

2008

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Repository Citation

Hamilton, Vivian E., "Expressing Community Values Through Family Law Adjudication" (2008). *Faculty Publications*. 45.
<https://scholarship.law.wm.edu/facpubs/45>

EXPRESSING COMMUNITY VALUES THROUGH FAMILY LAW ADJUDICATION

Vivian E. Hamilton*

I. INTRODUCTION

This Essay examines whether state court judges adjudicating family law cases may exercise their discretion in a manner that expresses community values. It suggests that they may consider doing so in private law—but not public law—disputes. Expressing community norms through discretionary decision making may promote societal goals of cohesion, solidarity, and legitimization of the courts. These goals must be balanced, however, against the cost to individuals' liberty rights in a diverse and heterogeneous society.

The Essay begins by discussing diverging social values in U.S. communities, especially with respect to issues pertaining to family life. It next argues that giving expression to a community's values through adjudicating private law disputes—where litigants more or less voluntarily submit their cases for resolution to the court of a given community—may help ensure that members of the relevant community perceive the court as both legally and socially legitimate. It cautions against doing so in public law actions, however. In those actions, the state hauls private parties before the community's tribunal and by pursuing litigation on its own behalf, represents community values. Courts in those cases should place foremost their role as guardians of individuals' negative liberty, checking both the state's police power and the potentially oppressive weight of community norms.

Americans' views on many social and cultural issues diverge, with the views of the religiously devout/traditionalists/political conservatives differing significantly from those of the less devout/modernists/political liberals.¹ These differences are especially stark with respect to issues directly implicating family life—sex, marriage, childbearing, and childrearing. Professors Naomi Cahn and June Carbone have argued that families' lives in different regions of the country—and indeed the family laws of different states—rest upon different moral paradigms.² I have argued that two principles—Biblical traditionalism and liberal individualism—underlie U.S. family law itself,³ and that these

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¹ Others participating in this conference have forcefully made this point. See, e.g., Naomi Cahn and June Carbone, *Deep Purple: Shades of Family Law*, 110 W. VA. L. REV. 459, 46-69 (2007) [hereinafter *Deep Purple*]; Naomi Cahn & June Carbone, *Red Families v. Blue Families*, available at <http://ssrn.com/abstract=1008544> (August 16, 2007) [hereinafter *Red Families v. Blue Families*]; William Galston, *Political Polarization and the U.S. Judiciary*, 2008 Draft Manuscript on file with the author.

² Cahn & Carbone, *Red Families v. Blue Families*, *supra* note 1.

³ I define family law as "those sets of laws (1) whose purpose is to regulate relationships among intimates, or (2) whose operation hinges on the existence of a certain family status or relationship."

foundational yet often incompatible principles have shaped the core of our family law.⁴

Here, I first argue that these underlying principles also help explain why Americans' views on what constitutes moral family life and good family policy diverge. I next consider the implications of values divergence for family law adjudication. In particular, I consider courts' roles in furthering what is arguably one of the core functions of law: to express fundamental social values.⁵ There are certainly arguments against courts' assuming an expressive role, but one of the strongest arguments in favor of such a role is that it helps legitimize the court in the eyes of the community in which it sits.

Under what circumstances, however, may a court engaged in discretionary decision making strive to express the particular values of the community in which it sits? This Essay does not purport to provide definitive answers to this question, but it does suggest that its analysis should take into account the type of case being adjudicated. Here, I contrast private law and public law actions.⁶ It may be permissible for a court engaging in discretionary decision making in a private law action to consider community values, but it is likely objectionable for a court engaging in discretionary decision making in a public law action to do so.

In private disputes, the parties themselves seek to have the tribunal of their community adjudicate a dispute between them. On issues committed to its discretion, it may be appropriate for that tribunal to render decisions guided by, or filtered through, community standards. In most public law actions, on the other hand, the state itself not only initiates the action and intervenes in the family, but it also litigates on behalf of the "people". In those cases, the state as litigant adequately represents and seeks to effectuate community values; courts need not express contrary values, but they should rein in their expressive role. Because the state's potentially oppressive power is brought to bear in a way that is absent in private law actions, moreover, courts should instead emphasize the importance of safeguarding personal liberty against state incursion. State statutes by and large support this dual vision of the judicial role in family law cases.⁷

With this in mind, gaining a better understanding of the sources of Americans' divergent values is useful, because those values help shape both families' lives and legislative policies in a given state. Understanding better whether and when courts might allow communities' particular moral values to inform judicial discretionary decision making is critical—those decisions affect the balance between individuals' liberty rights in a diverse and heterogeneous society and social cohesion, social solidarity, and the legitimization of the courts. The inquiry proceeds against the backdrop of a federalist system that permits state laws to express the unique moral sentiments of its citizens and encourages state-by-state legislative experimentation.

Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31, 36 (2006).

⁴ *Id.*

⁵ See, e.g., Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 *TEX. L. REV.* 959, 974 (2008).

⁶ For a brief discussion of the distinction between public and private law, see Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 *HARV. J.L. & PUB. POL'Y* 267 (1986).

⁷ See, e.g. *infra* note 70 and accompanying text.

Part II briefly discusses what I argue are the underlying foundations of American family law—Biblical traditionalism and liberal individualism. It argues that although American family law reflects early lawmakers' near-universal belief in a theistically ordained natural order shaped by Biblical tradition, a simultaneous commitment to the ideal of liberal individualism has guided many subsequent developments in law.

Part III argues that Americans tend to be committed to one or the other principle. Their commitment, moreover, comes with diverging political worldviews. This Part examines more closely Biblical traditionalism, which historically and thematically has shaped the concept and norm of conjugality. This norm views the opposite-sex marital family as the only acceptable family form. This view has historically been (and in many fundamental ways continues to be) clearly expressed in law and policy, especially in states where political conservatives are in the majority. In those states, families that fail to conform to this norm receive less societal support and may be more vulnerable to state intrusion into their lives.

Part IV suggests and discusses two functions of family law adjudication in the face of regional differences in Americans' community and moral standards: giving expression to social values and safeguarding liberty and equality goals. It argues that while courts may be more justified in expressing community social values in private law cases, there is a compelling argument why they should not do so in public law cases.

Part V examines these adjudicatory functions through two cases involving nontraditional (polygamous) families. The first, *Sanderson v. Tryon*,⁸ is a private law action—a Utah custody case between biological parents, one of whom continued to practice polygamy post-separation. The second, *In re Sara Steed*, is a public law action in which the State of Texas temporarily removed 468 children from the custody of their parents in a Fundamentalist Latter Day Saints ("FLDS") community based on thin evidence of abuse.⁹ The cases illustrate the two approaches to adjudication described above. In *Sanderson*, the Supreme Court of Utah held that community disapproval of the polygamous lifestyle could be considered by trial courts adjudicating private custody disputes, but it held that community values could not be determinative. In *In re Sara Steed*, on the other hand, the Texas Appellate and Supreme Courts held that the lower court had abused its discretion—which was more limited than that granted judges deciding cases in the private custody context—when it refused to return the children to their parents. The trial court's decision in that case arguably effectuated the community's disapproval of the FLDS belief system, yet in doing so, inadequately protected individuals' rights against state incursion.

⁸ 739 P.2d 623 (Utah 1987).

⁹ No. 03-08-00235-CV, 2008 Tex. App. LEXIS 3652 (May 22, 2008).

II. TWIN PRINCIPLES OF U.S. FAMILY LAW

Two foundational principles have shaped the contemporary rules and concepts of U.S. family law: the first is a pre-modern view of natural law filtered through Judeo-Christian theology;¹⁰ the second is a theory of liberal individualism that originated with political thinkers of the seventeenth century.¹¹

A. Biblical Traditionalism

The historical and ideological origins of English family law were natural law principles, which were revealed by Biblical teaching.¹² These same principles, of course, animated early American family law—the English colonists in America adhered to English laws, and American civil authorities later largely adopted the English common law.¹³

The natural law theories espoused from the Medieval period through the Reformation asserted objective moral principles imposed by a divine creator and discoverable through reason, with an assist from the Holy Scriptures.¹⁴ Early American lawmakers embraced natural law principles, which helped them accommodate both their religious convictions and their commitment to religious liberty.¹⁵

In the context of family law, the Biblical tradition mandated certain family practices, the most central reflecting the concept of conjugality. Laws governing marriage and the marital family have effectuated that norm. U.S. family laws thus implemented the Biblically derived unity of husband and wife, with the unit headed by the husband.¹⁶ They also implemented the Biblically derived indissoluble nature of marriage through rules that prohibited exit from marriage.¹⁷ Family law continues to embody the Biblical-traditional concept of conjugality and the marital family, particularly in rules that: limit entry into marriage; establish unalterable terms that govern the intact marriage; continue to

¹⁰Hamilton, *supra* note 3, at 46-56. See also JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (Don Browning & Ian Evanson, eds. 1997); FRANCES GIES & JOSEPH GIES, MARRIAGE AND THE FAMILY IN THE MIDDLE AGES 36-42 (1987).

¹¹Hamilton, *supra* note 3 at 56-65. See also, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 267-85, 323-53 (Peter Laslett ed., Cambridge Univ. Press 3d ed. 1988) (1690); LAURENCE H. TRIBE AND MICHAEL C. DORF, ON READING THE CONSTITUTION 70-71 (1991); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1508-17 (1992).

¹²Hamilton, *supra* note 3, at 51. See also, e.g., WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 38-43 (Garland Pub. 1978).

¹³Hamilton, *supra* note 3, at 53.

¹⁴M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 90 (7th ed. 2001); BLACKSTONE, *supra* note 12, at 39-43; Hamilton, *supra* note 3, at 51-52.

¹⁵Hamilton, *supra* note 3, at 52.

¹⁶NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 9-12 (2002); Hamilton, *supra* note 3, at 53.

¹⁷See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497 (2000).

view the conjugal couple as a single unit in many respects; and presume marriages to be enduring, requiring a state declaration for legal dissolution.¹⁸

The importance of conjugality is clear in legislation and proposed legislation that seeks to embody in law the belief that the marital family is the natural and morally superior family form.¹⁹ Examples include not only state marriage laws, but also the federal Defense of Marriage Act,²⁰ the proposed Federal Marriage Amendment²¹ and the state marriage amendments,²² and the 1996 Welfare Act, which included marriage promotion as one of its principle goals.²³

B. Liberal Individualism

Lockean liberal democratic ideals espoused radical individualism and a theory of the negative state.²⁴ They remained neutral about all but the thinnest conception of the good. Along with Biblical traditionalism, these ideals heavily influenced late-eighteenth century American statesmen and the original contours of U.S. family law.²⁵

Early laws vested full citizenship and its attendant rights in white, male property owners.²⁶ Respecting their liberty required that state intervention be minimal; thus men had near-absolute control over their homes and the members of their households.²⁷ This arrangement sought to respect both individual rights and Biblical-traditionalist norms of the patriarchal family.²⁸

Over time, the principle of liberal individualism helped expand the numbers and classes of individuals entitled to full citizenship within the conjugal family.

¹⁸ Hamilton, *supra* note 3, at 54.

¹⁹ *Id.*

²⁰ 28 U.S.C. § 1738C (2000). DOMA limits marriage for federal purposes to a union between a man and a woman and ensures that same-sex couples are excluded from receiving federal benefits afforded opposite-sex married couples. It also purports to interpret the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, to not require states to recognize same-sex marriages formalized in other states. *Id.*

²¹ S.J. Res. 1, 109th Cong. (2005). The Federal Marriage Amendment would prohibit the U.S. and any state constitution from being interpreted to require marriage or analogous status for any union other than the opposite-sex marital couple. *Id.*

²² Twenty-six states have constitutional amendments prohibiting same-sex marriage. Lambda Legal, Status of Same-Sex Relationships Nationwide, <http://www.lambdalegal.org/nationwide-status-same-sex-relationships.html> (last visited August 29, 2008).

²³ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601-19 (2000).

²⁴ See JOHN LOCKE, TWO TREATISES ON GOVERNMENT 341, § 87 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1689).

²⁵ LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION, 70-71 (1991).

²⁶ Hamilton, *supra* note 3, at 61.

²⁷ *Id.* (citing JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 82-83 (1970)).

²⁸ *Id.*

It also helped expand the total quantum of liberty permitted each individual.²⁹ It has influenced rules that endowed married women with legal capacity, eased restrictions on divorce, and relaxed legal constraints on intimate conduct generally.³⁰ It has fallen short, however, of significantly opening the conjugal construct to other groups, like same-sex or polygamous families.³¹

III. DIVERGING COMMITMENTS

This Part examines more closely one of family law's foundational principles, Biblical traditionalism, which historically and thematically has shaped the concept and norm of conjugality. That norm has in turn been effectuated through laws governing marriage and the marital family. Those laws envision the unity of sex, marriage (of the opposite-sex couple), and childrearing. Biblical traditionalism unsurprisingly coincides with contemporary religious commitments of adherents of the Christian faith. Legal rules governing families thus reinforce theologically derived beliefs. The conjugal norm dictates a rigid, clearly defined model of family structure and family behavior. The unity of legal rules and religious beliefs reinforces that model. I argue that a community's adherence to a sharply delineated and exclusive definition of moral family structure and family life makes it less likely that the community will accommodate, much less support, families and behavior that deviate from that norm.

Indeed, nontraditional families in communities that have a strong commitment to Biblical traditionalism appear to be more vulnerable than similar families in communities that have a weaker commitment to that principle and the norms it furthers. These families, which include same-sex and other nonmarital families, generally receive weaker support in statutory law and, more recently, state constitutional law. Recent data gathered and reported by Professors Cahn and Carbone demonstrates that same-sex families, for example, have received the highest level of protection in those states with the lowest levels of religiosity (as measured by church attendance).³²

Americans' conceptions of the proper contours of family law and policy tend to conform to either Biblical traditional or liberal individual principles, but not both. This tendency is expressed through individuals' own life choices, their voting patterns, and the legislative patterns of the states in which they tend to congregate. Professors Cahn and Carbone observe this divergence of views, noting that, "American society may be developing two different approaches to social issues, one that claims to be grounded in religious and moral values, while another that claims to be reflecting the dramatic changes that are occurring to the American family."³³

²⁹ *Id.* at 56.

³⁰ *Id.* at 60.

³¹ *Id.* at 71.

³² Cahn & Carbone, *Red Families v. Blue Families*, *supra* note 1.

³³ Cahn & Carbone, *Deep Purple*, *supra* note 1, at 465. See generally, Linda C. McClain, *The Role of Courts in Circumstances of Moral Disagreement, Redux* (or, from *Red-Blue Values Polarization*

Cahn and Carbone have documented some of the ways in which the family law regimes of the various states diverge.³⁴ They trace many of the differences in individuals' lives (including rates of marriage, age at marriage, rates of divorce, rates of teen pregnancy and abortion, and policies towards same-sex families) to differing moral commitments that tend to prevail in different regions of the country. They also discuss the importance of religiosity—both to individuals' life courses as well as to the contours of family law—in different regions of the country.

Cahn and Carbone illustrate that families in “red” and “blue” states (those whose populations voted Republican and Democrat, respectively, in the 2004 Presidential election) have moved towards different family models.³⁵ As William Galston notes in his contribution to this Symposium, “religious observance and political preference now are powerfully correlated.”³⁶ Cahn and Carbone show that the red states hew to a more traditional family system, while the blue states have moved to embrace what Cahn and Carbone term “the new middle class morality.”³⁷ The traditional family model emphasizes marriage and insists that sex, procreation, and childrearing all occur within the marital family. The new middle class morality emphasizes more egalitarian gender roles, and it correlates with greater investment in education and careers, and lower rates of childbearing.³⁸

In some ways, legislation in the red, more devout states reflects traditional family norms—and reflects a commitment to Biblical traditionalism—while legislation in the blue, less devout states is more likely to reflect liberal values.³⁹ The diverging commitments of the red and blue states observed by Cahn and Carbone thus also demonstrate differing commitments to the twin principles of family law.

The incorporation of Biblical traditional norms into American law unified Judeo-Christian imperatives for the moral family and the actual rules of family law. These theological imperatives and legal rules both identify the opposite-sex marital couple—the conjugal norm—as the proper locus for sex, procreation, and childrearing. A strong commitment to Biblical traditionalism thus entails a sharply circumscribed view of acceptable family life and appropriate family policy. This view disapproves of nonmarital sex and childbearing, cohabitation, and same-sex relationships.

to *Common Ground Over Family Life and Family Law?*), 77 UMKC L. REV. 417 (2008).

³⁴ See generally Cahn & Carbone, *Red Families v. Blue Families*, *supra* note 1, at 34-36, 43-45.

³⁵ See Cahn & Carbone, *Red Families v. Blue Families*, *supra* note 1, at 1-2.

³⁶ See Galston, *supra* note 1, at 15 (citing Alan S. Miller & John P. Hoffman, *The Growing Divisiveness: Culture Wars or a War of Words?*, 78 SOC. FORCES 721, 721-52 (1999)).

³⁷ See generally Cahn & Carbone, *Red Families v. Blue Families*, *supra* note 1, at 2, 34-36 (discussing differences in laws regarding parental notification of abortion between red and blue states).

³⁸ *Id.*

³⁹ Cahn & Carbone, *Red Families v. Blue Families*, *supra* note 1, at App. B.

Because Americans as a whole are a fairly religious people (more religious, for example, than our counterparts in European democracies),⁴⁰ relatively large segments of the populace may already be committed to a Biblically derived vision of family. And because American family law comports with fundamental tenets of the New Testament, the contours of “good family life” shaped by those laws are especially attractive to devout Christians. Theological beliefs and the traditional rules of family law are thus mutually reinforcing.

The unity between theological imperatives and legal rules arguably creates some useful coherence, as it reinforces and gives effect to the moral viewpoint of a large segment of the populace.⁴¹ But this unity also creates daunting challenges. Because the legal framework does coincide with a rigid vision of the moral family, the law itself becomes imbued with moral meaning. Law reform efforts that, for example, attempt to respond to changing social conditions or to reflect growing commitment to other principles, thus meet with especially entrenched resistance.

Partly for this reason, family law—especially in some regions of the country—has sometimes been slow to respond to changes in families. The law of divorce provides a ready example: in the Christian tradition the doctrine of indissolubility required lifelong marriage.⁴² Early American law enforced the doctrine, and divorce was nearly impossible.⁴³ Despite consistent demand for relaxing the requirements for divorce, lawmakers were slow to give up on the ideal of indissolubility—even when states began gradually permitting judicial divorce, it was made available only to the innocent party who could prove the fault of his or her spouse.⁴⁴ For decades, unhappy married couples colluded to present false evidence to meet fault-based grounds required to obtain a divorce.⁴⁵ Some states responded to the ever-increasing demand for divorce not by relaxing requirements for dissolution, but instead by enacting even more stringent divorce laws.⁴⁶ Not until the 1970s did states begin adopting no-fault divorce laws that finally freed couples from the need to perjure themselves in order to be released from unhappy marriages.⁴⁷

⁴⁰ See *id.*; see also Stephen G. Calabresi, “A Shining City on a Hill”: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law, 86 B.U. L. REV. 1335, 1380 (2006) (citing SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD, 61-62 (Norton 1996)).

⁴¹ See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (refusing to recognize a right to enter polygamous marriage and pointing to community consensus that “[p]olygamy has always been odious among the northern and western nations of Europe”).

⁴² MATTHEW 19:6-9; THEODORE MACKIN, DIVORCE AND REMARRIAGE 340 (1984).

⁴³ See Friedman, *supra* note 17; Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017 (2000); Joanna L. Grossman, *Separated Spouses*, 53 STAN. L. REV. 1613 (2001) (reviewing HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY (2000)).

⁴⁴ Friedman, *supra* note 17, at 1501.

⁴⁵ *Id.* at 1507.

⁴⁶ *Id.* at 1502-03.

⁴⁷ Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79.

When a family structure—and *only* that family structure—has both legal and moral significance, other family forms become less acceptable. And sometimes they are barely tolerated. Moreover, if only a single rigid family construct is acceptable as moral and right, lawmakers may refuse to enact social changes that require deviation from accepted norms and struggle to enact even incremental responses to social changes. Instead, they may view their role as enacting (or safeguarding) legislation that preserves and strengthens Biblical traditional norms of family life.

To be sure, federalist principles permit significant variation in family law regimes across the states. Until recently, the trend in family law has been a liberalizing one. For example, states have enacted laws that provide for greater equality for women within marriage; interracial marriage; greater access to both marriage and divorce for the poor;⁴⁸ and unwed parents' and nonmarital children's rights.

A powerful countertrend, however, aims to shore up marriage and the marital family against such incursions. Marriage promotion, the Defense of Marriage Act,⁴⁹ and the widely publicized covenant marriage acts are examples of this.⁵⁰

Nontraditional families that fail to conform to prevailing family norms get fewer rights, whether positive (the right to have family relationships legally recognized, entitlement to benefits, etc.) or negative (the right to be let alone). And nontraditional or nonconforming families in communities with a strong commitment to Biblical traditionalism may be particularly vulnerable to some of the more extreme forms of state intervention. The most ready example may be efforts by same-sex families to gain legal recognition. Their efforts have been least successful in states with strong religious commitments, and more successful in other, less traditional, more progressive states.⁵¹ But nontraditional families' vulnerability has also recently played out in another context—childrearing in Fundamentalist Mormon families. The next Part considers whether and when the judicial role in family law ought to include giving expression to community values. Because, as discussed above, community values vary widely across the nation, taking them into consideration may significantly affect adjudicated outcomes.

⁴⁸ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁴⁹ 28 U.S.C. § 1738C (2008). ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

⁵⁰ See Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L. L. 135, 137-38 (2007) (discussing the only three states to have adopted covenant marriage legislation—Arizona, Arkansas and Louisiana).

⁵¹ California, Connecticut, Massachusetts, New Jersey, and Vermont, for example, have all enacted legislation that permits same-sex couples to enter into civil unions or marriages.

IV. THE ROLE OF THE STATE JUDGE AND THE PERCEIVED LEGITIMACY OF COURTS

How should state court judges called upon to exercise discretionary decision making adjudicate family law disputes? This Part contrasts disputes between family members with disputes in which the state has intervened in families' lives. Judges' roles most obviously include furthering the fair, just, and efficient resolution of disputes.⁵² Less obviously, courts might also share an obligation to further another arguable purpose of law—lending official state sanction to "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious."⁵³ Adjudication might further this goal by operating as "the social process by which judges give meaning to our public values."⁵⁴

The traditional Blackstonian model of adjudication requires that ours be a "government of laws, not of men." Professor Paul Mishkin described this theory of adjudication as "the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance."⁵⁵ In other words, the law, not the judge, dictates outcomes. Because it accounts for what judges usually do—but not always (*e.g.*, they sometimes must and do make new law)—Mishkin noted that the "Blackstonian conception is not entirely valid, neither is it wholly wrong."⁵⁶ The ideal is critical, however, because it "expresses a symbolic concept of the judicial process on which much of courts' prestige and power depend."⁵⁷ Judicial adherence to the rule of law—as well as the *perception* of judicial adherence to the rule of law—helps ensure that citizens perceive courts to be legitimate.

Family laws, however, frequently require judges to exercise discretionary decision making, in "which a judge, who has consulted all relevant legal materials, is left free by the law to decide one way or another."⁵⁸ Statutes governing families frequently consist of broadly worded, open-textured standards.⁵⁹ A law of legal standards "leaves room in which judges at all levels

⁵² Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

⁵³ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (1881).

⁵⁴ Owen M. Fiss, *Foreward: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

⁵⁵ Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62 (1965).

⁵⁶ *Id.* at 60.

⁵⁷ *Id.* at 62.

⁵⁸ Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 364-65 (1975).

⁵⁹ Custody statutes, for instance, vest judges with a great deal of discretion. The California statute is typical:

In making a determination of the best interest of the child . . . , the court shall, among any other factors it finds relevant, consider all of the following: (a) The health, safety, and welfare of the child. (b) Any history of abuse by one parent or any other person

retain considerable space in which to maneuver. One could consider this space a vacuum, an area of lawlessness, or merely a set of gaps bounded by the fabric of the law.⁶⁰ Indeed, judges in divorce, custody, and other family law cases may wield more extensive discretion than judges presiding over any other type of civil litigation.⁶¹ A central question for judges attempting to apply the law in these cases, then, is how to exercise that discretion in a way that furthers the multiple goals of adjudication.⁶² From what source or sources should they draw guidance when applying vague standards to particular situations? When vested with discretion, should state courts decide family law cases in a way that gives expression to regional or community values? Doing so might result in judges applying statutes containing identically worded "best interests of the child" standards with one outcome if a case is litigated in New York but a different one in North Dakota.⁶³

Studies have found that the justices of the Supreme Court, for example, tend to vote along lines consistent with their personal political ideologies.⁶⁴ Indeed, many political scientists have argued that judges decide cases, not according to the rule of law, but instead according to preexisting personal preferences.⁶⁵ When judges render decisions by referring to their own personal

seeking custody . . . (c) The nature and amount of contact with both parents . . . (d) The habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol by either parent . . .

Cal. Fam. Code §3011 (West 2000). Judges similarly wield extensive discretion under statutes that govern property distribution and alimony upon marital dissolution. New York's statute, for instance, states that, while judges should allocate to each party his or her separate property, "[m]arital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties." N.Y. D.R.L. LAW § 236(B)(5)(c) (McKinney 2003).

⁶⁰ Rex R. Perschbacher & Debra Lynn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 41-42 (2004).

⁶¹ See, e.g., Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 405 (1996); Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2218 (1991).

⁶² HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 139-41 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

⁶³ My colleague James Dwyer argues that courts adjudicating disputes involving children should act exclusively to promote children's welfare. A court as *parens patriae* should act as a proxy for the child and render a decision that the child herself would have reached, had she been capable of rational decision. And in some instances, the child's actual decision should be respected. JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 125-67 (2006). Professor Dwyer suggests that courts in this context have no cause to consult community norms. I see it a bit differently. Even if a court adopts the reasonable approach of focusing exclusively on the child's welfare/wishes, there may be some instances in which the outcome (e.g., which parent should be the child's primary custodian) is not self-evident. Instead, a judge may have to make inferences about what a child's preferences would be, and what outcome is most likely to further her welfare. In those cases, the judge might take into consideration the relevant community, since that community may shape those preferences and impact the outcome in some way.

⁶⁴ See, e.g., JEFFREY A. SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 89, 93 (Cambridge Univ. Press 2002).

⁶⁵ See Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89 (2005).

political ideology, however, they risk undermining the legitimacy of the judicial system. Even where legal standards direct courts to exercise discretion, if a judge merely fills in the gaps by reference to political ideology, then the outcome of cases may depend on the political predilections of the judge. This suggests, then, that judges should avoid drawing on personal ideology when exercising discretion. Upon what, then, should judges draw?

Some scholars have emphasized the importance of the expressive function of law and argued that courts should help give expression to prevailing social values. Professor Neil Siegel writes that this "requires judges to balance fidelity to rule-of-law values, which confers legal legitimacy on courts, with fidelity to social values, which confers social legitimacy."⁶⁶ Professor Barry Friedman cautions against the belief that adherence to rule-of-law values alone will confer legitimacy on the judicial process—"even where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court's decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate."⁶⁷

Taking this approach gives effect to one of the commonly, though not universally, accepted purposes of law: lending official state sanction to "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious."⁶⁸ A judge who accepts the expressive purpose of law thus receives some guidance: she should, all things being equal, resolve cases by filling in the gaps in legal standards by reference to the values of the relevant community. She must then decide what the relevant community is. In family law cases, that will usually be the state or region in which the court sits.

Some theorists have argued that when legislation vests judges with discretion, effectuating legislative directives requires that discretion be exercised, at a minimum, in a manner consistent with majority will or community values.⁶⁹ One could argue that this ought not be the presumptive rule in all family cases. Instead, a distinction ought to be drawn between public and private cases.

When courts adjudicate private disputes, such as divorce or child custody actions between parents, it is arguable that they may consider community standards: the parties have voluntarily (to varying degrees, to be sure) submitted their dispute to the tribunal of a community. The state, which is not formally a party to the litigation, can nonetheless express its preference in a number of different ways. First, it can enact legislation that directs a court how to resolve a dispute. In cases where rules govern, then, a court expresses public values by applying the rule of law to the case before it. In private family law actions, however, legislatures have instead generally adopted broadly worded standards and have given judges discretion to apply them. In those cases, judges might best express public values by exercising their discretion in a manner consistent with

⁶⁶ Siegel, *supra* note 5, at 982.

⁶⁷ Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387 (2001). See also Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790-91 (2005).

⁶⁸ HOLMES, *supra* note 53.

⁶⁹ HART & SACKS, *supra* note 62.

community standards. This practice may help ensure that the members of the community perceive the court as both legally and socially legitimate.

On the other hand, when courts adjudicate public law actions, such as those involving allegations of child abuse or neglect, even that weak voluntariness that brings the litigants to a private dispute before the tribunal is lost: the state itself⁷⁰ hauls the parties before its tribunal. Through its prosecution of these cases, the executive branch represents community values. Courts adjudicating those cases, then, have less obligation to fill that role. They instead may, or perhaps should, place foremost their role as guardians of individuals' negative liberty—freedom from governmental interference—checking both the state's police power and the potentially oppressive weight of community norms. State statutes by and large support this dual vision of the judicial role in family law cases. Abuse and neglect statutes, for instance, tend to be drawn more narrowly than are rules governing divorce or child custody—the former are more like rules, the latter more like standards.⁷¹

To be clear, there are arguments against weighing community values even in the private law context. Giving weight to community values may result in unwanted incursions on individual autonomy and self-expression. Yet it is possible that achieving the long-term goal of social legitimacy may require some short-term sacrifice of individual freedom. When community values would unduly infringe on personal freedom or other important social values, however, "it may be appropriate for courts to . . . sacrific[e] social stability over the short run in order to advance social solidarity and other important values over the long run."⁷²

The next Part considers these issues in the context of two cases involving parenting.

V. JUDGING PARENTING: TWO APPROACHES

This Part compares the adjudication of two custody cases involving families that practiced polygamy. The cases are instructive because communities in the U.S. overwhelmingly disapprove of polygamous families, and all states prohibit plural or polygamous marriage. *Sanderson v. Tryon* was a private law case—a custody dispute between two parents. *In re Sara Steed* is an ongoing public law

⁷⁰ In abuse and neglect cases, state child protective services offices investigate and pursue cases on behalf of the state government.

⁷¹ TEX. FAM. CODE ANN. §§ 262.101-102 (2001), for instance, permit Texas state officials to obtain a court order authorizing emergency removal of a child from her home upon a showing that:

- (1) there is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child's welfare;
- (2) there is no time, consistent with the physical health or safety of the child, for a full adversary hearing under Subchapter C; and
- (3) reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child.

⁷² Siegel, *supra* note 5, at 974.

abuse and neglect action. Both cases thus involved litigants whose values were rejected by the majority community in which they lived. While atypical, they are especially useful examples of the different ways in which courts permitted the consideration of community values to impact the outcome of litigation.

With Part IV in mind, I argue that both cases were wrongly decided at the trial level but correctly decided by the respective appellate courts. The trial courts in both cases rendered decisions that sought to effectuate community norms that disapprove of the polygamous lifestyle. The appellate courts in both cases reversed. The *Sanderson* court held it permissible to consider the parents' morally objectionable practice of polygamy but rejected its apparent use by the trial court as a conclusive factor. The *Steed* court overturned the trial court's decision to remove children living in a polygamous community from their parents' custody. The state statute required a showing of immediate physical danger, neglect, or sexual abuse.⁷³ Absent such a showing, the appellate court held that the trial court abused its discretion by removing the children. The trial court's removal was based on evidence that showed little more than that polygamist families inculcated in their children values and a lifestyle (including early marriage and pregnancy) inimical to community norms.⁷⁴

A. Background

Nineteenth-century members of the Church of Jesus Christ of Latter-Day Saints rejected what they viewed as the profane culture of their day.⁷⁵ They were, in turn, rejected by the communities in which they first settled in Ohio, Missouri and Illinois.⁷⁶ Because they clashed with and were persecuted by established communities, they moved often,⁷⁷ finally settling in the Salt Lake Valley in what is now Utah.⁷⁸ The practice of plural marriage was so "odious"⁷⁹ to early Americans that the heavily Mormon State of Utah was pressured to disavow polygamy and its practitioners as a condition of statehood.⁸⁰ Because

⁷³ Texas law requires a showing of "immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child's welfare." The trial court, however, ordered children removed from their homes without evidence of physical or sexual abuse (other than the fact that several teenaged girls were pregnant). See *supra* note 70; see also *infra* notes 93-126 and accompanying text.

⁷⁴ In re *Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *1 & n.1 (Tex. App. May 22, 2008); In re Tex. Dep't of Family and Protective Servcs., 255 S.W.3d 613 (Tex. 2008).

⁷⁵ Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 739 (2003).

⁷⁶ JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* 100-02 (Doubleday 2003).

⁷⁷ See RICHARD L. BUSHMAN, *JOSEPH SMITH: ROUGH STONE ROLLING* 327-28, 398-402 (Alfred A. Knopf 2005).

⁷⁸ *Id.* at 56-75.

⁷⁹ *Reynolds*, 98 U.S. at 164.

⁸⁰ RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 212 (3d ed. 1992). For the 1890 document in which the then-leader of the Mormon Church formally announced the church's

they believed it to be an essential component of their faith, however, those Mormons who refused to abandon the practice of plural marriage formed various splinter groups, calling themselves Fundamentalist Mormons.⁸¹ One such example was the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS).

FLDS members continue to practice polygamy,⁸² grounded in religious beliefs, including the Old Testament teachings of biblical patriarchs.⁸³ Fundamentalist Mormons believe in patriarchy. The husband/father is his family's religious and social leader, and, ideally, men sire large numbers of children.⁸⁴ They also believe that "righteous" men and their wives will live as kings and queens in eternity.⁸⁵

Fundamentalist Mormonism is thus at least partially grounded in Biblical teachings, but it embraces aspects of the Old Testament—those that allow polygamous families—that have been explicitly rejected by modern Christians.⁸⁶ Fundamentalist Mormon families thus defy the accepted conjugal norm.

Some critics of FLDS argue that polygamous families are not just an aberrational family form, but that the form leads to harm and abuse of women and children.⁸⁷ Polygamists counter that abuse is not limited to their families; it also occurs in monogamous families.⁸⁸ They argue that abuse is not inherent in polygamy itself, and that the appropriate response is not to ban all polygamous families but instead to enact more targeted laws to address abuse. Forbidding polygamy outright is therefore overinclusive, because among polygamous families are many in which no such abuse occurs.⁸⁹ Plural marriage remains illegal in every state, however, and those who practice it are frequently viewed with extreme suspicion.⁹⁰

B. Private Law Adjudication: *Sanderson v. Tryon*

In *Sanderson v. Tryon*, biological parents each sought custody of their three children. A Utah state trial court removed the children (born while their parents were involved in polygamous relationship) from the custody of their otherwise fit mother and placed them with their father.⁹¹ The children's mother had entered

intention to abandon the practice of polygamy, see THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, DOCTRINE AND COVENANTS, Official Declaration 1, available at <http://scriptures.lds.org/od/1>.

⁸¹ Jeffrey Michael Hayes, Comment, *Polygamy Comes Out of the Close: The New Strategy of Polygamy Activists*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 99 (2007).

⁸² More specifically, they practice polygyny, the marriage of one husband to more than one wife.

⁸³ Irwin Altman, *Polygamous Family Life: The Case of Contemporary Mormon Fundamentalists*, 1996 UTAH L. REV. 367, 368 (1996).

⁸⁴ *Id.*

⁸⁵ *Id.* See also Gordon, *supra* note 75, at 741.

⁸⁶ NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 5-6 (2000).

⁸⁷ Hayes, *supra* note 81, at 105 (internal citation omitted).

⁸⁸ *Id.* at 106.

⁸⁹ *Id.* at 107.

⁹⁰ Polygamists usually evade prosecution by registering only one civil marriage; subsequent marriages are "spiritual", not legal or civil marriages. *Id.* at 107.

⁹¹ *Sanderson v. Tryon*, 739 P.2d 623 (Utah 1987).

into another polygamous spiritual marriage, while the father had abandoned the practice of polygamy after the couple separated.⁹² The court declined to make any finding concerning whether the awarding of custody to their father was in the children's best interests. Instead, the court and counsel both framed the issue as "whether children may be taken from an otherwise fit and proper parent solely for the reason that the parent practices plural marriage."⁹³

The Supreme Court of Utah pointed out that the trial judge had failed to adjudicate the case before it—its decision did no more than give effect to community/majority values condemning the practice of polygamy and failed to make any specific factual findings. It faulted the trial court for making "no findings to support the conclusion that [the father's] custody would best serve the children's interest; nor were there findings of fact 'which deal with one parent or the other being the better, more nurturing parent.'"⁹⁴

So, the supreme court rejected a conclusive presumption against custody to a parent who practiced polygamy, a presumption that would have given full expression to community norms. Instead, it held that, while relevant, community norms or values must "be considered as one among many other factors regarding the children's best interests."⁹⁵

By refusing to allow community values to conclusively dictate the outcome of a private custody dispute, *Sanderson* underscores a critical limit on the notion that discretionary adjudication ought to express community values in these cases. Even if a court treats community values as relevant to its determination, they ought not be the sole determining factor. When exercising its discretion, a court might first determine whether to weigh community values at all. If it does choose to do so, it should consider other relevant factors, which may outweigh the community's preference. For instance, ensuring that a child receives continuity of care from her primary caretaker may outweigh a court's determination that the caretaker's lifestyle is inconsistent with community norms.

The following section addresses an example from the class of cases in which courts ought to refrain from weighing community preference altogether.

C. Public Law Adjudication: *In re Sara Steed*

Courts should be even more hesitant to effectuate community values in rendering judgments in cases where the state itself participates in the litigation. In these cases, the state through its participation, expresses community values. Courts should thus refrain from exercising discretionary decision making in a way that explicitly incorporates or expresses community values. Instead, courts should exercise their discretion by reference to principles that safeguard the rights and liberties of the individual.

⁹² *Id.* at 624.

⁹³ *Id.* (internal quotations omitted).

⁹⁴ *Id.* at 626.

⁹⁵ *Id.* at 627.

One example of such a case is *In re Sara Steed*—the largest abuse and neglect case in U.S. history—⁹⁶ in which state officials removed 468 children from their nontraditional (polygamous) families in a Texas FLDS community.

Residents of the western Texas town of Eldorado were suspicious of the FLDS community that moved there in 2003.⁹⁷ The community built a large temple and other buildings on their 1,691-acre site, named the “Yearning for Zion” ranch (“YFZ”).⁹⁸ The county sheriff placed the compound under weekly surveillance, and an unofficial squad of businessmen and officials flew regularly over the ranch.⁹⁹ One newspaper report noted that the town’s vigilance “border[ed] on obsession.”¹⁰⁰

In late March 2008, a caller claiming to be a 16-year-old girl living in the YFZ ranch contacted police and alleged that she had been abused and forced to have sex with her 49-year-old spiritual husband.¹⁰¹ Based on her allegations, officials with the Texas Department of Family and Protective Services (“the Department”) went to the YFZ ranch to investigate.¹⁰² Department officials interviewed adults and children through the night and searched for physical evidence.¹⁰³ They then took emergency custody of 468 children (including infants) without a court order, removing them from their homes on the ranch and placing them in scattered foster homes across the state.¹⁰⁴ The Department alleged that immediate danger to the children’s physical health or safety justified

⁹⁶ This is according to the Texas Department of Family and Protective Services. *In re Tex. Dep’t. of Family and Protective Servcs.*, Relator, 255 S.W.3d 613, 614 (Tex. 2008).

⁹⁷ Gretel C. Kovach, *Officials Tell How Sect in West Texas Was Raided*, N.Y. TIMES, Apr. 11, 2008 at A16; Thomas Korosec, *Have Polygamists Found Their Eldorado? West Texas Compound May Be a Haven from Scrutiny, But Neighbors Worry*, HOUSTON CHRON., March 6, 2005, available at <http://www.chron.com/dispatch/story.mpl/side2/3069543.html>. One resident noted that Eldorado has “been a nice town until now . . . I don’t like it. I don’t feel it’s a good place for them to be.” Sylvia Moreno, *Polygamous Sect Moves In, and Texas Town Asks “Why”?*, WASH. POST, Sept. 7, 2004, at A3. Another resident—a state official who directs the local agency that administers welfare programs—stated that “[w]e don’t want anyone to mess up our little world . . . I hope they stay on their own ground and they don’t register to vote.” *Id.*

⁹⁸ Moreno, *supra* note 97.

⁹⁹ Romero, *Wary Texans Keep Their Eyes on the Compound of a Polygamous Sect*, N.Y. TIMES, Nov. 14, 2004, available at <http://www.nytimes.com/2004/11/14/national/14texas.html>; Moreno, *supra* note 97. The sheriff promised that “[w]e won’t hesitate to enforce the law if any are broken” but conceded that “there have been no laws broken yet.” *Id.*

¹⁰⁰ Moreno, *supra* note 97.

¹⁰¹ David Mattingly, *Women Return to Texas Polygamist Ranch*, CNN.com, available at <http://www.cnn.com/2008/CRIME/04/14/polygamy.retreat/index.html> (last visited Oct. 20, 2008).

¹⁰² *In re Sara Steed*, No. 03-08-00235-CV, 2008 WL 2150954 (Tex. App. May 22, 2008).

¹⁰³ *In re Texas Dept of Family and Protective Services*, 255 S.W.3d 613, 613 (Tex. App. 2008).

¹⁰⁴ Kirk Johnson and Gretel C. Kovach, *Sect’s Children Returned to Parents, But Inquiry Continues*, N.Y. TIMES June 3, 2008, available at <http://www.nytimes.com/2008/06/03/us/03polygamy.html>.

the emergency action.¹⁰⁵ Officials never located the girl who placed the call,¹⁰⁶ and newspaper reports later suggested that the call had been a hoax.¹⁰⁷

The Department then obtained an *ex parte* order from a San Angelo District Court granting the Department temporary custody of all the children.¹⁰⁸ Two weeks after the initial removal, the Department sought in an adversarial hearing to continue its custody.¹⁰⁹

The Texas Family Code requires courts to return children to their parents unless the Department shows the existence of specific circumstances that justify its continued temporary custody pending litigation of permanent custody.¹¹⁰ The Department must show: that danger exists to the physical health or safety of the child such that it is contrary to her welfare to remain in the home; that reasonable efforts were made to prevent the child's removal; and that reasonable efforts have been made to enable the child to return home, but that doing so would cause substantial risk of continuing danger to the child.¹¹¹ The district court found that the Department had met its burden and named it the temporary sole managing conservator of the children.¹¹²

Mothers of some of the children moved the court of appeals for an emergency stay of the district court's temporary custody order and for mandamus.¹¹³ The court of appeals denied the mothers' motion for stay¹¹⁴ but one month later, granted their petition for a writ of mandamus.¹¹⁵

The court of appeals found that the district court had abused its discretion when it failed to return the children to their parents and ordered it to vacate its order granting custody of the children to the Department.¹¹⁶ The appellate court summarized the evidence presented by the Department and declared it

¹⁰⁵ *Id.* TEX. FAM. CODE ANN. §§ 262.101-102.

¹⁰⁶ *In re Tex. Dep't of Family and Protective Servcs.*, 255 S.W.3d at 614.

¹⁰⁷ Nicholas Riccardi and Miguel Bustillo, *Texas Vows New Tack Against Sect*, L.A. TIMES, May 31, 2008, at A1; Faye Bowers, *Are FLDS Sect's Beliefs Sufficient Grounds for Taking the Kids? Texas Supreme Court Is Set to Weigh in on State's Actions Toward a Polygamous Sect*, CHRISTIAN SCIENCE MON., May 27, 2008; Miguel Bustillo, *Texas Asks High Court to Overturn Sect Ruling*, L.A. TIMES, May 24, 2008, at A14.

¹⁰⁸ Brief of Relators at *4, *In re Steed*, 2008 WL 2340323, (Tex. App. May 22, 2008) (No. 03-08-00235-CV).

¹⁰⁹ *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *1 & n.1 (Tex. App. May 22, 2008); Brief of *Amici Curiae*, American Civil Liberties Union & American Civil Liberties Union of Texas, in the Supreme Court of Texas, *In re Texas Department of Family & Protective Services*, In Opposition to Relator's Petition for Mandamus, No. 08-0391, at 2 (2008).

¹¹⁰ TEX. FAM. CODE ANN. § 262.201.

¹¹¹ *Id.*

¹¹² *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *1, n.1 (Tex. App. May 22, 2008).

¹¹³ Emergency Motion for Stay Pending Review of Petition for Mandamus, *In re Steed*, 2008 WL 2340323, *3 (Tex. App. Apr. 23, 2008) (No. 03-08-00235-CV). See also AP, *Heavy Security as Grand Jury Looks into Texas Sect*, June 25, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=91087070>.

¹¹⁴ *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132303 (Tex. App. Apr. 25, 2008).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at *4.

insufficient to support the findings required to keep the children in state custody.¹¹⁷ the Department had presented at the district court hearing evidence that girls interviewed shared the FLDS belief in underage marriage and pregnancy; there were, at the time of the removal of the children, five girls who were pregnant and who had become pregnant at ages fifteen and sixteen (and other women had been pregnant as adolescents).¹¹⁸

The Department and district court had concluded that these facts, along with the investigator's opinion that the FLDS's belief system groomed boys to become perpetrators of sexual abuse and girls to become victims of sexual abuse, warranted the emergency removal and continued custody of all of the children.¹¹⁹ The court of appeals disagreed, holding that:

The Department did not present any evidence of danger to the physical health or safety of any male children or any female children who had not reached puberty. Nor did the Department offer any evidence that any . . . 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.¹²⁰

One week later, the Supreme Court of Texas affirmed the Court of Appeals ruling.¹²¹

Many commentators agreed that the initial removal had been an overreaction to an isolated and unreliable allegation. There was surely cause for concern that underage girls may have been obligated to enter spiritual marriages (the group's spiritual leader, Warren Jeffs, was convicted in Utah for having coerced a 14-year old girl to marry.) But other than the fact of their pregnancies, there was no evidence suggesting coercion or physical or sexual abuse. The Department conceded that "teenage pregnancy, by itself, is not a reason to remove children from their home" but argued that because these pregnancies took place within a community that condoned underage marriage and childbearing, removal was necessary.¹²² On this thin evidence, the district court approved Department officials' decision to remove the children from their homes

¹¹⁷ *Id.*

¹¹⁸ In re Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *1-2 (Tex. App. May 22, 2008). Teen pregnancy is even more commonplace in Texas than in other states—it has the highest teen birth rate among all states for teens aged 15-17. Dept. of State Health Servcs., *Texas Teen Pregnancy and Birth Facts 2002*, <http://www.dshs.state.tx.us/famplan/tpp.shtm#fact> (last visited August 28, 2008) (citing The National Center for Health Statistics 2004). Nor is underage marriage uncontemplated in the state—until 2003, the age at which a minor could enter a legal marriage was fourteen, with parental consent. TEX. FAM. CODE ANN. § 2.102 (Vernon 2006). In 2005, the age requirement was raised to sixteen but younger minors may still marry, with court approval. *Id.*

¹¹⁹ In re Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *3 (Tex. App. May 22, 2008).

¹²⁰ *Id.*

¹²¹ In re Tex. Dep't of Family and Protective Servcs., 255 S.W.3d 613 (Tex. 2008).

¹²² In re Sara Steed, et al., No. 03-08-00235-CV, 2008 WL 2150954, *2 (Tex. App., May 22, 2008).

outright when, as noted by the Texas Supreme Court, it had “broad authority to protect children short of separating them from their parents.”¹²³

The lack of credible evidence of child maltreatment suggests that other factors led officials to remove the children from the YFZ ranch. Those factors may have been complex, but they likely included a conviction that the FLDS family structure and belief system are inherently immoral. That conviction stems from Christian theology and is reinforced by laws that actualize Biblical traditional norms, in part by criminalizing plural marriage. Officials thus may well have singled out the FLDS community for teenage pregnancy—behavior not especially uncommon in Texas,¹²⁴ arguably because that behavior was coupled with a belief system not shared by the majority community. Indeed, it was the community’s belief system that justified the removal of all of the children (as opposed to removing only the children most obviously at risk—pubescent girls), despite there being no evidence of any physical abuse or harm to any of them.¹²⁵

The YFZ case has highlighted the importance of the judiciary’s checking function. The district court judge presiding over the case, perhaps seeking to implement community norms, approved the children’s removals and ordered the children kept in state custody.¹²⁶ The Texas appellate and supreme courts both disagreed, finding that the essence of the State’s claim—“that the community had a culture of polygamy and of directing girls younger than eighteen to enter spiritual unions with older men and have children”—did not warrant the emergency removal of the children.¹²⁷ In what was a highly politicized case, then, the courts better insulated from community pressure more ably performed the judicial checking function.¹²⁸

Texas authorities initially grounded their case against the parents at the YFZ ranch in the FLDS belief system and their adherence to plural marriage. Yet, as the Texas appellate courts noted, the only issue relevant to determining whether the children ought to have been removed and placed in state custody was whether they were being physically abused or were in imminent danger of abuse. By giving effect to community family norms (*i.e.* Biblical traditional norms), Texas officials violated the Texas child protection statute and the constitutional right of the Fundamentalist Mormon parents to the “care, custody, and control of their children.”¹²⁹

In re Sara Steed highlights the need for courts to act as moderating or tempering forces and the utility of a judiciary insulated from popular opinion. Yet the near-unanimous public distrust and moral condemnation of the YFZ community members, along with the sensational character of the accusation,

¹²³ *In re Tex. Dep’t. of Family and Protective Servcs.*, 255 S.W.3d at 615.

¹²⁴ *See supra* note 118.

¹²⁵ *Id.*

¹²⁶ *In re Tex. Dep’t of Family & Protective Servcs.*, 255 S.W.3d at 613.

¹²⁷ *Id.* at 614; *In re Sara Steed*, 2008 WL 2132014, at *3.

¹²⁸ *Id.*

¹²⁹ *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (holding that a visitation order that gave no special deference to parents’ wishes was an unconstitutional infringement on parent’s “fundamental right to make decisions concerning the care, custody, and control of her two daughters”).

created an atmosphere in which it was exceedingly difficult for a judge to make a good decision. And even a judge who is relatively free from undue community pressure may share in that community's sensibilities. Especially in the area of family regulation, enforcing community norms can threaten libertarian ideals.

VI. CONCLUSION

Allowing courts to incorporate community values in some cases may further the expressive purpose of law and shore up perceptions of the social legitimacy of the judicial system. Courts must safeguard, however, against the potentially oppressive power of community norms—especially when the state (rather than private litigants) invokes the judicial process in effectuating those norms.

The courts charged with adjudicating disputes involving families face an exceedingly difficult task. Vague standards frequently vest significant discretion and decision making authority in family judges. Those judges must then attempt a delicate balance, mediating between validating and enforcing community standards and respecting individual rights.