AACWA”) and the Adoptions and Safe Families Act of 1997 (“ASFA”).¹¹² Although states have varying statutes dealing with termination of parental rights, Congress imposed additional rules on state child welfare systems through AACWA.¹¹³ AACWA’s aim was to reorient the focus of state removal actions from being the “first and last resort” toward a more service-first approach designed to emphasize maintaining functional and intact families.¹¹⁴

The AACWA requires states to include specific elements for removal or termination actions and proceedings.¹¹⁵ States are obligated (while considering child safety as the paramount concern) to make “reasonable efforts” in preserving and reunifying families prior to removal and termination unless “aggravated circumstances” exist.¹¹⁶ According to the United States General Accounting Office, as of July 1999 all states had enacted laws that either mirrored federal legislation or imposed stricter requirements.¹¹⁷ Because of this

111. *Santosky*, 455 U.S. at 769–70.

112. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

113. See Stephanie Sherry, Note, *When Jail Fails: Amending the ASFA to Reduce Its Negative Impact on Children of Incarcerated Parents*, 48 FAM. CT. REV. 380, 382 (2010) (discussing the history and background leading up to the adoption of AACWA and its subsequent amendment through the ASFA).

114. Jeanne M. Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J. L. & PUB. POL’Y 100, 108 (2009).

115. 42 U.S.C. § 671 (2006); see also Kaiser, *supra* note 114, at 107 n.23 (stating that AACWA’s ultimate intent was to reorient the foster care system to focus more on “services aimed at preserving families and achieving permanency for children” (quoting Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 270 (2003) (internal quotation marks omitted))).

116. 42 U.S.C. § 671(a)(15)(A–D) (2006). The term “aggravated circumstances” is left to be defined at the state level. In addition, the “reasonable efforts” requirement can also be precluded when “parental rights . . . to a [removed child’s] sibling have [previously] been terminated involuntarily.” *Id.*

117. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN SUBCOMM. ON HUMAN RES., COMM. ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, FOSTER CARE: STATES’ EARLY EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT 2 (1999), available at <http://tinyurl.com/6pcl6ms>.

legislation, a majority of states require agencies to make *reasonable efforts* in family preservation before removal, and to attempt *reasonable efforts* in seeking reunification postremoval as a means of preventing need for removal oversight.¹¹⁸

Although the “reasonable efforts” requirements potentially provide protection to religious parents in unwarranted and questionable removal situations, 42 U.S.C. § 671 of the AACWA does not define “reasonable efforts” and the federal government has evaded opportunities to provide clarification for the term beyond the current statutory context.¹¹⁹ Therefore, some scholars have displayed concern for the legislation’s “dead letter” status¹²⁰ resulting from this lack of definition and the ASFA’s amendments failure “to provide states with a comprehensive meaning for and standards by which to measure reasonable efforts.”¹²¹

However, religious parents and communities have assurances of basic statutory and judicial safeguards despite overarching occurrences at the YFZ Ranch.¹²² The clear and convincing evidentiary standard, and the federal legislative requirement for reasonable reunification efforts, can protect parental rights in religious contexts because they require both a high level of proof and significant agency efforts in restoring children to their families before parental rights can ultimately be terminated.¹²³

118. Crossley, *supra* note 115, at 293 n.169.

119. *Id.* at 260.

120. *Id.* The term “dead letter” refers to the frequent disregard of the “reasonable efforts” requirement.

121. *Id.* at 290.

122. However, these potential safeguards would only be used in a defensive posture post-removal and would not extend to civil actions prevented by “qualified immunity.” *See* Foy v. Holston, 94 F.3d 1528, 1534 (11th Cir. 1996) (describing the qualified immunity doctrine as having pragmatic impact “on the reality of the workaday world”). The qualified immunity doctrine allows public officials to act without fear of civil litigation only when they could have reasonably anticipated, before taking action, whether their conduct might expose them to damage liability. *Id.* In other words, an official receives immunity from civil damages if an objective observer would be unable to predict whether the action was completely lawful until adjudicated by a court in the future. *Id.* Thus, a religious parent who has a child unjustly removed based upon a belief system would potentially be without civil recourse, unless it could be shown that an objective observer in the agency’s position could anticipate the action’s potentially illegality.

123. Granted, this does not fully consider the implication for truly endangered children with neglectful parents in a nonreligious (or even religious) setting, but such is not within the consideration of this Comment.

C. "Removal Stampedes"

Despite assurances of potential legal protection, it might remain unnerving to parents that a mass removal action (for arguably religious reasons) *recently* and *actually* took place within the United States at the YFZ Ranch. Even eventually vindicated religious parents may fear the interim effect removal might have on their children and the extreme efforts it takes to regain custody. Agencies should tread carefully out of consideration for harm to children caused by unnecessary removal efforts, which might be difficult for agencies practicing "defensive social work" by "erring on the side of safety" out of fear of adverse outcomes for the child.¹²⁴

Although many children were eventually returned to YFZ Ranch,¹²⁵ arguably irreparable damage occurred during the interim proceedings by the mere act of removal.¹²⁶ Disregarding due process and parental rights in removal actions not only brings up complex constitutional issues, but it also "jeopardize[s] children's safety and well-being by increasing the likelihood that they will unnecessarily enter foster care" and potentially suffer irreparable harm from removal.¹²⁷ Often forgotten during "removal stampedes . . . [are] the range and extent" of psychological, financial, and other harm on the affected families resulting from "unnecessary removals."¹²⁸ Removal actions can be extremely difficult for children suddenly forced to separate from familiar surroundings without possibly knowing or understanding why.¹²⁹

124. Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 459 (2003) (citing Douglas J. Besharov, *Protecting Abused and Neglected Children: Can Law Help Social Work?*, 7 CHILD ABUSE & NEGLECT 421 (1983)); Colin Poitras, *Rowland Fires a Rebuke at DCF*, HARTFORD COURANT, May 21, 2003, at A1, available at <http://tinyurl.com/6vfq7r8>.

125. Authorities returned 438 children, most of who went back to the YFZ Ranch. Paul A. Anthony, *Children's Court Advocates Frustrated by CPS' Actions*, SAN ANGELO STANDARD-TIMES (Mar. 29, 2009, 12:00 AM), <http://www.gosanangelo.com/news/2009/mar/29/childrens-court-advocates-frustrated-by-cps/>.

126. See Chill, *supra* note 124, at 459 (arguing that potentially irreparable harm to the child occurs within "removal stampedes").

127. See Sankaran, *supra* note 90, at 55 (noting that due process violations in juvenile courts have the potential to cause parents to disengage with the process altogether).

128. See Chill, *supra* note 124, at 459 (explaining that "[r]emoved children . . . are not necessarily safer in their new placement" and that unnecessary removals drain resources and intensify existing child protection challenges).

129. *Id.* at 457 (denoting potential terror and sorrow possibly resulting in attachment and abandonment issues in the child).

After an emergency child removal, a convergence of factors creates a “snowball effect,” making it difficult for parents to get the child back.¹³⁰ From a practical standpoint, postremoval proceedings change the focus from “whether the child should be removed to whether he or she should be returned.”¹³¹ This requires parents to “demonstrate their fitness” for reunification, rather than requiring the State “to demonstrate the need for out-of-home placement.”¹³² Seizing control of the child tilts the litigation playing field in favor of the State, shifting the burden of proof, “in effect, if not in law,” from the State to the parents.¹³³ This prospectively slanted field presents another uneasy consideration for religious parents who may possess concerns regarding state removal actions.

In summary, although safeguards for religious parents exist, future removal and termination actions will continue to involve an inherent tension between parental rights and state interests. These actions, and any potential solutions, will be determined on a situation-specific basis and will tend to address the same questions previously aligned on the rights and interests playing field. In addition, these actions may create irreparable harm to both child and parent before any potential arbitrary actions can be judicially rectified.

IV. RELIGION AS A PRETEXT FOR REMOVAL AND TERMINATION

A. Removal and Religion: Actual Abuse and Neglect Required

In child custody hearings, the issue of religion primarily arises (if at all) within divorce proceedings;¹³⁴ therefore, religious parents have been somewhat protected by the exclusion of religious considerations within the (nondivorce) removal and termination context. However, some argue that since courts can consider religion in child custody disputes without infringing a parent’s First Amendment rights, then courts may also consider religion in

130. *Id.* at 459; *see also* Pamela B. v. Ment, 709 A.2d 1089, 1093 (Conn. 1998) (recognizing “the potential impact . . . ex parte temporary custody order[s],” initial custody determinations, and continuity have on maintaining the status quo and thus influencing the final outcome in removal based custody determinations).

131. Chill, *supra* note 124, at 459.

132. *Id.*

133. *Id.*

134. Nilson, *supra* note 45, at 321.

parental termination proceedings without a First Amendment violation.¹³⁵ But, religion generally remains a nonfactor in removal and termination measures except in instances of abuse, neglect, abandonment, or similar areas of parental action (or inaction) warranting child protection. The Supreme Court has upheld parents as having the dominant role in child-rearing decisions “absent a finding of neglect or abuse.”¹³⁶ Nevertheless, the potential *effect* of religious belief resulting in child mistreatment can be a tremendous factor in a state’s removal justifications and also in determining continuation of parental rights.¹³⁷

Courts have determined that child custody decisions should focus on individual conduct and character rather than religious beliefs, unless the belief potentially jeopardizes a child’s health or safety.¹³⁸ In *Shepp v. Shepp*, a Pennsylvania case involving a parent promoting polygamous beliefs to his child, the court held that the parent could be prohibited from advocating a sincere religious belief, “which, if acted upon, would constitute a crime.”¹³⁹ According to the court, this exclusion only arises if it is established that advocating the conduct would have “potential for significant social burdens” *or* endanger the child’s physical or mental health or safety.¹⁴⁰ Even then, the court reasoned that the conduct’s illegality was not sufficient on its own to warrant restriction.¹⁴¹ Therefore, a parent’s constitutional right to teach a religious belief to his or her child does not constitute a per se threat of harm and cannot be infringed absent

135. *Id.*

136. *Parham v. J.R.*, 442 U.S. 584, 604 (1979).

137. *See In re Edward C.*, 178 Cal. Rptr. 694, 699 (Cal. Ct. App. 1981) (“[T]he state must show that the parent’s religious choices [actually] jeopardize the health or safety of the child and that the state cannot override parental choice just because it runs counter to the tastes or lifestyles of the majority. Mistreatment of a child, however, is not privileged because it is imposed in the guise of freedom of religious expression.”); *see also Nilson*, *supra* note 45, at 322.

138. *Shepp v. Shepp*, 906 A.2d 1165, 1173–74 (Pa. 2006); *see, e.g., Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 126 (1996) (recognizing the state’s compelling interest to protect a minor’s psychological and physical well-being); *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972) (holding that a parent’s free exercise rights may be limited if a parent’s decisions in relation to the belief could cause “significant social burdens” or might potentially jeopardize a child’s health or safety).

139. *Shepp*, 906 A.2d at 1173–74.

140. *Id.*

141. *Id.*

a finding that discussing the belief comprises a grave threat to the child.¹⁴²

In addition, the Utah Supreme Court adopted a similar, albeit slightly different, position in *In re Black*.¹⁴³ The court dealt with a child removal action involving a polygamous family.¹⁴⁴ The court upheld the lower court's finding that the children of the husband and his second wife were neglected (as defined by Utah statute) because their polygamous parents "knowingly failed . . . to provide . . . the proper maintenance, care, education and training required by law and morals."¹⁴⁵ The court reached this result due to the parents' willful avoidance of abiding by the state's bigamy laws.¹⁴⁶

Early in the opinion, the court focused on the couple teaching their children to live polygamy despite the law.¹⁴⁷ Yet, the court ultimately seemed to distinguish between action as opposed to mere belief or teaching.¹⁴⁸ The court declared that the parents not only believed and taught that plural marriage was God's law, but they also actually *exercised* the "practice of polygamy in the presence of [the] children."¹⁴⁹ According to the court, merely advocating a belief in illegal activity is protected by the right to teach and believe religious doctrine "so long as it does not incite to crime."¹⁵⁰ Similar to *Shepp*, the Utah Supreme Court noted that had the parents merely accepted

142. *Id.*

143. 283 P.2d 887 (Utah 1955).

144. *Id.*

145. *Id.* at 907 (emphasis omitted).

146. *Id.* at 907–08 (detailing how the couple "embarked upon a criminal career" by not obtaining a marriage license and "for 20 years have had, a method convenient, easy, illegal and immoral"; or in other words, ignoring "every law established for the orderly behavior of decent people").

147. *Id.* at 896 (discussing the husband's admission that he taught, preached, and practiced polygamy and encouraged his children to do the same); *see also id.* at 869–99 (detailing testimony from multiple family members on this same subject).

148. *Id.* at 901, 907.

149. *Id.* at 901.

150. *Id.* at 907 (qualifying this statement by declaring that such a right would not prevent the parents from falling within Utah's child negligence statute because of the law's specific requirement that a child be provided the care necessary for its "health, morals or well-being"). *But see* Davis v. Beason, 133 U.S. 333, 342 (1890) (stating that if a religious belief were to become a crime, then teaching and advising its practice would be considered aiding and abetting and thus subject to criminal prosecution), *abrogated on other grounds by* Romer v. Evans, 517 U.S. 620 (1996).

and affirmed polygamy as a matter of belief *only*, “they would probably not [have been] subject to a proceeding such as this.”¹⁵¹

Hence, according to the *Shepp* and *Black* rationale, subscribing to and teaching a religious belief (even when implementing the belief may result in illegal conduct) does not warrant child removal and parental rights termination unless the belief actually results in illegal conduct or harm to the child.¹⁵² But it is uncertain whether this is a bona fide, albeit partial, protection to religious parents. For example, statutory discrimination¹⁵³ could motivate a legislative body to pass a law directly (but not overtly) targeting a specific religious belief or practice, justified by the damage the tenant may cause to society’s “morals and good order.”¹⁵⁴ If this were to happen, a now illegal religious practice could lead to immediate child removal and potential parental right termination, even if the law were found posttermination to be unconstitutional.

The *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* case provides a possible illustration.¹⁵⁵ In *Lukumi*, a denomination of the Santeria religion attempted to conduct animal sacrifices.¹⁵⁶ Santerian doctrine includes the belief that animal sacrifices are a necessary part of its adherents’ faith and rites must be performed at significant life events, such as birth, marriage, and death.¹⁵⁷ Because

151. *Black*, 283 P.2d at 901.

152. *See id.* *But see Davis*, 133 U.S. at 342 (stating that if a religious belief were to become a crime, then teaching and advising its practice would be considered aiding and abetting and thus subject to criminal prosecution).

153. Attempting to prove a government entity acted with discriminatory intent in a removal context might be problematic, in that “state officials can act lawfully even when motivated” by dislike or hostility toward specific protected behavior. *Foy v. Holston*, 94 F.3d 1528, 1534 (11th Cir. 1996) (citing *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977)); *see also Foy*, 94 F.3d at 1536 (holding that a child custody worker is entitled to immunity “unless it was already clearly established when [the worker] acted that no child custody worker could lawfully act—that is, do what [the worker] did—to protect children in the circumstances of this case if the worker also acted, in part, out of hostility toward the parent’s religion”).

154. *See, e.g., United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J. dissenting) (“The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order.”), *overruled in part by Girouard v. United States*, 328 U.S. 61 (1946); *Davis*, 133 U.S. at 342 (holding that religious actions cannot be contrary to peace, good order, and society’s morals); *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (declaring Congress’s ability to prohibit religious actions that violate social duties or subvert good order).

155. 508 U.S. 520 (1993).

156. *Id.* at 525.

157. *Id.*

of concerns that a religious group may engage in practices inconsistent with “public morals, peace or safety,” the city council passed ordinances directly, but not explicitly, targeted towards outlawing Santerian animal sacrifices.¹⁵⁸ The Supreme Court overturned the ordinances because city officials specifically designed the laws to suppress “the central element of the Santeria worship service.”¹⁵⁹ Here, “religious practice [was] being singled out for discriminatory treatment” by broad ordinances forbidding religious worship that did not threaten a city’s legitimate interests in preventing animal cruelty.¹⁶⁰

Using *Lukumi* to explore a hypothetical example, it is possible that religious parents in a *Lukumi*-type situation could be viewed as negligent under a law similar to the Utah child negligence statute used in *Black* because they could potentially incite the children to engage in criminal conduct. Thus, the State could remove the children and terminate parental rights because the parents attempted to practice (or even teach) a currently illegal religious belief. Again, by way of illustration, parents in *Lukumi* would presumably have continued teaching the religious belief of sacrificing animals despite Florida passing a city ordinance making the practice against the law. In a *Lukumi*-type scenario under the Utah child negligence statute in *Black*, it is at least questionable whether parents would be allowed to teach, believe in, or practice this tenant without losing their children. In such a situation, it is also possible that *all* parents belonging to the *Lukumi* religious community could lose custody of their children if those parents were ascribed the greater community’s belief, despite a lack of evidence that they intended to practice the belief or encourage their children to do so (as happened at YFZ Ranch).¹⁶¹

158. *Id.* at 526. The city council enacted an emergency ordinance fully incorporating Florida’s existing animal cruelty laws, and then declared Hialeah city policy opposing ritual animal sacrifices. *Id.* at 527. In addition, the city council adopted ordinances defining “sacrifice” as harmful actions towards animals not accomplished “for the primary purpose of food consumption” and prohibited animal ownership for groups or individuals who perform animal sacrifices (even when intended for strictly food purposes), but exempted licensed slaughtering establishments. *Id.* at 527–28. The city also received confirmation from the Florida Attorney General that the ordinances would align with state law prohibiting religious animal sacrifice. *Id.* at 527.

159. *Id.* at 534–35.

160. *Id.* at 538.

161. One obvious, but noteworthy, distinction between this *Lukumi* illustration and the *Shepp* and *Black* cases is that the Court in *Lukumi* examined whether the animal sacrifice

Therefore, religious parents might still rationally fear a broad removal action if their ascribed belief potentially became unpopular, and thus against the law. As in *Lukumi*, it could be possible for a supposedly neutral law of general applicability to be passed against a religious practice that the majority believes to be against public health, safety, or morals. This could consequently subject religious parents to potential child removal actions for attempting to teach a prohibited practice, even if the law were later found posthearing to be unconstitutional. Or, in the case of YFZ Ranch, this could subject parents to removal and rights terminations for merely belonging to a religious group and living within the group’s community, whether or not the parents actually subscribed to the belief, planned on living it, or expected their children to potentially do so as well.

Although *Shepp* and *Black* are only state cases with limited precedential value or influence, they potentially provide examples of protection religious parents can receive regarding *teaching* religious beliefs to their children, even when those beliefs directly (or indirectly) contravene statutory constructions. By relation, this would extend to fringe and nonmainstream beliefs because “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”¹⁶²

In summary, courts seem to draw a line when the belief itself constitutes a grave threat of harm, potentially resulting from living the belief in the children’s presence. Yet, a potential challenge for religious parents may arise if a facially neutral law is passed targeting a sect’s religious practice under the guise of protecting public health, safety and morals; but, parents may possess a certain level of legal safety when teaching that religious belief to their children. However, this level of protection could be diminished when a government agency arbitrarily ascribes to parents the beliefs (and future actions regarding those beliefs) held by the religious community or sect they belong to. And a final difficulty is the question of how a particular court would construe the phrase “grave threat,” “harm,” or “neglect,” and what type of religious tenant might be perceived as potentially causing “significant social burdens,”¹⁶³—especially

prohibition was directly targeted toward the sect and not the impact of the sect’s teachings in a family environment.

162. *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981).

163. See *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972) for particular uses of “harm” and “significant social burdens.” Another question concerns a court’s role in construing such

considering that such ambiguity in a relevant state's child welfare law is usually "resolved with reference to the public policy goals underlying" the statute.¹⁶⁴

B. Removal and Religion: Lessons from YFZ Ranch

The YFZ Ranch case demonstrates that a state agency may view the possibility of a belief being possessed and potentially practiced at a future time (e.g., FLDS mothers encouraging their sons and daughters to "spiritually marry" at an early age) as creating grave harm to children, regardless of evidence that a particular parent personally taught the belief to their child. Such agency determination can be alarming to parents within a religious community who might be ascribed a belief involving illegal conduct with "potential" for the belief being lived at some future time.

In the YFZ Ranch case, a pervasive religious belief system held by a "family" of believers was alleged to have risen to abusive levels based on current and future effects of perpetuating the belief, thus potentially placing all children in danger and creating an urgent need to remove the children from the community.¹⁶⁵ Underage marriage constituted the abusive belief assumed to be held by the community that required immediate removal of all children.¹⁶⁶ The sect's "mindset" that young girls could marry at "whatever age" *and* that a female's "highest blessing" is to have children created enough concern within DFPS to necessitate the immediate removal of all children in the community and displayed the agency's apparent focus on the religious aspects of the community.¹⁶⁷ Absent the belief regarding marriage, all of the children (other than five minors pregnant at the time of the raid¹⁶⁸) probably would have remained at

phrases. Are these questions of policy that should be left to the state legislatures that passed the law? *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 652 (1943) (Frankfurter, J. dissenting) (noting that although "conscientious scruples" override "religious scruples" when major state concerns are involved, judges should be diffident when setting their judgment against the state in the policy realm of differentiating between major and minor state concerns and in determining "what means are appropriate to proper ends").

164. *Sealed v. Sealed*, 332 F.3d 51, 59 (2d Cir. 2003).

165. Affidavit, *supra* note 19, at 5–6.

166. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *2 (Tex. App. 2008) (as determined by DFPS in interviews with various community members).

167. *Id.* at *2.

168. *See, e.g.*, TEX. DEP'T OF FAMILY AND PROTECTIVE SERVS., ELDORADO INVESTIGATION: A REPORT FROM THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE

the ranch.¹⁶⁹ However, viewing the belief as abuse necessitating removal required assuming the belief to be held by all parents within the community. It also required the inferential step that those parents would inevitably act on the belief either eventually or in the immediate future. It is doubtful whether state action upon such inferences could be justified given due process, clear and convincing evidentiary standards, and other removal considerations previously discussed.

Protection of religious parents' rights are enhanced by specific statutory and judicial safeguards, as exemplified by those afforded the YFZ parents who questioned the state's assumptions and reasoning regarding their individual belief system. For example, DFPS's actions in the case largely fell within the "immediate danger" and urgent need aspect of child removal.¹⁷⁰ In these types of "immediate and urgent" actions, the Texas Family Code ("TFC") requires DFPS to file suit regarding the parent-child relationship and request an initial hearing to be held no later than the first working day after removal.¹⁷¹ In addition, TFC requires a full adversarial hearing no later than fourteen days after the government agency takes possession of the child.¹⁷² These requirements demonstrate the previously discussed two-part process of *statutory justification* and *plan creation*¹⁷³ essential to protecting parental rights. This is done by ensuring agency actions are immediately reviewed to determine whether requirements for removal were met and that a plan can be put forth for potential reunification.

In addition, these statutory requirements place a presumption on reunification. Under the TFC, in an emergency removal situation, the agency must provide sufficient evidence to prove that: 1) the child's physical health or safety was in danger, 2) there was an urgent need for protection requiring the child's immediate removal, and 3) reasonable efforts were made to prevent or eliminate the need for removal, otherwise "the court shall order the return of the child to

SERVICES 7 (2008) [hereinafter ELDORADO INVESTIGATION], available at http://www.dfps.state.tx.us/documents/about/pdf/2008-12-22_Eldorado.pdf.

169. *Steed*, 2008 WL 2132014, at *4.

170. *See, e.g.*, ELDORADO INVESTIGATION, *supra* note 168, at 7.

171. TEX. FAM. CODE ANN. § 262.105(a) (West 2010).

172. *Id.* § 262.201(a).

173. *See supra* Part III.

the parent.”¹⁷⁴ However, the Court of Appeals of Texas held that DFPS failed to carry its required statutory burden,¹⁷⁵ and the court seemed to see through the religious pretext for the removal. The Supreme Court of Texas also affirmed the appellate court decision and held that “removal of the children was not warranted.”¹⁷⁶

The Texas Appellate Court examined DFPS’s actions within the context of each individual statutory prong. First, the court determined the FLDS belief system did not, itself, put the children in any physical danger.¹⁷⁷ Second, the court held that DFPS failed to establish the need for urgent and immediate removal because of a lack of evidence that each child in the community was in immediate danger.¹⁷⁸ The court debunked the notion that YFZ was a community household by citing a lack of evidence that the removed pregnant minors were living in the same household as the other children.¹⁷⁹ In addition, there was no evidence the parents “may someday” allow future sexual abuse warranting the “extreme measure of immediate removal.”¹⁸⁰ There was also no evidence FLDS mothers were likely to force their “pubescent female children to underage marriage or sex.”¹⁸¹ And, third, the court stated that DFPS did not make any reasonable efforts to ascertain if “some measure short of removal and/or separation from parents would have eliminated” the perceived risk.¹⁸²

This is significant for religious parents because the court implies that a belief system alone cannot place children in immediate physical danger, but rather it is the outcome from imposing “certain alleged tenets . . . on specific individuals” that may be brought into question.¹⁸³ It is unlikely that a court or agency could justifiably predict that a parent will undoubtedly subject his or her child to a future underage marriage, or anything of a similar theological nature construed as a dangerous aspect of a particular parent’s religion. A

174. FAM. § 262.201(b)(1)–(3).

175. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *3 (Tex. App. 2008).

176. *In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613, 615 (Tex. 2008).

177. *Steed*, 2008 WL 2132014, at *3.

178. *Id.*

179. *Id.* Witnesses stated that the community was actually divided into separate groups and households. *Id.* at *3 n.10.

180. *Id.* at *3.

181. *Id.*

182. *Id.* at *4.

183. *Id.* at *3.

court will likely determine that a mere teaching or belief does not incite removal when a state’s statutory requirements for removal include: 1) actual jeopardizing of health or safety, 2) high evidentiary standards regarding urgent need for immediate removal, and 3) reasonable agency efforts for reunification. In addition, if state statutes and judicial systems seemingly fail in protecting against potentially inequitable removal actions, religious parents have standing in federal courts to seek redress if they feel their parental rights have been violated by discriminate state action.¹⁸⁴

Thus, in custody cases involving state intervention, an important safeguard to religious parents and communities will be court actions similar to those in Texas where astute judges hold agencies strictly accountable to narrowly construed statutory requirements, which must be met independent of religious persuasion and organizational doctrine imputed to the believers in question. Rather, future adjudications may likely focus on individualized parental actions (or omissions) autonomously chosen and proven regardless of which church, sect, or religious community the parent belongs to. Such a direction will also prove more efficient for agencies similar to DFPS because they will not need to attempt to decipher religious requirements via postabduction interviews as a means of justifying previous removal actions.

V. CONCLUSION: IS THE ONLY THING RELIGIOUS PARENTS HAVE TO FEAR IS FEAR ITSELF?

Under the guise of child protection and state interests, DFPS removed virtually all children from the YFZ Ranch because the community was perceived to have a pervasive belief system that included underage marriage and sexual activity for minor females. DFPS considered the YFZ Ranch community to constitute one family unit and concluded that every parent of the community ascribed to the sect’s entire belief system. DFPS also assumed each FLDS community member would subscribe to, teach, and eventually practice underage marriage. The potential for practicing the belief system supposedly jeopardized each minor child within the YFZ Ranch because parental application of the belief would raise minor

184. Church of Scientology Flag Serv. Org. v. City of Clearwater, 2 F.3d 1514, 1525 (11th Cir. 1993) (“Religious groups and their members that are signaled out for discriminatory government treatment . . . have standing to seek redress in federal courts.”).

females to be subjects of abuse, and boys would be raised to become perpetrators of sexual abuse. This threat purportedly created an immediate and urgent need, in the opinion of the DFPS, to abruptly remove all minor children from the community. Thus, male and female minors (including infants) were taken on the basis of potential, future adherence to a “pervasive belief system” ascribed to parents as members of a larger religious community.

DFPS’s action potentially raises questions for other religious parents and communities regarding whether their children could also be removed, and their parental rights terminated, because of a pervasive religious belief they or their religious community hold. However, religious parents and communities generally should not fear broad future state removal and termination proceedings regarding their children unless there are larger issues of abuse, neglect, or abandonment surrounding religious beliefs.

Typically, judicial and statutory protections will prevent removal and termination justifications based solely upon religious teaching or belief. For example, parents will be afforded due process because of the fundamental nature of parental rights in raising and teaching their children; any government action in this area must adhere to the “clear and convincing” evidentiary standard. Statutory provisions, such as those in the YFZ Ranch case, generally contain “reasonable effort” requirements in preserving and reunifying families. Courts, as demonstrated by the Texas Supreme and Appellate Court, will necessarily review justifications for regular and emergency removals, and also adjudicate proposed long-term plans for the child. Finally, teaching and belief will not warrant state intervention absent actual abuse or neglect.

However, religious parents and communities should still maintain a reserved fear of government action regarding child removal and termination because of certain arbitrary elements remaining within the process. Despite parental due process rights, state action can still be statutorily and judicially justified when involving a child’s well-being or state interests in “public order.” Broad government agency and/or judicial interpretation of potentially subject terms like “welfare,” “abuse,” and “public order” could counteract and trump other parental protections and considerations extending beyond typical scenarios.¹⁸⁵ For example, in

185. See Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional*

the YFZ Ranch case, DFPS removed children in danger of abuse despite lack of confirming evidence that abuse had taken place, or that potential for abuse was present. As it turned out, the initial call accusing a community member of abuse was a hoax.¹⁸⁶ Had the Texas statutory scheme or judicial decrees viewed “abuse” and “welfare” as broadly as DFPS, the outcome may have warranted full-fledged fear for religious parents and communities everywhere. To help remedy broad statutory readings bringing about this possible outcome in the future, ambiguous terminology in child removal statutes should be refined and enhanced.¹⁸⁷

In addition, broad statutory interpretation, direct statutory discrimination, or a hostile view of a particular belief system, might jeopardize perceived parental protections currently in existence. Even the statutory requirement for reasonable agency efforts in preserving and reunifying families may be trumped by perceived “aggravating circumstances” viewed by governing, administrative, and judicial bodies as negating the possibility for reunification. “Aggravating circumstances,” unless specifically defined, can be a subjective phrase open to interpretation that is hostile to religious parents associated with fringe, or even mainstream, communities. This is compounded by some state action shifting the statutory balance from “aggravating circumstances” toward a more harm-centered approach and the arguably dead-letter status of the reasonable efforts clause.

And finally, fear of removal for religious reasons might still be justified by the fact that such an occurrence as the YFZ Ranch case actually and recently happened. Although many children were eventually returned to their parents and homes on the Ranch, removal arguably caused irreparable social and mental harm during interim proceedings after the children were forcibly taken.

Although safeguards for religious parents exist, future removal and termination cases involving the tension between parental rights and state interests also contain potential pitfalls that may create justified (albeit reserved) fear in the minds of religious parents and

Value of Pre-Deprivation Process, 65 OHIO ST. L.J. 913, 960 (2004) (“Dependency laws . . . uniformly rely on ambiguous criteria, like ‘abuse’ and ‘neglect,’ without providing true guidance to social workers and welfare agencies.”).

186. Teague, *supra* note 20 (the caller was considered a real person in the investigation up until May 18, 2008, at which point authorities acknowledged she did not exist).

187. See Howard Davidson, *Child Protection Policy and Practice at Century’s End*, 33 FAM. L.Q. 765, 774 (1999) (asserting that “it is time to seriously consider changes in the fundamental ways in which child abuse and neglect are defined and responded to”).

communities within the United States. As the Court stated in *United States v. Ballard*, “If one could be sent to jail because a jury in a hostile environment found [that person’s religious] teachings false, little indeed would be left of religious freedom.”¹⁸⁸ Similarly, a religious parent might state, “If one could have their children removed because a city, state, or agency in a hostile environment found the parent’s religious teachings against health, safety, or public order, little indeed may be left of religious freedom and parental rights.”

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188. 322 U.S. 78, 87 (1944).

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