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Yearning for Zion Ranch Raid: Lowering the Standard of Proof for the Termination of Parental Rights

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LOWERING THE STANDARD OF PROOF FOR THE TERMINATION OF PARENTAL RIGHTS

INTRODUCTION

In April 2008, over 400 children were seized from the Yearning for Zion Ranch in Eldorado, Texas by Child Protective Services on the grounds that the children were suffering from abuse.[1] An anonymous complaint made by a sixteen-year-old girl alleging physical and sexual abuse prompted the raid.[2] The residents of the Ranch were members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS"), a breakaway sect of the mainstream Mormon community.[3] The state sought to remove the children from their parents' custody on the premise that the sect's belief in polygamy and underage marriage created an imminent danger to the children's physical health and safety.[4]

This incident escalated the conflict between parental rights and religious rights.[5] Currently, the state's burden of proof to remove children from parental custody is the "clear and convincing" standard as outlined in the landmark Supreme

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[1] Hari Sreenivasan, *Finding the Truth in Eldorado: Is the FLDS Raid About Stopping Child Abuse, or Is Freedom of Religion Being Abused?*, CBS NEWS, Apr. 20, 2008, http://www.cbsnews.com/stories/2008/04/20/sunday/main4029277.shtml.

[2] Ralph Blumenthal, *Additional Children Removed At Polygamist Ranch in Texas*, N.Y. TIMES, Apr. 6, 2008, at A27.

[3] The Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS") is a splinter sect of the Church of Jesus Christ of Latter Day Saints, the mainstream Mormon religion. Mormonism began in 1830 as a religion that believed in polygamy but such belief was abandoned by the Church of Mormon in 1890. Since then many splinter groups have been created such as FLDS. These splinter groups, including FLDS, continue to preach the validity of polygamy despite its illegal nature. Additionally, as with most fundamental religions, FLDS and other splinter groups maintain a rigorous lifestyle devoted to the doctrine of their religion. *See* D. Michael Quinn, *Plural Marriage and Mormon Fundamentalism*, *in* FUNDAMENTALISMS AND SOCIETY 240, 252 (Martin E. Marty & Scott Appleby eds., 1993).

[4] *In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *1 (Tex. App. May 22, 2008), *aff'd sub nom. In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008).

[5] *See* Sreenivasan, *supra* note 1.

Court case, *Santosky v. Kramer*.[6] This heightened standard requires the evidence to be more persuasive than the common civil standard of a preponderance of the evidence, i.e., more likely than not.[7] Consequently, states like Texas have statutes that require proof of imminent danger to a child's physical health or safety for even temporary removal of children from the custody of their parents.[8] However, following the Yearning for Zion Ranch raid, the question remains whether the nature of these religious beliefs creates the type of imminent danger to physical health and safety required by statute.[9]

Affirming the Court of Appeals of Texas, the Texas Supreme Court held that there was no evidence that the physical health or safety of the children from the Yearning for Zion Ranch were in danger.[10] Nor did the court find that the FLDS belief system constituted sufficient evidence of imminent abuse to warrant removal of the children from their parents.[11] Furthermore, although it noted that the case involved "important fundamental issues concerning parental rights and the State's interest in protecting children," it declined to further elaborate on these issues.[12]

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[6] Santosky v. Kramer, 455 U.S. 745, 768-69 (1982).

[7] *See infra* notes 45-57 and accompanying text.

[8] TEX. FAM. CODE ANN. § 262.201 (Vernon 2008). The relevant Texas statute regarding removal pending a final termination hearing states in part:

> (b) At the conclusion of the full adversary hearing, the court shall order the return of the child to the parent . . . or custodian entitled to possession unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that: (1) there was a danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child;
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> . . . .
>
> (d) 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 (2) has sexually abused another child.

Id.; *see also In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *1 (Tex. App. May 22, 2008), *aff'd sub nom. In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008).

[9] *See In re* Steed, 2008 WL 2132014, at *1-3; Sreenivasan, *supra* note 1.

[10] *In re* Tex. Dep't of Family & Protective Servs., 255 S.W.3d. 613, 615 (Tex. 2008).

[11] *See id.* Although the Court affirmed the ruling, it did so on the condition that appropriate relief still be granted to protect the children, although the court did not specify what type of relief would be appropriate. *Id.*

[12] *Id.* (O'Neill, J., concurring in part and dissenting in part).

The state intervention at the Yearning for Zion Ranch is not the first raid on a Mormon fundamentalist community. In 1953, over 120 Arizona officers arrested thirty-six men and eighty-six women, and took into custody 263 children from a fundamentalist community in Short Creek, Arizona.[13] The purpose of the raid[14] was to protect the children from "'the foulest conspiracy [one] could imagine . . . dedicated to the production of white slaves.'"[15] However, similar to the Yearning for Zion Ranch case, the Supreme Court of Arizona ordered that the children be returned home to their families.[16] The Arizona court held that the parents of the children seized in the Short Creek raid had been denied participation by their attorneys during the custody hearing, thereby resulting in a violation of the due process of law and rendering a decision to deprive the parents of custody of their children invalid.[17] Furthermore, the Arizona court found that neither party had presented evidence as to whether the children's safety and welfare would best be protected by depriving the parents the right to custody.[18] As a result, the presumption that the child's interests are best served by allowing custody to remain with the child's parents was not rebutted, and therefore, it was in the interest of the children of Short Creek to remain with their parents.[19]

Given the history of clashes between the state and Mormon fundamentalists, the Yearning for Zion Ranch case revived important issues dealing with a parent's fundamental rights in conflict with the interests of the State. This Note argues that a parent's religious beliefs can be evidence of physical abuse and thus a danger to a child's safety, prompting the need for removal. Part I discusses a parent's rights to the upbringing of his or her child under the Fourteenth Amendment, as well as the current burden of proof required to terminate these parental rights under the Fourteenth Amendment. Part I also examines a parent's right to control the religious upbringing of his or her child and contends that these rights are not absolute and can be a factor in a custody

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[13] Michael Homer, *Children in New Religious Movements: The Mormon Experience*, *in* INTRODUCTION TO NEW AND ALTERNATIVE RELIGIONS IN AMERICA 224, 234 (Eugene V. Gallagher & W. Michael Ashcroft eds., 2006).

[14] As advocated by then-Governor of Arizona, J. Howard Pyle. *Id.*

[15] *Id.*

[16] *Id.*

[17] Ariz. State Dep't of Pub. Welfare v. Barlow, 296. P.2d 298, 299-300 (Ariz. 1956).

[18] *Id.* at 301.

[19] *Id.*

determination. Next, Part II argues that religious beliefs normally protected under the First Amendment can be considered as evidence in parental termination cases and suggests that termination is appropriate where these religious beliefs are abusive. Furthermore, Part II contends that because the Yearning for Zion Ranch community resembles one large family and, in general, the presence of abuse in one child is sufficient for the removal of the other children in the family, the remainder of the Yearning for Zion Ranch children should also be removed. Part III examines the policy arguments in support of lowering the evidentiary standard. Part III asserts that the current evidentiary standard leaves the child's interest to remain free from abuse not as protected as the parent's interest in custody of his or her child. Therefore, further protection is warranted and can be achieved by lowering the standard of proof. Finally, Part IV concludes that when religion is considered abusive and pervasive throughout a close community, like the Yearning for Zion Ranch, then the standard of proof to remove the children from their parents in the community should be lowered from the clear and convincing standard to the preponderance of the evidence standard.

I. BACKGROUND

The current burden of proof for termination of parental rights should be lowered to a preponderance of the evidence standard in cases where a pervasive religious belief system throughout a community promotes abuse in at least some of the children within that community. In order to understand the rationale behind this argument, it is first necessary to understand the current law in regards to parental rights termination, as well as the role of religion in child custody cases.

A. Termination of Child Custody Rights

1. The Fourteenth Amendment Due Process Rights in Child Custody Proceedings

The Fourteenth Amendment of the United States Constitution requires that no state "deprive any person of life,

liberty, or property, without due process of law."[20] Pursuant to the Fourteenth Amendment, parents inherently have a fundamental right to the care and custody of their children unencumbered by the state.[21] The right to marry, procreate, and raise one's children is considered "one of the basic civil rights of man."[22] The Supreme Court first recognized the right of parents to rear their children in *Meyer v. Nebraska*,[23] holding that the Fourteenth Amendment's protection of life, liberty, and property also included the protection of the individual's right to raise children.[24] Specifically, the State could not interfere with a parent's choice to teach her children a foreign language because this would be an undue interference with the parent's right to raise her children.[25] Similarly, in *Prince v. Massachusetts*, the Court recognized that a parent has the authority to raise his or her child as part of "the private realm of family life which the state cannot enter."[26] However, the Court recognized that this private right could not conflict with the state's interest to protect the welfare of children.[27] The court stated that the rights of parenthood are not beyond limitation and that the state may proscribe or compel certain activity that is in the best interest of the child's welfare.[28]

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[20] U.S. CONST. amend. XIV, § 1. The purpose of this provision is to provide individuals with substantive and procedural protections when individual's fundamental rights are at risk of being compromised or terminated. *See* Ann E. Ward, *Standards of Proof in Parental Rights Termination:* Santosky v. Kramer, 36 SW. L.J. 1069, 1070 (1982); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 523 (2d ed. 2002). Procedural due process refers to the procedures the government must undertake when seeking to deprive a person of their life, liberty, or property. *Id.* This process usually means that an individual is entitled to notice and a hearing before these rights are terminated. *Id.* Substantive due process refers to the reasoning behind the deprivation of an individual's life, liberty, or property. *Id.* The level of substantive due process afforded depends upon the inherent nature of the fundamental right at stake. *Id.* at 524. Generally, for an interest that is deemed important to the individual, the government needs to show a compelling reason to deprive the individual of this interest. *Id.* Parental custody rights are interests that are deemed to be fundamental and, thus, required to be afforded both procedural and substantive due process. *Id.*

[21] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[22] Skinner v. State of Okl. *ex rel.* Williamson, 316 U.S. 535, 541 (1942); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[23] 262 U.S. 390 (1923).

[24] *Id.* at 399.

[25] *See generally Meyer*, 262 U.S. 390.

[26] *Prince*, 321 U.S. at 165-66.

[27] *Id.* at 165.

[28] *Id.* at 166-68 (holding that the state may limit a parent's insistence that a child hand out religious literature as part of child employment laws).

Given that parents have a fundamental right under the Fourteenth Amendment to the care and custody of their children, due process protections are necessary when the state seeks to limit or terminate this fundamental right.[29] As such, the government may only terminate custody if the parents are afforded some minimal level of procedural protection through which they can argue their case.[30] Furthermore, terminating the parent's custody must be necessary to achieve the State's compelling interest.[31]

To determine whether due process was met, the following three factors, originally articulated in *Matthews v. Eldridge*, must be considered: 1) the private interest affected by government action; 2) the government's countervailing interest including "fiscal and administrative burdens;" and 3) the risk of an erroneous decision.[32] In a parental custody case, the private interest affected is the parent's right to care for and have custody of his or her children.[33] Additionally, unique to custody cases, the child has a private interest at stake, specifically the interest to be "free from abuse or neglect."[34] However, the child's interest is not given the same weight as the parent's interest.[35] The government's interest is the health, safety, and welfare of the children involved.[36] In this respect, the government's interest is presumably aligned with the parent's interest in that the state and the parents are generally concerned with preserving a child's well-being, and this is usually best achieved when a child is cared for by his or her parents.[37] However, the government's interest will diverge from that of the parents when the government has decided that

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[29] *See* Ward, *supra* note 20, at 1070-71.

[30] CHEMERINSKY, *supra* note 20, at 772. Although procedures will vary from state to state, courts will determine the sufficiency of the procedural protection by analyzing the process using the *Eldridge* factors. *See infra* note 32 and accompanying text.

[31] *Id.*

[32] Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

[33] Parents have an interest in "the companionship, care, custody and management of his or her children" that "undeniably warrants deference and, absent a powerful countervailing interest, protection." Lassiter v. Dep't of Soc. Servs. of Durham County, N.C., 452 U.S. 18, 27 (1981) (internal quotation marks omitted) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

[34] Ward, *supra* note 20, at 1070.

[35] *Id.* at 1072.

[36] *Lassiter*, 452 U.S. at 27.

[37] *See id.*

remaining in the care and custody of the parent is no longer in the best interest of the child.[38]

Additionally, the government must be concerned with the fiscal and administrative costs of conducting a hearing to determine the custody rights of parents.[39] An increase in the number of hearings required to comport with due process standards undoubtedly increases the cost to the public.[40] However, conserving administrative resources and lowering costs are not controlling factors in determining whether procedural safeguards are met.[41] In parental custody cases, the child's welfare will outweigh these fiscal and administrative factors.[42] Finally, the court must consider the possibility of an erroneous decision leading to a wrongful termination of the parent's custodial rights, which would not be in the best interest of the parent, child, or the government. Thus, given the importance of the interests at stake, the Supreme Court has concluded that a hearing is necessary in order to decide whether or not termination of parental rights is appropriate.[43]

2. *Santosky v. Kramer*: The Clear and Convincing Standard

In conducting a hearing, an individual's due process rights are protected by the standard of proof required to establish that the individual is no longer entitled to his or her liberty or property rights.[44] There are three evidentiary standards: beyond a reasonable doubt, clear and convincing, and preponderance of the evidence.[45] The beyond a reasonable doubt standard, the highest level of proof, is applied to criminal cases in which an individual risks losing his freedom.[46] The burden is on the prosecutor to convince a jury of a "subjective state of near certitude" that the defendant is guilty.[47] This

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[38] *See id.*; Ward, *supra* note 20, at 1071-72.

[39] *See* Matthews v. Eldridge, 424 U.S. 319, 347 (1976).

[40] *Id.*

[41] *Id.* at 348.

[42] Stanley v. Illinois, 405 U.S. 645, 656-58 (1972).

[43] *Id.*

[44] *See* Santosky v. Kramer, 455 U.S. 745, 755-56 (1982); Spence v. Gormley, 439 N.E.2d 741, 750 (Mass. 1982).

[45] Ward, *supra* note 20, at 1075.

[46] *Id.*

[47] Jackson v. Virginia, 443 U.S. 307, 331 (1979) (Stevens, J., concurring) (internal quotations omitted) (quoting Norman Dorsen & Daniel A. Rezneck, In re Gault *and the Future of Juvenile Law*, FAMILY LAW QUARTERLY 1, 26 (Dec. 1967)).

standard is applied because of the importance of the personal interest at stake and also the grave consequences of an erroneous decision (namely, an individual's loss of freedom).[48]

A preponderance of the evidence is the lowest standard and is applied in most civil cases where only monetary loss is at stake.[49] By this standard, the weight of the evidence tends to support the facts of one party more so than the other party.[50] The clear and convincing standard of proof falls in between reasonable doubt and preponderance of evidence.[51] This standard is applied when there is something at stake more important than just a pecuniary interest, but not as protected as an individual's liberty.[52] The clear and convincing standard is most often applicable when an individual's fundamental rights are at stake.[53] Generally, proof by clear and convincing evidence is defined as the persuasion of the trier of fact that "the facts asserted are highly probably true"[54] and the trier of fact has a "clear conviction, without hesitance, of the truth of the facts related."[55] Specifically, the trier of fact must be persuaded by more than a "substantial margin"[56] and with a "higher probability than is required by the preponderance-of-the-evidence standard."[57]

Prior to the decision in *Santosky v. Kramer*, states varied as to the standard of proof required for termination of parental custody. In *Santosky v. Kramer*, the Court struck down a New York statute as unconstitutional on the grounds that it offended the Due Process Clause of the Fourteenth

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[48] Ward, *supra* note 20, at 1075.

[49] *Id.*

[50] Annotation, *Instructions Defining Term "Preponderance or Weight of the Evidence*," 93 A.L.R. 155 (1934).

[51] Ward, *supra* note 20, at 1075.

[52] *Id.*

[53] *In re* Polk License Revocation, 449 A.2.2d 7, 13 (N.J. 1982). For example, in a civil commitment proceeding, the clear and convincing standard of proof is required since this type of proceeding involves the fundamental right of freedom from restraint. Foucha v. Louisiana, 504 U.S. 71, 84, 86 (1992). The clear and convincing standard may also be used in cases in which it is determined that a patient would wish to end life sustaining medical support. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 285 (1990). Denaturalization and deportation proceedings also require a clear and convincing standard of proof. *See* Woodby v. INS, 385 U.S. 276, 277 (1966) (deportation); Chaunt v. U.S., 364 U.S. 350, 353 (1960) (denaturalization).

[54] Lopinto v. Haines, 441 A.2d 151, 156 (Conn. 1981).

[55] First Nat'l Bank of Roland v. Rush, 785 S.W.2d 474, 479 (Ark. Ct. App. 1990).

[56] United Mine Workers v. Gibbs, 383 U.S. 715, 736 (1966).

[57] California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93 n.6 (1981).

Amendment because it allowed for termination of custody rights upon a showing by a preponderance of the evidence that the parent was unfit and the child was permanently neglected.[58] The Court concluded that in order to terminate parental custody rights, the State must prove by clear and convincing evidence that the parents are no longer entitled to custody of their children.[59] Thus, to terminate a parent's custody rights,[60] the trier of fact must have a "clear conviction, without hesitance, of the truth of the facts related"[61] and believe that "the facts asserted are highly probably true."[62] In support of its decision, the Court applied the *Eldridge* factors in ruling out the preponderance standard in favor of the clear and convincing standard.[63] First, the Court found that the private interests at stake were compelling.[64] Second, the Court found that the risk of error in using the preponderance of the evidence standard was high because the parents would suffer an irrevocable grievous loss.[65] Third, the Court concluded that any countervailing governmental interest in using a preponderance standard was minimal when compared to the first and second factors.[66]

Since *Santosky*, all parental termination proceedings require the clear and convincing standard.[67] The Court affirmed that, going forward, a case by case analysis for the evidentiary standard in termination proceedings was inappropriate and due process rules are applied to "the generality of the cases, not the rare exception."[68] It is crucial that the parties and the fact-

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[58] Santosky v. Kramer, 455 U.S. 745, 747 (1982).

[59] *Id.* at 747-48.

[60] A parent's custody rights are generally terminated when there is evidence of abuse or neglect to the child. *See generally* SCOTT E. FRIEDMAN, THE LAW OF PARENT-CHILD RELATIONSHIPS: A HANDBOOK 133-44 (1992).

[61] First Nat'l Bank of Roland v. Rush, 785 S.W.2d 474, 479 (Ark. Ct. App. 1990).

[62] Lopinto v. Haines, 441 A.2d 151, 156 (Conn. 1981).

[63] *See Santosky*, 455 U.S. at 758, 769.

[64] *Id.* at 758. The Court considered the private interests of the parents to the care and custody of their children to be "far more precious than any property right." *Id.* at 758-59. Further, to terminate a parent's right to custody of his or her child would not mean merely an infringement upon the parent's constitutional fundamental rights but an obliteration of this right all together. *See id.* at 759. Thus, the court found the private interest of the parents to be so compelling that a higher degree of certainty as to the parent's unfitness is necessary to terminate custody rights. *See id.* at 759, 769.

[65] *Id.* at 758-59.

[66] *Id.* at 758.

[67] *Id.* at 769.

[68] *Id.* at 757 (internal quotation marks omitted) (quoting Matthews v. Eldridge, 424 U.S. 319, 344 (1976)).

finder are aware of "how the risk of error will be allocated, [thus] the standard of proof necessarily must be calibrated in advance."[69] Accordingly, state courts have unmistakably adopted the clear and convincing standard for child termination proceedings.[70] Texas is no exception: the Texas Appellate Court has consistently held that the termination of parental rights requires clear and convincing evidence.[71]

The effect of the use of this heightened standard in termination proceedings can be seen in other child protection laws. For instance, in Texas, emergency removal of children from the home is allowed only if there is an immediate danger to the health or safety of the child caused by the act or omission of a person entitled to custodial possession of the child, and protection requires immediate removal.[72] Once this evidence is satisfied, a court may conclude that the child is in continuing danger by remaining in the home, and a temporary order of removal is therefore appropriate.[73] This temporary removal could lead to permanent removal of a child from the home.[74] Thus, the high standards for temporary removal are another safeguard for the parents in a termination proceeding. For example, the Yearning for Zion Ranch case merely concerned a temporary, as opposed to permanent, removal, and the Texas Supreme Court held that there was no evidentiary basis for

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[69] *Id.*

[70] Kent K. v. Bobby M., 110 P.3d 1013, 1015-16 (Ariz. 2005) ("The statue thus clearly requires that the party seeking termination establish the grounds for termination by clear and convincing evidence."); *In re* A.C.G., 894 A.2d 436, 439 (D.C. 2006) ("Proofs made in a termination proceeding must satisfy the clear and convincing evidence standard . . . that lies somewhere between a preponderance of evidence and evidence probative beyond a reasonable doubt." (internal quotation marks omitted) (quoting *In re* K.A., 484 A.2d 992, 995 (D.C. 1984))).

[71] *See* Holick v. Smith, 685 S.W.2d 18, 20 (Tex. 1985) (evidence supporting termination must be clear and convincing (citing *Santosky*, 455 U.S. at 747-48)); *In re* S.R.L., 243 S.W.3d 232, 235 (Tex. App. 2007) ("Parental rights can be terminated involuntarily only by a showing of clear and convincing evidence."); Colbert v. Dep't of Family and Protective Servs., 227 S.W.3d 799, 807 (Tex. App. 2006); Ybarra v. Tex. Dep't of Human Servs., 869 S.W.2d 574, 576 (Tex. App. 1993) ("Because the termination of the parent-child relationship severs rights treasured by the law, strict standards apply; evidence to meet those standards must be clear and convincing."); Hellman v. Kincy, 632 S.W.2d 216, 218 (Tex. App. 1982) ("[D]ue process requires that the State support its allegations by at least clear and convincing evidence." (internal quotation marks omitted) (quoting *Santosky*, 455 U.S. at 747-48)).

[72] TEX. FAM. CODE ANN. § 262.201(b) (Vernon 2008); *see also In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613, 614 (Tex. 2008).

[73] TEX. FAM. CODE ANN. § 262.201(c); *see also In re* Tex. Dep't. of Family and Protective Servs., 255 S.W.3d at 614-15.

[74] *See* TEX. FAM. CODE ANN. § 105.001; TEX. FAM. CODE ANN. § 161.206; TEX. FAM. CODE ANN. § 262.201(c).

temporary removal of the children from the Yearning for Zion Ranch.[75] The court found the belief system of the members of the Ranch alone did not prove an immediate danger to the health and safety of the children.[76] Therefore, it is highly unlikely that this evidence would be sufficient to satisfy the clear and convincing standard in a permanent termination proceeding.

B. The First Amendment: The Parent's Rights to Control the Child's Religious Upbringing

As part of a parent's fundamental right to the custody and control of his or her child, as established in *Meyer v. Nebraska* and *Prince v. Massachusetts*, a parent has the right to control the child's religious upbringing.[77] This right, grounded in the Fourteenth Amendment, is further protected by the First Amendment's Establishment and Free Exercise clauses.[78] The Court has interpreted these clauses to include the notion that parents are entitled to the protection of their religious beliefs in raising their children.[79]

A pivotal case demonstrating the extent to which a parent has a right to control his or her child's religious upbringing is *Wisconsin v. Yoder*. In this case, Amish parents refused to enroll their children in any public or private school after completing the eighth grade, thereby violating Wisconsin's mandatory school-attendance law.[80] As a result, the parents were convicted and fined for violating the state statute.[81] The parents brought suit on the grounds that their First and Fourteenth

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[75] *In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d at 615.

[76] *In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *4 (Tex. App. May 22, 2008), *aff'd sub nom. In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008).

[77] CHEMERINSKY, *supra* note 20, at 778-79.

[78] U.S. CONST. amend. I. The First Amendment is applied to the states through the Fourteenth Amendment. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972). The First Amendment is divided into two clauses: the Establishment Clause and the Free Exercise Clause. The Establishment Clause can be interpreted in a number of different ways. However, it is often interpreted to mean that the government cannot use religion as a ground for its action or inaction or favor one religion over another. CHEMERINSKY, *supra* note 20, at 1193, 1196 (3d ed. 2006). The Free Exercise Clause provides that the government will not interfere with an individual's right to believe nor the individual's right to act in regards to religious beliefs. *Id.* at 1247.

[79] *See Yoder*, 406 U.S. at 233; Jennifer Ann Drobac, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1614 (1998).

[80] *Yoder*, 406 U.S. at 207.

[81] *Id.* at 208.

Amendment rights were violated due to the fact that enrollment in high school violated the Amish belief system.[82] The Supreme Court held that Wisconsin's requirement of education after the eighth grade violated the Amish parents' free exercise of their religious beliefs.[83] In so deciding, the Court established that the free exercise of religion includes the right of parents to control the religious upbringing of their children[84] and that the parent's right to religious upbringing trumps the right of the state to require child education.[85]

Nonetheless, the right of parents to control the religious upbringing of their children is not absolute.[86] In *Prince v. Massachusetts*, an aunt, having custodianship over her niece, brought the young girl with her to distribute Jehovah's Witness material, in violation of the state's child labor laws.[87] Although the Court recognized that children have the right to exercise their religious beliefs and that parents have the right to promote religious education for their children,[88] the right to exercise religion is not beyond state limitation.[89] The state may limit parental freedoms where the child's welfare is affected, even if the freedoms include religious conviction.[90] Exercising its police powers, the state has a right to limit child labor by

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[82] *Id.* at 208-09. The Amish religion supports the belief that in order to have salvation, members of the religion must live in a church community that is separate from the world. *Id.* at 210. The Amish believe in a simple life that is in contradiction with the typical contemporary ideals, which praise material success and individuality as opposed to community. *Id*. There is a pervasive belief in the Amish community that a child's attendance in high school provides "impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs." *Id.* at 211. No objection is made by the Amish community to a child's attendance of grades first through eighth because the community believes that the children need to be taught the basic skills in order to be good Amish citizens. *Id.* at 212. The parents in this case brought substantial expert testimony about the beliefs and lifestyle of the Amish community in order for the court to rule on the First Amendment claim. *Id.* at 209.

[83] *Id.* at 219.

[84] Drobac, *supra* note 79, at 1614.

[85] *Yoder*, 406 U.S. at 214-15, 221-22.

[86] *See generally* Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that exercising religious beliefs may not override child labor laws).

[87] *Id.* at 160-61, 163. Under Massachusetts General Laws, it is illegal for any person to furnish a minor with articles knowing that the minor intends to sell these articles. Furthermore, it is illegal for a parent, guardian or custodian to encourage a child to work in violation of child labor laws, including allowing a child under the age of sixteen to work or to work long hours or work in the evening. MASS. GEN. LAWS ANN. ch. 149 §§ 80-81 (West 2004).

[88] *Prince*, 321 U.S. at 165.

[89] *Id.* at 166.

[90] *Id.* at 167.

placing restrictions on when and where children may work, even if their work consists of furthering their religious beliefs.[91]

Although *Yoder* and *Prince* appear to be diametrically opposed, it is possible to distinguish the propositions for which they stand and to create a rule regarding state intervention in parental religious rights. The determining factor underlying the different outcomes in each case is the nature of the law violated by the parents' religious practice. For instance, in *Prince*, Sarah Prince's First Amendment right to allow her niece to distribute religious pamphlets conflicted with the state's child labor laws.[92] In limiting Prince's right to control her niece's practice of religion, the Court held that child labor was "among evils . . . [whose] crippling effects" require state action to protect the "healthy, well-rounded growth" of children.[93] However, in *Yoder*, the conflict arose from a state statute requiring mandatory school attendance for students from grades one through twelve.[94] In finding in favor of the Amish parents, the Court decided that non-compliance with the mandatory school attendance statute was not a threat to the social welfare of the child.[95] The Court was concerned that by forcing the Amish children to attend school, the state would undermine the Amish community's religious beliefs by influencing and shaping the beliefs of their children through education.[96] According to the *Yoder* Court, this was the "kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."[97]

Indeed, the *Yoder* Court distinguished the facts of the case from the *Prince* decision. In refusing to afford weight to the State's argument that exempting Amish children from the school attendance requirement deprived the children of their right to secondary education, the Court noted that this right is not comparable to the "evils" associated with child labor.[98] Accordingly, the rule suggested by these two cases is that unless the state can show a compelling interest in protecting

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[91] *Id.* at 168-69.
[92] *Id.* at 159.
[93] *Id.* at 168.
[94] Wisconsin v. Yoder, 406 U.S. 205, 207 n.2 (1972).
[95] Drobac, *supra* note 79, at 1615.
[96] *Yoder*, 406 U.S. at 218.
[97] *Id.*
[98] *Id.* at 229-30.

the child's welfare, such as preventing child labor, the parent's First Amendment claim will prevail.[99]

C. Considering Religion in Child Custody Cases

In child custody proceedings, the state has a compelling interest to protect the welfare of the child involved;[100] thus, parents generally do not have a valid First Amendment claim when the court considers the religion of the parents in custody proceedings. The Court in *Prince* qualified its decision by stating that its ruling did "not extend beyond the facts [of] the case" and did not give the states license to justify intervention in religious activities on behalf of children "in the name of health and welfare."[101] Nonetheless, since the *Prince* decision, courts have carefully examined the religious beliefs of parents in child custody cases.[102] In divorce proceedings involving child custody disputes, the courts have looked to religion as one factor to determine the fitness of each parent to care for the child.[103] The standard used by many courts is that a parent's religious activity will not be a factor when it is clear that the child will not be harmed from the religious activity.[104] As one court noted, "[s]o long as a court makes findings as to a child's actual needs respecting religion, the court may consider such needs, as one factor, in awarding custody."[105] Thus, the courts are using a standard derived from *Prince* and *Yoder*—the child's welfare must be at stake in order to deprive parents of

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[99] *See* Drobac, *supra* note 79, at 1615 ("The [*Yoder*] decision suggests that absent a showing that a parent's actions will 'jeopardize' the child's health or safety, a court may not regulate or restrict the religious behaviors of the parent."). However, since the decision in *Yoder*, the Court has held that laws which are facially neutral with regard to religion will be considered valid. *See id.* at 1617. While this is the current state of the law regarding free exercise of religion, it is not of much use in child custody cases because these cases involve the parent's fundamental right to the upbringing of their children and thus the heightened standard is still necessary. *See id.*

[100] *See supra* note 38 and accompanying text.

[101] Prince v. Massachusetts, 321 U.S. 158, 171 (1944).

[102] *See* George L. Blum, Annotation, *Religion as a Factor in Child Custody Cases*, 124 A.L.R. 5TH 203 (2004); *see also* Lauren C. Miele, Note, *Big Love or Big Problem: Should Polygamous Relationships Be a Factor in Determining Child Custody*, 43 NEW ENG. L. REV. 105, 122-23 (2008) (discussing religious considerations in child custody proceedings).

[103] Miele, *supra* note 102, at 122.

[104] *Id.* at 123.

[105] Bonjour v. Bonjour, 592 P.2d 1233, 1240 (Alaska 1979) (citing Wojnarowicz v. Wojnarowicz, 137 A.2d 618, 621 (N.J. Super. Ct. Ch. Div. 1958)).

their right to care and custody of their child on the grounds of their religious beliefs.[106]

For example, in *Colopy v. Colopy*, the Massachusetts Supreme Court considered the religious needs of children in a custody dispute.[107] In this case, the father was awarded custody of the couple's five children.[108] Prior to the proceeding, the couple had lived at a religious center as part of a religious community.[109] However, as a result of a change in the rules of the community, the couple was no longer allowed to live as husband and wife, and the children were separated from their parents and each other and forced to live with other adults in the community.[110] When the mother refused to leave the religious center, the court found that it was in the best interest of the children to award custody to the father, who had left the community and established a home in mainstream society.[111]

As evidenced in *Colopy v. Colopy*, in order for religion to be considered in a child custody hearing, it must pose an extreme threat to a child's safety or welfare. Simply practicing a religion that promotes seemingly unorthodox beliefs is not enough to infringe upon a parent's right to control the religious upbringing of his or her children. For instance, in *Burnham v. Burnham*, the Nebraska court considered the religious beliefs of the parents in determining custody of the child in a divorce proceeding.[112] In this case, the mother of the child practiced Catholicism of the Tridentine Church of Fatima Crusaders.[113] Under this religion, the woman's marriage to the child's father was not legitimate because they were not married in the Fatima Crusader Church.[114] Consequently, the mother believed the child to be illegitimate.[115] She also believed that she was

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[106] *See supra* note 99 and accompanying text.

[107] Colopy v. Colopy, 203 N.E.2d 546, 547 (Mass. 1964).

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] Burnham v. Burnham, 304 N.W.2d 58, 61 (Neb. 1981). "The courts preserve an attitude of impartiality between religions and will not disqualify a parent because of his or her religious beliefs." *Id.* (internal quotation marks omitted) (quoting Goodman v. Goodman, 141 N.W.2d 445, 448 (Neb. 1966)). "However, we do have a duty to consider whether such beliefs threaten the health or well-being of the child." *Id.*

[113] *Id.* at 60.

[114] *Id.*

[115] *Id.* It is worth noting that the parents were actually married in the Catholic Church before the birth of their child; however, because it is not the Fatima Crusaders Church, it was not seen in the eyes of the mother as legitimate. *Id.*

"bound . . . [by] mortal sin to educate her child in the . . . Church."[116] The school connected with the Tridentine Church allowed for corporal punishment and strict discipline and required a parental waiver releasing the school of all liability in case of an unforeseen accident.[117] The mother stated that it was her intention to send the child to this school because failure to do so would result in her excommunication from the Church.[118] Additionally, the mother's brother was ostracized from the family by the mother and her own parents for his failure to convert from Catholicism to the Church of Tridentine.[119] She testified that if her daughter was to decide that she did not want to be a part of the Church of Tridentine, she would be willing to cut the child from her life.[120]

Based on these facts, the court held that it was obligated to consider the religious beliefs of the mother in determining who should be awarded custody.[121] In considering the mother's religious beliefs, the court decided that these beliefs could possibly have an adverse impact on the upbringing of the child.[122] Namely, the belief that the child was illegitimate and the fact that the mother would be willing to cut the child out of her life caused the court to conclude that the father should be awarded custody of the child.[123]

The above-mentioned cases are not the exception to the norm,[124] many state courts find that religion can be a determining factor in child custody suits.[125] Thus, based on the

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[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 61.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 61-62.

[124] Although these cases are not the exception to the norm, some courts still refuse to look at religion as a factor in determining the custody placement of a child. *See* Alaniz v. Alaniz, 867 S.W.2d 54, 56-57 (Tex. App. 1993) (holding that awarding custody on the premise that one parent's religion is more normal than the other parent's is not proper); *In re* Marriage of Knighton, 723 S.W.2d 274, 285 (Tex. App. 1987) (holding that the test for determining the custody of a child is the "'best interest of the child'" test and not the religious beliefs of the mother without evidential proof that these beliefs were illegal or caused harm to the child (citing TEX. FAM. CODE ANN. § 14.07(a) (Vernon 1986))); Blum, *supra* note 102.

[125] *See* Kendall v. Kendall, 687 N.E.2d 1228, 1235-36 (Mass. 1997) (holding that when the children had been brought up in the Jewish faith, it was proper for the court to limit their exposure to the father's Christian beliefs as a matter of custody provisions); Graci v. Graci, 187 A.D.2d 970, 973 (N.Y. App. Div. 1992) (holding that the mother's religious education of the children contributed to her home being a superior

above examples, courts have the ability to consider religion in child custody cases without infringing upon the First Amendment rights of the parents.[126] If the courts can apply religion as a factor in determining the outcome for child custody disputes without violating the First Amendment, then by logical extension, the courts can apply religion to parental termination proceedings without violating the First Amendment.

II. SUPPORT FOR TERMINATION UNDER THE CURRENT LAW

Where there is a pervasive religious belief throughout a community condoning child abuse,[127] the burden of proof should be lowered from the clear and convincing standard to a preponderance of the evidence standard. However, even under the current evidentiary standard there is support for the removal of children who have not been abused but where abusive religious beliefs are present in a communal living arrangement.

A. Applying Religion to Termination Proceedings

Considering religion in parental termination proceedings is a necessary step towards lowering the standard of proof for termination of parental custody rights in cases where a pervasive belief system in a community condones child abuse. However, the application of religion as a factor in child custody proceedings has been confined mostly to individual child custody disputes, usually arising out of divorce.[128] The religious beliefs of a child's parents are generally not a factor in parental termination proceedings because for termination to occur, the state must prove that "the child is subjected to real physical or emotional harm and less drastic measures would be unavailing."[129] Typically, grounds for

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environment for the children); Aldous v. Aldous, 99 A.D.2d 197, 200 (N.Y. App. Div. 1984) (holding that religion was one factor among many in determining the custody of the child). *See generally* Blum, *supra* note 102. Other courts have also utilized religion as a factor in custody determination hearings.

[126] *See generally* Blum, *supra* note 102.

[127] *See* discussion *infra* notes 152-157 and accompanying text.

[128] *See supra* Part I.C.

[129] Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976). Although religion is generally not the main factor in parental termination proceedings, in some cases, religion is a motivating factor. *See In re* State *ex rel.* Black, 283 P.2d 887, 913 (Utah 1955). However, these types of cases historically involved other strong factors warranting removal. For instance, in *In re State ex rel. Black*, the Blacks' religion dictated that the family engage in illegal polygamous behavior. *Id.* at 903.

termination result from "severe or chronic abuse or neglect."[130] For example, sexual abuse including anything from fondling to sexual intercourse is considered a crime and gives the state grounds to intervene "under its *parens patriae* authority."[131] Additionally, emotional abuse resulting in diminished psychological functioning or failure to thrive or control aggressive behavior also may result in state protection of the child.[132] Thus, more often than not, physical or emotional abuse is the focus of a termination proceeding rather than the ideological beliefs of the parents involved.

However, religion often plays an indirect role in termination proceedings when it is the *source* of abuse or neglect. For example, in *In re Edward C*, the California Court of Appeals considered evidence that the children had been physically abused because they were being hit with a strap and "lectured about God at mealtimes for so long that they often fell asleep without eating."[133] In defending his actions, the father explained that "he loved and treated his children equally and that God directed his discipline of them."[134] Thus, while the court did not specifically base its termination decision on the religious beliefs of the father, it was the effect of those beliefs that led to the permanent termination of his rights. In response to the parents' claim that their religious freedoms prevented the court from infringing upon the upbringing of their children, the court stated that "mistreatment of a child . . . is not privileged because it is imposed in the guise of freedom of religious expression."[135] Therefore, while on its face religion is not generally considered in parental termination proceedings, its effect on the treatment of children will be a factor in determining whether a parent should maintain his or her custodial rights.

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[130] LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 841 (2002).

[131] FRIEDMAN, *supra* note 60, at 136. *Parens patriae* is the doctrine invoked by courts that treats the state as a parent to a child by asserting jurisdiction over the child. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 205-07, 210 (1980), *reprinted in* HARRIS & TEITELBAUM, *supra* note 130, at 322 n.1, 323 (2002).

[132] FRIEDMAN, *supra* note 60, at 138.

[133] *Id.* at 134; *see also In re* Edward C., 178 Cal. Rptr. 694, 697 (Cal. Ct. App. 1981).

[134] *In re* Edward C., 178 Cal. Rptr. at 698; *see also* FRIEDMAN, *supra* note 60, at 134.

[135] *In re* Edward C., 178 Cal. Rptr. at 699; *see also* FRIEDMAN, *supra* note 60, at 135.

Another case considering religion in custodial termination proceedings arose out of the Short Creek raid.[136] The court ruled that the removal of children from the care of their parents was appropriate in *In re State in Interest of Black*.[137] This case involved a family living on the Utah side of Short Creek, rather than the Arizona side, and subject to the Utah courts' jurisdiction.[138] In this case, Leonard Black and Vera Johnson were deprived of the custody and control of their children resulting from an unlawful polygamous marriage.[139] The court held that exposing the children to "[t]he practice of polygamy, unlawful cohabitation and adultery"[140] constituted child neglect because the parents failed to offer "the proper maintenance, care, training and education contemplated and required by law and morals."[141] Effectively, the court found that the parents created an environment that was not conducive to the proper upbringing of children through their unlawful practice of polygamy.[142] As such, the court conclusively determined that religious beliefs and practices will not be afforded constitutional protection when they are in conflict with the laws of the nation and result in detriment to the child's welfare.

Applying the foregoing facts to the Yearning for Zion case, the religious beliefs of the residents of the Ranch would likely not be considered as a prima facie factor for termination. However, the *effects* of the beliefs held by members of the Ranch are certainly relevant to a termination proceeding.[143] Specifically, a group of pubescent, underage girls at the Ranch were spiritually married.[144] This "effect" of the religion is a clear

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[136] *See supra* notes 13-19 and accompanying text.

[137] *In re* State *ex rel.* Black, 283 P.2d 887, 913 (Utah 1955).

[138] Whereas most of the custody hearings for children taken from their parents in Short Creek were held under Arizona's jurisdiction and ultimately led to custody being placed with the parents as a result of due process violations, this case was tried separately in the Utah state courts and thus avoided constitutional infringements. *Id.* at 888.

[139] *Id.*

[140] *Id.* at 913.

[141] *Id.* at 895.

[142] As a result of the court's findings, Vera Johnson was deprived of her right to custody of her children and only upon a showing that she was no longer living with Leonard Black would she be granted temporary custody of the children. *Id.* at 913.

[143] Miele, *supra* note 102, at 132-34 (discussing the impact of polygamy and the belief system surrounding the practice in child custody hearings).

[144] Spiritually married refers to the fact that girls and women on the Ranch were not legally married to their "husbands." Rather they were spiritually married typically in a polygamous household. *In re* Tex. Dep't of Family and Protective Servs.,

violation of Texas law prohibiting sexual conduct with a minor and constitutes traditional sexual abuse, which is a ground for parental termination.[145] In fact, the court acknowledged that sexual abuse was established as to these girls on the basis of the evidence of their pregnancies and involvement in underage sexual intercourse as condoned by the belief system of the Yearning for Zion Ranch community.[146]

However, as to the other female children (not among the group identified as having been sexually abused), the court specifically found there to be no abuse or threat to the physical health or safety of these children.[147] The court held that, absent any evidence of a danger to the physical health or safety of the children, the belief system of the Ranch was not enough to warrant interference by the state.[148] Similarly, the court decided that there was no threat to boys on the Ranch because there were no signs of any physical or sexual abuse.[149] Thus, the court decided that the religious beliefs of the residents on the Yearning for Zion Ranch did not constitute strong enough evidence to warrant removal of the children that had not been physically abused.[150]

Justice O'Neill, joined by Justices Willet and Johnson, concurred with the court's ruling that the Texas Department of Family and Protective Services failed to provide evidence of an imminent danger to the children's health and safety as it related to boys and pre-pubescent females.[151] However, Justice O'Neill disagreed with the majority's holding that there was no

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255 S.W.3d 613, 616 n.1 (Tex. 2008) (O'Neill, J., concurring in part and dissenting in part).

[145] *See id. See generally* FRIEDMAN, *supra* note 60, at 136-38.

[146] *In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *2 (Tex. App. May 22, 2008), *aff'd sub nom. In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008). As to the five female children alleged to have suffered sexual abuse, they were not among the children the court considered in the petition for mandamus and the court as much as conceded that these five females were sexually abused, stating "[w]ith the exception of the five female children identified as having become pregnant between the ages of fifteen and seventeen, there was no evidence of any physical abuse or harm to any other child." *Id.* at *2.

[147] *Id.* at *3.

[148] *Id.*

[149] *Id.*

[150] The five female children who showed signs of sexual abuse were not included in the court's decision. These female children were not the children of the parents petitioning for a writ of mandamus. *Id.*

[151] *In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613, 616 (Tex. 2008) (O'Neill, J., concurring in part and dissenting in part).

evidence that pubescent girls were in danger.[152] Justice O'Neill pointed to the high number of girls on the Ranch under eighteen years old who were pregnant, had given birth, or were "spiritually married."[153] She also noted that under the standards of the Ranch, girls were never too young to be married or to have children and that the religious leader of the sect had the power to decide when and to whom a girl would be married.[154] Further evidence was offered that under the Texas Penal Code, child abuse occurs when a person engages in sexual conduct with a child under the age of seventeen who is not the legal spouse of that individual.[155] Given this definition, the girls from the Yearning for Zion Ranch fit under the definition of sexual abuse because they were not legally married to their "husbands," but rather were only spiritually married.[156] Based on this evidence of a "pattern or practice of sexual abuse," Justice O'Neill concluded that all the pubescent girls at the Ranch were in danger of sexual abuse and therefore, removal from the Ranch and their parents was appropriate.[157]

Contrary to the majority's opinion, Justice O'Neill found that the religious beliefs did "present[] evidence that 'there was a danger to the physical health or safety' of pubescent girls on the [Ranch]."[158] Because the Ranch community believed in polygamy, spiritual marriage, and impregnating girls under

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[152] Justice O'Neill found that the evidence of abuse in some of the pubescent females created a "pattern or practice of sexual abuse, that 'the urgent need for protection required the immediate removal' of those girls." *Id.* (citing TEX. FAM. CODE ANN. § 262.201(b)(1)-(3)).

[153] *In re* Texas Department of Family and Protective Servs., 255 S.W.3d at 616 (O'Neill, J., concurring in part and dissenting in part).

[154] *Id.* Justice O'Neill was persuaded by testimony from a child psychologist that these practices constitute child abuse because children who are fifteen and sixteen years old are "not sufficiently emotionally mature to enter a healthy consensual sexual relationship or a 'marriage.'" *Id.* The child psychologist also testified that the belief system on the Ranch was such that all of the children exposed to these beliefs were in danger, regardless of their age or gender. TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, ELDORADO INVESTIGATION 7 (2008) [hereinafter ELDORADO INVESTIGATION].

[155] TEX. PENAL CODE ANN. § 21.11(a)-(b) (Vernon 2003).

[156] *In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d at 616 (O'Neill, J., concurring in part and dissenting in part).

[157] *Id.* at 616-17. Supporting her holding, Justice O'Neill cited *Texas Department of Human Services v. Boyd*, where the court held that endangering a child meant "more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the conduct be directed at the child or that the child actually suffers injury." *Id.* (quoting Tex. Dep't of Human Servs. v. Boyd, 727 S.W.2d 531, 533 (Tex. 1987)).

[158] *Id.* at 616.

the age of eighteen, Justice O'Neill found that there was enough evidence to establish "a pattern or practice of sexual abuse" and "that other such girls were at risk of sexual abuse as well."[159] Similarly, the Texas Department of Family and Protective Services made an ultimate finding that twelve girls, or one out of every four, on the Ranch, were victims of sexual abuse and that their parents were aware of this abuse.[160] As a result, the Department found that these twelve girls, along with 262 other children on the Ranch, were victims of neglect because their parents failed to remove them from situations where they would be exposed to sexual abuse.[161] Accordingly, Justice O'Neill's opinion and the Department of Family and Protective Services' findings suggests that religious beliefs serve as a factor in establishing a pattern of sexual abuse that can extend beyond just the abused children to other children at risk of the same behavior.[162] Therefore, in considering the religious convictions of the FLDS members at the Yearning for Zion Ranch, it is possible to conclude that their religious beliefs condone statutory rape resulting from the adherence to "spiritually marrying" underage girls. Given this conclusion, removal of these children was warranted because the Ranch provided an unsafe atmosphere and created a risk of harm to all the children on the Ranch.

B. Analogizing the Yearning for Zion Ranch to a Family

The children at the Yearning for Zion Ranch were properly removed from their parents by the Department of Family and Protective Services due to the fact that the community as a whole condoned sexual abuse among some of the children. The Texas Supreme Court should have characterized the Ranch as a family in order to justify removal of the remaining children who were not abused but are at risk for future abuse. Conversely, the Texas Supreme Court determined that there was not sufficient evidence to warrant removal of most of the children from the Yearning for Zion Ranch because there was no apparent physical abuse as to these children individually.[163] However, the court failed to

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[159] *Id.* at 616-17.

[160] ELDORADO INVESTIGATION, *supra* note 154, at 4.

[161] *Id.*

[162] *See* discussion *infra* Part II.B.

[163] *See generally In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613.

consider the idea that individualized proof is not necessary.[164] Courts and legislatures have authorized the removal of children from parental care in cases where there was only evidence that one sibling had been abused.[165] Similarly, the Texas Supreme Court should have characterized the Ranch as a family in order to justify removal of the remaining children who were not abused but are at risk for future abuse.

Cases where parents lose custody of all their children based on evidence of abuse in only one child are justified by reasoning that if there is evidence of neglect or abuse in one child, then it is likely that the other children are also victims of abuse or neglect.[166] One study showed that in almost half of the families where abuse was present, more than one child was abused.[167] This same study also demonstrated that the likelihood of the abuse reoccurring was high.[168] Other similar

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[164] *See, e.g.*, N.Y. FAM. CT. ACT § 1046(a)(i) (Consol. 1999) ("[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent . . . .").

[165] In Maryland, the Court of Special Appeals held that removal of one child based on neglect of a sibling was appropriate. *In re* William B., 533 A.2d. 16, 21 (Md. Ct. Spec. App. 1987) ("The parents' ability to care for the needs of one child is probative of their ability to care for other children in the family."). In support of its holding, the court stated that authorities should not have to wait until a child suffers abuse or neglect to determine that the parents are unfit. *See id*. Although such a finding must be adduced by actual evidence, "the fear of harm" may be enough to remove a child from parental custody. *Id.* Similarly, a New York court held that "proof of the abuse or neglect of one child is admissible evidence on the issue of abuse or neglect of a sibling and in appropriate cases it can be sufficient alone to sustain a finding of abuse or neglect." *In re* Kimberly H., 242 A.D.2d 35, 36, 38 (N.Y. App. Div. 1998) (where an infant was taken from her mother on derivative grounds due to the fact that the mother had already had her three other children taken from her recently as a result of her beating one of the children with a belt). The court further explained that when a prior finding of abuse is close enough in time to the current proceeding, the condition of abuse is presumed to still exist. *Id.* at 36. In Texas, the relevant statute states:

> 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 (2) has sexually abused another child.

TEX. FAM. CODE ANN. § 262.201(d)(1)-(2) (Vernon 2008).

[166] *See generally* DONALD T. KRAMER, 2 LEGAL RIGHTS OF CHILDREN § 16:38 (2008); Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim's Siblings*, 51 EMORY L.J. 241, 244, 255 (2002) (discussing social science studies tending to show abuse in one child leads to a presumption of abuse in the child's siblings).

[167] In over forty-five percent of the families studied, more than one child in the family suffered abuse. Roy C. Herrenkohl et al., *The Repetition of Child Abuse: How Frequently Does It Occur?*, 3 CHILD ABUSE & NEGLECT 72 (1979).

[168] *Id.* (incidents of abuse were reported in 18.5% of the 206 families studied whose cases had been closed, while reoccurrence, the repetition of abuse, was an even

studies demonstrate that where one child is abused, there is an increased likelihood that other children in the household are also being abused.[169] Yet another study found that one-third to one-half of cases involving sexual abuse involved abuse of another relative as well.[170] Despite these alarming figures, they may actually underestimate the true number of children suffering from abuse because often abuse goes unreported.[171] These studies further substantiate the idea that where one child in a family is abused, another child is probably also at risk because abuse towards the sibling could have gone unreported. Based on these studies it is possible to conclude that where there is abuse in one child, there is a presumption of abuse in the other children. Furthermore, even if that child has not also been abused or neglected, a home where family violence is present is not a safe atmosphere for the child.[172] Thus, courts often are willing to terminate parental custody in cases where there is no evidence of abuse towards one child but there is clear and convincing evidence of abuse towards the child's sibling.[173] The issue in these cases becomes not whether the child has been abused, but whether the child is *likely* to be abused and, therefore, the court has discretion to protect the children in an abusive household.[174] Based on the characteristics and practices of the members at the Ranch, it is possible to analogize the Yearning for Zion Ranch community

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more serious problem); *see also* Edward D. Farber et al., *The Sexual Abuse of Children: A Comparison of Male and Female Victims*, 13 J. CLINICAL CHILD PSYCHOL. 294, 296 (1984) ("Forty-three percent (43%) of the children in this study reported having been molested on two or more occasions."); Wilson, *supra* note 166, at 255-58.

[169] For a discussion on studies showing incest and sexual abuse see Wilson, *supra* note 166, at 256-58.

[170] DIANA E.H. RUSSELL, THE SECRET TRAUMA 242 (1986). A further study found that in one-fourth of cases involving abuse towards a child, the sibling was also abused. *See* Wilson, *supra* note 166, at 257.

[171] RUSSELL, *supra* note 170; Farber et al., *supra* note 168, at 294; *see also* Wilson, *supra* note 166, at 256.

[172] *See supra* note 165.

[173] *In re* Baby Boy Santos, 336 N.Y.S.2d 817, 820 (N.Y. Fam. Ct. 1972) (holding that there was sufficient evidence to terminate the parental custody rights for a baby boy given the significant amount of abuse his sister had suffered even though he had not personally suffered abuse); *see also In re* Interest of M.B., 480 N.W.2d 160, 161-62 (Neb. 1992) ("If evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused.").

[174] *In re* Baby Boy Santos, 336 N.Y.S.2d at 819-20 ("It has been the experience of the Court, as well as authorities in the subject of child abuse, that there is in effect a 'child abuse syndrome' and that when one abused child is removed from the home, that another child in the home may become the object of abuse by the parent." (citations omitted)).

to a family.[175] In doing so, there is support for removal of all the children despite a lack of physical abuse in each child.[176]

The Texas Department of Family and Protective Services did argue that the Yearning for Zion Ranch constituted the equivalent of a household for the purposes of a custody proceeding. However, the Texas Appellate Court rejected this argument and the Texas Supreme Court affirmed.[177] The Appellate Court stated that the notion that the Ranch comprised one household was contrary to the evidence, which showed that there were separate living arrangements and separate family groups.[178] Contrary to the court's opinion, the living arrangements at the Ranch indicate otherwise.

Notably, the members of the Yearning for Zion Ranch do not all live in a single unit; they live in a guarded, concrete compound within which there are several housing units.[179] Although this is not a traditional single dwelling unit, it is similar to one in that the aggregate of the individual housing units within the locked compound equal one large estate.[180] Furthermore, the fact that the Ranch does not allow outsiders into the compound makes it similar to the family dwelling that restricts outsiders unless they have been invited to enter the dwelling.[181]

The court also incorrectly pointed to the existence of separate family groups to reject the notion that the Ranch constitutes a family. Adherents to the FLDS religion encourage the practice of polygamy, allowing a male to take several wives and have multiple children with each wife.[182] As such, it is difficult to distinguish separate family groups amongst the mix of husbands with several wives and children. In fact, because it was facially unclear which child belonged to which parents, the residents of the Ranch were compelled to participate in DNA

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[175] *See infra* notes 192-196 and accompanying text.

[176] *See supra* notes 165-173 and accompanying text.

[177] *In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *3 (Tex. App. May 22, 2008), *aff'd sub nom. In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008).

[178] *Id.* at *3 n.10.

[179] *See id.* at *3; Gretel C. Kovach & Andrew Murr, *Trouble in the Hills*, NEWSWEEK, Apr. 10, 2008, *available at* http://www.newsweek.com/id/131379/page/1; Simon Romero, *Wary Texans Keep Their Eyes on the Compound of a Polygamous Sect*, N.Y. TIMES, Nov. 14, 2004.

[180] *See* Romero, *supra* note 179, at 1.

[181] *See* Kovach & Murr, *supra* note 179.

[182] David Von Drehle, *The Texas Polygamist Sect: Uncoupled and Unchartered*, TIME, Apr. 24, 2008, *available at* http://www.time.com/time/magazine/article/0,9171,1734818-2,00.html.

testing to determine the correct lineage of the children.[183] The practice of polygamy and the refusal of the Ranch members to procreate with "outsiders" has created in-breeding[184] and an undeniable biological link between many of the Yearning for Zion residents.

Moreover, there are other factors that weigh in favor of the Yearning for Zion Ranch community being treated as a family. The traditional notion of family includes a husband and wife, legally married and living together with their children.[185] However, a family can also consist of unrelated individuals residing together.[186] Some of the key factors that courts consider in establishing a family relationship are whether there is "stability, permanency and [a] functional lifestyle which is equivalent to that of the traditional family unit."[187] For instance, a group of college students living together were considered a family because they had renewable leases and an intention to remain in the living unit through the completion of their degrees.[188] They also "ate together, shared household chores, and paid expenses from a common fund."[189] In contrast, a group-home was not considered a family because the staff worked for the home on a rotating basis, which caused a lack of stability.[190] Also, the residents lived at the home for only a short period of time, thereby creating a lack of permanency.[191]

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[183] Kirk Johnson, *DNA Is Taken From Sect's Children*, N.Y. TIMES, Apr. 22, 2008, at A19.

[184] *See* Sara Corbett, *Children of God*, N.Y. TIMES, July 27, 2008, at MM1; Johnson, *supra* note 183.

[185] *See* Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 506 (1998). For discussion of the contemporary divergence from the traditional conception of the family see generally JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE (1997) and Chris Snow, Book Note, *Defining the Family: The Family in Transition*, 1 J.L. & FAM. STUD. 287 (1999).

[186] Penobscot Area Housing Dev. Corp. v. City of Brewer, 434 A.2d 14, 21-22 (Me. 1981); Borough of Glassboro v. Vallorosi, 568 A.2d 888, 894 (N.J. 1990).

[187] *Borough of Glassboro*, 568 A.2d at 894.

[188] *Id.*

[189] *Id.* Although in a similar case, a group of college students were not considered a single family because they were not related by blood, adoption or marriage. However, this case involved an ordinance, which the Supreme Court upheld as not violating any constitutional right that specifically required that the individuals be related by blood, adoption or marriage. *See* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 2-3, 9 (1974). In the present case, there is no ordinance in question that limits the definition of families to relation by blood, adoption or marriage.

[190] *Penobscot Area Housing Dev. Corp.*, 434 A.2d at 21-22.

[191] *Id.*

Applying these factors here, the Yearning for Zion Ranch resembles a family due to the unique characteristics of the Ranch members' lifestyle. The Ranch community exudes "stability, permanency and [a] functional lifestyle which is equivalent to that of the traditional family unit."[192] Similar to the college students deemed to satisfy the definition of a family because of their functioning as a family-type unit, the residents of the Ranch also function as a family-type unit.[193] In particular, the Ranch has communal facilities such as a garden where residents can grow fruit and vegetables to share, a milk barn, a cheese factory, and other establishments meant for sustaining the community.[194] The maintenance and use of these establishments in a communal fashion for the benefit of everyone at the Ranch is comparable to the college students sharing chores for the maintenance and benefit of the entire house in a familial manner.[195] Additionally, unlike the group home where the rotation of staff members undermined stability, the Yearning for Zion Ranch has religious leaders that act as patriarchal figures.[196] Therefore, the Yearning for Zion Ranch is more similar to a family than a shared home.

Even if it is accepted that the Ranch constitutes a family, the issue of whether or not the belief system on the Ranch creates a dangerous atmosphere for the children is still debated.[197] Similar to a family, the residents of the Ranch share

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[192] *Borough of Glassboro*, 568 A.2d at 894.

[193] *See id.*

[194] *From Hunting Ground to Polygamist Ranch*, CBS NEWS, Apr. 18, 2008, http://www.cbsnews.com/stories/2008/04/18/national/main4028781.shtml [hereinafter *Hunting Ground to Polygamist Ranch*] (detailing the initial establishment of the Yearning for Zion Ranch by members of FLDS); Stephanie Sinclair, *Inside Their World*, N.Y. TIMES MAGAZINE, July 27, 2008, *available at* http://www.nytimes.com/slideshow/2008/07/27/magazine/0727-ZION_index.html.

[195] *See Borough of Glassboro*, 568 A.2d at 894. Similar to the college students who shared food and the responsibility of cooking and cleaning, members of the Yearning for Zion Ranch also share the source of their food and the expense and labor associated with their food source. *See Hunting Ground to Polygamist Ranch*, *supra* note 194; Sinclair, *supra* note 194.

[196] *See Penobscot Area Housing Dev. Corp*, 434 A.2d at 21-22. The Yearning for Zion Ranch is led by male religious leaders who dictate which men will marry which women, what type of contact the members will have with modern products and the way of life within the sect in general. *See Hunting Ground to Polygamist Ranch*, *supra* note 194; Kirk Johnson & Gretel C. Kovach, *Daughter of Sect Leader Gets Additional Protection*, N.Y. TIMES, June 4, 2008, at A16; Kovach & Murr, *supra* note 179.

[197] *See, e.g.*, *In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613, 616-17 (Tex. 2008) (O'Neill, J., concurring in part and dissenting in part); *In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *3 n.10 (Tex. App. May 22, 2008), *aff'd sub nom. In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008); ELDORADO INVESTIGATION, *supra* note 154, at 6.

religious beliefs and require specific rules in the upbringing of children and the way of life in the Ranch.[198] The Texas Department of Family and Protective Services argued that the existence of a "pervasive belief system" that condones young girls "marry[ing], engag[ing] in sex, and bear[ing] children as soon as they reach puberty" posed a threat of abuse to all the children on the Ranch.[199] In response, the Texas court held that it was the beliefs and actions of certain individuals, and not the community as a whole, that posed a danger to the children.[200] However, as demonstrated in *Yoder*, courts will look at the beliefs of the entire religious community as precedent for determining how certain convictions will impact the community.[201] Thus, a court examining this case should find that where members of a community, acting in a manner so as to resemble a family, promulgate a belief that in practice violates criminal statutes and constitutes sexual abuse of children and other members fail to stop this abuse or report it to authorities, the community has accepted this practice as a whole. This behavior creates an unsafe atmosphere for all the children exposed to it.

In summary, the case of the Yearning for Zion Ranch can be analogized to a family for the purpose of removal in that it is a closed community that resembles a household. Thus, if some of the children on the Ranch are being abused and therefore qualify for removal, the court should be able to remove the other children because the possibility exists that these children are or will be abused and the atmosphere is not promoting the child's welfare. However, because the Texas court applied the requisite clear and convincing evidence standard, the parents' rights were not terminated and the children were returned to an unsafe environment.

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[198] *See* Kovach & Murr, *supra* note 179.

[199] *In re* Steed, 2008 WL 2132014, at *2 (internal quotation marks omitted).

[200] *Id.* at *3. The Texas Appellate Court found that there was disagreement amongst members of the Yearning for Zion Ranch on what is an appropriate age for marriage. *Id.* at *3 n.9.

[201] *See* Wisconsin v. Yoder, 406 U.S. 205, 209-12, 215, 219 (1972) (examining the effect of compulsory school attendance past the age of sixteen on the upbringing of children in the faith of the Old Order Amish religion).

III. LOWERING THE EVIDENTIARY STANDARD

Currently, the standard for termination of parental rights is the clear and convincing standard.[202] However, in a situation where a pervasive belief system in a closed community, such as the Yearning for Zion Ranch, promotes child abuse in some of the children, the standard of proof for removal of the remainder of the children should be lowered. Although the current state of the law does not promote this assertion,[203] the law should be revised in consideration of important policy perspectives.

Requiring that the state prove by clear and convincing evidence that the parent has either abused or neglected his or her children or caused them some other irreparable harm satisfies the *Eldridge* factors as to the *parent*.[204] However, this standard does not necessarily provide adequate protection for the children involved.[205] In granting parents greater protection by requiring the state to prove abuse by clear and convincing evidence, a potentially abused or neglected child is afforded less protection. In some circumstances, this could mean that an abused or neglected child is also being afforded less protection because the evidence of abuse or neglect may not be apparent. For instance, in *DeShaney v. Winnebago County Department of Social Services*, a young boy was treated several times for injuries caused by his father, prompting a physician to report the injuries to the Department of Social Services.[206] However, based on the requirement that the state show clear and convincing proof of abuse, the Department decided that there was not sufficient evidence of abuse to require that the boy be removed from the parent's custody.[207] Subsequently, the boy suffered from continual abuse that led to permanent brain damage and severe retardation.[208] The rationale behind the Department's decision and the clear and convincing standard in general is that just like it is better to let a guilty man go free than to send an innocent man to prison in the criminal

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[202] *See supra* Part I.A.2.

[203] *See* Santosky v. Kramer, 455 U.S. 745, 768-70 (1982).

[204] *See supra* text accompanying note 33.

[205] *See* Catherine J. Ross, *Legal Constraints on Child-Saving: The Strange Case of the Fundamentalist Latter-Day Saints at Yearning for Zion Ranch*, 37 CAP. U. L. REV. 361, 372-73 (2008).

[206] DeShaney v. Winnebago County Dep't. of Soc. Servs., 489 U.S. 189, 192-93 (1989).

[207] *Id.*

[208] *Id.* at 193.

context,[209] here too it is better to allow a child to stay with parents who are abusive rather than to take a child away from non-abusive parents. However, the situations are distinct because in the criminal context the victim will likely never be harmed again by a wrongly acquitted defendant whereas a child is forced to continue living with his or her abusive parents when the state fails to prove abuse or neglect by clear and convincing evidence. Accordingly, the rationale in support of protecting a parent's fundamental rights and liberty interests is upheld while the consequences to the child victim are not even considered.

Returning to *DeShaney v. Winnebago*, the young boy's mother brought suit against the Department of Social Services asserting a violation of the boy's due process rights because the state failed to intervene on the boy's behalf to protect him from his father's abuse.[210] The Court ruled against the child and held that the Fourteenth Amendment Due Process Clause is meant to protect individuals from *state* interference with their liberty or property rights, as opposed to private interference from private actors.[211] Therefore, when the state's interest and the parent's interest diverge, in that the parent is no longer looking out for the health, safety, and welfare of the child, the child has virtually no due process protection of his or her own interest in being free from abuse.[212] The Fourteenth Amendment protects the parent's interest against undue interference by the state, while the clear and convincing standard places a heavy burden on the state to interfere even when abuse may be present.

Justice Rehnquist, writing for the dissent in *Santosky*, also found that the clear and convincing standard does not adequately protect the child's interest in remaining free from abuse.[213] While the majority opinion, in applying the *Eldridge* factors, merely considered the private interests of the parent, Justice Rehnquist also considered the private interest of the child involved.[214] Specifically, Justice Rehnquist reasoned that the child has an interest independent from the parent in the

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[209] *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

[210] *DeShaney*, 489 U.S. at 193.

[211] *Id.* at 196-97.

[212] *Cf. id.* at 202-03 (holding that the State was not required to protect a child from abuse at the hands of his father).

[213] *See* Santosky v. Kramer, 455 U.S. 745, 788-90 (1982) (Rehnquist, J., dissenting).

[214] *Id.* at 788-90.

outcome of a termination proceeding.[215] While both the child and the parent have an interest in avoiding an erroneous termination, severing the ties between the parent and child, the child also has an interest in avoiding an erroneous continuation of a relationship where abuse is present.[216] Thus, since the interests of the parent and the child are of equal importance, the appropriate conclusion, according to Justice Rehnquist, is to apportion the risk of an erroneous termination equally and therefore the preponderance of the evidence standard is the correct standard.[217]

Based on the foregoing, it is apparent that children are not afforded the same protection as adults in termination proceedings. While it is undeniable that parents have a fundamental right to the upbringing of their children, and that the state has a compelling interest in avoiding wrongful termination of parental custodial rights,[218] children have an equally compelling interest in remaining free from abuse. However, as *DeShaney* demonstrates, children have no due process protection to be free from abuse.[219] Thus, while parents have the Fourteenth Amendment right to the control of their children *and* the added protection of the clear and convincing standard in termination proceedings, children have virtually no protection.[220] As such, the clear and convincing standard may not always be the right standard to apply in termination proceedings. In order to best protect a child's interest to be free from abuse, it is prudent to lower the standard of proof from clear and convincing to a preponderance of the evidence in some circumstances, such as cases involving extreme and potentially dangerous religious communities.

In the case of the children from the Yearning for Zion Ranch, the children remain at risk of abuse due to the "pervasive belief system" of the community,[221] as evidenced by the presence of pregnant and "married" underage females on

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[215] *Id.* at 788 n.13.

[216] *Id.*

[217] *Id.* at 791; *see generally* Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209 (1994) (arguing that the clear and convincing standard is too onerous a burden and does not adequately protect the interests of the children involved).

[218] *See supra* text accompanying notes 33-36.

[219] *See supra* notes 211-212 and accompanying text.

[220] *See supra* notes 211-212 and accompanying text.

[221] *In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *2 (Tex. App. May 22, 2008), *aff'd sub nom. In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008).

the Ranch.[222] Although the Texas Supreme Court held that there was not enough evidence of an imminent threat to the children's health or welfare,[223] given this risk of future abuse, the children on the Ranch should be removed. Yet, in order to establish abuse warranting removal, the standard of proof must be lowered. If it can be established by clear and convincing evidence that some of the children in a family-like community were abused, then the standard by which the state needs to show that the other children are threatened by abuse should be lowered to a preponderance of the evidence standard. Therefore, since there was enough evidence of abuse to satisfy the clear and convincing standard for five pregnant and married underage girls on the Ranch,[224] then it should be possible to prove abuse as to the other children by a preponderance of the evidence.[225]

While it is true that the boys living on the Ranch are not subject to the same possibility of abuse as the girls, they should nevertheless be considered in danger.[226] Regardless of gender, if one child is abused in the home by the parents then the other children are deemed to be at risk and the parents are considered unfit.[227] Because there is abuse against some of the girls at the Ranch, which can be analogized to a family,[228] the boys should be removed from the Ranch as well. A study in the Netherlands concluded that there are actually few differences between sexual abuse towards girls and boys and in as many as 21% of the cases studied, offenders were equally interested in males and females.[229] Additionally, parental termination

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[222] *See In re Tex. Dep't of Family and Protective Servs.*, 255 S.W.3d at 616 (O'Neill, J., concurring in part and dissenting in part).

[223] *Id.* at 615 (majority opinion).

[224] *See In re* Steed, 2008 WL 2132014, at *2 (noting that there was no evidence as to abuse in the children *except* as to the five female children).

[225] By lowering the standard to a preponderance of the evidence for the remaining children not showing signs of abuse, the state will be able to prove the need for termination by demonstrating conclusive abuse in some of the children on the Ranch and the presence of pervasive belief condoning abuse. This is based on the presumption that where abuse is present in some children, it is likely to be present or at least pose a risk to other children in the same environment. *See supra* Part II.B.

[226] Courts have been willing to find a risk of potential abuse where one child has been abused regardless of the gender of the child's siblings. *See, e.g.*, *In re* Burchfield, 555 N.E.2d 325, 333 (Ohio Ct. App. 1988) (removing both the brother and sister of a female child who had suffered sexual abuse based on the unfitness of the environment).

[227] *See supra* note 165 and accompanying text.

[228] *See supra* Part II.B.

[229] Farber et al., *supra* note 168, at 295.

statutes, such as the Texas Family Code, do not differentiate by gender when authorizing removal of one child because of evidence of sexual abuse to the child's sibling.[230] In fact, the California Appellate Court has specifically dealt with the issue of abuse towards a female child as being sufficient evidence for removal of her brothers.[231] The court held that "[b]rothers can be harmed by the knowledge that a parent has so abused the trust of their sister"[232] and "aberrant sexual behavior by a parent places the victim's siblings who remain in the home at risk of aberrant sexual behavior."[233] Furthermore, boys exposed to a sister's abuse are being taught to become predators. Although there was no evidence that the boys on the Ranch were subject to sexual abuse, there is still a strong argument to be made that they are residing in a dangerous atmosphere. Therefore, a preponderance of evidence of abuse could be demonstrated to effectuate removal.

IV. POTENTIAL ISSUES ARISING FROM LOWERING THE STANDARD OF PROOF

Analogizing the Yearning for Zion Ranch to a family to provide a legal basis for lowering the standard of proof required to terminate parental rights is not without potential criticisms. Although these criticisms are valid, they do not create impermeable barriers to lowering the standard of proof under specific circumstances.

A. Unequal Application of Due Process Principles

The first potential issue arises from the premise of the argument: that in *some* cases the standard of proof required to

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[230] TEX. FAM. CODE ANN. § 262.201(d)(1)-(2) (2008). The statute specifically states: "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: . . . has sexually abused another child." § 262.201(d)(2) (2005). Similarly, in New York, "proof of abuse or neglect of one child shall be admissible evidence of the abuse or neglect of any other child." N.Y. FAM. CT. ACT § 1046 (1999). California's statute provides that a child may be deemed a dependent of the court if "[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused . . . by his or her parent" or if "[t]he child's sibling has been abused or neglected" in a manner defined by this section. CAL. WELF. & INT. CODE § 300(d), (j) (West 2008).

[231] *In re* P.A., 51 Cal. Rptr. 3d 448, 452-54 (Cal. Ct. App. 2006).

[232] *Id.* at 453 (citing *In re* Rubisela E., 101 Cal. Rptr. 2d 760, 775 (Cal.Ct. App. 2000)).

[233] *Id.* at 454.

terminate parental rights should be lowered. This creates an inequality in the application of parental termination law, where parents who are not part of a religious family espousing beliefs in child abuse are afforded a higher burden of proof than their counterparts who are part of such religious groups. Thus, certain persons are arguably provided greater due process than others.

While on its face this criticism may ring true, the reality is that parents will still be afforded substantial due process even in situations where the standard of proof should be lowered. Due process requires procedural and substantive safeguards to protect parents from an erroneous termination decision.[234] By lowering the burden of proof, there is no change substantively because the government still needs to prove a compelling interest in order to terminate the parent's rights.[235] Procedurally, parents will be afforded protections because they will still be allowed a hearing before the termination of their rights and further, it will be necessary to first prove by clear and convincing evidence that at least one child is suffering from child abuse as a result of a pervasive belief system within the religious family. Thus, the burden of proof will be lowered *only after* the state had produced clear and convincing evidence of some abuse. Consequently, the lower standard of proof will only apply to other children after the higher standard has already been met.

Furthermore, applying the preponderance of the evidence standard to parental termination proceedings will still comport with the *Eldridge* factors. In fact, each of the *Eldridge* factors will probably be applied more equitably.[236] First, the private interest affected by lowering the burden of proof in certain cases considers both the child and the parent as distinct interests. Whereas currently the parent's interest also include the child's interest because it is assumed that their interests align,[237] by lowering the burden of proof, the child is given a distinct interest from the parent to be free from abuse. This distinction of interests is apposite because the child's interest was presumed aligned with the parent's interest up until the point in time where clear and convincing evidence of abuse was shown as to another child. Once this threshold has been passed, it should then be assumed that the child's interest

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[234] *See supra* Part IA.1.

[235] *See supra* Part IA.1.

[236] *See supra* notes 32-43.

[237] Ross, *supra* note 205, at 366-67.

diverges from the parent's. Second, the government's interest is enhanced in the sense that its interest in ensuring the health, safety, and welfare of the children involved will be given greater consideration.[238] By seriously considering the threat of abuse in a community where a pervasive belief system condoning abuse exists, the government's interest in the children's welfare is given greater weight than if the sole standard is the clear and convincing standard. Further, lowering the standard of proof in certain cases will also inherently lessen fiscal and administrative burdens in that it will not be necessary to exhaust resources attempting to collect elusive physical evidence for children who are in danger as a result of a belief condoning abuse and evidence of abuse in other children besides themselves.[239]

Finally, the risk of an erroneous decision resulting in a parent's rights being terminated unjustly is no more than where a parent's rights are terminated as to one child when there is no abuse as to that child but there is clear and convincing evidence of abuse committed against another child in the same family.[240] If terminating a parent's rights to all of his or her children as a result of abuse of one child complies with due process,[241] then applying the same principles to the Ranch, being treated as a family, should likewise comply with due process. Consequently, even if the standard of proof is lowered in some specific cases, the parents involved in these cases will still be afforded an appropriate level of due process.

Even if it is conceded that some parents will be afforded a different level of due process than other parents, equality in due process is not necessary and not always possible. This should not be viewed as lowering the standard of proof because, as noted by the Supreme Court in *Lassiter v. Department of Social Services of Durham County, North Carolina*, "due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'"[242] The Court went on to hold that the "fundamental fairness" required by due process may vary based on the circumstances and thus a case-

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[238] *See supra* text accompanying notes 36-38.

[239] *See supra* text accompanying notes 39-41.

[240] *See supra* notes 172-173 and accompanying text.

[241] *See supra* notes 172-173 and accompanying text.

[242] Lassiter v. Dep't of Soc. Servs. of Durham County, N.C., 452 U.S. 18, 24 (1981) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

by-case analysis is appropriate.[243] Dissenting from the majority in the *Santosky* opinion, Justice Rehnquist reasoned that "'not all situations calling for procedural safeguards call for the same kind of procedure.'"[244] In his opinion, Justice Rehnquist stated that the flexibility of the due process concept required that its mandates be considered based upon the facts of each particular case.[245] Thus, considering due process requirements on a case-by-case basis means that it is not necessary in every case to afford the same standard of proof afforded in a previous case of the same nature because the underlying facts will inherently require a different analysis.

Accordingly, while it is possible to argue that lowering the standard for termination of parental rights will afford unequal constitutional process to some people based upon certain criteria, this is not fatal to this Note's argument. First, a different standard of due process does not necessarily mean that the parents are not being afforded the appropriate level of due process. Second, the concept of due process is not completely clear or concrete, and thus, it is essential to provide for different procedural safeguards based upon the specific facts of the case. Therefore, regardless of whether the state is required to prove by only clear and convincing evidence or clear and convincing *and* by a preponderance of the evidence, a parent's constitutional rights to due process will be protected.

B. Problems with Treating the Ranch as a Family

A second criticism arising from lowering the standard of proof in certain parental rights termination proceedings evolves from the idea that the Yearning for Zion Ranch is treated as a single family. First, treating the Ranch as a family would be contrary to the concept that each parent must be suspected of abuse before a child can be removed.[246] Second, defining the Ranch as a family would create a slippery slope to

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[243] *Id.* at 24-26.

[244] *See* Santosky v. Kramer, 455 U.S. 745, 774-75 (1982) (Rehnquist, J. dissenting) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[245] *Id.*; *see also* Robert A. Wainger, Brief Note, Santosky v. Kramer: *Clear and Convincing Evidence in Actions to Terminate Parental Rights*, 36 U. MIAMI L. REV. 369, 371 n.17 (1982) ("The dissenting Justices argued that due process analysis cannot be achieved by considering only the effects of a specific burden of proof. Rather, a court must consider all of the procedural safeguards that a state employs and measure their cumulative effect. A court should also consider any nonprocedural restraints on official action.").

[246] Ross, *supra* note 205, at 399.

allow other communities to be considered a family for the purpose of parental termination. While both of these arguments raise legitimate concerns, ultimately they should not defeat the objective that the burden of proof for parental termination proceedings must be lowered in some instances.

The first counterargument to treating the Ranch as a family unit arises from the concept that each parent needs to be accused individually of abuse. The Texas courts specifically rejected the argument by the Department that the Ranch should be treated as one family unit.[247] The Texas Court of Appeals noted that among the FLDS communities there were differences in opinions as to "what is an appropriate age to [marry], how many spouses to have, and when to start having children."[248] The court went on to state that "not all FLDS families are polygamous or allow their female children to marry as minors."[249] Supporting the view that the community's beliefs cannot be treated as one whole, Catherine Ross in her article, *Legal Constraints on Child-Saving: The Strange Case of the Fundamentalist Latter-Day Saints at Yearning for Zion Ranch*, argues that the Fourth Amendment requires that "individualized suspicion of each parent [is necessary] before his or her child is removed."[250]

While these arguments against treating the Ranch as a family are somewhat compelling, they are not sufficient to preclude lowering the burden of proof. In analyzing the Department's argument regarding treating the Ranch as a family, the Texas Court of Appeals simply stated that the notion that the Ranch constituted a family was contrary to the evidence, not that such a concept was an unreasonable possibility.[251] Ostensibly, if sufficient evidence is presented, the Ranch or a similar community could be considered a family. Further, Professor Ross admits that requiring child welfare workers to "weigh the risk of abuse to each child in the household before removing the child" is a break from current

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[247] *See supra* notes 177-178 and accompanying text.

[248] *In re* Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *3 n.9 (Tex. App. May 22, 2008), *aff'd sub nom. In re* Tex. Dep't of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008).

[249] *Id.* at *3 n.11.

[250] Ross, *supra* note 205, at 399. Ross argues that the Fourth Amendment, governing searches and seizures, requires individualized suspicion before the government acts, thus precluding any action based on suspicion of the community as a whole. *Id.* at 399-400.

[251] *See In re* Steed, 2008 WL 2132014, at *3 n.10.

practice.[252] Therefore, because the current laws of most states allow the government to remove children that it suspects are at a risk of abuse based on evidence of abuse to siblings, requiring individualized proof that each child is at risk from each parent is too stringent of a standard.

Even if individualized proof is too stringent of a standard, critics may still argue that analogizing the Ranch to a family creates precedent that all religious communities or communities organized in a manner espousing a particular belief can also be analogized to a family. This parallel to a family should not be read so broadly. The Ranch can be analogized to a family because of the extreme measures it has taken to seclude itself from the rest of society and the lifestyle the members of the Ranch lead, including polygamy (creating confusion as to who comprises each nuclear family) and an integrated system of working and living together.[253] Thus, asserting that the Ranch constitutes a legal family for the purpose of a parental termination proceeding is much different from a religious community that may share a belief system, attend religious services together, share meals together, etc., but are still members of the rest of society because they live and work and integrate with people outside of their community. Therefore, while it is possible that other communities could be seen as families for the sake of parental termination proceedings if the Ranch is considered a family, such a determination should be limited to situations where the community truly resembles a family as defined by cases such as *Penobscot Area Housing Development Corp.* and *Borough of Glassboro*.[254]

V. CONCLUSION

Parents have a constitutional right to the custody and control of their children, which encompasses the control over the religious upbringing of their children.[255] Because this right is deemed to be fundamental, clear and convincing evidence of abuse and neglect must be demonstrated when the state seeks to

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[252] Ross, *supra* note 205, at 400; *see also supra* notes 173-174 and accompanying text.

[253] *See supra* notes 192-196 and accompanying text.

[254] *See supra* notes 186-191 and accompanying text.

[255] *See supra* Part I.A.1.

terminate these parental rights.[256] However, while this standard adequately protects the rights of the parents, it fails to adequately protect the rights of the children to be free from abuse or neglect.

In parental termination cases in a closed community where there is a pervasive belief system condoning sexual abuse of children, similar to that of the Yearning for Zion Ranch, the best procedure is to require clear and convincing evidence that abuse has occurred in some of the children as a result of this belief system. However, since this type of community resembles a family, it should be treated as a legal family. Thus, abuse found in one child in the community should be enough to remove the other children. In order to protect the interest of the children to be free from abuse, while still protecting the constitutional rights of parents to the custody of their children, the standard of proof required to remove the children who have not been abused should be the preponderance of the evidence standard. Therefore, to satisfy the burden of proof for parental termination, the state needs only prove that the children who have not been abused more likely than not will be abused because of the clear and convincing evidence of the actual abuse of other children in the compound.

By lowering the standard of proof required for termination of parental custody rights, the court will be protecting the rights of children to live free from the abuse of their parents. Although the First Amendment right of free exercise of religion and the Fourteenth Amendment parental due process right require preservation, their importance should not overshadow the need for the state to protect the welfare of children.[257]

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[256] *See supra* Part IA.1-2.

[257] Since the Yearning for Zion Ranch case was decided, ordering the return of the children to their parents, Texas Department of Family and Protective Services has initiated safety plans signed by the parents of the children involved in order to protect against any possible future abuse. ELDORADO INVESTIGATION, *supra* note 154, at 5. Of the 439 children involved in the investigation, 424 of the cases have been nonsuited. *Id.* However, the investigation has led to a grand jury indictment of twelve of the male residents for charges ranging from sexual assault of a child to tampering with evidence to bigamy and failure to report child abuse. *Id.* at 15.

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