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**Religious [Out]Laws: An Analysis of the 2008 Fundamentalist  
Latter-day Saints Raid**

A dissertation submitted in partial satisfaction  
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

in

POLITICS

By

**Cassie Ambutter**

June 2014

The Dissertation of Cassie Ambutter  
is approved:

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**Tyrus Miller**  
**Vice Provost and Dean of Graduate Studies**

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## Abstract

Religious [Out]Laws: An Analysis of the 2008 Fundamentalist Latter-day Saints Raid

By Cassie Ambutter

In early April 2008, based on a single allegation of child abuse, the state of Texas and Child Protective Services (CPS) executed a raid on the Fundamentalist Latter-day Saints, a polygamous Mormon group living on the “Yearning for Zion” ranch in Eldorado, Texas. The raid involved the immediate removal of over 400 children who were then placed in protective custody in nearby San Angelo. Despite the fact that the initial abuse allegation was determined to be a hoax, the raid was the catalyst for a long and drawn-out legal battle over whether the FLDS were suitable parents. While CPS described this case as a series of clear-cut instances of child sexual abuse, I contend that much more lay below the surface. I argue that CPS’s simple narrative of the FLDS as an unthinking and brainwashed monolithic cult missed the deep complexities of this case. Specifically, I submit that an analysis of the FLDS raid requires attention to the ways in which religion and sexuality function as dual sites of legal, constitutional, and political regulation. Considering topics such as the category of religion and religious freedom, the notion of public order, and the legal construction of the child and the family, I examine ways that the FLDS – representing both a religious and a sexual minority – face a peculiar set of difficulties when attempting to interface with the law. Drawing heavily on theories of secularism, religious freedom constitutional jurisprudence, classical liberal philosophy and its

contemporary critics, as well as queer theory, I unpack and explore the nuances of the initial 14-day hearing to determine child custody as well as subsequent decisions from the Third Court of Appeals in Austin and the Texas Supreme Court. Formative of my theoretical interventions and jurisprudential analyses are the in-person interviews I conducted with *ad-litem* attorneys who served as legal guardians for FLDS minors after the raid. The *ad-litem* attorneys were responsible for articulating to the court the best interests of the FLDS minors. Because it provided insight into the relationship between the FLDS and the law, the ethnographic component of this dissertation is crucial to the formulation of many of my central claims about the FLDS as both religious and sexual minorities. Ultimately, I describe how, regardless of one's political position on whether the raid itself was justified, the law's tumultuous relationship with FLDS difference produced many undesirable outcomes. From the smooth reunion of FLDS parents with their children, to a comprehensive determination of whether actual sexual abuse had occurred in every household, the structure of the law presented a serious roadblock to the resolution of many of the raid's central conflicts.

## Acknowledgements

There are many people to whom I owe an immeasurable debt of gratitude for this project. These are people without whom this dissertation would not exist. The Brigham Young University Library, its archives, and its librarians were a tremendous help to me in the nascent stages of this project. The LDS friends I made at BYU are some of the loveliest and most genuine people I've ever met. They took my intellectual inquiry seriously even if they didn't necessarily agree with what I was arguing. The lawyers I interviewed over the course of two summers in Texas are a group of seriously badass zealous advocates and I am still in awe of their dedication to their clients. The access they granted me was essential to this project and I am grateful that they took several hours at a time out of their busy days to answer my questions. I've never had much faith in the law, but those lawyers really challenged me in that regard. The story of the FLDS raid helped me come to terms with what it means to have faith and especially helped me come to terms with my own faith. They are as strong and resilient and complex as all of the rest of us. This project is for them too.

I am indebted to my committee: Dean Mathiowetz, Mayanthi Fernando, Vanita Seth, and Neda Atanasoski. At different points in this process, they all helped me generate new ideas, reassured me, and showed me incredible kindness and patience. I am a better writer and a better teacher because of each of them. To my lifelines and my colleagues-for-life, Karen de Vries and Jasmine Syedullah: thank

you for keeping me sane, reminding me of what's important, and for showing me what true friendship really is. I am so infinitely glad that amid the sea of competition and bitterness, I managed to find you guys. Milad Odabaei is an indispensable intellectual resource, a generous and kind reader, and he also introduced me to chocolate cream scones. He was there for me during one of the worst periods of my life. I will never forget that. Even though we probably never quite understood each other's projects, I am very grateful to Shawn Nichols for her ear, her patience, her support, and her couch (!). Finding a friend in graduate school within your own discipline with whom you feel no competitiveness is kind of a miracle. She is totally that miracle for me.

I met Cindy Morris on my first day of graduate school, which coincidentally was also one of her first days on the job. During the first six years of my time at UCSC, she advocated for me every step of the way. I found in Cindy not merely an administrative resource, but also someone for whom I came to care deeply – a friend more than a supervisor. She had faith in me even when I had no idea why. Now I get it.

My students over the past 7 years, particularly Caitlin Emmons, Ashelen Vicuna, Ernest Chavez, and Naveed Mansoori are a major reason I was able to complete this project. I tested out so many of the ideas in this dissertation in front of the classroom. My students humbled me, challenged me, and moved me at every turn and I am blessed to have been able to walk with them on their journeys. They remain the most incredible people I have ever met and I am in awe of them.



My best friend in the whole world, Josh Sucher, shows up at my door unannounced and makes time stop for a few days so we can be 16 again. I am infinitely grateful for those moments of respite and I hope they continue for the rest of our lives. Truly, “I love you” could never be enough.

Christine Bunting has spent 7 years talking me off of ledges, stopping my hyperventilation, and loving me at my most unlovable and insufferable moments. This dissertation would not be possible without her.

I could never adequately articulate how grateful I am to JSB. She encouraged me to write, even when I wasn’t sure why I was writing or if I was even capable of writing. And even though I know she’d attribute it to “someone else,” she quite honestly saved my life and handed it back to me. She truly is and always will be my [fairy] godmother.

The people at House For All Sinners and Saints in Denver and St. Gregory of Nyssa in San Francisco loved me back to life and helped me discover my true calling in life. Any roadblock I faced in the last 18 months of writing simply could not have been overcome without all of them. When I started writing Chapter 2 and knew I was going to call it “The Church Is Its People,” I had absolutely no idea what that would come to mean to me. I cannot thank them enough for reminding me of God’s presence in the world in everything they do. They are my chosen family and it is because of them that I am learning how to love fearlessly and with reckless abandon. Good Friday may be every day, but luckily so is Easter.

## *Chapter 1*

### *Introduction: The Spring 2008 FLDS Raid: Stakes, Concerns, and the Place of Polygamy in U.S. Culture*

On March 29, 2008, a Texas Child Protective Services hotline received a phone call that would eventually cost the state over \$15 million. The call to report physical and sexual abuse, which allegedly came from a 16-year-old girl named Sarah, was determined to be a hoax.<sup>1</sup> Nevertheless, that call was the catalyst for a long and drawn out legal battle over the most suitable living and family arrangements for the 400+ legal minors living on the Yearning for Zion ranch in Eldorado, Texas. The YFZ ranch in Eldorado is home to the nation's largest and most concentrated population of Fundamentalist Latter-day Saints (FLDS). The largely though not exclusively polygamous group has existed since the late 19<sup>th</sup> century, when the official Mormon Church renounced the earthly practice of polygamy in order to secure Utah's statehood.<sup>2</sup> This dissertation is about everything that happened after that initial March phone call.

I did not necessarily come to this topic in a traditional way. I was not raised in the mainstream Mormon Church (much less one of its polygamous off-shoots) so I have often been asked about my point of entry into this topic. I had been reading about Mormon polygamy since I was a young teenager. Raised a secular Jew, I was

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<sup>1</sup> Ben Winslow. "Woman arrested for Colorado hoax calls said her name was 'Sarah.'" *Deseret News*. 18 April 2008. <http://www.deseretnews.com/article/695271894/Woman-arrested-for-Colorado-hoax-calls-said-her-name-was-Sarah.html?pg=all>

<sup>2</sup> Kathleen Flake. *The Politics of American Religious Identity: The Seating of Senator Reed Smoot, Mormon Apostle* (Chapel Hill: University of North Carolina Press, 2003), 56-75.

perplexed by the idea that a present-day community in the U.S. could believe God so ordered their lives. I certainly was not of the opinion that God had that kind of power. As a graduate student halfway through my first year, I was doing some recreational reading and, through a series of unexpected events, the subject of that reading would become this dissertation. Specifically, in the winter of 2008, I took a graduate seminar on language and politics. I decided early in the quarter that I would write my seminar paper on a recently published memoir by a woman who dramatically escaped the clutches of an emotionally and physically abusive husband as well as a repressive and insular religion. This book was called “Escape” by Carolyn Jessop. She was one of the wives of a very influential man in the Fundamentalist Latter-day Saints, a mostly polygamous offshoot of the Mormon Church, in Eldorado, Texas.

Part of the reason I selected this memoir was because of its sensationalism. Jessop spoke of intense regulation and micromanagement within the community, religious “brainwashing,” and the real social dangers of girls marrying too young.<sup>3</sup> Her story was one of personal tragedy, loss of home and community, and the desire of a mother to protect her children from harm. It was truly compelling, and at the time I didn’t give much thought to digging deeper into the context she described.

All of that changed the following quarter when I checked the news during a seminar break and learned that the state of Texas had conducted a raid on the FLDS. On April 3, 2008, on suspicion of one instance of child sexual abuse, over 400 women and children from the Yearning for Zion (YFZ) ranch in Eldorado were

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<sup>3</sup> Carolyn Jessop, *Escape* (New York: Broadway Books, 2008).

loaded onto buses and brought to a coliseum in either nearby San Angelo or Fort Concho, where they waited for Texas Child Protective Services to explain why they were all being held indefinitely.<sup>4</sup>

As I watched the raid unfold from several states away, I saw the same photos the rest of the U.S. public saw: women with unfashionably long French braids adorned in 19<sup>th</sup>-century style prairie dresses being ushered onto buses, holding the hands of scared and crying young boys and girls.<sup>5</sup> In the days immediately following the release of those initial photos, I watched the same interviews everyone else watched: news anchors interviewing FLDS mothers and getting generally monotone but concerned responses about the community and the allegations being leveled against them. In these interviews, FLDS mothers all plead with Child Protective Services and the state of Texas to return their children to them.<sup>6</sup>

### **The Role of the *Ad-litem* Attorneys**

My impetus for writing this dissertation was not born out of my disbelief in Carolyn Jessop's story but neither was it born out of my desire to return all FLDS children to their families because the state had obviously violated their religious freedom. Rather, I found myself asking a lot of questions that the state of Texas, Child Protective Services, and the media were not asking because they believed such

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<sup>4</sup> Danielle White, interviewed by Cassie Ambutter, Dallas, Texas, September 9, 2010.

<sup>5</sup> Sara Corbett, "Children of God," *The New York Times*, 27 July 2008.

<sup>6</sup> CNN, *Larry King Live*, "Mothers: Give Our Kids Back," Eldorado, TX. 20 April 2008.

ABC, *Good Morning America* with Robin Roberts, "Polygamist Mothers Plea: One-On-One Interview Inside Compound," 17 April 2008.

questions to be beside the point. For example: Would the usual standards legal and constitutional standards used to determine acceptable religious behavior be applied in this case? If not, what does that say about the status of the FLDS as a religion? How much of the raid had to do with the state's general disdain for polygamy? In that vein, how was Texas family law (or any state's family law for that matter) going to manage child abuse accusations as well as custody and family counseling arrangements for the largely polygamous FLDS families?

In the nascent stages of this project, I was not sure to whom I ought to direct these questions. Then, in the spring of 2009 (and, incidentally, exactly one year after the raid) I attended a conference<sup>7</sup> where I met a professor who told me her friend served as a volunteer attorney after the raid and that this attorney was still in contact with his client. My initial phone interview with this attorney, Chris Cantrell<sup>8</sup>, led to several more in-person interviews during the summer of 2010, which led to many more in-person interviews over the summer of 2011. The lawyers who volunteered to represent children and/or people that the state presumed to be legal minors are referred to as attorneys *ad-litem*. An *ad-litem* is a court-appointed attorney who articulates the best interests of his/her client; if the client is too young or too emotionally immature to adequately speak to those interests, the *ad-litem* functions as

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<sup>7</sup> Midwest Political Science Association Conference. Panel on "Religion and Law." 3 April 2009. Chicago, Illinois.

<sup>8</sup> Chris Cantrell, phone interview by Cassie Ambutter, June 5, 2009.

In the interest of confidentiality, I have changed the names of all *ad-litem* attorneys I interviewed in person or over the phone.

that person's legal guardian and determines the best interests based on an assessment of that individual over the course of a few interactions.<sup>9</sup>

Because of the unusual circumstances of this case, many of the *ad-litem*s had relationships with their clients that were not typical. A number of the lawyers I interviewed spoke of caring deeply for their clients, taking calls from them at all hours of the night, and continuing to remain in contact with their clients long after they were obligated to do so. This atypical relationship produced some of the fiercest advocacy on behalf of the clients – people the *ad-litem*s cared for as though they were kin. Although I was not present during the confidential meetings between the *ad-litem*s and their clients, I could not have anticipated how, even two years later, the lawyers would articulate the closeness of their relationships. In a project about non-normative religion, non-normative sexuality and the law, it seemed fitting that the most unexpected point of convergence of all three would be love, care, and the genuine concern for overall wellbeing I heard the lawyers express for their clients. As will become evident throughout the dissertation, even though the questions I asked the *ad-litem*s were almost exclusively legal and political, their responses spoke to the decidedly human elements of this case: namely, that real children, real families, and sincere, deeply held religious beliefs were at stake.

The *ad-litem*s were not only formative of many of the core interventions in this dissertation, but they also figured prominently in the three main legal battles that

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<sup>9</sup> Texas Family Code. Section 107.001. “The Parent-Child Relationship And the Suit Affecting the Parent-Child Relationship.” (2) (5), “Attorney ad litem” and “Guardian ad litem.” <http://www.statutes.legis.state.tx.us/Docs/FA/htm/FA.107.htm>

the FLDS faced immediately following the raid. While I unpack and examine those legal battles extensively in Chapters 2 and 3, I want to briefly highlight their significance here. The initial civil investigation regarding child sexual abuse allegations against the FLDS was the 14-day adversary hearing to determine custody of the 400+ minors. Pursuant to Texas Family Code, the 14-day hearing must occur within 14 days of a child's removal from his/her home in order to determine whether the child will be retained by the state for an additional period of time or whether they child will be returned to its parents.<sup>10</sup>

District court judge Barbara Walther for Schleicher County, Texas presided over this particularly unusual scenario: There were so many lawyers and clients that the court had to utilize an additional, spillover room for any people that the main courthouse could not accommodate. Lawyers in this spillover room who were interested in asking questions or making statements during the hearing had to do so via special audio and visual assistance.<sup>11</sup> I will discuss the meaning and long-term significance of Judge Walther's verdict in great detail in Chapter 2, but the immediate impact was that all minors and suspected minors were to be retained by the state, and the court would reevaluate the situation of each individual child before 60 days had passed.<sup>12</sup>

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<sup>10</sup> Texas Family Code, Section 262.201. "Full Adversary Hearing; Findings of the Court." <http://www.statutes.legis.state.tx.us/Docs/FA/htm/FA.262.htm>

<sup>11</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing. April 17-18, 2008.

<sup>12</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 5, pg# 340: 13-17.

The Third Court of Appeals in Austin as well as the Texas Supreme Court published decisions in *In re: Sara Steed* that disagreed with and thus ultimately overturned Judge Walther's initial ruling. Contending that the state (and in particular, Child Protective Services) had not met its burden of proof, they ordered all children for whom there was no demonstrable evidence of abuse to be reunited with their families.<sup>13</sup> This marked the end of the civil charges against individual members of the FLDS.<sup>14</sup>

Prior to my ethnographic work with the *ad-litem* attorneys, I was committed to interviewing the alleged minors who were seized by the state as well as the parents of those alleged minors. Initially, this seemed like the ideal route to take, particularly given how the media and state representatives from Texas clamored to hear their personal stories. That said, the more engrossed I became in my interviews with the lawyers, the more my project started to take shape around their claims. Saba Mahmood, an anthropologist of secularism, argues that our theories emerge from our ethnographic work, which is why it is especially difficult to employ theories used in one ethnographic context to a wholly different scenario.<sup>15</sup> So, while I take seriously the individual FLDS members' accounts of the raid, that is not what I aim to document or explore here.

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<sup>13</sup> *In re Steed*, No. 03-08-00235-CV, at 9: Appendix 1. *In Re Texas Department of Family and Protective Services*, Relator. On Petition for Mandamus. No. 08-0391, The Supreme Court of Texas.

<sup>14</sup> The state filed criminal charges for sexual abuse in instances where they could prove that certain FLDS men were culpable, but these were distinct from the civil (custody) charges brought by Child Protective Services.

<sup>15</sup> Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (New Jersey: Princeton University Press, 2005), 163-165.



This dissertation is fundamentally about the law. It attends to the ways in which the law manages the kinds of difference that simply cannot be assimilated or enfolded into the political and ethical project of U.S. liberal democracy without a massive structural overhaul of the legal system and political culture. I argue here that despite the fact that it was integral to the architecture of modern U.S. religious freedom jurisprudence, Mormon polygamy—insofar as it represented both non-normative religion and non-normative sexuality—is essentially alien to the structure of U.S. law, and this alienness shaped every aspect of the raid and its legal aftermath. In one respect, because no member of the FLDS was ever charged with violating Texas’s anti-bigamy statute in connection with the initial raid, one could claim (as many Texas state officials, representatives from Child Protective Services, and even *ad-litem*s have) that this case was not per se about the state’s desire to stamp out and prosecute polygamy.<sup>16</sup> However, with a deeper investigation into the raid and its ensuing legal battles, I use this dissertation to tell a different story. While state officials maintain that the raid was a straightforward case about child sexual abuse, each of my chapters explores an issue in the raid that lay below the surface.

### **Interlocutors and Interventions**

My central interventions in this dissertation rely on intellectual contributions from several areas of theoretical inquiry. I engage with contemporary queer theorists

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<sup>16</sup> Jerrold Cullen, interviewed by Cassie Ambutter, Plano, Texas, September 8, 2011. Also, see, for example: Kirk Johnson, “Texas Polygamy Raid May Pose Risk,” *The New York Times*. 12 April 2008.

such as Sara Ahmed and Jasbir Puar who consider the significance and value of queer analytics for thinking about contemporary political and ethical problems of sexuality. I extend their questions in order to decenter the subjects of queer theory and focus instead on analyzing sites and spaces as queer. In general, I entered this project with concerns about queer theory's treatment of religion as a force or phenomenon that is wholly destructive of queer life. This treatment is largely due to the fact that early queer theory centered so heavily on rejecting the politics of assimilation (e.g. marriage, military participation, etc) in service of upending the liberal state. Because religion was perceived to be something that encouraged traditional relationships instead of subverting them, religion and queer theorizing seemed at odds with one another.<sup>17</sup> Given that the classic relationship of queer theory and religion is based on their supposed antagonism, it is difficult to conceptualize them together without imagining that religion is working to suppress the free expression of sexuality. While I acknowledge that this tension is a legitimate one in a secular state that often encourages both religious and sexual freedom, I aim in this dissertation to ask a different sort of question of queer theory: Can queerness as an analytic help us look at the relationship of the law and legal norms to religious and sexual minorities? Might we deploy the queer analytic to look not at the personal experiences and sentiments of

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<sup>17</sup> For more on this, see for example: Eve Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 2008), Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham: Duke University Press, 1997), and David Bell & Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Cambridge: Polity, 2000).

persecuted queer subjects, but at the legal, social, cultural, and political effects of the FLDS's relationship to the law?

I also engage with critics of secularism, particularly Talal Asad, Hussein Agrama, and Winnifred Fallers Sullivan. Although Asad and Agrama largely write about contexts outside the U.S. (namely Egypt and Western Europe), I rely on their frameworks in order to describe, examine, and unpack the management and production of religious difference in secular states like the U.S. Understanding that secularism was more than just the hypothetical extrication of religion from politics, Asad and his interlocutors interpreted secularism as an ontological force, a truth of the “modern state” that produced ways of knowing and being, particularly with regard to religion. To that end, he called for studies in secularism to think about secularism in terms of “the forms of life that articulate [it], [and] the power [it] release[s] or disable[s].”<sup>18</sup> In many secular states, Asad’s formulation reveals itself in what Agrama refers to as “the active principle of secularism” – namely the authority of the state to determine how and in what ways religion will be permitted to influence or impact public life.<sup>19</sup> U.S. law and religion scholar, Winnifred Fallers Sullivan, said that: “Understanding Americans to be fundamentally religious is now once again deeply embedded in government and in our public culture.”<sup>20</sup>

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<sup>18</sup> Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003), 17.

<sup>19</sup> Hussein Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: University of Chicago Press, 2012), 104.

<sup>20</sup> Winnifred Fallers Sullivan, “We Are All Religious Now. Again.” *Social Research: An International Quarterly* 76, no. 4 (2009): 1192.

I expand on Sullivan, Asad, and Agrama's questions about the category and role of religion in public life in order to inquire about the analytical and political value of religious liberty for religious minorities in the U.S. legal system. In terms of the raid (and from the perspective of CPS) the question of whether the FLDS were a true church or a real religion was peripheral to the objective reality of child sexual abuse. Yet, the stakes of such a question are high, as constitutional safeguards and additional legal protections lend a significant degree of legitimacy to a group that understands their relationship to the world to be religious. For this reason, I am concerned with how the absence of those safeguards impacts the religious minorities whose difference the law cannot easily accommodate. Considering how the FLDS would be understood or treated by the law (and, in particular, the court system) thus figures centrally in this dissertation.

My intervention into queer theory and theories of secularism is undergirded by my broader engagement with poststructuralist critics of liberalism like Wendy Brown and Elizabeth Povinelli. I extend their questions about difference and incommensurability in order to investigate the ontological power of norms about religion and sexuality under late liberalism. Brown argues that a political feature of robust liberalism is its ability to accommodate difference without that difference entirely supplanting the liberal state.<sup>21</sup> Povinelli ultimately articulates a similar point, though she adds that acceptable forms of difference under liberalism – if they seek legal protection – have to conform to the overarching principles of liberalism as a

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<sup>21</sup> Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2008), 183-185.

political and cultural ideology.<sup>22</sup> Their questions about the law's limited ability to recognize difference and alterity inform my particular claims about the FLDS in the context of the raid: namely that the FLDS as a religious and sexual minority are so saturated by their difference that an impasse will inevitably result when they interface with the law. To that end, my goals here are not to articulate the desires or wishes of the FLDS, or assess how the law might better accommodate the FLDS, but rather to describe the effects of their relationship to the law, the outcome of that relationship, and the kinds of spaces it forecloses and enables.

### **New Problems, New Questions**

My first chapter, "Public Order, the Problem of the Polygamy, and the Project of Secularism," essentially functions as a genealogy of the notion of "public order" in the U.S. political landscape. I engage primarily with Hussein Agrama, an anthropologist of secularism, in order to describe the ways in which the notion of "public order" served to create standards of acceptable religiosity in the U.S. and, in particular, regulate the religious and sexual practices of polygamous Mormons. Moreover, in order to highlight the shift in the style of regulation, this chapter employs constitutional law as it traces the historical treatment of Mormon polygamy beginning in the 19<sup>th</sup> century. I argue that while there may no longer be laws affirmatively regulating and prosecuting individuals for polygamy, that does not mean that the cultural, political, and even legal disdain for polygamy has receded

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<sup>22</sup> Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Modern Australian Multiculturalism* (Durham: Duke University Press, 2002), 173-176.

from the U.S. consciousness. In fact, I suggest here that despite Texas representatives' insistence that polygamy was irrelevant to the raid, the rise of tolerance discourse has allowed disdain for polygamy to thrive in more coded and covert ways.

My second chapter, "The Church Is Its People," is titled after a statement made by one *ad-litem* attorney during the 14-day adversary hearing to determine custody of the 400+ FLDS minors. In this chapter, I take up the claim of critics of secularism (particularly Talal Asad) that religious freedom only protects certain religions and thus determines only certain kinds of actions to be religious. Going further, this chapter demonstrates that the invocation of "religious freedom" as a particular way of reasoning and as a legal claim is not universally available to all who might understand their relationship to the world as "religious." Specifically, only when certain criteria are met – only when something is clearly determined to be a proper religion – is it able to then deploy religious freedom as a form of reasoning. In this chapter, I engage with the literature on New Religious Movements<sup>23</sup> in order to account for why the FLDS often fall on the wrong end of a religion-cult continuum, thus making themselves more susceptible to state intervention and far less likely to receive the legal and constitutional benefits of a proper religion. When one cannot invoke religion or religious freedom, such an analytical foreclosure impacts how

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<sup>23</sup> As I describe at considerable length in Chapter 2, there is debate among New Religious Movement scholars about whether fundamentalist Mormonism emerged too early to be considered "new," but I highlight how fundamentalist Mormons nevertheless share many common traits with an NRM proper. It is these overlapping traits that make them especially likely targets for increased state scrutiny or even raids.

other dimensions of a conflict might be thought. Given that the trial court and much of the news media believed it was inappropriate to invoke religion or religious freedom with regard to the FLDS raid, it affected how other aspects of FLDS life were assessed, namely sexual relationships, marital relationships, and gender dynamics. In particular, the definition of religion enshrined in the law defines the parameters of what it means to be religious and reveals the implications of a state that supports and institutionalizes such a definition.

In my third chapter, “Political Fissures, Analytical Imbrications: The Impossibility of FLDS Teen Pregnancy,” I describe the policy position that Texas faces a teen pregnancy crisis. Although Child Protective services raided the FLDS because of a single accusation of child sexual abuse (which CPS believed to be part of a supposed larger culture of underage sex and pregnancy), the law did not treat these young mothers as part of that teen pregnancy crisis. While the news media and some liberal feminist theorists suggest that the simple presence or absence of consent is what distinguishes these two types of teen pregnancies, this chapter examines how a focus on consent tends to explain away other fundamental political questions about liberalism, the notion of childhood, marriage, and gender norms under secularism. To that end, I engage with classical liberal contract theorists like Locke, Rousseau, and J.S. Mill as well as several of their present-day feminist interlocutors in order to unpack the legal notion of “childhood” at play in the raid and its ensuing investigations. Ultimately, I demonstrate how these different groups of pregnant teens are de-linked politically and thus cannot be thought together analytically. Then, I

describe how this de-linking is enabled by liberal legal logic. Finally, over and against the ways they are separated politically, I argue that these teen pregnancies are fundamentally overlapping phenomena; thus, I evaluate the ethical and analytical implications of considering them together.

In my final chapter, “Queer Spaces,” I build on the work of contemporary queer theorists<sup>24</sup> in order to argue that the interactions between the FLDS and liberal law – interactions that implicate both their religion and their sexuality – ought to be characterized as queer and analyzed through that lens. Queer theorizing as I figure it here destabilizes a notion of the individual who inhabits a sexual identity, in favor of *spaces, interactions, and modes of being in the world that are queer*. As I conceptualize it within this chapter, the queer space does not rely on an admission of queerness by a group of queer subjects. Thus, this chapter explores how the circumstances of the FLDS raid demand attention not to the individual subjects of fundamentalist Mormon polygamy, but to the ways that the spaces they occupy are queer ones – ones that engage with, inhabit, challenge, and defy acceptable ways of being religious and sexual in the world.

I chose these points of intervention into the FLDS raid partly because they were issues that seemed to be hidden beneath the surface of an ostensibly straightforward legal conflict about child abuse and custody arrangements; I also chose them because they revealed the unpredictable and jagged nature of the law,

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<sup>24</sup> In particular, see: Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Durham: Duke University Press, 2006) and Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007).



particularly in its relationship to religious and sexual minorities. The deeply complex, diverse elements of the law are clearest in the contrasting relationship between the first and final chapters. The story I tell in chapter 1 is one in which the law, via the amorphous standard of “public order,” essentially becomes increasingly tolerant of Mormon polygamy. This was represented by a decrease in laws that affirmatively regulated polygamy and consequently ushered in an era in which the law sought to accommodate or tolerate the kind of difference presented by polygamous Mormons. Yet, my final chapter reveals how -- despite its good intentions in attempting to solve the legal crises presented by the raid – the law’s structural inadequacies were too great. To that end, I demonstrate how the strictures of hetero-monogamy in the law, particularly the emphasis on biological parentage as the primary determinant of what constitutes a family, made it virtually impossible for the law to make sense of the kind of difference exhibited by the FLDS.

### **The Public Face of Polygamy: “Sister Wives” on TLC**

Two years after the raid, the fascination with polygamy in the U.S. imagination reached new heights and further revealed the importance of the questions I ask in this dissertation. The television network TLC premiered a new series called “Sister Wives” about the Brown family of Utah, which includes husband Kody and his wives Meri, Janelle, Christine, and Robyn, and their seventeen children. The family is affiliated with the Apostolic United Brethren, a polygamous off-shoot of the Mormon Church that is similar to the FLDS in some basic ways (chief among them

the belief in the principle of plural marriage) but distinct in that they are a far more diffuse community and are, on the whole, less insular than the FLDS.<sup>25</sup>

The show chronicles their lives in Utah, the struggles they go through as an independent polygamous Mormon family, and how they interface with the overwhelmingly monogamous, mainstream LDS world of which they are a part. TLC also details the Brown family's abrupt move to Las Vegas (a place generally considered to be more hospitable to polygamists) soon after they "came out" publicly as polygamous. As a result of their public declaration, Utah state officials pursued a formal investigation into their lives and considered prosecuting them for violating Utah's anti-bigamy law. Although the state claims to no longer be pursuing a case against the Brown family, they remain in Nevada because of the fear that an investigation would escalate should they return to Utah and continue to live openly as a polygamous family.<sup>26</sup>

TLC documents the struggles the Brown family faces when they interact with the law (in terms of their fears of prosecution and persecution at the hands of the state) as well as struggles they face socially when attempting to interact with a political and religious culture that finds them at least bizarre and at worst, repugnant. For example, in Season 1, Episode 6, entitled "A Fourth Wife To Be," the wives shop for wedding dresses for Robyn's marriage to the rest of the Brown family. They experience significant misrecognition and fear of being 'outed' when the sales clerk

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<sup>25</sup> Janet Bennion, *Polygamy in Primetime: Media, Gender, and Politics in Mormon Fundamentalism* (Waltham: Brandeis University Press, 2012), 182.

<sup>26</sup> Bennion 183-187.

asks if the other wives are Robyn's bridesmaids and the women awkwardly respond by saying they are "special guests." At this point in the taping of the series, the Brown family had not come out publicly as polygamous and feared that if their identity were to be revealed, they would face serious social and legal consequences.<sup>27</sup> During the first seven episodes of Season 2, the family came out on national television in New York, fielded questions about their relationship, their children, and their faith, and consequently faced intense legal scrutiny. Police were parked outside of their house throughout the day and night and the teenaged children expressed fears that their father would be arrested and they would all be taken by the state and kept from their families. In many ways, the fears expressed by the Brown family are not unusual as the state has a history of persecuting Mormons who live the religious principle of plural marriage.<sup>28</sup> Although the Brown family is distinct from the FLDS in many ways, the real, legitimate fears of persecution are common among all polygamous Mormons.

In Season 2, episode 20, "College-Bound Browns," Religious Studies instructor and Episcopal priest Danielle Tumminio invites Kody Brown, his wives, and their older children to a panel discussion on polygamy with an audience of students from several Boston-area colleges/universities. Tumminio describes this as her attempt to normalize polygamy by presenting a polygamous family who, apart

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<sup>27</sup> *Sister Wives*. "A Fourth Wife To Be." *Sister Wives*. TLC. 17 October 2010.

<sup>28</sup> *Sister Wives*. "Browns Out of Hiding," "Free Range Browns," "The Price of Polygamy," "Carving into Polygamy," "Wife #3 Hits Sin City," "Polygamist Party," and "The Brown Family Decision." *Sister Wives*. TLC. 3 March 2011, 20 March 2011, 27 March 2011, 3 April 2011, 10 April 2011, 17 April 2011, and 8 May 2011.

from the fact of polygamy, is virtually indistinguishable from an average white middle-class American family. During the question and answer session, the Browns are quick to distinguish themselves from other fundamentalist Mormons like the FLDS. They offer that they, unlike the FLDS, emphasize consent, choice, and waiting until a later age to marry.<sup>29</sup> In this episode, the Browns advocate for the acceptance (both social and legal) of polygamous families who violate no laws or norms apart from the prohibition on polygamy, a law with which they disagree. While the Browns actively work to distance themselves from the FLDS (and there are no doubt major differences between the two), their relationships to the law are nevertheless fairly similar. As I describe in chapter 2, because fundamentalist Mormons occupy a peculiar, liminal space of being not quite a religion and not quite a cult (according to constitutional and academic definitions of both “religion” and “cult”) as well as embody a family arrangement that is essentially alien to the structure of U.S. law, their interactions with the law are generally antagonistic; regardless of whether there is a desire on the part of lawmakers to accommodate Mormon polygamy, legal and constitutional formulations of religion, marriage, and family render that quite difficult, if not impossible.

Kaitlin McGinnis suggests that despite the fact that the Browns faced charges as a result of publicly violating Utah’s anti-bigamy law, “their television program...may actually be achieving [their] goal of dispelling polygamy

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<sup>29</sup> Sister Wives. “College-Bound Browns.” *Sister Wives*. TLC. 13 November 2011. Moya Luckett. “Playmates and Polygamists: Feminine Textuality in Big Love, Sister Wives, and The Girls Next Door.” *Feminist Media Studies* (2013), 9-11.

misconceptions and could potentially represent the beginning of a societal turning point towards the acceptance of the practice.”<sup>30</sup> In July 2011, Kody Brown and his family filed a lawsuit that challenged the constitutional merits of Utah’s anti-bigamy statute. In a petition that combined arguments for religious freedom and sexual freedom, the Browns contended that polygamy ought to be constitutionally protected primarily because the Supreme Court ruled in *Lawrence v. Texas* (2003) that the sexual privacy of consenting individuals is protected under the Due Process Clause of the 14<sup>th</sup> Amendment.<sup>31</sup> I mention this not because I will pursue constitutional arguments regarding sexual privacy in this dissertation, but rather to highlight a new way that polygamous Mormons are pursuing constitutional safeguards.

Many have deployed the same privacy logic to argue for the legalization of both polygamy and gay marriage. These arguments generally rely on broad notions of tolerance and pluralism as well as libertarian ideas about the right to be free from government intervention in matters of personal, private concern.<sup>32</sup> However, unlike arguments for gay marriage that still, by design, rely on a two-parent matrix, assimilating polygamy into the U.S. social and legal schema would – at least initially – confound it. As I describe throughout this dissertation, particularly in chapters 2, 3,

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<sup>30</sup> Kaitlin R. McGinnis. “Sister Wives: A New Beginning for United States Polygamist Families on the Eve of Polygamy Prosecution.” *Villanova Sports and Entertainment Law Journal* 19 (2012): 259.

<sup>31</sup> McGinnis 280. (I will address the result of this case in my conclusion).

<sup>32</sup> For example, see: Adrienne D. Davis. “Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality.” *Columbia Law Review* (2010); Jamie M. Gher. “Polygamy and Same-Sex Marriage – Allies or Adversaries Within the Same-Sex Marriage Movement.” *William and Mary Journal of Women and Law* 14 (2008); Elizabeth Larcano. “Pink Herring: The Prospect of Polygamy following the Legalization of Same-Sex Marriage.” *Connecticut Law Review*. 38 (2005).

and 4, U.S. liberal legalism is not designed to easily accommodate any kind of polygamous Mormons. The FLDS (and polygamous Mormons generally) have family structures and marital arrangements – both of which are attendant to their religiosity – that are alien to U.S. liberal legalism. Thus, extolling liberal virtues as a vehicle for the legal accommodation of consensual adult polygamous relationships misrepresents the nature of the conflict between Mormon polygamy (especially the FLDS) and U.S. liberal legalism. As I will describe in detail, U.S. understandings of religion, marriage, sex, and family have all been legally or constitutionally codified in such a way that precludes a simple extension of liberal virtues to this particular “other.” As I describe in chapters 1 and 2, the polygamous Mormon “other” was created in opposition to the norm of acceptable religious behavior, and thus the polygamous Mormon came to represent that which could never be an expression of proper religiosity.

### **Digging Deeper**

I did not write this dissertation with the intention of solving the crisis presented by the raid. I also do not necessarily think that the law will offer us easy answers in the form of the repeal of anti-bigamy laws nationwide or the creation of progressive legislation that seeks to define marriage or family in a much more capacious way. Rather, my goal here is to encourage new questions about old topics. The role of polygamy in the political, social, moral, legal fabric of this country did

not simply vanish with the passage of 19<sup>th</sup> century laws that prohibited its practice<sup>33</sup>; polygamy may have receded from our consciousness but its continued importance is evidenced in the questions that emerged from the raid but were never asked.

My examination of the law did not offer clear-cut solutions to the many problems with the raid (from the initial decision to conduct it to the way Child Protective Services handled each family's case), and similarly, the questions I ask in the following chapters do not come with definitive answers. Specifically, questions regarding what it means to be religious, the definition of "child," and the definition of marriage and family are all attendant to the broader question of polygamy's role in U.S. culture. Throughout this dissertation, I show that the law proves itself especially jagged and unpredictable when dealing with this particular set of questions.

As I highlighted earlier in my discussion of the Brown family from TLC's "Sister Wives," the issues I unpack in this dissertation are not problems that impact and concern the FLDS exclusively; rather, they also concern the approximately 40,000 polygamous Mormons living in the U.S. today.<sup>34</sup> Because polygamous Mormons (even ones as different as the Browns claim they are from the FLDS) fear being targeted and persecuted for their beliefs, families will always fear they will be torn apart by the state. To that end, the FLDS raid revealed that Texas's approach to the recognition and management of radical difference was to quash it without asking

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<sup>33</sup> I will discuss many of these in later chapters, but I am primarily referring to the Morrill Anti-Bigamy Act (1862) and the Edmunds-Tucker Act (1887).

<sup>34</sup> Jillian Keenan. "Legalize Polygamy!" *Slate Magazine* 5 April 2013.  
[http://www.slate.com/articles/double\\_x/doublex/2013/04/legalize\\_polygamy\\_marriage\\_equality\\_for\\_all.html](http://www.slate.com/articles/double_x/doublex/2013/04/legalize_polygamy_marriage_equality_for_all.html)

sufficient questions. For example, in my interview with *ad-litem* attorney Lisa Reyes, I asked whether she thought that something like the 2008 raid was likely to happen again, be it in Texas or elsewhere. In her response, she expressed doubt that Texas would pursue anything like this again:

I think – and this is a very Texas phrase – but so often people in Texas shoot first and aim later. And that’s kinda what the state did. They shot before they aimed and didn’t realize what can of worms they had opened up. They didn’t think it through. They swept everybody up together and then kicked them out the door. And that’s what got them in such hot water.<sup>35</sup>

The more I began reading the legal documents and the more interviews I conducted, the clearer it became that Reyes’ characterization was accurate. That the state of Texas and Child Protective Services approached the FLDS as though every person in the community was virtually indistinguishable from every other person necessarily impacted the kind of treatment they received from those agencies and institutions. Because I aim in this dissertation to describe and account for the relationship between the FLDS and the law, each of the avenues I explore herein attends to the reality of the law’s overgeneralizations about the FLDS and the damage such overgeneralizations wrought. Be it religion, marriage, family, or childhood, the issues I explore in the ensuing chapters compel us to take more seriously the state’s tactics for managing and domesticating radical forms of difference. A crucial part of this is to consider why the 2008 raid and its legal aftermath unfolded as they did.

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<sup>35</sup> Lisa Reyes, interviewed by Cassie Ambutter, Dallas, Texas, September 7, 2010.



## *Chapter 2*

### *Public Order, the Problem of Polygamy, and the Project of Secularism: Taming Robust Religious Difference*

Because most of the FLDS children were reunited with their families after the 2008 Fundamentalist Latter-day Saints raid, one of the central looming questions was why the raid even happened at all. On the surface, however, the question of what initially motivated the state seemed obvious. As I mentioned in the introduction, the state of Texas and Child Protective Services' impetus for conducting the raid was a phone call from an alleged 16-year-old girl and the attendant suspicion of widespread child sexual abuse on the YFZ ranch in Eldorado.

Of the justifications offered by the state and CPS for the raid and the ensuing legal battles, the mere fact of polygamy within the FLDS was not chief among them. In fact, as I will describe here, and later in Queer Spaces, polygamy was not officially what Texas was committed to prosecuting in this case. My interviews with *ad-litem* attorneys indicate that polygamy itself is generally ignored in Texas and neighboring states in the interest of tolerance. As the *ad-litem*s have highlighted and as my discussion of their interviews will confirm, state officials – absent a secondary reason like child abuse, sex trafficking, or welfare fraud -- typically engage in a policy of non-intervention with respect to Mormon polygamy. In this way, the role of polygamy in the raid -- including the initial removal of minors, the state's retention of those minors, as well as ensuing investigations -- appeared on the surface to be minimal or even incidental to the more serious allegations of child abuse. I will

demonstrate, however, that the fear of and disdain for polygamy has not receded from the U.S. political consciousness; rather, the approach to regulating polygamy has become more roundabout and coded.

The specter of Mormon polygamy nevertheless figured into political and legal dimensions of the raid as well as its aftermath despite the fact that it was not the explicit impetus for the raid. As this chapter will illustrate, Mormon polygamy has a complex relationship to U.S. legal and constitutional history, particularly in terms of religious/sexual freedom. Specifically, beginning in (and occurring most prominently during) the 19<sup>th</sup> century, polygamy was regulated by all levels of government under the fairly amorphous “public order” standard. Public order is not a regulatory concept exclusive to the U.S., nor does it take a coherent form across national, political, and ideological boundaries. Yet, as I will describe below, even in its diverse iterations, the theoretical and political import of the public order standard in the regulation first, Mormon polygamy, and later, of virtually all religious freedom claims, is undeniable.

Public order within the U.S. relies on a capacious set of norms and values that defy traditional questions of what it means to be secular and what it means to be religious. Public order, insofar as it is historically enshrined in secular legal practices/courts, is itself a secular concept. That said, public order is also understood through a very particular notion of Protestant Christianity, and so it functions as a religious standard as well. Specifically, public order serves as the standard against which acceptable, proper religious practice is measured. Public order is the vehicle

through which religion comes to be defined and regulated by the law. The legal definition of religion emerges most clearly through the concept of public order.

This chapter thus examines the development of the “public order” standard in U.S. religious freedom jurisprudence. It argues that this standard – the intentions of its political supporters notwithstanding – had the effect of taming robust religious difference as well as robust sexual difference. Lawmakers, politicians, and jurists deployed the public order standard in a way that shaped the conversation about religious and sexual freedom in the U.S. The original language of “public order” figured prominently in 19<sup>th</sup> century law and policy about Mormon polygamy and its legacy looms large in political and constitutional debates about the state’s role in managing religious difference.

From *Reynolds v. United States* (1878) onward, fundamentalist Mormonism and its attendant practices (namely polygamy) have always been judged by the standard of public order. Public order has consistently been the rubric by which religions were deemed properly religious, i.e. whether they qualified for rights and freedoms as an accepted religion. Historically, when Mormonism came to be disqualified from legal protections, the court or legislature’s justification always centered on the idea of public order. As I will attend to later, public order was not a clearly defined set of rules or norms that remained consistent over time. Instead, it was a fairly amorphous way for the state to express its disapprobation for Mormonism generally and polygamy more specifically. Later, public order manifested in slightly different forms, calling itself “moral order” or inspiring in the

populace fears of “criminality” or “lawlessness.” Public order thus grew into an at once vague and complex regulatory schema for managing religious difference.

### **Theories of Public Order In Secularism**

In order to describe the ways that “public order” functioned politically and constitutionally with respect to religious freedom jurisprudence, I engage briefly with Talal Asad, an anthropologist of secularism, and more extensively with the theoretical contributions of Hussein Agrama, a theorist of secularism in the Egyptian context. I do this not to suggest that the notion of public order within a secular Egypt can be transposed onto the United States, but rather to parse how a secular state’s commitment to “public order” always reveals the ways in which such a state actively blurs the line between the religious and the secular. So, I primarily engage, concur with, and deploy Agrama’s theoretical framework insofar as it suggests that the line between the religious and the secular is becoming increasingly blurred, but I depart from his intervention in terms of how public order is and has been deployed in the U.S. context.

By way of theoretical background, I describe below some of Talal Asad’s contributions to the idea of religion and public order, a topic on which Hussein Agrama expands in his more recent work. Asad describes religion in 17<sup>th</sup> and 18<sup>th</sup> century Europe as that which undermines (or is perceived to undermine) the rationality and publicity of the state. Specifically, he characterizes religion during that era as “the source of uncontrollable passions within the individual and of dangerous

strife within the commonwealth. It could not, for this reason, provide an institutional basis for a common morality.”<sup>36</sup> So, religion itself could violate the notion of public order simply by being made public. Given its refusal to be domesticated, “religion is what actually or potentially divides us, and if followed with passionate conviction, may set us intolerantly against one another.”<sup>37</sup> In this way, because religious fervor was perceived to be so volatile, its mere presence in the public arena was threatening to good order. Religion as an historical category was a way of understanding one’s relationship to God through “belief-statements,” “personal experience,” and “private institutions.”<sup>38</sup> Such a conception of religion (i.e. one which was enabled by secularism and worked to enable notions of religious toleration) flourished in a state where the extricability of morality and politics was desirable and thought to be possible.<sup>39</sup> The presumption underwriting this conception of religion was that – as a consequence of modernity – “secularism...produced enlightened and tolerant religion.”<sup>40</sup>

Following Talal Asad’s theoretical commitments to performing a genealogy of secularism, Hussein Agrama extends his questions about the political project of secularism, but he shifts the conversation and the stakes slightly. Agrama describes the public order justification as it used by Egypt’s courts, which he contends have

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<sup>36</sup> Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University, 1993), 205.

<sup>37</sup> Asad 207.

<sup>38</sup> Ibid 207.

<sup>39</sup> Ibid 206.

<sup>40</sup> Talal Asad, *Formations of the Secular: Christianity, Islam, and Modernity* (Stanford: Stanford University Press, 2003), 193.

absorbed and in many ways decentralized the enforcement of certain aspects of *Shari'a* law. In doing so, Agrama intentionally sidesteps the question of whether Egypt is secular or religious by attending to the conditions of contemporary secularism's "intractability"; namely, the ontological question of which category more aptly describes Egypt is not nearly as compelling as the epistemological inquiry that asks about the conditions that enable the supposedly religious and the supposedly secular to fold so effortlessly into one another.<sup>41</sup>

For Agrama, public order is a necessary piece of the religion/secularism puzzle. It is deployed in various registers within Egypt such that there is nothing that clearly marks it as merely a religious notion or a liberal legal notion. Agrama characterizes public order as "those laws and values that are essential to a state's social and legal cohesion and [which] are usually held by a majority of its citizens."<sup>42</sup> Public order in the Egyptian context is, according to Agrama, a secular concept that can be linked with or infused with religion. While he offers several examples of such an overlap, I want to briefly engage with and summarize his example about polygamy in Egypt. I do this not only because this dissertation focuses on polygamous Mormons and the law but also because Agrama's polygamy example reveals Egypt's attempt at allowing religious difference to flourish, even in the face of the state's particular preference for one religion over the other. As I will demonstrate later in this chapter,

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<sup>41</sup> Hussein Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: University of Chicago Press, 2012), 71.

<sup>42</sup> Agrama 95.

U.S. courts and lawmakers have taken a markedly different approach to robust religious difference yet have still done so in the name of public order.

The polygamy example is offered in the context of Egyptian family law. As Agrama describes, Egyptians are governed by a family law that is specific to their religion. The *Shari'a* is the law that governs all relationships except ones where both parties are from the same Christian denomination. He recalls a legal case from the 1970s about a mixed Christian marriage in which the man wanted to take a second wife but the first wife refused. The man and woman deferred to the maintenance of public order (defined by Islam or Christianity, respectively) to make a case for whether the second marriage should or should not happen. Ultimately, the court denied the request for a polygamous marriage and the denial was premised upon a dual interpretation of public order. First, the denial could occur as an expression of state sovereignty in which the state determines both the norm and the exception. Second, and not unrelated, the court's denial of the second marriage request illustrates the power of the state "to decide and interpret which are essential religious principles of society."<sup>43</sup> So, the court determined that Christianity and polygamy were incommensurable and in so doing it upheld a particular notion of public order wherein it decided what counts as essentially religious. These dual functions of public order may at first blush seem paradoxical, i.e. the expression of state sovereignty and determining what counts as religious. However, Agrama suggests that they only seem paradoxical if we take secularism to mean a stark separation of religion from politics

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<sup>43</sup> Ibid 94.

rather than a concept whose potential is born from the tensions it holds which are “integral to its very foundation.”<sup>44</sup> To that end, the power of the state to determine both what is fundamentally religious and the extent to which religion can permeate public life is what he calls “the active principle of secularism.”<sup>45</sup>

I introduced Agrama’s description of public order in Egypt because I engage with it to examine the ways U.S. courts and legislatures determined the parameters and boundaries of religious freedom and, by necessity, of religion itself. While I will describe at length in a later chapter the way that the FLDS raid, custody trial, and subsequent appeals were fraught with the tension between religious belief and action, the idea of public order is central to the maintenance of that distinction just as it is central to the moments of overlap. In what follows, I will review some of those moments in U.S. religious/political history in which public order figured centrally in judicial and constitutional conflicts pertaining to religious freedom. In reviewing some of those moments, I will describe how – particularly in the 19<sup>th</sup> century but continuing into the present day – a court’s rejection of religious freedom claims was always premised upon some idea of public good or moral order. That standard, however vague, was deployed in the very first federal constitutional court case that attempted to parse the meaning of religious freedom. The same standard would continue to be used, albeit in varying forms, in religious freedom jurisprudence up through the present day. These examples highlight the role of public order in taming and sanitizing religious difference and, by consequence, reveal many of the

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<sup>44</sup> Ibid 8.

<sup>45</sup> Ibid 104.



weaknesses of an idea of secularism that relies on the stark separation of religion from politics.

### ***Reynolds and Beason: Mormonism and Public [Dis]order***

*Reynolds v. United States* (1878) – first case to establish the meaning and parameters of religious liberty in the U.S. – deployed the public order standard as a way to determine what counted as acceptable religious action and by extension to determine what is essentially religious. In *Reynolds*, George Reynolds was charged with violating the 1862 Morrill Anti-Bigamy Act. The Morrill Act criminalized multiple marriages by federal decree and, as a way of curtailing Mormon influence in the territories, limited the ability of LDS-affiliated persons to purchase property worth more than \$50,000.<sup>46</sup> The act’s text – as with the text of most federal laws – does not include within it the justification for its creation and passage. However, in the majority opinion in *Reynolds*, the invocation of public order justifies the passage of the Morrill Act.

Paraphrasing James Madison’s notes on the appropriate place of religion in civil government, Chief Justice Morrison Waite struck down the idea that polygamy constituted a legitimate form of religious duty and argued that it constituted that which the federal government was free to regulate: “actions which were in violation of social duties or subversive of good order.”<sup>47</sup> The “good order” to which the court referred was polygamy’s opposite – monogamous Christianity – which was so

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<sup>46</sup> The Morrill Anti-Bigamy Act, 37<sup>th</sup> United States Congress, Sess. 2., ch. 126, 12 Stat. 501.

<sup>47</sup> *Reynolds v. United States*, 98 U.S. 145 (1878).

important to the civilizational dynamism of the U.S. that the court could enshrine those values in law.<sup>48</sup> Essentially, by upholding a law that explicitly condemned polygamy as antithetical to the national political culture, the *Reynolds* court reasserted the value of monogamous Christianity via the standard of “good order.” The court in *Reynolds* also referred to Thomas Jefferson’s writings on religious freedom to argue the intent of the First Amendment’s Free Exercise Clause. Specifically, the court drew on his assertion that government ought to “interfere when [religious] principles break out into overt acts against peace and good order” because this authority “properly belongs...to the State.”<sup>49</sup>

The majority opinion in *Reynolds* closes by posing a hypothetical scenario wherein “the professed doctrines of religious belief [are made] superior to the law of the land...in effect permit[ting] every citizen to become a law unto himself.”<sup>50</sup> In other words, the court in *Reynolds* conveys the fear of religious belief trumping legitimate secular law, thereby threatening the foundations of U.S. governance. The court’s framing of religious exceptions (and in this case, polygamy specifically) as a violation of laws and mores continues to frame the debate about religious freedom as a federally guaranteed liberty through the present day. To that end, Mormon polygamy was the initial barometer for the limit on acceptable religious practice as

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<sup>48</sup> The court in *Reynolds* argued that polygamy is traditionally incompatible with Christian nations and that prior to the rise of Mormonism in the U.S. it was “almost exclusively a feature of the life of Asiatic and of African people.” Essentially, the court argued that polygamy and monogamy could not peacefully coexist within one polity. To that end, “every civil government [must] determine whether polygamy or monogamy shall be the law of social life under its dominion.” 98 U.S. 145 (1878).

<sup>49</sup> *Reynolds*

<sup>50</sup> *Ibid.*

well as the reason why religious practice needed to be much more carefully regulated and managed than religious belief.

A later U.S. Supreme Court case that addressed the problem of Mormon polygamy as a federal constitutional question was *Davis v. Beason* (133 U.S. 333). *Beason* involved a man (Davis) in Idaho who violated an oath that demanded an individual disavowal of polygamy and religions that mandated it or associated with it. In defining the parameters of religious freedom under the First Amendment, the court said: “It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society.”<sup>51</sup> Government may not generally interfere with an individual’s beliefs, but it is fully within the state’s powers to interfere with the free exercise of religion in order to “secure [the state’s] peace and prosperity, and the morals of its people.”<sup>52</sup> Much like Agrama’s description of public order in the Egyptian context, public order is being used here as a way of demarcating the appropriate justifications for state intervention into religious liberty. The courts in *Reynolds* and *Beason* similarly determined what counted as acceptable religiosity. In this way, in the U.S. context as well, the notion of public order functioned as an expression of Agrama’s “active principle of secularism.”<sup>53</sup> In sum (and following Agrama’s logic) the maintenance of public order is the exclusive purview of the state. However, insofar as it also determines what sorts of actions or practices will not be

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<sup>51</sup> *Davis v. Beason*, 133 U.S. 333 (1890).

<sup>52</sup> *Beason*

<sup>53</sup> Agrama 104.

granted government protections, public order is also that which settles the question of what is essentially religious.

Public order has been used throughout several centuries of U.S. constitutional jurisprudence as a rubric for determining what can be classified as religious action and thus what sort of religious action is constitutionally protected. The power of the state to determine the exception to laws is just as fundamental as determining the law itself. Agrama argues that “the legal concept of the public order...blur[s] the difference between legal equality and majority values, between norm and exception – and thus... relentlessly raises without resolving the question of religion and politics.”<sup>54</sup> In the Egyptian context, *Shari’a* heavily informs the notion of public order, particularly in the areas of marriage and family. However, in his formulation, exempting people (on the basis of religious differences) from a kind of public order so strongly influenced by *Shari’a* actually signifies an adherence to public order as well. Specifically, because of the ability to routinely grant exceptions, the existence of and ability to grant exceptions becomes less like an exception and more like the norm itself.<sup>55</sup> I depart from Agrama’s formulation on the question of the state’s willingness to grant religious exceptions to particular laws. As I will demonstrate below, religious exceptions – especially when they concern religious action rather than simply religious belief – are much more rare in the U.S. context. Moreover, instead of religious exceptions being granted in the name of public order (e.g. with the goal of preventing inter-religious conflict) such exceptions are instead routinely

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<sup>54</sup> Ibid 98.

<sup>55</sup> Ibid 94.

denied in the interest of public order. Jurists and lawmakers in the U.S. from the 19<sup>th</sup> century into the present day have routinely perceived religious exceptions to otherwise valid, secular law to be tantamount to disorder, lawlessness, and social chaos. Below I examine several examples of this phenomenon from the 19<sup>th</sup> century onward in order to highlight the state's clear interest in using public order as the pretext for taming robust religious (and in the case of polygamy, sexual) difference.

As I will discuss in a later chapter and throughout this dissertation, polygamous Mormons are both religious and sexual minorities that do not easily conform to prevailing laws regarding religion or sexuality, and so by consequence their relationship to the law is a deeply fraught one. Religiously-mandated polygamy has always been at the heart of the debate about public order in the U.S. For this reason, public order as the state's pretext for taming robust religious and sexual difference is the focus of this chapter. Although Child Protective Services and the state of Texas claimed that polygamy did not figure into their decision to raid the FLDS or their decision to advocate for the continued retention of FLDS minors, the historical specter of polygamy loomed large.

### **Mormon Polygamy: A National Political/Religious Emergency**

In order to take seriously the regulation and management of sexuality and religion in the U.S., it is necessary to consider how polygamy (specifically Mormon polygamy) has been integral to the creation of standards regarding acceptable religiosity and acceptable sexuality. One cannot, I offer, be invested in questions of

religion in the U.S. without attending to the myriad ways in which Mormonism confounded preconceived ideas about this category and marked an historical, epistemological shift in the substance and meaning of said category.

Not long after the Mormon Church introduced polygamy as a divine revelation in about 1830, the government at every level sought to prosecute practicing Mormons and those affiliated with Mormons. By its very presence within the borders of the U.S., polygamy threatened to unravel the social fabric of the country, creating veritable moral anarchy and disrupting public order.

In Agrama's terms, public order may not be squarely within categories like "religious" or "secular."<sup>56</sup> That said, in the context of Egyptian personal status courts, one thing that explicitly defines public order – both conceptually and in practice – is the way in which it is not just shaped by *Shari'a* but by Christianity as well.<sup>57</sup> Like the court in *Reynolds* held, the Christian norm of monogamy rendered the existence of LDS polygamy a violation of public order and, by extension, it was neither a constitutionally protected religious action nor was 19<sup>th</sup> century Mormonism a legitimate religion.<sup>58</sup>

Public order is essentially the backbone of "the belief-action distinction" that is so central to U.S. religious freedom jurisprudence.<sup>59</sup> Public order has been employed as a liberal-legal apparatus by which constitutionally protected religion and religious action would come to be defined. So, 19<sup>th</sup> century Mormonism (i.e.

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<sup>56</sup> Agrama 74.

<sup>57</sup> Ibid 96.

<sup>58</sup> *Reynolds*

<sup>59</sup> This is a topic on which I write extensively in [The Church Is Its People](#).

Mormonism prior to banning polygamy) did not count as religion proper because it mandated polygamy and polygamy violated public order. Because *Reynolds* was the first case to determine the constitutional parameters of religious freedom (and thus religion itself), LDS polygamy became that which brought public order to the fore of religious freedom debates. In that way, Mormonism as a violation of public order is central to the constitutional conception of religious freedom in the U.S. As I will go on to illustrate below, public order as an analytical tool can help account for why religious freedom claims were not taken seriously by the trial court during the 14-day custody hearing after the FLDS raid. Public order is also crucial for analyzing the appellate and Texas Supreme Court decisions on the case, particularly the ways that the courts negotiated the tensions between religious belief and action, which is the subject of a later chapter. In what follows here, I highlight some of the federal and state government's efforts to tame the spread of religiously-mandated polygamy.

The fear that Mormon polygamy threatened public order routinely manifested itself in federal law and in constitutional jurisprudence. As I've described, public order did not merely serve as a secular legal standard but also contained within it particular ideas associated with Protestant Christianity. That said, given how the term has been deployed, the secular and religious dimensions of public order are fundamentally intertwined in U.S. law and policy and so it is not helpful to extricate the religious reasoning from the secular reasoning. The deployment of public order to tame robust religious and sexual difference thus serves to question the utility of an

interpretation of secularism that emphasizes a stark separation between religion and politics.

Below, I describe several 19<sup>th</sup> century examples in which it is evident that public order in the U.S. represents a significant point of convergence between religion and politics. In order to illustrate this, I will review formal speeches given by several U.S. Presidents, all of which highlight the complex and dual nature of the notion of public order. Moreover, they demonstrate the ways public order was used as a vehicle through which to regulate and tame robust religious and sexual difference. First, I engage briefly with literature on the significance of presidential speechmaking, focusing particularly scholars who comment on the relationship of speechmaking to the president's actions, policy preferences, and vision for the nation.

Much has been written about the impact of presidential speeches on public opinion as well as on congressional lawmaking. These speeches typically convey the president's policy preferences and lay out visions for the nation's future. In general, presidents experience a higher legislative success rate immediately following a formal address to the public.<sup>60</sup> Presidents often feel a particularly high level of confidence during inaugural addresses because they (along with political commentators) have a tendency to interpret a clear electoral win as a political mandate.

First recognized by scholars in the 19<sup>th</sup> and early 20<sup>th</sup> centuries, this "myth of the presidential mandate" was used as grounds for the president to advocate

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<sup>60</sup> Matthew Eshbaugh-Soha. "The Politics of Presidential Agendas." *Political Research Quarterly* 58, no. 2 (2005): 3.



aggressively for particular policies or opinions with which a majority of the U.S. populace might not have agreed.<sup>61</sup> Whereas presidents in the 20<sup>th</sup> century onward often had their policy objectives stalled or entirely blocked because of partisan divisiveness in both houses of Congress, this was less so in the 19<sup>th</sup> century. 19<sup>th</sup> century understandings of presidential power and authority emphasized that the president had to have the support of a party as well as act as the “presumably nonpartisan chief executive.”<sup>62</sup> In obtaining and maintaining this dual support from constituents and party representatives, presidential speeches serve as vehicles for the dissemination of key policy agendas. To that end, the most effective and inspiring presidential speeches are the ones that include calls to action while informing the public of specific problems or threats.<sup>63</sup> Early term presidential speeches (including the inaugural address) enable the public “to get a sense of the tone the presidents would like to set for their administrations and the nation.”<sup>64</sup>

In general, scholars suggest that when presidents’ speeches address specific problems, they are not obligated to offer substantive, researched reasons advocating for a particular position or solution. Rather, the office of the president imbues the officeholder with a certain degree of credibility and so, regardless of any initial lack of specific detail, the public is likely to interpret those particular problems as

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<sup>61</sup> Robert A. Dahl. “The Myth of the Presidential Mandate” *Political Science Quarterly* 105, no. 3 (1990): 360.

<sup>62</sup> Dahl 366.

<sup>63</sup> Jeffrey Scott Mio, Ronald E. Riggio, Shana Levin, and Renford Reese. “Presidential Leadership and Charisma: The Effects of Metaphor.” *The Leadership Quarterly* 16, no. 2 (2005): 288.

<sup>64</sup> Mio, Riggio, Levin, and Reese, 289.

important.<sup>65</sup> In this way, a successful speech is attuned to the national political climate and so it should reaffirm the public perception of the president as a unifying national leader.<sup>66</sup> In terms of an inaugural address (as opposed to other speeches like state of the union addresses), the populace generally expects to hear the president echo the dominant cultural views in an attempt to identify with the audience. Inaugural addresses are mostly “ritualistic performances” in which presidents articulate policy preferences in only a tangential way; for the most part, an inaugural address is typically comprised of “generic components.”<sup>67</sup> Yet, a common thread in almost every inaugural address has been the individual president’s emphasis on the preservation of the union. This was particularly true of addresses delivered in the 19<sup>th</sup> century, when the Civil War called the nation’s stability into serious question.<sup>68</sup>

However, even after the Civil War, presidents used inaugural addresses and state of the union speeches to report on national stability and possible threats to that stability. The speeches I review below identify Mormon polygamy as a threat to the stability of the U.S. Thus, the rhetoric of “preserving the union” continued when the president and Congress believed that U.S. cultural values were under attack.

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<sup>65</sup> Jeffrey E. Cohen, “Presidential Rhetoric and the Public Agenda.” *American Journal of Political Science* (1995): 102.

See also: Jeffrey Tulis. *The Rhetorical Presidency*. (Princeton: Princeton University Press, 1987).

<sup>66</sup> Lyn Ragsdale. “Presidential Speechmaking and the Public Audience: Individual Presidents and Group Attitudes.” *The Journal of Politics* 49, no. 3 (1987): 732.

<sup>67</sup> David Ericson. “Presidential Inaugural Addresses and American Political Culture.” *Presidential Studies Quarterly* 27, no. 4 (1997): 728.

See also: Daniel P. Klinghard. “Grover Cleveland, William McKinley, and the Emergence of the President as Party Leader.” *Presidential Studies Quarterly* 35, no. 4 (2005): 736-760.

<sup>68</sup> Ericson, 739.

In President Ulysses S. Grant's third state of the union address in 1871, he contended that the "self-styled Saints" could retain their liberty of conscience but "[would] not be permitted to violate laws under the cloak of religion."<sup>69</sup> Four years later, President Grant stated that it was impossible for polygamy to "exist in a free, enlightened, and Christian country" with no legislative safeguard against it.<sup>70</sup> Similarly, in President Grover Cleveland's first inaugural address, he claimed that polygamy was "destructive of the family relation" and was therefore uncivilized, immoral, and a threat to the state.<sup>71</sup> Monogamous, Christian families were therefore integral to the stability of the nation and such an ideal simply could not be realized within the "homes of polygamy."<sup>72</sup> So, as Presidents Cleveland and Grant suggest in their addresses to the nation, Mormon polygamy offended the Christian sensibilities of the U.S. and in so doing, threatened the vitality and stability of the nation. In this way, the presence of public order rhetoric justified the dual regulation of religion and sexuality. Given its ostensibly anti-Christian sexuality, Mormon polygamy was deeply problematic because it compromised the nation's moral center; it similarly

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<sup>69</sup> Ulysses S. Grant, XVIII President of the United States. Third Annual Message to the Senate and House of Representatives, December 4, 1871. The American Presidency Project. University of California, Santa Barbara.

<http://www.presidency.ucsb.edu/ws/?pid=29512>

<sup>70</sup> Ulysses S. Grant, XVIII President of the United States. Seventh Annual Message to the Senate and House of Representatives, December 7, 1875. The American Presidency Project. University of California, Santa Barbara. California, Santa Barbara.

<http://www.presidency.ucsb.edu/ws/?pid=29516>

<sup>71</sup> Grover Cleveland, XXII President of the United States. First Inaugural Address, March 4, 1885. *The Avalon Project: Documents in Law, History, and Diplomacy*. Yale Law School. [http://avalon.law.yale.edu/19th\\_century/cleve1.asp](http://avalon.law.yale.edu/19th_century/cleve1.asp)

<sup>72</sup> Grover Cleveland, March 4, 1885.

compromised the secular rule of law as it rendered the laws of man subservient to the laws of God. For these reasons, the invocation of public order served to convey the immediacy of the problem and the need to regulate and manage it.

19th century U.S. politicians perceived Mormon polygamy not only as a threat to the republic but also a kind of a national security emergency. In an 1879 letter to several European governments, President Rutherford B. Hayes asked that Mormon converts not be allowed to immigrate to the U.S. By virtue of Mormonism's command to engage in polygamy, Hayes stated that "all who come to this country for the purpose of affiliating with the Mormon Church do so with the avowed intention of becoming criminals."<sup>73</sup> The other governments denied Hayes' request, claiming that they could not, absent any criminal action, prosecute an individual for intent.<sup>74</sup> According to President Hayes, Mormons should have been barred from entering the U.S. because there were federal laws banning one of the church's central tenets. The characterization of polygamy as criminal activity and of Mormons themselves as criminals was central to the public order narrative in the U.S.

### **Religion Outside the Law**

The perception of criminality was a key aspect of the establishment of religious freedom in the 19<sup>th</sup> century U.S. and it remains a legal standard and an implicit fear in the present day. Criminality -- or lawlessness -- in religious freedom

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<sup>73</sup> Patrick Mason, *The Mormon Menace: Violence and Anti-Mormonism in the Postbellum South* (New York: Oxford University Press, USA, 2011), 60.

<sup>74</sup> Mason 60.

jurisprudence has not been exclusively invoked in the context of Mormonism. In fact, U.S. courts at all levels have deployed a notion of criminality in the management of many different religious traditions. Below, I highlight several examples from the last twenty-five years in which criminality is deployed as a strategy to tame religious difference.

In *Employment Division of Oregon v. Smith* (1990), the U.S. Supreme Court addressed the issue of peyote use during a Native American religious ceremony. Specifically, two members of the Native American Church were fired from their positions as substance abuse counselors and subsequently denied unemployment benefits because their employer alleged they had been fired for violating a criminal law. It was this law to which these two men desired a religious exemption.<sup>75</sup> Writing for the majority, Justice Scalia argued that while some states have granted religiously motivated peyote exceptions to anti-drug policies, Oregon was not one of those states and thus was well within its police powers when it denied unemployment benefits to two Native American peyote users. Moreover, if the law was “neutral [and] generally applicable,” the state did not have to prove that it had a “compelling interest” in limiting an individual’s liberty. Instead, religious action could be limited (i.e. deemed unworthy of constitutional protection) if it required an exemption from those neutral and general laws.<sup>76</sup>

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<sup>75</sup> I briefly return to this case in a later chapter.

<sup>76</sup> *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

Justice Scalia referred implicitly to the notion of public order when he invoked a fear that lawlessness would likely result from giving too much latitude to religious diversity. He stated that “any society adopting such a system [of religious exemptions] would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them.”<sup>77</sup> In other words, the court contends that religious exemptions to secular laws have the potential to undermine the stability of the nation; the threat of anarchy invariably increases when a nation experiences widespread religious difference. In this way, the language of criminality or lawlessness figures centrally in the state’s management and regulation of robust religious difference. As the court said, the benefit of religious difference in and for a liberal democracy simply could not outweigh laws that prohibited “socially harmful conduct.”<sup>78</sup> Coded references to public order via the language of lawlessness or criminality thus serve to tame differences that the state perceives to be socially or morally threatening to the stability of the nation. So, public order emerges again as an amorphous standard that transcends the line between the religious and the secular in the interest of regulating religious (and often sexual) conduct.

Another instance of perceived criminality or lawlessness driving the state’s desire to regulate and tame robust difference comes out of a 1991 Florida federal district court case known as *Warner v. Boca Raton*. On its face, *Warner* – a case about the centrality of ornate funeral monuments to the religious identity of Jews and

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<sup>77</sup> *Oregon v. Smith*

<sup>78</sup> *Ibid.*

Catholics – does not seem similar to polygamy or peyote in its ability to inspire fears of lawlessness. Yet, something as seemingly personal as how to decorate a loved one’s grave proved to be threatening to public order in a local context. When arguing the city’s case that grave sites should look relatively uniform for aesthetic and landscaping purposes, attorney Bruce Rogow contended that to make such allowances in the interest of religious diversity would amount to “creating cemetery anarchy.”<sup>79</sup> From these two examples, courts and legal experts often perceive religious exemptions to lead the U.S. public down a dangerous path of lawlessness, criminality, and disorder. This is precisely the warning issued by the Supreme Court in *Reynolds* towards the end of the 19<sup>th</sup> century, and its logic continues to govern the management of robust religious difference.

### **Religious Exceptions and the Maintenance of Public Order**

U.S. courts and lawmakers from the 19<sup>th</sup> century through the present day articulate a persistent, overriding fear regarding religious difference and political and social disorder: namely, that granting religious exceptions to general laws would invariably lead to a society of many exceptions and few rules. This well-established yet informal standard for determining acceptable religious behavior differs from the descriptive formulation offered by Hussein Agrama on the question of Egypt. To reiterate, Agrama asserted that within personal status courts in Egypt, an exception to

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<sup>79</sup> Winnifred Fallers Sullivan. *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2007), 89.

public order might still be considered public order itself.<sup>80</sup> Agrama's characterization of public order was one in which a notion of political and social stability had more than one religious tradition built into it. In this way, courts were more explicit about the ways in which public order was a religious notion.

However, in U.S. religious freedom jurisprudence, religious exemptions may never contravene public order. The concept of public order operating in the U.S. does not contain within it the tenets of multiple, distinct religious traditions and U.S. courts are not as explicit about the ways in which public order functions as a religious concept as well as a secular-legal one. They simply would not be legitimate or recognizable religion(s) if their belief system encouraged or mandated actions that would subvert the public good or moral order, which as my previous examples illustrated, is fairly strict even as it lacks a clear justification. So, as *Reynolds*, *Smith*, and *Warner* demonstrate, threat of anarchy posed by religious exemptions to neutral law. By consequence, religious exceptions to public order (a term which is both secular and religious) do not become a norm of public order simply as a matter of course.

That said, U.S. courts have granted and still grant religious exceptions to neutral, general laws; however, those exceptions are granted precisely because the practice in question posed no conflict with public order. The courts that grant such exceptions do not associate the religious practice with chaos, lawlessness, or social and political disorder. By extension, courts do not view practitioners of these

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<sup>80</sup> Agrama 94-95.



religions as criminals. In what follows, I briefly describe two instances in which courts affirm religious exceptions to generalized laws specifically because those exceptions are deemed unthreatening to the social mores and the political culture of the U.S. The first is a 1972 case about Amish schoolchildren in Wisconsin and laws pertaining to compulsory education. The other is a 2011 case regarding the so-called “ministerial exception” in churches’ employment policies. Both of these cases highlight the fact that lawmakers and courts must interpret religious exceptions as innocuous consonant with an amorphous conception of U.S. political and social values.

I discuss *Wisconsin v. Yoder* (1972) at length in a later chapter, so here I will focus exclusively on how the court majority granted a religious exception because this exception did not contravene public order. *Yoder* involved the Old Order Amish community in Wisconsin and its desire to exempt Amish children from public school after the 8<sup>th</sup> grade (when children are typically 13 or 14), as opposed to after their 16<sup>th</sup> birthday, as required by Wisconsin law. The state of Wisconsin argued that compulsory education through a child’s 16<sup>th</sup> birthday provided necessary life skills and educational benefits for every child, but especially for Amish children who might decide to leave the insular religious community. The Amish argued that the extra 2-3 years of schooling was insufficient to mandate that all Wisconsin parents abide by this policy regardless of personal conviction.<sup>81</sup> The Supreme Court ultimately agreed with the Old Order Amish and granted what it believed was a “religiously grounded”

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<sup>81</sup> *Wisconsin v. Yoder* 406 U.S. 205 (1972)

exemption that did not compromise “the health, safety, and general welfare” of the U.S. populace.<sup>82</sup> In the court’s opinion, the public order standard is again deployed as the means by which religious exceptions to generally applicable laws are either rejected or granted. The high court did not believe the Wisconsin Amish community’s desires regarding the education of their children conflicted so fundamentally with the values of the wider U.S. political culture as to constitute a threat of lawlessness or disorder. So, even though the court granted a religious exception to a generally applicable law, it did not need to supplement or add to the working definition of public order in order to make that possible. The exception was granted precisely because the request from the Amish fit neatly into the fabric of established religious diversity in the U.S.

The 2011 case called *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (EEOC) is another important instance of the court’s willingness to grant religious exceptions. The plaintiff, Cheryl Perich, filed suit against the church and school for violating the Americans with Disabilities Act when she was fired for having a sleep disorder that prevented her from working for certain periods of time. Before she was officially fired, the church asked her to resign and she refused, threatening legal action for wrongful termination. Because Perich refused to settle the disagreement within the church (i.e. the preferred method of dispute resolution), the church and school took legal action, alleging that

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<sup>82</sup> *Wisconsin v. Yoder*

the “ministerial exception” allowed them to fire for religious reasons any employees acting as ministers.<sup>83</sup>

While *Hosanna-Tabor* does not involve an individual plaintiff’s attempt to secure a religious exception to a generally applicable law, it does concern the right of an entire church to be exempt from certain formal legal procedures that would otherwise apply to public institutions and many private institutions as well. Specifically, decisions regarding hiring and firing within a public institution or secular private institution can be and routinely are subject to determinations of legality and constitutionality by courts at all levels. According to the unanimous court, *Hosanna-Tabor* hinged on whether the government could compel a church to hire or fire one of its ministers irrespective of the church’s wishes. In arguing that generally applicable employment guidelines such as the Americans with Disabilities Act did not apply to the internal politics of the church, the court said: “Requiring a church to accept or maintain an unwanted minister, or punishing a church for failing to do so...interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”<sup>84</sup>

The Equal Employment Opportunity Commission contended that the court’s decision in *Employment Division v. Smith* (described earlier) prohibited the consideration of a “ministerial exception” to generally applicable laws. The EEOC’s logic was that the court in *Smith* held that adherence to particular religious tenets does

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<sup>83</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* 132 U.S. 694 (2012).

<sup>84</sup> *Hosanna-Tabor v. EEOC*

not free an individual of his/her obligation to follow generally applicable laws. Here, however, the court believed that the logic in *Smith* was not relevant; while the court found that the Americans with Disabilities Act – particularly its prohibition on retaliating against an employee who receives a diagnosis – was a generally applicable law. That said, the facts of *Hosanna-Tabor* are different insofar as the case concerns “government interference with an internal church decision that affects the faith and mission of the church itself.”<sup>85</sup> In essence, the court here differentiates between the external performance of religious acts (ingesting peyote) and the internal regulation of decisions pertaining to the church’s overarching mission. With respect to the question of public order, the kind of religious exception at issue in *Hosanna-Tabor* was the right of a church to manage its own internal government regarding the employment of ministers called to spread the message of its faith.<sup>86</sup> Because the “ministerial exception” refers almost exclusively to matters of employment, the church is not exempt from prosecution related to other matters, such as criminal conduct. For this reason, while the “ministerial exception” might be interpreted as a fairly broad entitlement, the court did not believe that such an exception would seriously endanger the safety of the populace or compromise its morals and values.

The logic of public order was deployed by all levels of government in the 19<sup>th</sup> century as a way of taming robust religious difference in the form of Mormon polygamy. That logic continued into the present day in the form of requests for religious exceptions to generally applied laws, where exceptions are granted or

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

rejected based on their perceived threat to the political, moral, and/or social fabric of the U.S. While the prominence of polygamy's threat to public order waned into the 20<sup>th</sup> and 21<sup>st</sup> centuries, the specter of polygamy loomed large: over a century of religious freedom jurisprudence was borne out of the fear that polygamy (and practices imagined to have similar social effects) necessarily led to criminality in the form of political and social disruption.

### **The FLDS Raid and the Specter of Polygamy**

Because of this rich, complex, and politically divisive history, the legacy of polygamy was no doubt a factor during the 2008 raid and its aftermath, irrespective of CPS representatives' and politicians' insistence that it was not germane to the child abuse investigations. So, while polygamy may not have been explicitly listed as a legal justification for the raid and ensuing investigations, the fact that a majority of FLDS families are polygamous impacted all decisions pertaining to custody as well as all questions related to religious freedom and the status of the church. I write more extensively in a later chapter on ways that the legal status of polygamy in the U.S. shaped what was legally and ethically possible regarding marriage recognition, family, and custody arrangements. In what follows I briefly review some of the remarks from the 14-day adversary custody hearing as well as commentary from some of the *ad-litem* attorneys with whom I conducted interviews. While this evidence does not demonstrate ways in which the crime of polygamy explicitly motivated the raid, it does reveal how lawyers' and other government officials'

preconceptions about polygamy reflected the harsh rhetoric of the 19<sup>th</sup> century. Moreover, the evidence illustrates how contemporary legal disdain for polygamy can be expressed in other seemingly unrelated ways, thus reinforcing the public order standard.

Over the course of my interviews with people who served as *ad-litem* attorneys or temporary legal guardians for FLDS minors, one of the questions I asked was whether polygamy itself was ever raised by the state as a safety concern. Several of the *ad-litem*s offered that while the simple fact of plural marriage was not raised as a safety concern, practices believed to be associated with polygamy generally were raised as ongoing safety issues for FLDS minors. One *ad-litem*, Angela Waymer, said:

Yeah, the lifestyle definitely was [addressed]. I mean, maybe [the state] didn't say that...but just that the girls are taught to be subservient [in polygamy]. They brought up a lot of things like that. But yes I do recall there being some emphasis on especially the way the girls are raised – to pretty much have kids and get married. And that's what they see. So I think in that vein, and I don't know if it was ever said, and I don't think it was that polygamy is per se dangerous. But just sort of the mentality.<sup>87</sup>

Here, Waymer states that polygamy was never explicitly mentioned as a legal justification for the raid, yet in her explanation she alludes to beliefs or practices thought to be associated with polygamy.

Another *ad-litem* attorney Jerrold Cullen, offered:

It's not per se a [technically legal] endangerment issue. [CPS] tried to say that promoting a polygamous relationship in front of the kids was a form of mental abuse but it just didn't go very far because no one really believed it. The fact that they were polygamous made all the sensationalism in the newspapers, but

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<sup>87</sup> Angela Waymer, interviewed by Cassie Ambutter, Dallas, Texas, September 3, 2010.

from a legal standpoint... other than that polygamy is illegal in the state of TX, no one's being prosecuted for polygamy [in the context of the raid]. The only prosecutions were for sexual abuse of underage girls. It just didn't come up. Polygamy was never a legal issue that was raised among the *ad-litem*s. That was not the grounds for termination. That may be why the state did not pursue the mental abuse reasoning, because they didn't want to get into the issue of polygamy.<sup>88</sup>

In Cullen's observation, while CPS initially put forth the claim that polygamy constituted a form of mental abuse, such a claim was not technically legally pertinent to the investigation. Ultimately, he suggests that state officials' failure to pursue that particular angle was rooted in their desire to avoid the issue of polygamy entirely. Specifically, Cullen ventures that CPS might have believed that there was a strong link between mental abuse and polygamy, and so avoiding the former was a way of avoiding the latter entirely.

Finally, another *ad-litem*, Andrea Conroe, claimed:

Not that I recall, not generally. Certainly there were references to the belief system and things they were being taught about having sex with minors... the boys being raised in a culture that condoned that, etc etc. but the evidence was more specific, [such as CPS claiming] that they were forced to work in the fields, they were deprived of certain things [like playtime, to which mainstream children generally have access]. There were actual physical abuse and neglect allegations made by CPS as well...none of which I ever heard substantiated at all. Which is why I think the case was overturned, in part, but I do think the state representatives would be hard-pressed to deny that [polygamy itself] was at least an overarching concern and/or instigating factor. And the distaste for polygamy, especially in that part of the state, a very conservative part of West Texas.<sup>89</sup>

So, the *ad-litem*s who spoke on the particular question of whether polygamy was raised as a safety concern for the children all concurred that polygamy was never

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<sup>88</sup> Jerrold Cullen, interviewed by Cassie Ambutter, Plano, Texas, September 8, 2011.

<sup>89</sup> Andrea Conroe, interviewed by Cassie Ambutter, Dallas, Texas, September 15, 2011.

invoked as an explicit legal justification for the raid, the initial retention of minors, or the subsequent appeals to retain the minors. However, each of the attorneys who elected to speak on this subject referred to a range of practices believed by CPS and the state to be attendant to polygamy. Specifically, while the mere fact of being raised by one man who is married to several women was not legally relevant to this investigation, factors such as the patriarchal culture, the strong emphasis on marriage and child-rearing, as well as the belief that polygamy was often associated with sex with minors informed what these *ad-litem*s characterize as CPS and the state's engagement with the specific question of polygamy. As I will discuss in a later chapter, polygamy's illegality – while not the central focus of this investigation – would ultimately matter in terms of marriage and custody disputes as well as for holding adults accountable for verifiable instances of child abuse.

### **The Rise of Tolerance Discourse: A New Way of Policing Polygamy**

In general, the 20<sup>th</sup> century ushered in a new era in the legal management of Mormon polygamy that can be attributed to a burgeoning discourse on tolerance, pluralism, and diversity. In what follows, I briefly review some of those larger conversations in order to account for such a shift in the style of regulation.

Ultimately, I go on to explain that, given the discourse on tolerance and pluralism, the state may still implicitly regulate polygamy without actively creating new laws policing polygamous Mormons. In this way, Texas CPS representatives and even some *ad-litem* attorneys may insist that polygamy was essentially irrelevant to the



raid and ensuing legal and political battles, but in my conversations with the *ad-litem*s and in the trial documents, polygamy nevertheless appeared in the conversation in more coded and covert ways.

The move toward a discourse about tolerance and pluralism enables a coded, less explicit way of policing polygamy free from the stigma of radical exclusion. Late-20<sup>th</sup> century political philosopher Bernard Williams argues that toleration is generally a unilateral relationship where members of a political or social majority bestow the virtue of tolerance onto marginalized groups. His account of the state and its relationship to tolerance highlights the general tendency of majorities to be in positions where they tolerate marginalized populations.<sup>90</sup> This reveals the dual nature of tolerance discourse, namely that identifying which institutions or persons act as the benefactors of tolerance is just as crucial as identifying the one who is tolerated. For example, Michael Walzer (one of Williams' contemporaries) contended of religious minorities that: "the degree of outrage they arouse in the majority" is the yardstick to determine whether a given religion can be compatible with majority sensibilities.<sup>91</sup> This essentially becomes a precondition for toleration within a polity.

In the context of a tolerance discourse, polities tout values such as mutual respect in the face of different and competing conceptions of the good life. In Walzer's assessment, while tolerance is a vehicle for the accommodation of differences, such toleration is made easier when individuals or religious groups

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<sup>90</sup> Bernard Williams. "Tolerating the Intolerable," *The Politics of Toleration: Tolerance and Intolerance in Modern Life*, ed. Susan Mendus (Edinburgh: Edinburgh University Press, 1999), 66.

<sup>91</sup> Michael Walzer. *On Toleration* (New Haven: Yale University Press, 1997), 69.

conform to a model of liberalism or religiosity that makes the “other” more familiar to “us.” Specifically, when individuals or religious groups abide by liberalism’s stated end goals of individuality, free choice, and rationality, they are more likely to be tolerated than people or groups who resist those norms or reject them outright.<sup>92</sup> One of Walzer’s contemporaries, Alisdair MacIntyre, argues that the root of conflict among individuals and between groups is a matter of differing beliefs and conceptions of the good. Thus, he argues that populations must find ways to manage intolerable groups or opinions amongst themselves<sup>93</sup> in a way that ostensibly excludes the coercive power of the state and allows it to maintain its guise of neutrality.<sup>94</sup>

The increase in tolerance discourse in the late 20<sup>th</sup> century helps account for why laws explicitly criminalizing polygamy are far less popular than they were in the 19<sup>th</sup> century. However, the presence of tolerance discourse did not eliminate the disdain or disapprobation for polygamy; negative opinions about polygamy were more coded in the interest of serving a tolerant, diverse community. In this way, laws or policies designed to extinguish polygamy had to be similarly roundabout and

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<sup>92</sup> Walzer 65-68.

<sup>93</sup> MacIntyre’s suggestion essentially echoes Michel Foucault’s concept of governmentality. For Foucault, *governmentality* arose with the shift from sovereignty to government. Whereas sovereignty and the law as such were inextricable, government demands not an external imposition of laws but “employing tactics rather than laws, and even of using laws themselves as tactics – to arrange things in such a way that...such and such ends may be achieved.” In other words, when Foucault argued that the shift from sovereignty to government turned on the population’s happiness as the object, he argued that tactics rather than laws would be the new governing mechanism. For more see: “Governmentality” in *The Foucault Effect*, ed. Burchell, Gordon, and Miller, (Chicago: University of Chicago Press, 1991), 95.

<sup>94</sup> Alisdair MacIntyre. “Toleration and the Goods of Conflict” in *The Politics of Toleration: Tolerance and Intolerance in Modern Life*, ed. Susan Mendus (Edinburgh: Edinburgh University Press, 1999), 150-151.

covert. My interviews with *ad-litem* attorneys echo the language of tolerance, diversity, and multiculturalism as a way to explain why explicit disdain for polygamy could not have motivated the raid and the ensuing legal investigations. For example, in response to my question about what he thought motivated the raid, attorney Jerrold Cullen said:

I don't think anybody in Austin said, 'Oh my gosh, we can't stand polygamy or the FLDS.' Texas is relatively diverse and isn't as close-minded as people think we are. Texas is really pretty open, just because you have an unbelievable mix of people who live here. A lot of the editorials in the local San Angelo newspaper online, they were very much trying to raise everyone's sensitivities to the threat of the FLDS – and it wasn't so much a religious threat as it was a practical one: them taking over the county.<sup>95</sup>

Here, Cullen makes two important points. The first is that Texas is an open-minded and diverse place and so official state representatives of Texas do not articulate explicit disgust for any group of people. Yet, he also highlights local editorials that described the FLDS' presence in Schleicher County as a “practical” threat. He characterizes this threat as a legitimate one, a fear of them “taking over” – a fear that he claims has nothing to do with the FLDS' religion. This is an example of a new way of policing polygamous Mormons and simultaneously articulating a message of tolerance and diversity, all without the creation of any explicit laws that criminalize their behavior.

Like Cullen, other *ad-litem*s articulated similar experiences with regard to the perception of the FLDS as a threat. Specifically, in response to my question about

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<sup>95</sup> Jerrold Cullen, interviewed by Cassie Ambutter, Plano, Texas, September 8, 2011.

why CPS would decide to remove all the children from the ranch when there was only suspicion of one reported instance of abuse, *ad-litem* attorney Angela Waymer said:

I don't know if they just saw it all as a snub on the morals and mores of Protestant monogamous society. I think they were also fearful of the number of people living on the ranch and them eventually having a political influence. Being elected. Getting to vote.<sup>96</sup>

Here, Waymer describes something similar to Cullen, but she deepens the claim's complexity. That the FLDS might eventually have substantial political power and influence in Schleicher County threatened the county's non-FLDS residents. While there is no documented reason as to the origins of this fear, Waymer attributes it to the kind of otherness and difference that the FLDS represented, namely, an otherness that violated the accepted morals dictated by "Protestant monogamy." Given the extent to which such mores are entrenched in U.S. political culture, this was no doubt perceived as a threat to public order.

The fear of the FLDS as a political threat (or more specifically as a threat to foundational U.S. cultural values) speaks to the limits of tolerance as a political virtue. In the era of tolerance discourse, that which cannot be tolerated necessarily violates a notion of public order.<sup>97</sup> The lawlessness attendant to violations of public

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<sup>96</sup> Angela Waymer, interviewed by Cassie Ambutter, Dallas, Texas, September 14, 2010.

<sup>97</sup> According to Wendy Brown, given that the politics of liberal tolerance is fundamentally about difference, there is a point at which tolerance is no longer able to broker a compromise between liberalism and the "different" subject that is its focus. For Brown, a liberal polity can allow difference to exist within its bounds (and even tolerate it) without being completely consumed and transformed by it. The threat of such a possible political transformation is what triggers state regulation of the tolerated practice in question. For more, see: Wendy Brown. *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006), 170-187.

order does not have to be evidence-based; it need only evoke the perception of criminality and disorder. For example, when I asked why the trial court and legal briefs generally referred to the FLDS as one unit as opposed to dealing with the circumstances of any one child or one family, *ad-litem* attorney Danielle White responded:

During the 14-day hearing, someone was questioning the CPS representative, Angie Voss. Someone got up and said, “if you have a report of sex abuse in Miles, TX, would you remove all the children in the community?” She said, “No.” So this lawyer said, “Well then why did you remove all the children here?” And [Voss] said, “Well because they all think alike.” And that was their theory of the case, that because they were in the same culture, the same religion, the same cult if you will, then they’re all the same and we get to take them all.<sup>98</sup>

From White’s perspective, the lead CPS investigator (Angie Voss) believed the FLDS ought to be treated as one virtually identical unit. For this reason, the FLDS are not entitled to the individual toleration generally afforded to a person whose difference is crucial to his/her political identity. The FLDS can therefore be reduced to an undifferentiated mass, a uniform polygamous cult that ought to be treated as though there were nothing meaningful to distinguish one member of the group from another. The FLDS are saturated by their difference, are perceived by CPS to necessarily be beyond the scope of toleration, and thus, are in violation of public order standards.

Other *ad-litem*s generally extolled the virtues of tolerance when questioned about how and in what ways polygamy explicitly factored into the raid and ensuing investigations. When I asked attorney Nancy Mattison whether she experienced

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<sup>98</sup> Danielle White, interviewed by Cassie Ambutter, Dallas, Texas, September 9, 2010.

polygamy being raised as a safety concern among the *ad-litem*s or between *ad-litem*s and CPS lawyers/caseworkers, she said:

Not polygamy per se. It just seems that most people are kinda like “oh, it’s not my thing, but whatever, as long as they’re not bringing kids into it, or doing anything that’s really harmful. Whatever they wanna do, they wanna do.” That was the general attitude. CPS, law enforcement, attorneys, everybody. A big deal was not made out of polygamy.<sup>99</sup>

Mattison describes state officials’ relationship to polygamy as one of indifference.

She characterizes polygamy as a preference that many others do not share, but one that is deserving of toleration as long as the participants do not “bring kids into it” or engage in “anything that’s really harmful.” In this way, Mattison deploys tolerance discourse in order to describe the way state representatives generally view polygamy.

However, not all the *ad-litem*s’ discussions of polygamy so obviously invoke the language of tolerance. Yet, their commentary still often reflects an attempt to frame polygamy as a less-than-ideal “lifestyle choice” that, provided no one is “harmed,” people should nevertheless generally be able to engage in freely. In response to my question about whether there was a visible pro-polygamy presence once the raid began to generate so much attention, *ad-litem* attorney Allison Garrity responded:

We’re a great country because we’re allowed to express those kinds of freedoms. So from that perspective, sure there were people that supported them. There were no groups that said “Oh, we think polygamy is awesome, and we gotta have it! [Polygamy is] great and that’s why these kids should go back, because there’s nothing wrong with it.” That was never heard...certainly not by me, anyway.<sup>100</sup>

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<sup>99</sup> Nancy Mattison, interview by Cassie Ambutter, Dallas, Texas, September 13, 2011.

<sup>100</sup> Allison Garrity, interview by Cassie Ambutter, Highland Park, Texas, September 7, 2011.

So, Garrity frames the state's tolerance for polygamy as part of a broader culture of personal liberty within the United States. Echoing the language described in the tolerance literature, polygamy can be interpreted as a freedom, as simply a different but competing conception of "the good life." As Garrity describes, however, there were no individuals or groups outside the FLDS that affirmed polygamy as a good in and of itself, or as a way of being in a world that was just as legitimate as any other. Polygamous Mormons thus become a recipient of toleration provided that they do not violate an ambiguous notion of public order within the U.S.

An examination of the rise of tolerance discourse helps account for the shift in the style of regulation around polygamy. In an era that emphasized diversity and pluralism (albeit with significant inherent caveats), the President and Congress no longer needed to recommend specific legislation in order to target the beliefs and practices of fundamentalist Mormons. Instead, polygamy could be regulated in more coded and covert ways without undermining the basic precepts of tolerance. Moreover, even though polygamy itself was not explicitly mentioned during the investigation or in the list of charges, attorney questions and witness testimony during the 14-day custody hearing focused on the lawlessness and, significantly, "disorder" attendant to FLDS life. For example, the state/CPS called psychiatrist Dr. Bruce Duncan Perry to testify to general experiences of childhood trauma among the FLDS. Attorney Jackie Allen asked:

(Attorney, Allen), Q: Which one of the following is presently the greater danger to the welfare of the girls under five: lifestyle of the FLDS community or separation from their mothers?<sup>101</sup>

(Witness, Perry), A: I think fundamentally it's probably more unhealthy for the child to be removed from the parent.<sup>102</sup>

Another attorney, Stan Joynton, asked a follow-up question, intimating that the fact of FLDS polygamy was relevant to how CPS and the *ad-litem*s should approach any question of the children's continued care. In particular, *ad-litem*s addressed the fact that a majority of the children lived in polygamous families, but witness testimony often suggested that the state and the law ought to approach the children as though that fact were immaterial<sup>103</sup>:

(Attorney, Joynton), Q: In the large group homes that the kids live in, oftentimes they are cared for by people other than their parents. And I would imagine that in some situations they may not even have much contact with their biological parents. Could you please explain [why identifying biological parents is significant here?] <sup>104</sup>

(Witness, Perry), A: Even if the children have no connection, and even if the other people are caregiving and playing a parenting role with the children, I think it would still be important to know who the biological parents are.<sup>105</sup>

Dr. Perry's answer does not include a specific reason as to why biological parentage is so crucial, and given the fact that most FLDS families are polygamous or aspire to become polygamous, the legal desire to process the families as monogamous could

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<sup>101</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol.5, pg# 156: 12-14.

<sup>102</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol.5, pg# 156: 19-20.

<sup>103</sup> I talk at length about the role of biology and parenthood in the context of the raid in my "Queer Spaces" chapter.

<sup>104</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol.5, pg# 157: 13-17.

<sup>105</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol.5, pg# 158: 1-4.



potentially constitute a form of erasure. For this reason, I frame Perry's testimony within the historical treatment of Mormon polygamy as a belief and practice that runs contradictory to a system of ostensibly secular laws. In the context of the raid and particularly evidenced in this testimony, contemporary FLDS polygamy becomes not that which the law affirmatively seeks to eliminate (as it did in the 19<sup>th</sup> century) via laws with explicit references to public order; instead, present-day legal disdain for polygamy can simply be folded into other laws, thereby maintaining the public order standard in more covert ways.

As I mentioned earlier, the psychiatrist and many of the *ad-litem*s speak of polygamy in coded language, referring to it obliquely by focusing on practices or beliefs they believe to be attendant to polygamy more broadly. This is additionally made manifest in the subsequent custody decisions from the Third Court of Appeals in Austin, TX as well as the Texas Supreme Court. In the Third Court of Appeals decision, the court held that the Department of Family and Protective Services (the agency that manages CPS) did not adequately:

offer...evidence that any of Relators' [FLDS] pubescent female children were in physical danger other than that those children live in a ranch among a group of people who have a 'pervasive system of belief' that condones polygamous marriage and underage females having children.<sup>106</sup>

In this statement from the Third Court of Appeals, the trial court initially retained custody of the FLDS minors because of a belief system that accepts or encourages plural marriage as well as legal minors giving birth. Yet, the appeals court rejected

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<sup>106</sup> Texas Court of Appeals. Third Court, Austin, Texas. *In re Sara Steed*, et al., No. 03-08-00235-CV

the trial court's ruling because no attorneys or witnesses offered sufficient evidence that such a belief system necessarily led to illegal acts. So, absent a relationship between the belief system and any actionable offense, the minors had to be reunited with their families.

So, even though polygamy was not a specific criminal charge that any individual FLDS faced, attorneys and the trial court invoked the belief system of polygamy as well as practices allegedly attendant to it in order to justify the removal and retention of the children. In this way, although no individual FLDS member was prosecuted for violating Texas's prohibition on bigamy, the 19<sup>th</sup> century fears of criminality and social disorder amplified by the presence of polygamy nevertheless loomed large in the raid. Attorneys and the trial court implicitly invoked the public order standard as an oblique way of taming the kind of religious difference that the FLDS embodied. As evidenced by the lawyers' commentary as well as the court decisions, polygamy was coded in various ways, all of which spoke to the alleged danger it would eventually pose to all male and female FLDS children.

Ultimately, the public order standard provides a lens through which to examine how a secular state such as the U.S. manages and tames robust religious difference. If one is to take seriously the evolution of state regulation of religious difference in the U.S., that analysis must begin with a consideration of Mormon polygamy and the many and varied ways that all levels of government sought to manage, control, and even directly suppress it as a religious practice in the 19<sup>th</sup> century. A concept that blurs the lines between the secular-legal and the religious,

public order has manifested itself in various ways throughout the last two centuries but has maintained a fairly consistent set of core principles: the fear of social, moral, and political disorder as well as the fear of actions that can be lead to criminality or anarchy. The crime of polygamy was not the direct catalyst for the 2008 FLDS raid or even the explicit reason the state sought to retain the FLDS children but polygamy nevertheless appeared in more covert and coded ways in the 14-day adversary hearing, in my conversations with *ad-litem*s, and in appellate court decisions. Mormon polygamy is so fundamentally a part of the history of public order in the U.S. such that its legacy continues to help courts carve out or prohibit religious exceptions to ostensibly neutral, secular laws. It is because of this legacy that the trial court hearing the initial custody case was unwilling to entertain an objection to the raid on the grounds of religious freedom. Because of this legacy and its modern manifestations, the FLDS did not have access to the legal protections of “religious freedom” in the initial custody hearing.

### *Chapter 3*

#### *“The Church Is Its People”*

In order to make an argument before the law that relies upon a claim to religious liberty, the religion in question must be understood as real and legitimate. However, if one’s belief system or cosmology is deemed illegitimate, one must make some alternate claim to justice and redress before the law. In terms of the FLDS, I argue that the nature of the charges as well as presumptions about their beliefs and practices rendered them something other than real religion. Specifically, I investigate the practical effects of this designation on the relationship between FLDS families and the law as well as the effect on the theoretical and legal concept of religious freedom.

Before assessing the morality of the raid, I argue that the question of why the FLDS were more susceptible to a state intervention must first be considered. Specifically, this chapter will unpack and examine the relationship between how the FLDS were vulnerable to raids and the way they were treated by the courts, by their lawyers, and by the media. In this way, this chapter asks the question: In what way does the state scrutiny of the FLDS speak to the at once creative and destructive work done by Protestant Christianity at the level of formal law?

One can see the simultaneously creative and destructive work happening, both conceptually and practically, in the realm of religious freedom. What does it mean to suggest that formal religious freedom only protects certain religions and thus only determines certain kinds of actions to be religious? In effect, this chapter will

demonstrate that the invocation of “religious freedom” as a particular way of reasoning is not universally available to all who might understand their relationship to the world as “religious.” In other words, only when certain criteria are met – only when something is clearly determined to be a religion – is it able to then deploy religious freedom as a form of reasoning. If one cannot invoke religion or religious freedom, such an analytical foreclosure impacts how other dimensions of a conflict might be thought. Given that the trial court and much of the news media believed it was inappropriate to invoke religion or religious freedom with regard to the FLDS raid, it affected how the other aspects of FLDS life were assessed, namely sexual relationships, marital relationships, and gender dynamics. In particular, the definition of religion enshrined in the law as Protestant Christianity defines the parameters of what it means to be religious and reveals the implications of a state that supports and institutionalizes such a definition.

### **“The Church Is Its People”**

The idea for this chapter came to me when reviewing the transcript from the trial court and the subsequent appeals. The most revealing dimension of these transcripts was not only what was said about religion and religious freedom, but also what goes without saying. Below, I offer a conversation between one *ad-litem*<sup>107</sup> attorney, the lead attorney for CPS, and the trial court judge in which the *ad-litem* objects to the proceedings on the grounds of religious freedom.

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<sup>107</sup> A court-appointed party that acts on behalf of another party

Mr. Edwards (*ad-litem*): “I object under the First Amendment...on the basis of religious freedom. To my knowledge this is a unique situation. ...to my knowledge only this sect has been handled procedurally in the way this – this – this group has been – this – this church has been. ...the Court acknowledged at the outset [that this is] highly extraordinary. And I think that has to do with the group that is the subject and the individuals that are the subjects of this case. And the thrust of the State’s argument...[and] the warrant for search of the premises, almost exclusively goes to the – to the church, to its beliefs, to its alleged practices. I think that the Department’s case basically boils down to an attack on the church and its fundamentals.”<sup>108</sup>

Ms. Richards, for CPS: “This is not a case against the church. This is against sexual abuse, in general. And that’s what the thrust of this case is. We have no issue which will be presented to this Court about this organization’s belief system, its religious acts. What we have are its behaviors with regard to its minor children. We believe it’s a pattern of sexual assault.”<sup>109</sup>

Judge Walther: “The church is not in front of the court today. The parents and the children are in front of the court today...”<sup>110</sup>

Edwards: “...except the church is – is the people. The church is not a building. The church is not – is not a constitution or a set of bylaws. The church is its people.”<sup>111</sup>

Judge Walther: “...the court is not in the position, certainly does not intend to rule about someone’s religious practices and their freedom of religion. What I’m trying to get to is whether or not these children should be returned to their parents... I’m not passing [judgment] on anybody’s religious beliefs.”<sup>112</sup>

Edwards (the *ad-litem* attorney) argued that CPS’s case amounted to an attack on the FLDS and their core principles. Richards (CPS’s lead attorney) insisted that the state was simply interested in pursuing the sexual abuse allegations; the church’s beliefs and “religious acts” were irrelevant to the case at hand. When Edwards countered that

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<sup>108</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 4, pg# 68-69: 25; 1-5, 13-17; 19-23.

<sup>109</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol.4, pg# 70: 4-10.

<sup>110</sup> *Ibid* pg# 71: 9-10; 12-14.

<sup>111</sup> *Ibid* pg# 72: 2-4.

<sup>112</sup> *Ibid* pg# 73: 3-6; 10.

the church is inextricably linked to its people, the judge responded that she would not be ruling on any religious questions, and so any objections pertaining to religious freedom were irrelevant. *I contend in this chapter that it is precisely the church's belief system and religious acts that were "on trial" at the 14-day hearing and in subsequent appeals.*

The issue of religious freedom would not be raised again until the ACLU filed a brief to have the judge's ruling overturned on appeal, a fact to which I will later attend. But the above exchange offers insight into a crucial dimension of the raid, and this chapter's central questions rely upon the assumptions of that exchange. In particular, in sustaining a religious freedom objection to the proceedings, Judge Walther made it patently clear that in terms of this case, the church was not specifically implicated and the court was attending to matters that had nothing to do with religion. The issue this chapter explores is precisely why this case seemingly had both nothing and everything to do with religion.

During the 14-day hearing to determine the fate of the 400+ children who were removed from the ranch, the trial court was loath to hear arguments pertaining to religious freedom. The presiding judge, Barbara Walther, instead asked ad-litem attorneys and attorneys representing parents to focus exclusively on CPS's allegations: child sexual abuse and underage marriages.

Being other than real religion effectively meant that the court evaluated any minor-major marriages without context, and as a legal and moral wrong unto themselves. Specifically, this chapter will describe how attempts by ad-litem

attorneys to discuss the sexual and marital relationships of the FLDS in the context of their cosmology were deemed irrelevant to the facts. That said, this was not – on the part of the ad-litem – a case of universal support for arguments based on religious freedom. As my interviews suggest, ad-litem were also skeptical about giving credence to claims regarding religious freedom; overall, religious freedom was interpreted as an excuse, a “card to play” that sidestepped the real and singular issue of sexual abuse and underage marriages.

Here, Danielle White, a Dallas area lawyer who served as an ad-litem attorney after the raid, describes how Angie Voss -- Child Protective Services’ lead investigator – characterized the state’s approach to the FLDS:

“...during the 14 day hearing, someone was questioning a CPS representative...she’s really a pretty good person put in a horrible situation...Angie Voss... she was like a head CPS person from San Angelo at the raid, the one who was forced to take them all, even though she didn’t agree with it. Someone got up and said “if you have a report of sex abuse in Miles, TX, would you remove all the children in the community?” “No!” “Well then why did you remove all the children here?” “Well because they all think alike.” And I was just like “you just bought the state a civil rights suit.” Which amazingly no one’s filed. And that was their theory of the case, that because they were in the same culture, the same religion, the same cult, then we get to take them all.”<sup>113</sup>

Although the FLDS church was not per se on trial, White’s summary of Voss’s testimony describes how legal arguments were often infused with and sometimes even premised upon gross generalizations and stereotypes about the FLDS as a group. In order for the state and CPS to consider a religious freedom claim, they would first have to recognize the FLDS as a legitimate religion capable of seeking redress under

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<sup>113</sup> Danielle White, interviewed by Cassie Ambutter. September 10, 2010. Dallas, TX.



the First Amendment. Instead, White's interpretation of Voss's testimony reveals one of the fundamental underlying assumptions; namely, this was a belief structure perceived as wholly unlike Catholicism or Methodism because everyone's thoughts were presumably indistinguishable from one another. In other words, from the perspective of the state and CPS, the FLDS were on the wrong end of a religion-cult continuum.

### **The Category of Religion and its Effects**

Critics of secularism like Tomoko Masuzawa and Talal Asad discuss the emergence of "religion" as a category whose history is at once changing and jagged and yet, paradoxically, truth-making. In other words, while religion as an analytical category hasn't always meant the same thing at every historical moment, it persists as an organizational apparatus – a way of knowing the world. My intention, in exploring these theorists' discussion of how the concept of universal religion came to be, is to illustrate how the judge and the CPS attorneys could proclaim – with constitutional and legal certainty – that the acts they were prosecuting were not religious acts. I submit that we need this historical context regarding the origins of the category of religion in order to understand how this legal logic came to be.

According to Masuzawa, beginning in the late 17<sup>th</sup>-early 18<sup>th</sup> century, "religions of the world" first became an object of scientific study.<sup>114</sup> In the late 18<sup>th</sup> and early 19<sup>th</sup> centuries, the early modern taxonomic system that had once been used

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<sup>114</sup> Tomoko Masuzawa, *The Invention of World Religions* (Chicago: University of Chicago Press, 2005), 63.

to classify people and nations by their ceremonial practices would begin to examine what we understand as “religion” in a different way. Specifically, the whole taxonomic system did not change, but rather, what changed was the way a “religion was to be recognized, to be identified as such, so that it might be compared with another.”<sup>115</sup> This shift in thinking about religions – wherein religions could be objectively compared in a scientific way – presumed that religion could be “discernible, identifiable, and at least in principle, isolable.”<sup>116</sup>

The turn of the 20<sup>th</sup> century marked a major shift in this thinking, i.e. the beginning of the most significant analytical hierarchy in favor of Christianity – namely, posing it as *the* exclusive “world religion” over and against “religions of the world;” in short, “it allowed any liberal Christian to acknowledge the existence of other religions without ceding Christianity’s exclusive claim to universal truth...”<sup>117</sup> This immediate analytical and political effect would have long-term consequences for thinking about politics, ethics, and the place of religion in later centuries.

While it might plainly follow that individuals or groups with a faith or belief system that does not align with accepted definitions of legitimate religion would not have access to “religious freedom” as a form of legal reasoning, the effect of this on actual people’s lives is staggering. In what follows, I will demonstrate that the distinction between real/legitimate religion and that which is other-than-real religion is very much alive in the arena of law and politics. In order to do that, I rely on the

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<sup>115</sup> Masuzawa 64.

<sup>116</sup> Ibid 64.

<sup>117</sup> Ibid 119.

now widely accepted academic idea that secularism cannot simply be defined as a pure separation of church and state or disestablishment, but as a cultural formation of the modern nation-state.<sup>118</sup> A political and ethical project whose manifestation differs somewhat depending on the nation out of which it emerges, Talal Asad characterizes the secular constitution in the U.S. as that which is able to contain and even foster intolerance and bigotry without undermining the overarching principles of secularism; this is because, he importantly argues, those features of secularism are internal to its logic.<sup>119</sup>

Talal Asad's theories about how Christianity is deployed politically as *the* universal religion helps to think through these long-term consequences. Asad argued that to consider the role of the secular state in the geopolitical arena, one must necessarily also consider the idea of religion; in so doing, we must attend particularly to the fact that a secular state implies a particular notion of religion. Specifically, Asad describes how within modern secular governments, the space designated for religion is distinct from the space designated for state functions.

For Asad, what came to be defined as religion has not been historically uniform; rather, its definition has been jagged and taken different paths. In places with secular constitutions, for example, "the space that religion may occupy in society has to be continually redefined by the law..."<sup>120</sup> Asad suggested that in modern states

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<sup>118</sup> Talal Asad is credited most frequently with this formulation, but many others have deployed the idea since he first articulated it. See for example: Saba Mahmood (2005) and Hirschkind and Scott (2006).

<sup>119</sup> Talal Asad, *Formations of the Secular* (Stanford: Stanford University Press, 2003), 7.

<sup>120</sup> Asad (2003), 201.

with secular constitutions, religion is a space of beliefs and practices that are irreducible to other spaces, such as politics.<sup>121</sup> For Asad, “there cannot be a universal definition of religion, not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive processes.”<sup>122</sup>

Asad’s account of early modern Europe describes an attempt by scholars and royalty to generate an all-encompassing universal definition of religion. In this view, Christianity or Christendom understood itself to be “the world” and other religions were at best tolerated.<sup>123</sup> Drawing on Geertz’s conception of religion, Asad describes the “optional flavor” of modern notions of religion, particularly that “religion today *is* a perspective,” whereas other phenomena like science are essentially compulsory.<sup>124</sup> While 20<sup>th</sup> and 21<sup>st</sup> century conceptions of religion conceptualize it as one “perspective” among many: “Historians of progress relate that in the premodern past secular life created superstitious and oppressive religion, and in the modern present secularism has produced enlightened and tolerant religion.”<sup>125</sup> As I described in the preceding chapter, though appearing most famously in the writings of John Locke, tolerance in the late-20<sup>th</sup> century functioned as a way to tame or manage forms of difference that were not easily legible to the U.S. liberal imagination.

In fact, religion came to be defined, Asad suggests, by a practice of tolerance

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<sup>121</sup> Talal Asad, *Genealogies of Religion* (Baltimore: The Johns Hopkins University Press, 1993), 27.

<sup>122</sup> Asad (1993), 29.

<sup>123</sup> Ibid 40.

<sup>124</sup> Ibid 49.

<sup>125</sup> Ibid 193.

that emanated specifically from the state. In particular, he describes how Lockean religious toleration was “motivated by concern for the integrity and power of the state.”<sup>126</sup> Christian tolerance takes as a given that “religion is what actually or potentially divides us, and if followed with passionate conviction, may set us intolerantly against one another.”<sup>127</sup> For religion to be accepted as a legitimate social and political force within the modern state, he argues that it must be willing to enter public debate with the intention of rational conversation about relevant issues. Asad says that this willingness to enter public debate was “not intended [to] apply to *any* religion whatever” but just those “that have accepted the assumptions of liberal discourse.”<sup>128</sup> This politically expedient definition of religion is a version of Christianity in which other cosmologies or religious truths are respected as valid for the people who believe them, but at the same time, such a definition does not require Christianity to relinquish its title as the notion of universal religion.

In Asad’s formulation of religion in the modern secular state, the law formally defines the space and place of religion in public life. He asks: “In what way does the law define and regulate practices and doctrines on the grounds that they are ‘truly human?’ What discursive spaces does this work of definition and regulation open up for grammars of ‘the secular’ and ‘the religious?’”<sup>129</sup> In posing questions to reveal the impact and import of defining religion according to the dictates of U.S. law (particularly constitutional law), this chapter will describe how one of Asad’s primary

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<sup>126</sup> Ibid 206.

<sup>127</sup> Ibid 207.

<sup>128</sup> *Formations of the Secular* 183.

<sup>129</sup> Ibid 17.

theoretical interventions provides a means of thinking about the role of religion and religious freedom during and after the FLDS raid.

As Masuzawa stated, the definition of *the* “world religion” or the “universal religion” was simultaneously productive and destructive of religious difference. It was productive insofar as it produced its opposite – “national” or “ethnic” religions, but it was destructive of what made those “other” religions culturally and theologically distinct from the universal. If, as scholars like Talal Asad and Carl Schmitt<sup>130</sup> and have both argued in different ways, Protestant values are formative of the modern state (particularly its institutional legal mechanisms), then it follows that the state reenacts the particular work done by the idea of “universal religion.” This work – whose effects can no doubt be violent – reveals itself very clearly in the context and content of the FLDS raid. If legal norms and constitutional law define the appropriate place of religion and those laws and norms reflect Protestant values, it follows then that what counts as religion is heavily determined by those Protestant values.

### **New Religious Movements and the Religion-Cult Continuum**

Given the relationship between law and religion, it is necessary to consider together the literature on the category of religion as well as the literature on New Religious Movements (NRMs). In what follows, I suggest that though the FLDS are, by those literatures’ standards, neither religion nor classic “cult,” their liminal

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<sup>130</sup> In Ch. 3 of “Political Theology” (1985), Schmitt asserted that “all significant concepts of the modern theory of the state are secularized theological concepts...”

existence as something other-than-real religion made them more susceptible to state intervention, and more likely to be raided.

While the FLDS occasionally made references to religious persecution after the raid, the media coverage of and legal attention to such claims was peripheral to discussions of child sexual abuse and underage marriages. In one instance, an FLDS woman identified only as Kathleen said:

“We have been persecuted for our religion. We are being treated like the Jews were when they were escorted to the German Nazi camps.”<sup>131</sup>

This invocation of religious persecution is significant insofar as it was not seriously considered or deployed by the trial court in its legal reasoning. In what follows, I will offer a possible explanation as to why this was the case. In order to illustrate this point, I will draw on the literature about “New Religious Movements,” a category in which the FLDS are sometimes included.

The term “New Religious Movement” (NRM) has been broadly defined and is also referred to as “alternative religious movement,”<sup>132</sup> “emergent religions,”<sup>133</sup> and “marginal religious movement,”<sup>134</sup> characterizations that are largely distinctions of nomenclature. An historian of American religion, J. Gordon Melton, argues that the term “New Religious Movement” was a Japanese import, largely a result of the

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<sup>131</sup> Ryan T. Cragun and Michael Nielsen. “Social Scientific Perspectives on the FLDS Raid and the Corresponding Media Coverage” in *Modern Polygamy in the United States: Historical Cultural and Legal Issues*, eds. Cardell K. Jacobsen and Lara Burton (Oxford: Oxford University Press, 2011), 216.

<sup>132</sup> Timothy Miller, *America’s Alternative Religions* (New York: SUNY Press, 1995), 173.

<sup>133</sup> Robert S. Ellwood, *Mysticism and Religion* (California: Seven Bridges Press, 1980), 50.

<sup>134</sup> Charles L. Harper and Bryan F. Le Beau, “The Social Adaptation of Marginal Religious Movements in America,” *Sociology of Religion* 54 (1993): 171.

United States' post-World War II enforcement of religious freedom in Japan. Because the U.S. changed its immigration policy in 1965 to allow a greater percentage of Asian groups, they brought with them their fledgling Christianities and a desire to "evangelize the baby boom generation just coming of age at the end of the 1960s."<sup>135</sup> Alternatively, Lorne Dawson, a Canadian sociologist of religion, draws partly on secularization theories to explain the rise in NRMs in the 1960s. For some of those theorists, religion is merely a matter of individual or family preference and not quite so enmeshed in societal norms. Some of the more prominent NRMs include the Unification Church (Moonies), the Branch Davidians, The Family, and Scientology.<sup>136</sup> Others later modified Dawson's theory and suggested that the rise of NRMs is a relic of America's "more religious" days. Specifically, NRMs formed in reaction to the ostensible rise of secularization in the United States.<sup>137</sup>

Another sociologist of religion, Elisabeth Arweck, suggests that NRMs as a group cannot just be evaluated from without. She argues that it is important to consider how the movements self-identify, particularly distinguishing between a "church," a "sect," and a "cult." Had these religious groups appeared prior to World War II, they would have certainly been classified as either "sects" or "cults." This includes but is not limited to both the Mormons and the Jehovah's Witnesses. For

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<sup>135</sup> J. Gordon Melton, "The Fate of NRMs and their Detractors in Twenty-First Century America," in *New Religious Movements in the 21st Century: Legal, Political, and Social Challenges in Global Perspective*, ed. Phillip Charles Lucas and Thomas Robbins (New York: Routledge, 2004), 231.

<sup>136</sup> Lorne Dawson, *Comprehending Cults: The Sociology of New Religious Movements* (Canada: Oxford University Press, 2006), 17-18.

<sup>137</sup> Dawson 25.



Arweck, the term “sect” was applied to any marginal religious group, including those in the 19th century.<sup>138</sup>

The profile of the people who join NRMs speaks to the prevalence of “cult” rhetoric that surrounded many of the marginal religious groups. Implicit in the rhetoric is that there is little to nothing voluntary about these new religious groups. Furthermore, because many of the converts were in their twenties, scholars theorized that the young adults’ families believed their children were manipulated into these groups, perhaps even brainwashed. The thrust behind the anti-cult movement was the desire to save “by unlawful detention young converts who are then subject to de-programming.”<sup>139</sup> In both the United States and Great Britain, the anti-cult movement believed that new religious groups were disruptive of family life and systematically worked to brainwash innocent young adults.<sup>140</sup>

Central practices of many NRMs are particularly troubling for their detractors and critics because they violate norms of American liberalism. Some scholars argue that what is so abhorrent is the communitarian nature of many of these groups, which often results in a common mode of dress, a fact which appears distinctly un-American.<sup>141</sup> However, Dawson addresses what underlies much of the “anti-cult” rhetoric and general opprobrium for NRMs: “The collectivist sentiments...of many

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<sup>138</sup> Elisabeth Arweck, *Researching New Religious Movements: Responses and Redefinitions* (London: Routledge, 2006), 32-33.

<sup>139</sup> Bryan Wilson, *The Social Dimensions of Sectarianism* (Oxford: Clarendon Press, 1990), 43.

<sup>140</sup> Arweck, 36-37.

<sup>141</sup> Benjamin Zablocki and J. Anna Looney, “New Religious Movements in the Post-9/11 World,” in *New Religious Movements in the 21st Century*, ed. Phillip Charles Lucas and Thomas Robbins (New York: Routledge, 2004), 323.

NRMs clash with the markedly individualistic orientations of contemporary...American culture.”<sup>142</sup> At their core, it is the communitarian orientation (or merely the notion of being an insulated community)<sup>143</sup> that renders pernicious so many of the new religious groups in the late 19th and 20th centuries, including the FLDS.

NRMs’ insularity is troubling to the American liberal schema in that it violates the presumption of a sharply defined public/private boundary. Some scholars argue that new religious movements tend to reject the notion that religious belief is to be relegated to the private sphere, whereas civil society is linked inextricably to the secular, public sphere. Mainstream people of faith generally tend to subordinate their private, religious beliefs to their public presentation.<sup>144</sup> Furthermore, others assert that at the heart of the private sphere is the notion of choice, while public life breeds conformity.<sup>145</sup>

However, complication of the public/private distinction and an attachment to communitarian principles were not the only features of NRMs that unsettled the general public. What also unsettled the public was the fear that monogamy’s importance will be diminished, which could precipitate the unraveling of the social fabric. New Religious Movements often “deviate[d] from traditional dyadic relationship,”<sup>146</sup> causing concern among the mainstream population. Outsiders

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<sup>142</sup> Dawson 105.

<sup>143</sup> Wilson 39.

<sup>144</sup> Zablocki and Looney 318-319.

<sup>145</sup> Dawson 53.

<sup>146</sup> Zablocki and Looney 320.

translated deep devotion to religious leaders into “newly interpreted conjugal relationships.”<sup>147</sup> However it was not simply the sexual liberation that disrupted the liberal democratic, monogamous social order. The other end of the sexual spectrum, asceticism, was likewise condemned for its extremism. The asceticism of the Hare Krishna seemed deviant, given that heterosexual monogamous marriage was revered.<sup>148</sup>

As I show below, many aspects of FLDS life reflect some of the characteristics of NRMs. Specifically, I will review perceptions of the FLDS as a “cult,” their tendency towards collectivism, the extent to which spirituality structures members’ lives rather than being incidental to it, and their unconventional sexuality.

CPS, the state’s witnesses, and the trial court itself never had to explicitly say that the FLDS were closer to a cult than a religion, though in a few instances they did. Witnesses for the state/CPS stressed their perceived differences from Catholics and mainline Protestants. For example, psychiatrist Dr. Bruce Duncan Perry (to whose testimony I will later attend in greater detail) referred to life among the FLDS in Eldorado as “psychologically destructive” and “authoritarian.”<sup>149</sup> Also, during the 14-day hearing in trial court, Angie Voss - CPS’s lead investigator - said that FLDS “women...appear to have a very difficult time making a decision on their own.”<sup>150</sup>

Another similarity that the FLDS share with other NRMs is a tendency

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<sup>147</sup> Ibid 321.

<sup>148</sup> Dawson 126-129.

<sup>149</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol.5, pg# 61: 10-11.

<sup>150</sup> Ibid, pg# 23: 6-8.

towards collectivism. According to one of the *ad-litem* attorneys I interviewed, the FLDS have "in effect a religious cooperative, a commune if you will. But cooperatives are legal, trusts are legal. It was started legally in the 1940s. It seemed to work pretty well to take care of a community of people as a community, and not as a nuclear family and private property ownership like good capitalists."<sup>151</sup> Collectivism is so central to the structure of the FLDS that a trust has been established and managed for decades to serve the interests of the community writ large. According to a 2006 memo filed by a lawyer for a member of the trust:

"The United Effort Plan Trust was [originally] intended and designed to enable Petitioner Association members to organize their communal life around one of the central tenets of their religion - the Law of Consecration and Stewardship, also known as the Holy United Order. Thus the Declaration of Trust of the UEP Trust states that the Trust was created and exists solely "to preserve and advance the religious doctrines and goals of the Fundamentalist Church of Jesus Christ of Latter-day Saints' (the "FLDS Church"), and that the Trust is to be administered 'consistent with its religious purpose to provide for [FLDS] Church members according to their wants and their needs, insofar as their wants and needs are just (Doctrine and Covenants, Section 82: 17 - 21).'"<sup>152</sup>

What is particularly striking about this quote is that it demonstrates the centrality of communal wealth and property to the FLDS's broader belief system. That the United Effort Plan Trust finds theological justification in a sacred Mormon text (The Doctrine and Covenants) further cements the relationship between the faith and the principle of collectivism.

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<sup>151</sup> Danielle White, interviewed by Cassie Ambutter, Dallas, Texas, September 10, 2010.

<sup>152</sup> Clark, Stephen C. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT. Filed with the Utah Court of Appeals, Trial Court No. 053900848.

Another important similarity between the FLDS and other NRMs is that the FLDS's way of being religious diverges so fundamentally from the ways that most people are religious in a modern secular state. An interview I conducted with an *ad-litem* attorney, Angela Waymer, illustrates how NRMs and the FLDS have a way of being religious that departs from much of mainstream secular society. Highlighting that spiritual beliefs figure centrally in the lives of the FLDS, Waymer says:

“They’re so communal and their faith is so central, which is pretty rare in our society. To live it every day like that. I couldn’t even imagine that level of duty, personally, because we are so individualistic, and that’s why even if you’re spiritual you’re like ‘God’s going to love me no matter what. I can do this, or that. It won’t matter. Whatever, we’re all going to be fine.’ That’s so different from the way they live.”<sup>153</sup>

Waymer highlights a tension between the way that most Americans are religious and the way that the FLDS are religious. Specifically, she emphasizes that serious religious duty typically plays a minor role in the lives of most people living under modern secularism. Charles Taylor, political philosopher and communitarian, theorizes that statements like Waymer’s reflect how secularism has changed the ways that people are religious. He describes what he calls “Secularities 1 – 3,” i.e. disestablishment, the recession of religion from public life, and a change in the conditions of belief. For Taylor, secularity #3 has made it possible to reject God out of hand in favor of fullness through humanism.<sup>154</sup> In other words, that one can have a relationship to God or to a church without that relationship ordering one’s entire life

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<sup>153</sup> Angela Waymer, interviewed by Cassie Ambutter, Dallas, Texas, September 14, 2010.

<sup>154</sup> Charles Taylor, *A Secular Age* (Cambridge: Belknap Press of Harvard University, 2007), 38-41.

is, according to Taylor, a feature of modern secularism. This characterization of modern secularism is notably different from Waymer's description of FLDS religiosity.

Finally, I will very briefly note one additional way in which the FLDS parallel the characterization of NRMs: the way in which those outside the community viewed their sexuality as repugnant. According to one *ad-litem* attorney, a "distaste" for unconventional sexuality was "at least an overarching concern and/or instigating factor" in the raid, due to "concerns about boys being raised in a culture that condoned polygamy."<sup>155</sup>

There is considerable debate among NRM scholars about whether there should be laws instituted to protect NRMs from state intervention and interference. I will highlight one instance in which the state forged a direct confrontation with an NRM that was viewed as an insular cult. This instance is the now-infamous Branch Davidian siege at Mt. Carmel Center in Waco, Texas. In 1993, ATF agents engaged in a ten-day standoff, descended upon their homes and attempted to flush the parishioners out through the use of high-decibel noises, the cessation of electricity, and shining spotlights at night. ATF tanks drove over Davidian cars and ultimately gassed a residence filled with civilians and many young children. Fire spread as a result and killed nearly 100 people, including Davidian leader, David Koresh.<sup>156</sup>

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<sup>155</sup> Angela Waymer, interviewed by Cassie Ambutter, Dallas, Texas, September 14, 2010.

<sup>156</sup> Catherine Wessinger, "New Religious Movements and Conflicts with Law Enforcement," in *New Religious Movements and Religious Liberty in America*, ed. Derek H. Davis and Barry Hankins (Waco: Baylor University Press, 2003), 91-92.

Catherine Wessinger, an historian of religion, argues that the siege and raid occurred because there was a lack of understanding on the part of the federal government; what the incident indicated was that the government was unwilling to understand Branch Davidian beliefs, their worldview, and take them to be a serious religious group. She states: “No matter how strange the beliefs appear to outsiders, the believers adhere to their religious faith sincerely because it makes sense to them.”<sup>157</sup> So, the failure to take seriously the Branch Davidian religion led to tremendous violence and destruction that could have likely been mitigated if not prevented entirely. Furthermore, the Davidians faced extensive persecution in the U.S. appellate court system, where federal judges were unwilling to put the government on trial because they believed the Davidians posed a legitimate threat to social mores and state power. Instead --and in the name of “law and order” – the deaths of four ATF agents during the siege overshadowed the violence perpetrated on the Davidian people.<sup>158</sup>

The FLDS are not considered a standard NRM because they were founded before the Second World War. That said, they were characterized in the media and in the trial court as a brainwashed, and at once oversexed and ascetic collectivist religion -- some of the defining features of classic NRMs. Based on the characterizations offered by NRM scholars, the FLDS would be a likely target of potential state intervention. In fact, there were previous raids on the FLDS, most notably in Short

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<sup>157</sup> Wessinger 100.

<sup>158</sup> Stuart A. Wright, “Analysis of Branch Davidian Case,” in *New Religious Movements and Religious Liberty in America*, ed. Derek H. Davis and Barry Hankins (Waco: Baylor University Press, 2003), 81-85.

Creek, Arizona, an FLDS community. On July 26, 1953, Arizona officials obtained warrants to arrest the residents of Short Creek and detain over 250 children. The charges included, but were not limited to, bigamy, adultery, cohabitation, and statutory rape.<sup>159</sup> Though the Arizona legislature spent nearly a month planning the details of this raid, they allocated \$50,000 for the raid's execution and took the money from the governor's *emergency* fund.<sup>160</sup> It was a full two years before all the children were returned to their parents in Short Creek; in the interim, most of them were placed in mainline Mormon foster homes.<sup>161</sup>

The FLDS might not fit the precise definition of an NRM because of the time period in which they were founded, but the media drew comparisons between Waco, Short Creek, and Eldorado.<sup>162</sup> The attorneys *ad-litem*- that I interviewed believed these comparisons had varying degrees of legitimacy. Jerrold Cullen, a Dallas family law attorney, stated:

“[The FLDS] certainly had bad experiences in Colorado City that drove them to Eldorado...I don't know that there was ever a great deal of trust, that's why they are so secretive. In many ways, it was a self-fulfilling prophecy. It was equated at the time with Waco...and there was *nothing* to suggest that [the FLDS] were violent...And I don't think there were any violent experiences in Colorado City.”<sup>163</sup>

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<sup>159</sup> Martha Sonntag Bradley, *Kidnapped from that Land: The Government Raids on the Short Creek Polygamists*, (Salt Lake City: University of Utah Press, 1993), 131.

<sup>160</sup> Ken Driggs, “This Will Someday Be the Head and Not the Tail of the Church,” *Journal of Church and State*, 2001, p. 68.

<sup>161</sup> Bradley 142.

<sup>162</sup> See, for example: Neil J. Young. “Short Creek's Long Legacy: How a failed 1953 raid shaped the relationship between polygamists and the government.” *Slate Magazine*. 16 April 2008,

Amanda Townsend and Gary Tuchman. “A dark history repeats for religious sect.” CNN. 11 April 2008.

<sup>163</sup> Jerrold Cullen, interviewed by Cassie Ambutter, Dallas, Texas, September 8, 2011.



Since there was not perceived to be any threat of violence from the FLDS in response to the raid, Cullen suggests here that the comparison to Waco is overdrawn. His contention that the FLDS accepted persecution as part of their history meant that raids were to be expected even though they were undesirable.

But the likelihood and fear of persecution weighed heavily on the minds of FLDS families. Sharon Reyes, a Dallas-based appellate lawyer, said described this in relationship to the different generations of FLDS who lived through the Eldorado raid:

“These kids are so proud that they were part of this in a way. And talking to some of the adult FLDS, I would hear “you know my grandmother was in the ‘53 raid.” It is this cultural identity to them, and it’s a piece of martyrdom that their families suffered.”<sup>164</sup>

Facing state intervention or being raided is part of their cultural memory and is indicative of the state’s relationship to NRMs generally. In particular, that state raids would be part of the FLDS’s cultural memory suggests that they are on the wrong end of the religion-cult continuum and that the state and its law perceives and manages them as though they were something other-than-real religion. Being treated as something other-than-real religion meant that during the raid, the trial and its aftermath, the lives and practices of the FLDS were assessed and analyzed as though the state was not dealing with a religion proper.

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<sup>164</sup> Sharon Rosa, interviewed by Cassie Ambutter, Dallas, TX, September 11, 2010.

## The FLDS in Trial Court

During the required 14-day adversary hearing to determine the fate of the FLDS children, lawyers representing individual FLDS members, lawyers for CPS, and expert witnesses referred to the FLDS by a wide variety of terminology. I suggest that such a vast difference in terminology is evidence of the group's liminal existence as something other than real religion. That the FLDS occupied an unclear space with respect to the category of religion would impact how they were treated under the law.

The FLDS were referred to as a "cult" when the witness or attorney wanted to emphasize negative aspects of the group. In order to make the case that the children should be retained by the state, CPS called psychiatrist Dr. Bruce Duncan Perry to testify. Dr. Perry described life among the FLDS in Eldorado as an "environment that [was] by some people called [a] 'cult,' and by other people called [a] 'psychologically destructive environment.'"<sup>165</sup> In characterizing the FLDS as a "cult," Perry described life among the group as a "very controlling or authoritarian environment that determine[s] what you eat, how you dress, [and] who you socialize with."<sup>166</sup>

Attorneys and witnesses used many categories on the religion-cult continuum to describe members of the FLDS. Attorneys *ad-litem* referred to the FLDS as everything from "a religious sect"<sup>167</sup> to "the compound or church in Eldorado."<sup>168</sup> Dr.

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<sup>165</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 5, pg# 61: 8-11.

<sup>166</sup> *Ibid*, pg# 81: 23-25; 82: 1-3.

<sup>167</sup> *Ibid* pg#169: 23.

<sup>168</sup> *Ibid* pg#175: 25; 176: 1.

William John Walsh -- a theologian who was called to testify as an expert witness on the FLDS -- characterized them as a “Mormon sect,” “a Mormon faith”<sup>169</sup>, and “a branch of Mormonism.”<sup>170</sup> I want to focus briefly on an excerpt of Dr. Walsh’s testimony from the trial court because it speaks to a broader point about the meaning of religion under liberal law. Specifically, I will attend to some of the ways that Dr. Walsh attempted to compare the FLDS to mainstream religions that are more familiar and relatable to an American court and an American public. Sometimes the trial court permitted Walsh’s lengthier explanations of similarities between the FLDS and mainstream religions and other times the court did not.

Regardless of whether the court wanted to hear testimony that compared the FLDS to mainstream religions, Dr. Walsh offered these comparisons with the intention of making the unfamiliar familiar. In providing some of those examples below, I aim to unpack and explore the implications of trying to make the FLDS count as a religion -- namely, what it means for them to occupy a liminal space rather than a space in which it goes without saying that they are a religion. In order to do this, I will describe a few examples of court cases in which the parties in question belonged to what all sides viewed as incontrovertibly real, legitimate religions.

I suggest that cases in which the parties belonged to real religions serve as an important contrast to the FLDS’s initial emergency removal case. Specifically, these court cases highlight within religious freedom jurisprudence an historical distinction between religious belief and religious action. Such a distinction changed over time

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<sup>169</sup> Ibid pg#189: 6-9.

<sup>170</sup> Ibid pg#216: 17.

and became less stark. Nevertheless, in many ways the distinction between belief and action animated many of the court proceedings pertaining to the FLDS raid and emergency removal – in particular the trial court transcript, an *amicus brief* filed by the ACLU, as well as the ruling in the Third Court of Appeals. In contrast to some of the established jurisprudence on religious freedom, what the court documents for the FLDS raid/removal suggest is that because the FLDS were viewed as neither religion nor cult, they occupy a liminal space in relation to the law.

Throughout his testimony, Dr. William John Walsh offered expert knowledge of the FLDS, and in doing so, he often compared them to other, more mainstream religions. For example, one exchange transpired in this way:

Richards: “Is it unreasonable to assume that because one or two people have a belief, that the entire community of FLDS members would have the same belief?”

Dr. Walsh: “No that is not a reasonable belief. That would be the same thing as saying all Catholics believe the same thing or all Baptists believe the same thing.”<sup>171</sup>

A similar exchange between *ad-litem* Carmen Dusek and Dr. Walsh went as follows:

Dusek: “Would it be fair to say...that if a young woman was perceived to not value the church beliefs, if she was perceived to not share [those] same values, that that could be emotionally harmful to that child if she were to decline to be spiritually married and to bear children at whatever age?”<sup>172</sup>

Dr. Walsh: “I mean, yes. It’s just like with Catholicism. What do you do if you have a teenage girl that says: I don’t want to go to mass. And I don’t like the Pope. And there’s going to be consequences within her Catholic family if she expresses those attitudes.”<sup>173</sup>

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<sup>171</sup> Ibid pg#171: 13-19.

<sup>172</sup> Ibid pg#199: 17-23.

<sup>173</sup> Ibid pg#200: 1-4.

Finally, an exchange between *ad-litem* David Pickering and Dr. Walsh solidifies the significance of comparisons to mainstream religions:

Pickering: “Do you have any opinion with regard to the family values of the LDS sects?”<sup>174</sup>

Dr. Walsh: “As just general family values, if you take away the polygamy, they would be very harmonious with just about any conservative religious group, Catholic, Baptist, or whatever, in the United States.”<sup>175</sup>

As the exchanges above indicate, Walsh repeatedly tried to draw comparisons between the FLDS and well-established mainstream religions. In effect, he attempted to normalize the FLDS by highlighting the similarities they share with familiar, mainstream religion(s). As the dialogue between Walsh and counsel suggests, the FLDS were not simply a religion like any other in the context of the court. In fact, Walsh’s repeated attempts to compare the FLDS to familiar Christian denominations signal the extent to which the FLDS were perceived as religiously foreign.

In other words, the fact that Walsh had to respond to every question about FLDS life, theology or cultural values with a comparison to mainstream Christianity indicates that that comparison was not implicit or neat – that it did not go without saying that the FLDS might be similar to other Christian denominations. Rather, despite Walsh’s efforts, it goes without saying that the FLDS were *not* considered by the attorneys or the judge to be comparable to Catholics or Baptists. If the parties in the courtroom believed there was a substantial likeness to these other mainstream

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<sup>174</sup> Ibid pg#202: 10-12.

<sup>175</sup> Ibid pg#202: 25; 203: 1-3.

religions, it is unlikely that Walsh would have had to repeatedly make those comparisons. But, in such a murky, liminal space of not-quite-cult but not-real-religion, the same line of questioning and the same sort of reasoning that could be used to analyze an indisputably real religion is simply not available.

### **What Counts As A Real Religion Under the Law?**

Because it goes without saying that the FLDS are not a legitimate religion like any other, in what follows below I attend to some of the reasons why. Specifically, I attend to some of the historical shifts in what counted as a religion under U.S. law. In doing so, I highlight how a tension between religious belief and action animated historical discussions about an appropriate legal definition of religion. Furthermore, I demonstrate how those tensions were evident at every level of the FLDS raid/removal case, which ultimately served to illustrate their liminality.

The legal definition of religion -- and by consequence religious freedom jurisprudence -- has always relied upon a distinction between religious belief and religious action. In what follows, I engage with five court cases in order to highlight the changing meaning of religion under the law. In particular, these cases illustrate that the relationship between belief and action was initially very dichotomous and has become increasingly jagged over time. I offer this brief history because it provides jurisprudential context for why the FLDS raid/removal case occurred the way it did.

The idea that belief cannot be compelled is a central component of modern conceptions of religion as well as the notion of religious liberty under American law. In order to highlight some of the constitutional questions regarding religious belief

and religious action, specifically in the context of fundamentalist Mormonism, I will now turn to two historical Supreme Court cases: *Reynolds v. U.S.* and *Davis v.*

*Beason.*

*Reynolds v. U.S.* is widely regarded as the first high court case to establish the moral and constitutional limits of religious liberty. George Reynolds, a Mormon man with two wives, was convicted of bigamy under the Morrill Act of 1862. The Morrill Act stated that Utah's recognition as a territory in 1851 was premised upon the elimination of "polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities."<sup>176</sup> In other words, if Utah wished to retain its status as a territory, it was required to eradicate polygamy, regardless of the religious justifications that church leaders offered for the practice.

In addition to being the first case to formally define religious liberty, *Reynolds* also defined legitimate religion according to the dictates of law. Chief Justice Waite stated:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?<sup>177</sup>

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<sup>176</sup> The Morrill Anti-Bigamy Act, 37<sup>th</sup> United States Congress, Sess. 2., ch. 126, 12 Stat. 501.

<sup>177</sup> 98 U.S. 145 *Reynolds v. United States* (October 1878).  
<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/reynoldsvus.html>

But, as Waite also noted, “The word ‘religion’ is not defined in the Constitution.”<sup>178</sup> Because this was the first case to describe the substantive meaning of religious freedom, its definition shaped expectations of what it means to count as religious in the eyes of the laws. In essence, the *Reynolds* court used the question of Mormon polygamy to outline a distinction between belief and action in which the former is free without question and the latter can be proscribed if it is “in violation of social duties or subversive of good order.”<sup>179</sup> In the earliest days of the Supreme Court, religious freedom was clearly defined as the freedom to believe; religions that sought constitutional protections were encouraged to adhere strictly to that mandate.

In 1890 (twenty-eight years after *Reynolds*), the Supreme Court heard arguments in a case called *Davis v. Beason*. Under Idaho law, all people were required to swear an oath in which they disavowed the practice of polygamy and any association with a religion that advocated it. Davis, a member of the Mormon Church, was charged with violating this oath. He protested the charge and attendant fines on First Amendment grounds. The Supreme Court in this case was tasked with determining whether compelling someone to swear an oath disavowing his religion was in violation of his free exercise rights. Like in *Reynolds*, the court in *Davis* shaped the parameters of a legal definition of religion. Justice Field wrote that the Free Exercise Clause of the First Amendment “was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and

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<sup>178</sup> 98 U.S. 145

<sup>179</sup> *Ibid.*



conscience,”<sup>180</sup> but never that Free Exercise rights should “be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society.”<sup>181</sup> Here, the court reaffirmed the central holding of *Reynolds*, i.e. that belief is without question protected by the constitution but that those beliefs cannot ever be used as a reason to engage in acts that are contrary to “the Christian world in modern times.”<sup>182</sup>

So, the court in *Davis* stated that a person could not seek protection under the Free Exercise Clause for engaging in acts that were contradictory to Christian morality and public order. Moreover, the court in both *Reynolds* and *Davis* were reluctant to accept that legitimate religions could require such abhorrent acts or practices as part of their relationship to God. In other words, both courts defined legitimate religion, i.e. religion that would receive constitutional protection, and at the same time defined its opposite.

A discussion about belief and action is central to the analysis of the FLDS raid and the initial legal battles that ensued. U.S. courts have a long and complex history with respect to religious freedom; *Reynolds v. United States* was the first high court case to decide the substantive meaning of religious freedom and, by extension, the legal definition of religion. Mormon polygamy was thus the first issue to ever draw the battle lines in the constitutional debate about religion.

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<sup>180</sup> 133 U.S. 333 *Davis v. Beason* (February 1890).

<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=133&invol=333>

<sup>181</sup> 133 U.S. 333

<sup>182</sup> *Ibid.*

Since the 19<sup>th</sup> century cases of *Reynolds* and *Davis*, the legal definition of legitimate religion has shifted over time. In considering such changes in the legal definition of legitimate religion, I will briefly turn to three cases, two from the U.S. Supreme Court and one from a lower court. The first, *Wisconsin v. Yoder* (1972) describes an inextricable relationship between belief and action. The second, *Warner v. Boca Raton* illustrates many of the limits placed on the ability to consider certain acts to be religious. The final, *Employment Division v. Smith*, is the current standard for religious freedom jurisprudence.

In *Wisconsin v. Yoder*, members of the Old Order Amish violated Wisconsin's compulsory education law when they removed their children from school in the eighth grade instead of waiting until the mandated age of 16. The Amish who violated this law claimed that they educated their children in ways that helped them flourish as members of the Amish community. Moreover, high school would introduce Amish children to values that contradicted the deeply conservative values of their religion. The state contended that it had a compelling interest in educating its young people and this interest should outweigh the Free Exercise rights of Amish parents.

In deciding this case, the court had to determine whether the practice of removing children from school in the eighth grade was a significant part of Amish life, i.e. deciding "whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent."<sup>183</sup> Such a determination required confirmation that the beliefs of the Amish are legitimate religious beliefs rather than

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<sup>183</sup> 406 U.S. 205 *Wisconsin v. Yoder* (May 1972)  
[http://www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0406\\_0205\\_ZS.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0406_0205_ZS.html)

“philosophical and personal.”<sup>184</sup> Ultimately, the court in *Yoder* determined that not only were the Amish articulating a legitimate religious belief, but that the *actions and practices* attendant to that legitimate belief warranted constitutional protection. The court said that “the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.”<sup>185</sup> In its recognition of the legitimacy of the Amish (and in a departure from *Reynolds* and *Davis*), the *Yoder* court argued that actions can receive constitutional protection under the First Amendment if they are “religiously grounded” and do not undermine “the health, safety, and general welfare”<sup>186</sup> of the American people.

The justices in *Yoder* argued that were the state to continue to enforce the compulsory education laws with respect to the Amish, it would amount to an undue influence on a child’s religious life. Specifically, “if the state is empowered...to ‘save’ a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child.”<sup>187</sup> Thus, the state in this case was prohibited from influencing Amish children’s religious life in the way that the compulsory education law would have required.

Even though, with *Yoder*, the Supreme Court ruled in favor of some relationship between belief and action, it was not an absolute relationship. *Warner v.*

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<sup>184</sup> 406 U.S. 205

<sup>185</sup> Ibid

<sup>186</sup> Ibid

<sup>187</sup> Ibid

*Boca Raton* (1991) was a Florida case in the lower courts that assessed the constitutionality of particular funeral monuments. Specifically, the city of Boca Raton passed an ordinance stating that all above-ground monuments in cemeteries' newer sections were prohibited for aesthetic reasons as well as the fact that in-ground monuments are easier to landscape.<sup>188</sup> Catholics and Jews were the law's primary defectors, as they felt compelled to adorn their loved ones' monuments with things that violated the ordinance. This case sought to determine the centrality of above-ground monument adornment to the plaintiffs' larger belief schemas.<sup>189</sup>

In weighing the plaintiffs' arguments about religious freedom against the city's contention that the plots were unsightly and difficult to maintain, Judge Ryskamp argued that "these views [about decorating cemetery plots] aren't central, they are not mandatory, and they are peripheral or marginal" to the religion in question.<sup>190</sup> In essence, this Florida judge considered that belief and action might be, in some cases, interlocking and mutually dependent. However, in the case of above-ground funeral monuments, he ruled that the actions or practices must be central to the broader religious schema and he did not find that such monuments figured centrally in the theological or cultural tenets of Judaism or Catholicism.

But despite the fact that cases since *Reynolds* have at least considered a relationship between belief and practice (though not always with the same outcome), the current case that is used as a legal standard for analyzing religious freedom issues

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<sup>188</sup> Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, (New Jersey: Princeton University Press, 2005),15-16.

<sup>189</sup> Sullivan 30-31.

<sup>190</sup> Ryskamp qtd. in Fallers Sullivan 94.

utilizes the logic deployed in *Reynolds*. In the case setting the current standard, *Employment Division of Oregon v. Smith* (1990), the U.S. Supreme Court describes belief and action as essentially antagonistic, wherein the former receives protection without question and the latter can be invalidated in the interest of a neutral law.

In *Smith*, two members of the Native American Church were fired from their jobs as substance abuse counselors because they ingested sacramental peyote during a religious ceremony. When they sought unemployment from the state, they were denied on the grounds that they were fired for work-related misconduct. Justice Scalia asserted that regardless of the *intention* (religious or otherwise) behind any instance of drug use, the government had an interest in prohibiting drug use altogether. He argued: “To make an individual’s obligation to such a law contingent upon the law’s coincidence with his religious beliefs, except where the state’s interest is “compelling,” – permitting him, by virtue of his beliefs, “to become a law unto himself,” – contradicts both constitutional tradition and common sense.<sup>191</sup> Here, he argued that the rule of law allowed for only very bounded exemptions to its dictates. With respect to this specific case, Scalia believed that such a stance enabled the high court to serve as the protector of America’s anti-drug values as well as discouraging the individual self-harm involved in drug use.<sup>192</sup>

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<sup>191</sup> 485 U.S. 660 *Employment Division, Department of Human Resources of the State of Oregon v. Smith* (1988)

<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=485&invol=660>

<sup>192</sup> Ibid 134. Moreover, this may also be a reference to what John Stuart Mill termed the “harm principle,” whereby individual liberty could only be curtailed if it inflicted harm. For more, see Mill, *On Liberty*, (Mineola: Dover Publications, 2002).

The above historical overview of religious freedom jurisprudence is necessary in order to understand the logic used by the trial court during the 14-day adversarial hearing regarding FLDS children’s status as well as by the Third Court of Appeals in *In re: Sara Steed*. Below I examine an *amicus curiae* (“friend of the court”) brief filed by the American Civil Liberties Union (ACLU) on behalf of several FLDS parents who wanted the trial court’s ruling vacated and their children returned to them. The ACLU brief is central because it relies on religious freedom arguments in order to make its case. I also examine the Third Court of Appeals and Texas Supreme Court rulings in order to highlight some implicit and explicit ways they deploy the belief/action distinction.

The American Civil Liberties Union, specifically its Program on Freedom of Religion and Belief, filed an *amicus* brief in support of individual FLDS parents who sought – over and against the findings of the trial court – to have their children returned to them. Drawing on constitutional jurisprudence pertaining to the rights of parents to raise their children, as well as rights attendant to pure religious freedom claims, the ACLU argued that the trial court acted without sufficient justification when it retained all the FLDS children.

According to Section 262.201 of the Texas Family Code, children retained by the state must receive a hearing to determine custody within 14 days of the initial removal. Children may not continue to be retained by the state unless:

- (1) there was a danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession 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, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child's removal; 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>193</sup>

The ACLU's complaint regarding the outcome of the 14-day adversary hearing was that the court persecuted FLDS members for their beliefs – a fundamental, constitutionally protected liberty – rather than actions of which there was concrete, demonstrable proof. The ACLU contended:

“The State's sole evidence on harm was limited to general allegations that these parents are part of a “culture,” and subscribe to a “belief,” and a “mindset,” that girls as young as 14 may be considered of age to marry. The record contains no evidence of harm specific to the children of Real Parties in Interest.”<sup>194</sup>

Furthermore, they argued:

“The evidence DFPS put forth was not just over generalized. It also focused heavily on the beliefs ascribed to the parents, rather than – as Section 262.201 [of the Texas Family Code] requires – on actions or omissions that threatened to place the children in harm's way.”<sup>195</sup>

Essentially, the ACLU argues that the realm of belief should be inherently free from state intervention; yet, this case amounted to punishing a community for its child-rearing practices, its beliefs, and the extent to which it advocates its beliefs. For the

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<sup>193</sup> BRIEF OF *AMICI CURIAE*, American Civil Liberties Union & American Civil Liberties Union of Texas, *In re Department of Family and Protective Services*. Proceeding from Cause No. 03-08-00235-CV in the Third Court of Appeals, Austin, Texas. No. 08-0391.

<sup>194</sup> BRIEF OF *AMICI CURIAE*

<sup>195</sup> *Ibid.*

ACLU, the state's treatment of the FLDS families amounted to religious bigotry.

They stated:

“However well-intentioned DFPS and the district court may have been, the application of novel expansions of state law to individuals associated with disfavored minority religious groups raises concerns about possible religious animus. There is a vast difference between “a legitimate [social services] investigation” and “a campaign to drive a wedge between parents and their children for obviously illegitimate reasons and by clearly unacceptable means.” *Word of Faith Fellowship v. Rutherford County Department of Social Services*, 329 F. Supp. 2d 675, 685 (W.D.N.C. 2004).”<sup>196</sup>

According to their *amicus* brief, the ACLU believe that child abuse and sexual abuse investigations are often necessary, but that the raid at the YFZ ranch targeted a community for its presumed beliefs about marriage and family – *not for anything the FLDS actually did*. Rather than being motivated by a benevolent concern for child welfare, according to the ACLU, disdain for the FLDS was the thrust behind the state's unprecedented investigation. According to the ACLU, the state relied upon broad group generalizations about the community, its beliefs, and its cultural norms. The ACLU accused the trial court of punishing FLDS families on pure suspicion and for their repugnant beliefs.

When attorneys for individual FLDS appealed the state's retention of FLDS minors, the appeals court ruled that minors should be reunited with their families because there was insufficient justification to remove them on an emergency basis. So, The Third Court of Appeals in effect agreed with the central premise of the ACLU's brief. The appellate court argued:

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<sup>196</sup> Ibid.



“...The Department [did not] offer any evidence that any of Relators’ pubescent female children were in physical danger other than that those children live at the ranch among a group of people who have a “pervasive system of belief” that condones polygamous marriage and underage females having children. The existence of the FLDS belief system as described by the Department’s witnesses, by itself, does not put 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>197</sup>

In essence, the Third Court of Appeals drew upon the ACLU’s distinction between a belief structure and a set of identifiable actions pertaining to those beliefs. Here, the Appeals court emphasizes the problems with group generalizations about all members of the FLDS. Specifically, they argue that the job of the courts and of the law is to make individual determinations and thus assess the validity of each individual child sexual abuse allegation.

In the Appeals court’s estimation, Child Protective Services removed alleged minors from the ranch

“...under the theory that the ranch community was “essentially one household comprised of extended family subgroups” with a single, common belief system and there was reason to believe that a child had been sexually abused in the ranch “household.”<sup>198</sup>

Because the trial court emphasized general community belief and presumed a large degree of uniformity and orthodoxy with respect to those beliefs (and practices attendant to them), the Appeals court overturned the lower court’s orders to retain the minors in state custody. In doing so, the Appeals court

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<sup>197</sup> *In re Sara Steed, et al.* No. 03-08-00235-CV. Texas Court of Appeals, Third District, At Austin.

<sup>198</sup> *In re Sara Steed, et al.* No. 03-08-00235-CV.

rejected the state’s argument that all FLDS living at the ranch could be counted as one household with a coherent set of beliefs. This is particularly important because the Texas Family Code stipulates that if one child in a household is suspected of being abused, the state must remove all children from that household. The Appeals court said:

“The notion that the entire ranch community constitutes a “household” as contemplated by section 262.201 [of the Texas Family Code] and justifies removing all children from the ranch community if there even is one incident of suspected child sexual abuse is contrary to the evidence.”<sup>199</sup>

Typically, the state could remove all children in a household if there was at least one abuse allegation. However, the Appeals court dismissed the state’s contention that all FLDS held the same beliefs and so the community should thus be counted as a single household.

The trial court and the appeals court offered two vastly different interpretations of the raid and its attendant legal and constitutional issues. The appeals court refers obliquely to Dr. Walsh’s testimony in which he repeatedly compared the FLDS to mainstream religions like Catholics and Baptists. The appeals court highlighted that there exist “differences of opinion among the FLDS community... much as there are differences of opinion regarding the details of religious doctrine among other religious groups.”<sup>200</sup> In effect, the appeals court used Walsh’s testimony to buttress its argument that individual practitioners are unlikely to strictly follow

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<sup>199</sup> Ibid.

<sup>200</sup> Ibid, Footnote #9.

every tenet of the FLDS belief system. Further, *belief* in certain values did not necessarily translate into clearly identifiable actions that violated the law and could be grounds for the immediate removal of hundreds of children.

The Texas Supreme Court affirmed the Appeals Court’s central holding, contending that allegations of “a culture of polygamy and of directing girls younger than eighteen to enter spiritual unions with older men and have children” were insufficient to justify removal of all suspected minors on an emergency basis.<sup>201</sup>

While appellate-level courts will often overrule decisions made by lower courts, the distinction between the decisions in this case is particularly noteworthy. The fundamental difference between the two turns on a principle central to the foundation of religious liberty in the U.S.: a distinction between belief and action. The different conclusions that the courts reached with respect to this case highlight the jagged and uneven consideration of the FLDS in relation to religion/religious freedom.

The state and the Department of Family and Protective Services wanted to retain these minors because the FLDS belief structure supposedly led to child sexual abuse; thus, the state tried to demonstrate that the FLDS were closer to a cult than a real, legitimate religion. In doing so, Child Protective Services (via the testimony of lead investigator Angie Voss) stated that there existed a “pervasive belief system” to which all FLDS adhered strictly and unwaveringly. As the literature on New

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<sup>201</sup> *In re Texas Department of Family and Protective Services, Relator*, No. 08-0391, In the Supreme Court of Texas.

Religious Movements illustrates, the presumption of uniformity of belief and a centralized authority are key elements of what is pejoratively referred to as a “cult.”

So, the trial court and the appellate courts reflected this historical tension between belief and action. In this way, the trial court’s discussion of belief focused on the presumed uniformity of FLDS belief, an allegation that contributed to the heinousness of the acts in question and the fear that they would persist if the minors were not retained by the state.

At the appellate level, belief figured centrally. In particular, the court focused on how there must be diversity within FLDS belief just as there is diversity within other religions. Given this, there was not sufficient justification to remove and retain FLDS minors on the grounds that a “global pattern” and “pervasive [system of] belief” had presented and would continue to present a threat to the emotional and physical safety of those minors.<sup>202</sup>

Marshaling evidence for one position or another (belief or action) has a significant impact on FLDS families. It also speaks to the fact of existing in a liminal space between cult and legitimate religion. Specifically, legal liminality is inevitable when one can say (as the trial court did) that this case was a matter of prosecuting illegal actions and potential actions but can also (as the Appeals court, the TX Supreme Court, and the ACLU did) that this case was a matter of the freedom of belief.

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<sup>202</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 4, pg# 204: 11-13.

So, in what most considered to be a case purely about child sexual abuse, it is noteworthy that over a century since *Reynolds*, tensions between religious belief and action as well as tensions between legitimate religion and its opposite are threaded throughout trial documents and lawyers' commentary on this case. The trial court – the fact-finding court – found the FLDS belief system to be homogenous and uniformly threatening to the wellbeing of minors. The trial court did not have to say that the FLDS are a cult or something like it. That the FLDS are other than real religion (and on the wrong end of the religion-cult continuum) is something that CPS sought to firmly establish. In this way, there emerges a clearer sense of the stakes for thinking about religion in the context of this case. With regard to the raid and the community's relationship to the law, FLDS religion is not a variable that can be isolated from other facets of FLDS identity. Specifically, it is not *only* FLDS religion that faced and continues to face massive state scrutiny. Instead, I submit that a consideration of religion and sexuality together – as twin sites of regulation during the raid – opens up new avenues for critical engagement regarding how the law works and what kinds of people and relationships it serves.

## *Chapter 4*

### *Political Fissures and Analytical Imbrications: The Impossibility of FLDS Teen*

#### *Pregnancy*

Tracing the evolution of the idea of “public order” as well as the legal and constitutional conception of religious freedom in the U.S. demands particular attention to theories of secularism, changing definitions of religion, and religious freedom jurisprudence. To that end, the previous two chapters focused most centrally on how religion was being defined, deployed, and in many cases avoided outright as a topic of conversation among lawyers and CPS workers during and immediately after the raid. The final two chapters consider how the legal and constitutional regulation of religion is inextricably linked to questions of sex and sexuality. I do this in order to ultimately offer a new way of thinking about religion and sexuality together as sites of legal and constitutional regulation.

The late-March phone call to Child Protective Services was sufficient evidence to obtain warrants to enter the Yearning for Zion ranch on April 3, 2008. On the morning of April 4, the Texas Department of Family and Protective Services (the managing agency for Child Protective Services) stationed buses outside the ranch and moved approximately 165 children (i.e. anyone who “looked young”) to a civic center near Eldorado. The following day, FLDS adult women (i.e. women who were perceived as older) left the ranch to be with the others at the civic center. By Monday,

April 7, all women and children had been removed from the ranch and were being housed at Fort Concho in San Angelo -- approximately 50 miles from their home.<sup>203</sup>

When most YFZ residents had left the ranch, state officials began their investigation of the premises. After a confrontation with FLDS men outside the temple early that same week, Texas authorities and members of the FBI breached the temple doors to search for evidence of sexual abuse. While inside the temple, state authorities recovered the Bishop's Record as well as several beds. The Bishop's Record listed the living arrangements of each FLDS family, including names and ages of every family's husband, wives, and children. Because the record listed underage women married to older men, state officials interpreted this document as evidence of sexual abuse. Further, CPS alleged that sex between adult men and underage girls routinely took place on the temple beds. These allegations, which CPS claimed were substantiated by the 16-year-old girl's phone call, describe a "pattern of abuse"<sup>204</sup> consistent with underage marriages.

### **The Problematic of the Pregnant Teenager**

In what follows, I pose a question of failed comparisons. First, I describe the policy position that Texas faces a teen pregnancy crisis. Although CPS raided the YFZ ranch because of a supposed culture of underage sex and pregnancy, the law did not treat these young mothers as part of the teen pregnancy crisis. Next, I

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<sup>203</sup> "Nation Reacts to Texas Raid on FLDS Compound" *Sunstone Magazine* July 2008. 70-73. <https://www.sunstonemagazine.com/wp-content/uploads/sbi/articles/150-70-73.pdf>

<sup>204</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 1-7.

demonstrate how these different groups of pregnant teens are de-linked politically and thus cannot be thought together. Then, I describe how this de-linking is enabled by liberal legal logic. Finally, over and against the ways they are separated politically, I argue that these teen pregnancies are fundamentally overlapping phenomena; thus, we must evaluate the ethical and analytical implications of considering them together.

The legal logic that insists that we consider the pregnant FLDS teens as wholly distinct from the mainstream teen pregnancy crisis in Texas is evidence of a queer space with the law. In this chapter, I describe some of the ways that space came to be, and more significantly, what it might mean – ethically, politically, and analytically – to attempt to think within and inhabit such a space. This is especially complex terrain to navigate because it requires attention to typically undisputed areas of liberalism as both a political philosophy and a lawmaking system, particularly notions of consent, childhood, and adulthood. Because the queer space does not signal an alternative political arena in which queer subjects might build a new queer world, what I do in this chapter and the ones that follow is to experiment with inhabiting that space.

Although it is not immediately apparent why we ought to think about the crisis of pregnant teenage girls in Texas alongside the crisis of pregnant teenage girls in the FLDS, I want to suggest that thinking them together requires a move beyond the legal logic that seems to naturally divide them. It requires that we think beyond the law that has rationalized them as separate, discrete instances of sexuality – the latter distinctly more perverse than the former. In order to approach them as



*analytically* imbricated, one must first explain how liberal-secularism produces them as *politically* distinct.

Depending on the year, Texas ranks either the third or fourth highest for teen pregnancy rates (and higher when you account for actual live births) in the United States. 94% of Texas high schools teach abstinence-only sex education.<sup>205</sup> Partly in response to the perceived ineffectiveness of such methods, the Texas Campaign to Prevent Teen Pregnancy – a non-profit organization invested in outreach and comprehensive education for Texas teens – was founded to increase access to sexual healthcare for young Texans “regardless of socioeconomic status, race, gender or ethnicity.”<sup>206</sup> According to the National Campaign to Prevent Teen Pregnancy, “Texas teen births cost taxpayers \$1.2 billion of the \$10.9 billion spent annually in 2008.”<sup>207</sup>

By contrast, Texas spent over \$15 million on the FLDS raid<sup>208</sup>, which included spending on attorney fees and trial costs, as well as DNA testing to determine parentage. At first blush, what produces these two phenomena as politically distinct is the age of the sexual participants. I contend, however, that they share a basic unit of analysis -- a pregnant teenage girl – and that the move to keep

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<sup>205</sup> The Texas Freedom Network Education Fund, November 2011:  
[http://www.tfn.org/site/DocServer/Report\\_final\\_web.pdf?docID=2941](http://www.tfn.org/site/DocServer/Report_final_web.pdf?docID=2941)

<sup>206</sup> The Texas Campaign to Prevent Teen Pregnancy: “Mission Statement”  
<http://www.txcampaign.org/pages/home>

<sup>207</sup> O. Richard Pimentel, “Teen Pregnancy: The Costs Go Beyond Individuals,” *San Antonio Express News*. The National Campaign to Prevent Teen and Unplanned Pregnancy. 13 June 2011. [http://www.thenationalcampaign.org/press/PDF/2011/SanAnt\\_ExpNews\\_6.13.11.pdf](http://www.thenationalcampaign.org/press/PDF/2011/SanAnt_ExpNews_6.13.11.pdf)

<sup>208</sup> Brooke Adams, “Texas vs. FLDS: A year after the raid” *The Salt Lake Tribune*, 27 March 2009.  
[http://www.sltrib.com/news/ci\\_11998456](http://www.sltrib.com/news/ci_11998456)

them politically separate has its roots in the liberal-secular ideologies of the modern state.

My goal here is not to determine the truth of the sexual/marital relationships that led to the existence of a pregnant teenage FLDS girl, i.e. whether or not the relations were *truly* consensual according to the letter of the law or even liberal philosophy. Rather, my interest lies in the question of why the marriages and the sex of young FLDS women are produced as politically distinct from the mainstream Texas teen pregnancy crisis; why are they produced as politically unrelated when analytically – and perhaps even ethically – it does not make sense to extricate them?<sup>209</sup>

### **Law and Courts as Battleground**

In what follows, I highlight the laws and codes that spurred CPS's investigation and I describe how FLDS families navigated the court system after the raid. This section introduces the procedural timeline for the eventual reunification of most FLDS families. Specifically, I address the demands and stipulations of Texas family law as well as the nature of the initial custody hearing and subsequent appeals.

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<sup>209</sup> For the purposes of this work, I am considering analytics, ethics, and politics as different valences and distinct ways of approaching a particular problematic. Saba Mahmood's *Politics of Piety* (2005) does this kind of thinking quite fluidly. Here, "analytics" refers to modes and ways of thinking: tools for the generation of thought and conversation. Underlying any type of analytics is the "politics" that enable or foreclose certain ways of considering a problem (195). In terms of distinguishing the above from a notion of "ethics," Mahmood draws on Foucault's definition, wherein ethics is a form of power that "permits individuals to effect by their own means or with the help of others, a certain number of operations on their own bodies and souls, thoughts, conduct, and way of being" in order that they are subjectivated by a moral discourse (Foucault 1997, 225 in Mahmood 28).

When CPS raided YFZ, separated families, and took small children and anyone else they thought looked young, they were required to go through proper legal protocol to justify retaining any young people. Pursuant to Texas Family Code § 262.201<sup>210</sup>, when CPS separates a child from his/her parents, the trial court must conduct a full adversary hearing within 14 days of the time the child was taken. In this hearing, the state and the attorneys for the children and their parents call witnesses to attest to their respective positions. Because this court's job is "fact-finding," the judge must assess the veracity of the witnesses' claims. In particular, the judge must decide whether being reunited with his/her parents poses an immediate threat to the child's physical and emotional wellbeing. If this immediate threat exists, the child is retained in state custody.

When a child is retained by the court, Texas Family Code §263.101<sup>211</sup> requires a status hearing to be held within 60 days after that child is taken into state custody. During this hearing DFPS/CPS caseworkers present individualized family service plans on any child in state custody. If biological parents ultimately desire to be reunited with their children, they must sign off on their individual service plans and promise to provide a safe environment for the child. Parents are also typically required to attend parenting classes and undergo psychological counseling. During these individual status hearings, the court determines whether to retain custody of any children or to return them to their parents.

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<sup>210</sup> Section 262.201. "Full Adversary Hearing; Findings of the Court."  
[http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_5220.jsp](http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_5220.jsp)

<sup>211</sup> Section §263.101. "60 Day Conservatorship Hearing."  
[http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_5350.jsp](http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_5350.jsp)

On April 17-18, Schleicher County Judge Barbara Walther presided over the 14-day mass adversarial hearing for more than 400 FLDS children. DFPS/CPS presented witnesses who testified to the allegation that life at the YFZ ranch was harmful to children. Specifically, CPS's lead investigator – Angie Voss – and a psychiatrist – Dr. Bruce Duncan Perry – testified that not only was the state justified in removing the children, but that it should retain custody for the foreseeable future. For these two witnesses, all females at YFZ were at risk of becoming sexual abuse/assault victims and all males were at risk of becoming perpetrators of abuse. The attorneys and guardians *ad-litem* for the children as well as attorneys for FLDS mothers and fathers called an expert witness on FLDS theology – Dr. William John Walsh. Dr. Walsh testified that the Department and its witnesses had made sweeping generalizations about FLDS beliefs and practices. Specifically, he stated that FLDS theology actually condemned the abuses of which the state and Department were accusing FLDS members.<sup>212</sup>

After the 14-day adversary hearing, Judge Walther ultimately decided to allow the Department of Family and Protective Services to retain custody of all of the FLDS children. This meant that all the children remained in state custody until a court can conduct a status hearing for each of them individually; this individualized hearing must take place within 60 days of their initial removal. According to Judge Walther, DFPS met “the requirements of Sections 262 of the Family Code” and thus the court “must continue the appointment of the Department as the temporary managing

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<sup>212</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 5, pg# 201: 7-13.

conservator of all children.”<sup>213</sup> In other words, in the space of the adversary hearing, the court found that the Department met its burden of proof and there was sufficient evidence to suggest that the children might be harmed if reunited with their parents immediately.

That May, a group of 38 FLDS parents filed a petition to have their 126 children returned to them. The parents filed a writ of *mandamus* in the Third Court of Appeals in Austin. A party requests a *mandamus* review if they believe that a lower court improperly performed their public duties. This judicial remedy is not a reassessment of the facts of the case; rather, *mandamus* assesses the claim of an aggrieved party and can compel a lower court to act based on the rights of that party. In response to this *mandamus*, the Third Court of Appeals determined that “the Department did not carry its burden of proof under section 262.201. The evidence adduced at [the adversary hearing] was legally and factually insufficient to support the findings required by section 262.201 to maintain custody of Relators’ children with the Department. Consequently, the district court abused its discretion in failing to return the Relators’ children to the Relators.”<sup>214</sup> The Third Court of Appeals therefore directed the lower court to return the children to their parents, terminating the Department’s status as “temporary managing conservator.”

In response, DFPS filed its own *mandamus*, asking the court to reconsider returning the children to their parents. Stipulating that the Third Court abused its

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<sup>213</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 5, pg# 340: 13-17.

<sup>214</sup> *In re Steed*, No. 03-08-00235-CV, at 9: Appendix 1

discretionary powers in ruling in favor of the Relators, the Department contended that “there was sufficient evidence to satisfy a person of ordinary prudence...that the household to which each child would be returned included a person(s) who had sexually abused another child.”<sup>215</sup> The Third Court denied the Department’s request for a *mandamus* review, thus committing to the reunion of FLDS children with their families.

The civil matter of reuniting FLDS families was settled when the Department petitioned the Texas Supreme Court to appeal the Third Court’s ruling. The Texas Supreme Court agreed with the appellate court’s central holding that the trial court should not have removed over 400 children on an emergency basis. That said, the Supreme Court also wrote that the appellate court’s ruling does not strip the Department of all managing authority. Specifically, the Department still has “broad authority to protect children short of separating them from their parents and placing them in foster care. The court may make and modify temporary orders “for the safety and welfare of the child,” including an order “restraining a party from removing the child beyond a geographical area identified by the court.” The court may also order the removal of an alleged perpetrator from the child’s home and may issue orders to assist the Department in its investigation.”<sup>216</sup> What the court affirmed here was simply that the children be returned to their families. Although the Department

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<sup>215</sup> *In Re Texas Department of Family and Protective Services*, Relator. Cause No. 03-08-00235-CV

<sup>216</sup> *In Re Texas Department of Family and Protective Services*, Relator. On Petition for Mandamus. No. 08-0391, The Supreme Court of Texas

viewed this as a tremendous setback in its investigation into abuse allegations, it still had substantial discretionary power over the actions of FLDS parents; the Department could stipulate that families must live in close geographical proximity to CPS headquarters and that any men formally accused of sexual abuse may not live in homes with children. While the Supreme Court's decision brought the civil matter to a close, some FLDS men faced individual criminal charges based on the age at which some of their wives conceived children.

### **The Legal Production of All Young FLDS as “Children”**

In order to consider my claim that we should approach these instances of teen pregnancy as though they are analytically imbricated, it is necessary to evaluate how and why they are interpreted as politically distinct. In what follows, I will focus on the sexual abuse charges on which CPS's sweeping investigation hinged. In order to do this, I will first draw on some of the legal rhetoric used during the 14-day adversary hearing. Later, I will attend to additional legal documents, such as writs of *mandamus* and subsequent court appeals. I will illustrate how liberal legal logic enabled the production of young FLDS (including pregnant and married teenagers) as “children” rather than “teens” or “young adults.” This characterization – namely, of the pregnant/married FLDS girl as a “child” – serves a particular set of political ends to which I will later turn.

In the 14-day adversary hearing, the court, CPS, and the witnesses for the Department categorized any young mother as a sexually abused child. CPS sought to

determine biological parentage for anyone they presumed to be a legal minor; in the interest of accomplishing this goal, the Children’s Advocacy Center recommended that the “children stay in care” due to “the suspected child sexual abuse and the ongoing investigation.”<sup>217</sup> Further, one CPS representative dismissed the allegation that this suit was simply an attack on the FLDS church; instead, she claimed, this was a case “against sexual abuse, in general” and what CPS alleged were the FLDS’s “behaviors with regard to minor children,” specifically “a pattern of sexual assault” and “a fair number of underage wives.”<sup>218</sup> The presiding judge for this hearing – Barbara Walther – insisted that this case was about “the best interest[s] of a child” and thus she was tasked with determining “whether or not these children should be returned to their parents.”<sup>219</sup> The above quotations highlight CPS’s and the court’s main concerns in the 14-day hearing, namely the prevention of child sexual abuse, underage marriage, sexual assault of a minor, and the possibility of family reunification. In each of the above selections, the court and witnesses for CPS emphasize that the young FLDS who were taken from YFZ are, for all legal intents and purposes, *children*.

Most of the court documents pertaining to the raid share this feature: the legal production of all young FLDS members as “children.” For example, DFPS filed a writ of *mandamus* in response to the Third Court of Appeals’ decision to reunite

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<sup>217</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 5, pg# 328: 20-23.

<sup>218</sup> *Ibid.* Vol. 4, pg# 70: 5-10; 63: 9-12.

<sup>219</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 4, pg# 73: 5-6.



FLDS families. This *mandamus* – a request to the Texas Supreme Court to rule in the DFPS’s favor – contains similar references to young FLDS as “children.” For example, DFPS’s *mandamus* asserted that the investigation centered on “adult men commanding sex from underage children; about adult women knowingly condoning and allowing sexual abuse of underage children.” Moreover, this *mandamus* refers to sixteen-year-old mothers as “child mothers” who “were married and were part of a household with other wives.” CPS conducted informal interviews with members of the FLDS while the latter were being held at the civic center at Fort Concho. These interviews revealed that teenaged girls were often married and had very young children of their own. CPS documented the existence of these “age-inappropriate” marriages and pregnancies as evidence of “the sexual abuse of children.”<sup>220</sup> This interview data indicated that there were young, married FLDS girls who were pregnant and/or already had a child; CPS treated the mere existence of these young married and/or pregnant girls as evidence of sexual abuse or sexual assault.

When attorneys for FLDS members petitioned the Third Court of Appeals in Austin, the court’s language also reflected the legal production of young FLDS members as “children.” Drawing on interview data collected by CPS, the Third Court referred to female FLDS members as “female children,” regardless of whether they were teens or pre-pubescent. Because the Third Court ruled in favor of the Relators (FLDS members), the widespread legal production of young FLDS as “children” defies what might seem to be a purely partisan distinction. For example, as evidence

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<sup>220</sup> All quotes in this paragraph derive from: *In Re Texas Department of Family and Protective Services*, Relator. Cause No. 03-08-00235-CV, No.08-0391.

for why families should be reunited, the court avers: “The record is silent as to whether the Relators or anyone in their households are likely to subject their pubescent female children to underage marriage or sex.”<sup>221</sup>

As with DFPS’s *mandamus* request, the Third Court – despite ruling against the Department -- collapsed any distinction between “sexual abuse” and “young pregnant girl.” In that vein, the court states: “There was no evidence that any of the female children *other than* the five identified as having become pregnant between the ages of fifteen and seventeen were victims or potential victims of sexual or other physical abuse”<sup>222</sup> (emphasis mine). In other words, the Third Court stated that the Department did not have sufficient evidence of imminent harm to remove all of the young FLDS members on an emergency basis. Despite their differing interpretations of the law, however, what this court’s ruling shares with the Department and its *mandamus* request is two-fold: the legal production of young FLDS as “children” and the collapsing of any distinction between “sexual abuse” and the mere existence of a young pregnant girl.

### **The “Child” of Liberal Philosophy**

In the legal battles that ensued from the FLDS raid, courts at all levels were engaged in the legal production of young FLDS as distinctly “children.” Below, I read J.S. Mill, Locke, and Rousseau together in order to highlight some of the

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<sup>221</sup> All quotes in this paragraph derive from: *In re Sara Steed, et al.* Texas Court of Appeals, Third District at Austin. No. 03-08-00235-CV

<sup>222</sup> All quotes in this paragraph derive from: *In re Sara Steed, et al.* Texas Court of Appeals, Third District at Austin. No. 03-08-00235-CV

connotations of “childhood” in classical and early liberal philosophies.<sup>223</sup> I do this in order to begin to connect how childhood is imagined in liberal philosophies with how it is configured in liberal law.

In Locke’s *Two Treatises of Government*, he states:

*Paternal or Parental Power* is nothing but that, which parents have over their Children, to govern them for the Childrens good, till they come to the use of Reason, or a state of Knowledge, wherein they may be supposed capable to understand that Rule, whether it be the Law of Nature, or the municipal Law of their Country they are to govern themselves by: Capable, I say, to know it, as well as several others, who live, as Free-men under that Law. . . .this is not intended to be a severe Arbitrary Government, but only for the Help, Instruction, and Preservation of their Off-spring.<sup>224</sup>

According to Locke, children are a group not yet capable of self-government or of being governed as sovereign persons under the law. The primary reason that they are incapable is because they lack the knowledge and capacity to understand how to govern themselves and how to be a subject in a country. Parental power exists as a training mechanism: a way of creating a governable subject. Parental power is not supposed to be an overly harsh and autocratic type of government; instead, this power exists to mold the child into a self-governing person and a subject under the country’s laws.

It is notable that Locke configures children as temporarily outside the relationship between self-governing individuals and a country’s laws. In *Liberalism*

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<sup>223</sup> While I use the term “liberal” to broadly categorize these three philosophers, I acknowledge that they have a great number of philosophical disagreements (e.g. Mill and Locke against Rousseau on the effects of private property in society). Irrespective of these disagreements, together they are useful for thinking about the role of the child in liberal government.

<sup>224</sup> John Locke, *Two Treatises on Government* (Cambridge: Cambridge University Press, 2008). Chapter XV, Para. 170.

*and Empire*, Uday Mehta argues that “children are explicitly and unambiguously excluded from the consensual politics of [Locke’s] *Second Treatise*.”<sup>225</sup> According to Mehta, “the exclusion of children...involves consent as a fundamental ground for the legitimacy of political authority.”<sup>226</sup> Moreover, because children “are unable to exercise reason...temporarily, [they] do not meet a necessary requisite for the expression of consent.”<sup>227</sup> In other words, because “child” is only a temporary state of being, children are kept apart from the polity and “can be governed without their consent.”<sup>228</sup> Mehta contends that children are excluded from Locke’s political formulation because they are incapable of rationality. Since children cannot reason, they are unable to consent to the authority of a political sovereign. Thus, without their explicit permission, children are maintained or “governed” by parental power.

For Rousseau, as for Locke, the move from childhood into a full-fledged member of a polity is a maturation process. According to Locke, paternal power exists “for the Benefit of their Children during their Minority, to supply their want of Ability...”<sup>229</sup> The presumption is that people are not born with full mental faculties, but, barring a specific personal flaw, they will mature into those faculties. In Rousseau’s *Emile*, this formulation manifests itself in the nature of childhood education. Rousseau states:

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<sup>225</sup> Uday Singh Mehta, *Liberalism and Empire* (Chicago: University of Chicago Press, 1999), 59

<sup>226</sup> Mehta 59.

<sup>227</sup> Ibid 59.

<sup>228</sup> Ibid 59.

<sup>229</sup> John Locke, *Two Treatises on Government* (Cambridge: Cambridge University Press, 2008), Chapter XV, Para. 173.

...Nature has given the child this plasticity of brain which fits him to receive every kind of impression. ... But by means of this plasticity all the ideas he can understand and use, all that concern his happiness and will one day throw light upon his duties, should be traced at an early age in indelible characters upon his brain, to guide him to live in such a way as befits his nature and his powers.<sup>230</sup>

For Rousseau, children are by nature able to acquire knowledge through training. A child's brain can learn duties and obligations relative to his age. What a child learns when he is young enables him to ease into his adult obligations.

While Rousseau's *Emile* describes how actual children mature into adulthood, *On the Social Contract* considers the notion of maturity in a broader and more metaphorical way. Rousseau says:

For nations, as for men, there is a time of maturity that must be awaited before subjecting them to the laws. But the maturity of a people is not always easily recognized; and if it is foreseen, the work is ruined. One people lends itself to discipline at its inception; another, not even after ten centuries. ... [Peter the Great] prevented his subjects from ever becoming what they could have been by persuading them that they were something they are not. This is exactly how a French tutor trains his pupil to shine for a short time in childhood, and afterwards never to amount to a thing.<sup>231</sup>

In *On the Social Contract*, Rousseau describes the pitfalls of maturing too quickly.

While he concurs with Locke that men cannot be subject to laws before they are mature enough to fully understand them, Rousseau suggests that people mature at different rates; thus, a person or a people can be harmed if they are expected to mature at a rate that does not fit their abilities. In this way, for Rousseau, adulthood and maturity cannot necessarily be equated.

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<sup>230</sup> Jean-Jacques Rousseau, *Emile* (London: Orion Publishing Group, 1997), 90.

<sup>231</sup> Jean-Jacques Rousseau, "On the Social Contract" in *Basic Political Writings* (Indiana: Hackett Publishing, 1987), 166.

For Mill, as for Rousseau and Locke, a maturation process is required in order to create subjects who are part of a polity. But for Mill, unlike for Rousseau, children are always configured as lacking the maturity that is necessary for full participation in this polity. Mill argues:

...[Where] the individual is sovereign... [is a] doctrine meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.<sup>232</sup>

In Mill's formulation, children are those people who are not yet sovereign individuals. Because they have not matured, they must be governed by someone else, lest they cause harm to themselves or others. According to Mill, the major benefit of adulthood or maturity is the ability to fully understand, appreciate, and partake of human liberty. The concept of "liberty...has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion."<sup>233</sup> In other words, Mill's liberty cannot be appreciated or enjoyed before a person or people reach(es) a state of maturity that enables free thought in the public sphere. Thus, a child – whether actual or metaphorical – must be managed and cared for until he can care for himself. For Mill, though, an actual child inevitably ages and will likely become a sovereign individual who is capable of free discussion and participation in a polity. Ultimately, one of the purposes of the law is

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<sup>232</sup> John Stuart Mill, *On Liberty* (New York: Dover Publications, 2002), 8.

<sup>233</sup> Mill 8.

to parse out this distinction; in essence, the law helps differentiate sovereign individuals from children.

In sum, for Locke, Rousseau, and Mill, a child is someone incapable of consent, volition, and self-government. Because children do not yet possess these abilities, they must be controlled and managed by parents or by the state. For actual children, this state of being is largely temporary. Nevertheless, what I highlight above illustrates the extremely limited capacity of the child in relation to liberal government. Thus, the legal production of young FLDS as “children” reveals something about the way liberal law interprets their existence: namely, as non-sovereign and unable to consent.

### **Feminist Interventions and the Social Contract**

Not only does liberal theory traditionally define children as incapable of self-government, but, as Carole Pateman describes, the notion of consent within liberal theory is also a gendered one. As Pateman argues, within liberal contract theory, women are by definition subordinate and non-sovereign. In what follows, I will explain Pateman’s analysis of liberal theory as a gendered enterprise; later, in light of the law’s differing treatment of FLDS and mainstream pregnant teens, I will turn to the limitation of her theoretical formulation for thinking about the FLDS raid.

In *The Sexual Contract*, Carole Pateman argues that when classical contract theorists envisioned the hypothetical social contract, the only people truly able to consent to be governed – and thus to participate politically -- were men. For Pateman,

the truth of the marriage contract makes women unable to participate in the social contract. Pateman's reading of both Locke and Rousseau suggests that the marriage contract is a pre-political agreement, a natural arrangement between men and women that forms the basis for any notion of society. In the relationship that Pateman describes, women are naturally subjugated by men, and thus the marriage contract can never be a meeting of equals. Specifically, because women do not count as "individuals," they cannot participate in a contract of their own accord. Because the unequal relationship between men and women is a pre-political truth, Pateman argues that women are "natural subordinate[s]." <sup>234</sup> Thus, for classical contract theorists like Locke and Rousseau, "civil freedom is a masculine attribute and depends upon patriarchal right." <sup>235</sup>

Given that marriage is prior to any conception of the political, it follows that for many contract theorists, the power of parents to govern children is also a natural right. Pateman's reading of Locke and Rousseau, for example, suggests that both theorists understood parental power to be a purely temporary authority, but one that brings with it an implicit duty of care. However, though young boys and girls are subject to parental authority alongside one another, they do not both simply mature into individuals capable of being governed by consent. She contends that "once out of their nonage, at the age of maturity, sons become as free as their fathers and, like them, must agree to be governed." <sup>236</sup> Pateman suggests that while "sons overturn

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<sup>234</sup> Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988), 54-55.

<sup>235</sup> Pateman 2.

<sup>236</sup> Ibid 84.



patriarchal rule,” when daughters come of age, government by the husband replaces parental government.<sup>237</sup> As daughters are women in effect, adult daughters cannot freely contract as individuals in their marriage. Through her reading of Rousseau, Pateman argues that a daughter’s inability to participate in a contract is due to the fact that “women’s and men’s bodies do not have the same political meaning.”<sup>238</sup> Ultimately, Pateman’s contention is that the social contract relies, as a matter of course, upon the subordination of women.<sup>239</sup>

Pateman’s interlocutors suggest that her central criticism of liberalism is that it is premised upon gender inequality. According to Jane Mansbridge, Pateman opposes liberal contract theorists because they devalue the important role of equality in theorizing a capacious notion of free choice.<sup>240</sup> In considering whether Pateman might still be a liberal despite these fundamental disagreements, Mansbridge argues that equality is simply not a point of emphasis for classical liberal contract theorists. Specifically, if we are to accept Pateman’s premise that all contracts always produce relations of subordination<sup>241</sup>, Mansbridge is skeptical that liberalism can ever be reimagined to fit Pateman’s ends. She says: “it is certainly questionable whether a liberalism so divested of many elements that some consider integral can continue to

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<sup>237</sup> Ibid 2.

<sup>238</sup> Ibid 100.

<sup>239</sup> Ibid 230.

<sup>240</sup> Jane Mansbridge, “Carole Pateman: Radical Liberal?” in *Illusion of Consent: Engaging with Carole Pateman*, eds. O’Neill, Shanley, Young (University Park: Pennsylvania State University Press, 2008), 23.

<sup>241</sup> Mansbridge 26.

bear the name.”<sup>242</sup> For Moira Gatens, Pateman’s central concern is the idea that property is vested in the person, something Gatens refers to as a “political fiction.” In the interest of a “genuinely democratic” vision of the world, Pateman believes that this presumption and its fictiveness must be revealed.<sup>243</sup> As long as we still conceptualize personhood in terms of property, Gatens believes we will never resolve the paradoxes Pateman articulates: namely, “the paradoxes generated by women, consent, and contract.”<sup>244</sup> But, Gatens describes, if your body is owned by another (e.g. the case of women or slaves) then any concept of choice within contract is a fallacy.<sup>245</sup> As such, Gatens’ reading of Pateman suggests that women have a “vicarious status” wherein their “participation in civil life, in employment, and in politics, is always as women, never as the full rights-bearing “individual” of modern contractual society.”<sup>246</sup> In other words, women are marked as women and can never be considered individuals who are capable of entering contracts.

So, while Locke, Rousseau, and Mill all describe a child who has the capacity to mature into a sovereign adult capable of consent, Pateman argues that the female child will only ever be governed without her consent, i.e. that daughters simply become wives, but never individuals proper. Yet, the distinction between a pregnant FLDS girl and a mainstream pregnant teen persists despite the problem of

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<sup>242</sup> Ibid 28.

<sup>243</sup> Moira Gatens, “Paradoxes of Liberal Politics: Contracts, Rights, and Consent” in *Illusion of Consent: Engaging with Carole Pateman*, eds. O’Neill, Shanley, Young (University Park: Pennsylvania State University Press, 2008), 33.

<sup>244</sup> Gatens 37.

<sup>245</sup> Ibid 34.

<sup>246</sup> Ibid 36.

subordination identified by Pateman and her interlocutors. Specifically, the legally produced distinction between “FLDS child” and “mainstream teen” is as internal to liberal legalism as female subordination is to the basic liberal formulation of the social contract. In other words, regardless of the fact that “individual” is a category that excludes women writ large, liberal legalism still distinguishes between differently situated groups of women who are the same age.

### **The “Teen” of the Teen Pregnancy Crisis**

The young, pregnant FLDS girls are uniquely produced as “children” under the law. By contrast, I will highlight some of the ways that Texas educators and policymakers construct the Texas teen pregnancy crisis. I do this in order to set the stage for the distinction between the “teens” of the teen pregnancy crisis and the pregnant FLDS girls. While teens are occasionally referred to as children in discussions of pregnancy prevention and sexuality (e.g. “children are learning about sex on television”), on the whole, they are constructed as teenagers who made uninformed decisions regarding their bodies.

In discussions about teen pregnancy and the kinds of sex education that might best prevent it, the sexual participants are fairly uniformly constructed as “teenagers.” Even though 94% of Texas schools teach abstinence-based sex education<sup>247</sup>, many are moving toward a program of “abstinence-plus.” In this program, educators and policy members recognize that teen boys and girls may have sex even though they are taught

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<sup>247</sup> The Texas Freedom Network Education Fund, November 2011: [http://www.tfn.org/site/DocServer/Report\\_final\\_web.pdf?docID=2941](http://www.tfn.org/site/DocServer/Report_final_web.pdf?docID=2941)

that abstinence is the best option. In this new program, abstinence is still reinforced as the only absolute way to prevent pregnancy. However, in order to take more preventative steps to combat the teen pregnancy crisis (in Texas and nationally), “abstinence-plus” will offer middle and high school students basic lessons about contraception.<sup>248</sup>

Research suggests that the “teens” of the teen pregnancy crisis are the product of misinformation and a failure to accept the reality of teenage sexuality. Educators in Midland, TX have “watch[ed] the teen pregnancy rates creep up year after year” and noted that “172 pregnant girls were enrolled in the city’s public schools [in 2010].” In 2009, Midland County reported that 29 out of every 1,000 13-17 year olds gave birth that year. Studies also suggest that abstinence-based education is “ineffective in preventing teenage pregnancies”; one Texas educator noted: “we’re not going to stop teenagers from having sex.”<sup>249</sup> According to the Washington Post, by the end of the first decade of the 21st century, the teen birth rate had steadily increased. In nationwide data collected from “young women...in grades 9 through 12,” there was “a slight increase...in the proportion of teens reporting no contraceptive use.”<sup>250</sup> In a statement to U.S. News and World Report, Cecile Richards (President of Planned Parenthood) said that the national increase in teen births “should serve as a wake-up call to anyone who still believes that teenagers aren’t sexually active or that

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<sup>248</sup> Morgan Smith, “In Texas, More Schools Teach Abstinence-Plus” *The New York Times*. 15 September 2011, 1.

<sup>249</sup> Morgan Smith.

<sup>250</sup> Rob Stein. “Why Are Teen Births Rising?” *The Washington Post* 18 June 2009.

abstinence-only programs curb the rate of teen pregnancy.”<sup>251</sup> Coverage of and research about the teen pregnancy crisis thus emphasizes two main points; first: girls ages 13-17 are getting pregnant and giving birth at an alarming rate, and second: teenage sexuality is inevitable and cannot be prevented via abstinence-only sex education. Common to the research and news coverage about this national crisis is the construction of the sexual participants as “teenagers.”

I offer these statistics in order to draw out how the sexual participants in the national pregnancy crisis are constructed: namely, as teenagers who lacked adequate information about sex and contraception. According to the National Campaign to Prevent Teen Pregnancy, early child sexual abuse can increase the likelihood of an eventual teen pregnancy. The Children’s Bureau defines child sexual abuse as:

A type of maltreatment that refers to the involvement of the child in sexual activity to provide sexual gratification or financial benefit to the perpetrator, including contacts for sexual purposes, molestation, statutory rape, prostitution, pornography, exposure, incest, or other sexually exploitative activities. In general, child sexual abuse refers to sexual acts, sexually motivated behaviors, or sexual exploitation involving children, including both touching and non-touching offenses involving varying degrees of violence.<sup>252</sup>

However, despite the causal links drawn by the research, early child sexual abuse and teen pregnancy are distinguished in the eyes of the law. Specifically, Child Protective

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<sup>251</sup> Deborah Kotz. “Why Teen Pregnancies Are on the Rise” *U.S. News and World Report* 26 January 2010.

<sup>252</sup> Holcombe, Logan, Manlove, Moore, and Ryan. “Child Sexual Abuse and Teen Pregnancy” *The National Campaign to Prevent Teen and Unplanned Pregnancy*, September 2007, p. 1.  
<http://www.thenationalcampaign.org/resources/pdf/childhood.pdf>

Services (CPS) routinely intervenes in cases of suspected child sexual abuse but they do not intervene in teenage pregnancies as a matter of course.<sup>253</sup>

In sum, discussion about the teen pregnancy crisis (in Texas and nationally) refers to the sexual participants as “teens,” “teenagers” or even “young men and women.” Research suggests that teenage sexuality is inevitable and that attempting to prevent it via abstinence-only education often leads to teen motherhood. Teenagers engage in unprotected sexual activity as a result of misinformation or lack of information about contraception. Policy conversations about the teen pregnancy crisis thus refer to the sexual participants as “teenagers” rather than “children.” These conversations also refer to the sexual behavior of the teens as uninformed or poorly informed decision-making, rather than sexual abuse, assault, or exploitation.

### **What Goes Without Saying**

The notion that we ought to keep the pregnant FLDS “child” and the mainstream pregnant Texas “teenager” politically and legally distinct seems to go without saying. As part of common parlance, something that goes without saying requires no additional explanation beyond a mere statement of fact. In what follows, I consider how Nietzsche and Foucault – each deploying a distinct style of genealogy – describe, explore, and explain how some major categories and narratives of modernity are so firmly established as truths that they go without saying. Ultimately, I suggest that the political and legal distinction between the FLDS “child” and the

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<sup>253</sup> Holcombe, Logan, Manlove, Moore, and Ryan. p. 2.

mainstream pregnant Texas “teenager” is a dichotomy that goes without saying. Because of the obviousness of their difference, interrogation into the logic that underwrites that difference is an endeavor that is generally foreclosed.

Nietzsche, like Foucault, poses the question of “what goes without saying” as a fundamentally epistemological one. Nietzsche argues that in order to formulate a critique of any narrative, it is crucial to first explore “the value of [this narrative] – and for that there is needed a knowledge of the conditions and circumstances in which they grew, under which they evolved and changed.”<sup>254</sup> For Nietzsche, the value of any “value” or political narrative only becomes immutably true once we cease questioning it – only then may it go without saying. He explains this as a change in consciousness; specifically, “something that has been underlined again and again: consequently, instead of fading from consciousness, instead of becoming easily forgotten, it must have been impressed on the consciousness more and more clearly.”<sup>255</sup> In other words, a concept or narrative becomes something that goes without saying when its truth no longer requires verification at a conscious level. For Nietzsche, of course, the truth that “has been underlined again and again” is the inherent value of Judeo-Christian values. Much like it is difficult for Nietzsche to believe that human beings are best governed by the Judeo-Christian ethics of good and evil, it is harder still for human beings to understand that they have not always been regulated in this way. He says: “There is nothing to wonder at in that: all

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<sup>254</sup> Friedrich Nietzsche, *On the Genealogy of Morals* (New York: Vintage Books, 1967), 20.

<sup>255</sup> Nietzsche 27.

*protracted* things are hard to see, to see whole.”<sup>256</sup> We do not have immediate conscious access to the epistemological conditions that gave rise to a particular narrative, and Nietzsche illustrates the difficulty of bringing our historical conditions into full view.

Foucault asks a similar epistemological question about our ontological commitments: namely, how did we come to accept as incontrovertible truth some of modernity’s major narratives? Specifically, Foucault interrogates the question of what goes without saying about sex and modernity. In particular, he says: “The question I would like to pose is not, *Why* are we repressed? But rather, Why do we say, with so much passion and so much resentment against our most recent past, against our present, and against ourselves, that we are repressed?”<sup>257</sup> For Foucault, the presumed truth of sexual repression beginning in the Victorian era obscures how sex operated at multiple societal levels.

Against the contention that sex was forbidden and had been banished from the public sphere, Foucault argues that among the bourgeoisie, there was a system of shared meaning about sex: namely, that it had been “transform[ed]...into a perpetual discourse...in the areas of economy, pedagogy, medicine, and justice.”<sup>258</sup> Given that many institutions and industries were obsessed with regulating sex, the end of the 18<sup>th</sup> and beginning of the 19<sup>th</sup> century witnessed an upsurge in laws about sex: laws establishing and then regulating perversions, and laws scrutinizing the sexuality of all

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<sup>256</sup> Ibid 34.

<sup>257</sup> Michel Foucault, *The History of Sexuality, Vol. 1: An Introduction* (New York: Vintage Books, 1990), 8-9.

<sup>258</sup> Foucault 33.



common relationships, e.g. between parents, between siblings, between parents and children, and between adults and children. These laws and norms aimed to protect the innocent from perversion -- from sexually deviant behavior.<sup>259</sup>

For Foucault, that we are repressed goes without saying. While Foucault, like Nietzsche, wants to problematize this undue givenness, he also identifies the repression hypothesis as a false one -- one that actually fails to describe the complexity of the modern condition. He describes the emergence of a “medico-sexual regime,” a mode of regulation wherein sexual practices were inextricably linked to the individual bodies that practiced them. The move to this new regime signaled a more capacious acknowledgment of sex rather than a greater repression. The goal of this new “medico-sexual regime”<sup>260</sup> was not to exclude aberrant, weird or perverse sex practices, but precisely the opposite – to include these practices in the space of regulation. The regime’s aim was also to specify them, to clearly consolidate and solidify each practice within the body of the individual: within the body of the individual whose biology could be examined by doctors, whose mind and consciousness could be examined by psychiatrists, and whose actions society could try to prevent.<sup>261</sup>

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<sup>259</sup> Ibid 30.

<sup>260</sup> Ibid 42.

<sup>261</sup> Ibid 43-47.

## Liberalism as Ontological Project

With respect to the FLDS raid and ensuing legal challenges, I argue that the characterization of young FLDS girls as “sexually abused children” instead of part of the statewide teen pregnancy crisis served a particular set of political ends. The nature of the FLDS relationships in question – namely that CPS alleged a “culture” of sexual abuse consistent with underage marriage – distinguishes them politically from a mainstream pregnant Dallas teen. In other words, what politically distinguishes these two phenomena is the age of their sexual/marital partners. Below, I describe how liberalism functions as an ontological project. Specifically, once the law produces a person as a “child,” their status as non-sovereign and non-consenting is enshrined in that law and it becomes truth. In essence, once liberal legal logic produced young FLDS girls as children, evaluation of their sexual and marital relationships could only be observed through that lens.

I first turn to Nietzsche in order to consider how the FLDS raid reveals the ways liberalism functions as an ontological project. For the purposes of explicating the above claim, I draw out some of Nietzsche’s arguments about the formation of truth. In *On The Genealogy of Morals*, Nietzsche argues:

One has taken the *value* of these “values” as given, as factual, as beyond all question; one has hitherto never doubted or hesitated in the slightest degree in supposing “the good man” to be of greater value than “the evil man,” of greater value in the sense of furthering the advancement and prosperity of man in general... But what if the reverse were true? What if a symbol of regression were inherent in the “good,” likewise a danger, a seduction, a poison, a narcotic through which the present was possibly living at the expense of the future?<sup>262</sup>

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<sup>262</sup> Friedrich Nietzsche, *On the Genealogy of Morals* (New York: Vintage Books, 1967), 20.

Here, Nietzsche contends that the widespread acceptance, the pervasiveness, and the becoming ontological of certain values foreclose the possibility of critical inquiry. According to Nietzsche, when a people stops questioning a set of values and merely accepts it as immutably true, conversation is halted; those people are essentially asked to trust that their values are a sign of human advancement. He later contends:

Whatever exists, having somehow come into being, is again and again reinterpreted to new ends, taken over, transformed, and redirected by some power superior to it; all events in the organic world are a subduing, a *becoming master*, and all subduing and becoming master involves a fresh interpretation, an adaptation through which any previous “meaning” and “purpose” are necessarily obscured or even obliterated.<sup>263</sup>

For Nietzsche, it is impossible to suggest that the values that govern a people are transhistorical or transcendental truths. New ideas, values, and powers take shape only by conquering archaic and stale ideas. When any value system goes unchallenged for too long, it is necessarily ripe for the sustained critique that Nietzsche posits.

Wendy Brown, a modern Nietzschean, argues that for Nietzsche, what imbues ideas with so much power is their ability to go uncontested. She says: “Nietzsche challenges everyday values assumed to be unchallengeable, thereby reversing their givenness in an effort to disclose the power this givenness carries and covers.”<sup>264</sup> For Brown, Nietzsche’s decision to disrupt what is uncontested and commonplace is a challenge both to the value of an ontology and to its epistemological conditions. In

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<sup>263</sup> Nietzsche 77.

<sup>264</sup> Wendy Brown, *Politics Out of History* (Princeton: Princeton University Press, 2001), 98.

essence, to posit that liberalism is an ontological project is to reveal its power as a singular historical lens.

### **Relational Autonomy and the Sexually Abused Child**

In what follows, I describe how the FLDS raid reveals the way liberalism functions as an ontological project, particularly through the concept of relational autonomy. Specifically, I argue that the events of the raid and its legal aftermath could not have unfolded in any other way. This story was already written. From that initial phone call onward, the law interpreted the sexual and marital relationships of the FLDS as ones between adult men and female children – *sexually abused* female children. Once they are produced as children *in relationship* to the men they have sex with and marry, they become politically distinct from a crisis of pregnant teenage Texas girls.

To say that the FLDS raid reveals the way liberalism functions as an ontological project is to contend that the events of the raid were experienced through that lens. I will briefly refer back to my earlier discussion of childhood in order to illustrate this. According to J.S. Mill, a “person of nonage” is incapable of consent and making choices until that person reaches an age “which the law may fix as that of manhood or womanhood.”<sup>265</sup> As I highlighted earlier, even though they have the capacity to mature into fully sovereign liberal subjects, liberal philosophy considers children to be non-sovereign and unable to consent. Although a mainstream pregnant

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<sup>265</sup> Mill 8.

Dallas teen and an FLDS teen mother are both legal minors or “person[s] of nonage,” the former is a “pregnant teenage girl” who is part of a statewide teen pregnancy crisis, while the latter is produced by the law as a *sexually abused child*. With regard to people constituted as legal minors, what the above distinction unmasks about liberalism is the relational nature of sexual autonomy.

These two pregnant teenage girls are politically distinct because of the age of the men they have sex with and marry. In other words, minors of the same age are interpreted differently by liberal logic. The larger the age disparity between the sexual/marital partners, the more likely the girl is discursively produced as a “child” rather than a teenager. The pregnant girl is *naturally* or *autonomously* neither child nor teenager. Instead, she becomes either child or teenager only when considered in relationship to the man she has sex with, the man who impregnates her.

Below, I describe how the characterization of young FLDS girls as “children” meant that their sexual and marital relationships with older men would always be legally produced as sexual abuse. I first introduce the testimony of an expert on FLDS theology so as to highlight his account of the underage marriage allegations. Then, I draw very briefly from an interview I conducted with a woman who served as an *ad-litem* attorney for several young members of the FLDS. I do this in order to illustrate how the political distinctness of the pregnant/married FLDS girl was never in question. The legal production of young FLDS as “children” meant that their sexual/marital relationships would always be characterized as abuse.

During the 14 day hearing to determine the custodial arrangements for the more than 400 children seized by DFPS, attorneys for the legal minors, mothers, and fathers called witnesses to testify to the general character of FLDS families, the specific practices of the FLDS in Eldorado, and the safety of the children on the ranch. The *ad-litem* attorneys called Dr. William John Walsh, an expert on FLDS theology. One attorney *ad-litem* asked Dr. Walsh whether Warren Jeffs<sup>266</sup> actually believed in and practiced marriages between men over 40 and underage women. Walsh stated that Jeffs was “indifferent to the age of women” but this does not mean he seeks them out because they are underage. Walsh said:

[Jeffs] comes to a conclusion that says: This woman has reached adult status in our community, and therefore, she will be treated as an adult and offer[ed] the opportunity for marriage. But there’s not some sort of leering: Ah-ha, let’s get some underaged girls. It’s more of a case of he has chosen, rightly or wrongly, to say that this particular female has become of maturity in our community.<sup>267</sup>

Dr. Walsh’s testimony does not characterize FLDS marriage practices as sexual abuse or assault. My contention is that he did not need to say that because it had already been said. Walsh’s comments did not need to provide that level of detail (i.e. speaking to a specific forced marriage involving a specific underage girl). CPS’s initial seizure and temporary retention of young FLDS was premised upon this fact: namely, if teen girls were having sex with/marrying older men, the relationships

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<sup>266</sup> The FLDS prophet, who at the time of this hearing was being held in Texas prison awaiting trial for arranging underage marriages.

<sup>267</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 5, pg# 193: 6-19.

*necessarily* constituted sexual abuse. One need not ask the question of sexual abuse or assault, because that question has already been answered.

In an interview I conducted with *ad-litem* attorney Danielle Lowe, she described what she understood to be the state's lack of concern for what any young FLDS girl felt about her marriage and motherhood. She says:

These underage marriages [] may or may not have been traumatic to those girls. We don't know because no one's bothered to find out. I'm not sure who's doing [the traumatizing] here... if it was [marrying] LeRoy [Jessop]<sup>268</sup>, a loyal follower of the church, or the state. Who traumatized that girl more? We don't know because no one's talking to her.<sup>269</sup>

Lowe suggests that CPS and the courts were not especially interested in the experiences of individual young mothers or the nature of their specific marital relationships. She claims that we don't know which experience was more traumatic for the FLDS girl in question – the state seizure of all the children or her marriage to and pregnancy with a much older man. As I have shown here, her relationship to both experiences is irrelevant for how she would be produced by liberal legal logic. As I described at length earlier, the “child” of liberal philosophy is non-sovereign and incapable of consent. Thus, the FLDS girl who enters into a marriage with a legal adult and gets pregnant is always already assaulted, always already abused, and ultimately, always already unfree.

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<sup>268</sup> LeRoy Jessop was sentenced to 75 years in prison for bigamy and sexual assault of a minor, charges premised upon his marriage to several underage women.

<sup>269</sup> Sarah Lowe, interviewed by Cassie Ambutter, Plano, Texas, September 9, 2010.

## **What Is It About FLDS Religiosity?**

I have highlighted here the ways that liberal legal logic makes it impossible to consider the pregnant FLDS teens alongside rather than in stark contrast to the mainstream Texas teen pregnancy crisis. Within that logic, that the two should be ethically, politically, and analytically distinct simply goes without saying. Interrogating how and in what ways their distinctness is such a given requires inhabiting a difficult and not uncontroversial space. Questions like who counts as a child, and the political meanings and uses of this a categorization have primacy in such a debate. As I demonstrated in my analysis of early liberal philosophy on the question of childhood, children were seen as in need of protection from parents or the state in order mature into citizens capable of self-governance. As Carole Pateman and her interlocutors note, this formulation only applied to boys and men because even though girls matured, they matured into wives and mothers rather than full sovereign citizens of the state. And yet, Pateman's formulation is still insufficient to explain the kind of analytical impossibility at work in attempting to compare pregnant FLDS teens with the teens of the teen pregnancy crisis. These two groups of teens have been rendered utterly distinct and, despite the ways in which both situations involve teenage girls, the political and legal fissure between these two groups calls attention to itself. As indicated by commentary from the *ad-litem*s as well as testimony from the expert witness on the FLDS, the underlying presumption is that the pregnant



FLDS teens somehow had less volitional pregnancies than their mainstream counterparts.

While the legal production of the FLDS teen girls as “children” is a crucial explanatory element of why such a fissure exists, it only tells part of the story. As I have reiterated consistently throughout this dissertation, there is no element of the 2008 raid in which a legal or political conflict can be reduced to *either* religion *or* sex. Unpacking and exploring each element of this raid requires an analytic in which sex and religion are fundamentally imbricated; the pregnant teens are no exception. In investigating the many reasons that such fissures exist, in my final chapter I turn to an analysis of the complex, multilayered and dynamic relationship between religion and sexuality in the context of the 2008 raid.

In this last chapter, I discuss how the status of the FLDS as both religious and sexual minorities creates a particular set of difficulties when members of the community attempt to navigate the legal system. Considering religion and sexuality as twin sites of regulation during the raid, I examine the ways in which such regulation creates an impossible bind for FLDS families. Attending to issues such as the legal concept of “the bastard child,” the role of biology in determining parentage, and the creation of Family Reunification Plans, I argue that a queer analytic can enable a new way of thinking about how the FLDS interface with the legal system. In particular, I submit that regardless of one’s political opinion about the raid and its aftermath, the interactions between the FLDS and the law should be characterized as a “queer space.”

## *Chapter 5*

### *Queer Spaces*

Throughout this dissertation, I have examined several undertheorized dimensions of the 2008 FLDS raid in the interest of highlighting some of the ways in which religious and sexual minorities face a particular set of difficulties when they interface with the legal system. In considering the relationship of sex and religion, my analysis of the raid revealed many of the complexities attendant to the legal and constitutional management of groups that are doubly marginalized. In the preceding chapters, I have described specific constitutional definitions of religion and religious freedom, the history of the concept of “public order,” and the legal construction of childhood; each of those chapters reveals how a group’s inability or unwillingness to conform to acceptable standards of religiosity or sexuality often complicates their interactions with the law and legal norms. In this final chapter, I use queer theory in order to offer a new way of thinking about religion and sexuality together. I do this not with the intention of explaining the true rationale behind the FLDS raid at long last, but rather, because I anticipate it might help reevaluate the law’s relationship to groups who experience marginalization on multiple fronts.

Below, I consider the relationship between the FLDS and the state, particularly the ways in which the FLDS – as comprising both a religion<sup>270</sup> and

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<sup>270</sup> I understand that religion is complex and multifaceted as both an analytical category and as representing a set of diverse spiritual practices. In chapter 2, I explored the meaning of religion as an analytical category in order to consider the development of religion-as-Protestantism within the U.S. legal system – particularly around issues of religious freedom. So, when I refer to “religion” in the U.S. context throughout this chapter, I do not aim to

sexuality – negotiate their interactions with liberal law. In the vast majority of encounters with the law during and immediately following the 2008 raid, the law proved structurally ill-equipped to manage the unusual situation of having over 400 minors in state custody, all of whom were affiliated with a single polygamous Mormon group.

Religion has been an undertheorized phenomenon within queer theory largely because of the perception that religion<sup>271</sup> has been an exclusively repressive force, i.e. that it stifles the diverse and capacious possibilities for human connection, for kinship, and for love – all of which queer theorists advocated over the last few decades. Particularly in the U.S., because of its characterization as repressive, religion has been dismissed as a relic of the past whereas queer theory represented the future. Within the queer theory literature, kinship formulations based on romantic love, God in Christ, and monogamous heterosexuality were shed in favor of reconceptualizing intimacy and imagining counter-hegemonic relationships by destabilizing and dismantling the monogamous, heterosexual family. At its core, queer theory involved rejecting assimilationism and refusing to center political activism on appealing to the liberal state for recognition.<sup>272</sup> To that end, religion (specifically Protestant Christianity), insofar as it nurtured the traditional relationships that queer theory

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uncritically collapse it with “Christianity,” I am simply writing about a Christian minority group’s experience with the dominant legal and social conventions -- which are largely influenced by a form of Protestantism.

<sup>271</sup> While this claim is certainly not exclusive to Christianity, my formulation in this chapter will focus exclusively on Christianity.

<sup>272</sup> For more on this, see: Eve Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 2008), Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham: Duke University Press, 1997), and David Bell & Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Cambridge: Polity, 2000).

sought to dismantle and upend, seemed on its face to be counterintuitive to queer theory's political ends.

In general, contemporary scholars of American law, religion, and sexuality such as Janet Jakobsen and Ann Pellegrini have tended to treat religion as a largely repressive force with respect to sexuality. For example, in Jakobsen and Pellegrini's formulation, they argue against the presumption that the U.S. ought to manage sexual difference by Protestant Christian principles. They claim that the separation of church and state means that "in the United States...no religion at all...is established as the one and true religion."<sup>273</sup> Moreover, they contend that the criminalization of sexuality in the U.S. exists because religion – specifically Christianity – is the main producer of all values.<sup>274</sup> In these circumstances, there can be no truly free sexuality; there can only be intense and coercive systems of regulation that police sexuality and render it unfree.

This particular formulation articulated by Jakobsen and Pellegrini illustrates an essentially destructive relationship between a Christian value system (or, they claim, any religious value system) and sexuality. Specifically, they argue that a religious value system forecloses the possibility that diverse sexualities will flourish.<sup>275</sup> In this way, such a formulation posits religion and sexuality as antagonistic forces, and rarely if ever productive, mutually constitutive, or complementary.

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<sup>273</sup> Janet Jakobsen and Ann Pellegrini, *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance* (Boston: Beacon Press, 2004), 79.

<sup>274</sup> Jakobsen and Pellegrini 123.

<sup>275</sup> *Ibid* 91.

This conceptualization of religion (and specifically Christianity) as an exclusively repressive force is complicated but not entirely undermined by the existence of Protestant evangelical sex manuals that encourage and even advise on sexual experimentation within the bond of a heterosexual marriage. As Religious Studies scholar Amy DeRogatis describes, evangelical sex manuals flourished initially during the 1960s and continue in different forms into the present day. These manuals did not emphasize sexual repression, but encouraged communication between heterosexual married couples and insisted that “sex [could] be salvific” and that the Bible and Christ were keys to “long-term sexual satisfaction.”<sup>276</sup> This treatment of religion and sexuality together thus encourages sexuality and even sexual experimentation within the confines of a monogamous heterosexual marriage, a marriage that would most certainly be recognized by not only the church, but also the state.

Jakobsen and Pellegrini describe a worldview where public moral variation is enabled by the removal of religious dogma and principles from the structures of government. However, contrary to their analysis, the queer spaces I describe in this chapter and throughout the dissertation are not ones that configure religion and sexuality as two necessary and diametric opposites. At the same time, the sexuality that exists within the structure of much of the FLDS is not the unbridled, revolutionary, progressive sexual utopia that Jakobsen and Pellegrini envisioned. Nor is FLDS sexuality simply reflected in the Protestant evangelical sex manuals that

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<sup>276</sup> Amy DeRogatis, “What Would Jesus Do? Sexuality and Salvation in Protestant Evangelical Sex Manuals, 1950s to the Present” *Church History* 74 (2005): 99.

emphasize the presence of Christ’s love in heterosexual, monogamous marriages that are simultaneously recognized by the state and generally free from unwanted state intrusion. In the context of the FLDS raid, religion and sexuality cannot be reduced to the predominant formulations offered by Jakobsen and Pellegrini or the evangelical Protestant sex manuals. Instead, religion and sexuality during the raid and its aftermath were inextricably linked, and regardless of any individual FLDS’ intentions, that inextricable link has serious implications for thinking about queer life, the law, and politics in the U.S. The queerness at work in this case is not merely repressive, intensely regulated, or revolutionary.

The circumstances in 2008 that involved the FLDS in the legal system tell us that there simply cannot be but two ways to think these analytical concepts (religion and sexuality). There must not only be *either* a stark separation of the two in the interest of allowing sexuality to flourish freely *or* a situation in which religion is the primary indicator of freedom and self-worth, which thereby represses or relegates all sexual activity to specific prescribed (hetero-monogamous) limits.<sup>277</sup> The raid – with all its attendant legal, political, and ethical conflicts – offers a way of thinking about religion and sexuality that cannot simply be collapsed into any of the aforementioned categories. As evidenced by their repeated and routine interactions with the legal system during and after the raid, it is clear that the FLDS do religion and sexuality in

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<sup>277</sup> Following the tradition of Foucault, the rejection of an “either-or” approach to sexuality allows for the possibility that all social phenomena are simultaneously expressed in multiple and contradictory forms. While Foucault rejected the “repressive hypothesis” wholesale, creation and destruction and regulation and freedom were and are always already present and working within the same historical time and place. For more on this, see: Michel Foucault, *The History of Sexuality, Volume 1: An Introduction*: (New York: Vintage, 1990).

a way that is essentially alien to the structure of the law. As I will demonstrate throughout this chapter and throughout the dissertation broadly, this alienness is fundamentally queer.

So, queer theory has been generative of a particular set of ethics and politics that seemed, on its face, to conflict with the dominant manifestation of religion in the U.S., i.e. Protestant Christianity. It follows, then, that queer theory would perceive religion to be wholly destructive of emergent and diverse queer life. But as I elaborate in this chapter and throughout this dissertation, the traditional academic or popular formulations for thinking about religion and sexuality do not apply in the case of the FLDS raid. Such formulations wither in the face of the raid and the subsequent legal battles that ensued. My analysis does not approach religion and sexuality as a binary in which only one or the other can flourish, but neither does it conform to the increased cultivation of heteronormative sexuality within evangelical Protestantism. Moreover, as I discuss extensively below, my analysis moves away from the “subjects” of queer theory and their intentional cultivation of new queer lives and radical politics. Instead, religion and sexuality are imbricated or overlapping and can generate a queerness of their own in relationship to the normative force of the law, regardless of whether individual subjects claim a queer identity. In this way, religion and sexuality must not necessarily be at odds if the subject of queer theorizing becomes something other than self-identified queer subjects.

As evidenced by the raid, the law manages, regulates, and polices the FLDS because of their religion as well as their sexual and family life. Later, I will describe

many examples in which the imbrication of religion and sexuality – specifically, FLDS religious and sexual life – became the subject of intense legal scrutiny. FLDS queerness ultimately confounds the law at every turn.

This chapter argues that the interactions between the FLDS and liberal law – interactions that implicated both their religion and their sexuality – ought to be characterized as queer and analyzed through that lens. The queer analytics that will be deployed throughout this chapter in order to explain the relationship between the FLDS and the law are drawn from a more recent school of queer theorizing. Such theorizing is represented in part by Jasbir Puar and Sara Ahmed, contemporary queer theorists within Women’s Studies and Cultural Studies, respectively. Their theoretical formulations mark a move away from queer subjects’ resistance to state oppression that has long since characterized queer theory and politics. So, as I figure it in this chapter and throughout the dissertation, queerness as an analytical tool signifies the theoretical turn away from the struggles of queer subjects as the primary site of political contestation. For example, Judith Butler argues that queer theory ought to concern itself with decentering the [neo]-liberal subject who fashions an identity from a host of options on the market. For Butler, when this neo-liberal subject figures centrally, the subject necessarily hails the liberal state for recognition and thus imbues the state with an even greater authority. So, queerness when defined as a discrete form of inhabited sexual identity is an “appeal to the state...in the hope of becoming ‘socially coherent’ at last;” moreover, the presumption that the state can or should be the site to which people turn to seek redress for injuries “commits us to the fantasy of



state power.”<sup>278</sup> For these reasons, among others, I center my analysis of the FLDS raid on the ways in which queerness emerges from spaces and interactions rather than from within rights-bearing or rights-seeking subjects themselves.

Over and against identity-based accounts of queer being, my analysis builds upon Jasbir Puar’s notion of queerness as “queer praxes...[which] propose queerness as not an identity or an anti-identity, but an assemblage that is spatially and temporally contingent.”<sup>279</sup> Moreover, William Connolly, a political theorist of pluralism and democracy, defines assemblages as “energized complexities of mutual imbrications and interinvolvement, in which heretofore unconnected or loosely associated elements *fold, bend, emulsify, and resolve incompletely into each other.*”<sup>280</sup> Thus, queer theory that adopts this mode of theorizing moves beyond liberal identity politics. So, queerness as I figure it here destabilizes a notion of the individual who inhabits a sexual identity, in favor of *spaces, interactions, and modes of being in the world that are queer*. In other words, this chapter will explore how the circumstances of the FLDS raid demand attention not to the individual subjects of fundamentalist Mormon polygamy, but to the ways that the spaces they occupy are queer ones – ones that engage with, inhabit, challenge and defy acceptable ways of being religious and sexual in the world.

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<sup>278</sup> Judith Butler, *Undoing Gender* (New York: Routledge, 2004), 117.

<sup>279</sup> Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007), 204.

<sup>280</sup> William Connolly, *Capitalism and Christianity, America Style* (Durham: Duke University Press, 2008), 40.

So, I am not suggesting that the FLDS identify as queer in any classic sense (e.g. I'm not claiming they routinely engage in same-sex sexual relationships or are gender nonconforming). Rather, I am arguing that there is nothing neat or clear-cut about the FLDS' interactions with the law. Specifically, the ambiguity regarding how to manage or legally process 400 minors from a polygamous religious group *produced a queer space* between the FLDS and the law. These queer spaces are particularly rich sites of conflict and contestation as the FLDS and their lawyers could not simply communicate with the law or the court system in order to resolve issues pertaining to the raid, custody disputes, or parentage. Instead, the queer space exists because that impasse or irresolvable conflict is a structural feature of the law. As Nancy Mattison, one of the *ad-litem* attorneys I interviewed put it, "Because of the way the law is set up...[we] do not have law in place that effectively deals with this kind of situation."<sup>281</sup> She claimed that structurally, the law cannot manage or make sense of FLDS families because they engage in a religiously mandated sexual practice, i.e. polygamy. So, as I will demonstrate throughout this chapter, the raid and its legal aftermath were evidence of the law's impotence in the face of such otherness.

### **Polygamy as Queer**

By way of introduction to the ways in which a queer space exists between the FLDS and the law, below I provide a brief overview of the role that polygamy or plural marriage played in the legal conflicts with the FLDS during and after the raid.

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<sup>281</sup> Nancy Mattison, interview by Cassie Ambutter, Dallas, Texas, September 13, 2011.

As there is a particularly rich and complex legal history of the ways in which polygamous Mormons experienced intense state regulation of their religion and sexuality, I will not spend much time detailing such history here. Instead, I provide a more thorough and nuanced discussion of that history and its impact on the 2008 raid in a later chapter.

When CPS raided YFZ, separated families, and took small children and anyone else they thought looked young, they were required to go through proper legal protocol to justify retaining any young people. Pursuant to Texas Family Code § 262.201<sup>282</sup> when CPS separates a child from his/her parents, the trial court must conduct a full adversary hearing within 14 days of the time the child was taken.<sup>282</sup> In this hearing, the state and the attorneys for the children and their parents call witnesses to attest to their respective positions. Because this court's job is "fact-finding," the judge must assess the veracity of the witnesses' claims. In particular, the judge must decide whether being reunited with his/her parents poses an immediate threat to the child's physical and emotional wellbeing. If this immediate threat exists, the child is retained in state custody.

During the 14-day hearing and in the course of conducting my interviews with *ad-litem* attorneys, polygamy itself was described as virtually irrelevant to both the raid and the investigations. Specifically, many of the *ad-litem*s stated that polygamy as a religious and sexual practice was never really raised as a particular concern during the child abuse investigations. However, I suggest here that polygamy

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<sup>282</sup> Texas Family Code § 262.201. "14-Day Adversarial Hearing."  
[http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS\\_pg\\_5220.jsp](http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_5220.jsp)

nevertheless inevitably figures into the queer space that exists between the FLDS and the legal system.<sup>283</sup> Insofar as the FLDS represent both religion and sexuality that cannot be easily collapsed into typical ways of thinking about either of those categories, the practice of polygamy exists as a site for conceptualizing the queer space between the FLDS and the law. According to fundamentalist Mormon theology (of which the FLDS are but one small subgroup), polygamy is a religious dictate, a sexual practice, and a way of structuring family life. So, for the purpose of briefly introducing some of the ways in which the practice of polygamy represents a queer space between the FLDS and the law, I will highlight some examples from my interviews with *ad-litem* attorneys as well as witness testimony from the 14-day adversary hearing.

During the 14-day adversary hearing, attorneys representing FLDS parents and children called to the stand Dr. William John Walsh, a Ph.D in Theology and an expert on FLDS theology and practice. In response to an attorney's question about how the FLDS define "family" or "household," Walsh stated:

A family will usually be centered upon a patriarch or husband who will have one or more wives. And these are not necessarily legal wives, but these are formal or informal arrangements made, and then the children resulting from those unions [are also considered part of that family].<sup>284</sup>

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<sup>283</sup> This particular queer space is also a part of FLDS historical memory and this is a topic on which I expanded and elaborated in Chapter 1.

<sup>284</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 5, pg# 173: 6-10.

Further, in response to an attorney's question about whether the FLDS' primary religious mission is to grow the group, and further, whether mothers who had more children were held in higher regard, Walsh responded:

What the FLDS believe is that they have a sacred responsibility...to love [their children] and rear them in righteousness so that one day they may go to heaven. So they believe that having children is a sacred calling. [Also], there is a belief that the willingness to have more children indicates a greater willingness to help God fulfill his plan.<sup>285</sup>

So, Walsh describes typical FLDS family structure in terms of religious dictates and marital life. He illustrates the polygamous ideal within FLDS family life and acknowledges that all secondary wives are not legal spouses. Furthermore, he emphasizes the centrality of children in FLDS theology and life; specifically, having many children is considered ideal within any FLDS family and part of a sacred duty to honor God.

Walsh's testimony highlights the fact that plural marriage and high birth rates are encouraged among the FLDS and that marriage, family, and sexuality is organized according to religious dictates. Whether the FLDS were targeted and raided by the state of Texas because they were polygamous is unknown and certainly widely denied by most every representative of the state. Regardless, because polygamy is constituted in both sexual and religious terms and in ways that cannot be reduced to typical formulations, the mere fact of FLDS polygamy produces a queer space between the FLDS and the law. In my conversations with *ad-litem* attorney Danielle

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<sup>285</sup> Ibid pg# 198: 6, 9-12, 15-17.

White, she speculated that Texas's end goal might have been to remove the children from a polygamous environment, though no Texas politician or CPS representative ever explicitly stated that this was their goal. She said:

If [the state's] goal is to get them out of polygamy...and I don't necessarily agree with that goal...[a raid] isn't going to help. It didn't work. You just made them stronger in their dedication to polygamy as the way to the Celestial Kingdom. If you want to persuade them out of their faith and their goal, that's not the way to do it. If you even think it's proper for the state to try to persuade someone out of their faith.<sup>286</sup>

So, while no state representatives ever specifically claimed to seek an end to polygamy as a fundamentalist Mormon practice, White suggests that the raid actually increased FLDS commitment to polygamy as divinely sanctioned and integral to entering the kingdom of heaven. She also highlights another complex element of this claim, i.e. that were the state to explicitly articulate an interest in eradicating polygamy as a religious/sexual practice, it could potentially encroach on religious freedom guarantees.

However, most of the *ad-litem*s agreed that because the legality of plural marriage was never the central issue in the raid and the ensuing investigations, polygamy itself was a less significant legal concern. According to *ad-litem* Jerrold Cullen:

[Polygamy is] not a per se endangerment issue. Some folks at CPS tried to say that promoting a polygamous relationship in front of the kids was a form of mental abuse but it just didn't go very far because no one really believed it. The fact that they were polygamous made all the sensationalism in the newspapers, but from a legal standpoint, other than that polygamy is illegal in the state of Texas, no one was being prosecuted for polygamy. Polygamy was never a legal issue that was

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<sup>286</sup> Danielle White, interviewed by Cassie Ambutter, Dallas, Texas, September 9, 2010.

raised among the *ad-litem*s. That was not the grounds for termination [of parental rights].<sup>287</sup>

As Cullen says, the state and CPS categorically did not invoke polygamy as a reason either for executing the raid or wanting to retain the children. However, regardless of whether the state identified polygamy as one of its central legal/political targets, the specter of polygamy as a sustained sexual/religious threat in the U.S. loomed large.

*Ad-litem* Andrea Conroe said:

From what I recall, polygamy wasn't raised as a safety concern. [But] I do think the state representatives would be hard-pressed to deny that [polygamy] was at least an overarching concern and/or instigating factor. And there's distaste for polygamy [generally], especially in that part of the state, a very conservative part of West Texas.<sup>288</sup>

Conroe and White thus identify what they perceive to be the state's unspoken and longstanding disdain for polygamy. Polygamy, as an illegal sexual and religious practice particularly associated with fundamentalist Mormons<sup>289</sup>, by definition occupies a queer space in relation to the law. Thus, while Cullen dismisses polygamy's illegality as a non-issue with respect to the raid and its aftermath, its

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<sup>287</sup> Jerrold Cullen, interviewed by Cassie Ambutter, Plano, Texas, September 8, 2011.

<sup>288</sup> Andrea Conroe, interviewed by Cassie Ambutter, Dallas, Texas, September 15, 2011.

<sup>289</sup> There is a long and intricate history regarding polygamy's illegality and its association to Mormonism which I expand upon in later chapters. However, a central takeaway from that history (which is helpful in understanding polygamy's relationship to the queer space) is what's known as the 1890 Manifesto. Then-church president Wilford Woodruff formally disavowed polygamy as a condition for Utah's statehood. The Manifesto did not dissolve the plural marriages performed prior to this announcement nor did it entirely cease the practice within the church. Nevertheless, this announcement caused a schism within Mormonism that resulted in the establishment of breakaway sects (like the FLDS) who believed despite Woodruff's announcement that polygamy was divinely sanctioned. That said, any person who wanted to continue his or her affiliation with the official Mormon church (and avoid prosecution by the state and federal government) had to accept that earthly polygamy was counter to God's will and renounce all associations with practicing polygamists. For more on this, see: Jan Shipps, *Mormonism: The Story of a New Religious Tradition* (Chicago: University of Illinois Press, 1987).

illegality determined how the law would perceive virtually every family issue within the raid, and every issue which I will go on to describe at length – from parentage and parent-child relationships to accountability and responsibility with respect to actual instances of child abuse. So, regardless of whether polygamy played an explicit or stated role in the raid or in legal discussions about the placement of minors, its inextricable and longstanding historical link to fundamentalist Mormonism necessarily signals a queer space in relation to the law.

### **Biology and the Queer Family**

While state representatives and most of the lawyers I interviewed contended that polygamy's illegality was not the central impetus for the raid, the U.S.'s long history of persecuting polygamists for their religious and sexual practice highlights the practice's queer relationship to the law. Moreover, as I stated above, polygamy's illegality is actually a crucial component of examining how and why other queer spaces within the raid emerged and unfolded as they did. In what follows, I will attend to several examples from the legal aftermath of the raid in which a queer space emerged between the FLDS and the law. The first two examples are complementary: the state's emphasis on biological parentage and the figure of the bastard child. These examples will demonstrate some of the structural failings of the law with respect to family relationships. Attendant to such structural failings, the normativizing effect of the law on FLDS families created a queer space in which a new sort of injury was made manifest. The normativizing effect of the law on FLDS families was most



evident in CPS's desire to determine biological parentage and thus to characterize a child's true parents as a heterosexual, monogamous couple. *Ad-litem* attorney Jerrold Cullen describes the state's reasoning in requesting DNA samples to determine biological parentage: "They were trying to prove abuse, and if a mother's not telling you who the father is, that was seen as further proof of abuse. DNA testing is just due diligence and the refusal to cooperate is grounds for termination [of parental rights]."<sup>290</sup> Regardless of the state's intentions and goals in attempting to collect information exclusively on biological parentage, that legal requirement had a particular effect on polygamous FLDS families.

The normativizing effect of the law is thus made apparent through CPS's desire to privilege the information about biological parents. This parallels Sara Ahmed's argument that certain actions within heteronormative spaces have a straightening effect. Specifically, that CPS required information from only one biological mother and a biological father served to "straighten" FLDS families. This particular bureaucratic protocol put FLDS families squarely within a heteronormative paradigm as the law attempted and failed to account for the fact of FLDS difference. In the state's effort to make sense of the polygamous families, it rendered them heterosexual and monogamous. Thus, the "space [of the law] extends the form of the heterosexual couple."<sup>291</sup> In this way, while the state would have collected any information on family life that an individual FLDS member offered, that information

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<sup>290</sup> Jerrold Cullen, interviewed by Cassie Ambutter, Plano, Texas, September 8, 2011.

<sup>291</sup> Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Durham: Duke University Press, 2006), 92.

was of secondary importance (in terms of determining abuse) to information on biological parentage. So, in the heteronormative space of the law “queer objects [like non-biological additional parents] are not ‘close enough’ to the family line in order to be seen as objects to be lost.”<sup>292</sup> So, non-biological additional mothers are not – in the eyes of the law – considered “family” in any meaningful way. They are not sufficiently aligned with conventional definitions of family in order to, for example, experience grief or loss at the possibility of not being counted as mothers. As I will expand upon at length later in this chapter, as non-biological live-in additional mothers, these “queer objects” could potentially provide useful details in a sexual abuse investigation yet they are rendered largely inessential in terms of the structure of the law.

So, insofar as the law only recognizes as legal the first marriage in a polygamous relationship, the secondary or non-biological parents<sup>293</sup> are rendered legal strangers to children they have, in most cases, raised since birth. In this way, the law cannot simply translate legally unmarried polygamous parents as a couple that is unwilling to have their marriage validated by the state. The central problem is that while any two individuals may be the biological parents of a child or children, biological parentage clearly does not encompass the entirety of polygamous FLDS

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<sup>292</sup> Ahmed 91.

<sup>293</sup> In states that permit “common law marriages,” two people do not have to be legally married in order to be considered married. Seventeen states allow for some kind of common law marriage, although there are significant limitations in some of those states. Pursuant to Ann. § 2.401 of the Texas Family Code, in order to acquire an “informal marriage” in Texas, a consenting man and woman must agree to be married, be cohabitating in Texas, and present themselves as married to other parties in the community. That said, “informal marriage” is not an option if one of the parties is legally married to someone else; specifically, bigamy is a felony under both Texas and federal law.

family life. So, the law may recognize non-biological parents as caretakers or guardians of a child when his/her biological parents are unable or unwilling to fulfill their duties.<sup>294</sup> That said, there is no formal legal category for additional, secondary parents and additional parents are certainly not legally recognized if the biological parents are present and involved in the child's life.

Sara Ahmed argues that *disorientation* -- or what she has characterized as the affective experience of failing to adequately conform to any prescribed orientation, like compulsory heterosexuality -- creates feelings of groundlessness. Specifically, those feelings can "unsettl[e]...one's belief that the ground on which we reside can support the actions that make a life livable."<sup>295</sup> For Ahmed, "bodies that experience disorientation...reach out for support as they search for a place to reground and reorientate their relation to the world."<sup>296</sup> In this way, the subjects of disorientation experience life as indeterminate; they experience the loss associated with being a stranger to the only available world.

There was some acknowledgement during the 14-day adversary hearing that FLDS family life could not be explained via typical legal categories as well as some recognition that these legal limitations failed to adequately make sense of FLDS difference. What the following excerpt illustrates is that while FLDS children know who their biological parents are, biological parentage does not sufficiently describe

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<sup>294</sup> Pursuant to § 151.001 of the Texas Family Code, this person will serve *in loco parentis* as the established legal guardian in the absence of the biological or legally adoptive parent. <http://www.statutes.legis.state.tx.us/Docs/FA/htm/FA.151.htm>

<sup>295</sup> Ahmed 157.

<sup>296</sup> Ibid 158.

the nature of family structure within the FLDS. We can see this dynamic at work in the following line of questioning between one *ad-litem* attorney (Griffith) questioning CPS lead investigator Angie Voss:

Griffith (attorney), Q: “Do you have any sense, whatsoever, of separate families or were you getting a sense of family arrangements?”

Angie Voss (CPS), A: There was definitely a sense of family arrangements in that the girls were showing that there’s a father with lots of wives who they call their mothers. All of them are their mothers. All of the children in the home are their brothers and sisters. And it’s not just in that [particular] home, it’s as a whole. For instance, even if somebody didn’t live in the girls’ particular home, she would [still] see another girl as her sister or another boy as her brother.”<sup>297</sup>

Griffith (attorney), Q: “Were you able to develop information about whether or not particular families or people were living in particular homes?”

Voss (CPS), A: Despite the fact that all of the women are called mothers to all of the children that call one another brothers and sisters, it appears that there’s mothers with their biological children who are married to a man who is married to several other women and their biological children.

Griffith, Q: Were they assigned to rooms that would reflect that, or could you tell?

Voss, A: I couldn’t tell.”<sup>298</sup> (230).

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<sup>297</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol. 4, pg# 197: 24-25; 198: 1-8.

<sup>298</sup> *Ibid* pg# 230: 8-20.

CPS's lead investigator described the living arrangements for many of the Eldorado FLDS as rather mixed. Children often lived with many women who were married to their biological father, all of whom they would refer to as their "mothers." Consequently, children referred to other children who were a product of those unions as their brothers and sisters. The religious dictates of Mormon fundamentalism – insofar as they strongly encourage polygamy – yield a reimagination of family, marriage, and parenthood that is essentially alien to the structure of U.S. law. This alienness is, at its core, queer.

In response to a question I asked about whether CPS considered the relationships between minors and non-biological parents when determining parentage, *ad-litem* attorney Danielle White essentially reaffirmed the testimony from the 14-day hearing. She said:

CPS's initial allegations were [that] these kids don't even know who their mothers are and they switch 'em around all the time. To hide it. I told my polygamy mom<sup>299</sup> that and she was like "It's not like we throw them in a pile every night and just pick up some new ones in the morning." It was kinda her smart-ass comment about it. They know who their biological mother is. They have a relationship of affection and respect to the sister wives of their biological mother. You know that person looks after you too but yet they're not quite your mother. And they'd address them as Mother Neta or Mother Sarah or whatever.<sup>300</sup>

*Ad-litem* Nancy Mattison essentially echoes White's sentiments:

CPS didn't legally recognize caregivers but they did [give] caregivers some [privileges] that they wouldn't normally give to [some person] who just happens to be a family friend. They sort

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<sup>299</sup> "Polygamy mom" was a term created by some *ad-litem*s to refer to their young clients' mothers, with whom they often consulted or communicated.

<sup>300</sup> Danielle White, interviewed by Cassie Ambutter, Dallas, Texas, September 9, 2010.

of informally recognized that these kids have relationships that are unique, that their strongest bond may not necessarily be with their biological mother. It may be with an older sister or another sister-wife.<sup>301</sup>

As White and Mattison describe, FLDS children can identify which woman gave birth to them and adult women know which children are their biological ones. In this way, there is clearly a degree to which biological parentage figures into FLDS family life. That said, as CPS's Angie Voss and many of the *ad-litem*s attest to, biological parentage is insufficient to explain the structure of many FLDS families. Thus, formal liberal law was poorly equipped to conceptualize the sexual/religious facts of FLDS difference.

The queerness at work in the above examples is "disorienting" in some of the ways that Ahmed describes, yet it is also distinct in another respect. This queerness, like Ahmed's, necessarily disallows appeals to the law as a way of seeking justice for the raid. This queerness also does not, by itself, create an alternative or alternate space in which individual queers gather together to cultivate a new existence. Ahmed's description of queerness as generative of "disorientation" presupposes a subject who is queer, a subject who self-identifies as queer. However, the difference between Ahmed's formulation and the queer space created by interactions between the FLDS and the law is that the queer space does not rely on an admission of queerness by a group of queer subjects. The queer space simply relies upon the product of interactions between religious/sexual minorities and the law. How the

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<sup>301</sup> Nancy Mattison, interview by Cassie Ambutter, Dallas, Texas, September 13, 2011.

FLDS self-identify is virtually inconsequential to the conceptualization and deployment of queerness as it is figured here.

There exists a queer space between the FLDS and the law that results from the imbrication of non-normative religion and sexuality in the form of both religiously mandated polygamy and the occasional marriage between men and women with substantial age differences. Insofar as the law cannot resolve those conflicts and offer legal justice to the FLDS members whose lives were unfairly intruded upon (or justice to the people who may have actually been in abusive situations but did not receive adequate individual legal attention), the queer space reveals the substance of those sites and moments that the law cannot quite make sense of.

Ahmed deploys the word “queer” in two ways: as not heterosexual and as that which is off a socially designated path. Given the intense state regulation of polygamous Mormons throughout U.S. history because of their non-normative religion and sexual/family life, Ahmed’s widely accepted definitions of “queer” certainly align with the collective experience of the FLDS in relation to the law. However, in both of the formulations she offers, a queer *subject* is articulated as one who provides a “slanted” view of the world within a discourse of heterosexuality.<sup>302</sup> However, in considering my above example about non-biological parents, queer spaces do not require a rights-bearing subject who “sees[] the world ‘slantwise;’” such spaces do not have to “overcome what is ‘off line,’” by “acting out of line with

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<sup>302</sup> Ahmed 106.

others.”<sup>303</sup> While Ahmed’s purpose is to theorize affective dimensions of queerness in a heteronormative world, I am chiefly concerned with the failure of the law to make sense of FLDS difference. Given that the nature of their essentially irresolvable difference is both religious and sexual, the space of the failure is undoubtedly queer.

### **The Queer Child**

Another example of the queer space created by tensions between the FLDS and the law is the problem of the “bastard child.” *Ad-litem* attorney Andrea Conroe said: “none of the products of [plural] marriages would’ve been anything other than bastardized children who were not the product of a [legally recognized] marriage.”<sup>304</sup> In describing as bastards the FLDS children who were products of non-legal marriages, Conroe is describing how many FLDS children would likely be understood socially. Legally, however, Texas has removed the “bastard” or “illegitimate” designation from its laws. Legally, as of 2001, there is no longer any meaningful legal distinction between the rights of a “legitimate child” in relationship to his/her biological father and the rights of an “illegitimate child.” Depending on the child’s circumstances, the “illegitimate child” is presently referred to as a “child with/out a presumed biological father.”<sup>305</sup> Yet, while closing this gap could be seen as a sign of formal legal progress, Conroe’s characterization of the children as “bastards” was less a commentary on the presence or absence of their fathers than it

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<sup>303</sup> Ibid 107.

<sup>304</sup> Andrea Conroe, interviewed by Cassie Ambutter, Dallas, Texas, September 15, 2011.

<sup>305</sup> Texas Family Code, Chapter 160, Uniform Parentage Act. Sections 160.606 – 160.607. <http://www.statutes.legis.state.tx.us/Docs/FA/htm/FA.160.htm>



was a commentary on the fact that the marriages could never be valid. In this way, eliminating the formal legal category of “bastard” technically made uniform all paternal responsibilities that fathers have regarding their children; that said, this legal change did not impact how the law characterized or categorized marriages. So, the children in question were still products of non-legal marriages and, by consequence, still bore the social and legal stigma of being “bastards” in effect. In that vein, that a lawyer tasked with advocating for FLDS children would casually characterize such children as “bastards” is a testament to the sustained presence of a social stigma.

In Sartre’s *Saint Genet*, he says of bastards: “Whenever the child tries to reach beyond the bureaucracy of which he seems an emanation to his true origins, he finds that his birth coincides with a gesture of rejection. He was driven out at the very moment he was brought into the world. Later, it is all of society that will cast him out...”<sup>306</sup> Sartre describes Genet as inhabiting an ontological wasteland, one that is not properly within the terrain of the law. In Sartre’s estimation, Genet’s designation as a bastard is tantamount to rejection by society and by law. Rejection is a simple fact of the bastard child’s birth, which he experiences as he tries to move beyond the bureaucratic designation of his birth. Sartre comments: “...the judge is unknown, the child is ignorant of the charges and of the law, but the condemnation attacks his existence itself and eats away at it.”<sup>307</sup> The “bastard” designation is thus imposed on the child through no fault of his own. By consequence of his biological parents being

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<sup>306</sup> Jean-Paul Sartre and Bernard Frechtman, “Saint Genet: Actor and Martyr” *The Tulane Drama Review*, Vol. 7. No. 3 (Spring, 1963), 27.

<sup>307</sup> Sartre and Frechtman 27.

unable or unwilling to marry, the child becomes subject to a law that, by design, shapes and nurtures his alienness. As Sartre describes, inhabiting such a liminal state in relationship to the law and social conventions necessarily impacts the child and relegates him to a space of non-being in relationship to society at large. So, for FLDS children involved in the raid, the law – as well as a deep social stigma – is invariably complicit in the existence of the queer space they occupy.

### **Difference, Accommodation, and Queer Potential**

Queering, for Ahmed, is the act of “disturb[ing] the order of things.”<sup>308</sup> Although her analysis focuses on queer subjects and bodies, her theoretical insights are crucial for my own description and analysis regarding the ways in which there exists a queer space between the FLDS and the law. She cautions against the use of “queer” – for theory or praxis – as an available and alternative yet bounded way of being. Queering is not simply the experience of disorientation in one world and so, by consequence, choosing to inhabit another world. “Queer,” she says, “is not available as a line we can follow.”<sup>309</sup> Considering this in the context of the FLDS raid, the queer space between the FLDS and the law will not necessarily be a space in which organized queer subjects generate a new and creative politics. Rather, in many instances that queer space may mark an irresolvable tension or impasse.

The queer space involves shaky ground, legally, religiously, sexually, and ethically. As I will describe via specific examples from the raid, the FLDS pose a

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<sup>308</sup> Ahmed 161.

<sup>309</sup> Ibid 179.

problem of an overabundance of difference; such an overabundance cannot simply be assimilated to or absorbed by the state.<sup>310</sup> Political scientist and feminist theorist Wendy Brown argues that one of the presumed virtues of liberalism is its ability to permit difference to flourish within its borders, i.e. to absorb difference without letting it consume or overwhelm the general principles undergirding liberalism itself. As she outlines, exceptions to this accommodationist principle are always made for people or practices thought to be fundamentalist and thus entirely inconsonant with liberalism's core values.<sup>311</sup> Poststructuralist anthropologist Elizabeth Povinelli describes this feature of liberalism in a similar way. What Brown calls "fundamentalism" Povinelli characterizes as "repugnance." Povinelli defines what she calls "the cunning of recognition" in relation to Australia's multiculturalism policy and the ability of the Aborigines to make native title claims.<sup>312</sup> As part of its official multiculturalism policy, the Australian state requires that Aborigines who make native title claims at once prove their cultural authenticity as well as their commitment to liberal principles of justice. Specifically, they must demonstrate an

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<sup>310</sup> To be sure, all people or groups do not experience the same problem with the structural features of the law. When the conflict at issue can be solved by a simple change in the inclusiveness of the law (e.g. extending marriage rights to gay and lesbian couples), a queer space has no occasion to exist. Thus, I suggest that the existence of a queer space poses an impediment to justice within the liberal legal framework. Yet, while such a site presents an impediment to traditional avenues of justice, I suggest that the queer space between the FLDS and the law actually opens up possibilities for political dialogue about religious and sexual minorities in the U.S.

<sup>311</sup> Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006), 183-185.

<sup>312</sup> In 1993, the Australian government passed a federal Native Title Act, effectively stating that Aborigines seeking native title had to prove an historical and contemporary connection to the land as well as an allegiance to "customary law" pertaining to that land. Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002), 157.

historical connection to their alterity whilst selectively omitting aspects of that history which liberal multiculturalism is not equipped to recognize (e.g. female genital surgery).<sup>313</sup>

So, to be clear, this particular inability to be absorbed by the state is not something that the FLDS actively pursue. Specifically, they are not trying to foment a revolution. Regardless, the queer space has the effect of calling into serious question the ways that one thinks about religion and sexuality in the U.S. Drawing on Deleuze's notion of the virtual, literary and cultural critic Claire Colebrook argues that identity politics restricts life's potential "to one of its already constituted forms."<sup>314</sup> Thus, a radical rethinking of queer requires going beyond a notion of queerness-as-embodied identity in order to account for the potential, emergent queernesses that are impossible in an identity-based narrative. In other words, the task of queer theory is to generate queernesses without the goal of "becom[ing] [a] legitimate social model[]." <sup>315</sup> Such a conception is over and against a notion of performativity in which each performative iteration hails the original norm even in its transgression. Thus, "the becoming...of the queer"<sup>316</sup> requires that -- rather than performances -- there must be creative repetitions "beyond... already constituted forms."<sup>317</sup>

So, as I configure it, the queer space does not offer an alternative collective

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<sup>313</sup> Povinelli 176.

<sup>314</sup> Claire Colebrook, "On the Very Possibility of Queer Theory" in *Deleuze and Queer Theory*, eds. Nigianni and Storr (Edinburgh: Edinburg University Press, 2009), 21.

<sup>315</sup> Colebrook 12.

<sup>316</sup> Ibid 25.

<sup>317</sup> Ibid 23.

consciousness or identity centered on a group-based queerness. Rather, the queer space between the FLDS and the law is a way of characterizing and describing the impact of the law's structural failings on religious and sexual minorities. The queerness that emerges from the legal machinations of the FLDS raid manifests itself in an inability to explain and vagueness when interacting with state bureaucrats. In this way, queerness moves beyond a standard individual disruption of the heterosexual matrix, emphasizing instead analyses that "approach queernesses that are unknown or not cogently knowable, that are in the midst of becoming, that do not immediately or visibly signal themselves as insurgent, oppositional, or transcendent."<sup>318</sup> Here, Puar posits that queernesses do not have to be subversive of state power or possess the desire to upend the state in order to have the effect of fundamentally disturbing longstanding assumptions about religion and sexuality in the U.S. I extend Puar's claims in my own formulation, and so for the purposes of acknowledging queer spaces as they exist within the legal and political dynamics of the raid, FLDS intentionality does not figure centrally.

### **Family Reunification Plans**

The explicit legal demand for information on biological parentage and the significance of the "bastard" designation are some significant ways in which a queer space exists between the FLDS and liberal law. In what follows, I discuss a third significant instance of the queer space, specifically the Texas Family Code's "Family

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<sup>318</sup> Puar 204.

Reunification Plan.” The Family Reunification Plan (also sometimes called the Service Plan, and hereafter “FRP”) is a form that details the reasons a child was removed from the parents’ custody and it specifies what the parents will have to do in order to be reunited with their child or children in the same home. These specifications often include psychological counseling or other behavioral therapies. The individual child’s CPS caseworker and the child’s biological parents are the parties who sign these forms.<sup>319</sup> When I asked *ad-litem* Nancy Mattison to elaborate on why the question of biological parentage is so significant in child abuse allegations, she invoked the FRP:

Initially [biology] mattered because if you’re going to terminate a parent’s rights, you can’t terminate a caregiver’s rights [because they have] no legal relationship with the child, so it was a matter of establishing legal relationships so you know how to deal with them. You can’t require a caregiver to go through a family plan because they have no legal relationship with the child. You can require a parent to [go through the family plan].<sup>320</sup>

I noted to Mattison that it seemed peculiar that CPS would only require FRPs from biological parents when they knew that the vast majority of FLDS children would be returned to polygamous homes. I was persistent about wanting to know why non-biological live-in parents were not required to submit FRPs. She said:

CPS talked about “mothers” but the “mother” was only the biological mother and there might be another caregiver who’s actually the female who’s responsible for taking care of that child, who that child has a closer relationship with. But that caregiver person is not the one who’s in the CPS case. The traditional system

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<sup>319</sup> Texas Family Code §263.102, “Service Plan.”

<http://www.statutes.legis.state.tx.us/Docs/FA/htm/FA.263.htm>

<sup>320</sup> Nancy Mattison, interview by Cassie Ambutter, Dallas, Texas, September 13, 2011.

does not apply to that community and it doesn't work. It's just going through random motions because that's what we always do.<sup>321</sup>

As Mattison describes above, CPS caseworkers informally affirmed that non-biological mothers often had a close parent-child relationship with those children but that relationship was not a legal one. Because it was not a legally recognized relationship, non-biological parents did not submit FRP forms and, it follows, did not have to attend psychological or other behavioral counseling. She questions the utility of the “traditional system” of family law and concludes that it “does not apply to [the FLDS].” Given that the structure of the law privileges biological parentage (especially when those parents are present in a child’s life), non-biological parents are simply not considered. This is true for instances in which non-biological parents may be seeking rights or privileges regarding their children but it is also true for situations in which child abuse has actually occurred and a non-biological live-in parent might be complicit. While the latter is what is at issue in completing FRPs, both of those situations exemplify the queer space that exists between the FLDS and liberal law. Moreover, they signal that a queer space is present regardless of one’s legal perspective on the raid (i.e. regardless of whether one vigorously defended the FLDS adults’ parental rights or condemned the parents wholesale). In the context of which parties were required to complete FRPs and why, questions arose as to how CPS ought to define a “household.”

Yet, despite the fact that the law was generally ill-equipped to make sense of FLDS difference, *ad-litem* attorney Danielle White suggests that lawyers and judges

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<sup>321</sup> Nancy Mattison, interview by Cassie Ambutter, Dallas, Texas, September 13, 2011.

understood that families could be complex and multilayered. Nevertheless, the multilayered family dynamics of many FLDS households seemed to be too complex to be codified by law. White elaborates:

There is this acknowledgment or idea in family law [that what] is important to a child is not necessarily biologically who they bond with. And particularly with very young children you have to be cognizant of that, and there's sort of a movement for the law itself to gravitate towards protecting those bonds of love. And I had a conversation with one of the judges involved peripherally in the case [and] if a child sees their mother or sister wives as like a mother – not their mother but like a mother – and grows up in a household with all these half-siblings, we should be treating them in a CPS case as a whole. We should look at a household.<sup>322</sup>

According to §71.005 of the Texas Family Code, a “household” is defined as “a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other.”<sup>323</sup> Child Protective Services also retains the right to remove all the children in a household if there is a threat to even one of the children. So, while White’s statement indicates that biological relationships and love are not mutually constitutive, the structure of the law is such that -- particularly when biological relations are present and involved in the childrens’ lives – those relationships are necessarily privileged and given primacy.

### **Is the Queer Space Beyond Partisanship?**

The queer spaces I have described and analyzed here mark a different way of understanding queerness. The queer analytic I explain herein decenters the queer

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<sup>322</sup> Danielle White, interviewed by Cassie Ambutter, Dallas, Texas, September 9, 2010.

<sup>323</sup> Texas Family Code, Title 4. Protective Orders and Family Violence, Chapter 71. Definitions. §71.005 <http://www.statutes.legis.state.tx.us/Docs/FA/htm/FA.71.htm>



subjects that have been so integral to formulating revolutionary queer ethics and politics. Instead, this formulation considers as queer certain spaces, sites, and interactions with the normative force of the law. Because I extend the questions of recent queer theory scholars and shift the focus beyond the self-identified queer subjects of queer theory, the outcomes are not politically or ideologically uniform or predictable. The queer space is not a progressive arena for articulating extralegal conceptions of justice but neither is it an accommodationist political project whereby hyper-marginalized people are brought under the legal protection of the state. I say this in order to emphasize that one can be sympathetic to the generalized struggle of the FLDS while simultaneously acknowledging that a queer space might describe or explain a dimension of their relationship to the law that doesn't conform to a narrative of total sympathy.

Ultimately, the import and significance of the queer space is precisely that it does not produce politically uniform outcomes. Nowhere is this more evident in the context of the raid than in the discussion of child abuse during the 14-day hearing, subsequent legal appeals, and in my conversations with *ad-litem* attorneys. As I indicated earlier in my discussion of the Family Reunification Plans required for minors to be reunited with their parents, the makeup of most FLDS families is fundamentally alien to the structure of the law. While I discuss the political, legal, and ethical dimensions of the sweeping sexual abuse allegations in a later chapter, I want to describe here how the relationship between the FLDS family structure and the law actually makes it more difficult to hold adults accountable if sexual abuse does

occur in the community. *Ad-litem* Danielle White said the following on how the law (through CPS) manages sexual abuse allegations in typical circumstances:

If abuse is going on in a household...let's say there's 3 kids in a household and [the stepfather] is routinely raping the 13 year old stepdaughter; he is not harming the other children nor do they even know about [the abuse]. CPS has an absolute legal right to the emergency removal of all the children, particularly if the mom won't do anything to protect them. And then, let's say [the biological father] shows up to get his daughter, Texas Family Code says you shall turn that child over to him, because he was not part of the problem or the abuse. If the mother will not protect her daughter, CPS can terminate her parental rights as to the other two children, too, if she does not become willing to protect her children from abuse.<sup>324</sup>

CPS's traditional model of child removal is predicated upon a monogamous (and heterosexual) family unit wherein the abuse is very likely to be perpetrated by only one of two people. Thus, in most circumstances, the model is an effective way of managing abuse allegations and investigations as well as punishing perpetrators. However, in this situation, the structure of the law failed to even serve the interests and goals of the people prosecuting individual FLDS – namely, CPS and the state of Texas. Using DNA testing and biological parentage as the primary determiner of abuse invariably meant that the makeup of most FLDS families figured far less centrally than it perhaps should have. So, the queer space between the FLDS and the structure of the law manifested itself in an extremely narrow definition of “family” and thus, limited attention to all possible avenues for determining abuse. Since Family Reunification Plans were not required of non-biological parents (in effect negating their parent status entirely), non-biological live-in parents could circumvent

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<sup>324</sup> Danielle White, interviewed by Cassie Ambutter, Dallas, Texas, September 9, 2010.

state-mandated therapy and counseling and so not be required to learn about abuse or how to prevent/report it. It follows that if CPS and the state of Texas did in fact support aggressive prosecution of the FLDS in attempt to root out child abuse, the existence of the queer space certainly hindered that political goal.

At some level, the state had to have known that there was considerable legal incommensurability between the nature of FLDS families and the structure of the law and that this incommensurability centered around religion and sexuality. During the 14-day hearing, the state called one of its chief witnesses, psychiatrist Dr. Bruce Duncan Perry. When attorneys asked Dr. Perry about the emotional, psychological, and physical harm that children would experience either if they were returned to their families or if they were retained by the state, he said, “I think the traditional foster care system would be destructive for these kids.”<sup>325</sup> For Dr. Perry, the foster care system “would not reflect the kind of innovation that...would be necessary to really help these kids.”<sup>326</sup> Moreover, he argues that traditional foster care “would not be the ideal environment for children who have been raised in this kind of setting” because the foster care situation would “need to have incredible training about the FLDS community.”<sup>327</sup>

Dr. Perry, a witness called by CPS and the state of Texas (and so is presumably someone who would side with their legal desires) testified that the traditional foster care system had fatal flaws. In the context of the FLDS raid, the

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<sup>325</sup> *In the Interest of a Child* in the District Court, 51<sup>st</sup> Judicial District, Cause Nos. 2779-2904, 14-Day Adversary Hearing, Vol.5, pg# 133: 22-23.

<sup>326</sup> *Ibid* pg# 134: 4-5.

<sup>327</sup> *Ibid* pg# 143: 13-15, 20-21.

fatal flaw was that otherwise perfectly good and loving foster families would be ill-equipped to care for FLDS children; this was because the structure and everyday experiences of most FLDS would be entirely alien to the families tasked with caring for their children. So, as a witness for the state, Dr. Perry supported CPS's retention of the FLDS children during the 14-day hearing. Nevertheless, he acknowledged the structural flaws of the current foster care system and determined that such a system would be fundamentally unhelpful and likely even destructive for FLDS children. Thus, Perry, despite his political and ideological agreement with the raid and CPS's ensuing investigation, unmask a queer space between the FLDS and the normative force of the law. This particular impasse, much like unthinkingly exempting non-biological live-in parents from completing Family Reunification Plans, reveals how FLDS families, by their very existence, simply cannot comport with accepted legal norms.

Throughout this dissertation, I have described how religion and sexuality often operate as dual sites of legal, political, and constitutional regulation. In this chapter, I attempted to characterize and account for some of the reasons why, given their religion and their sexuality, the FLDS had a particularly complex and often antagonistic relationship with the law and legal norms. I have also highlighted some of the political and legal consequences of such a difficult relationship and provided a different analytical mode of engagement with the problem. Moving beyond the traditional queer subjects as the privileged analytic site of queer theory allows queer theorists to explore uncharted political, ethical, and analytical territory. "Queer" as an

analytic, and more specifically my formulation of the “queer space” offers a different mode of thinking about religion and sexuality in relationship to the law – one that does not adhere to the common political tropes of legal accommodation/assimilation or revolutionary potential. As I have demonstrated throughout this chapter, the queer space does not offer a way out, but I am hopeful that it offers a new way in.

## Chapter 6

### *A Conclusion in Four Parts*

#### ***Brown v. Buhman* and the Constitutional Status of Polygamy in the U.S.**

By way of concluding, I want to address a major constitutional development in the lives of polygamous Mormons. In the introduction to this dissertation, I briefly introduced the fact that the Brown family (of TLC’s “Sister Wives”), in an attempt to be freed from state persecution for bigamy, filed a lawsuit in a Utah district court in 2011. In December 2013, U.S. District Court Judge Clark Waddoups struck down the part of Utah’s anti-bigamy law that prohibited cohabitation. While the core of Utah’s law remains intact – that which criminalizes the acquisition of multiple marriage licenses from the state – the part that permitted state prosecutors to target polygamous Mormons for simply living together has been discarded. In *Brown v. Buhman*, the court writes:

[The Browns] make no claim to have entered into legal unions by virtue of their religious cohabitation, having instead “intentionally place[d] themselves outside the framework of rights and obligations that surround the marriage institution.” In light of this...the cohabitation prong of the Statute [prohibiting polygamy] is not operationally neutral or of general applicability<sup>328</sup> because of its targeted effect on specifically religious cohabitation.<sup>329</sup>

In essence, Judge Waddoups argues that the Brown family (and thus, many other similarly situated polygamous Mormon families) never expected or requested

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<sup>328</sup> This is a reference to *Employment Divison v. Smith* (1990).

<sup>329</sup> *Brown v. Buhman*. In the United States District Court, District of Utah, Central Division. Case No. 2:11-cv-0652-CW. [https://ecf.utd.uscourts.gov/cgi-bin/show\\_public\\_doc?211cv0652-78](https://ecf.utd.uscourts.gov/cgi-bin/show_public_doc?211cv0652-78)

protection from the state for their relationship and their family, but they are justified in expecting the state not to target them for violating a prohibition on religious cohabitation. Specifically, they sought freedoms associated with the free exercise of religion, but in the context of marital relationships, the Browns understood themselves as wholly apart from the legal framework of marriage.

In attempting to defend its law, Utah's argument in this case is that religious cohabitation – and by extension, polygamy -- are necessarily attendant to a whole host of other social ills (e.g. child abuse and incest); the judge, however, rejected such an argument. In fact, as I mention in Chapter 4, more legal recognition of some elements of polygamous relationships could lead not only to a more capacious definition of marriage and family, but might also enable the state to more successfully prosecute actual victims of sexual abuse. Judge Waddoups agrees:

Such stories [of abuse] are tragic; the court believes, however, that striking the cohabitation prong could actually make prosecuting the underlying crimes easier. It seems to the court that the Statute [prohibiting polygamy and cohabitation] has unintentionally become a bottleneck to the straightforward prosecution of these other crimes precisely because of the State's general policy not to prosecute religiously motivated polygamy under the Statute in the absence of age concerns or evidence of "collateral" crimes. With the cohabitation prong stricken, the Statute can no longer function as this kind of barrier, and investigators and prosecutors can focus directly on the independent crimes that are being committed, if any.<sup>330</sup>

Judge Waddoups argues here, as I have similarly argued in Chapter 4, that the wholesale criminalization of Mormon polygamy defies partisan disagreement on the moral and political questions of whether polygamy is of any value to society. He

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<sup>330</sup> Brown v. Buhman

suggests that if fewer laws existed that sought to criminalize every aspect of fundamentalist Mormon religious life, the state would have greater leverage (and arguably increased legitimacy) when attempting to prosecute actual instances of abuse.

*Brown v. Buhman* is especially noteworthy because the Browns used *Lawrence v. Texas* (2003) and arguments in favor of sexual privacy in order to argue their case. Even though Utah's anti-bigamy statute (and particularly the part banning cohabitation) has roots in 19<sup>th</sup> century anti-Mormon animus, polygamous Mormons have a long history of rejection by the courts when they put forth religious freedom claims. While I have explored throughout this dissertation how and in what ways religion and sexuality intersect in the legal, political, and constitutional treatment of the FLDS, this new decision marks the first time that a polygamous Mormon family so explicitly claimed constitutional protection on the grounds of sexual privacy between consenting adults. Stopping short of characterizing religious cohabitation as a fundamental right, Judge Waddoups contends that the cohabitation prong of the statute violates "a fundamental liberty interest in intimate sexual conduct."<sup>331</sup>

Given the rapid and widespread extension of marriage rights and protections to the LGBT community in the U.S., the Browns' use of sexual privacy arguments are in step with the shifting political and constitutional culture of this country. The reality of the ever-expanding LGBT equality movement indicates that the courts and the legislature have begun to offer people, on the basis of their sexuality, legal

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<sup>331</sup> *Lawrence* quoted in *Buhman*.



protections and constitutional safeguards. William and Mary Professor of Law,

Nathan Oman, suggests:

Like the nineteenth-century Mormons that litigated to the Supreme Court in *Reynolds*, there is no reason to doubt the religious sincerity of the Brown family. Unlike the nineteenth-century Latter-day Saints, however, they have a legal incentive to insist that polygamy is about sex. This is precisely what they did, and Judge Waddoups accepted their argument.<sup>332</sup>

That said, the Brown’s case complicates the legal equality narrative. The notion of religious cohabitation in Utah’s anti-bigamy statute essentially criminalizes the personal use of terminology that the state views as its exclusive providence: in this case, that terminology relates to marriage. Judge Waddoups finds this to be particularly egregious and contends:

A defining characteristic of such cohabitation as lived by Plaintiffs and those similarly situated is that, in choosing “to enter into a relationship that [they know] would not be legally recognized as marriage, [they use] religious terminology to describe the relationship,” and this terminology—“‘marriage’ and ‘husband and wife’—happens to coincide with the terminology used by the state to describe the legal status of married persons.” *Id.* Stated succinctly, Plaintiffs “appropriate the terminology of marriage, a revered social and legal institution, for [their] own religious purposes,” though not purporting “to have actually acquired the legal status of marriage.” *Id.* at ¶ 123, 137 P.3d at 773.<sup>333</sup>

In attempting to persecute the Browns (and other similarly situated persons) for using the words “marriage” and “husband and wife” to classify relationships without legal recognition, the state of Utah is stripping them of the right to define marriage according to the dictates of their faith. Moreover, by “plac[ing] themselves outside

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<sup>332</sup> Nathan B. Oman. “A Judge Weakened Utah’s Anti-Polygamy Law. What Does This Say About Sex, Race, and Religion?” *Popular Media*. Paper 303. (2013)

<sup>333</sup> *Brown v. Buhman*

the framework of rights and obligations that surround the marriage institution,<sup>334</sup> the Browns asked not for a marriage right (as the gay community has done) but rather, they asked for a marriage liberty. As more states continue to legalize gay marriage and as federal courts continue to weigh in on the marriage debate, marriage becomes increasingly associated with formal civil rights, with legal equality, and with government protections.<sup>335</sup> For this reason, it is no doubt surprising to many that the Browns insist that they are satisfied with having access to marriage terminology and do not expect the attendant legal protections.

Since the 19<sup>th</sup> century, Mormon polygamy has sat at the intersection of conversations about religion and sexuality. A sexual and marital arrangement that adherents framed as a divine mandate, court cases and legislation about polygamy nevertheless focused exclusively on the power of the state to regulate polygamy as a *religious* practice. Regardless of whether 21<sup>st</sup> century Mormon polygamists pursue the legal language of sexual freedom rather than religious freedom, legal scholar Laurence Tribe claims that the kind of liberty articulated by the court in *Lawrence* was not per se the liberty to engage in sex without government interference, but to be in intimate relationship to another person, even if that relationship is one with which the court did not have direct experience. Tribe says, “It’s not the *sodomy*. It’s the

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<sup>334</sup> *Brown v. Buhman*

<sup>335</sup> See for example: Richard D. Mohr. *The long arc of justice: Lesbian and gay marriage, equality, and rights*. (New York: Columbia University Press, 2005) and Scott L. Cimmings and Douglas NeJaime. "Lawyering for marriage equality." *UCLA L. Rev.* 57 (2009): 1235.

*relationship!*<sup>336</sup> A focus on the relationship instead of the sex act is similar to the way Judge Waddoups used *Lawrence* to formulate his decision in *Brown v. Buhman*. Implicit in Waddoups' focus on the liberty to religiously cohabit is the reality of a divinely mandated sexual and marital *relationship*. The Brown family has only recently breathed new life into the legal/constitutional conversation about polygamy in the U.S. For this reason, it still remains to be seen whether polygamous Mormons who want to pursue legal protections ought to approach those protections from a religious freedom angle, a sexual freedom angle, or a hybrid of both.

### **Public Order and the Slippery Slope**

I highlighted in the first chapter the ways in which the concept of public order shaped the evolution of the polygamy debate in the U.S., particularly via tolerance discourse. The imbrication of religion and sexuality in the constitutional and legal issues surrounding Mormon polygamy remain, to this day, a question of public order. When the United States Supreme Court has handed down gay rights or sexual privacy cases in the last 20 years, voices on the court highlighted the potential for a domino effect in social justice issues, or what is commonly referred to as the “slippery slope” argument. Slippery slope arguments rely on the presumption that increased legal accommodation slowly erodes the moral fabric of society, thereby creating social disorder and unrest. For example, in his dissent in *Lawrence v. Texas*, Justice Scalia

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<sup>336</sup> Laurence H. Tribe. "Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name." *Harvard Law Review* (2004): 1904.

remarks on the court majority's decision to locate within the federal constitution a liberty guarantee of sexual privacy, and asks: "What justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution?'"<sup>337</sup>

Further, in *Romer v. Evans*, the people of Colorado passed a voter referendum (Amendment 2), which effectively singled out gay Coloradans and forbade them from filing discrimination claims against state agencies or private businesses. Because the amendment explicitly singled out gay Coloradans and denied them state protections offered to all other Coloradans, the court struck down the law. In the dissent, Justice Scalia again deployed the slippery slope argument in his reasoning. Contending that the citizens of Colorado ought to be allowed at the ballot box to voice their moral disapprobation for a particular practice, Scalia says:

But I had thought that one could consider certain conduct reprehensible – murder, for example, or polygamy, or cruelty to animals – and could even exhibit 'animus' toward such conduct. Surely that is the only sort of 'animus' at issue here: moral disapproval of homosexual conduct...<sup>338</sup>

For Scalia, the majority of Coloradans have the right to vote to prevent gays from filing discrimination claims against the state or private businesses. He reasons that this would be a sign of the majority's disdain for a specific population or practice – a disdain to which, as reasonable people, they are entitled. Disdain for gay people and homosexuality in general is, for Scalia, not unlike the disdain that reasonable people would express for murder or polygamy.

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<sup>337</sup> *Lawrence v. Texas* 539 U.S. 558 (2003)

<sup>338</sup> *Romer v. Evans* 517 U.S. 620 (1996)

While Justice Scalia – and other justices who signed on to his dissents in these cases – often argues that the expansion of legal protections for gays is a slippery slope to the ultimate moral decay of society (a vision hastened by the potential legalization of polygamy), some legal scholars believe this comparison to be a red herring. What she calls “faux slopes,” Ruth Stenglantz argues that such arguments are “rhetorical technique[s] designed to combine rational argument with emotional appeal” and they function almost exclusively as “empty threats.”<sup>339</sup> Even though slippery slope arguments are largely baseless threats designed to make the listener or reader fear the absolutely worst-case scenario (no matter how fantastical the scenario), they can nevertheless be effective. So, while most contemporary legal scholars do not consider the extension of marriage rights to same-sex couples to be a slippery slope to legalized polygamy, the frequent deployment of such a rhetorical strategy is a testament to its effectiveness as a scare tactic.

Insofar as the slippery slope argument draws upon the public’s perceived social and political anxieties, the question of public order is necessarily central to debates about the use of those arguments. In *Brown v. Buhman*, Judge Waddoups’ suggests that even though the religious cohabitation prong of Utah’s law should be struck down, there is not per se a problem with using the concept of public/moral order to help craft laws. When *Reynolds v. United States* first affirmed the federal criminalization of bigamy in the 19<sup>th</sup> century, public order (particularly the fear of

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<sup>339</sup> Ruth E. Stenglantz. "Raining on the Parade of Horribles: Of Slippery Slopes, Faux Slopes, and Justice Scalia's Dissent in *Lawrence v. Texas*." *University of Pennsylvania Law Review* (2005): 1100-1101.

what it would mean to protect religious *action* in addition to religious *belief*) was central to the court's logic. However, in Waddoups' estimation, 19<sup>th</sup> century laws criminalizing polygamy were written explicitly to target polygamous Mormons, and so their use of an amorphous public order standard signaled the court's inability to be self-reflective about its own prejudices. That said, he also contends that we ought not to assume that public order will always be deployed in such nefarious and prejudicial ways. Comparing *Reynolds* to *Lawrence*, he says:

The Supreme Court's decision in *Lawrence v. Texas* created ambiguity about the status of such "morals legislation." ... Although the court doubts that *Lawrence* actually must be interpreted to signal the end of the era in which the "good order and morals of society" are a rational basis for majoritarian legislation, there is no question this was the prevailing view in the 1870s.<sup>340</sup>

Here, Waddoups claims that the holding in *Lawrence* does not have to be read through the lens of the slippery slope argument. He concedes, however, that the court in *Reynolds* most certainly believed that affirming polygamy as a legitimate expression of religious freedom would have created a domino effect, leading most assuredly to the legalization of other more licentious or repugnant practices.

Waddoups' implication in this excerpt is that morality and public order are legitimate bases for the creation of laws affecting the majority of the population. This is especially noteworthy given the myriad ways in which public order has been used to stamp out polygamy. Religious cohabitation (which is effectively polygamy but without the parties seeking multiple marriage licenses from the state) therefore does not contravene public order in such a way as to erode the moral fabric of society. So,

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<sup>340</sup> Brown v. Buhman

while the holding in *Brown v. Buhman* does not actually overrule *Reynolds*, it questions the court's motivations in rendering such a decision. Ultimately, given the Brown family's success in overturning part of Utah's anti-bigamy law by pursuing a claim of sexual freedom, the constitutional avenues available to polygamous Mormons are undoubtedly more open than they once were.

### **The Enduring Faith of the FLDS**

While *Brown v. Buhman* represents the current legal and constitutional status of polygamy in Utah (with other states to potentially follow), the specific concerns of the FLDS since the raid are a bit more complex. One of the issues I discussed extensively in this dissertation was the court and CPS's treatment of the FLDS as a monolith, as effectively a cult that shared the same destructive, distorted, and abusive worldview. It wasn't until months after the raid and the Texas Supreme Court's decision to overturn the lower court's ruling that the court system and CPS finally began to deal with allegations and instances of abuse on an individual basis. After the Texas Supreme Court ruled that the District Court under Judge Barbara Walther had erred in its decision to retain all the alleged FLDS minors, twenty-six charges were filed against twelve FLDS men. Chief among these charges were bigamy and child sexual assault (the latter stemming from marriages involving parties with large age disparities). Attendant to some of these charges was the understanding that even if the court saw no reason to continue its involvement in a particular case, CPS reserved the

right to – independent of the court – maintain contact with specific children and their families.<sup>341</sup>

Some of the same issues that were present in the early stages of the raid reappeared as the state began to formulate these more individualized investigations. Of particular importance was the question of whether the FLDS counted as a legitimate religion and whether the raid violated their religious freedom guarantees under the First Amendment. In this vein, the following is a statement from FLDS spokesman, Willie Jessop, several months after the raid, when 34-year-old Abram Harker Jeffs was found guilty of child sexual assault for his marriage to a 15 year old girl: “For the first time, they’ve admitted it’s about religion.”<sup>342</sup>

Throughout this dissertation I have described the state’s insistence at nearly every turn that the raid and its initial legal aftermath had nothing to do with religion or religious freedom. The case was supposedly not about religious freedom and it also was not about polygamy. Instead, they claimed, the raid was a clear-cut case of child sexual abuse and the FLDS’s apparent unwillingness to comply with U.S. law regarding the age at which a person could consent to marriage. In characterizing the defense’s argument in Abram Harker Jeffs’ case, prosecutor Eric Nichols said: “They [the defense] say we should say someone’s religious belief trumps the law. The law says there are certain values that you must abide by... We are all accountable.”<sup>343</sup> In

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<sup>341</sup> Paul A. Anthony. “Nine more indictments issued against FLDS members.” *San Angelo Standard-Times*. 12 November 2008.

<sup>342</sup> Matthew Waller. “FLDS member found guilty of child sexual assault.” *San Angelo Standard-Times*. 22 June 2010.

<sup>343</sup> Waller.



implored the jury to find Harker Jeffs not guilty, his defense attorney, Stephanie Goodman, said: “We pray you’ll use a mixture of the two, man’s law and God’s law, and find our client not guilty.”<sup>344</sup> Given District Court judge Barbara Walther’s aversion to hearing religious freedom claims from FLDS lawyers, this lawyer’s tactic is surprising. However, an admission of the ways in which God ordered FLDS life did not always yield results in their favor. For example, several years after the raid, there was a custody battle between an FLDS man who had been exiled from the community and his second and third wives who still lived within it. Ultimately, the judge awarded custody to the father, Lorin Holm. During the questioning in the case, Holm’s attorney (Roger Hoole) asked the children’s second and third mothers: “If there is a conflict between the laws of God as given by Warren Jeffs [the current, but disputed head of the church] and the laws of the land, which is supreme in your mind? Which would you follow?” The mothers, Lynda and Patricia Peine, replied, “The laws of God.”<sup>345</sup> Though differently motivated, the above attorneys’ emphasis on the sincerity and depth of their client’s faith reflects the inextricability of FLDS religious belief and religious action. This is a faith that has cost and will likely continue to cost them a great deal. As I described extensively throughout this dissertation, the relationship of the FLDS to the state was one of mutual suspicion and often unintelligibility. Legal scholar Kelli Larsen offers:

Both sides, the government and remote religious communities, maintain a mutual distrust of one another. The cynicism from both groups stems from

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<sup>344</sup> Waller.

<sup>345</sup> “FLDS exile wins custody of kids from wives still in polygamous sect.” *The Salt Lake Tribune and Wire Services*. 27 March 2014.

numerous factors, and many of the behaviors of each group continue the circle of mistrust. Due to government raids, such as the 2008 raid, members of these religious groups have a genuine fear of government officials and law enforcement. They typically develop self-sustaining communities and have little need or desire to interact with mainstream society. Their high level of privacy is unusual in modern society, and consequently, rouses suspicion regarding these groups' reasons for isolation. The circle of distrust continues as the government attempts to regulate alleged corruption within these communities by creating laws to target certain behaviors and beliefs.<sup>346</sup>

Since the 19<sup>th</sup> century, living into their faith has put polygamous Mormons at odds with state officials and CPS. Congress and the U.S. Supreme Court attempted at every turn to intimidate polygamous Mormons into abandoning polygamy, which would have effectively amounted to their defying God in order to escape state persecution. This was and remains a difficult proposition even though the state and CPS address the legal and constitutional issues surrounding polygamy in subtle, more covert ways than was the case in the 19<sup>th</sup> century. Nevertheless, as I highlight below, FLDS faith and community endures despite continued antagonism from the state and skepticism from people all over the country (and the latter is a group into which I would put myself).

FLDS faith (distinct from mainstream Mormon faith and even the faith of the Brown family) is something I only got to know through descriptions offered by their attorneys, through the very small number of academics who study them, and through books written by believers and “apostates” alike. Because I intended this project’s focus to be the relationship of the law to a group who occupied the social/political

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<sup>346</sup> Kelli Larsen. “Protecting the Children, But At What Cost? Emergency Removal and Religious Communities: Putting Eldorado On the Map.” *Texas Tech L. Rev.* 42 (2009): 605-606.

position of religious *and* sexuality minority, the truth of their faith and even many of the tenets of their faith were secondary. Irrespective of my intentions – and even when I did not want it to be – the faith of the FLDS was undoubtedly central to every question I asked in this dissertation. Because I was not able to directly interview any members of the FLDS, I thought I had to sidestep questions regarding the specifics of their faith, the role of God in their lives, and particularly the extent to which they felt that God was calling them to live as they lived. And yet, I frequently got answers to those questions I shied away from asking. The answers have appeared throughout this dissertation and will, in one last way, appear below.

Saba Mahmood says that a good ethnography is one that transforms you, one that remakes you, even if it doesn't entirely convert you to the perspectives articulated by the people and subject matter with which you've engaged.<sup>347</sup> When I began writing this dissertation, I could not have anticipated the ways that it would enable the transformation of my own life. One of the pieces of the raid that most impacted me was the way the *ad-litem*s characterized whether and to what extent the FLDS were changed after much of the dust of the raid had settled. When I asked how the raid affected the structure of the community and whether members of the FLDS generally felt that they could no longer safely live in Eldorado, attorney Angela Waymer said:

They think they're going to be targets again. They know that they will. In their minds, that's just the price they pay for being who they are. There was

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<sup>347</sup> Saba Mahmood. *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton: Princeton University Press, 2005), 199.

definitely a fear early on that even if you got out of state custody that you couldn't go back to the ranch because of what CPS might do because of their assumption that obviously the kids are not safe. So for a while a lot of them did stay away but they have gradually started to move back.<sup>348</sup>

Waymer suggests here that the fear of persecution had not abated and so the FLDS were hesitant to move back to the ranch en masse. Attorney Nancy Mattison suggests something similar, namely that the fear of state persecution and CPS surveillance meant that the FLDS were more reluctant to live on the ranch:

They are more spread out now. There are some more independent [polygamists]. They did not all go back. I don't know why, if it was by choice or by mandate... I really don't know. As a community, the beliefs and the perceptions are probably about the same as they were. I don't think there's going to be any calls to the government...for government help, just like there wasn't before. The [FLDS] are going to continue practicing what they practice, and believing what they believe [even though] now [the raid] is part of who they are. I think they're always on alert that this could happen again at any time.<sup>349</sup>

Mattison claims that although the FLDS did not all return to the ranch at the same time (and some never did) the community's fundamental beliefs were not altered. She does not think the FLDS will begin to clamor for the state's assistance and the raid is now an intrinsic part of how they live in the world. Attorney Andrea Conroe echoes Waymer and Mattison's basic sentiments:

I don't think the raid really affected [the lives of the FLDS] much, truthfully. I think they kind of went right back to being farmers and ranchers and polygamists. Life's pretty much back to normal. I don't think it's impacted a whole lot of what they think about the state. There would always be a degree

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<sup>348</sup> Angela Waymer, interviewed by Cassie Ambutter, Dallas, Texas, September 14, 2010.

<sup>349</sup> Nancy Mattison, interview by Cassie Ambutter, Dallas, Texas, September 13, 2011.

of distrust. And it didn't seem to alter the community's faith, either. Polygamy is still a mandate from God.<sup>350</sup>

That the FLDS continued to fear state persecution was unsurprising. What surprised me was what the lawyers articulated as their clients' unwavering faith in the fact that polygamy was a divine mandate, dictated by God regardless of persecution at the hands of the state. But for a community with a long history of persecution in this country, the stakes were, and continue to be, high. That so many people remain in the FLDS and continue to live as polygamous despite the potential social and legal ramifications likely does not make much sense to the casual observer. Irrational beyond comprehension, the decision of the majority of the FLDS to stay on the ranch in Eldorado (and in polygamy more generally) is the kind of decision that cannot be easily defined, described, or categorized by the terms available to us in the secular liberal lexicon; given the lawyers' characterization of the FLDS' experiences as well as the documented history of the group, to call their decision a "free choice" or to reduce it to the rational calculation of a cost-benefit analysis obscures the fundamental, overarching force at work in their lives: God.

### **My "Coming Out"**

To some extent, I was always deeply distrustful of people who identified as very religious. I associated that kind of religious identity with political conservatism and, as someone raised marginally Jewish in New York City, I had a well-established allergy to what I understood to be conservative values. Yet, I imagined myself to be

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<sup>350</sup> Andrea Conroe, interviewed by Cassie Ambutter, Dallas, Texas, September 15, 2011.

sympathetic to the plight of the FLDS and a believer in a religious freedom of the highest order while remaining appropriately distant from and personally immune to the concerns and fears of a community facing significant legal trouble because of their religion. And yet, despite my attempts to hold fast to the fallacy of my own objectivity in this case, God, it seems, had other plans. On the first Sunday of Advent 2012, I began to feel an internal pang that called me to walk into a church that morning. Outside the context of ethnographic research, I had never willingly walked into a church on Sunday. In retrospect, I was hungry but I didn't know what for. It was the kind of hunger whose source I couldn't place and which I could not seem to satiate no matter how many Sundays I spent in church.

At the time, I didn't know what I was feeling but I desperately wanted it to go away. I prayed for my desire to be in church to go away. I prayed for this inscrutable hunger to dissipate so that I might be able to be freed from its bondage. I prayed to a God I was not even sure I believed in. I prayed the way I prayed in middle school for my homosexuality to go away, to be but a phase. I absolutely needed this to be a phase.

So this is me coming out for the second time in my life. This is me bearing my soul after seven years of writing about religion and sexuality. After writing about this topic for many years, it is only in the last 18 months that I have gleaned the full significance of my choosing such a topic. It is only in coming out as a Christian towards the tail end of this project that I have finally come to appreciate what it means to have an identity in God above all else, in defiance of all else, and despite

those who would tell me I'm just a little bit crazy. That initial desire to walk into a church one Sunday morning precipitated many unexpected changes, chief among them the realization that I was on a lifelong journey from which it was actually freeing to not be able to escape. If someone had told me three years ago that all of this would be my present and future reality, that this piece of writing would mark the end of my academic trajectory, I likely would have laughed. Because I want to close this chapter of my life with respect for the people about whom I have been writing for most of the last decade and because I want to do it with integrity, I have written a letter from my present self to the person I was just a few years ago. My intention in doing this is not to suggest that I should have left the academy years ago, because I certainly think this dissertation needed to be written. This letter from me to me is for all the times during this process that I felt lost, that something felt off, that it seemed like this wasn't what I was supposed to be doing:

Dear Cassie,

Despite being suspicious of religious people and organized religion generally, you have always confided that God was protecting you. You weren't always sure who you thought God was, but you definitely bargained with God all the time: "If you do this for me, God, I promise to never do this incredibly stupid/reckless/cruel thing again." You did kind and generous things not because you saw God in every person, but because you thought God was a figure in the sky that would punish you or never forgive you if you treated someone badly. You imagined God to be the worst version of yourself. This is a pretty scary thought, because if you were in charging of

dispensing divine mercy, you would destroy all the awful, oppressive groups in this world through violent retribution. You actually don't have to plan to dance on the graves of Justice Scalia or Fred Phelps or every racist police officer simply because you imagine them to be unrepentant people with hearts of stone. You will get to a point where you will be able to pray for those people: for your enemies, for those you have wronged, and for those who have wronged you. You will have the strength to pray for their hearts to be turned from stone into something that is fleshy and beating.<sup>351</sup> As it turns out, God isn't really the worst version of yourself. God is actually your best self.

Soon, you will feel a pull from some place you can't explain to fly to Denver, CO and be baptized into a Lutheran congregation you don't know and by a pastor with whom you will only have exchanged a few e-mails and a Skype conversation. You will, through the miracle of Facebook, grow to love them all madly, truly, and seemingly without any kind of clear conditions. You will pray for them when they ask and even when they don't. They will love you, even though you're not sure you deserve it. You will fly back to be with them as often as possible and each time it will be like you have never left. You will know the inside of the church building in great detail, and its contours will appear in your dreams.

The pastor will recommend a sister church in San Francisco that you can attend and still feel like you are present with them always. You will travel an hour and fifteen minutes each way, almost every Sunday morning, because you need to.

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<sup>351</sup> Ezek 36:26. "A new heart I will give you, and a new spirit I will put within you; and I will remove from your body the heart of stone and give you a heart of flesh."



You have to. You must. You will begin working there as a deacon, wearing fancy clothes whose spiritual value you will undoubtedly question, and you will be treated as though you have some kind of authority you won't quite understand. But you will constantly be reminded of your own humanity. A senior person in the church will scold you for saying or doing something stupid and will say to you, "You serve this church now!" and that will sound equal parts ridiculous and amazing.

Your capacity to love and to allow others to love you (*because of* who you are – all of you – and not *in spite* of it) will grow in unimaginable ways. Your heart will grow so big that some days you won't be able to help but simply burst into tears at the reality of suffering in the world. But you will seek that out. You will walk towards it, at first with fear, but ultimately with hope and compassion. You will walk towards rather than away from God.<sup>352</sup>

At some point during this time, you will realize you have a call to ministry as a university chaplain. You won't be able to admit this to yourself, much less to your committee, because you are scared of what they will say about deviating so significantly from the traditional academic path. Don't worry. You will realize that it doesn't matter and that all you can really do is be honest. For the first time you will do what feels right instead of just what seems to be the most logical path. You will

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<sup>352</sup> If there can be an idea attached to this sentiment, it is Martin Luther's "theology of the cross." This is the idea that the only real truth about who God is and how God works in the world can be gleaned from Christ's actions and words on the cross. In Luther's interpretation, God's actions on the cross signal God's presence at every site of suffering throughout human history. For more on this notion, see: Walter von Loewenich. *Luther's Theology of the Cross* (Minneapolis: Augsburg Publishing House, 1976).

relinquish some control over your own life and give it to God. You will trust that this is what you are meant to be doing with your life. You will trust.

You are going to find yourself doing things you can't explain and participating in activities whose meaning you don't necessarily understand fully. You will find yourself saying "yes," sometimes in defiance of common sense, simply because you can't wait to see what will happen if you do. You will serve on discernment committees for seminarians. You'll serve as a deacon even though it scares you. You will give people communion: You will put bread in their outstretched, cupped hands and know that they have been waiting all week for this moment. Maybe they will have been waiting longer. You have waited a lifetime. You will pass the cup of wine around the room and the whole experience will bring you back to earth. It will ground you.<sup>353</sup> You will befriend and voluntarily spend time with people with whom you have virtually nothing in common. You will love people, truly and sincerely and not out of obligation or pity, even though you may not actually *like* them.

You'll baptize friends you've made on the street and you'll walk around in a black cassock distributing ashes in Spanish on the streets of San Francisco for Ash Wednesday. That last one will change your life. You'll hold the face of a little boy, of a drunk homeless man who lifts up his filthy San Francisco Giants hat to reveal a head full of sores, of a middle-aged Salvadoran woman who will tell you the devil is

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<sup>353</sup> For more on the phenomenon I'm describing, see: Sara Miles. *Take This Bread: A Radical Conversion* (New York: Ballantine Books, 2008).

after her. You will give all of them ashes, you will hold their faces, and you will tell them all that they, *just like you*, are dust and to dust they will return.

You will tell all of those people not to be scared, and each time you say it you will be reminding yourself of the same thing. *Recuerda que polvo eres y en polvo te convertirás. La muerte no es el final. No temas.* Remember that you are dust, and to dust you will return. Death isn't the end. Be not afraid. Don't be afraid to have parts of you die so that other parts might live. You may not always have the right answers and there won't always be a proper footnote for every thought and for every feeling. But you need to know that new life will always rise from the ashes. You must live into the mystery, because that is faith, and of that you are certain.

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