How Young is Too Young When a Polygamist Cult Leader Intends to Marry You Off to Your First-Cousin?: The ongoing case against Warren Steed Jeffs.

By: Brian Daniel Whelan[1]

Since 2002, Warren Steed Jeffs has been the leader and "prophet" of a polygamous Mormon sect known as the Fundamentalist Latter Day Saints ("FLDS").[2] On June 9, 2005, a Mohave County Grand Jury returned a two-count indictment against Jeffs charging him with two counts of

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[1] Associate New Developments Editor, Rutgers Journal of Law & Religion; J.D. Candidate December 2007, Rutgers-Camden School of Law; B.A. 2005, University of California at Berkeley.

[2] This group separated itself from mainstream Mormonism in 1890 when Utah denounced polygamy. FLDS freely practices polygamy in the towns of Hildale, Utah, and Colorado City, Arizona, which straddle the state line. The sect also maintains groups of followers in Texas, South Dakota, Nevada, British Columbia and Mexico. Associated Press, CNN News, *Sect Leader Indicted on Sexual Conduct With Minor, Incest Charges* (July 12, 2007) *available at* http://www.cnn.com/2007/US/07/12/polygamy.charges/index.html (last visited Oct. 24, 2007).

sexual conduct with a minor and one count of conspiracy to commit sexual conduct with a minor.[3] On June 10, 2005, an arrest warrant was issued by the Arizona Superior Court. Consequently, Jeffs fled to avoid prosecution, causing a federal arrest warrant to be issued thereafter on June 27, 2005. Jeffs was eventually captured on August 28, 2006, during a routine traffic stop near Las Vegas, Nevada. Jeffs was then extradited to Utah where he was made to stand trial. At the time, he had been on the FBI's "Ten Most Wanted" list.[4]

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[3] Associated Press, Fox News, *Judge Orders Polygamist Sect Leader Warren Jeffs to Stand Trial on Rape Charges* (Dec. 14, 2006) *available at* http://www.foxnews.com/story/0,2933,236599,00.html (last visited Nov. 10, 2007).

[4] "Wanted by the FBI: Unlawful Flight to Avoid Prosecution – Sexual Conduct with a Minor, Conspiracy to Commit Sexual Conduct with a Minor", *available at* http://www.mormonfundamentalism.com/Photos/warrenjeffs.htm. (last visited Oct. 24, 2007). This site is dedicated to providing a historical examination of the teachings and doctrines of Mormon Fundamentalism.

After a series of delays and legal maneuvers[5] by both the defense and the State of Utah, Jeffs stood trial and was found guilty as charged on September 27, 2007, in Washington County, Utah. The Arizona charges were placed on hold and Jeffs was charged with a different set of offenses.[6] Jeffs was charged with being an accomplice to rape through arranging the marriage of a girl who was fourteen years old to her nineteen-year-old cousin. Jeffs allegedly counseled the newlyweds to "multiply and

[5] These included, among other things, extradition orders to Utah, several motions (including motions to suppress), interlocutory appeals, a petition for competency to stand trial, and media orders.

[6] Charges in that complaint, from the Fifth District Court Washington County, State of Utah, were the following: COUNT 1 - "Rape, as an accomplice" (a first degree felony per Utah Code Annotated §§ 76-5-402 and 76-2-202) for conduct committed between approximately April 14, 2001 and July 7 2001; and COUNT 2 - Same offense as Count 1, but for conduct committed between April 14, 2001 and September 30, 2003.

replenish the Earth," and encouraged the young woman to "give herself mind, body, and soul to her husband." [7]

A high level of animosity and resistance towards practicing FLDS members exists within both the Church of Latter Day Saints ("LDS" or "Mormons") and surrounding communities. The Utah Attorney-General, Mark Shurtleff, compared the FLDS to the Taliban in Afghanistan, and the Arizona Attorney-General, Terry Goddard, called Jeffs "a tyrant."[8] Despite the unpopular nature of the FLDS, conformity to mainstream religion is not a prerequisite to protections afforded by the U.S. Constitution.[9] In this

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[7] Associated Press, Fox News, *Former Teen Bride Read from Diary in Polygamist Warren Jeffs Trial* (Sept. 14, 2007), *available at* http://www.foxnews.com/story/0,2933,296769,00.html (last visited Nov. 10, 2007); *Judge Orders Polygamist Sect Leader Warren Jeffs to Stand Trial on Rape Charges*, *supra* note 3.

[8] Daphne Bramham, THE VANCOUVER SUN: "Warren Jeffs: Prophet or Monster?" (Sept. 8, 2007), *available at* http://www.rickross.com/reference/polygamy/polygamy698.html (last visited Oct. 24, 2007).

[9] U.S. CONST amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the

instance, what is truly at issue is Jeffs' spiritual and temporal control of not only the practice of FLDS but the control he exercised as president over the congregation, balanced against the need to protect those young girls who do not have a choice or chance to escape forced marriages.[10]

Assessment of Jeffs' Ability to Stand Trial

Part of the Warren Jeffs defense strategy was to petition for inquiry into the defendant's competency, which petition was subsequently granted.[11] The State's licensed

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free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (emphasis added).

[10] I would like to point out, I am not in favor of such marriages; yet, historically marriages of this kind were not out of the ordinary and historically they were consummated when the young girl began to menstruate. *See generally* David Herlihy, MEDIEVAL HOUSEHOLDS 2 (1985).

[11] Petition For Inquiry As to Defendant's Competency was filed on April 3, 2007. Pursuant to U.C.A § 77-15-3, the Court can be petitioned to examine the Defendant's competency to stand trial. Defense Counsel listed several

psychologist, Tim Kockler, Ph.D., examined Warren Jeffs for approximately an hour and a half and determined that Mr. Jeffs "[was] competent to proceed to trial."[12] The examination report did not reflect any issues that might be considered significant or warranting a need to remove Jeffs from a trial proceeding. The report reflected a discussion on such topics as personal history, religion, and other relevant issues, and concluded that Jeffs was competent to stand trial.

The Defense hired specialist Eric Nielsen, D.S.W.,[13] to make an independent report in conjunction with the petition to the court. In Nielsen's confidential report, the overwhelming image presented was one of a persecuted man not able to stand trial. Nielsen crafted an image of a man who sat in his cell while in constant commune with the Almighty: "The jail records show there have been long periods where he has been observed kneeling and praying so

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reasons for the petition, among them were significant loss of weight, drowsiness during proceedings, and other reasons redacted from the public record.

[12] Examiner: Tim Kockler, Ph.D., Competency Evaluation. Page 7.

[13] D.S.W. is an acronym for Doctor of Social Work.

much so that he developed ulcers on his knees. There have been periods where he has spent several hours on his knee without adjusting his position. He also had been refusing food and liquid during this period."[14] Furthermore, according to Nielsen, Jeffs was not forthcoming in discussions about his religion or its practices and refused to engage in conversation about domestics affairs. Accordingly, Nielsen determined that Jeffs suffered from a substantial mental illness.[15] The Utah Court followed the recommendation of the State's psychologist and ordered the trial to proceed.

Legal Argument

Jeff's defense counsel filed a motion to change venue on March 6, 2007. Counsel also filed a motion to declare Utah Code Ann. § 76-5-406(11)[16] unconstitutionally vague.

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[14] Examiner: Eric Nielsen, D.S.W., Report for Competence to Proceed Evaluation. Date of Evaluation: April 10, 2007. Date of report: April 18, 2007. This report was released to the public with certain redacted portions on May 25, 2007.

[15] *Ibid*.

[16] "[T]he victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the

The Utah Intermediate Court heard argument on the matter on March 27, 2007, and considered the written motions and memoranda of defense counsel and the State. On April 3, 2007, the court denied the motion to change venue, a motion to quash, and also the motion to declare Utah Code Ann. § 76-5-406 (11) unconstitutional, in a written order. It is extremely likely that the case will be appealed for two main reasons. First, it has been contended that the anti-FLDS sentiment did not permit a fair trial, and second, the constitutional issue of freedom of religion will be a hotly contested issue - i.e. the statute abrogated Jeffs' First Amendment rights.

Just How Young Is too Young?

Jeffs argues that the governing statute, Utah Code Ann. § 76-5-406 (11), is unconstitutionally void for vagueness. Again, that statute proscribes the following conduct:

> [T]he victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate, under circumstances not

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victim to submit or participate, under circumstances not amounting to the force or threat required.

> amounting to the force or threat required. [17]

Jeffs contends that his rights were trampled upon because in cases "where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'"[18] Accordingly, the statute is not neutral and violates what is essentially an important facet of the FLDS religion: the ability of the "prophet" Jeffs to divine God's will as to who shall and shall not be married.

Jeffs further asserts that the practice of marrying fourteen-year-olds to nineteen-year-olds (or older men in general) is a religious event, and as such it requires protection under the Free Exercise Clause.[19] Jeffs admits

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[17] Utah Code Ann. § 76-5-406 (11).

[18] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)(internal citations omitted).

[19] *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 658 (10th Cir. 2006)("First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of

that the statute is facially neutral; however, he argues that "it is unconstitutional because it is not of general applicability and it is not neutral because 'the object of the law is to infringe upon or restrict practices because of their religion [sic] motivation.'"[20]

Jeffs relies on cases that deal with statutes that are operationally not neutral if when "apart from the text, the effect of a law in its real operation is strong evidence of its object."[21] More succinctly stated, although the enticement statute is facially neutral, Jeff contends it was applied as a pretext for religious discrimination. According to Jeffs' defense counsel, the effect of the law

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individuals to associate for the purpose of engaging in protected speech or religious activities").

[20] *See* Defendant's Petition for Permission to Appeal Interlocutory Order, Filed in the Utah Appellate Court on April 18, 2007, at page 35, *available at* http://www.utcourts.gov/media/hpcases/index.cgi?mode=displayentries&parent_id=336&category_id=334.

[21] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993).

is to target Jeffs specifically and the entire FLDS community generally.[22]

According to the arguments made in the interlocutory petition,[23] the State's only evidence against the charges of facilitating sex between a minor and the principal was the use of religious doctrine during the marriage ceremony, and later when Jeffs counseled the complainant. The ceremony contained the language "go forth and replenish the earth and multiply."[24] When the accuser approached Jeffs about her concerns and problems with the marriage, he told her to "give herself, mind, body, and soul, to her husband."[25] Jeffs further counseled the young girl to be obedient and submissive to her husband.[26]

Assuming that the facts are indeed true, is it acceptable for a man of the cloth, so to speak, to encourage marriages between individuals who are mere

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[22] See Defendant's Petition for Permission to Appeal Interlocutory Order, Filed in the Utah Appellate Court on April 18, 2007, at page 35.

[23] *Ibid*.

[24] *Ibid*.

[25] *Ibid*.

[26] *Ibid*.

teenagers and specifically when one is only fourteen years old? Jeffs' role as president of the FLDS involved deciding who could and would be married. Jeffs sanctioned marriages and disbanded them subject to his interpretation of the divine. Here, the marriage was not necessarily between two teenagers who had developed a strong "puppy love," rather, the decision was made by Jeffs, supported by Jeffs, goaded by Jeffs along with the act of consummation. The analysis of whether Jeffs' influence in the process as a president, or leader of a faith, who merely sanctioned such a marriage between two such individuals is complicated by the knowledge that this man initiated the process, and then recommended "the young girl to do her duty."[27]

In this case, the practice of religion intersected facially neutral statutes that tended to infringe on the practice of religion. The balance of enforcement of the statute against the protections of the First Amendment naturally must give way to the need to protect young members of society. Is that true? Do we as a society want to remove facets of others religions that we do not

[27] Paraphrasing the expressions already discussed and mentioned above and highlighted in the petition for Interlocutory Appeal.

understand so that we protect certain persons against themselves? Here, enforcing the facially neutral and disputed statute in Utah minimally prevents the coercion of young children into marriage. The child was arguably not free to make her own decision. Furthermore, had this been a case where the children were "in love," should the outcome have been any different, or would that have had any effect on the proceeding? Certainly the complainant would not have complained, but would other FLDS members have complained?

Historically, the controlling balancing test set forth in *Sherbert v. Verner*[28] required a showing of a compelling state interest before legislation could infringe upon the Free Exercise of religion.[29] However, in the 1990's, the test went to the wayside in *Employment Division v. Smith*, wherein the Court returned to the view that the Free

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[28] *Sherbert v. Verner*, 374 U.S. 398 (1963), frames the question concerning Free Exercise Clause claims as one which must involve a compelling state interest: "[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Id.* at 407 (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

[29] *Sherbert v. Verner*, 374 U.S. at 403.

Exercise Clause was never available as a defense to the violation of a criminal statute which did not specifically target religion.[30] Congress, shortly thereafter, passed the Religious Freedom Restoration Act of 1993 to undo the Court's recent ruling.[31] Congress intended for the practice of religion to be met with guidelines that would allow participants to have effective notice of the types of practices that would result in criminal consequences and those which would not. The congressional policy decisions unraveled under the weight of public policy, which favored adherence to criminal statutes over the practice of religion. Despite that, it may be viewed as a potential infringement on others and their respective rights and

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[30] *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Supreme Court considered a Free Exercise Clause claim brought by members of the Native American Church who were denied unemployment benefits when they lost their jobs because they had used peyote. They challenged an Oregon statute of general applicability which made use of the drug criminal.

[31] In *City of Boerne v. Flores*, 521 U.S. 507 (1997), RFRA was deemed unconstitutional.

practices.[32] Regardless of the back and forth decisions, RFRA was deemed unconstitutional in 1997 by the Court in *Boerne v. Flores*, once and for all sending a bold message concerning public policy, and safety over religion.[33]

Historically, it is uncertain which way the pendulum will swing if at any point this matter should arrive at the highest Court of the land. However, it is certain that coerced marriages and feudal societies where women are sold off as chattel would be a large step backwards for this country and society at large. The interest of the State in protecting children from coerced marriages and thereby consummation/rape is such a compelling state interest that the conviction will most likely stand. Avoiding religious practices in this country that are akin to Taliban control over and treatment of women, as seen in Afghanistan, is a compelling state interest. As a society, it must be our duty to protect those at the most vulnerable level: children. Jeffs will be sentenced on November 20, 2007. Just as his interlocutory appeal was denied, so too should any pleas to higher courts.

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[32] *See generally Smith*, *supra* note 30.

[33] *City of Boerne*, 519 U.S. 1088.