

NO EXCUSES: PROTECTING THE VULNERABLE AFTER *BROWN V. BUHMAN*

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Abstract

This essay responds to the December 2013 federal court ruling striking down a criminal ban on polygamous cohabitation in Utah. In its decision, the court chided the state for its failure to present ‘competent’ evidence of the harms associated with polygamous practice. Moreover, the court asserted that its ruling would in fact aid in preventing harm by forcing the state to focus on prosecuting collateral crimes of polygamy. This essay is a response to the court’s December ruling in four important ways. First, it responds to the state’s failure to document harms associated with polygamous practice by presenting evidence of harm and abuse emanating from polygamous practice in insular communities. Second, and relatedly, it responds with a call to action for states to ensure that criminal laws against child rape, child abuse and abandonment, and other crimes of sexual abuse are vigorously prosecuted within insular polygamous communities where there are critical break downs in accountability and neutral law enforcement. Lastly, in documenting the harm and making a call to action this piece makes theoretical observations about the characteristics of closed polygamous communities that lead to critical break downs in accountability and a corresponding increase in abuse, crime, and turning a blind eye to persistent harm. In the final section, these theoretical observations are applied to a variety of other contexts to show that the harm and related call to action outlined in this piece have broader application to multiple contexts in society including other insular religious communities and even prestigious sports programs.

INTRODUCTION

While the national spotlight focused on the federal court ruling striking down Utah’s same-sex marriage ban,¹ the decision one week earlier by another federal judge in Utah striking down a portion of the state’s criminal

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¹ Brady McCombs, *Gay Couples Wed in Utah after Judge Overturns Ban*, USA TODAY (Dec. 21, 2013 6:57 AM EST), <http://www.usatoday.com/story/news/nation/2013/12/20/utah-same-sex-marriage-ban/4146907/>; *Kitchen v. Herbert*, 2:13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013).

polygamy ban took a backseat—quickly fading out of the spotlight.² The quick disappearance of the issue is not solely attributable to the following weeks decision on an issue of greater national interest. As this essay will demonstrate, the tendency to quickly turn away from issues involving polygamous practice is one symptom of a greater societal failing---the turning of a blind eye to harm caused by religious extremism.

As society shifts towards greater acceptance of broader familial relationships,³ society retains an obligation not to let these cultural shifts excuse or justify state and local governments inaction in the face of ongoing violation of criminal laws intended to protect vulnerable populations.

The abuse and harm that motivate this piece stretch much farther back into history,⁴ but for our purposes the story begins in July 2011, when the Brown family—of the TLC network show *Sister Wives*—filed a lawsuit challenging Utah’s anti-bigamy law.⁵ The lawsuit came in response to the decision by Utah County to investigate the Brown’s after the first episode of *Sister Wives* debuted on TLC.⁶ In defense of the law, the state asserted the harm of polygamy,⁷ but it provided no admissible evidence of such harms in its papers before the court.⁸ The Brown’s, however, offered seven constitutional challenges to Utah’s law.⁹

Not surprisingly, in light of the foregoing, the federal district court struck down the cohabitation prong of the law on free exercise grounds under the first amendment and for failing rational basis review under the due process clause.¹⁰ Nonetheless, the court did not reach its conclusion lightly.¹¹ Judge Waddoups chided the state for failing to offer “competent”

² See Jim Dalrymple II, *Any Appeal of Polygamy Decriminalization Ruling Will Have to Wait*, SALT LAKE TRIB. (Jan. 18, 2014 4:52 PM), <http://www.sltrib.com/sltrib/blogspolygblog/57413358-191/browns-utah-state-lawsuit.html.csp>.

³ See Leigh Ann Caldwell, *Is Same-Sex Marriage No Longer a Political Issue?*, CNN (Feb. 9, 2014), <http://www.cnn.com/2014/02/09/politics/same-sex-marriage-politics/>.

⁴ Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why It Is Not Protected Under Religious Liberty Constitutional Provisions*, 18 WM. & MARY BILL RTS. J. 953, 957 (2010) (outlining history of polygamy and related harm arising therefrom).

⁵ John Schwartz, *Polygamist, Under Scrutiny in Utah, Plans Suit to Challenge Law*, NEW YORK TIMES (July 11, 2011), http://www.nytimes.com/2011/07/12/us/12polygamy.html?_r=0.

⁶ *Brown v. Herbert*, 850 F. Supp. 2d 1240, 1244 (D. Utah 2012).

⁷ Nate Carlisle & Jim Dalrymple II, *'Sister Wives' Arguments Cover Old Polygamy Ground*, SALT LAKE TRIB. (Jan. 18, 2013 11:35 AM), <http://www.sltrib.com/sltrib/news/55643460-78/utah-polygamy-waddoups-polygamous.html.csp>.

⁸ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1177 (D. Utah 2013).

⁹ *Id.* at 1176–77.

¹⁰ *Id.* at 1176.

¹¹ *Id.* at 1220.

evidence of harm associated with polygamy.¹² Even without proper evidence, the court tacitly acknowledged the harms in noting that “any difficulties, suffering, or abuse that minors or others might have faced or continue to face in the closed, insular religious polygamist communities that exist in Utah and the broader cultural region ranging from Alberta, Canada down to Northern Mexico” were “genuinely tragic.”¹³

In addition to acknowledging the harm, the court expressed hope that its decision would enhance prosecution of crimes emanating from polygamous practice by making the process more straightforward and not complicated by Utah’s “general policy not to prosecute religiously motivated polygamy.”¹⁴ Whether the court’s sentiment is aspirational or realistic remains to be seen. What is clear is that history clearly suggests it is unrealistically aspirational and therefore deeply problematic, if not troubling.

This essay seeks to reinforce both the acknowledgement of harm and aspiration of greater enforcement with a strong call to action for states to immediately cease turning a blind eye to crimes emanating from the practice of polygamy. There is a dangerous possibility that instead of focusing on these crimes of polygamy the state’s response to the District Court ruling will be the continued and deliberate ignoring of deep problems and challenges associated with closed polygamous societies.

To avoid the devastating effects of such a decision, Part I of this essay will document the severe harms associated with closed polygamous societies; Part II aims to remove all doubt that greater focus by the state on prosecuting crimes emanating from polygamous practice is legally justifiable, even in light of the *Buhman* decision; Part III will then offer guidance to states on how to carry out a more focused effort to protect vulnerable populations and prosecute wrongdoers. Part IV then explores how several of the elements leading to persistent abuse insular polygamous communities can be broadly conceptualized and applied in other contexts to identify situations where break downs in self-accountability are likely to occur. These theoretical characteristics are then applied to broader contexts including other religious communities and football.

The essay concludes with a broader call to action for individuals, institutions, and communities to be a part of strengthening a movement towards greater accountability and an awareness of the warning signs that can lead to a break down in accountability and the resulting systematic abuse and cover up. In sum, this essay outlines both systemic approach whereby state agents will proactively and aggressively protect vulnerable

¹² *Id.* at 1220 n.64.

¹³ *Id.*

¹⁴ *Brown, supra* note 8, at 1221.

members of society harmed in the name of tolerating intolerance¹⁵ and a theoretical framework for identifying potential hotspots for abuse resulting from failure of internal accountability that transcends mere law enforcement applications—requiring individuals, communities, and institutions to be vigilant in ensuring accountability within their spheres of influence.

I. DOCUMENTING THE HARMS OF CLOSED POLYGAMOUS COMMUNITIES

While the state of Utah may have failed to present “competent” evidence of the harms associated with polygamy, the following will offer evidence of such harms in the context of closed polygamous communities. In preparing this essay, I spent significant time over a number of weeks (fall 2012–winter 2013) personally interviewing former members of the polygamous faith, The Fundamentalist Church of Latter Day Saints (FLDS).¹⁶ These interviews revealed personal accounts of the harms of polygamy—especially when practiced within closed communities. In addition to these personal accounts of harm, the below will draw from the extensive judicial findings of the British Columbia Supreme Court¹⁷ where—unlike the not “competent” showing by the state of Utah—the province worked carefully to document the social harms associated with closed polygamous societies.

This essay will focus narrowly on documenting the existence and grave nature of crimes emanating from the practice of polygamy. It is, in addition, important to note that the principles documented in this essay relating to the harm and unlawful activity that occurs in closed religious communities has application to other contexts.¹⁸ The following will clearly demonstrate why state agents must immediately fulfill their obligation by drawing on the author’s extensive interviews and findings of the British Columbia Supreme

¹⁵ See generally AMOS N. GUIORA, FREEDOM FROM RELIGION: RIGHTS AND NATIONAL SECURITY (2009) (outlining more fully the social costs of extremist religious practices and outlining steps for reducing such costs to secure both liberty and security); AMOS N. GUIORA, TOLERATING INTOLERANCE: THE PRICE OF PROTECTING EXTREMISM (2014) (briefly discussing the history of polygamy, associated harms, and asserting the superiority of state laws over practices that endanger children; see also Rebekah Wightman *Op-ed: Legislature Should Protect Girls in Polygamy*, SALT LAKE TRIB. (Feb. 1, 2014 1:01 AM), <http://www.sltrib.com/sltrib/opinion/57466493-82/utah-polygamy-duty-within.html.csp> (calling for action to protect the vulnerable from polygamy).

¹⁶ Notes referred to from these interviews are in the authors personal files.

¹⁷ Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (Can.) [hereinafter *British Columbia Decision*].

¹⁸ See *infra* Part IV comparing the forces that create harm within closed polygamous societies to similar forces that push communities or institutions to place individuals above the law and create incentives for turning a blind eye to crime—causing devastating harm to go unreported and uncorrected.

Court decision.

A. Personal Accounts of Harm: Interviews with Former FLDS

While the *Buhman* court did not accept accounts of harm to justify an outright ban on polygamous cohabitation, these personal and painful accounts of real persons should powerfully motivate state actors and citizens alike to take robust action to ensure the collateral crimes of polygamy are prosecuted to the fullest extent. Indeed, everyone has a responsibility not to turn a blind eye to crime and harm. In presenting personal accounts, I hope to rebut the view of some that polygamy is akin to the ‘free love’ exalted in some quarters during the 1960’s and lay to rest any doubt that real individuals are caught in a cycle of crime, abuse, and lawlessness that pervades closed polygamous communities. The following will thus illustrate the harms that unequivocally flow from accounts of child brides (married into a polygamous relationship) and lost boys (forced to leave the FLDS community to minimize the sexual competition for adult males).

Child Brides

It is hard to even imagine the enduring pain endured by young girls forced into marriages at fourteen or fifteen years of age, but these are the stories of real women with whom I personally spoke. While the ages varied, the youngest child bride I interviewed was fourteen years old when she was given in ‘marriage.’ The men in these relationships were significantly older; some were in their twenties, but others much older than that.

Recall for a moment the three women kidnapped in Ohio and kept for ten years in captivity, physically abused, starved, and raped.¹⁹ Juxtaposing these women’s experience of being kidnapped and taken from family and abused by a stranger against the experience of child brides taken and abused within their own communities brings to life the harsh reality of life as a child bride in a closed polygamous community.

A consistent theme ran throughout my interviews. The harm experienced, and the crimes committed, were neither random nor attributable to an isolated perpetrator. The stories of child brides revealed that they were born and raised to become the next victims in a community of abuse. Unlike the tragedy in Ohio where one man struck like lightning

¹⁹ *Ohio Kidnapping: Three Women Kept Diaries Documenting Abuse*, THE TELEGRAPH (Aug. 1, 2013 10:43 AM BST), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10215761/Ohio-kidnapping-three-women-kept-diaries-documenting-abuse.html>.

and caused ten years of devastating and unfathomable abuse, these women were kidnapped from birth—trapped within a community of abuse.

The harm they experienced was not caused in spite of their parents' and neighbors' best efforts to protect them. Rather, parents, neighbors, and religious leaders, all played integral parts in the tales of terror these women shared with me. At ages as young as fourteen, these girls parents would forsake them to their future tormentor—the man who would claim to be their husband—in blatant violation of the criminal law. One by one, I listened to story after story of rape, sexual abuse, and physical violence. Women truly were objects of their 'husband's' abuse.

This sexual violence extended across multiple dimensions beyond the rapes themselves. In a culture that embraced neither birth control nor abortion, these women were forced to bear numerous children—conceived in acts of rape and abuse. One woman poignantly shared her experience bearing fifteen children. In a statement that is truly impossible to grasp by anyone who has not lived a similar experience, this women heartrendingly shared that she was able to tell which of her children were conceived by rape and which were the result of more consensual sexual relations. In a real sense, this woman lived with incarnate reminders of horrific sexual violence. Moreover, the fact that the very reminder of abuse was at the same time a child that she carried to term could only create a feeling of internal conflict that defies characterization in words.

The abuse these women experienced was not limited to rape and violence. They also told of their experiences being not only personally deprived of food but also having to watch their children go without food also. This starving occurred when a woman 'fell out of favor' with her 'husband.' Thus, in the brief respites from sexual abuse and rape these child brides experienced personal starvation and had to watch their children also suffer—all the while feeling it was their fault for not keeping their 'husband' satisfied.

In the community, disfavored child brides and their children were publicly shunned. Some were even expelled from the community and deprived of their children. Others, while not forced from the community, were kicked out of the 'main house' and separated from their children. All in all, the child brides I personally interviewed experienced an interconnected web of sexual, physical, and psychological abuse arising out of the polygamous practice in their isolated communities.

Lost Boys

Young girls were not the only ones impacted by crimes emanating from polygamy. The interviews I conducted corroborated accounts of abuse and

neglect of young boys. The practice of polygamy creates a surplus of men in the community, so some of these must be removed to make way for others to accumulate more ‘wives.’ The most vulnerable are the youth. The boys I spoke with had little education because they were required to work on construction projects from an early age. Several of them recounted harsh accounts of abuse within their homes and communities growing up.

These early experiences of abuse, child labor, and lack of education represented only the starting point for the harm and abuse that I recorded in my personal interviews. As teenagers these young boys were wakened from their beds and driven out of town by their mothers to a deserted stretch of highway. There, their mothers pushed them out of the car with a kick to the rear and left them—alone and abandoned. With no parents or guardians to take care of them and provide for their needs, some of the boys I spoke with had turned to drugs and male prostitution. A social worker I spoke with who works with lost boys confided in me that many of these boys spend nights crying themselves to sleep out of mixed emotions of missing their parents and despair about the bleakness of their future. Some of the conversations I had with these boys were very painful because the combination of their lack of education and their experience of continually being beat down made it almost impossible for them to verbalize their personal accounts of harm.

These personal interviews confirm real harm occurring as a result of polygamous practice in insular communities. The gravity of the harm itself should motivate state actors to step up and ensure that every instance of such abuse is discovered and prosecuted; however, even if full discovery were impossible to accomplish, vigorous efforts would be justified even to protect one of these children destined for a life plagued by violence and abuse—perpetrated by the very members of the community who ought to have lovingly cared for and protected these children from such harm.

These accounts of harm are further corroborated by the findings of the British Columbia Supreme Court, and they stand in stark contrast to the finding of the court in *Buhman*. Regardless of the correctness of the district court ruling, these accounts send a resounding message to the state and to individuals everywhere that harm does exist. Real people’s lives are in danger, and the populations that face the most devastating harm are those with little or no means of protecting themselves or stopping the cycle of abuse or abandonment that ultimately will forever remain with these victims with whom I spoke.

B. Judicial Notice of Harm: The British Columbia Court Decision

In addition to the patently unlawful and incredibly harmful accounts related above, a British Columbia Court found not only collateral crimes of

polygamy harmful, but also the practice itself.²⁰ The court held “42 days of hearings” and the court’s opinion was over 330 pages—filled with evidence and expert testimony on the intrinsic harms of polygamy.²¹ These findings will be briefly explored below.

First, the court found a myriad of harms that polygamy creates for women involved in the practice. Namely, the court found “higher rates of domestic violence and abuse, including sexual abuse. Competition for material and emotional access to a shared husband can lead to fractious co-wife relationships. These factors contribute to the higher rates of depressive disorders and other mental health issues that women in polygamous relationships face.”²² Moreover these harms are compounded by higher order births among this population leading to more death “in childbirth and shorter lives than their monogamous counterparts.”²³ On a more subjective note, the court found that women in polygamous relationships “tend to have less autonomy, and report higher rates of marital dissatisfaction and lower levels of self-esteem.”²⁴ The courts findings of harms to women are compounded for children.

Children in polygamous communities were found to “face higher infant mortality, even controlling for economic status and other relevant variables.”²⁵ Those that did survive suffered “more emotional, behavioural and physical problems, as well as lower educational achievement than children in monogamous families.”²⁶ These harms inhere in the nature of the relationships where “jealousy among co-wives” leads to “emotional problems for children” and where fathers of numerous children cannot “give sufficient affection and disciplinary attention to all of their children”²⁷ These harms are multiplied by those discussed above involving early marriages—child brides—where “early sexual activity, pregnancies and childbirth have negative health implications for girls, and

²⁰ *British Columbia Decision*, *supra* note 17, para. 1350 (noting that Canada’s criminal ban on polygamy “seeks to protect against the many harms which are reasonably apprehended to arise out of the practice of polygamy”).

²¹ See Ian Austen, *Canadian Court Rules That Polygamy Ban Is Constitutional*, N.Y. TIMES (Nov. 23, 2011), http://www.nytimes.com/2011/11/24/world/americas/british-columbia-court-upholds-canadas-polygamy-ban.html?_r=0; *British Columbia Decision*, *supra* note 17, at paras 5–6 (noting “the most comprehensive judicial record on the subject [of polygamy] ever produced” and finding “very strong basis for a reasoned apprehension of harm to many in our society inherent in the practice of polygamy”).

²² *British Columbia Decision*, *supra* note 17, at para. 8.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at para 9.

²⁶ *Id.*

²⁷ *Id.*

also significantly limit their socio-economic development.”²⁸

Girls are not the only ones harmed by the practice of polygamy. The gender imbalance created by families with plural wives “means that young men are forced out of polygamous communities to sustain the ability of senior men to accumulate more wives. These young men and boys often receive limited education as a result and must navigate their way outside their communities with few life skills and social support.”²⁹

Each of these harms was found to exist by the court after extensive hearings from the parties, amici, and experts who testified on both sides.³⁰ They also bear striking resemblance to the personal accounts of those I interviewed. By contrast, the court in *Buhman* heard no “competent” evidence on the harms associated with polygamy³¹—a remarkable failure on the part of the state, given the availability of experts and evidence as demonstrated by the case in Canada. It is not surprising in this light that the court reached the conclusion that it did in *Buhman*.

In any case, the findings of the British Columbia court should give society reason to pause before embracing the *Buhman* courts’ decision as a win for greater freedom and individual rights—especially when considered in the context of the harms personally, and painfully, articulated by victims of polygamy’s harm. Even for those who agree with *Buhman*’s holding, the harms that exist and the persistent violations of the criminal law perpetrated against a particularly vulnerable segment of society ought to sound as a rallying cry for far greater government attention to fighting the social harms and crimes associated with polygamous practice—especially in insular polygamous communities.

II. STATES ARE LEGALLY JUSTIFIED AND MORALLY OBLIGATED TO DEDICATE GREATER RESOURCES TO COMBATING HARMS

With the moral justifications for greater state action to fight crimes emanating from polygamy plainly established, the following seeks to reassure state and local actors that greater focus on discovering and prosecuting the collateral crimes of polygamy is legally justifiable—even in light of the *Buhman* decision. The court in *Buhman* rested its decision primarily on three constitutional claims³²—the free exercise clause under

²⁸ *British Columbia Decision*, *supra* note 17, at para 10.

²⁹ *Id.* at para 11.

³⁰ *See Id.* at paras 1–15; *See* Ian Austen, *Canadian Court Rules That Polygamy Ban Is Constitutional*, N.Y. TIMES (Nov. 23, 2011), http://www.nytimes.com/2011/11/24/world/americas/british-columbia-court-upholds-canadas-polygamy-ban.html?_r=0.

³¹ *Buhman* pg. 70.

³² *Buhman* at 2, 23.

*Employment Division v. Smith*³³ and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,³⁴ a hybrid rights theory under *Smith*, and the Fourteenth Amendment as interpreted in *Lawrence v. Texas*.³⁵ Thus the following will address the court's holding on each of these issues in turn and will demonstrate that these constitutional protections of individual rights do not grant authority to violate criminal laws or abuse vulnerable populations. Moreover, the government is justified in dedicating greater resources to fight the criminal acts associated with polygamy as well as their effects.

A. Free Exercise Under *Smith* & *Lukumi*

The court in *Buhman* first found that Utah's anti-bigamy statute violated the principles of *Smith* and *Lukumi* by targeting religious cohabitation triggering and failing to satisfy strict scrutiny.³⁶ By contrast, targeting crimes associated with polygamy would not violate the free exercise principles of *Lukumi*. A major aspect of the *Buhman's* court's *Lukumi* analysis focused on the widespread prevalence of non-religious cohabitation and the state's failure to evenhandedly prosecute religious and non-religious cohabitation.³⁷ The court noted that religion was the "elephant in the room" motivating prosecution of polygamous cohabitation but not "adulterous cohabitation."³⁸

This type of targeting triggered strict scrutiny under *Lukumi* because it made the law not neutral and not generally applicable.³⁹ In the context of collateral crimes of polygamy, the tables turn. Religion becomes the elephant in the room for turning a blind eye on rampant crime and lawlessness.⁴⁰ This essay intends to set to rest any doubt that First Amendment protections of religious freedom end where individuals engage in criminal activity and endanger the interests of children.

In *Smith*, the United States Supreme Court reaffirmed at least one principle established in *Reynolds v. United States*⁴¹ and that is that laws "are

³³ U.S. 872 (1990).

³⁴ 508 U.S. 520 (1993).

³⁵ 539 U.S. 558 (2003).

³⁶ *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1217–21 (D. Utah 2013).

³⁷ *See Id.* at 1209–16.

³⁸ *Id.* at 1211–15.

³⁹ *Id.* at 1217–21.

⁴⁰ *See* Debra Weyermann, *FLDS Continues Abusive Polygamist Practices in Utah and Arizona*, HIGH COUNTRY NEWS (June 11, 2012), <http://www.hcn.org/issues/44.10/flds-continues-abusive-polygamist-practices-in-utah-and-arizona> (faulting cultural deference to alternative religious life-styles as a significant part of the persistence of crime and abuse arising out of polygamous practice in Utah and citing several lenient or failed prosecutions).

⁴¹ 98 U.S. 145 (1878).

made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”⁴² *Smith* further held that no prior free exercise case has prevented the government from enforcing an “across-the-board criminal prohibition on a particular form of conduct.”⁴³ Indeed, *Smith* unequivocally reaffirmed that no individual may “become a law unto himself,”⁴⁴ and this principle applies with even more force to communities. These principles bring to the forefront the irony of the current situation. While the cohabitation prong of Utah’s anti-bigamy statute was struck down on grounds that it was selectively enforced against religious cohabitation,⁴⁵ the state selectively fails to enforce neutral and generally applicable laws associated with collateral crimes of polygamy by turning a blind eye towards the crime and abuse occurring in polygamous communities.⁴⁶

The current situation is undoubtedly deplorable, and patently unjustified by any fear of intruding on the free exercise rights of individuals in polygamous communities. Where local law enforcement have fallen below mandatory training requirements,⁴⁷ are currently on trial for civil rights violations,⁴⁸ and have never—in the past ten years—recorded an instance of rape⁴⁹—in spite of numerous accounts of adult sexual contact with underage girls,⁵⁰ the state will not violate free exercise rights by focusing its resources on protecting vulnerable populations in these communities. The state has an obligation to enforce its laws in spite of the religious differences of its people, and it is not bound to ignore ongoing violations of its laws simply because the unlawful activity is associated with a particular religious practice.

The backbone principle of *Smith* is that states remain free to enforce neutral and generally applicable laws even when those laws have the effect of curtailing a religious practice. It follows that the state is not justified in

⁴² *Smith*, 494 U.S. 872, 879 (1990).

⁴³ *See Id.* at 884.

⁴⁴ *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

⁴⁵ *See Brown v. Buhman*, 947 F. Supp. 2d 1170, 1217–21 (D. Utah 2013).

⁴⁶ Weyermann, *supra* note 40.

⁴⁷ *See Bill Would Force Utah Polygamous Town to Disband Police Department*, KSL.COM (Feb. 14, 2012 1:24 pm), <http://www.ksl.com/?sid=19230673>.

⁴⁸ *See Jennifer Dobner, Arizona Couple Living Near Polygamous Sect Sues for Discrimination*, GLOBALPOST (Jan. 29, 2014 9:49pm), <http://www.globalpost.com/dispatch/news/thomson-reuters/140129/arizona-couple-living-near-polygamous-sect-sues-discrimination>.

⁴⁹ *See Reports on Utah Crime Statistics* page 2002–2012 <http://publicsafety.utah.gov/bci/crimestatistics.html> (no rape crimes were documented in the town of Hildale Utah in any of the reports in this range—2012 being the most recent year of data).

⁵⁰ *See supra* Part I.

failing to enforce its criminal laws to prosecute crimes emanating from polygamous practice out of fear that it will violate free exercise principles.

B. Hybrid Rights

As a second ground for striking down the cohabitation prong of Utah's anti-bigamy statute, the court applied the hybrid rights analysis from *Smith* finding that the law again triggered and failed to satisfy strict scrutiny.⁵¹ The Tenth Circuit has given vitality to the hybrid rights doctrine mentioned in *Smith*.⁵² Specifically, where a party alleges a violation of the free exercise clause and alleges an additional “colorable” claim to an independent constitutional right” the court will evaluate the hybrid claim under heightened scrutiny.⁵³ In *Buhman*, the court found the following companion constitutional claims that formed the basis of the plaintiffs hybrid rights claim: 1) a claim of freedom of association, 2) a substantive due process claim, 3) an equal protection claim, 4) a free speech claim, and 5) an establishment clause claim.⁵⁴

No colorable claim under any of these constitutional protections remains when the state shifts its focus away from the very act of polygamous cohabitation and instead focuses on prosecuting only the collateral crimes often associated with polygamous practice. In demonstrating a colorable claim under an independent constitutional protection the plaintiff must show “a ‘fair probability, or a likelihood,’ of success on the companion claim.”⁵⁵ None of the alleged claims in *Buhman*—nor any other potential constitutional claim—could have a fair probability of success when asserted as a religious right to commit child rape, rape, statutory rape, or child abuse and abandonment. The obviousness of this inquiry only underscores the tragedy of continuing inaction in the face of ongoing abuse and harm to vulnerable populations in polygamous communities.

C. Due Process Under Lawrence

Just as a vigorous state campaign to discover and prosecute collateral

⁵¹ *Buhman*, 947 F. Supp. 2d at 1221–22.

⁵² See *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 655 (10th Cir. 2006) (“*Smith* thus carved out an exception for “hybrid rights” claims, holding that a party could establish a violation of the free exercise clause even in the case of a neutral law of general applicability by showing that the challenged governmental action compromised both the right to free exercise of religion and an independent constitutional right.”)

⁵³ *Id.* at 649, 659.

⁵⁴ *Buhman*, 947 F. Supp. 2d at 1222.

⁵⁵ *Grace United Methodist Church*, 451 F.3d at 656 (10th Cir. 2006).

crimes of polygamy would not violate the first amendment protections of religious freedom, the due process protections outlined in *Lawrence* would also fail to shield the perpetrators of crimes from greater state efforts to protect the vulnerable. The court in *Buhman* followed Tenth Circuit precedent and applied rational basis in analyzing the plaintiffs' liberty and privacy interests under *Lawrence*.⁵⁶ However, even if a form of heightened scrutiny applied to claims under *Lawrence*, as some courts have held,⁵⁷ the following will show that *Lawrence* by its own language does not establish a liberty interest that would prevent greater state focus on discovering and prosecuting collateral crimes of polygamy.

In striking down the cohabitation prong of Utah's law the court in *Buhman* explained that "[c]onsensual sexual privacy is the touchstone of the rational basis review analysis in this case, as in *Lawrence*."⁵⁸ The issue of consent immediately becomes a point of critical distinction between any claim under *Lawrence* for religious cohabitation and the prosecution of polygamy related crimes that involve minors. The first caveat noted in *Lawrence* itself was that the case did "not involve minors."⁵⁹ The Supreme Court in *Lawrence* continued its list of caveats emphasizing that the case did not involve "persons who might be injured or coerced" and that it did not involve "public conduct."⁶⁰ Each of these distinguishing features carves out the space for states to vigorously prosecute collateral crimes of polygamy that often involve minors and have very public consequences. Indeed, allegations of child brides, underage sexual activity with adults, abused and abandoned lost boys, and abuse and belittling of women in a male dominated culture all fall squarely outside of the liberty or privacy interest established in *Lawrence*.

In the final analysis, even under the highest standard of strict scrutiny, the state would undoubtedly have a compelling interest in enforcing criminal laws that punish actual acts of violence and abuse towards women, sexual activity with children unable to consent, and abuse or abandonment of young boys. Moreover, criminal prohibitions of such conduct are narrowly tailored to achieve the state's interest in protecting women and children—prohibiting only very specific acts of conduct that constitute the crime. In this light, the foregoing analysis distinguishing the issues in *Buhman* that led to partial invalidation of Utah's anti-bigamy statute may seem obvious or unnecessary, but this is not the case.

⁵⁶ *Buhman*, 947 F. Supp. 2d at 1222–25.

⁵⁷ See, e.g., *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (finding that *Lawrence* required the application of heightened scrutiny).

⁵⁸ *Buhman*, 947 F. Supp. 2d at 1223.

⁵⁹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁶⁰ *Id.*

The states have persistently failed to take vigorous action against ongoing harm associated with collateral crimes of polygamy, and the purpose of this essay is to challenge that inaction. Because religion and fear of constitutional infringement appears to be the elephant in the room justifying state inaction, this essay has called the state's bluff in pointing out the obvious: no principle of religious freedom or individual liberty can justify state inaction when it comes to prosecuting crimes emanating from polygamous practice—especially within insular communities.

III. THE WAY FORWARD: IDENTIFYING DEFICIENCIES AND OFFERING GUIDANCE FOR GREATER STATE EFFORTS TO PROTECT THE VULNERABLE

Having articulated the ongoing harms associated with unprosecuted collateral crimes associated with polygamy as well as the state's complete lack of any legitimate justification for failing to prosecute these crimes out of fear of constitutional infringement of individuals rights to religious exercise or individual liberty, this section makes a call to action to improve efforts to discover and prosecute crimes associated with polygamy. While the official website of the Attorney General of Utah articulates that the state is focused on “crimes within polygamous communities that involve child abuse, domestic violence and fraud,”⁶¹ a closer examination of the state's own purported focus demonstrates a dramatic failure to properly address the problem of crime associated with polygamy.

One token of this lapse in effort is the state's own primer on combatting polygamy.⁶² First, the state has entirely failed to even update the primer in over two years.⁶³ Far more egregious however, the language and tone conveyed in the primer minimize blatant violation of laws intended to protect vulnerable populations by portraying criminal activity as a ‘cultural difference’ that is part of a polygamous ‘lifestyle.’⁶⁴

⁶¹ *Polygamy*, OFFICE OF THE ATTORNEY GENERAL, UTAH.GOV http://attorneygeneral.utah.gov/protecting-utah/from_crime/polygamy/ (last visited Feb. 17, 2014).

⁶² THE PRIMER: A GUIDEBOOK FOR LAW ENFORCEMENT AND HUMAN SERVICES AGENCIES WHO OFFER ASSISTANCE TO FUNDAMENTALIST MORMON FAMILIES (Jan. 2011), http://attorneygeneral.utah.gov/wp-content/uploads/sites/6/2013/08/The_Primer.pdf [hereinafter THE PRIMER].

⁶³ THE PRIMER, *supra* note 62, at 1.

⁶⁴ *Id.* at 39 (“Approaches to the choice of a marriage partner vary widely among fundamentalists, and some communities allow marriages that are closer than is permitted by law. . . . In certain communities, marriages involving incest may also be seen as a means of ‘keeping the bloodlines pure.’”). In another passage of The Primer, on the “Age of Consent,” the government's language excuses abusive criminal activity involved in underage marriage and associated sexual activity:

While blaming failure to comply with the law on ‘lifestyle’ choices and ‘cultural’ differences, the state’s primer simultaneously encourages law enforcement officers to turn a blind eye to these ‘cultural’ propensities to commit collateral crimes of polygamy when it states that “occurrence of a particular event or condition in one specific family or community does not indicate that it is inevitably present or likely in other families or communities.”⁶⁵ The state’s failure to acknowledge the gravity of the harm and its failure to provide any meaningful guidance to law enforcement on how to discover and prosecute crimes associated with polygamy necessitate the strong call to action outlined in this section.

Thus, the following will provide specific calls to action that will enable the state to vigorously discover and prosecute crimes associated with polygamy. First, drawing on my experience in counter-terrorism, I will offer insights into how the state can develop means of infiltrating closed polygamous communities in order to ‘gather intelligence’ necessary to prosecute crimes committed to the fullest extent of the law. Second, this essay calls on the legislature to act decisively to ensure that law enforcement in closed polygamous communities remain independent, committed to upholding state law in accordance with the oath they have sworn, and trained to ensure effective protection of vulnerable individuals in closed polygamous communities like Hildale, Utah. In other words, to ensure that those to whom duty is owed are fully protected by those entrusted by the state to provide them safeguard from criminal activity, even if committed in the name of religion. Otherwise, the culture of unabated crime associated with closed polygamous communities will continue till the proverbial “kingdom come.”

A. Infiltrating Closed Communities & Gathering Intelligence

The cultural or religious homogeneity associated with polygamous communities calls for a discussion of how to infiltrate closed groups and obtain intelligence necessary to discover and prosecute violations of the

The age at which Americans marry has shifted over the last century. Society’s traditions change regularly, and most people now frown on early marriages, generally because it is assumed that teens are too young for such a momentous decision, or are neither intellectually nor emotionally prepared for the responsibilities of marriage. Since some of the fundamentalist communities have remained reclusive and isolated, many of their members have retained the marriage customs of their ancestors and have, to some extent, fallen out of step with mainstream society.

Id. at 34.

⁶⁵ *Id.* at 6.

criminal law. Just as “[i]ntelligence is one of the most important counterterrorism tools,”⁶⁶ combatting polygamy related crime will also require information gathering to discover the perpetrators. It is the intelligence gathering that transforms improper reliance on a culture’s propensity to a certain crime into legitimate particularized prosecutions of individual perpetrators of crime. By discouraging law enforcement officers from making generalizations about polygamous families and communities,⁶⁷ Utah’s policy actually discourages officers from connecting the dots of legitimate intelligence in their efforts to enforce the law and protect vulnerable populations.

The British Columbia Supreme Court’s findings demonstrate that communities built around polygamous relationships have a tendency to foster social harms, and several of those harms involve violations of the law.⁶⁸ Certainly this abstract knowledge of a propensity to certain social harms does not provide sufficient information for blanket arrests; nevertheless, it provides legitimate basis for targeting the community for intelligence gathering designed to produce specific evidence required to prosecute crimes that occur within the community.

The most important source of intelligence for purposes of combatting crimes associated with polygamy is human intelligence. This involves information “gathered directly from personal contacts.”⁶⁹ Information provided by individuals within polygamous communities can reveal details about the day-to-day activities in communities culturally closed off from the rest of the state. In gathering this information, it is important to note four standards that govern whether information is “actionable.”⁷⁰ First, information must be deemed reliable.⁷¹

That is, “past experience [should] show the source to be a dependable provider of correct information.”⁷² This “requires discerning whether the information is useful and accurate,” and it “demands analysis by the [law enforcement] officer whether the source has an agenda.”⁷³ The next inquiry is whether the information is “viable,” that is whether it is “possible that [a crime] could occur in accordance with the source’s information.”⁷⁴ Third, the information must be “relevant” in that it is timely and not stale and

⁶⁶ AMOS N. GUIORA, GLOBAL PERSPECTIVES ON COUNTERTERRORISM 199 (2d 2011).

⁶⁷ THE PRIMER, *supra* note 62, at 6.

⁶⁸ *See supra* notes 17–30 and accompanying text. *Supra* BCSC Notes & accompanying text.

⁶⁹ GUIORA, *supra* note 66, at 200.

⁷⁰ *Id.*

⁷¹ *See Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

could still be acted upon to make a difference.⁷⁵ Lastly, the information should be “corroborated” by checking it with another source that “confirms the information in whole or in part.”⁷⁶

The following example demonstrates these principles. In his initial encounter with an alienated polygamous family, private investigator Sam Brower recalled the following:

During the three hours that I listened to Ross and Lori, I stayed in professional mode and carefully sifted through their words. Were they lying? Were they vague or inconsistent on important details? Were they just after money or media attention? Did the timeline hang together? Was there any proof? They had lent me their love letters to the girl, allowed me to copy the entire hard drive of their computer, and answered all of my questions without hesitation. Those were not the actions of people trying to hide information. I started to believe them.⁷⁷

This passage offers several important points for discussion. First, it confirms that there are individuals within polygamous communities willing to talk with persons they perceive as interested in helping them rectify ongoing harm in their community. Second, it provides a concrete set of examples of questions that officers should be asking during the intelligence gathering process to ensure the intelligence they gather will be actionable. Additional questions include: “who is the source”; “who is the target of the source’s information”; “what are the risks to the source if the targeted individual is detained”; and “what are the risks to the source if the information is made public.”⁷⁸ With these procedures and questions in mind, the next important inquiry is where law enforcement officers can turn to develop human intelligence sources.

The answer to this question is easily found in turning to the state’s ‘primer’ in which it outlines a “Safety Net Committee” set up to reach out to disenfranchised and disaffected members of polygamous communities.⁷⁹ Some may see the goals of providing a safety net and the goal of criminal enforcement as diametrically opposed, but failing to integrate these goals has only led to a continuation of the harms. In the counterterrorism realm, one professor noted “the United States’ failure to prevent 9/11 was not the

⁷⁵ See GUIORA, *supra* note 66, at 200.

⁷⁶ *Id.*

⁷⁷ SAM BROWER, *PROPHET’S PREY* 19 (2011).

⁷⁸ GUIORA, *supra* note 66, at 201.

⁷⁹ See THE PRIMER, *supra* note 62, at 9–10.

result of a lack of [intelligence]. . . .The shortcomings were primarily related to intelligence sharing and analysis, rather than intelligence gathering.”⁸⁰ In a similar vein, the persistence of ‘cultural’ lag regarding underage marriage, incest, among other abuses noted in the primer will not be resolved by only treating the symptoms of the abuse—i.e. helping those who escape polygamous communities.

Rather, the state must focus on the *cause* of the problem—the lack of enforcement of the criminal law in polygamous communities. To do this, the state should make law enforcement intelligence gathering an important part of its safety net program. No one would be required to talk with police, but there can be little doubt that some important human intelligence sources could be developed through this collaboration—and my interviews with disaffected former members of polygamous communities allow me to make this assertion with even greater confidence.

Investing law enforcement resources in developing human intelligence sources would almost certainly go a long way to remedying past failures to properly carry out enforcement efforts against unlawful polygamous activities. In 2008, authorities in Texas raided a polygamist compound removing 401 children in response to a hotline call claiming abuse at the compound,⁸¹ but it turned out the phone call had been a hoax and the state was required to return all of the children to their parents at the compound.⁸² The state’s reactive approach led to a disruptive battle between the state and the community ending with all children returning to the same allegedly abusive environment.

Proactive development of human intelligence and diligent detective work building cases against individuals in violation of criminal laws has the potential to avoid the embarrassment in Texas where a knee-jerk reaction to false unverified intelligence led to a five-year fiasco with little long-term gains for vulnerable children. Indeed, a proactive approach founded on principles of pursuing only verified actionable intelligence can chip away at the culture of abuse associated with closed polygamous communities.

B. Ensuring Independence of Local Law Enforcement

The true independence of local police forces in closed polygamous

⁸⁰ GUIORA, *supra* note 66, at 203.

⁸¹ Wendy Koch, *401 Children Taken in Raid of Texas Polygamist Compound*, USA TODAY (Apr. 7, 2008 10:38 PM), http://usatoday30.usatoday.com/news/nation/2008-04-07-Polygamy_N.htm.

⁸² Janet Heimlich, *No Refuge*, TEXAS OBSERVER (Aug. 1, 2012 5:58 CST), <http://www.texasobserver.org/no-refuge/>.

communities has long been questioned,⁸³ but the full extent of the problems may just be coming to light in the current trial involving local government and police forces from the twin communities of Hildale, Utah and Colorado City, Arizona.⁸⁴ While these allegations have yet to be resolved by the jury, they are not the first warning signs that closed polygamous communities fail to maintain independent governments and law enforcement departments. In the town of Colorado City, Arizona “seven Marshals have had their police certifications revoked” over the last ten years.⁸⁵ The reasons for these revocations are telling about the state of affairs within these departments. Officers were discharged for being “convicted of unlawful sexual conduct with a 16-year-old girl,” “molesting a five-year-old girl,” “failing to report child sex abuse,” and writing “letters to Warren Jeffs, pledging their allegiance to him while he was a fugitive on the run from the FBI.”⁸⁶ Yet despite this telling story of not only turning a blind eye to abuse but also directly participating in the cycle of lawlessness and abuse, neither the Arizona nor Utah legislatures has taken action to ensure an independent police force in these communities.⁸⁷

These failures must be remedied if there is any hope for victims of abuse and violence to be protected by uniform and vigorous enforcement of criminal laws intended to protect vulnerable populations. The state must take bold action to correct the problems of puppet governments that do not uphold the law. It is worth at least noting that at least one court has upheld a state’s decision not to recognize a city as a legitimate municipality on grounds that a religious group wholly controlled it and to recognize its

⁸³ See Mark LaMet, *ABC15 Investigates Why Law to Hold Colorado City Marshals Accountable Fails to Pass Again*, ABC 15 (Jul. 19, 2013), http://www.abc15.com/dpp/news/local_news/investigations/abc15-investigates-why-law-to-hold-colorado-city-marshals-accountable-fails-to-pass-again.

⁸⁴ See Dobner, *supra* note 59; *Man Living in Polygamous Town Talks About Harrassment*, THE POLYGAMY BLOG, SALT LAKE TRIBUNE (Jan. 30, 2014 8:47 AM), <http://www.sltrib.com/sltrib/blogspolygblog/57471918-185/wyler-police-flds-harassment.html.csp> (trial testimony alleging police involved in harassment in failing to respond to citizens calls for help); Jim Dalrymple II, *Trial Hinges on Control of Polygamous FLDS Church*, THE SALT LAKE TRIBUNE (Jan. 28, 2014 7:24 am), <http://www.sltrib.com/sltrib/news/57455266-78/cookes-church-flds-attorneys.html.csp> (noting that the plaintiffs allege that community government is run by the FLDS church including allegations of a “surveillance network that is allegedly shared by both the government and the church”).

⁸⁵ LaMet, *supra* note 83.

⁸⁶ *Id.*

⁸⁷ *Id.*; Lindsay Whitehurst, *Bill to Disband Polygamous Town’s Police Department Dies*, SALT LAKE TRIBUNE (March 5, 2012 6:34 PM), <http://www.sltrib.com/sltrib/news/53650359-78/bill-utah-arizona-department.html.csp?page=2>.

incorporation would violate the establishment clause.⁸⁸

While this essay does not argue for action so bold, States must take steps to ensure that the laws of the state are enforced by those charged with this duty. It is the solemn responsibility of the Governor of Utah to “see that the laws are faithfully executed,”⁸⁹ and that is the clarion call of this essay—to state actors in Utah and all other states and communities where polygamous practice creates an environment of harm and abuse. The state government must ensure that local governments and especially law enforcement agencies are held accountable. If government is not accountable to the people, then the perpetrators of violence and abuse will never themselves be held accountable. The cycle of abuse and lawlessness will continue, and innocent women and children will bear the burden of society’s collective blind eye.

There are several starting points for ensuring the law enforcement are held accountable to actually fulfill the duty of their office. First, the state should provide funding for the expansion of county law enforcement in the regions surrounding known polygamous communities, and these expanded law enforcement divisions should step in to jointly patrol polygamous communities and investigate crimes associated with polygamy. Second, the legislature should adopt a law—similar to those proposed in the past—designed to ensure that all law enforcement departments comply with state requirements for training and conduct.

In addition to these ideas, the governor should immediately set up a task force to determine the scope of the ongoing harm and criminal activity associated with polygamy in Utah. Steps to document the harm like those adopted and employed in the British Columbia litigation should be taken to measure the scope and gravity of the abuse happening throughout the state.

In response to the findings the state should make itself accountable by acknowledging the existence of the harm and adopting vigorous steps to end the culture of abuse within closed polygamous communities. The foregoing has demonstrated that the harms occurring within closed polygamous communities will not resolve themselves because in the present system no one is holding those responsible for the harm accountable. The lack of accountability and the collective blind eye mutually reinforce a cycle of violence and harm that the state must not allow to continue.

IV BROADER IMPLICATIONS AND APPLICATIONS OUTSIDE THE POLYGAMY CONTEXT

This essay is at once a response to the recent polygamy decision in Utah

⁸⁸ See *State of Or. v. City of Rajneeshpuram*, 598 F. Supp. 1208, 1216 (D. Or. 1984).

⁸⁹ UTAH CONST. ART. VII §5 cl. 1.

and a call to action for the state of Utah—and other similarly situated states—to stop turning a blind eye to collateral crimes of polygamy. Regardless of one’s view on the propriety of a ban on polygamous cohabitation, all can stand together and fight against abuse and corruption involving child brides, lost boys, and corrupt government and law enforcement practices that are associated with closed polygamous communities. All of that being said, the root causes of the abuse and collective inaction associated with closed polygamous communities have far-reaching applications to other settings outside the context of polygamy. Specifically, this essay now explores closed polygamous communities of the Fundamentalist Latter Day Saint Church (FLDS) and identifies three theoretical factors that lead individuals, groups, communities, and institutions to tolerate or ignore inexcusable conduct—even when to do so violates the law. These factors are then identified in a broader spectrum of communities and institutions where instances of abuse and cover up have been identified—thus confirming the utility of these factors as symptoms tied to a break down in accountability.

A. The Danger of Closed Communities: As Seen Through the Example of the FLDS Church

The FLDS church has long been in and out of the media spotlight associated with underage marriages, teen pregnancy, abandoned boys, and closed polygamous communities.⁹⁰ The question naturally arises: how does a community permit such activities to continue, seemingly in perpetuity? The following will outline three influences that play an important role in perpetuating the ongoing cycle of abuse and violence within closed polygamous communities associated with the FLDS. The first factor involves an analysis of the FLDS Leader Warren Jeffs and his influence over religious adherents. Second, the loyalty of government officials to perceived religious duties over their secular responsibilities will be examined. Lastly, this essay will address the consequences of insularity and isolation and how this can undermine accountability within the community.

Investigator Sam Brower, who played a vital role in Warren Jeffs’

⁹⁰ See e.g. Sara Corbett, *Children of God*, NEW YORK TIMES (July 27, 2008), <http://www.nytimes.com/2008/07/27/magazine/27mormon-t.html> (detailing allegations in Texas involving under-age marriage and early motherhood in a closed polygamous ranch community); Julian Borger, *The Lost Boys, Thrown Out of US Sect so That Older Men Can Marry More Wives*, THE GUARDIAN (June 13, 2005 19:02 EDT), <http://www.theguardian.com/world/2005/jun/14/usa.julianborger> (“Up to 1,000 teenage boys have been separated from their parents and thrown out of their communities by a polygamous sect to make more young women available for older men, Utah officials claim.”).

ultimate arrest and prosecution, noted that from Jeffs' unimposing appearance and "unassuming voice" "[a]n observer unfamiliar with the [Jeffs'] identity would have found it hard to believe" that he was the infamous leader of the "largest polygamous religious organization in North America."⁹¹ Yet, thousands of people believe Jeffs' every word and are willing to assist him and others in committing "rape, sodomy, extortion, child abuse, tax fraud, forced underage marriages, suicides, and kidnappings."⁹² The question naturally follows, how can one man wield so much power and influence over so many people.

As one of the individuals I interviewed noted, Jeffs' is akin to Hitler with respect to charisma, persuasion and evil. While this is, tragically, a recurring theme in world history this essay does not address the question of how one gains such power and influence. Rather, our focus is in drawing attention to this situation in an effort to convince state and local government officials to assign greater resources to ensure laws designed to protect vulnerable populations are not cast aside at the command of powerful religious or secular voices imbued with power—whether through religious dogmas or otherwise. Where the voice of one man from a jailhouse pay phone can command the attention and obedience of thousands⁹³—indeed entire communities—the state has a responsibility to ensure that the rule of secular law continues to take preeminence in its domain over the voice of a convicted felon.

Closely related to the first factor, where any concern may arise that local agents have pledged loyalty to a non-state actor rather than their sworn duty to uphold the law outside officials have a responsibility to ensure that the law is enforced. That is a basic requirement of state government; to allow local agents to enforce religious law rather than ensure enforcement of civil law directly results in harm to vulnerable members of closed communities. In the context of FLDS, law enforcement and public officials from the towns of Hildale, Utah, and Colorado City, Arizona, have refused to answer questions regarding their activities on duty and in their official capacity asserting rights of religious freedom.⁹⁴ While there is no doubt that all individuals have fundamental rights of religious freedom to worship according to the dictates of their conscience,⁹⁵ it is equally true that public

⁹¹ BROWER, *supra* note 77, 1–2.

⁹² *Id.* at 7–9.

⁹³ *Id.* at 11.

⁹⁴ See Nate Carlisle, *What Does FLDS Meeting House Look Like? Marshal Doesn't Want to Say*, SALT LAKE TRIBUNE THE POLYGAMY BLOG (Oct 8, 2013 7:17 AM), <http://www.sltrib.com/sltrib/blogspolygblog/56968771-185/amp-meeting-cameras-font.html.csp> (discussing transcript pages from depositions taken in a recent case by the U.S. Department of Justice against two communities for alleged civil rights violations).

⁹⁵ See U.S. CONST. amend. I.

officials hold a duty—preeminent in its sphere—to uphold the law.⁹⁶

Where the state is aware that religious and secular duties are being confused so that religious leaders wield authority over the state such that neutral and binding laws are being ignored, impugned, or selectively enforced then the state is under an absolute obligation to employ greater resources to ensuring the law of the land takes its preeminent place in its sphere. Without uniform rule of law vulnerable populations and minorities are denied an outlet or escape from abuses committed in their communities.

The last factor noted here, is the physical isolation inherent to a closed community. That theme of isolation was repeatedly noted by those interviewed; the isolation, physical in nature, also extends to the emotional and practical. The complicated, and tragic, result of isolation is absolute dependence on FLDS leadership and the extraordinary power that results from this deeply troubling dependence. The isolation-dependence relationship predicated on absolutism results in obedience to the tenets of the faith and its leadership; the inevitable consequence of that troubling paradigm is unmitigated harm to vulnerable individuals.

In the FLDS community of Short Creek, an FLDS trust the “United Effort Plan” holds all the property.⁹⁷ The added control over the land and financial resources of the community increases the vulnerability of individuals living in houses from which they might be expelled by the word of Warren Jeffs—or to the contrary obedience might be rewarded with financial reward.⁹⁸ This monopoly over the necessities of life creates dependence; the geographical and cultural isolation within these communities insulates them from outside society, its laws and protections.

Geography makes it literally more challenging for individuals to escape the control of the community, and it makes it equally difficult for outsiders to keep an eye out for signs of lawlessness or abuse occurring within the community. Cultural factors play a similar role. The dramatic differences in culture create fear of the outside among individuals living within larger society. Moreover, those on the outside have little incentive to move in to these towns precisely because of the cultural differences. All of these factors contribute to the insularity of the community and create pressure for individuals to be obedient to non-state actors even when such obedience requires outright law breaking.

⁹⁶ *Law Enforcement and the United States Constitution*, UTAH STATE TROOPER MAGAZINE (Summer 2013), <http://www.utahstatetrooper.com/law-enforcement-and-the-united-states-constitution/> (“The oath police officers in Utah swear to is found in Article IV, Section 10, of the Utah Constitution and reads: ‘I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this State, and that I will discharge the duties of my office with fidelity.’”).

⁹⁷ BROWER, *supra* note 77, at 16.

⁹⁸ *See Id.* at 15–20.

Where one individual wields great authority to the extent that people will follow the leader over the law, vulnerable populations will have little recourse to redress the harm and crime occurring within their community. The insularity of the community makes it even more difficult insiders to escape abuse and for outsiders to identify and correct abuse that is occurring in the community. The presence of any one of these factors is a cause for concern and must result in greater attention to ensure laws are enforced and vulnerable populations are protected. The following will depict the application of these principles beyond the polygamy context. The tragedies associated with the presence of one or more of these factors are strikingly similar to those outlined in Part I of this essay. They all involve abuse of the vulnerable resulting from breakdowns in internal accountability.

B. Applying Theoretical Factors Associated with Critical Breakdowns in Accountability to Broader Contexts

Crystallizing the theoretical observations of the foregoing, three factors stand out as warning signs that a breakdown in accountability may be imminent. First, when loyalty to an individual, a religion, a philosophy, or an idea becomes greater than loyalty to law of the land or the rules of the game—individuals or perhaps whole institutions and communities have a tendency to excuse inappropriate conduct associated with the individual or idea to which they have developed preeminent loyalty. Second, where institutions or actors charged with insuring accountability get caught in the fray and pledge their loyalty—whether by word or by deed—to the preeminent individual or ideology a breakdown in the system of accountability is almost bound to be the result. Third, when isolation or insularity is added on top of these initial factors accountability will almost certainly not be restored without outside intervention.

The combination of these factors creates persistent problems in accountability across the spectrum of societal experience. It is this phenomenon that leads to abuse and cover up in Hasidic Communities,⁹⁹ Amish Communities,¹⁰⁰ Catholic Churches,¹⁰¹ football programs like Penn

⁹⁹ Jason Kessler, *Hasidic Leader Gets 103 Years in Child Sex Abuse Case*, CNN (Jan. 22, 2013 3:59 PM EST), <http://www.cnn.com/2013/01/22/justice/new-york-brooklyn-sexual-abuse/>.

¹⁰⁰ Trang Do, *Fighting Sexual Abuse in the Amish Community*, FOX 43 (May 8, 2013), <http://fox43.com/2013/05/08/fighting-sexual-abuse-in-the-amish-community/#axzz2sf5bcWot>.

¹⁰¹ See Tom Kington, *Catholic Church 'systematically' protected abusive priests*, U.N. says, LOS ANGELES TIMES (Feb. 5, 2014 7:38 a.m.), <http://www.latimes.com/world/worldnow/la-fg-wn-un-catholic-church-abusive-priests-20140205,0,3036334.story#axzz2sf7SYecZ>.

State,¹⁰² and even high school sports.¹⁰³ Each of these examples will be fleshed out in turn—making unmistakably clear the broad applicability of this call to action. And the importance of these factors as markers of potential abuse and a lack of accountability.

First, my own experiences living in Israel has allowed me to become intimately familiar with the experiences of abuse and harm that occur within insular Hasidic communities. Each of the three factors associated with a lack of accountability and a cycle of harm exist within the Hasidic community. Powerful Rabbi's command the respect and veneration of the people, and in turn individuals and families become more willing to turn a blind eye to horrifying sexual abuse within the community. The cultural strictness alienates those who might intervene and ensure accountability. Moreover, the cultural isolation discourages individuals from going outside the community for help because of deep-seated distrust of outsiders.

To mention only one instance of abuse within this community in Israel, women are routinely forced to sit at the back of public buses—in spite of the Israeli Supreme Court's emphatic decision that such segregation is patently unconstitutional.¹⁰⁴ This example, while not as extreme as sexual abuse and violence also rampant in the community, demonstrates that even where the community is aware of the law outside enforcement is necessary because of internal breakdowns in accountability. All three factors predicting lack of accountability are present and, not surprisingly, so are substantial failures of internal accountability.

Amish communities face similar challenges as those mentioned above,¹⁰⁵ but the Catholic Church's ubiquity across the globe and presence within mainstream society and communities makes it a particular important case to discuss. A recent report by the U.N.¹⁰⁶ reveals that even where the organization is integrated into society the presence even of two of the three factors can still predict a breakdown in accountability—and its resulting harm. In such cases, where only one or two factors are present there is still a

¹⁰² *Penn State's Insular Culture Shielded Sandusky*, CBS NEWS (Dec. 12, 2011 6:50 PM), <http://www.cbsnews.com/news/penn-states-insular-culture-shielded-sandusky/>.

¹⁰³ See Tara Culp-Ressler, *Four Adults Charged with Helping Cover Up the Steubenville Rape Case*, THINKPROGRESS (Nov. 25, 2013 12:08 PM), <http://thinkprogress.org/health/2013/11/25/2990681/adults-steubenville-charges/> (announcing charges against four adults—including felony charges the district superintendent—for helping to cover up the rape of an unconscious victim by high school football players).

¹⁰⁴ See <http://www.cijja.ca/united-nations/international-human-rights-day-and-extremism/>.

¹⁰⁵ See e.g. Do, *supra* note 100, (outlining problems with abuse in Amish communities).

¹⁰⁶ See Kington, *supra* note 101.

need for greater external focus in order to stem the tide of abuse and ensure individuals responsible for crimes are held accountable.

The “scathing report” by the United Nations reveals that current internal measures set by the church have failed to properly hold individuals fully accountable.¹⁰⁷ The international notice created by the United Nations report is one excellent example of how outside forces can exert pressure to encourage greater internal accountability. This essay asserts that in response to this pressure the Catholic Church—and any other institution finding itself in a similar situation—should acknowledge the harm that has taken place and make concrete strides to assess the pressures that led to initial cover ups and abuse. With this information the institution ought to develop responsive mechanisms intended to strengthen institutional accountability and redress past wrongs. Denying past abuses or failures in accountability will only ensure that abuse continues unabated.

Lastly the twin examples of Penn State Football¹⁰⁸ and the high school football team involved in the Steubenville rape cases¹⁰⁹ demonstrate that these principles are not anti-religious principles. Rather, any organization, community, or institution is vulnerable to failures of accountability—perhaps especially in sports. Sports stars and sports programs win the respect and loyalty of individuals and communities. People idolize their sports heroes and perhaps at times feel they can do no wrong. These tendencies line up with the first factor that undermines accountability.

Moreover, sports programs that develop a prestigious reputation make themselves vulnerable to problems with accountability because reporting crimes or harm committed by a member or coach of the team tarnishes the school’s history and record.¹¹⁰ Indeed, as in the Steubenville case even high level officials can become not only complicit in improper behavior but may in fact affirmatively seek to engage in the unlawful conduct they are called on to identify and remedy.

With these examples in mind, this essay stands for the proposition that

¹⁰⁷ See *Id.* (“The Roman Catholic Church has ‘systematically’ protected predator priests, allowing ‘tens of thousands’ of children to be abused, a United Nations committee said Wednesday in a scathing report that cast the first shadow over Pope Francis’ honeymoon period as pontiff.”).

¹⁰⁸ See *Penn State’s Insular Culture Shielded Sandusky*, CBS NEWS (Dec. 12, 2011 6:50 PM), <http://www.cbsnews.com/news/penn-states-insular-culture-shielded-sandusky/>.

¹⁰⁹ See Culp-Ressler, *supra* note 103.

¹¹⁰ See *Penn State’s Insular Culture Shielded Sandusky*, CBS NEWS (Dec. 12, 2011 6:50 PM), <http://www.cbsnews.com/news/penn-states-insular-culture-shielded-sandusky/> (“Too many, from the university president to department heads to janitors, knew of troubling behavior by this revered, longtime coach who founded a charity for children with hardscrabble backgrounds. But at this school whose sports programs vow “success with honor,” the circle of knowledge was kept very limited and very private.”).

outside actors have a duty to assist in restoring accountability through intervention or close monitoring for internal abuse where any one—and especially where all three—of these factors is likely to exist. High schools must be ever watchful over sports or academic programs that achieve preeminent acclaim in the eyes of the community, parents, and fellow students. Colleges must be vigilant and expend additional resources and focus ensuring that storied programs do not fall prone to break downs in accountability.

Perhaps most of all, religious institutions and churches must recognize that the loyalty of the believers may create problematic internal pressures to cover up scandal or abuse. Churches have an obligation to institute stringent safeguards of accountability and transparency in order to recognize and properly correct abuses by holding those responsible accountable both internally and to the law.

Where any group or institution fails in this duty it puts at risk vulnerable populations within the group to abuse and cover up. States and all other well equipped outside actors have a responsibility to ensure that accountability is preserved and abuses punished—otherwise the cycle of abuse and cover up will continue in perpetuity. This obligation extends not just to institutional actors and governments, but it also extends to each individual as fellow citizens in communities. Where we see warning signs that indicate there is a break down in accountability we all have a personal duty not to turn a blind eye. The responsibility to act requires vigorous but careful action—not care as an excuse for inaction but rather diligent action with the laser focus of enforcing neutral and generally applicable laws against secular and religious extremist practices.¹¹¹

The burden, then, is to engage in a narrow discussion regarding factors that should motivate greater oversight to ensure accountability combined with greater focus on identifying unlawful practices and prosecuting these to the fullest extent of the law. Only this approach can properly balance protections of liberty against the need to protect vulnerable populations from persistent harm and abuse—in any societal context.

CONCLUSION

The final message of this essay applies not only to the state of Utah in calling on state agents to forcefully and immediately recognize the harm emanating from polygamy regardless of the *Buhman* decision but it also

¹¹¹ See Amos Guiora, *Fervent Religious Belief: Between Passion and Extremism* (Sept. 28, 2012), <http://extremisproject.org/2012/09/fervent-religious-belief-between-passion-and-extremism/> (noting the importance of caution against casting “aspersions” but calling for proper proactive efforts to quell the harms associated with extremism).

applies to individuals, communities, churches, and institutions everywhere to pause for a moment to reflect on possible factors that might undermine internal accountability. The call to action is to each and everyone that reads this piece to speak out in spite of pressure to keep quiet. In that vein, I will conclude with a recent anecdote from football that illustrates that accountability is not dead everywhere, and that it is individuals willing to stand up against the pressure that can make a difference in ensuring that abuses and improper conduct do not go uncorrected. The story will certainly be somewhat familiar to any who watched the Rose Bowl in 2014, but its broader implications and meaning may not have powerfully sunk in at the time.

This story begins with an Academic All American, a third generation student at Michigan State who was the captain of its football team headed back to the Rose Bowl as a team for the first time in twenty six years.¹¹² In the days leading up to the game, Michigan State's coach became aware that his defensive star and team captain had violated the team's rules.¹¹³ In that moment, the coach had a decision to make. The decision that hung in the balance has everything to do with accountability. Rather than turn a blind eye the coach made the decision to suspend his senior linebacker Max Bullough.¹¹⁴ One commentator stated that without Bullough the game "could easily be a bloodbath" in which Michigan State opponent Stanford would run all over the Spartans.¹¹⁵

That did not stop the coach from pulling his star linebacker. This decision undoubtedly involved a risk of losing one of the most important games in recent Michigan State football history. Nonetheless, the coach made the decision to hold his player accountable for his decision. The game was a grueling one, and it came down to one final goal line stand. Michigan State was virtually one play away from winning or losing the game. As the ball was snapped and the Stanford players pushed to move the ball that last short distance for the touchdown Max Bullough's replacement "soared over the pile to deliver the final hit of Michigan State's season, the storybook

¹¹² See Mike Griffith, *Max Bullough, Michigan State Senior Captain and Middle Linebacker, Suspended for Rose Bowl*, MLIVE.COM (Dec. 26, 2013 12:52 AM), http://www.mlive.com/spartans/index.ssf/2013/12/michigan_state_football_senior_1.html.

¹¹³ See *Spartans' Max Bullough Suspended*, ESPN.COM (Dec. 26, 2013 11:17 PM ET), http://espn.go.com/college-football/story/_/id/10194532/max-bullough-michigan-state-spartans-suspended-miss-rose-bowl.

¹¹⁴ *Id.*

¹¹⁵ Devin O'Barr, *2014 Rose Bowl: Loss of Max Bullough Will Loom Large for Michigan State*, RANT SPORTS (Dec. 26, 2013 9:45 am EST), <http://www.rantsports.com/ncaa-football/2013/12/26/2014-rose-bowl-loss-of-max-bullough-will-loom-large-for-michigan-state/>.

ending [that comes] with a moral.”¹¹⁶

While not every stand taken for accountability will come with a storybook ending, individuals, states, institutions, and communities everywhere have an obligation to push for greater accountability and an end to persistent harm and abuse that can pervade insular communities where internal systems of accountability have broken down altogether. This push will inevitably involve risks. There will be challenges along side successes. In this context, it is the decision to push for accountability that makes the difference. Where individuals, communities, and states collectively decide to stand for accountability and to not turn a blind eye, progress will be made in ending the cycle of abuse and lawlessness that currently plagues closed polygamous communities.

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¹¹⁶ *Michigan State Stops Stanford to Win 100th Rose Bowl*, ESPN.COM
(<http://scores.espn.go.com/nct/recap?gameId=340010127>).