RELIGIOUS CONSTRAINTS DURING VISITATION: UNDER WHAT CIRCUMSTANCES ARE THEY CONSTITUTIONAL?

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INTRODUCTION

Controversy in the law is perhaps nowhere more apparent than in the area of personal autonomy. To what extent do individuals in society possess rights which limit the authority of the state to intervene in the name of public interest? In the area of family law, controversy abounds regarding the existence and limits of personal rights. The issue of parental rights over the care and control over their children provides an example of personal rights under fire. If public interest were the exclusive standard, then an argument could be made that many, if not all children, ought to be removed from their parents who, in most cases, lack professional training in child psychology, child rearing techniques and child education. Moreover, parents generally possess the baggage of their own immediate past and have internalized belief systems that make assimilation and harmonious relationships in society more difficult. Indeed, the possibility of establishing an egalitarian society, devoid of parochial biases and cultural peculiarities, may depend on the eradication of the family as a protected institution.

And yet family autonomy continues to receive protected status against public interest challenges. In the event of divorce and child custody disputes, public interest arguments are clothed in the rhetoric of best interest of the child. Parental rights, are often pitted against the court’s perceptions of the child’s best interest. Of course, the conflict is most evident whenever the parent claiming personal rights belongs to an unorthodox religion or follows an unconventional way of life. Very often the courts believe that the child’s best interest would be served by excluding family influences which are aberrational or unconventional.

The impulse toward conventionality is often evident in domestic disputes when the initial custody award is made. The courts often

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rely on the discretionary standard of best interest to override constitutionally protected family relationships. The threat to personal rights arising out of family relationships continues wherever the state in a post-divorce context mediates conflicts between the custodial and noncustodial parent. The noncustodial parent's visitation rights are the most susceptible to erosion and qualification. This article examines the rights of the noncustodial parent against best interest arguments used in justification of limitation. The specific focus is the right of the noncustodial parent to exercise some influence over the religious development of his or her children. More particularly, the circumstances under which the courts may constitutionally impose restrictions on visitation rights exercised for the purpose of religious training. The issue has generated a great deal of litigation and the courts have failed to establish a coherent way of reconciling best interest rhetoric with the constitutional rights of the noncustodial parent.

LEDoux v. LEDoux: The Overriding of Parental Rights on the Basis of Best Interest Rhetoric

LeDoux v. LeDoux demonstrates the ease with which important moral and constitutional rights, as well as the child's interest in a full relationship with his or her noncustodial parent, may be substantially eroded under the auspices of the discretionary rhetoric of "best interest." In LeDoux the Nebraska Supreme Court affirmed on appeal a district court divorce decree that ordered the noncustodial father, a Jehovah's Witness, "to refrain from exposing or permitting any other person to expose his minor children to any religious practices or teachings inconsistent with the Catholic religion." In a concurring opinion, Judge Grant emphasized the possible breadth of the decision by opining:

I do not see how one parent with one set of religious beliefs and one parent with a different, conflicting set of religious beliefs can raise their minor children with full training and instruction in each parent's beliefs without reducing their minor children to a totally confused, psychologically disastrous state.

1. For an overview of the conflict between custody disputes and constitutional claims, see Mangrum, Exclusive Reliance on Best Interest may be Unconstitutional: Religion as a Factor in Child Custody Cases, 15 CREIGHTON L. REV. 25 (1981).
3. Id. at 480, 452 N.W.2d at 2. The children were four and seven at the time of the trial. Id. at 481, 452 N.W.2d at 3.
4. Id. at 487, 452 N.W.2d at 6 (Grant, J., concurring, joined by Hastings, C.J., & Boslaugh, J.).
Judge Fahrnbruch's separate concurring opinion evidences the majority's insensitivity to the role of the noncustodial parent, in the conclusion that "[t]he majority opinion protects the welfare of the LeDoux children by adhering to the prior holdings of this court that the custodial parent normally has the right to control the religious training of the children of a marriage." 5 Taken together, LeDoux stands for the proposition that the custodial parent wields nearly unfettered control over the religious training of the children, lest the best interest of the child be jeopardized. This despite the fact that the Nebraska Supreme Court has previously ruled that "[i]n the absence of extraordinary circumstances, a parent should not be denied the right of visitation." 6 It is not clear why the same "extraordinary circumstance" test for ensuring visitation should not also be required as a condition for restricting visitation rights.

Judge Shanahan, dissenting, alone recognizes that the majority's holding substantially rejects the rights of the noncustodial parent. He critically observes that: "The majority wanders into theological smoke from the fire of fervent faith fueled by divergent dogma and eventually emerges grasping a solution referenced to religion rather than legal rationale." 7 After reviewing the record, he concludes that

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5. Id. at 487, 452 N.W.2d at 6 (citations omitted). During the same term the Court decided LeDoux, the Nebraska Supreme Court in Von Tersch v. Von Tersch, 235 Neb. 263, 455 N.W.2d 130 (1990), raised the question as to under what circumstances a court in a domestic dispute may grant physical custody of children to one parent while allowing the other parent to control educational decisions. The Von Tersch family had attended the Catholic Church until 1978, when they began to visit various Protestant churches. In 1986, the mother, Geri Von Tersch, began attending services at the Sword of the Spirit Church and enrolled her twin children in kindergarten at the church's school. When the husband, Larry Von Tersch, returned to the Catholic Church in May of 1988, the parties alternated the twins' church attendance between the Catholic Church and the Sword of the Spirit Church. Neither party ever objected to the arrangement of exposing the twins to both the Catholic faith and the Sword of the Spirit faith. This lack of dispute between the parties regarding the religious aspects of the training prompted the court on appeal to note that the case did not therefore raise constitutional issues. The court on appeal reversed the trial court's "best interest" directive that the custodial parent enroll the children in the public school, the noncustodial parent's preference. The court held that the custodial parent has a right to control the education of the children. See id. at 264-75, 455 N.W.2d at 131-38.

While Von Tersch, strictly speaking, only deals with control over education, the case contains all the warning flags commonly involved in disputes over religious upbringing. The same psychologist who testified in the LeDoux case, Dr. Rizzo, testified "that continued attendance at the Sword of the Spirit school would reduce the twins' opportunity for social interaction and competition, to the extent that they may 'tend to perceive themselves as being perhaps more qualified and competent than they truly are.'" Id. at 272, 455 N.W.2d at 136. This "best interest" argument was relied upon by the trial judge as a basis of a spiritual custody award. Id. at 272-73, 455 N.W.2d at 136-37. By vesting educational authority in the custodial parent, the court apparently rejects the concept of spiritual custody in Nebraska.


7. LeDoux, 234 Neb. at 487, 452 N.W.2d at 6 (Shanahan, J., dissenting).
"the LeDoux visitation order prohibits Edward LeDoux's free exercise of his religion in reference to his children and, consequently, constitutes a denial of religious freedom protected by the state and federal Constitutions." 8

This case presents the difficult issue of under what circumstances a court in a domestic dispute in the name of best interest may fashion a visitation order that infringes the rights of the noncustodial parent. Judge Shanahan's dissent, in effect, argues that the restrictive order in LeDoux, though predicated on the best interest of the child, unduly restricts the father's rights. This article relies on this debate evidenced by the majority and the dissenting opinions to discuss the legal conflict between the discretionary standard of best interest and the rights of the noncustodial parent.

The majority and concurring opinions in LeDoux are troubling in several respects. First, while the majority per curiam opinion acknowledges that the court may only "abridge religious practices upon a demonstration that some compelling state interest outweighs a complainant's interests in religious freedom," 9 the court's analysis belies any serious consideration of the father's free exercise rights and minimalizes the "compelling state interest" standard it acknowledges as controlling.

Second, while the court acknowledges that a court may fashion its visitation order in a restrictive manner if "particular religious practices pose an immediate and substantial threat to a child's temporal well-being," 10 it is difficult to imagine that the religious practices involved herein (the father's talking to his children of his religious beliefs) truly pose an immediate and substantial threat to the child's well-being. The only religious activity ascribed to the father by the testifying psychologist was the father's "'trying to read him religious stories and trying to get him to pray, and things of this nature.'" 11 If such activities, practices common to many attentive parents, are viewed as posing immediate and substantial threats to the well-being of children whose custodial parent possesses divergent religious views, then nothing is left for the so-called free exercise rights of the noncustodial parent.

The "immediate and substantial threat to the child's well-being" that the court felt these activities posed was evidenced by stress exhibited in the child following the visits. Dr. Rizzo testified that "following each visit Andrew wet himself and had the equivalent of a

8. Id. at 498, 452 N.W.2d at 12 (Shanahan, J., dissenting).
9. Id. at 485, 452 N.W.2d at 5.
10. Id. at 486, 452 N.W.2d at 5.
11. Id. at 483, 452 N.W.2d at 3 (quoting Dr. Rizzo's testimony).
nightmare. This limited allegation of stress constituted the entirety of the claim of substantial and immediate threat to the child's well-being relied upon ostensibly as the basis for a finding that the restriction served a compelling state interest.

Moreover, Dr. Rizzo on cross-examination admitted that stress often is exhibited in small children following a divorce. He further admitted that the stress in this case, in so far as attributable to religion, had been undoubtedly exacerbated by the mother repeatedly telling the children prior to their visitation with their father that he would likely force them to pray and listen to religious stories which they were not supposed to hear. Indeed, Dr. Rizzo admitted that "I would have to say there is no doubt that the child is probably mouthing some of those things' which had been 'put into his ears by his mother.' The child's stress was largely attributable to the custodial mother's incitement. Judge Shanahan concludes from the record that:

it was Diane LeDoux's distaste or dislike for Jehovah's Witnesses doctrine and her intense indoctrination of the children, especially Andrew, which resulted in Andrew's reactive disturbance when he was confronted with his father's activities of a religious nature, paternal conduct that had been maternally condemned as something which Edward LeDoux was not "supposed to do." It is all too clear that day by day Andrew had to be taught to turn away from another's religion practiced in a different way. Through such inculcation, Edward LeDoux's reading a telephone book to Andrew could be made a taboo.

If so, then the court's ruling encourages any custodial parent who would prefer exclusive control over his or her children to instill anxiety in the children if the noncustodial parent offers any conflicting beliefs or values. By stimulating conflict the custodial parent would enlarge his or her dominion over the child's environment.

Third, the court's order prevents the father from speaking of religion not only to the "stressed" seven-year-old, but also to the four-year-old brother despite the fact that no evidence was presented of any stress or anxiety experienced by the younger child. Sensing a void in the record establishing a compelling state interest, Judge Fahnrbruch, in his concurring opinion, in effect judicially notices that "[b]ecause of the magnitude and intensity of the conflict, it not

12. Id. at 483, 452 N.W.2d at 4.
13. Id. at 484, 452 N.W.2d at 4.
14. Id. at 494, 452 N.W.2d at 9-10 (Shanahan, J., dissenting).
15. Id. at 494, 452 N.W.2d at 9 (Shanahan, J., dissenting).
16. Id. at 498-99, 452 N.W.2d at 11-12 (Shanahan, J., dissenting).
only likely will, but inevitably will, detrimentally affect the general welfare of the younger child.' 17 This type of disputable evidence certainly is not within the ambit of Nebraska's evidentiary rule of judicial notice of adjudicative facts. 18 It can neither be characterized as a fact "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." 19

If the "inevitable effect" of exposing children to multiple belief systems always poses an immediate and substantial threat to the well-being of children, then the court has been remiss in not intervening in the countless families where the parents follow conflicting religious beliefs. At a bare minimum, in any domestic case the custodial parent would have an absolute right to exclude the noncustodial parent from questioning, commenting upon or offering alternative beliefs to their children during visitation.

However, such an exaggerated emphasis of best interest would seriously infringe upon the rights of noncustodial parents without any real showing of either a compelling state interest or the absence of a less restrictive alternative. Judge Fahrnbruch's speculative noticing of a compelling threat to the well-being of the children is simply another way of stating that no such showing is required. According to this view, a noncustodial parent has no rights with respect to communicating beliefs to his or her children that conflict with those held by the custodial parent.

The "inevitability" of adverse effects caused by exposing children to multiple belief systems would also provide a basis for challenging public school curriculum whenever the subject taught, for example evolutionary theory, conflicted with the belief system of the custodial parent(s). One suspects, however, that the right of the custodial parent(s) to control "belief influences" will seldom be extended by Nebraska courts beyond domestic conflicts. Indeed, the court in *State ex rel. Douglas v. Faith Baptist Church,* 20 upheld Nebraska's then existing state regulatory laws compelling attendance at accredited schools against free exercise claims of the custodial parents. 21

Fourth, the order restricted the father from exposing the chil-

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17. *Id.* at 487, 452 N.W.2d at 6 (Fahrnbruch, J., concurring).
dren only to those religious ideas inconsistent with the religious teachings of the Catholic religion; that is, only to conflicting religious ideas. As with all religions, however, the Catholic answer to many theological and temporal issues is very much a matter of debate even among theologians. The court assumes that this will be easy for the husband to determine because he previously had been a Catholic. The court's restrictive order suggests that there exists a "true Catholic" answer to debatable theological issues, and more importantly places the courts in a position where they will have to adjudicate any dispute between the parties regarding the true meaning of Catholicism.

Fifth, as Judge Shanahan observes in dissent, "[f]or some unexplained reason, this court's majority recounts testimony that 'Jehovah's Witnesses observe only one holiday, that being the memorial of the death of Jesus Christ, and they believe that patriotism is divisive.'" Although no testimony had been given linking the Jehovah's Witnesses' beliefs with any mental or physical harm to the children, the court seems mesmerized by the fact that the father rejected traditionally acceptable practices and attitudes, such as the giving of Christmas presents, Boy Scouts and patriotism. Despite recognizing their constitutional duty to "preserve an attitude of impartiality between religions" the Justices obviously have factored in their disapproval of a nontraditional religion and relied upon this bias as an implicit justification for limiting the rights of the noncustodial parent.

With the significant limitation on parental rights exhibited in LeDoux in mind, this article reviews the historical, psychological, constitutional, and philosophical implications at issue and recommends enhanced respect for the rights of the noncustodial parent during visitation.

HISTORICAL ANALYSIS OF PARENTAL CONTROL OVER THE RELIGIOUS TRAINING OF CHILDREN

ENGLISH HISTORY

At early common-law, feudalism and the patriarchal orientation of Christianity and antiquity firmly established the father as the legal head of the family who had absolute control over, among other things, the family's religious training. Indeed, patriarchalism followed necessarily from the feudal order, an order which established land ownership through ancestry and legally disabled the wife

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22. LeDoux, 234 Neb. at 496, 452 N.W.2d at 10 (Shanahan, J., dissenting).
23. Id. at 485, 452 N.W.2d at 5.
through the notion of coverture. Patriarchal authority at common-law “was viewed as absolute, proprietary, and God-given, and consequently unalterable by man.”

Paternal control over religious training, \textit{religio sequitur patrem}, followed naturally from this more general rule of \textit{patria potestas}.

Blackstone summarized the father’s power at common-law as follows:

The legal power of a father, (for a mother, as such, is entitled to no power, but only to reverence and respect,) the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, . . . when the empire of the father, or other guardian, gives place to the empire of reason. Yet till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children.

Thus the mother, though entitled to reverence and respect, exercised authority over her children only derivatively through the “empire of the father,” who possessed absolute control over his children even after his death. The Crown theoretically possessed general prerogative authority as \textit{parens patriae} to protect those subjects who were unable to protect themselves; such authority, however, was only exercised against pauper parents who were financially unable to care for their own children. Thus, while Blackstone acknowledged that the Crown, under statutes for apprenticing poor children, could take the children of paupers, “[t]he rich indeed are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family.”

Lord Mansfield’s decisions in \textit{Rex v. Delaval} and \textit{Blissets Case} commonly are credited with positing the earliest common-law limitations to the absolute authority of the non-pauper father.

\begin{itemize}
  \item \textbf{25.} 1 W. BLACKSTONE, \textit{COMMENTARIES ON THE LAWS OF ENGLAND} 446, 452-53 (17th ed. 1830).
  \item \textbf{27.} 1 W. BLACKSTONE, supra note 25, at 451.
  \item \textbf{28.} Id.
  \item \textbf{29.} 97 Eng. Rep. 913 (K.B. 1763).
  \item \textbf{31.} While Mansfield’s recognition of a common law right to intervene against the authority of the father for the sake of the child, following a conservative reaction to the excesses of the French Revolution, was later distinguished by more traditional judges in England, the American courts in developing a best interest theory commonly justified their departure from the common law rule of patriarchal autonomy by reference to \textit{Delaval} and \textit{Blissets Case}. See, Zainaldin, 73 Nw. U.L. Rev. at 1055-64.
\end{itemize}
Delaval, Mansfield granted a writ of habeas corpus in favor of a daughter who had been totally neglected by her father and who had been apprenticed for the purposes of prostitution. Upon a writ of habeas corpus, the court sent her “at liberty to go where she will” on the grounds of “public decency and good manners.”\(^3\) In Blissets Case, the court denied a bankrupt father’s writ of habeas corpus to reacquire his six-year-old daughter from his wife who had left him for mistreatment to her and her child. The court justified qualifying “[t]he natural right” of the father to custody and control on grounds of abandonment:

> [T]he paternal authority as to its civil force was founded in nature, and the care presumed which he would take for the education of the child; but if he would not provide for its support, he abandoned his right to the custody of the child’s person, or if he would educate it in a manner forbidden by the laws of the State, the public right of the community to superintend the education of its members, and disallow what for its own security and welfare it should see good to disallow, went beyond the right and authority of the father.\(^3\)

Lord Mansfield’s efforts to establish common-law authority favoring limitations on patriarchal authority were largely repudiated on their facts in King v. De Manneville\(^3\) and Ex Parte Skinner.\(^3\) In De Manneville the court, reaffirming the father’s paramount right to custody of his children, denied a mother’s writ of habeas corpus to secure an eight-month-old daughter from the father despite evidence that the father had neglected and ill-treated the child.\(^3\) The court in Skinner similarly held that despite Blissets Case, the King’s Bench had no authority to deprive a father of the custody of his child in favor of the mother, unless a charge of abuse or abandonment could be made out.\(^3\)

While patriarchal autonomy was so firmly rooted in the common-law as to make judicial intervention in the family unlikely except against pauper parents or extreme cases of abuse or abandonment, the courts of equity in the early eighteenth century, relying on the Crown’s residual parens patriae authority to protect

\(^33\) Blissets Case, 98 Eng. Rep. at 900.
\(^35\) 9 Moore 278 (C.P.-Ex. 1824).
\(^36\) De Manneville, 102 Eng. Rep. at 1055.
\(^37\) Skinner, 9 Moore at 281. The court did acknowledge that unlike the common law courts, the courts of chancery had “jurisdiction as representing the King as Parens Patriae, and that Court may accordingly, under circumstances, control the right of a father to the possession of his child, and appoint a proper person to watch over its morals, and see that it receive proper instruction and education. . . .” Id. at 282.
the incapacitated, followed up from where Lord Mansfield had left off. In the cases of Shelley v. Westbrooke (Shelley's Case) and Wellesley v. Beaufort (Wellesley's Case) courts of equity established their authority to intervene against paternal authority in behalf of the child's welfare. In Shelley's Case, Lord Chancellor Eldon refused the poet Percy Bysshe Shelley's petition to obtain custody of his two children after their mother had committed suicide. Lord Eldon held that Shelley's atheistic beliefs and writings, as well as his immoral conduct, made him unfit as a parent. In Wellesley's Case, the House of Lords, against the petition of an aristocrat father known for his immoral and controversial ways, for the first time affirmed the authority of the courts of equity to intervene against the power of the father in favor of the child's welfare.

The authority of the courts of equity to intervene for custody purposes in appropriate "fitness" cases otherwise had little impact on patriarchal control over religious training. The common-law doctrine of religio sequitur patrem, establishing paternal control over religious training, generally prevailed even in the chancery courts. The chancery decision in Hawksworth v. Hawksworth is illustrative. In Hawksworth, a Protestant widow, following the death of her Catholic husband, raised their infant daughter for eight years as a Protestant before the father's Catholic relations demanded that the chancery court order the daughter to be raised as a Catholic. In ordering the Protestant mother to raise her child as a Catholic, the Vice Chancellor acknowledged that such an order would not be in the interest of either mother or child, but denied any discretion to do otherwise:

38. 37 Eng. Rep. 850 (Ch. 1817).
44. 6 L.R. 539 (Ch. App. 1871). See also In re Meades, 5 Ir. R. 98, 103 (1871) (holding that the father's authority in matters pertaining to the education of his children "is not to be abrogated or abridged without the most coercive reason"); Austin v. Austin, 55 Eng. Rep. 634, 637 (M.R. 1865) (holding that the importance of educating the child as a Catholic was not sufficient grounds to deprive the mother of custody).
45. Hawksworth, 6 L.R. at 539-41.
Were I at liberty to follow my own opinion, I should have no hesitation in acceding to [counsel for the mother's] argument. For to direct that this ward shall be brought up in the Roman Catholic faith will be to create a barrier between a widowed mother and her only child; to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union which ought to be as close, as warm, and as absolute as any known to man; and lastly, to inflict severe pain on both mother and child. But it is clear that no argument which would recognise any right in the widowed mother to bring up her child in a religion different from the father's can be allowed to weigh with me at all. According to the law of this Court the mother has no such right. The duty of the widowed mother is in general to bring up the child according to the faith which the father professed, even though she utterly disapproves of it. . . . As it is, however much I regret the conclusion, the law must prevail, and the child must be brought up in her father's faith.46

Paternal preference for religious training continued not only after the death of the father, but also in the event of divorce. Thus the court in *D'Alton v. D'Alton,* 47 explained:

Although the wife may have obtained a decree of judicial separation, the Court will not give her the custody of the children if she intends to bring them up in a religion different from that of their father . . . . [I]f the marriage had continued undissolved, and the husband and the wife had continued to live together, she would not have been able to control the husband otherwise than by her example and influence, as to the religious education which should be given to their children.48

The principle of *religio sequitur patrem,* however, could be forfeited, abandoned, or waived under certain circumstances. Although not discussed in terms of the father's abandonment or forfeiture, the common-law right of the mother of an illegitimate child to control the child's religious training provides such an example.49 Other examples include cases such as *Stourton v. Stourton,* 50 and *Andrews v.*

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46. Id. at 540-41 n.1.
47. 4 L.R.-P. & D. 87 (1878).
48. Id. at 87-88.
Salt, where the chancery courts, while affirming the rule of paternal preference for religious training, even after the death of the father, each held that the respective father's Catholic relations had forfeited their right to have the children raised as Catholics when they, in each instance, had allowed the children to be raised in the Church of England for nearly ten years by their surviving mothers.

AMERICAN HISTORY

American family law developed outside the feudal structure out of which the property-oriented rule of paternal preference arose in English common-law. Moreover, while English law formed the basis of American common-law, the reception, whether by common-law analysis or statute, was modified to fit the peculiar circumstances of the American experience. The American courts, following the English experience, favored paternal preference in child custody and rearing matters, but were more receptive to discretionary intervention on behalf of the welfare of the child.

Paternal misconduct or neglect, for example, could justify overriding the presumption favoring paternal authority. For example, the court in Nickols v. Giles refused to grant the father a writ of habeas corpus for purposes of regaining the custody of his child from his wife who resided with her father. Because the child was "well taken care of, and not likely to be so by the father," the court refused to grant the writ.

More significantly, the court in Commonwealth v. Addicks, relying in part upon Lord Mansfield's opinion in Rex v. Delaval, recognized discretionary authority for the courts to make custody awards based on the child's welfare without a showing of abandonment or forfeiture. In Addicks, the father filed a writ of habeas corpus to regain custody of his young children from his divorced wife. Despite acknowledging the mother's immoral character, the court recognized that children of "tender age" need the "kind of assistance which can be afforded by none so well as a mother." Accordingly, the court denied the writ on behalf of the child's best interest. Similarly, the

51. 8 L.R.-Ch. 622 (1873).
52. Id. at 642; Sturton, 44 Eng. Rep. at 588.
53. For an extended analysis of the development of child custody law in America, see Zainaldin, 73 NW. U.L. REV. at 1052-74.
54. 2 Root 461 (Conn. 1796).
55. Id.
56. 5 Binn. 520 (Pa. 1813).
57. Id. at 521-22.
58. Id. at 521.
59. Id.
court in In re Waldron, in denying the father's writ of habeas corpus, cited Adicks for the proposition that, unlike English common-law, in America custody "is a matter resting in the sound discretion of the Court, and not a matter of right which the father can claim at the hands of the court. It is to the benefit and welfare of the infant to which the attention of the court ought principally to be directed."  

Justice Story's Commentaries on Equity Jurisprudence, and Kent's Commentaries on American Law both acknowledge the general right of the father to the care and custody of his children, but each observes that under American common-law the father's right is not absolute. Story admits that the origin of equity jurisdiction against absolute paternal control is obscure and controversial, but notes that the House of Lord's affirmation in Wellesley's Case "is conclusive in favor of its rightful origin." He suggests that "it is highly probable that it has a just and rightful foundation in the prerogative of the Crown, flowing from its general power and duty as parens patriae, to protect those who have no other lawful protector." Story summarizes the equitable limitations on the presumptive authority of the father over his children as follows:

For although in general parents are entrusted with the custody of the persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature and morals and religion, and that they will be treated with kindness and affection. But whenever this presumption is removed, whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children,—in every such case the Court of Chancery will interfere and deprive him of the custody of his

60. 13 Johns. 418 (N.Y. 1816).
61. Id. at 421.
62. 3 J. Story, Commentaries on Equity Jurisprudence § 1742-84 (14th ed. 1918).
63. 2 J. Kent, Commentaries on American Law 188-253 (11th ed. 1867).
64. 3 J. Story, supra note 62, § 1760, at 377-78; 2 J. Kent, supra note 63, at 218.
65. 3 J. Story, supra note 62, § 1764, at 379; 2 J. Kent, supra note 63, at 218-19.
66. 3 J. Story, supra note 62, § 1743, at 361.
67. 3 J. Story, supra note 62, § 1765, at 380.
68. Id. at § 1749, at 364.
children, and appoint a suitable person to act as guardian and to take care of them and to superintend their education.\(^6\)

As a jurist, Justice Story relied upon *parens patriae* in *United States v. Green\(^7\)* and *United States v. Bainbridge\(^7\)* to override in each instance the father's claims to custody, reasoning that the court's primary concern in such cases is the welfare of the child.\(^7\)

The emerging "child's welfare" standard led to the recognition of a "tender years" presumption, which turned the rule of paternal preference on its head. That is, once the courts turned from the status-oriented rule of *patrem potestas*, common experience reinforced by sexual stereotypes, suggested as the court in *Addicks* expressed, "none so well as a mother" can best serve the interest of a child of "tender age."\(^7\)

The "tender years" presumption continued as the norm in this country until recently when equal protection arguments have restored balance between the parents.\(^7\)

The courts treated the narrower issue of religious training largely incidental to custodial authority. The legislatures in the late nineteenth century did begin requiring that the public placement of children be in accordance with their parents' religious faith.\(^7\)

Consequently, there is a paucity of early American religious training cases. In an often cited 1916 Harvard Law Review article on *The Parental Right to Control the Religious Education of a Child*, Lee Friedman observes "our courts have been remarkably free from litigation over the religious education of children . . . . Most of the states . . . are still without any decisions on the subject from a court of last resort."\(^7\)

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\(^{69}\) Id. at § 1757, at 374-75.

\(^{70}\) 26 F. Cas. 30 (C.C.D. R.I. 1824) (No. 15,256).

\(^{71}\) 24 F. Cas. 946 (C.C.D. Mass. 1816) (No. 14,497).

\(^{72}\) Id. at 952; *Green*, 26 F. Cas. at 32.

\(^{73}\) *Commonwealth v. Addicks*, 5 Binn. 520, 521 (Pa. 1813).

\(^{74}\) See *Lee Friedman, Life with Father: 1978, 11 FAM. L.Q. 321, 329-40 (1978); Kurtz, The State Equal Rights Amendments and Their Impact on Domestic Relations Law, 11 FAM. L.Q. 101, 137 (1977). Roth, The Tender Years Presumption in Child Custody Disputes, 15 J. FAM. L. 423, 432-34 n.38 (1976-77), cites authority from most states which he claims "at one time or another, have raised a presumption in favor of the mother as preferred custodian."

\(^{75}\) See statutes and interpretive cases collected in Friedman, *The Parental Right to Control the Religious Education of a Child*, 29 HARV. L. REV. 485, 498 n.49 (1916).

\(^{76}\) 16 Mo. App. 159 (1884).

\(^{77}\) Id. at 167.

\(^{78}\) Friedman, 29 HARV. L. REV. at 498.
Visitation Rights

*religio sequitur patrem,* preferred the father. The court in *Hernandez v. Thomas,* for example, in holding that the father’s religious preference controlled unless the tenets contravened the law, stated that “[i]t is not enough to consider the interest of the child alone; and as between father and mother, or other near relation of the child, where sympathies of the tenderest nature may be confidently relied on, the father is generally to be preferred.”

Where a father expressed no preference, however, then the expressed preference of the mother, contrary to English common-law, would be followed.

Some courts, relying on statutory prohibitions against basing custody awards on religious distinctions refused to consider religious factors in child custody or care disputes. As a practical matter the operation of the “tender years” presumption placed the mother in control of religious training more often than previous experience had shown.

During the later part of the nineteenth century, states began adopting legislative standards for deciding custody and care issues. Currently, most states provide by statute the specific decisional standards for custody and rearing issues. Few states leave custody and care issues simply to the sound discretion of the court. Many states have adopted the “best interests” of the child, or the “general welfare” of the child as the standard. Most jurisdictions, following the approach of the Uniform Marriage and Divorce Act, specify best interest as the welfare standard for custody and visitation issues, but list general interpretive factors.

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79. 50 Fla. 522, 39 So. 641 (1905).
80. *Id.* at 536, 39 So. at 645 (quoting Verser v. Ford, 37 Ark. 27 (—)).
Rather than making visitation rights a discretionary issue subject to the best interest calculus, section 407 of the Uniform Marriage and Divorce Act specifies that the noncustodial parent “is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health.”86 Section 40887 specifies that the custodial parent may determine the child’s upbringing, including “religious training” unless the parents agree in writing to the contrary or the child’s physical or emotional health would be significantly impaired.88 Presumably, the references to the custodial parent determining the child’s upbringing and religious training are to be interpreted as primary, excluding “spiritual custody” awards, rather than exclusive control. Any other interpretation would contradict the Act’s section 407 preservation of visitation rights and jeopardize the constitutional rights of the noncustodial parent. The required showing that visitation would “endanger seriously” the child should also constitute the standard for restriction on religious training.

### BEST INTEREST EXAMINED IN THE VISITATION CONTEXT

Perhaps the greatest threat to the noncustodial parent’s visitation rights is not the pervasive best interest standard itself, but psychological assumptions regarding whether visitation is in the best interest of the child. In the seminal work *Beyond the Best Interests of the Child*,89 first published in 1973, the authors argue that a “noncustodial parent should have no legally enforceable right to visit the child.”90 According to these authors, when domestic conflict occurs

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86. **UNIFORM MARRIAGE AND DIVORCE ACT** § 407 (1987). The comments to this section explain that the “extraordinary finding” required to deprive a noncustodial parent of visitation rights “are intended to mesh with other uniform legislation.” *Id.*


88. *Id.* at § 408.

89. J. GOLDSTEIN, A. FREUD & A. SOLNIT, **BEYOND THE BEST INTERESTS OF THE CHILD** (2d ed. 1979). The psychological parent principle was first introduced in the legal literature by Note, *Alternatives to ‘Parental Right’ in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963). The Note, based on the work of Anna Freud, argued for the adoption of the concept of a psychological parent in place of the biological parent. This notion was later incorporated in the broader work cited above.

90. J. GOLDSTEIN, A. FREUD & A. SOLNIT, supra note 89, at 38.
and the parents are not together for the purpose of child rearing, then the child's best interest, for them the only legally cognizable interest, is furthered by maintaining a healthy relationship with a single "psychological parent." What is important for the best interest of the child is not the continued contact with both biological parents, but rather the continuity of a single care-provider who will serve as the psychological parent during the developmental years. The study recommends that in the case of conflict between the parents the courts defer to the discretion of the psychological parent.

According to the Beyond the Best Interests of the Child view, granting visitation rights in the noncustodial parent over the objection of the custodial parent is contrary to the child's best interest because such visitation threatens the relationship between the psychological parent and the child, the source of the child's psychological well being. The authors explain their view:

Children have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other. Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents. A "visiting" or "visited" parent has little chance to serve as a true object for love, trust, and identification, since this rule is based on his being available on an uninterrupted day-to-day basis.

Locating the decision whether to permit visitation in the custodial spouse forces the child to work things out with the custodial parent and signals to the child that the custodial parent has control of outside influences, including involvement of the noncustodial parent.

Of course the viability of the Beyond the Best Interests of the Child thesis depends upon the empirical validity of the single psychological-parent principle. The empirical validity of this theory has always been controversial among psychologists and it has become increasingly controversial among legal commentators.

However, regardless of its psychological soundness, the receptiv-

91. Id. at 17.
92. Id. at 38.
93. Id.
94. For some early criticisms of the single psychological parent theory and its implication for visitation rights, see Foster, Book Review, 12 WILLAMETTE L. REV. 545, 550-51 (1976); Strauss & Strauss, Book Review, 74 COLUM. L. REV. 996, 1002 (1974); Dembitz, Beyond Any Discipline's Competence (Book Review), 83 YALE L.J. 1304, 1310 (1974). For a further review of the psychological parent theory and its critics, see Garrison, Why Terminate Parental Rights?, 35 STAN. L. REV. 423, 455-74 (1983), and sources cited therein. For an in-depth critique of the Beyond the Best Interests of the Child theory applied to the issue of visitation rights, see Novinson, Post-Divorce Visita-
ity of the Beyond the Best Interests of the Child thesis by the courts, as illustrated by cases such as Ledoux, has made it outcome determinative in most cases where the issue has been addressed. Professor Peggy Davis, considering the operation of judicial notice of legislative facts in custody matters, investigated the judicial handling of "psychological best interest" theories made famous by the Beyond the Best Interests of the Child work. Davis noted that judges often referred to the theory as they had seen it described in general or social science literature or in arguments of counsel or written briefs. She observed that the psychological parent theory in most cases "appeared to be outcome determinative" despite "expert rebuttal evidence, judicial consideration of the possibility of litigation imbalances, or indications that the court was aware of competing expert perspectives."

In a similar study of the improper use of judicial notice of legislative facts as a basis for deciding family matters, Professors Perry and Melton warn that unfettered judicial notice of social facts "enhance[s] the possibility of social facts becoming legal truth by judicial repetition." Each of these authors, together with many other commentators, notes the problems with leaving judges unrestricted in the investigation and determination of legislative and background facts. Simply stated, once the psychological parent theory becomes common currency among the courts, it is repeated without critical analysis or reflection. In the case of visitation rights, the psychological parent theory has gained such widespread judicial acceptance that contrary empirical studies often go unanswered if not unexamined. The reliability of the psychological parent theory, however, from the perspective of the best interest of the child, is anything but beyond empirical reproach. The empirical studies of Judith Wallerstein and Joan Berlin Kelly described in Surviving the Breakup, directly challenge the generally accepted psychological-parent theory in favor of the continued relationship of both the custodial and noncustodial par-

96. Id. at 1549.
97. Id. at 1552-53 (citations omitted).
ents. Their research indicates that continued visitation was "im-
mensely important" both in confirming to the children that their
noncustodial parent had not abandoned them and that they had not
abandoned their noncustodial parent.101 Indeed, in many instances
the quality of the relationship between noncustodial parent and child
improved over what it had been prior to the marriage breakup and
contributed directly to the child's emotional well-being in the post-
divorce period: "Whether the father maintained his presence by reg-
ular visiting or attenuated his contact to the vanishing point, he con-
tinued to influence the thoughts and feelings of his children and,
most particularly, their self-concept and self-esteem."102 Contrary to
the pivotal emphasis placed on the custodial parent by the Beyond
the Best Interests of the Child study and the comparative depreciation
of the role of the noncustodial parent, Wallerstein and Kelly found
that a continued relationship with both parents enhanced the best in-
terest of the child:

Within the postdivorce family, the relationship between the
child and both original parents did not diminish in emotional
importance to the child over the five years [of the study].
Although the [custodial parent's] caretaking and psychologi-
ical role became increasingly central in these families, the
[noncustodial parent's] psychological significance did not cor-
respondingly decline.103

The authors conclude, "Our findings argue against burdening the
visiting relationship with severe restrictions of legal constraints
which make it more difficult for parents and children to seek out
each other's company in response to their own wishes or needs."104

The trend to expand by statute visitation rights to grandparents
or other relatives reinforces the view that it is in the child's best in-
terest to have continued contact with family members other than the
psychological parent.105 In effect these statutes, whether as a matter

101. Id. at 45-47, 58-59.
102. Id. at 130, 235.
103. Id. at 307 (emphasis in original).
104. Id. at 315.
105. See, e.g., IOWA CODE ANN. § 598.35 (West Supp. 1990); KAN. STAT. ANN. § 60-
1616(b) (Supp. 1989) (grandparents and stepparents); NEV. REV. STAT. §§ 125 A.330(s),
125A.340 (great-grandparents) (1989); N.Y. DOM. REL. LAW § 72 (McKinney Supp.
1990); N.H. REV. STAT. ANN. § 458:17-d (Supp. 1989); N.C. GEN. STAT. § 50-13.2 (1987);
parents or other family members); W. VA. CODE § 48-2B-1 (1986); WIS. STAT. ANN.
§ 767.245 (West Supp. 1990) (grandparents, stepparents, or others who have served as a
"parent"). See also, Foster & Freed, Grandparent Visitation: Vagaries and Visi-
tudes, 23 ST. LOUIS U.L.J. 643, 653-63 (1979); Note, Visitation Rights of a Grandparent
over the Objection of a Parent: The Best Interests of the Child, 15 J. FAM. L. 51 (1976-
77).
of best interest analysis or recognition of extended family rights, challenge the core notion of the single psychological parent.

In summary, even strict adherence to the best interest standard does not necessarily favor depreciation of the noncustodial parent’s involvement in the post-divorce family.\textsuperscript{106} In any event, the best interest standard is subject to statutory and constitutional constraints arising out of protected family relationships.

CONSTITUTIONAL CONSTRAINTS ON THE BEST INTEREST STANDARD

The primary focus of the courts and legislatures in contemporary child custody and visitation cases has been the “best interest” of the child, and with legitimate reason. Protecting the child serves valid policy considerations, as well as enhances the personal rights of the child to be protected until the child is sufficiently mature to be self-sufficient. Whether visitation enhances or detracts from the child’s best interest, however, is problematic at best. The bias, prejudice, or misperceptions of the court may in many instances weigh more heavily in the final best interest analysis than an objective evaluation of the child’s welfare. This may be especially true whenever the court believes that there are good and sufficient reasons for discriminating against the noncustodial parent.

In any event, the court’s exercise of unfettered discretion in the name of best interest may jeopardize rights of family autonomy, equal protection, free exercise, free association, free speech, and may generate establishment problems. Justice demands that the courts not read out of existence these basic rights in the name of best interest, but rather that they seek to reconcile best interest policy arguments with entitlement reasoning.

FAMILY RIGHTS ARISING IN THE NUCLEAR FAMILY

The autonomy of the nuclear family finds support in history and tradition.\textsuperscript{107} From a constitutional basis, family rights have been tied to the due process\textsuperscript{108} and equal protection clauses of the fourteenth

\textsuperscript{106} For an extended discussion of a comparison between the Beyond the Best Interest theory and its critics, see Novinson, Post-Divorce Visitation: Untying the Triangular Knot, 1983 U. ILL. L. REV. 121, 141-65.

\textsuperscript{107} For an extended discussion of Roman, Germanic, Anglo-Saxon, and Judeo-Christian tradition of family autonomy, see Blakesley, Family Autonomy, in C. BLAKESLEY, L. WARDLE, & J. PARKER, CONTEMPORARY FAMILY LAW: PRINCIPLES, POLICY & PRACTICE 1-16 (1988).

amendment,\textsuperscript{109} the free exercise clause\textsuperscript{110} as well as the ninth amendment's residual retention of those rights retained by the people but not specifically enumerated in the text of the Constitution.\textsuperscript{111} Family rights also have been recognized as so basic and fundamental as to not require specific constitutional enumeration.\textsuperscript{112}

The Supreme Court first identified family rights as a legally recognized concept during the era of \textit{Lochner v. New York}.\textsuperscript{113} In \textit{Meyer v. Nebraska}\textsuperscript{114} the Court, in invalidating a statute proscribing the teaching of any modern language other than English in the first eight grades, recognized family autonomy as an aspect of liberty guaranteed by the due process provisions of the fourteenth amendment:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.\textsuperscript{115}

The right of family autonomy, in this case, justified overriding the "desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters . . . ."\textsuperscript{116}

A few years later, the Court in \textit{Pierce v. Society of Sisters}\textsuperscript{117} re-

\begin{footnotesize}
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\item\textsuperscript{109} Caban v. Mohammed, 441 U.S. 380, 391 (1979); \textit{Stanley}, 405 U.S. at 651.
\item\textsuperscript{110} Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972). The Court in \textit{Yoder} explained that where parental rights arising under the due process clause are coupled with parental rights associated with free exercise claims, then the courts must be especially circumspect in intervening. \textit{Id.}
\item\textsuperscript{111} Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).
\item\textsuperscript{112} Cf., \textit{Slaughter-House Cases}, 83 U.S. (16 Wall.) 36, 76 (1872) in which the notion of fundamental rights as a source of constitutional limitation on the power of the state was propounded. The same notion of fundamental rights arising out of common-law recognition based on "time immemorial" or natural law reasoning antedating and surviving the enactment of the constitution finds support in Coke's famous dictum in \textit{Dr. Bonham's} case, 8 Coke 107, 118 and James Otis' \textit{Writs of Assistance} case argument in 1761 (see Adams, "Abstract" of the Argument in the \textit{Writs of Assistance} Case, in Law & American History 66-71 (1980)). Indeed, fundamental rights reasoning comprised one of the persistent revolutionary themes. See, B. Bailyn, \textit{The Ideological Origins of the American Revolution} 175-229 (1967).
\item\textsuperscript{113} 198 U.S. 45 (1905). The substantive due process analysis of the infamous case of \textit{Lochner v. New York}, was applied by the Court from the turn of the century until the court-packing controversy of 1937. J. NOWAK, R. ROTUNDA & J. YOUNG, \textit{Constitutional Law} §§ 11.3-11.4, at 342-49 (3d ed. 1986).
\item\textsuperscript{114} 262 U.S. 390 (1923).
\item\textsuperscript{115} \textit{Meyer}, 262 U.S. at 399.
\item\textsuperscript{116} \textit{Id.} at 402.
\item\textsuperscript{117} 268 U.S. 510 (1925).
\end{enumerate}
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lied on the notion of family autonomy as a justification for invalidating Oregon's compulsory public education law. The Court reasoned:

[R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.\(^{118}\)

The principle of Meyer and Pierce is that parents who "nurture and direct" their children may, in the exercise of that right, choose directives and nurturing measures at odds with that which the state would otherwise choose as serving the best interest of the child.

The substantive due process arguments of the Lochner era were repudiated as a protection of economic relationships in West Coast Hotel Co. v. Parrish\(^ {119}\) and United States v. Carolene Products.\(^ {120}\) While the Justices since Parrish and Carolene Products have been unwilling to "substitute their social and economic beliefs for the judgment of legislative bodies"\(^ {121}\) as a protection of contractual autonomy, similar arguments have emerged in protection of notions of family autonomy. For example, the Court in Wisconsin v. Yoder,\(^ {122}\) in exempting the old-order Amish from compulsory school requirements after the eighth grade, characterized parental rights in the rearing of children as fundamental to our tradition and history:

[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.\(^ {123}\)

Nor is Yoder the only modern case bespeaking of family rights as fundamental. The Court in Smith v. Organization of Foster Families,\(^ {124}\) characterized family rights as follows:

\(^{118}\) 268 U.S. at 535.  
\(^{119}\) 300 U.S. 379, 391-92 (1937).  
\(^{120}\) 304 U.S. 144, 148 (1938).  
\(^{122}\) 406 U.S. 205 (1972).  
\(^{123}\) Id. at 232.  
The individual's freedom to marry and reproduce is "older than the Bill of Rights." . . . the liberty interest in family privacy has its source, and its contours are ordinarily sought, not in state law, but in intrinsic human rights, as they have been understood in "this Nation's history and tradition." 125

**FAMILY RIGHTS BEYOND THE TRADITIONAL FAMILY**

Of course the right to family autonomy in the context of a traditional family does not necessarily carry with it comparable rights in non-traditional family settings or in post-divorce contexts. The state may be less reticent to intervene when the nuclear family has been dissolved. Indeed, in the case of a custody or visitation dispute the court necessarily has to settle the controversy by reconciling competitive interests and rights. Nonetheless, the Court has recognized family rights beyond the context of the traditional nuclear family.

For example, the Court in *Moore v. City of East Cleveland* 126 extended the protection afforded the family from state intervention despite the fact that the protected relationship was that of a grandmother and her two grandsons. Justice Powell explained that the Court's previous decisions clearly "establish[ed] that the Constitution protects the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. . . . by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." 127

*Moore* recognized that family rights extend beyond the traditional nuclear family, but the courts have been circumspect in extending the constitutional protection afforded the family to other relationships. For example, the Court in *Village of Belle Terre v. Boraas* 128 held that unrelated persons could not successfully claim family rights as a way of avoiding a local zoning ordinance which excluded households consisting of unrelated persons from living in the village. Similarly, the Court in *Bowers v. Hardwick* 129 expressly refused to extend the family's privacy rights to homosexual relationships. The Court explained that homosexual relationships, rather than being " 'deeply rooted in the Nation's history and tradition,'" 130 have historically been criminally proscribed and socially condemned. 131

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125. Id. at 845 (footnote and citations omitted).
127. Id. at 503-04.
130. Id. at 192 (quoting Moore, 431 U.S. at 503).
Functional family relationships, such as those established in foster families, are entitled to some protection, but comparatively less than traditional family relationships. The Court in *Organization of Foster Families*, for example, held that while a foster family may "hold the same place in the emotional life of the foster child, and fulfill the same socializing function, as a natural family," such relationships must be subordinated to rights arising out of the natural family. There Justice Brennan explained that the natural family, having its origin "entirely apart from the power of the State," enjoyed special constitutional protection over other "state created" relationships, such as the foster family. In so doing, the Court implicitly rejected the psychological-parent theory as an unconstitutionally acceptable standard.

The Supreme Court, in a series of illegitimacy cases, has reinforced the primacy but noncontrolling significance of the biological relationship as a predicate to establishing family rights. For example, the Court in *Stanley v. Illinois* held that an unwed father could not be deprived of the custody of his child unless he has been proven unfit. In *Stanley*, the unwed father had lived sporadically with his illegitimate children and their mother for eighteen years. In effect, the father's relationship had been established beyond the biological relationship to a caring personal relationship, although less continuous than the traditional family setting. When the mother died, the children automatically became wards of the state without any hearing to determine the unfitness of the unwed father. The state law, in effect, presumed as a matter of law that an unwed father was necessarily unfit. The Court invalidated the state statute on the basis of both procedural due process and equal protection. The equal protection argument followed from the fact that by statute the unwed mother's rights could not be terminated without a fitness hearing. Writing for the Court, Justice White held that as a matter of due process, Peter Stanley, the natural father, "was entitled to a hearing on his fitness as a parent before his children were taken from him."

What is unclear in *Stanley* is whether the Court's ruling rests upon a substantive due process entitlement analysis, or is simply an announcement that if the state selects unfitness (rather than best interest) as a standard for terminating parental rights, then an unfitness finding cannot be established upon an irrebuttable presumption that unwed fathers are necessarily unfit. That is, the key question is

133. Id. at 845.
134. 405 U.S. 645 (1972).
135. Id. at 649.
whether the Court is relying exclusively on unfitness as the state's own articulated goal\(^\text{136}\) or whether an unfitness showing is constitutionally required because of a substantive due process right to the parent-child relationship arising out of the biological relationship. In this regard the Court's partial reliance on the "warm, enduring, and important"\(^\text{137}\) natural bond of affection between parent and child, suggests that the Court was anticipating the recognition of relational rights as a matter of substantive due process.

In keeping with *Stanley*, the Court in *Caban v. Mohammed*,\(^\text{138}\) held that a statute requiring consent of only the mother for adoption violates equal protection when the father's "relationship with his children [is] comparable to that of the mother."\(^\text{139}\)

The incomplete nature of the biological relationship as the sole basis of family entitlement, however, can be illustrated by cases dealing with unwed fathers who have not established any emotional relationship with their children. The Court in *Quilloin v. Walcott*,\(^\text{140}\) and *Lehr v. Robertson*,\(^\text{141}\) for example, held that where the unwed father has never established any significant personal or custodial contact with the child, then such an absentee parent could not block the adoption of the child by the natural-custodial parent's spouse. In each instance the emotional family, which included one of the natural parents, was given priority over the other natural parent who had exercised no responsibility for his child. In effect, no "unfitness" showing is constitutionally mandated if the biological father has not established a relationship with his children functionally equivalent to traditional fatherhood. As the Court in *Lehr* explained, "the rights of the parents are a counterpart of the responsibilities they have assumed."\(^\text{142}\) Implicit in this analysis is the notion that parental rights are personal, stemming from a combination of biological relationship and nurturing experience.

Thus, whenever a biological relationship combined with experience in nurturing exists, then the state's authority to limit the parent's right faces strict constitutional limitations. In his dissent in *Caban v. Mohammed*, Justice Stewart suggested that the rights of an unwed parent who has never exercised any parental responsibility are not coextensive with parents in a post-divorce setting, assuming arguendo "that each married parent after divorce has some substan-

\(^{136}\) See id. at 652-53.
\(^{137}\) Id. at 652.
\(^{139}\) Id. at 389.
\(^{140}\) 434 U.S. 246, 256 (1978).
\(^{142}\) Id. at 257.
tive due process right to maintain his or her parental relationship.”

Perhaps the justification for extending parental rights beyond divorce arises from the core notion, expressed in Moore v. City of East Cleveland, “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural,” a process that continues in the nuclear and the post-divorce family, but was never present with the unwed and noninvolved father.

It goes without saying that it is difficult to see “what it is that makes all this [sex, marriage, childbearing, and childrearing] a unit” for constitutional purposes. Nonetheless, the Court has recognized that the right to rear one's biological children with whom a nurturing relationship has been established can only be overridden by a powerful countervailing state interest. Indeed, both Stanley and Caban imply that such relationships are protected beyond the nuclear family relationships as a matter of substantive due process.

Termination cases indicate that parental rights predicated on a biological relationship and some experience in rearing cannot be terminated without a due process hearing requiring the showing of unfitness. This is true for the noncustodial parent as well. Moreover, the Court in Santosky v. Kramer held that under the neglect statute which was relied upon to terminate parental rights on the basis of unfitness, the minimum constitutional burden of proof was a “clear and convincing” showing that the statutory requirements for termination had been met. In justifying this higher burden, the Court reasoned that “‘[i]f the State prevails it will have worked a unique kind of deprivation’.... Few forms of state action are both so severe and so irreversible.” Justice Blackmun, in dissent in Lassiter v. Department of Social Services, compared the termination of parental rights to criminal penalties.

The termination cases, where the parent has established an enduring relationship with his or her biological child, are the closest constitutional analogue to cases curtailing visitation rights. As with termination cases, “[i]n the absence of extraordinary circumstances, a

143. Caban, 441 U.S. at 397 (Stewart, J., dissenting).
144. Moore, 431 U.S. at 503-04.
151. Id. at 756-57.
152. Id. at 759 (citation omitted).
parent should not be denied the right of visitation.\textsuperscript{154} Similarly, since the courts cannot constitutionally predicate a custody award on the basis of the preferred religious views of either parent,\textsuperscript{155} an order directing either the custodial\textsuperscript{156} or the noncustodial parent to defer to the exclusive religious training of the other parent would violate the establishment clause\textsuperscript{157} as well as other family rights discussed above. The question remains under what circumstances the best interest of the child qualifies as a compelling state interest sufficient to override parental rights in the post-divorce family.

RELYING ON THE INADEQUACIES OF “BEST INTEREST” RHETORIC AS ESTABLISHING A COMPELLING STATE INTEREST

Every state relies on some form of “best interest” of the child analysis as the pivotal issue in child custody and care disputes. If policy constraints upon which the best interest standard have been erected were sufficient to override parental rights, then the notion of family autonomy would be significantly eroded. The courts, acting in the best interest of the family, could intervene on a regular basis to restrict the unorthodox and unconventional, as well as to substitute

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\item \textsuperscript{154} Deacon v. Deacon, 207 Neb. 193, 200, 297 N.W.2d 757, 761 (1980).
\item \textsuperscript{155} See Mangrum, Exclusive Reliance on Best Interest May be Unconstitutional: Religion as a Factor in Child Custody Cases, 15 Creighton L. Rev. 25 (1981).
\item \textsuperscript{156} Spiritual custody awards directing the custodial spouse to raise the child in the religion of the noncustodial parent are unusual but not without precedent. In most instances the court is merely enforcing either an antenuptial agreement or a divorce stipulation covering the religious training of the children in the event of divorce, unless it can be demonstrated that enforcement would not be in the child’s best interest. See, e.g., Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 (1982) (shifting physical custody from mother to father after mother “flagrantly violated” the tenets of the faith in which she had agreed to raise the children); Spring v. Glawn, 89 A.D.2d 980, 454 N.Y.S.2d 140 (1982) (holding that a divorce stipulation between a Jewish noncustodial father and a Catholic custodial mother that the children would not be exposed to any religious training without the consent of both parents required that the child be removed from a parochial school and placed in a public school); Gluckstern v. Gluckstern, 31 Misc. 2d 58, 220 N.Y.S.2d 623 (Sup. Ct. 1961) (enforcing an antenuptial agreement that the children would be brought up in the Jewish faith by the custodial Christian Scientist mother). Other courts, however, have held these contracts unenforceable. See, e.g., Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956) (holding that the language of a divorce agreement regarding the religious upbringing of the children was not sufficiently clear as to warrant a contempt finding upon its alleged violation); Hackett v. Hackett, 150 N.E.2d 431 (Ohio Ct. App. 1958) (holding that violation of a provision in separation agreement was not grounds for a contempt finding).
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better parents or parenting conditions. The courts, however, have consistently denied that a simple best interest analysis can be invoked to override parental rights.

Justice Stewart, in a concurring opinion in *Organization of Foster Families*,\(^{158}\) expressed "little doubt" that "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest,"\(^{159}\) then family rights would be directly offended.

The inadequacies of a best interest standard as a basis for overriding parental rights is further suggested by *Santosky v. Kramer*.\(^{160}\) There the majority queried "[n]or is it clear that the State constitutionally could terminate a parent's rights without showing parental unfitness."\(^{161}\) Justice Rehnquist, in dissent, predicted that "the majority probably would balk at a state scheme that permitted termination of parental rights on a clear and convincing showing merely that such action would be in the best interests of the child."\(^{162}\) That is, alternative parents or parenting conditions not only have to be better than those offered by the natural parents, but instead the natural parents have to have forfeited their right to continue in the protected family relationship by some affirmative abuse or neglect.

The Court in *Palmore v. Sidoti*\(^{163}\) expressly held that the best interest standard, by itself, provides an inadequate basis for overriding parental rights even in a post-divorce family. In *Palmore*, the caucasian father of a three-year-old daughter sought modification of a custody order on the grounds that his ex-wife, who was also caucasian, was then cohabitating with a black man, whom she later married. In modifying the custody award, the trial court reasoned that the child of an interracial marriage would necessarily suffer from social stigmatization that would be absent if the father was awarded custody. The Supreme Court reversed, reasoning that "private biases and the possible injury they might inflict are [im]permissible considerations for removal of an infant child from the custody of its natural mother."\(^{164}\) Following *Palmore*, religious biases and the threat of possible injuries suffered as a result of the child's exposure to con-

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\(^{159}\) *Id.* at 862-63 (Stewart, J., concurring).

\(^{160}\) 455 U.S. 745 (1982).

\(^{161}\) *Id.* at 760.

\(^{162}\) *Id.* at 773 (Rehnquist, J., dissenting).


\(^{164}\) *Id.* at 433.
flicting religious teachings, cannot state a constitutional basis for overriding parental rights in the name of best interest.

MORAL RIGHTS AND THE FAMILY

The courts have regularly invoked the notion of moral rights in defense of family autonomy. The Supreme Court’s references to the moral foundation of the family has variously been described in historical-cultural terms and also in terms of moral absolutes. The Court in *Moore v. City of East Cleveland*\(^\text{165}\) recognized family rights as flowing from tradition. The Court stated, “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”\(^\text{166}\)

The Court in *Stanley v. Illinois*,\(^\text{167}\) in comparison, identified family rights as part of the rights of man:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one’s children have been deemed “essential,” “basic civil rights of man,” and “[r]ights far more precious . . . than property rights.” “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”\(^\text{168}\)

Finally, the Court in *Organization of Foster Families*\(^\text{169}\) described the source of family rights as tradition, history and the rights of man. The Court found this concept “‘older than the Bill of Rights,’ . . . the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in ‘this Nation’s history and tradition.’ ”\(^\text{170}\)

Whether we locate family rights in tradition or as an aspect of our basic human rights that antedate our constitutional history, an analysis of family autonomy as a moral concept is important if we are to defend either limiting or extending family rights in visitation disputes. To the extent that family rights are tenuous or ill conceived, then best interest arguments in favor of intervention in the family

\(^{165}\) 431 U.S. 494 (1977) (plurality opinion).

\(^{166}\) Id. at 503.

\(^{167}\) 405 U.S. 645 (1972).

\(^{168}\) Id. at 651 (citations omitted).

\(^{169}\) 431 U.S. 816 (1977) (citations omitted).

\(^{170}\) Id. at 845 (citations omitted).
gain enhanced credibility as an exclusive determinate factor. On the other hand, if there exists sound moral principles justifying deference to family relationships in the face of best interest arguments, then the courts would act responsibly only if they sought the reconciliation of the perceived best interest of the child with moral claims of the respective family members.

Radical critics of traditional society have long condemned the institution of the family and the claim of family rights. For these critics of the family, the family stands for and perpetuates parochial self-interest. If social equality is ever to be achieved, the family must be abolished and with it accompanying social classes. In place of child rearing by parents who lack training and sense of communal responsibility, the state should intervene in child rearing on the basis of an egalitarian social agenda. Thus, by abolishing the family, conditions of equality may be better perpetuated and the public interest served.

Several moral arguments are available in refutation of radical criticisms of the family. One line of liberal defense balances the disadvantages of parochialism and inequalities perpetuated by the family against the corresponding social advantages. John Rawls, for example, in his *Theory of Justice* adopts a balancing perspective and concludes that the family is defensible in the just society. On the negative side, the important liberal "principle of fair opportunity can be only imperfectly carried out, at least as long as the institution of the family exists." The root notion is that variant family conditions challenge the moral principle that those similarly endowed ought to have an equal opportunity to succeed in society. Accordingly, the principle of fair equality of opportunity favors abolishing the family.

On the positive side, Rawls acknowledges that the family serves other moral purposes. For example, Rawls's difference principle, an aspect of the principle of fraternity which favors distributing benefits in favor of the least advantaged group, is a principle experienced most vividly in the family:

The family, in its ideal conception and often in practice, is one place where the principle of maximizing the sum of advantages is rejected. Members of a family commonly do not wish to gain unless they can do so in ways that further the interests of the rest. Now wanting to act on the difference principle has precisely this consequence. Those better cir-

172. Id. at 74.
173. See id. at 74, 301.
174. Id. at 511-12.
cumstanced are willing to have their greater advantages only under a scheme in which this works out for the benefit of the less fortunate.175

Rawls further exhibits his sympathy for the family by selecting rationally “heads of families” as the candidates most likely to choose rationally the principles of justice in the original position, because family heads will “care about the well-being of some of those in the next generation.”176

Rawls also views the family as an appropriate training ground for moral development of the children. Since children are incapable of assessing the moral validity of precepts given to them by those in authority, their moral development is highly dependent upon those in authority acting appropriately with the children in their care and control. If the children are taught love by those in authority, they will be more capable of developing love themselves. For biological, psychological and social reasons, parents are more likely to love and sacrifice for their children than are other candidates. Parental love serves as a foundation for the child’s development of self respect and lays the groundwork for further moral development:

[When the parent’s love of the child is recognized by him on the basis of their evident intentions, the child is assured of his worth as a person. . . . He experiences parental affection as unconditional; they care for his presence and spontaneous acts, and the pleasure they take in him is not dependent upon disciplined performances that contribute to the well-being of others.177]

The loving relationship between parent and child, the first condition of moral development, leads to the second condition of providing intelligible rules that the child can comprehend. The affection, example, and guidance of loving parents is crucial to the child’s moral development.178 It cannot be effectively substituted by “loveless relationships maintained by coercive threats and reprisals.”179 As parental love and example teaches associational rights and duties, the child learns to work out his or her own standards of cooperation adapted to the particular complex social relations he or she experiences. The family thus serves the child’s development of moral autonomy.

Ironically, Rawls’s conditional defense of the family takes on a consequentialist cast. The family may be abolished if “other arrange-

175. Id. at 105.
176. Id. at 128.
177. Id. at 464.
178. Id. at 464-66.
179. Id. at 466.
ments . . . prove to be preferable." Short of abolishing the family, the just society must take institutional steps, such as adopting the difference principle, to ensure that family parochialism does not further undermine social equality.

Robert Nozick, in contrast to Rawls's tentative defense of family autonomy, articulates a natural rights defense of the family. Nozick critically notes:

the ambivalent position of radicals toward the family. Its loving relationships are seen as a model to be emulated and extended across the whole society, at the same time that it is denounced as a suffocating institution to be broken and condemned as a focus of parochial concerns that interfere with achieving radical goals.

For Nozick, the historical relationships of love and care within the family are protectable on the libertarian principle that one has a right not to be interfered with so long as one is not interfering with anyone else. The family arises naturally as part of our biological and social capacity. The state, as a result, has no grounds for intervention.

Nozick does recognize that once the child exists he or she has claims even against those who created him. Constraints on parental discretion, however, especially in matters of training, care and support, cannot be justified in the name of normalcy or in aid of the public interest. Rather, only the competing rights of others, especially the child, can justify overriding parental autonomy.

For Charles Fried, family rights follow from the core notion of the right to personal autonomy: "The guiding conception, I suggest, is that the right to form one's child's values, one child's life plan and the right to lavish attention on that child are extensions of the basic right not to be interfered with in doing these things for oneself." Further, the parent's preferred position over others who may better serve the child's best interest is "based on the facts of human reproduction," the significance of family relations to our sense of personal integrity, and the connection between creation and overcoming the fact of mortality:

[The physical facts are importantly implicated in the resulting social bond. The mother experiences the baby as pecu-

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180. *Id.* at 463.
181. *Id.* at 75-83.
183. *Id.* at 168.
184. *Id.* at 38-39, 287-91.
186. *Id.* at 153.
liarly hers, and this affects her perspective. The child does not belong to the community, and in view of its helplessness, it does not even belong to itself, not yet at least. In this way the mother's (and by extension the father's) sense of autonomy is enlarged, enlarged to the point where by investing their autonomy in a growing, other person, their use of autonomy is the model for the deepest form of altruism. As has often been said, parenthood is the closest many of us come to overcoming the fact of mortality. Parenthood is a kind of physical continuity, a physical continuity which is also bound up with spiritual and moral continuity through our influence on our children. The family as an institution expresses these aspects of the parent's personality.187

While Fried thus views parental rights as an aspect of parental autonomy, he also observes that the exercise of parental autonomy serves as a basis of the child's sense of autonomy: "Belonging at first to our parents, whom we will replace, we have a chance of believing we belong to ourselves."188 For Fried, the notion of enlarging personal autonomy serves as a basis for constraints on parental discretion. There is "no right to harm your children," and "no right not to provide for one's children, not to assure they have proper schooling, and so on"189 because the exercise of such a right would jeopardize the child as a potentially independent being. Otherwise the "child's most intimate values and determinants" are the prerogative of the parents because the "society has no special right to choose them, since society, after all, is only the hypostasis of individual, choosing persons."190

Each of these moral defenses of family rights which have been recognized by the courts as part of our tradition and history, as well as intrinsic to our basic notion of human rights, reinforces the continued recognition of visitation rights on the part of the custodial parent. The noncustodial parent's very sense of self worth and autonomy is threatened by constraints which restrict nurturing and training experiences with the child. Further, the child's moral development and own self worth are directly threatened whenever an historical loving relationship is severed or limited in a way that precludes continued development. The parent's efforts to overcome the condition of mortality by physical, spiritual, and emotional continuity via parenthood, as well as the child's belief in the potential of belonging to his or her self by first belonging to his or her parents,

187. Id. at 155.
188. Id.
189. Id. at 152 (emphasis in original).
190. Id. at 154.
are all at issue when visitation constraints are imposed by the state under the rhetoric of best interest.

Of course, limitations may be appropriate when the child's physical, emotional, or psychological well-being is substantially and immi-
nently threatened by an abusive parent. Once a child exists he or she has claims even against his or her creators. The state, however, cannot morally intervene against these basic human rights for less than these compelling interests. While the courts have, for the most part, been true to this challenge, persistent threats to family autonomy in the general language of public interest or best interest always remain a problem.

RECONCILING CONSTITUTIONAL AND MORAL RIGHTS AND BEST INTEREST IN THE AREA OF RELIGIOUS TRAINING

As shown above, the law of child custody, training and visitation has evolved from the common-law rule of patria protestas and religio sequitur patrem in favor of a best interest standard mediated by constitutional principle. Whereas historically the courts deferred to paternal authority to the exclusion of any best interest consideration, the courts more recently have reversed themselves: best interest is often relied upon to the exclusion of parental rights. Reconciling the best interest of the child with the congeries of intersecting and overlapping rights remains the real challenge for the courts. Judicial performance, as evidenced by LeDoux v. LeDoux, has been confused, inconsistent and perplexing. An analysis of the cases discussing issues of religious training in the post-divorce family recommends the following reconciliation of best interest with the rights of the noncustodial parent.

BOTH THE CHILD'S FREE EXERCISE RIGHTS AND THE PRIMARY RIGHT OF THE CUSTODIAL PARENT TO CONTROL THE RELIGIOUS TRAINING OF THE CHILDREN MAY JUSTIFY TIME, PLACE AND MANNER RESTRICTIONS ON VISITATION

While the single psychological parent theory discussed above argues in favor of the custodial parent's exclusive control over the religious training of the children, most courts have refused to decide on an all-or-nothing basis. Although contrary authority exists, some courts have on occasion placed time, place, and manner restrictions

on visitation out of respect for the child's free exercise rights and to facilitate the custodial parent's opportunity to provide religious training for the child.

Because religious services are often conducted on the weekends, visitation schedules which are weekend-based may make it difficult for the child to attend the worship services of his or her choice or for the custodial parent to participate with the child in religious activities. Some courts, insisting on a duty of impartiality, have refused to tailor visitation orders in aid of either the child's preference or the custodial parent's religious training efforts. The court in Angel v. Angel,192 for example, refused to modify the visitation order so as to allow the custodial father, a Catholic, to retain custody on Sunday so that the child could be brought up in the Catholic Church. The court stated that it must remain impartial between the various religious denominations and consequently the custodial parent's primary right to provide religious training to the child did not establish a sufficient basis for modifying the visitation order.193 Similarly, the court in Matthews v. Matthews194 refused to reduce the mother's visitation rights with her son to only one day of visitation every two weeks to enhance the custodial parent's ability to attend church with his child more regularly.195 The court in Wagner v. Wagner196 also refused to modify the regular visitation schedule to accommodate the children's Hebrew school training. The court stated that the "advantages of continuous contact, love and affection between children and . . . the parent not having custody" outweighed their need for specific religious training.197 Similarly, the court in Sanborn v. Sanborn198 permitted the father's visitation on Saturday, the mother's day of religious observance, despite the impact on the child's religious training.199

Other courts, however, have allowed time and place restrictions. The court in Williamson v. Williamson,200 for example, permitted a visitation modification to enhance opportunities of the mother for regular church activities with her children. The weekend custody visitation was limited to every other weekend, and the summer visitation order was limited to 30 days, in aid of the mother's efforts at

192. 74 Ohio L. Abs. 531, 140 N.E.2d 86 (1956).
193. Id. at --, 140 N.E.2d at 88.
195. Id. at --, 254 S.E.2d at 803.
197. Id. at 557, 398 A.2d at 920.
199. Id. at --, 465 A.2d at 894.
religious training. Similarly, the court in Lee v. Gebhardt modified the weekly, weekend visitation to one weekend per month in aid of the custodial parent's opportunity to participate in the child's religious growth. To the same effect the court in Chasan v. Mintz refused the father's petition for modification, on grounds of convenience, of a visitation schedule which required that he return the child to the mother on Sunday in time for religious services. The court in Pogue v. Pogue also permitted a modification of a visitation award to require a Jehovah's Witness father to return the child to the mother on Sunday so that the Catholic mother could attend Sunday Mass with the child.

It is suggested that reasonable restrictions on visitation for purposes of facilitating the child's religious upbringing, according to the child's preferences or as directed by the custodial parent, is constitutionally permissible. The rights of the noncustodial parent must be exercised consistently with the rights of the custodial parent and the religious needs of the child, especially where the child has developed specific religious propensities as a result of prior religious experiences.

RELIGIOUS BELIEFS OR PRACTICES OF THE NONCUSTODIAL PARENT WHICH ARE ILLEGAL MAY BE CONSTRAINED BY VISITATION ORDERS

Prince v. Massachusetts established the principle that neither free exercise claims nor family rights override the state's paren patriae authority to protect children from illegal conduct that parents would otherwise permit. In Prince, an aunt, as custodian of a nine year-old girl, involved her in selling religious literature for the Jehovah's Witnesses in violation of a Massachusetts child labor law. The Court recognized that the "custody, care and nurture of the child reside first in the parents," but such care cannot be exercised to the severe detriment of the child: "Parents may be free to become martyrs themselves . . . it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that

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201. Id. at 163-64.
203. Id. at —, 567 P.2d at 468-69.
205. Id. at —, 409 A.2d at 787-88.
207. Id. at —.
209. Id. at 166.
choice for themselves." Applied to the facts of the case the Court held that the state's parens patriae power extended to preventing "the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street."

The principle of Prince, that the state in exercise of its parens patriae power ought to be able to protect children from illegal conduct, is defensible even though the application under the facts of Prince is questionable. Justice Murphy, dissenting, argued that the state had not met its burden to prove the reasonableness of the legislation in justification of the clear infringement on free exercise and parental rights. Thus, Justice Murphy reasoned that "[i]f the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child."

Justice Murphy's constraint that the threatened evil must be "grave, immediate [and] substantial" before the state can override constitutionally protected family rights, fairly explains the state's burden whether the intervention is premised on either the state's parens patriae authority or police power. That is, while the intervention in Prince was justified under the state's parens patriae power to protect the child, Justice Murphy's reference to "dangers to the state" acknowledges that the state's police power may provide a separate basis for state encroachment on family autonomy. Justice Jackson, in a concurring opinion in Prince, explained that constitutional "limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be." For Justice Jackson, the state could limit the religious activities of selling literature to nonbelievers, because money-raising activities are "Caesar's affairs" subject to regulation by the state's police powers.

Perhaps the "martyr-like" proselytizing rule of Prince explains the court's ruling in Morris v. Morris. In Morris, the Superior Court held that the state could not prohibit the sale of religious literature to nonbelievers. The court relied on the state's parens patriae power to protect the child from undue influence, but also noted that the state's police power might provide a separate basis for regulating the activity.

210. Id. at 170.
211. Id. at 168.
212. Id. at 174 (Murphy, J., dissenting) (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)).
213. Id. at 175.
214. Id. at 177 (Jackson, J., concurring, joined by Roberts & Frankfurter, J.J.).
Court of Pennsylvania, while refusing the Roman Catholic mother's petition that the father be prevented from exposing their daughter to his Jehovah's Witness beliefs, ordered the father to stop taking his four-year-old daughter on door-to-door religious solicitations during weekend visitations. In imposing the least restrictive alternative, the court discounted the mother's argument that the child's exposure to the two conflicting religions would confuse her, but agreed that the door-to-door visitation threatened her well being.

The Court's opinion in Wisconsin v. Yoder explains the limits of both *parens patriae* and police power as justifications for state laws which jeopardize free exercise and family autonomy rights. In *Yoder*, the state argued that the Amish parents by refusing to comply with compulsory education laws that extended beyond the eighth grade both threatened the well-being of their children, a *parens patriae* argument, and the public welfare of the community, a police power argument, because the children might become a burden on society in consequence of their lack of education. The Court there held that the "conduct" neither posed a substantial threat "to the physical or mental health of the child" nor presented any demonstrable harm "to the public safety, peace, order or welfare. . . ."

Applied to visitation issues, where a parent's religious beliefs require participation in illegal activities, then visitation may be restricted if the activities (1) threaten third persons or the general public, or (2) threaten imminent and substantial harm to the child. Any broader proscription on the religious activities of the noncustodial parent on the grounds of the illegality of the activity would be susceptible to constitutional challenge and should not be used as a justification for overriding visitation rights.

**ONLY THOSE RELIGIOUS BELIEFS OR PRACTICES OF THE NONCUSTODIAL PARENT POSING AN IMMINENT AND SUBSTANTIAL THREAT TO THE PHYSICAL OR EMOTIONAL WELL-BEING OF THE CHILD MAY JUSTIFY VISITATION CONSTRAINTS**

Most courts have recognized that despite constitutional rights protecting family relationships, if the exercise of those rights significantly threatens the involved child's physical or emotional well-being restrictions are then constitutionally permissible. Disagreement exists, however, with regard to the evidentiary burden required in justi-
PLICATION of religious restrictions incident to visitation. While most courts require a clear and convincing showing of substantial and imminent harm, some courts, such as the court in *LeDoux*, have approved of restrictions upon a lesser showing of harm.

*Some Judicially Imposed Restrictions are Suspect Given the Inadequacy of Evidence Establishing an Imminent and Substantial Threat to the Child’s Physical or Emotional Well-Being*

Some courts, similar to the Nebraska Supreme Court in *LeDoux*, have questionably permitted religious visitation restrictions upon a speculative showing of harm to the children. For example, the court in *Bentley v. Bentley*,221 a case very similar to *LeDoux*, affirmed a visitation modification prohibiting the noncustodial father from teaching his children the doctrines of the Jehovah’s Witnesses and taking them to the sect’s religious functions, on the speculative finding that because they were otherwise being raised as Catholics by the custodial mother, they would be “emotionally strained and torn” as a result of the conflict.222

The court in *Funk v. Ossman*223 also approved religious visitation restrictions upon a showing that the conflicting religious training had had some emotional effect, despite acknowledging the constitutional implications raised by such a ruling. In *Funk*, the custodial mother, a lay minister in the Lutheran church, moved for an order prohibiting the Jewish noncustodial father from enrolling their child in formal Jewish training at the synagogue during visitation periods. At the hearing, three experts, including the father’s rabbi in whose Sunday school the child was enrolled, stated their opinions that a child should not simultaneously receive formal religious training in conflicting religions. Two psychologists, one of whom was the mother, testified that the child’s anxiety over being introduced to conflicting religious training had manifested itself in the psychosomatic problem of encopresis, the soiling of his pants. Based upon this evidence the court held that a sufficient showing had been made to override the noncustodial parent’s constitutional rights, and affirmed the order prohibiting the father from enrolling the child in formal religious training.224 However, the court was careful to point out that the order did not prohibit and the mother did not object to the father taking the child to Jewish services, Jewish summer camps, or cele-

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221. 86 A.D.2d 926, 448 N.Y.S.2d 559 (1982).
222. Id. at —, 448 N.Y.S.2d at 559-60.
224. Id. at —, 724 P.2d at 1250-52.
brating Jewish holidays. That is, the order was narrowly drawn to prohibit only the taking of the child to Jewish Sunday school with the ultimate goal of bar mitzvah. Indeed, the entire issue of religious training had originally been raised by the father who had moved for an order that the child not be educated or indoctrinated at home or any other place in any other religion other than Judaism. Thus, the order in Funk was much more limited than the order in either Bentley or LeDoux.

In another case, Andros v. Andros\textsuperscript{225} the court affirmed a visitation order more restrictive than the order involved in Funk, but again less restrictive than involved in LeDoux. In Andros, the custodial mother, who was Lutheran, successfully sought a modification of a previous joint custody decree and a restriction prohibiting the non-custodial father from taking the children to any Assemblies of God religious activities. In support of the modification the mother offered uncontested expert evidence of a psychologist that “attendance at two churches with beliefs and practices as divergent as in this case may endanger the child's emotional health.”\textsuperscript{226} Further, the court talked with both the eight- and the ten-year-old children who each expressed some fear at the events of a five-hour faith healing meeting that they had attended where the father had told the daughter, who had scoliosis, to “go forward” and be healed.\textsuperscript{227}

Based upon the testimony that the children's emotional health required an order prohibiting the noncustodial father from taking the children to any Assemblies of God religious activities, the court granted the mother's petition and the court on appeal affirmed. The appellate court explained that despite the fact that the testifying psychologist was unable to “quantify” the emotional damage posed by conflicting religious training, quantification was unnecessary: “Rather, a finding that the children's emotional health is endangered is sufficient to satisfy the statutory [best interest] requirement.”\textsuperscript{228}

Despite the limited nature of the holding in Andros, the court's broad dicta is more troubling in some respects than the opinions in either LeDoux or Funk. Whereas the courts in the latter cases acknowledged that constitutional rights are threatened whenever religious restrictions are imposed incident to visitation, and consequently required an affirmative showing of emotional or physical harm as a constitutionally mandated precondition to religious restrictions, the court in Andros failed to cite a single case discussing the constitu-

\textsuperscript{225} 396 N.W.2d 917 (Minn. Ct. App. 1986).
\textsuperscript{226} Id. at 920.
\textsuperscript{227} Id. at 921.
\textsuperscript{228} Id. at 923.
tional issues implicated whenever religious visitation restrictions are ordered. Indeed, in response to the father's claim that the order "unduly restricts his relationship with [his children] and abridges his freedom of religion," the court nonchalantly responded: "We disagree. [The father's] freedom to exercise his religious beliefs remains exactly the same as before."

The court obviously overlooks both the fundamental notion that free exercise rights extend to the right to invite others to come unto your beliefs, and the basic concept that family rights entail an opportunity to form the basic beliefs and values of your children. Indeed, the order gives the father less free exercise and speech rights in relationship to his children than he has with strangers on the street.

Moreover, the court confused the not uncommon rule, incorporated into the Minnesota statute, that the custodial parent controls the children's religious upbringing, with the constitutionally suspect interpretation of that rule: that custodial parental control necessarily implies exclusive dominion over religion even in the absence of any showing of threatened emotional or physical harm posed by conflicting beliefs.

Apart from the court's broad dicta in Andros, which undoubtedly misstates the law, the cases discussed above, as well as the Nebraska Supreme Court's majority opinion in LeDoux, properly conclude that an affirmative showing of either emotional or physical harm is required as a constitutional precondition to visitation orders restricting the noncustodial parent's religious involvement with his or her children; the above cases, in each instance, however, are questionable under the facts. If the constitutional rights of the noncustodial parent are to have any meaning apart from lip service, then a "best interest" showing of minimal emotional conflict cannot be the standard. The affirmative showing must pose a "substantial and imminent" threat, which must be established by clear and convincing evidence. In this regard, judicial speculation sprinkled with a sparse reference to limited examples of "confusion" or "conflict" in the record cannot be the constitutional standard. Indeed, as one court has aptly explained:

Precisely because a court cannot know one way or another,

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229. Id.
230. The Supreme Court has long since protected the free exercise and speech rights of street proselytizing. See e.g. Salta v. New York, 334 U.S. 558 (1948); Cantwell v. Connecticut, 310 U.S. 296 (1940).
231. MINN. STAT. § 518.003, subd. 3(a) (1984), which states: "Legal custody' means the right to determine the child's upbringing, including education, health care and religious training."
232. Andros, 396 N.W.2d at 924.
with any degree of certainty, the proper or sure road to personal security and happiness . . . a valuation of religious teaching and training and its projected as distinguished from immediate effect . . . upon the physical, mental and emotional well-being of a child must be forcibly kept from judicial determinations . . . . If a court has the right to weigh the religious beliefs or lack of them of one parent against those of the other, for the purpose of making a precise conclusion as to which one is for the best interests of the child, we open a Pandora's box which can never be closed.\textsuperscript{233}

\textit{Most Courts have Properly Conditioned Religious Restrictions on Visitation upon a Clear and Convincing Showing of a Serious Threat to Emotional or Physical Well-Being}

Most courts, recognizing the magnitude of the constitutional rights implicated, have required a clearer demonstration of substantial and imminent threat to the child's emotional or physical well-being before legitimizing religious visitation restrictions. For example, in \textit{Lewis v. Lewis},\textsuperscript{234} the trial judge cancelled the father's visitation rights until such time as he could assure the court that he would not discuss religion with the children during visitation. On appeal the court reversed and remanded, holding that visitation rights could not be refused on religious grounds without some showing of demonstrable harm to the children.\textsuperscript{235}

Similarly, the court dismissed the argument that a showing of speculative psychological harm is constitutionally sufficient in \textit{In re Mentry}.

\textsuperscript{236} In \textit{Mentry}, the noncustodial father taught his child of his Mormon beliefs and involved him in church activities during his visitation periods. Based upon the mother's petition that the father's religiously-based activities during visitation were interfering with her relationship with her child and would likely psychologically harm him, the trial court ordered the father not to engage in any further religious activities during visitation. In support of the order the trial court noted that at times when the child was angry with his custodial mother he would say "I am a Mormon. I want to be a Mormon. I want to be like my Daddy."\textsuperscript{237} The court reasoned that the child's statement, taken together with other evidence, established that the religious activity during visitation improperly undermined the

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\item \textsuperscript{234} 260 Ark. 691, 543 S.W.2d 222 (1976).
\item \textsuperscript{235} Id. at —, 543 S.W.2d at 223.
\item \textsuperscript{236} 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1983).
\item \textsuperscript{237} Id. at 264, 190 Cal. Rptr. at 945-46.
\end{enumerate}
\end{footnotesize}
mother's relationship and control over her custodial child and thereby threatened emotional harm to the child. On appeal the court reversed on the insufficiency of the showing of harm: "a court will not enjoin the non-custodial parent from discussing religion with the child or from involving the child in his religious activities in the absence of a showing that the child will be thereby harmed." The court continued by explaining the harm standard: "Harm [resulting] from conflicting religious instructions or practices, which would justify a limitation, [on the non-custodial parent's ability to engage in such activity with the child.] should not be simply assumed or surmised; it must be demonstrated in detail." The court further observed that "diversity of religious experiences is itself a sound stimulant for the child," and more importantly concluded that the court "'does not have the capacity to supervise the fragile, complex interpersonal bonds between child and parent.'" That something more than a "best interest" showing of some harm is constitutionally mandated also can be illustrated by the court's opinion in Munoz v. Munoz. The trial court, relying on its discretionary authority under the "best interest" standard, prohibited a Catholic mother from taking her three children to Catholic services during visitation because their Mormon father had shown that his children's exposure to conflicting religious beliefs was causing them psychological harm. The court on appeal, despite recognizing that:

the general rule that in child custody cases the trial court, in furtherance of the best interests and welfare of the child, is vested with a wide latitude of discretion and in the absence of a manifest abuse of discretion in awarding the custody and control of minor children, its judgment will not be disturbed on appeal held that "[h]owever, where the trial court does not follow the generally established rule of noninterference in religious matters in child custody cases without an affirmative showing of compelling reasons for such action, we are of the opinion that this is tantamount to a manifest abuse of discretion." The court explained the rationale for its ruling as follows:

238. Id. at 262, 190 Cal. Rptr. at 845 (quoting In re Murga, 103 Cal. App. 3d 496, 505, 163 Cal. Rptr. 79, 79 (1980)).
239. Id. at 265, 190 Cal. Rptr. at 846 (quoting Felton v. Felton, 383 Mass. 232, 418 N.E.2d 606 (1981)).
240. Id. at 266, 190 Cal. Rptr. at 847.
241. Id. at 267, 190 Cal. Rptr. at 848 (quoting J. Goldstein, A. Freud, & A. Solnit, Beyond The Best Interests of The Child 11-12 (1979)).
243. Id. at 813-14, 489 P.2d at 1135.
244. Id.
The courts are reluctant . . . to interfere with the religious faith and training of children where the conflicting religious preferences of the parents are in no way detrimental to the welfare of the child. The obvious reason for such a policy of impartiality regarding religious beliefs is that, constitutionally, American courts are forbidden from interfering with religious freedoms or to take steps preferring one religion over another.\footnote{245}

Similarly, the court in \textit{Robertson v. Robertson},\footnote{246} in reversing and remanding, held that the mother’s affidavit testimony that the Jehovah’s Witness father’s religious instruction given during visitation confused and alarmed the children was insufficient to justify an order restricting visitation. The court stated that a clear and convincing factual showing, not mere speculation, that the children would be substantially affected by conflicting religious training is required before restrictive orders can be justified.\footnote{247}

The court specifically addressed the issue of whether confusion over conflicting religious training sufficiently established a “best interest” basis for restricting visitation rights in \textit{Khalsa v. Khalsa}.\footnote{248} In \textit{Khalsa}, both parents believed in and practiced the Sikh religion during the period of their marriage; the children at their birth were given Sikh names and were exposed to Sikh traditions. Upon divorce the mother was granted sole custody of their two children. Shortly after divorce the mother abandoned the Sikh religion, stopped calling their children by their Sikh names and discontinued raising their children as Sikhs. Concerned about his children losing a sense of their Sikh heritage, the father moved in the alternative for sole or joint custody; the mother, in response, moved to restrict the father’s religious training of their children during visitation. At the trial the mother introduced a surprise expert witness, a psychologist, who testified that an order prohibiting the father from further teaching the children of the Sikh religion would be in their best interest. Based upon the evidence presented, the trial court denied the father’s motion for either joint or sole custody and granted the mother’s motion for an order barring the father from speaking to the children of religion. On appeal the court reversed and remanded because of the introduction of the testimony of the surprise expert witness. Because the issue of religious restrictions was an issue of first impression, and in guidance to the trial court, the court on appeal discussed at length the limited scope of the court’s authority to intervene in regard to

\footnotesize{\textsuperscript{245} Id. at 812, 489 P.2d at 1135 (citations omitted).} \\
\footnotesize{\textsuperscript{246} 19 Wash. App. 425, 575 P.2d 1092 (1978).} \\
\footnotesize{\textsuperscript{247} Id. at --, 575 P.2d at 1093.} \\
\footnotesize{\textsuperscript{248} 107 N.M. 31, 751 P.2d 715 (Ct. App. 1988).}
the family's religious beliefs and practices. The court outlined the general rule of nonintervention as follows:

In justifying a prohibition of religious restrictions on visitation rights, physical or emotional harm to the child cannot be assumed, but must be demonstrated in detail. . . . Factual evidence of harm rather than "mere conclusions and speculation" is required.

Thus, a custodial parent's general testimony that the child is upset or confused because of the non-custodial parent's religious practice is insufficient to demonstrate harm. Further, general testimony that the child is upset because the parents practice conflicting religious beliefs is likewise insufficient.249

The court concluded that courts "should intervene in this sensitive and constitutionally protected area only where there is a clear and affirmative showing of harm to the children. Restrictions in this area present the danger that court-imposed limitations will unconstitutionally infringe upon a parents' freedom of worship or be perceived as having that effect."250

The court in Hanson v. Hanson251 similarly reversed the trial court's "best interest" order prohibiting the noncustodial father from taking their children during visitation periods to any but the Catholic church. Noting that the issue was one of first impression for the North Dakota courts, the court determined that "most courts that have considered the question have refused to restrain a noncustodial parent during visitation periods from exposing the minor child to his or her religious beliefs and practices, absent a clear, affirmative showing that these religious activities will be harmful to the child."252 Observing the constitutional basis of this general rule, the court adopted it as its own: "[t]o justify the placement of religious restrictions on visitation rights, the physical or emotional harm to the child resulting from the conflicting religious instructions or practices cannot be simply assumed or surmised, but must be demonstrated in detail."253

Applied to the facts, the court held that despite the fact that the father's Pentecostal Apostolic Church condemnation of Catholicism likely "strained" the children's relationship with their Catholic mother, and likely "confused" and "upset" the children, the evidence fell "short of the clear and affirmative showing of physical or emotional harm to the children required to justify the religious re-

249. Id. at —, 751 P.2d at 720 (citations omitted).
250. Id. at —, 751 P.2d at 721 (emphasis in original).
251. 404 N.W.2d 460 (N.D. 1987).
252. Id. at 463 (citations omitted).
253. Id. at 464.
strictions placed upon [the father's] visitation rights."²⁵⁴

These cases, exemplified by the Munoz rule that it is "tantamount to a manifest abuse of [best interest] discretion" for a court to interfere with the custodial parent's right to expose his or her children to his or her religious beliefs and activities, in the absence of "an affirmative showing of compelling reasons"²⁵⁵ demonstrate proper judicial reconciling of best interest with the rights of the non-custodial parent. Any lesser requirement would subordinate rather than reconcile the noncustodial parent's constitutional rights with the court's liberal perception of the child's best interest.

Courts Should Not Justify Religious Restrictions on Visitation Merely on the Basis of a Showing of a Deleterious Effect on the Child's Relationship with the Custodial Parent

If the best interest of the child were all that is at issue in disputes over child training, then court's subscribing to the single psychological parent theory described above would as a matter of course condition visitation upon acceptance of religious training restrictions. Since the courts would likely take judicial notice of the deleterious effect of conflicting religious views on the preeminence of the psychological parent, religious training would as a matter of course be delegated exclusively to the custodial parent. The courts, however, have generally held that the fact that the religious views of the non-custodial parent may have an adverse effect on the child's relationship with the custodial parent does not state a justified basis for restricting visitation rights. The focus must be one of harm to the child, not damage to the preeminence of the custodial parent's control over the child.

The issue of religious conflict challenging the primacy of the custodial parent is illustrated by the case of Gamble v. Gamble.²⁵⁶ In Gamble, the father had the child baptized during visitation, without telling the mother of his intention to do so, and indoctrinated the child to pity the mother because he believed she was possessed of the devil. Even in these extreme circumstances where the custodial parent's own worthiness was put in issue by the noncustodial parent's religious teachings, the court refused to restrict visitation. The court explained that only in exceptional cases where a conclusive showing of likely harm to the child exists should visitation rights be curtailed.²⁵⁷

²⁵⁴. Id. at 465 (citations omitted).
²⁵⁵. Munoz, 79 Wash. 2d at 814, 489 P.2d at 1135.
²⁵⁷. Id. at 388.
Similarly, the court in *In re Marriage of Murga*\textsuperscript{258} affirmed the trial court’s denial of the mother’s request for visitation restrictions regarding the father’s religious training during visitation periods. The father required the child during visitation to spend fifteen to twenty minutes a day with the family reading and discussing the bible, singing and praying. The mother claimed that as a result the child exhibited behavior problems upon returning home, hated religion and refused to go to church with her. The court ruled that even if the visitation practices affected the custodial parent’s relationship with the child, especially her control over religious training, such a finding would not justify visitation restrictions.\textsuperscript{259}

Similarly, the Supreme Court of Idaho in *Compton v. Gilmore*,\textsuperscript{260} in reversing the trial court’s restrictive visitation order, held that even though the trial court had found that the child exhibited strange, unusual, and aggressive behavior toward the mother after visitation with her father, who informed the child that his mother was “walking away from God,” the court held that before a visitation restriction on religious training could be sustained there must be a clear and convincing showing that the conflicting religious beliefs adversely affected the general welfare of the child.\textsuperscript{261}

To the same effect, the court in *Felton v. Felton*,\textsuperscript{262} in reversing the trial court’s restrictive visitation order, held that before the court could justifiably restrict the Jehovah’s Witness father from teaching of his faith during visitation, there must be a finding supported by something more than mere conjecture that the experience was disturbing to the children to their substantial emotional or physical injury. The court found value in having the children exposed to the conflicting religious beliefs of the parents, suggesting that diversity of religious experience is itself a sound stimulant for children who would later have to choose between religious alternatives in their later lives.\textsuperscript{263}

The court in *In re Marriage of Heriford*,\textsuperscript{264} in rejecting the mother’s claim that as custodial parent she enjoyed an absolute mandate to determine all facets of the child’s religious training, similarly refused to restrict visitation on the weekends in order to provide the children with a “church home.”\textsuperscript{265}

\textsuperscript{258} 103 Cal. App. 3d 498, 163 Cal. Rptr. 79 (1980).
\textsuperscript{259} Id. at 504-05, 163 Cal. Rptr. at 81-82.
\textsuperscript{260} 98 Idaho 190, 560 P.2d 861 (1977).
\textsuperscript{261} Id. at —, —, 560 P.2d at 863, 866.
\textsuperscript{263} See id. at —, 418 N.E.2d at 610-11.
\textsuperscript{264} 586 S.W.2d 769 (Mo. Ct. App. 1979).
\textsuperscript{265} Id. at 772. Other courts have refused to restrict visitation to enhance the custodial parent’s preeminent control over religious training on the weekends. See e.g. O.
The reverse is also true, in the absence of a showing of harm to the child, the noncustodial parent cannot restrict the custodial parent's religious training of the child. In *Fisher v. Fisher*, the court refused to modify the custody order or to require the custodial mother to continue the children's Christian training. The court explained the general rule of noninterference:

Once the purely secular decision of custody is made, the court may not interfere with the religious practices of either the custodial or noncustodial parent unless, of course, those practices threaten the children's well-being. The court may not order the custodial parent to educate the children in a particular faith, just as the noncustodial parent's right to pursue his or her religious activities and to involve the children in those activities during legal visitation periods cannot be violated. "The refusal to intervene in the absence of a showing of harm to the child reflects the protected nature of religious activities and expressions of belief, as well as the proscription against preferring one religion over another."267

*The Normalcy of the Religious Beliefs Cannot be Considered under the Auspices of the Best Interest Analysis*

If the "best interest" of the child were all that was at issue, then the normalcy of a parent's religious beliefs or practices would be a relevant consideration in visitation and custody cases.268 Child custody and care disputes would involve a referendum on religious and life-style conventionality. Undoubtedly, such an approach would vio-

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266. *Id.* at 324 N.W.2d at 585 (quoting In re Marriage of Murga, 103 Cal. App. 3d 498, 505, 103 Cal. Rptr. 79, 82 (1980) (citations omitted).

267. There exists substantial concern regarding the impact on personal autonomy and privacy of unfettered reliance on the "best interest" standard in custody and care disputes. One commentator has suggested that "[i]n the name of a child's 'best interest' the courts have surveyed every aspect of parent's lives, invading constitutional rights to privacy and to the exercise of free speech, religion, association and travel." Comment, *Child Custody: Best Interest of Children vs. Constitutional Rights of Parents*, 81 Dick. L. Rev. 733, 733 (1977). Another writer critically observed that the courts combine "a myriad of factors, labeling them 'best interests.'" Note, *Religion—A Factor in Awarding Custody of Infants?*, 31 S. Cal. L. Rev. 313, 314 (1958). Another critic has commented, "Because what is in the best interests of a particular child is indeterminate, there is good reason to be offended by the breadth of power exercised by a trial court judge in the resolution of custody disputes." Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226, 230 (Summer 1975). Another writer has concluded that because of the vagueness of the "best interest" standard "[t]he custodial parent is therefore at the mercy of the trial judge's moral values and prejudices." Comments, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings*, 35 UCLA L. Rev. 677, 694 (1988).
late free exercise, establishment and privacy rights. For example, in *In re Marriage of Knighton*, the court of appeals twice reversed and remanded a custody award to the father because the trial court had allowed the mother's religious beliefs to sway the jury despite the absence of any evidence that the religious beliefs posed a substantial and imminent threat to the children's physical or emotional well-being. The mother belonged to the Worldwide Church of God, a sabbatarian Christian sect that did not celebrate traditional holidays and followed a strict set of tenets. In both jury trials the husband's counsel made blatant appeals to the jury based upon the mother's religious beliefs. The court on the second appeal noted that seventeen of the thirty pages of transcript of the mother's cross examination involved questions related to her religious beliefs. Moreover, counsel argued in closing that the best interest of the children required that the jury award the father custody because of the abnormality of the mother’s religious beliefs: “As I see it, this is a chance for a normal life for these children as opposed to an abnormal [life] during their childhood.” The court on appeal held that “[w]ithout that supporting evidence [of harmful effect on the children], the evidence produced led to a constitutionally impermissible trial . . . of Mrs. Knighton's religious beliefs.”

The court held that constitutional considerations protected “an individual's untrammelled right to religious belief so long as the teachings and practice of that religious belief are neither illegal or immoral.” The court also held that “it is a fundamental principle that the State cannot prefer the religious views of one parent over the other in deciding the best interest of a child.” Despite the fact that this case involved the issue of custody, rather than visitation, the principle is the same. The best interest analysis in visitation cases cannot be invoked as a justification for considering religious practices or beliefs affecting the normalcy of the child's parental influences.

CONCLUSION

The legal standard for evaluating child custody and control issues has evolved from the status-oriented rules of *patria potestas* and
recipro sequitur patrem, vesting nearly absolute authority in the father, to a discretionary standard of best interest hedged up by constitutional constraints. Surely the United States Supreme Court correctly stated that those constitutional constraints are "deeply rooted" and should not be lightly disregarded. The "sanctity of the family" arises in part because "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." Accordingly, the courts must continue in good faith to reconcile constitutional claims to noninterference in family autonomy with the best interest standards that otherwise grant the courts extensive discretion in custody and control matters. The visitation rights of the noncustodial parent may be the most vulnerable of related family rights given the focus of the best interest standard. Nonetheless their foundation in free exercise, establishment, free speech, equal protection, due process, the ninth amendment's residual retention clause, as well as tradition and fundamental notions of intrinsic human rights, demand that courts, before restricting the noncustodial parents visitation rights, require an affirmative showing by clear and convincing evidence that the noncustodial parent's religious influence over his or her children during visitation threatens imminent and substantial harm to their emotional or physical well-being. Any lesser showing would erode the sanctity of family relationships and jeopardize the noncustodial parent's closest opportunity to overcome the fact of mortality, by seeking continuity with his or her children through shared religious experiences.