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Avoiding Another Eldorado: Balancing Parental Liberty and the Risk of Error with Governmental Interest in the Well-Being of Children in Complex Cases of Child Removal

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NOTES

AVOIDING ANOTHER ELDORADO: BALANCING PARENTAL LIBERTY AND THE RISK OF ERROR WITH GOVERNMENTAL INTEREST IN THE WELL-BEING OF CHILDREN IN COMPLEX CASES OF CHILD REMOVAL

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INTRODUCTION

By removing 468 children from an exclusive ranch community on one April day (the Eldorado, Texas raid), Texas Department of Family and Protective Services (the Department) social workers and investigators attracted national headlines.¹ Members of the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) religious sect inhabited the Eldorado community located in the rural western part of the state.² The Department began its investigation of the community after someone purporting to be a sixteen-year-old female phoned the department to report physical and sexual abuse occurring within the confines of the ranch.³ Prior to removing the children, social workers and police investigators interviewed members of the sect⁴ and determined that the children faced “immediate danger to [their] physical health or safety.”⁵ Less than four weeks later, a Texas Supreme Court ruling (the *Texas* case) sent all of the FLDS children back to their homes and stated that “[the] removal of the children was not warranted.”⁶ Many people were outraged that children living in close quarters with suspected sex offenders had to return to those conditions;⁷ others expressed frustration and anger that the Department racked up a hefty bill for the state without adequate evidence to support its actions or to sustain state intervention.⁸

1. See *In re Tex. Dep’t of Family and Protective Servs.*, 255 S.W.3d 613, 613-14 (Tex. 2008) (per curiam).

2. *Id.* at 613.

3. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *4 & n.12 (Tex. App. 2008) (describing the problems with locating the alleged sixteen-year-old caller); see also *In re Tex.*, 255 S.W.3d at 613.

4. See *In re Tex.*, 255 S.W.3d at 613.

5. *In re Steed*, 2008 WL 2132014, at *1.

6. *In re Tex.*, 255 S.W.3d at 615.

7. See, e.g., *Texas High Court: Removal of Sect Kids ‘Not Warranted’*, CNN, May 29, 2008, <http://www.cnn.com/2008/CRIME/05/29/texas.polygamists/index.html> (quoting a Texas attorney who said that “if the media showed the actual events of adult males demanding sex with 11-year-old girls, there would be no one questioning the graphic danger of returning these children to their home at this time”).

8. Ashley Broughton, *Polygamist Case Price Tag: \$7 Million*, CNN, June 3, 2008, <http://www.cnn.com/2008/US/06/03/flds.price/index.html?iref=newssearch> (quoting a resident of Eldorado who stated that Eldorado residents were “going to wind up with a \$30 million bill

In defense of Texas's social workers, there is a good reason for them not to have their "ducks in a row"⁹ before removing the children: Texas law does not defer to their professional expertise but requires them to formulate a belief as to what an ordinary prudent person would find dangerous to a child.¹⁰ Moreover, the United States Courts of Appeals are split over the federal standard for when child removal is acceptable.¹¹ Without a clear standard for temporary removal even in traditional cases, social workers face a double-edged sword: risking large expenditures and heavy criticism in fruitless cases¹² or taking no action and facing punishment, termination by their employers, and brutal (potentially deadly) abuse of children by not pursuing credible reports.¹³

A clearly stated standard recognizing the difficulty of investigation and high risk to children in complex cases would lead to greater predictability, less confusion among nonattorney professionals, and more effective collaboration among child protective services workers, investigators, and attorneys. Studies show that in effectively implemented child protection programs, "the ability of committed and empowered professionals to 'transcend professional boundaries' and work collaboratively" allows social workers and

here in this little county because these people didn't have their ducks in a row").

9. *Id.*

10. TEX. FAM. CODE ANN. § 262.104(a) (Vernon 2008) (stating that child protective workers or law enforcement officials may remove children without a warrant if the information they receive and their personal knowledge would "lead a person of ordinary prudence and caution to believe" a child is in danger of physical harm or sexual abuse).

11. See Alyson Oswald, *They Took My Child! An Examination of the Circuit Split over Emergency Removal of Children from Parental Custody*, 53 CATH. U. L. REV. 1161, 1173-82 (2004) (describing the incompatibility of the Second Circuit's decision in *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999), that social workers must always consider whether sufficient time to obtain a warrant exists before removing children, and the Eleventh Circuit's holding in *Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003), that balancing a variety of relevant factors determines whether a situation warrants removal, and that lack of time itself is not dispositive).

12. See, e.g., Broughton, *supra* note 8 (describing the criticisms of the seven million dollars Texas spent on removing hundreds of children from a polygamous sect in 2008).

13. See Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913, 922 (2004) (citing Michael Fechter, *Helping Till it Hurts? DCF Errs By Taking Children in Marginal Cases, Lawyers Say*, TAMPA TRIB., May 29, 2002, at 1 (describing Kayla McKean's murder)); see also Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 FAM. CT. REV. 540, 542 (2004) (describing "defensive social work" as the propensity for social workers to base their removal decisions on "fear of civil (and even criminal) liability").

state attorneys to form effective partnerships and achieve optimal results.¹⁴ Complex cases feature greater numbers of children, more potential predators, and difficult (or impossible) preintervention investigations.¹⁵ When social workers have to weigh these factors within a complex framework that does not value their professional expertise, they become “frustrat[ed]” and start to “resent” the process instead of working effectively through it.¹⁶

This Note argues that the United States Supreme Court should adopt a distinct constitutional standard for temporary, emergency child removal in complex cases that comports with Due Process by balancing parental liberty, the risk of error, and the government’s *parens patriae* interest in the health and welfare of children.¹⁷ The importance of a constitutional standard in complex cases stems from three main factors: streamlining and ensuring consistent results when parents of removed children file civil actions for deprivations of their rights by state actors,¹⁸ creating a Due Process standard that would apply to the states through the Fourteenth

14. Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REC. 1, 19-20 & nn.69-73 (2006), available at http://lawrecord.typepad.com/rutgers_law_record/files/Law_Record_Spring_Article_1_2006.pdf (citing clinical and academic studies for the proposition that effective collaboration between social workers and lawyers is rare but important to protect the state’s interest in the health and safety of children).

15. For the purpose of this Note, the term “complex cases” will mean cases in which parents and their children live confined with unrelated adults and strangers in exclusive communal living or “intentional community” situations that offer limited access to outsiders. “Complex cases” will not be used to describe those who simply share a home with an unrelated family, but those who intentionally choose communal living and seclude themselves from mainstream society for religious, philosophical, economic, or other reasons.

16. Kisthardt, *supra* note 14, at 21 (discussing social workers’ frustration, resentment, and alienation toward the adversarial legal process that limits their role in child removal decisions).

17. No legal scholarship covers the area of emergency removal of children from intentional communities, thus this Note will attempt to suggest and balance factors based on issues anticipated from or litigated in the *Texas* case. For a discussion of the rights of polygamist parents in light of their illegal relationships with one another rather than alleged mistreatment of their children, see R. Michael Otto, “*Wait til Your Mothers Get Home*”: *Assessing the Rights of Polygamists as Custodial and Adoptive Parents*, 1991 UTAH L. REV. 881.

18. 42 U.S.C. § 1983 (2006) (creating a right to file civil cases in federal court when a person acting “under color of any statute” causes the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws”).

Amendment,¹⁹ and preventing intentional communities from sheltering themselves in states with unclear standards for removal. The Court adopted a constitutional standard for permanent removal in traditional cases to resolve the first two of these issues;²⁰ in the same way, federal courts should recognize the essential interests at stake and announce a standard that is functional and predictable in complex cases.

This Note argues that courts should require a showing that children are in substantial danger of harm by a preponderance of the evidence in complex cases of temporary, emergency removal. Because of the imprecision and unpredictability of impending abuse in such cases, courts should not have to find exigent circumstances in order to warrant removal. By choosing to live in isolation from society and associate closely with child offenders, these parents present increased risks that courts must consider when ruling on the permissibility of a removal. If courts apply identical standards in traditional and complex cases, states will not be able to sufficiently protect children facing the unique risks of complex cases because the children grow up confined with predators outside the structure and protection of mainstream society. Part I of this Note summarizes the history of the FLDS sect and the contemporary prevalence of communal living groups, explains that the Eldorado incident is not the first time child removal issues have arisen, and explores Congress's recent commitment to fight crime occurring in these communities. Part II explains the rationale for instituting a federal standard for complex child removal that balances the weight of the government's *parens patriae* interest in the health and well-being of children against the fundamental right of parental liberty as it has evolved under the Court's Fourteenth Amendment jurisprudence. Part III describes the Supreme Court's balancing test for Due Process, uses this test to formulate a proposed standard, and then applies that standard to the government's 2008 raid in Eldorado. Finally, it concludes that states must elicit proof of a substantial risk of physical or sexual child abuse by a preponder-

19. U.S. CONST. amend. XIV, § 1.

20. See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (instituting "clear and convincing evidence" as the minimum standard of proof required to permanently terminate parental rights in any United States jurisdiction).

ance of the evidence in order to justify temporary removals in complex cases because the potentially devastating consequences of widespread, institutional abuse and the difficulty of investigation must be weighed fairly against the strong parental liberty interest.

I. HISTORY

After the Texas Supreme Court issued its ruling and FLDS children returned to their homes, United States Senator Harry Reid spoke about the presence of sect groups living on the fringes of society.²¹ He labeled such groups a form of “organized crime” and proposed before the Senate Judiciary Committee that federal and state law enforcement officials partner to end the illegal conduct of sects that have “wrongfully cloaked themselves in the trappings of religion.”²² In addition to child abuse, statutory rape, and bigamy, Senator Reid listed “welfare fraud, tax evasion, massive corruption and strong-arm tactics to maintain what they think is the status quo” as offenses committed by sect groups.²³ After making these assertions, he requested the creation of a task force to intervene.²⁴ Although religious sects and communal living groups may seem like a small problem in the United States, Senator Reid said the problems they present “deserve[] national attention and federal action.”²⁵ A closer examination reveals that intentional communities have presented reoccurring problems with unfortunate consequences.

A. FLDS

The FLDS sect did not formally or intentionally split from the Church of Jesus Christ of Latter-day Saints (LDS or Mormon church).²⁶ The LDS abandoned plural marriage in 1890,²⁷ under

21. See Senator: Polygamous Sects Are 'Form of Organized Crime,' CNN, July 24, 2008, <http://www.cnn.com/2008/CRIME/07/24/polygamy.hearing/index.html>.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. MARTHA SONNTAG BRADLEY, KIDNAPPED FROM THAT LAND 28 (1993).

27. *Id.* at 6.

heavy pressure from the United States government.²⁸ Over time, the rift within the LDS belief system grew, as small communities ignored the orders of the LDS hierarchy and clung to the practice of plural marriage.²⁹ Mainstream Mormon church leaders labeled these communities “fundamentalist”³⁰ and attempted to distinguish them from the public’s perception of the LDS.³¹

Congress’s initial attempt to criminalize polygamy was the Morrill Anti-Bigamy Act of 1862.³² This statute, however, did not significantly reduce LDS membership because the nation was preoccupied with the Civil War and the Act was difficult to enforce.³³ After the war ended and Americans turned their eye to protecting the “basic moral fiber” of the nation,³⁴ the Supreme Court’s ruling in *Reynolds v. United States*³⁵ upheld antipolygamy statutes and their punishments as constitutional.³⁶ Subsequent to this ruling, fervent enforcement led to arrests and prosecutions that left at least 1000 Mormons imprisoned and over 10,000 more disenfranchised by the end of the nineteenth century.³⁷ Wilford Woodruff succeeded Taylor in the office of LDS President,³⁸ and he issued a “Manifesto” commanding the faithful to obey “the law of the land” and terminate the practice of plural marriage.³⁹

28. *See id.* at 3-6.

29. *Id.* at 9.

30. *Id.* at 28.

31. *See id.* at 18 (noting that the LDS church changed its stance in two dramatically different phases: “first, its covert authorization of continued new marriages and then, after 1910, its harsh disassociation not only from new marriages but from its [originally] authorized post-1890 marriages [that] provided much of the impetus for the question to remain painfully open in the minds of many faithful Latter-day Saints”).

32. Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501 (1862).

33. BRADLEY, *supra* note 26, at 3.

34. *Id.* at 4.

35. 98 U.S. 145, 166-68 (1878).

36. *Id.* at 168 (holding that it was within Congress’s power to enact a statute criminalizing polygamy in the territories); *see also* BRADLEY, *supra* note 26, at 4-5 (discussing antipolygamy statutes from the late nineteenth century).

37. BRADLEY, *supra* note 26, at 5. These arrests overcrowded Arizona’s prisons, which led Mormon President John Taylor to suggest that polygamists flee to foreign countries to avoid stringent prosecution. *Id.*

38. *Id.*

39. *Id.* at 6.

Many Mormons believed this was apostasy, a concession with far too high a price, and refused to accept it.⁴⁰ They became the FLDS and moved to isolated communities in order to pursue what they believed was “the everlasting Gospel and the law of Plural Marriage.”⁴¹ Since then, authorities near FLDS communities have largely adopted “live-and-let-live attitude[s]” despite the FLDS blatantly violating statutes outlawing polygamy.⁴²

1. *Short Creek Raid*

On July 26, 1953, Arizona Governor Howard Pyle engineered a raid “to protect the lives and future of 263 children ... the product and the victims of the foulest conspiracy ... a community dedicated to the production of white slaves.”⁴³ This was not the first raid on FLDS sect members living in isolated polygamy in the Short Creek region.⁴⁴ It was, however, the first raid in which the government took custody of Short Creek’s children.⁴⁵

Utah and Arizona residents, unlike Texans following the Eldorado incident,⁴⁶ believed the 1953 intervention would actually save the state money.⁴⁷ Despite their geographic seclusion from society, FLDS members living in Short Creek evoked resentment from fellow citizens who both viewed polygamy as morally repugnant and harbored bitterness over the tax strain placed on them by the abundance of children in the FLDS compound.⁴⁸ Families living in the compound benefited from publicly-funded child support and education programs without contributing anything to the state’s

40. *Id.* at 19-20.

41. *Id.* at 28.

42. D. Michael Quinn, *Plural Marriage and Mormon Fundamentalism*, in *FUNDAMENTALISMS AND SOCIETY: RECLAIMING THE SCIENCES, THE FAMILY, AND EDUCATION* 240, 276 (Martin E. Marty & R. Scott Appleby eds., 1991).

43. See BRADLEY, *supra* note 26, at 112-13.

44. See, e.g., *id.* at 68-71 (detailing a March 7, 1944, raid on the Short Creek region).

45. In the first raid on Short Creek (1935), the government arrested six adult church leaders. *Id.* at 54. In the second raid (1944), the government arrested sixteen men and eight women. *Id.* at 70. In the 1953 raid, the government arrested thirty-six men and eight women, *id.* at 134, but also took custody of 153 children, *id.* at 137.

46. See Broughton, *supra* note 8.

47. BRADLEY, *supra* note 26, at 116.

48. *Id.*; see also *id.* at 148-52 (discussing public reaction to the raid).

purse.⁴⁹ With great encouragement from the local judge,⁵⁰ Governor Pyle convinced the Arizona legislature to appropriate funds for a full-scale investigation into the Short Creek polygamists.⁵¹

In order to gather sufficient evidence, Governor Pyle contracted with a detective agency from California.⁵² Investigators from the agency pretended to be a film crew interested in shooting a movie in the Short Creek region and took surveillance photographs of the community.⁵³ Believing that the evidence made a compelling case against the FLDS for unlawful cohabitation, Governor Pyle chose to act, even without support from neighboring Utah.⁵⁴

When the matters reached the courtroom, the state moved to take permanent custody of the children until a court resolved the legal proceedings against their parents.⁵⁵ For Arizona to gain permanent custody, the state had to prove that each child was “neglected, dependent or delinquent.”⁵⁶ Although the specifics of each case for the 263 children varied, the state’s argument consistently rested on social workers’ belief that “the morals of said children are endangered, and they are in danger of becoming law violators” if left with their natural parents.⁵⁷ Many potential witnesses declined to testify,⁵⁸ leading the Arizona Superior Court to conclude that “no one had presented sufficient information to justify removal” of the children from their families.⁵⁹ Thus, the 1953 raid ended with all the children removed by Arizona Child Protective Services officials returning to their parents—the same result as the 2008 Texas raid.

In fact, the 2008 Eldorado raid bears a striking resemblance to its 1953 Short Creek predecessor.⁶⁰ During each raid, state law

49. *Id.* at 116-18.

50. *Id.* at 117-18.

51. *Id.*

52. *Id.* at 119.

53. *Id.* at 119-20; *see also id.* at 131 (listing the charges against the fundamentalists as contained in the arrest warrants, including rape, bigamy, and polygamous living).

54. *Id.*

55. *Id.* at 156.

56. *Id.*

57. *Id.*

58. *Id.* at 156-57.

59. *Id.* at 157.

60. *See* Geoffrey Fattah, *Parallels to Short Creek Raid in 1953 Are Pointed Out*, DESERET MORNING NEWS, Apr. 10, 2008, at A4 (quoting author and professor Martha Sonntag Bradley’s assessment of the similarities between the Short Creek and Eldorado raids).

enforcement and social workers descended on each of the compounds in the early morning hours and left with hundreds of women and children.⁶¹ In both cases, accusations of widespread child abuse were aimed to raise popular support for the raids.⁶² Due to FLDS members' conservative, traditional dress, images of women and children being ushered out of the community appeared "almost the same as images from 1953."⁶³ Although FLDS leaders appear to have anticipated both raids, neither incident involved violent resistance.⁶⁴

Unfortunately for state officials, both raids led to powerful criticism of their ineffective strategies.⁶⁵ In 1953, all the women and children taken into custody by Arizona returned to their compound and, after two months' imprisonment, their husbands and fathers returned on bail for charges the state never pursued.⁶⁶

A case that arose from the 1953 raid sheds light on the extreme shift in judicial attitudes toward the removal of children.⁶⁷ Utah officials, who had not participated in the initial raid, took custody of a man's children living on the Utah side of the border after he was arrested by Arizona officials.⁶⁸ The Utah Supreme Court held that the children had been neglected and must be removed from their parents because, by raising them in a polygamous household, their parents had subjected them to "this illegal and immoral practice in action" and taught them that polygamy is "God's law and that it is above the law of man."⁶⁹ Based on this finding of a moral, not physical or emotional, risk to children, Utah permanently removed Black's children in 1955.⁷⁰ By 2008, the judicial opinion had shifted such that living behind a fence and mingling with suspected perpetrators of sexual offenses does not satisfy the

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *In re Black*, 283 P.2d 887 (Utah 1955).

68. *Id.* at 888.

69. *Id.* at 910-11.

70. *Id.*

conditions for temporary removal.⁷¹ FLDS officials consider the Short Creek raid a testament to their fortitude in the face of persecution, and allude to it with pride much the same way as Texans remember the Alamo.⁷²

2. *Eldorado Raid*

On Saturday, March 29, 2008, a Texas child protection hotline received a telephone tip from a female claiming to be “Sarah,” a married teenager living in the FLDS community at Zion Ranch in Eldorado, Texas.⁷³ “Sarah” told an operator that adult males living in the Zion Ranch Community regularly engaged in abusing teenage girls physically and sexually, and one adult male abused her on multiple occasions.⁷⁴ The Texas Department of Family and Protective Services responded, searched the premises, and interviewed its residents.⁷⁵ Department officials discovered several facts that led to their decision to remove more than 400 children from the Zion Ranch.⁷⁶ This information included: twenty females becoming pregnant before the age of legal consent; the theory that the ranch community actually consisted of “one household comprised of extended family subgroups;” and the lead investigator’s assessment that a “pervasive belief system” conditioned young girls to become willing victims of grown men.⁷⁷ Proceeding with these as their chief

71. *See In re Tex. Dep’t of Family and Protective Servs.*, 255 S.W.3d 613, 613-15 (Tex. 2008) (holding the Department’s allegations that a community had a culture of polygamy and of directing underage girls to enter unions with older men and bear children did not warrant a grant of emergency custody to the Department of the 468 children living in the community at a church-related ranch).

72. Fattah, *supra* note 60.

73. *In re Tex.*, 255 S.W.3d at 613.

74. *Id.*

75. *See In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *4 (Tex. App. 2008).

76. *Id.* at *2.

77. *Id.* at *1-2 (explaining in full their reasons for removal: “Interviews with investigators revealed a pattern of girls reporting that ‘there was no age too young for girls to be married’; Twenty females living at the ranch had become pregnant between the ages of thirteen and seventeen; Five of the twenty females identified as having become pregnant between the ages of thirteen and seventeen are alleged to be minors, the other fifteen are now adults; Of the five minors who became pregnant, four are seventeen and one is sixteen, and all five are alleged to have become pregnant at the age of fifteen or sixteen; The Department’s lead investigator was of the opinion that due to the ‘pervasive belief system’ of the FLDS, the male children are groomed to be perpetrators of sexual abuse and the girls are raised to be victims

arguments, Department officers went to court to defend their removal decision. Nonetheless, the Texas Supreme Court found that the facts shown by Department officials failed to state a case that warranted removal.⁷⁸ Echoing the lower Texas appellate decision, the Texas Supreme Court stated the Department failed to meet its burden of proof for removal under the applicable statute.⁷⁹ The court's ruling allowed lower courts to take alternative measures to ensure the children's safety and the investigation's success.⁸⁰ These measures included "an order 'restraining a party from removing the child beyond a geographical area identified by the court,'" "removal of an alleged perpetrator from the child's home," and "orders to assist the Department in its investigation."⁸¹ Elaborating on its holding more than the Texas Supreme Court did, the appellate court revealed that in order to justify removal, the Department would have needed to make specific showings of a propensity to subject children to physical or sexual abuse for each household within the ranch from which children were removed.⁸² After the Texas Supreme Court ruling, all the children were returned to the custody of their parents under guidelines similar to those recommended by the Texas Supreme Court, restricting the children's association with suspects.⁸³ Department officials sought foster care for eight of the children within two months because their parents failed to comply with the protective measures instituted by the court and allowed them to come into contact with suspected or charged sexual offenders.⁸⁴ Court proceedings are pending for twelve FLDS men

of sexual abuse; All 468 children were removed 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'; [and] Department witnesses expressed the opinion that there is a 'pervasive belief system' among the residents of the ranch that it is acceptable for girls to marry, engage in sex, and bear children as soon as they reach puberty, and that this 'pervasive belief system' poses a danger to the children" (footnotes omitted)).

78. See *In re Tex.*, 255 S.W.3d at 615.

79. *Id.* at 614-15 & nn.1-9 (quoting Texas Family Code Sections 262.105, 262.201(b)-(c), 261.303(a), and 261.3032).

80. *Id.* at 615.

81. *Id.* (footnotes omitted).

82. *In re Steed*, 2008 WL 2132014, at *1.

83. *State Requests Foster Care for 8 FLDS Children*, CNN, Aug. 5, 2008, <http://www.cnn.com/2008/CRIME/08/05/polygamy/index.html>.

84. *Id.*

arrested in conjunction with this investigation; charges include felony aggravated sexual assault, bigamy, tampering with evidence, and failure to report child abuse.⁸⁵

B. Modern Day Communal Living

Although it is difficult to track the number of nontraditional communities that currently operate within the United States (potentially leading to complex cases), a database lists 1201.⁸⁶ Seventy-five of these communities openly advertise teenagers (the most vulnerable population demographic in the FLDS case⁸⁷) among their numbers.⁸⁸

Though no one could seriously describe intentional communities as “pervasive” in any region, they have sustained a sizable and continuous population in the country for over a century, particularly in the southwest.⁸⁹ Brushes with the law have come along with this presence, the largest and most notorious being the raids and mass child removals in 1953 and 2008.⁹⁰ These large-scale attempts to bring communities into compliance with the state’s child protective interest have been discouraged by wasted time and money in failed raids. Still, federal lawmakers vow they will not allow frontier communities to persist with illegal behavior.⁹¹

85. Terri Langford, *8 More Indictments Issued in FLDS Polygamist Case*, HOUS. CHRON., Nov. 13, 2008, at B3. The first of the twelve charged, Jessop, was convicted of sexual assault of a child and sentenced to ten years imprisonment. At his trial, new insight into the treatment of children at the Zion Ranch developed through testimony that the victim in this case was one of the defendant’s nine wives, and that she was originally assigned to the defendant’s brother before being “reassigned” to Jessop.” Eleven more trials will follow. Associated Press, *Polygamist Sect Member Sentenced to 10 Years*, AUSTIN AM.-STATESMAN, Nov. 11, 2009, www.statesman.com/news/content/news/stories/local/2009/11/11/1111jessop.html.

86. Intentional Communities Database, <http://icdb.org/> (last visited Nov. 20, 2009).

87. See *In re* Tex. Dep’t of Family & Protective Servs., 255 S.W.3d 613, 613 (Tex. 2008) (discussing the Texas Department of Protective Services’ concern that the FLDS community had a culture of directing teenage girls to enter spiritual unions with older men and have children).

88. *Id.*

89. See Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 353-54 (2003) (discussing the FLDS community population in the southwest).

90. Fattah, *supra* note 60.

91. Senator: *Polygamous Sects Are ‘Form of Organized Crime,’ supra* note 21.

II. THE NEED FOR A FEDERAL STANDARD

As federal task forces seek to intercede in the “organized crime” that intentional communities allegedly perpetuate,⁹² federal and state agents must have an understandable framework through which to evaluate the data they gather. Successfully and predictably determining which situations warrant emergency removal and when to seek court approval before intervening will be essential to the success of this venture. More complex cases will develop as this initiative gets underway and parents will likely invoke their Due Process rights in an attempt to avoid the ramifications of emergency removal.⁹³ Instituting a federal standard to clarify how courts may

92. *Id.*

93. Parents may also attempt to invoke First Amendment and Equal Protection rights to stop state intervention. Those challenges, however, are outside the scope of this Note.

For a description of Equal Protection challenges in traditional child removal cases, see Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1, 31-34 (2001).

Communal living groups are not a strictly suspect or suspect class under current Supreme Court case law and are not likely to become one because the Court only affords this protection when a class “is ... saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (describing the criteria for finding a strictly suspect class and finding that social economic class does not qualify). States traditionally leave intentional communities to their own devices and they do not face extensive government interference or discrimination. See Amnon Lehavi, *How Property Can Create, Maintain, or Destroy Community*, 10 THEORETICAL INQUIRIES L. 43, 67-68 (2009) (noting that intentional communities need isolation from society in order to survive).

Religious sects, particularly the FLDS, are highly likely to lodge complaints that their First Amendment rights have been violated when facing the removal of their children en masse. Cf. Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 663 (2006) (noting the free exercise rights of noncustodial parents). However, the First Amendment does not unconditionally allow all activity guised as the practice of “religion.” See *supra* note 35 (Supreme Court upheld restriction on polygamy). The Court’s First Amendment jurisprudence allows the government to regulate the practice of religion when the government demonstrates a “compelling governmental interest” and vindicates that interest by employing the “least restrictive means.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (holding the government must show a compelling interest in order to restrict the practice of religion that citizens otherwise enjoy). Because courts have already shown deference to the major societal goal of protecting children from sexual abuse, they should find it is a compelling government interest. Mary Ellen Reilly, *Expert Testimony on Sexually Abused Child Syndrome in a Child Protective Proceeding: More Hurtful than Helpful*, 3 CARDOZO PUB. L. POL’Y ETHICS J. 419, 454 (2005) (stating that “courts

balance the Due Process rights of parents and children would not only make removal determinations more expedient but also would likely follow precedent. The Supreme Court has already implemented a federal, constitutional standard determining the standard of proof required in all *permanent* child removals.⁹⁴ Recognizing the necessity of a minimum federal standard to protect parental rights against excessive state action in permanent removals logically calls for the creation of a similar constitutional minimum for *temporary* removal. Some may argue that federal courts should leave temporary removal standards to local authorities because the rights at stake do not have as great of consequences. Temporary removal could, however, undermine a parent's relationship with his or her child, cause resentment on the part of the child who fails to understand his or her plight, or lead to victimization in the state's custodial facilities.⁹⁵ This standard would not instruct the government when it must act, but it would merely solidify when temporary intervention is constitutionally permissible. Neglecting to create a federal standard fails to balance adequately both the state's "urgent interest" in the welfare of children and the effect of nonintervention on abused or neglected minors who the state cannot expect to serve as their own advocates.⁹⁶ By ignoring widespread abuse occurring in small communities outside the realm of mainstream society, the state implicitly condones these abusive practices and fails to vindicate the rights of its most dependent citizens. A federal standard will ensure both parents and children have their rights guarded in a clear, consistent, and predictable manner. Parental rights are not absolute even in traditional cases,⁹⁷ and complex cases must lead to closer scrutiny by the state because of their isolation from society and potential to hide long-standing instances of abuse.

... use ... a less stringent evidentiary standard on the grounds that preventing sexual abuse is a major societal and judicial concern").

94. *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (instituting "clear and convincing evidence" as the minimum standard of proof required to permanently terminate parental rights in any United States jurisdiction).

95. *Id.* at 789 n.15 (Rehnquist, J., dissenting) (noting that unnecessary stays in foster care may have "deleterious effects" on children's development into responsible, productive citizens).

96. *Id.* at 766.

97. *See Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987).

A. Relevance of a Federal Standard

Opponents of a federal standard will likely raise the objection that the formulation of a federal standard would not serve a significant purpose. Child removal involves state officials enforcing state law, thus the issue would rarely, if ever, reach federal court. This objection fails to consider civil actions brought under 42 U.S.C. § 1983 and the Supreme Court's ultimate jurisdiction over federal questions arising in state courts.

Originally known as the Ku Klux Klan Act, Congress enacted § 1983 to protect oppressed minorities from discriminatory state government officials acting "under [the] color of" state law.⁹⁸ The statute's text does not restrict its applicability to racially discriminatory practices but also protects against "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."⁹⁹ Though commonly used as the launching point for civil actions alleging state discrimination against members of protected classes, parents frequently invoke § 1983 after state officials remove their children without a hearing.¹⁰⁰ These claims focus on the parents' allegation that state social workers have infringed their fundamental right of parental liberty without providing a proper venue to contest the propriety of such action.¹⁰¹ In these actions, federal courts may not only award monetary damages to parents when states have violated their rights, but also formulate appropriate equitable relief, including returning removed children to their parents.¹⁰² Following the Eldorado Raid, decisions by Texas appel-

98. 42 U.S.C. § 1983 (2006); *see also* Darrell A. H. Miller, *White Cartels, The Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 *FORDHAM L. REV.* 999, 1012 (2008) (describing the introduction and early application of 42 U.S.C. § 1983).

99. *Id.*

100. *E.g.*, *Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003); *Roska v. Peterson*, 304 F.3d 982 (10th Cir. 2002); *Mabe v. San Bernadino County Dep't of Pub. Soc. Servs.*, 237 F.3d 1101 (9th Cir. 2001); *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999); *Jordan v. Jackson*, 15 F.3d 333 (4th Cir. 1994) (ruling on temporary removal cases brought to federal court under § 1983).

101. *See, e.g.*, *Roska*, 304 F.3d at 993; *Mabe*, 237 F.3d at 1104; *Jordan*, 15 F.3d at 337.

102. *See, e.g.*, *Coe v. Ziegler*, 657 F. Supp. 182, 183, 187 (S.D. Ohio 1987) (ordering injunctive relief for parents who were "under a present threat of having their children removed from their legal and physical custody," contingent on the juvenile court system failing to comply with the parent's request within twenty days); *see also* 42 U.S.C. § 1983 (2006) (including as a possible remedy a "suit in equity or other proper proceeding for redress").

late courts rendered filing federal claims unnecessary, but counsel for the FLDS parents likely would have advised their clients to seek relief in federal court if their state claims had failed, as many parents in traditional cases have.

In addition, any state court of last resort decision that rests on an interpretation of the United States Constitution may be appealed to the United States Supreme Court.¹⁰³ States may argue that their statutes provide independent and adequate state grounds, but when the statutes provide for removal without a prior court proceeding, parents raise valid constitutional concerns.¹⁰⁴ The losing party could appeal the court's decision requesting the Supreme Court to weigh due process rights of parents against the state's own interests. Though parents in complex cases have not chosen this route, they could choose to assert their due process rights rather than argue the semantics of the state's removal statute.¹⁰⁵ If they did so, the highest state court's holding could be appealed by the losing party and would reach the Supreme Court for a final holding on the constitutional protection of parental rights against temporary, emergency removal.¹⁰⁶ The Supreme Court could then have the chance to decide the extent of constitutional protections, a decision that would bind all states to a minimum due process standard.

Although much litigation in complex cases has arisen out of state court findings (especially those in Texas and Utah),¹⁰⁷ § 1983 and the presentation of federal questions in state court both point to the fact that a federal standard would serve a significant purpose. In light of these inroads to federal court, the Supreme Court's decision to set a minimum standard for permanent removal seems reasoned

103. 28 U.S.C. § 1257 (2006) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.").

104. *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) (holding that "[w]e are, of course, bound to accept the interpretation of [State] law by the highest court of the State").

105. *E.g., Doe*, 329 F.3d at 1293 (discussing parents' argument that a Florida statute that authorized emergency removal of their children was unconstitutional under the Fourteenth and Fourth Amendments).

106. 28 U.S.C. § 1257.

107. *E.g., In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613 (Tex. 2008); *In re Black*, 283 P.2d 887 (Utah 1955).

and supports a similar standard for temporary removal in complex cases.

B. Parens Patriae

According to the *parens patriae* interest, the state has standing to intercede on behalf of its citizens and secure justice for the most defenseless in cases in which they face a “legal disability.”¹⁰⁸ States can bring *parens patriae* actions in two categories: “First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general [and] [s]econd, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”¹⁰⁹ All *parens patriae* litigation has emerged from these two categories.

Courts have found a state’s interest in the health and well-being of children fits within the first category. “[T]he state, as *parens patriae*, has a significant interest in protecting children from abuse and maltreatment ... [T]he unfortunate reality [is] that children are often victimized, and that the state has a strong interest in protecting them from the infliction of physical harm by those charged with their care.”¹¹⁰ Through this established interest, states regularly intercede on behalf of minors in traditional child removal cases.

The Supreme Court affirmed the strength of this interest in *Prince v. Massachusetts*, stating “the state as *parens patriae* may restrict the parent’s control.... Its authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience.”¹¹¹ This holding clarifies that the state may still restrict parental liberty, even combined with enumerated First and Fourteenth Amendment rights, to protect minors from the ill effects of their parents’ spiritual persuasion.¹¹²

108. BLACK’S LAW DICTIONARY 1144 (8th ed. 2004).

109. *Alfred L. Snapp & Son, Inc. v. Puerto Rico* 458 U.S. 592, 607 (1982).

110. *See Valmonte v. Bane*, 18 F.3d 992, 1003 (2d Cir. 1994) (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982), for the strength of the “state’s interest in protection of children”).

111. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (holding that parental liberty does not extend to a mother dispatching her daughter to distribute religious bulletins proclaiming the faith of Jehovah’s Witnesses).

112. *See id.*

The doctrine of *parens patriae* provides the legal framework for the state to intercede on behalf of abused minors, individually or en masse, and it is the legal basis for creating a lower standard in complex cases.

C. Finding Parental Liberty in Substantive Due Process

In contrast, parents' interest in the freedom to raise their children as they see fit is protected by the Constitution.¹¹³ In a series of cases starting in the early twentieth century, the Court found parental liberty among the fundamental rights that could not be removed under the Fourteenth Amendment without due process of law.¹¹⁴

1. Meyer v. Nebraska, Pierce v. Society of Sisters

Parens patriae is an extremely powerful and potentially dangerous tool of the state.¹¹⁵ If allowed to exist unchecked, the power could provide the groundwork for any number of overbearing and controlling state actions under the color of the state's urgent interest in child welfare.¹¹⁶ Although neither the Constitution nor the Bill of Rights spells out a specific fundamental right to parental liberty that checks *parens patriae*, the Supreme Court has read parental liberty as a fundamental freedom that cannot be removed without due process.¹¹⁷ The Court first found this parental right in a pair of cases arising early in the twentieth century, both of which involved parental decisions regarding education.¹¹⁸

113. *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923); *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 531-35 (1925).

114. *See Pierce*, 268 U.S. at 535.

115. *See supra* notes 111-12; *see also* Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 ILL. B.J. 684, 690 (1998).

116. *See Brown, supra* note 13, at 941 (detailing the history of America's use of the *parens patriae* doctrine, and asserting that in the nineteenth century, "America's *parens patriae* interest in children was a function of crime-control, not the well-being of children" (footnote omitted)).

117. *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399; *see also* Katharine A. Higgins-Shea, Note, *On the Clock: Should State Law Require Child Welfare Workers To Consider Whether There is Sufficient Time To Obtain Judicial Authorization When Effecting Emergency Removals of Children from Their Parents?*, 38 SUFFOLK U. L. REV. 147, 150-53 (2004).

118. Higgins-Shea, *supra* note 117, at 150-51.

In *Meyer v. Nebraska*, the Court held that Nebraska's refusal to include a foreign language in public school curriculum was "arbitrary and without reasonable relation to any end within the competency of the State."¹¹⁹ The Court construed the State's action as a violation, not of students' rights as the ones who wished to enroll in the banned classes, but of the parents' rights to determine freely their children's curriculum as implied in the "liberty" of the Fourteenth Amendment.¹²⁰ This holding opened the door for parents to invoke their rights to determine their children's upbringing, without addressing issues of neglectful or abusive parenting.

In *Pierce v. Society of Sisters*, the Supreme Court extended the fundamental right found in *Meyer* to forbid states from forcing children to attend public school, because doing so "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children."¹²¹ The Supreme Court applied a rational basis test, finding that standardizing children by indoctrinating them all at the same school was not a "purpose within the competency of the State" because "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹²² The Court considered "custody, care, and nurture of children" as the rights of a parent.¹²³

These two cases marked milestones for parental liberty and autonomy to determine the best interests of their children, recognizing parental liberty as a fundamental right protected by due process rights.¹²⁴ The Court maintained a rational basis test, however, requiring only a reasonable relation to a proper state objective to defeat parental liberty and did not address concerns raised by unfit parenting.¹²⁵ *Meyer* and *Pierce* both occurred within the context of parents actively pursuing what they believed was best for their children. Neither case addressed the issue of protections for parents accused of abusive or neglectful treatment of their children. In this

119. *Meyer*, 262 U.S. at 403.

120. *Id.* at 400-03.

121. *Pierce*, 268 U.S. at 534-35.

122. *Id.* at 535.

123. Higgins-Shea, *supra* note 117, at 151.

124. *Id.* at 150-51.

125. *Pierce*, 268 U.S. at 535; *Meyer*, 262 U.S. at 399-400.

era, the Supreme Court is likely to lower the standard of proof for temporary child removal in complex cases if such a case reaches Supreme Court review.

2. *Prince v. Massachusetts*

In *Prince v. Massachusetts*, the Court finally addressed the interplay of *parens patriae* and parental liberty in a case that involved detrimental parental conduct (as opposed to parental challenges to state educational policies).¹²⁶ In this case, an aunt provided her niece, of whom she was the custodian, with Jehovah's Witness magazines knowing that her niece would sell them illegally in the street.¹²⁷ Holding that the state had a valid *parens patriae* interest in restricting the conduct that trumped the aunt's custodial and religious freedoms, the Supreme Court proclaimed that the "state cannot enter" the "private realm of family life," but that "the family itself is not beyond regulation in the public interest."¹²⁸ Thus, the Court allowed the state to prosecute the aunt for her conduct, finding that a guardian's rights do not override the *parens patriae* interest of the state simply because they involve religion.¹²⁹

Although *Prince* may stand for the proposition of privacy in family life and an argument can be made that the Supreme Court only allowed the guardian to be penalized because of the public nature of the magazine distribution, this case clearly places qualifications on that privacy.¹³⁰ The *Prince* Court realized the danger in allowing children to participate unconditionally in the religious practices of their parents or guardians, especially those that require interaction with people outside the family unit, and would not hesitate to allow states to regulate private and reclusive societies when religious liberty cloaks child abuse and molestation.¹³¹ Creating a lower standard for state intervention in complex cases squares with the Supreme Court's holding in *Prince*.

126. *Prince v. Massachusetts*, 321 U.S. 158, 159-60 (1944).

127. *Id.*

128. *Id.* at 166.

129. *Id.* at 166-67, 170.

130. *Id.* at 166.

131. *See id.* at 166, 169-70.

3. *Santosky v. Kramer*

Prince dealt with state punishment of a parent or guardian, but the punishment did not rise to the level of removing the parent's custody rights.¹³² As of the early 1980s, the Supreme Court had not dictated a federal standard for balancing *parens patriae* and parental liberty.¹³³ In 1982, the Supreme Court dealt with the issue of terminating parental rights in the case *Santosky v. Kramer*.¹³⁴ New York enacted a statute allowing the state to gain permanent custody of children if it made a showing by "a fair preponderance of the evidence" that the children were "permanently neglected."¹³⁵ The Supreme Court found, however, that the risk of inappropriately taking custody of nonneglected children dictated a higher standard.¹³⁶ When moving to terminate the natural parents' rights, New York emphasized observations of parent/child interaction that occurred while the children were in foster care—visits the state said were "devoid of any real emotional content" and that the parents demonstrated a lack of ability to "plan[] for the future of the[] children."¹³⁷ These observations did not amount to sufficient evidence for the Court to allow permanent removal.¹³⁸

The Supreme Court found that states could not invoke the *parens patriae* interest to rationalize permanently eliminating parental liberty with a lowered standard of proof.¹³⁹ The Court held that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."¹⁴⁰ Thus, the Court created a federal standard of proof for permanent removal.

Significantly, the Court distinguished temporary removal from permanent removal of parental custody.¹⁴¹ The Court left undis-

132. *See id.* at 166.

133. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

134. *Id.*

135. *Id.* at 747.

136. *Id.* at 747-48.

137. *Id.* at 751-52.

138. *Id.* at 747-48.

139. *Id.* at 747-48, 758.

140. *Id.* at 747-48.

141. *Id.* at 777-80.

turbed New York's temporary removal based on the appearance of neglect, allowing the State to remove, rehabilitate, and then reunite the children with their parents after it was satisfied that the parents were fit.¹⁴² By doing so, the Supreme Court, unlike the Texas Supreme Court, recognized the gravity of an error in a permanent removal decision as far greater than that in a temporary removal.¹⁴³ The *Santosky* model, which advances the importance of immediate safety and protection of children before ensuring that they reunite safely with their parents, provides an example of how courts must treat complex cases.

4. *Troxel v. Granville*

A dispute over the visitation rights of third parties helped the Court define the weight given to Due Process claims concerning the infringement of parental liberty. In *Troxel v. Granville*, paternal grandparents claimed a right to extend their hours of visitation with their grandchildren.¹⁴⁴ State law in Washington allowed third parties to petition state courts for the visitation rights of any child, even if the child's parent objected.¹⁴⁵ The Troxels' son passed away and their grandchildren's mother restricted the grandparents' opportunity to spend time with their grandchildren.¹⁴⁶ Granville, the mother, stated that her preference and opinion of the best interests of her children should outweigh the grandparents' rights.¹⁴⁷

The *Troxel* Court held that parental liberty in the care and custody of one's children must be afforded "at least some special weight."¹⁴⁸ This "weight" led the Court to decide that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because

142. *Id.* at 748-52.

143. *See id.* *But see In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *3 (Tex. App. May 22, 2008).

144. 530 U.S. 57, 60-61 (2000) (reviewing whether the children's mother could limit the grandparents to one visit a month but not eliminate their rights of visitation completely).

145. WASH. REV. CODE § 26.09.240(1) (2009), *invalidated by In re Parentage of C.A.M.A.*, 109 P.3d 405 (Wash. 2005); WASH. REV. CODE § 26.10.160(3) (2009).

146. *Troxel*, 530 U.S. at 60-61.

147. *Id.* at 69.

148. *Id.* at 70.

a state judge believes a ‘better’ decision could be made.”¹⁴⁹ Rather, in order to substitute the court’s judgment for that of a fit parent, the decision that the court favors must be imposed only if it outweighs the decision of the parent by a substantial amount; additional weight is given to parental judgment under the presumption that parents know best how to vindicate the best interests of their children.¹⁵⁰

Throughout *Troxel*, the Supreme Court continued to distinguish those parents that benefit from this presumption as “fit” and “adequate.”¹⁵¹ The Court even began its analysis with the assertion that “the Troxels did not allege, and no court has found, that Granville was an unfit parent.”¹⁵² The Court did not state what presumption, if any, is given to parents alleged to be unfit, but its constant assertion of the fact that Granville was fit makes it clear that unfit or allegedly unfit parents do not benefit from the same presumption.¹⁵³ This presumption would not negatively affect a decision to form a lower federal standard of proof applicable in complex cases. The fact that the Court saw such a distinction between the rights of fit and unfit (or even allegedly unfit) parents suggests that the Court would favor a lowered federal standard or presumption for parents living in intentional communities with suspected child abusers.

5. Circuit Split over Temporary Emergency Action

In modern American culture, citizens often take for granted the fundamental right to parental liberty, perceiving it as equivalent to

149. *Id.* at 72-73 (disapproving of the Superior Court’s statement, “I look back on some personal experiences We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out”).

150. *Id.* at 70.

151. *Id.* at 67-68.

152. *Id.* at 68.

153. *Id.* at 67-70, 72 (“Accordingly, so long as a parent adequately cares for his or her children, (*i.e.*, is fit), there will normally be no reason for the State to interject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”).

the Bill of Rights.¹⁵⁴ This modern conception makes reviewing the Supreme Court's recent extension of parental liberty highly important. Parental liberty is often extended to lengths that are beyond the limits that the Court has expressed, such as the temporary custody of children whose parents are accused or suspected of abusing their children or allowing them to be abused. The Court has not made it clear in previous cases that allegedly unfit parents have a fundamental interest in constant, uninterrupted care and custody of their children. The Court has certainly not stated that parents who present risk factors that indicate the probability of abuse and neglect retain this fundamental right.

In the line of cases examined thus far, the Supreme Court has made definitive statements about parents on each end of the parental spectrum. It has found a fundamental right of liberty to protect the decision making of those who are presumptively fit.¹⁵⁵ For parents in danger of permanently losing care and custody of their children due to repeated accusations of abuse or neglect, the Court has enacted a heightened standard of proof.¹⁵⁶ The United States Courts of Appeals have examined a third variety of cases, those where only temporary custody measures are at stake, and have arrived at varying conclusions.¹⁵⁷

None of the United States Courts of Appeals have fashioned a precise standard for temporary removal in the way the Supreme Court has for permanent removal.¹⁵⁸ They have, however, examined whether child protection officials must first seek court approval of proposed temporary intervention by attaining a warrant or court order before removing children.¹⁵⁹ The majority of appellate courts

154. See, e.g., Free the FLDS Children-AKA The Freedom Liberty Defenders Society, <http://www.flds.ws/> (last visited Nov. 20, 2009) (purporting to defend "Due Process, Religious Liberty, Human Rights, [and] Constitutional Rights" in advocating for total parental liberty in FLDS communities).

155. E.g., *Troxel*, 570 U.S. at 68-70.

156. E.g., *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

157. For the courts of appeals' various opinions on temporary removal proceedings, see *Doe v. Kearney*, 329 F.3d 1286, 1295 (11th Cir. 2003); *Roska v. Peterson*, 304 F.3d 982, 993 (10th Cir. 2002); *Mabe v. San Bernadino County Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1108-09 (9th Cir. 2001); *Tenenbaum v. Williams*, 193 F.3d 581, 607 (2d Cir. 1999); and *Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994).

158. See *Santosky*, 455 U.S. at 477-78 (standard for permanent removal).

159. See *supra* note 157.

hold that “removal of children from the custody of their parents in emergency circumstances without judicial authorization” is allowed regardless of whether the state makes a specific finding that there is “sufficient time to obtain judicial authorization.”¹⁶⁰ They have held that the risk of harm to children, combined with the *parens patriae* interest, outweighs parental liberty in close cases where abuse or neglect are alleged.¹⁶¹

By favoring the *parens patriae* interest and deciding in favor of protection over court process when children are in imminent risk of harm, federal appellate cases suggest that these courts would look favorably on removal in complex cases.¹⁶² From these holdings it seems likely that the majority of federal appellate courts would approve a “preponderance of the evidence” standard for removal in emergency or imminent risk situations and these courts would not require a finding that there existed insufficient time for preintervention process.¹⁶³ A Supreme Court decision holding time inessential as a factor in complex cases would clarify the proper balance of the fundamental interests at stake in these cases and would provide a clear mandate for child protective service professionals.

III. FORMULATING AND APPLYING THE STANDARD

To determine whether the evidence presented warrants the removal of children in complex cases, courts should employ a “preponderance of the evidence” test that probes whether it is more likely than not that children are in serious danger, without at-

160. Higgins-Shea, *supra* note 117, at 157 (citing *Hollingsworth v. Hill*, 110 F.3d 733 (10th Cir. 1997) and *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000)). *But see Tenenbaum*, 193 F.3d at 593-95; *Mabe*, 237 F.3d at 1106, 1108-09 (requiring a court finding that no sufficient time existed to obtain judicial authorization prior to the removal).

161. *See supra* note 160.

162. *See supra* note 160. A warrant is not necessary for temporary removal of children from dangers in the home, and thus the majority of courts have decided to place the risk of error on the parents. Maintaining the same level of caution in regard to the safety of children, it is likely that courts would not require a warrant or a finding of insufficient time to obtain one to justify removal in complex cases.

163. *See Santosky*, 455 U.S. at 747-48, 758, 764-66, 769-70. When striking down the preponderance of the evidence standard for parental rights termination proceedings, the Court emphasized the severe nature of permanent removal. The Court noted New York’s temporary removal procedure and did not question the authority or justification for state officials to intercede temporarily. *Id.* at 748.

tempting to embed a determination of “sufficient time” that would confuse the issues and force courts to rule on matters of speculation. In order to ensure that both the state’s *parens patriae* interest and parental Due Process rights receive protection, the Court should neither lower the standard below a preponderance of the evidence nor heighten scrutiny to the clear and convincing evidence standard.

A. Three Factor Due Process Test

When faced with cases that present a conflict between important governmental interests and recognized Due Process rights, courts must evaluate the weight of each interest. This creates a fluid process that at times seems unpredictable.¹⁶⁴ In order to fashion a workable and more predictable standard, the Supreme Court has stated certain factors to weigh when determining such cases.¹⁶⁵ The three factors that courts currently weigh in determining whether a state practice violates parental Due Process are:

[f]irst the private interest that will be affected by the official action; [s]econd the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional ... procedural safeguards; and finally the Government’s interest, including the ... fiscal and administrative burdens that the additional or substitute procedur[es] would entail.¹⁶⁶

Neatly isolating the issues involved in child removal, especially in complex cases, proves difficult and frustrating, but finding the best way of separating them serves as a first step toward making sense of complex cases. Addressing the factors in the order presented above, courts will consider the parents’ interest first, then the risk of error along with possible alternatives, and lastly the cost to the government.¹⁶⁷ Both the financial cost and cost to the govern-

164. See Higgins-Shea, *supra* note 117, at 152-53 (“Due process is a flexible concept ... there are no fixed or rigid requirements in order to satisfy it.”).

165. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1975).

166. *Id.* at 335.

167. *Id.*

ment's interests, for example, the *parens patriae* interest, will be addressed in this Section.

1. Weight of the Parents' Interest

Parents who defend their rights in complex cases maintain a strong interest in retaining custody of their children.¹⁶⁸ Often their unique belief system has caused them to raise their children in a sheltered and secluded manner, one that does not translate well to foster care after removal.¹⁶⁹ These parents believe they are seeking the best for their children by guiding them in stringent religious observance and have cultivated close relationships that children depend on emotionally and psychologically.¹⁷⁰ This reliance and the potential detriment caused by its disruption, though difficult to quantify neatly, weighs strongly in favor of maintaining a standard that prevents careless and baseless removal.

The parents' choice to continue living in secluded communities, however, cuts two ways. Parents must consider that literally fencing themselves off from interaction with society makes unobtrusive investigation of alleged abuse impossible and, despite the difficulty of investigation, the state maintains a strong interest in preventing such abuse. Although parental belief systems alone are not sufficient to initiate removal proceedings, belief systems may lead parents to continue to place their children at risk because they remain loyal to their perception of a higher law and do not see the sexual practices of men in their community as harmful to children.¹⁷¹ Thus, there is a greater logical link between the belief system of the community and revictimization of children than the Texas Court of Appeals found. As the proceedings in Texas have

168. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *1 (Tex. App. May 22, 2008) (stating that emergency, temporary removal, including removal from a complex community, is an "extreme measure" that courts can only justify when "the circumstances indicate ... the need for protection of the children is so urgent that immediate removal of the children from the home is necessary").

169. Terri Langford, Richard Stewart & Janet Elliot, *Polygamist Sect Children Present a Cultural Challenge for Foster-Care Facilities*, HOUS. CHRON., Apr. 25, 2008, at A1 (describing attempts by foster parents to relate to the FLDS children).

170. *E.g.*, SONNTAG BRADLEY, *supra* note 26, at 110-11 (giving an example of a parent-child relationship in a polygamous home).

171. *In re Steed*, 2008 WL 2132014, at *3.

demonstrated, familial bonds in complex cases run deep and mothers may disrespect court orders designed to prevent further abuse.¹⁷²

Certainly the parental interests in the *Texas* case were very strong, if not fundamental. The rights under consideration, however, are temporary custody rights, not permanent ones.¹⁷³ Although parents and their advocates may advance an argument that parental rights have not been sufficiently protected under this standard, the difference between permanent and temporary removal warrants lowering the standard.¹⁷⁴ A firm “preponderance of the evidence” standard, one that requires that children “more likely than not” are in danger before removal is warranted, would satisfy this purpose.

2. Risk of Error and Alternative Measures

The risk of potential errors weighs heavily on both sides. Certainly foster care is not ideal and no child will view separation from his or her parents as a pleasant occurrence, but the risk of leaving children in contact with abusive or neglectful parents and community members may have even more devastating results.¹⁷⁵ One author has argued that courts should not remove children without prior approval (in the same way that adults are civilly committed) because “adults—even those suspected of mental illness—are generally better able to care for themselves than are children.”¹⁷⁶ “[P]ain inflicted on innocent parents when children are wrongly removed greatly exceeds the harm caused by wrongful arrests and commitments of adults,”¹⁷⁷ “modern definitions of child

172. See *supra* note 77 and accompanying text; see also *State Requests Foster Care for 8 FLDS Children*, *supra* note 83.

173. *Nicholson v. Scopetta*, 344 F.3d 154, 172 (2d Cir. 2003) (citing *Tenenbaum v. Williams*, 193 F.3d 581, 600-01 (2d Cir. 1999)) (restating the principle that “brief removals generally do not rise to the level of a substantive due process violation, at least where the purpose of the removal is to keep the child safe during investigation and court confirmation of the basis for removal”).

174. *Id.*

175. See, e.g., *Brown*, *supra* note 13, at 925 n.75 (describing the poor conditions in foster homes).

176. *Id.* at 970.

177. *Id.*

abuse tend to be fluffy and vague,”¹⁷⁸ and “removal carries with it a large measure of moral approbation.”¹⁷⁹ The fragility of children and the potential mental anguish of mothers in the community subsequent to a false removal strongly reaffirm that states cannot take removal lightly, even if temporary.

The fact that children are vulnerable weighs more strongly toward the conclusion that they should be removed. Sexually Abused Child Syndrome is a medically recognized mental condition brought on by the infliction of sexual abuse on children, and it manifests itself in many ways.¹⁸⁰ Leaving children in situations in which the preponderance of the evidence indicates ongoing institutional abuse will likely lead to permanent damage to their mental health and stability.

Texas’s appellate courts presumably believed that protective measures will sufficiently protect children.¹⁸¹ Returning children to their mothers and asking their mothers not to return to their loved ones proved unrealistic.¹⁸² Another alternative—removing adult parents, suspected of abuse, from their homes and taking them into custody to prevent them from returning into contact with their children—would constitute a seizure under the Fourth Amendment.¹⁸³ In order to sustain a seizure and not face civil rights lawsuits, law enforcement officials would need probable cause.¹⁸⁴ Yet, the difficulty of investigation, lack of cooperation by fellow

178. *Id.*

179. *Id.*

180. Reilly, *supra* note 93, at 436 (“Sexualized behavior ... is the most commonly cited symptom of sexual abuse. Other symptoms frequently attributed to sexually abused children include ‘impaired trust, withdrawal, depression, guilt, shame, anxiety, and hyper vigilance.’” (footnote omitted)); *see, e.g.*, *Gates v. Tex. Dep’t of Protective & Regulatory Servs.*, 537 F.3d 404, 429 (5th Cir. 2008) (noting that imminent danger of sexual abuse may justify seizing a child from his parents without a warrant); *Gottlieb v. County of Orange*, 84 F.3d 511, 520 (2d Cir. 1996) (holding that an objectively reasonable basis for believing sexual abuse occurred justified an immediate removal from the child’s home without court order).

181. *State Requests Foster Care for 8 FLDS Children*, *supra* note 83 (describing restrictions such as requiring mothers of “children who lived in a home with a man who married underage girls or agreed to an arranged marriage of an underage daughter ... to keep the children away from that man”).

182. *Id.* (stating that Department officials reinitiated custody proceedings against the parents of eight children within two months of the children’s return because of the parents’ refusal to comply with these protective measures).

183. U.S. CONST. amend. IV.

184. *Id.*

members of the community, and the scale of the investigation would make it impossible to remove all potential perpetrators and ensure child safety.¹⁸⁵ Seizing parents with probable cause, instead of removing children under the state's *parens patriae* interest, is simply not a tenable alternative in complex cases.

The likelihood of abuse and the potentially lingering consequences outweigh the risks associated with temporary removal as long as the risk is shown to be serious and substantiated by a preponderance of the evidence standard.

3. Costs to the Government

There are a variety of costs to the government associated with removal. Certainly the financial costs of removal can be extremely steep, especially in complex cases in which dozens or even hundreds of children may have to be transported, fed, and sheltered.¹⁸⁶ Coupled with the cost of court proceedings and parental appeals, the state may impinge both its budget and reputation (if the removal is found to be unwarranted).¹⁸⁷ On the other hand, a state that allows mass child abuse to continue uninterrupted in complex communities will also damage its reputation, lessen its *parens patriae* interest in children and their future, and face the possibility of a steep tax burden.¹⁸⁸ Overall, when the evidence gathered suggests that children of a complex community "more likely than not" are suffering abuse, not intervening is arguably more costly to the government than intervening.

In order to trigger the government's *parens patriae* interest, the court must find "some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse."¹⁸⁹ In the FLDS cases, or similar complex

185. See Corrie MacLaggan, *Year After Raid, Bills Consider Removal Policy*, AUSTIN AM.-STATESMAN, Apr. 3, 2009, at A1 (noting the problems of removing perpetrators).

186. See Broughton, *supra* note 8 (discussing the seven million dollar price tag of the FLDS removals).

187. See *supra* note 8 and accompanying text.

188. See *supra* notes 48-49 and accompanying text (describing the tax bill Utah and Arizona were footing to provide welfare and child support to the Short Creek community whose residents did not pay any taxes).

189. *Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997).

cases involving exclusively male sexual abuse of females, mothers will likely raise the point that the government may not “interpose itself between a fit parent and her children simply because of the conduct—real or imagined—of the other parent.”¹⁹⁰ The government may interpose itself, however, when the parent’s consent to place her child in a position of high risk itself makes the parent unfit.¹⁹¹

The government’s interest in protecting children from emotional, physical, and psychological injury must allow social workers to perform their duties. By invoking their professional expertise and instincts,¹⁹² without asking them to weigh difficult hypothetical “prudent person” legal standards that do not translate to their methods of training, state social workers will work more efficiently. Studies show that “social workers may be able to transcend boundaries of distrust with children and families better than legal professionals” because “social workers become the conduit for information that all the professionals in the process need for effective decision-making.”¹⁹³ Although courts must ultimately place a check on social workers to ensure that they are performing their tasks both accurately and legally, the standard must reflect the experience and expertise social workers possess. A “preponderance of the evidence” or “more likely than not” standard would both serve as a check on the power of social workers and provide legal and social work professionals with a clear standard.

B. Applying the Standard in the Texas Case

Applying this standard to complex cases will create more efficient and uniform results. It will allow child protective social workers to incorporate their expertise and predict when courts will sustain removal. However, applying the standard retroactively to the *Texas*

190. *Wallis v. Spencer*, 202 F.3d 1126, 1142 n.14 (9th Cir. 2000) (finding that a mother’s claim that state officials violated her constitutional rights by removing her children must be evaluated distinctly from her husband’s claim when the state removed the children despite evidence only implicating the husband in abuse of the children).

191. *Nicholson v. Scopetta*, 344 F.3d 154, 160 (2d Cir. 2003) (affirming that a parent abuses its child when a parent “creates or allows a ‘substantial risk’ of physical injury to the child).

192. See *Kisthardt*, *supra* note 14, at 19-20 (describing social workers’ interpersonal and counseling skills).

193. *Id.* at 20.

case would not likely change the outcome. In applying this test, this section will consider the preponderance of the evidence, serious risk of harm, and lack of time determination in the context of the Eldorado Raid.

1. Preponderance of the Evidence

To sustain a temporary removal under this test, Texas officials would have been required to show that children were “more likely than not” abused.¹⁹⁴ The evidence the state could put forth included a phone call,¹⁹⁵ teenage mothers,¹⁹⁶ and a “pervasive belief system.”¹⁹⁷ Unfortunately for state officials, neither the caller who left the anonymous tip nor any evidence of her existence ever materialized.¹⁹⁸ When officials arrived, they could not find anyone else to break the FLDS “code of silence.” Thus officials were left with the limited physical evidence of teenage pregnancies.¹⁹⁹ Twenty of the 468 removed children became pregnant between the ages of thirteen and seventeen.²⁰⁰ For the five teenage parents still classified as minors, this evidence would have warranted their removal under a preponderance of the evidence test. In traditional cases, state statutes currently consider not only the child who has been abused, but also siblings or others living in the home, when determining whether to return a child to his or her parents.²⁰¹ To child protective

194. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328-29 (2007) (explaining the preponderance of the evidence test).

195. *See supra* text accompanying note 74.

196. *See supra* text accompanying note 77.

197. *Id.*

198. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *4 n.12 (Tex. App. May 22, 2008) (describing the problems with locating the alleged sixteen-year-old caller). Officials later traced the call to a Colorado woman. *See Ben Winslow, Swinton Enters Not Guilty Plea*, DESERT MORNING NEWS, July 10, 2008.

199. *See Terri Langford & Lisa Sandberg, Many Teen Pregnancies in Sect*, HOUS. CHRON., Apr. 29, 2008, at A1 (quoting state officials for the proposition that part of the reason for removal was to attempt to break the “code of silence”).

200. *In re Steed*, 2008 WL 2132014, at *2.

201. *See* TEX. FAM. CODE ANN. § 262.201(d) (Vernon 2008) (requiring: “In determining whether there is a continuing danger to the physical health or safety of the child, the court may consider whether the household to which the child would be returned includes a person who:

- (1) has abused or neglected another child in a manner that caused serious injury to or the death of the other child; or

workers from the outside, sexual abuse perpetrated on the young females of the FLDS community did not follow a predictable pattern; young females were married (and expected to consummate marriages) when elders in the community claimed to receive revelations that the females were prepared to enter a “spiritual marriage.”²⁰² Thus, Department officials argued that the Eldorado compound should be viewed as one household under the Texas statute because of the difficulty in untangling the complicated relationships behind the gates of the ranch to find the children who interacted regularly with alleged perpetrators.²⁰³ If courts allowed this analogy to stand, however, those living in intentional communities could face removal any time a registered sex offender moved into the community. Though the secrecy and isolation of these communities, along with the presence of offenders, raises suspicion, it cannot warrant the drastic step of immediate removal without knowledge of a child’s interaction with the offender. Twenty pregnant teens out of a population of nearly 500 children (the number of teenagers was not specified), while alarming, cannot raise the inference that all of the children were likely abused. Despite the difficulty of gathering evidence and intensely uncooperative witnesses, Texas officials would have had to show some sort of individualized finding under this standard that the children were more likely than not abused. Department requested parents to ensure that “children who lived in a home with a man who married underage girls or agreed to an arranged marriage of an underage daughter” to be kept away from that man.²⁰⁴ The court would have found this evidence, if available despite the silence of witnesses, sufficient to sustain removal of the pubescent girls fitting this category under a preponderance of the evidence standard. The individualized finding necessary to accompany the accusations of institutionalized abuse would be satisfied by information that a man living with the child had married underage females or allowed the girls’ sisters to marry while underage.

(2) has sexually abused another child.”).

202. *State Requests Foster Care for 8 FLDS Children*, *supra* note 83 (quoting a young female from the FLDS who stated “Heavenly Father is the one that tells [Jeffs] when a girl is ready to get married and that he is only following the word of Heavenly Father”).

203. *In re Steed*, 2008 WL 2132014, at *3.

204. *See supra* note 181 and accompanying text.

A case from the Second Circuit provides Texas officials with a possible alternative. The court in *Nicholson v. Scopetta* held that while evidence of a child's mental state alone will not satisfy a preponderance of the evidence standard for child removal, the "court can use 'competent opinion or expert testimony' to make this determination."²⁰⁵ In the *Texas Case*, allowing competent expert witnesses to interview children, especially pubescent teenage girls, and examine them for evidence of Sexually Abused Child Syndrome would have made compelling evidence for the removal of those children. Even with the use of this evidence, the state would have still failed to meet its burden for temporary removal for the vast majority of the 468 children. The state would have met its burden and sustained removal for: pregnant minors, minor mothers, females living with men accused of perpetrating abuse or permitting abuse of their daughters, and those diagnosed by competent expert witnesses. Implementing a constitutional standard of this type would reinforce that actual, not speculative, evidence is required even for temporary removal.

2. *Risk of Serious Harm*

Minor allegations of emotional or psychological harm should not warrant removal of children in complex cases. Some questions remain as to the precise definition of "serious harm." However, the definition rises above the level of instituting a "pervasive belief system" and certainly includes "bruises or broken bones for which there is no justifiable explanation."²⁰⁶ Sexual abuse would also qualify, as courts consider preventing sexual abuse a "major societal and judicial concern."²⁰⁷ In a recent dissent, three justices of the Supreme Court cited a statistic that "40% of 7- to 13-year old sexual assault victims are considered 'seriously disturbed'" and concluded that in child rape cases "[t]he harm that is caused to the victims and to society at large by the worst child rapists is grave."²⁰⁸ Evidence

205. 344 F.3d 154, 161 (2d Cir. 2003).

206. *Arredondo v. Locklear*, 371 F. Supp. 2d 1281, 1284 (D.N.M. 2005).

207. Reilly, *supra* note 93, at 454.

208. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2677 (2008) (Alito, J., dissenting) (arguing that permitting states to execute child rapists does not violate the prohibition on cruel and unusual punishment found in the Eighth Amendment).

provided by Department workers alleged that girls as young as thirteen were abused in the Eldorado compound.²⁰⁹ State officials would meet their burden of showing risk of serious harm under this standard for those allegedly abused. For children included in the removal who showed no evidence of abuse and were not in the specially affected class of pubescent females, the risk that they could later become victims or perpetrators when they come of age would not qualify as a serious risk warranting removal. The population of the ranch, larger than that of many small towns in the region, cannot support the inference that all of its residents are engaged in child abuse based on proof of abuse in less than twenty cases.

3. *No Time Element*

Though the various federal courts have not employed a consistent, precise standard to dispose of temporary cases, the decisions have made findings of sufficient or insufficient time unnecessary in temporary removal cases (complex or traditional).²¹⁰ An abundance of state legislation requires temporary removal merely be “supported by reasonable belief, probable cause, or the equivalent”;²¹¹ these legislatures prescribe no specific finding of insufficient time.

Avoiding issues of precise timing would make complex cases much easier to argue because in many instances abuse is institutionalized, even preceded by religious ceremonies known as “spiritual marriages,” but there is no predetermined date for the marriage and subsequent sexual abuse of young girls.²¹² While some FLDS girls may not have any thought or desire to marry, they could come home at the age of twelve to hear their parents or a church elder telling

209. *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *1-2 (Tex. App. May 22, 2008).

210. See Higgins-Shea, *supra* note 117, at 157-58 (stating that “[t]he majority of circuit courts either reject or fail to address the time consideration factor discussed by both the *Tenenbaum* and *Mabe* courts”).

211. *Id.* at 148; see, e.g., R.I. GEN. LAWS § 40-11-5(d) (2009); UTAH CODE ANN. § 78A-6-106 (2008). But see ARK. CODE ANN. § 9-27-313(a)(1)(c) (2009) (stating that the child must be in “immediate danger,” which means “removal is necessary to prevent serious harm”); N.Y. FAMILY COURT ACT § 1024(a) (Consol. 1999) (requiring “not time enough to apply for an order” before emergency approval will be upheld).

212. See *State Requests Foster Care for 8 FLDS Children*, *supra* note 83.

them that a “revelation” has told the church leader that the girl’s time to marry has come.²¹³

Therefore, requiring child protective workers to make a showing of insufficient time in order to sustain removal of children from intentional communities would lead to highly speculative conjecture about the possible date of a pubescent girl’s “spiritual” marriage. Applying the standard without an element of timing still leads to fair constitutional results that heavily weigh the interests of the parent as well as the state’s *parens patriae* interest.

Under the proposed preponderance of the evidence standard, the Texas Supreme Court would have made a different ruling, removing females that evidence suggested were in danger. Yet, the standard would still protect parents’ interests by not allowing states to consider a community of children together and remove them all based on suspicions or projections of future harm.

CONCLUSION

Courts must evaluate complex cases of child removal distinctly from traditional cases and clearly establish a functional due process standard for this evaluation. By choosing to live in isolation from society and associate closely with child abusers, these parents present additional factors which courts must weigh to vindicate sufficiently the state’s *parens patriae* interest. If identical standards are applied in traditional and complex cases, the state will not be able to protect sufficiently children facing unique risks as they grow up confined with predators. The best standard for courts to adopt in these cases would require state workers to show “by a preponderance of the evidence” that children are in danger of becoming victims to the common practices of their intentional communities. Such a standard will provide consistency and a proper balance of the state’s and parents’ constitutional interests. However, this standard will not lead to improper or overzealous removal without sufficient evidence or when no serious harm is alleged.

Even if such a standard was in place in Texas at the time or Texas courts had adopted a similar one, admissible evidence would

213. *Id.*

have warranted only the removal of a portion of the children in the Eldorado compound. After extensive investigation, later reports led the Texas Department of Family and Protective Services officials to conclude that 275 of the children removed qualified as abused or neglected.²¹⁴ Only twelve of those were females subjected to sexual abuse, and the Department labeled the remaining 263 children “neglected,” without explaining in its report what the diagnosis meant.²¹⁵ The Department has not pursued further removal for any of those diagnosed as “neglected,” electing instead to educate parents on proper nurture of their children.²¹⁶ If Texas had in place the proper standard for temporary removal in complex cases, the state officials would have likely followed more conservative procedures from the beginning. Only removing those who met the standard would have saved state funds, prevented potential emotional and psychological damage to children, and saved an abundance of court time and resources.

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214. Corrie MacLaggan, *State: 275 Kids in Sect Harmed*, AUSTIN AM.-STATESMAN, Dec. 24, 2008, at A1.

215. *Id.*

216. *Id.*

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