EXCLUSIVE RELIANCE ON BEST INTEREST MAY BE UNCONSTITUTIONAL: RELIGION AS A FACTOR IN CHILD CUSTODY CASES

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I. INTRODUCTION

Child custody law has evolved from a rule of *patria potestas* which vested near absolute authority over the custody and control of children in the father, to a best interests rule defended primarily by the power of the state as *parens patriae*. The doctrine of *parens patriae*, as applied to child custody disputes, has been invoked by courts and legislatures to justify state intervention against whatever rights parents may have over the care and control of their children. In interfering with parental control over children, questions concerning the constitutional and moral limits to the state's power have often gone unanswered if not unasked.

Resolution of this question is critical, especially since the number of custody cases is increasing dramatically. Between 1956 and 1976 the number of children involved in divorce proceedings rose from 361,000 to 1,100,000. And while the total number of children under eighteen years of age was about the same in 1977 as in 1960, "the number living with a separated parent doubled, the number living with a divorced parent tripled, and the number living with a never-married parent became seven times as high." When the nuclear family's protective shell is ruptured the state is often required to make difficult custody and control decisions. Decisions in such cases are usually couched in terms of the best interests of the child, and parental rights are often disregarded.

Parental control over religious training is one area where parental rights are often so abused. This article focuses on the right of parents to control the religious training of their children, and suggests an explanatory framework for reconciling that right with

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the state's power to intervene in the best interest of the child. The article begins with a critique of Burnham v. Burnham, where the Nebraska Supreme Court unconstitutionally relied upon the mother's religious beliefs in granting custody to the father, purportedly as required by the best interests of the child. To fully analyze the Burnham-type custody case, the English and American history of child custody law will be discussed from common, statutory and constitutional law perspectives. Custody cases where religion was a factor will then be examined. It will be argued that religious factors may be legitimately considered as part of the best interest equation only (1) where the child has actual religious needs; (2) where the religious beliefs or activities violate constitutionally valid laws; or (3) where religious activities or beliefs threaten imminent and substantial harm to the child's physical or mental well-being. Except in these narrowly circumscribed areas, judicial reliance on religious factors in deciding custody cases will be argued to be unconstitutional. A moral justification of this constitutional interpretation will also be advanced. In conclusion it will be argued that where the courts go beyond the limits suggested herein in considering religious factors in custody cases, they do so in contravention of constitutional as well as moral limits to the state's power.

II. BURNHAM v. BURNHAM: THE OVERRIDING OF PARENTAL RIGHTS ON THE BASIS OF THE BEST INTERESTS OF THE CHILD

The confusion experienced by the courts in reconciling the constitutional rights of parents to control the religious training of children with the power of the state to intervene under its parens patriae power to protect the best interests of the child is manifest in the Nebraska Supreme Court's decision in Burnham v. Burnham. The brevity of the opinion is exceeded only by its lack of scholarliness in addressing this complex legal and moral problem. An examination of this case provides useful parameters for a broader discussion of the role of religious factors in child custody disputes. It is the author's opinion that the Burnham case represents an unconstitutional subjection of the parental rights of the mother to the prejudices of the supreme court justices justified vaguely by the "best interests" standard.

The Nebraska Supreme Court's award of custody to the father because of the religious beliefs of the mother is troubling in sev-
eral respects. First, "[m]ost of the evidence at trial focused on the religious differences between the parties," and the supreme court on appeal apparently relied upon religious pamphlets which had been attached to the record as exhibits, despite the fact that the mother testified she had not read them and was unaware of their content.

Second, the supreme court reviewed this case de novo. Although this practice is consistent with the Nebraska statute pertaining to appeals in equity, it is contrary to previous judicial pronouncements regarding the handling de novo of child custody matters. The rationale for deferring to the discretion of the trial judge even when a case is reviewable de novo was explained in Peterson v. Peterson:

When viewing these cases from a cold record the decision of the trial judge is peculiarly entitled to respect. He saw all the parties and witnesses. He was in closer touch with the situation than this court can be from a review of a written record. While this case is triable de novo in this court, we cannot overlook the fact that the judgment of the trial judge is entitled to great weight in determining the best interests of children in custody proceedings.

Notwithstanding the deference normally afforded the trial court's award of custody, barring an abuse of discretion, the supreme court ignored the trial court's finding that the child's best interest would be served by awarding custody to the mother.

5. Id. at 499, 304 N.W.2d at 60.
7. One reason for reversing the trial court's award to the mother was "[t]he racist views held by Carolyn and, apparently, by her church." 208 Neb. at 503, 304 N.W.2d at 61. Carolyn's "anti-Semitic" views were partially inferred from a letter she wrote to her sister stating "I have discovered that there exists in this world, a master plot on the part of the Jews and Communists, to gain control of the world." 208 Neb. at 500, 304 N.W.2d at 60. In addition, religious pamphlets were admitted as exhibits, referred to at length in the appellant's brief, and undoubtedly relied upon by the supreme court in evaluating Carolyn's "racist views."
8. 208 Neb. at 501, 304 N.W.2d at 61.
12. Id. at 331, 243 N.W.2d at 52.
14. The trial decree read, in part, as follows:
[T]hat both the Petitioner and Respondent are fit and proper persons to be awarded the care, custody and control of the minor child of the parties, however, it would be for the child's best interest that the Respondent be awarded the permanent care, custody and control of the child, subject to the rights of reasonable visitation on the part of the Petitioner, subject to
Third, the supreme court disregarded its own previous decisions regarding the "impartiality" required of the courts under the first amendment in "religious custody" cases. The court interpreted its previous decision in *Goodman v. Goodman* as requiring only that the courts cannot "disqualify a parent because of his or her religious beliefs." The rule as stated in *Goodman*, but not mentioned in *Burnham*, continues as follows: "Particularly is this true where there is no showing that the religious beliefs, or a conflict between them, seriously threaten the health or well-being of the child." The *Burnham* court thus improperly interpreted *Goodman* to imply that all religious beliefs may be relied upon to decide custody issues. This change in the previous Nebraska law elevates the best interests standard at the expense of the parent's constitutional rights.

Fourth, neither of the two non-Nebraska cases cited by the court in support of the priority of the best interests standard over the constitutional rights of the parents supports the rule for which they are cited. The Alaska Supreme Court in *Bonjour v. Bonjour* held that the court should not be precluded from considering religious factors as part of the best interests equation. *Bonjour* narrowly specifies those circumstances where religious factors may be relied upon, and actually reversed a trial court for essentially doing what the Nebraska Supreme Court in *Burnham* does. *Morris v. Morris*, cited for the rule that "the impact of the parents' beliefs on the child" may be considered in custody cases, did not itself involve a custody dispute. Rather, the issue was whether the non-custodial parent had a right to teach religious doctrine to his children while exercising his visitation rights. Its authority is limited to cases where the adverse impact of contradictory religious teachings may curtail the religious rights of a non-custodial parent.

Fifth, it is difficult to understand how the "beliefs" that the supreme court found "may have an adverse impact on" the four-year-old daughter threatened the physical or mental well being of the further provision the Respondent shall not remove the minor child from Douglas County, Nebraska, without the permission of this Court.

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17. 180 Neb. at 88, 141 N.W.2d at 448 (emphasis added).
19. *Id.* at 1238.
20. *See* text accompanying note 159-64 *infra*.
22. *Id.* at 142.
the child sufficiently to justify reversing the trial court's contrary finding. The first "threatening belief" relied upon by the appellate court was the mother's belief that the child was born illegitimate. The record, however, makes it clear that the mother's belief was limited to religious illegitimacy, in that the marriage was performed in the Roman Catholic Church rather than the Tridentine Church, of which the mother was a member. The second "threatening belief" was the speculative possibility that the mother would cut the daughter out of her life if she failed to obey the laws of the church once she attained maturity. The third "threatening belief" was the mother's belief that the Jews and the Communists are trying to control the world. No evidence was presented as to how any of these beliefs would affect the mother and child relationship, or the child's physical or mental well being. Rather, the speculative "adverse impact" relied upon by the supreme court as the basis for reversing seems to have been implied from the assumption that the abnormality of the mother's beliefs would necessarily be contrary to the child's best interests.

The court also suggested that the mother's desire to send the child to a religious school in Idaho would jeopardize the father's visitation rights. This comment is curious for several reasons: first, the mother testified that her church did not expect her to send the daughter to the religious school until she was in seventh grade; second, she stated that if the court ordered otherwise she would not attempt to send her out of state to school, and that her church would hold the court rather than her responsible; and third, the decree specifically restricted her from removing the child

23. The court stated as follows: "We believe that the following beliefs may have an adverse impact on Jaime: (1) The belief that she is illegitimate; (2) The willingness of Carolyn to cut Jaime out of her life if she disobeys the rules of the Tridentine Church; and (3) the racist views held by Carolyn and, apparently, by her church." 208 Neb. at 503, 304 N.W.2d at 61.


25. The first question discussed by the court on this issue was phrased in terms of Jaime's conduct at the age of 14 or 15. The mother's response was ambivalent: "Depending on which law, how it would affect me. That's too vague." The second question was whether it was possible that she may cut off Jaime as she had her brother if she married someone that was divorced. The mother's affirmative response to this irrelevant question is apparently the basis of the second challenged belief. See 208 Neb. at 501, 304 N.W.2d at 61. The question not only seems remote and speculative, since the child at the time of the appeal was but four years old, but also there is no explanation of how the mother cutting her off at maturity if she did not follow the rules of the church would seriously threaten her physical or mental well-being as a minor.

26. 208 Neb. at 503, 304 N.W.2d at 62.

27. Transcript at 60:7-25; 61:1-5.

28. Id. at 49:1-4.
from the county. This point, therefore, seems irrelevant, rather than a legitimate basis for reversing the trial court.

_Burnham_, then, is an example of the priority of the best interests standard as administered in a completely discretionary manner, over the constitutional rights of a parent.29 This unconstitutional deprivation of the rights of one parent is not justified by the fact that the other parent, who also had equivalent rights to custody, was awarded custody. In a custody dispute between parents who are seeking a divorce, the court has power under the doctrine of _parens patriae_ to decide which parent can better serve the best interests of the child. In so deciding, however, the court's discretion is not unlimited. Our notion of equal respect for the varied beliefs of members of our society requires at a minimum that individuals not be penalized for believing the unacceptable, except in narrowly defined circumstances. This view on the constitutional limits to the state’s power is substantiated by the historical development of child custody law, a well as moral arguments in defense of family rights.

III. HISTORY OF ENGLISH CHILD CUSTODY LAWS

The English law of child custody has evolved from the common law right of near-absolute authority of the father to the custody of a legitimate child,30 toward a statutorily controlled law giving preeminence to the child's welfare over parental rights.31 This gradual erosion of parental rights was initiated by the courts of chancery, which began to qualify paternal rights in the early part of the nineteenth century.32 It was furthered by a series of nineteenth century statutes, which increased maternal rights consistent with the child's best interests.33 Finally, with the passage of the Guardianship of Infants Act of 1925,34 now the Guardianship

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29. Respondent's motion for a rehearing was denied on May 13, 1981, as was the Trinitarian Latin Right Catholic Church's motion to submit an amicus curiae brief in support of the motion for rehearing on May 5, 1981.


31. See Foster and Freed, supra note 30, at 325-29; Hall, _The Waning of Parental Rights_, 31 CAMB. L.J. 248, 265 (1972); Rendleman, _Parens Patriae: From Chancery to the Juvenile Court_, 23 S.C.L.R. 204, 204-12 (1971).


33. See text accompanying notes 64-70 infra.

34. 15 & 16 Geo. 5, C. 45, § 1.
of Minors Act of 1971, the notion that the child's welfare is the paramount if not the exclusive concern of the courts in custody cases, has been legislatively established in England. By comparison to the constitutional limits recognized in this country, the modern English custody law favors the child's welfare, as interpreted by the courts, over parental rights.

A. Paternal Rights at Early Common Law

i) Common Law Development of the Law of Custody

At early common law, feudalism and the patriarchal orientation of Christianity firmly established the father as the legal head of the family, with corresponding legal powers and rights of control. The near absolute power of the father over his children was akin to the Roman rule of patria potestas, and included control of the child's education, religious training, person and property. This extensive power vested in the father was an aspect of property law and guardianship, and could even be assigned to others at his discretion. Blackstone summarized the father's power at common law as follows:

The power of a parent by our English laws is much more moderate [than the ancient Roman laws which gave the father a power of life and death over his children]; but still sufficient to keep the child in order and obedience. . . . 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.

In contrast to the "empire of the father," the mother had virtually no legal powers, though she was "entitled" to respect. The crown had power to intervene under the doctrine of parens patriae, but that power was exercised primarily against pauper parents who were unable financially to care for their children. Thus Blackstone recognized that the poor laws entitled the crown to take the children of paupers "out of the hands of their parents, by

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35. Guardianship of Minors Act of 1971, c. 3.
the statutes for apprenticing poor children; and are placed out by
the public in such a manner, as may render their abilities, in their
several stations, of the greatest advantage to the common-
wealth.”

In comparison, Blackstone noted that “[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.”

Notwithstanding the near absolute power the common law rec-
ognized as belonging to the father in matters regarding the custody
of his children, Lord Mansfield in the cases of *Rex v. Delaval* and
*Blisset’s Case* qualified that power on the basis of an embryonic
best interests analysis. In *Delaval* the father had bound his
daughter to an apprenticeship with a music master, who in turn
assigned the indenture to Delaval, ostensibly for music training,
but apparently for purposes of prostitution. Mansfield granted a
writ of habeas corpus, “discharged [her] from all restraint,” and
sent her “at liberty to go where she will.” The court thereby de-
prived the father of what amounted to a property right to her serv-
ces on the grounds of “public decency and good manners.”
This case can be partially explained by analogy to the statutory author-
ity of the courts under the poor laws to take children out of the
custody of pauper parents. Mansfield, in depriving the father of
custody, noted that she had received ill treatment from him prior
to the apprenticeship, and he had totally neglected her while she
had been in the care of her masters. The decision, however, is
broader than the poor law cases of neglect and represents the
emergence of the idea of *parens patriae* in custody cases.

*Blisset’s Case* represents a further departure from the com-
mon law rule of paternal authority over the custody of children. *Blisset’s Case* involved a dispute between parents over the cus-
tody of their six year old daughter. The wife had left her husband,
and taken her child, because of mistreatment by the husband. In
denying a writ of habeas corpus filed by the father to obtain his
child, Mansfield acknowledged “[t]he natural right is with the fa-
ther...” but qualified that right in the following manner:

[T]he paternal authority as to its civil force was founded
in nature, and the care presumed which he would take for

38. 1 BLACKSTONE’S COMMENTARIES, supra note 36, at 451.
39. Id.
42. These cases are noted as early inroads on the absolute right of the father to
43. 97 Eng. Rep. at 914.
44. Id. at 915.
45. 98 Eng. Rep. at 900.
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.46

Although in Blisset's Case the father was actually errant and bankrupt, the case seemed to enhance the state's parens patriae power to intervene for the sake of public security and welfare. This case can also be viewed as an early implied recognition of the right of the mother to have some control over the rearing of small children. Mansfield, however, was not so bold as to suggest that the mother had any legal authority in the matter.

These early "best interests" cases were not immediately followed at common law. In King v. De Manneville,47 for example, a mother's writ of habeas corpus to secure an eight month old daughter from the father was denied. The father was a resident alien of France at a time when England was at war with France. The mother had left the father because of ill treatment and had taken the child with her. The father, in response, had "forcibly taken the child then at the breast, and carried it away almost naked in an open carriage in inclement weather . . . ."48 The court disregarded the mother's "tender age" argument, as well as the allegation that the father's actions demonstrated total disregard for the child's health, and decided that the law clearly vested the power of control over children in the father.

Also, the court in Ex Parte Skinner49 held that despite Blisset's 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. This decision was reached despite the fact that the father was in prison and the child was in his mistress's care. Lord Chief Justice Best indicated 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

46. Id.
48. Id. at 1054.
49. 9 Moore 278 (1924).
Decisions such as De Manneville and Skinner foreclosed any further development of a best interests doctrine at common law. Further qualifications to the common law rule of paternal authority had to come from the courts of equity and from Parliament. This patchwork of custody law drawing from common law, equitable and statutory antecedents, has obscured the source and extent of parental rights in England.

ii) Equitable Modifications of the Common Law Rule

Shelley's Case and Wellesley's Case represent a watershed in English custody law between the common law dominance of paternal preference and equitable considerations favoring the child's own welfare. In Shelley's Case the poet Percy Bysshe Shelley attempted to obtain custody of his two minor children, after their mother had committed suicide. Lord Chancellor Eldon held that Shelley's atheistic beliefs and writings, together with his highly immoral conduct which Shelley deemed worthy of approbation, made him unfit to control the rearing of his children. The case was remanded to the master for a report and determination of what would be the proper plan for the maintenance and education of the children.

In Wellesley's Case the father, an immoral and controversial aristocrat, unsuccessfully argued the Blackstonian version of common law that "there are certain things which ought to be left alone, a man and his children ought to be allowed to go to the devil their own way, if he pleases." For the first time, the House of Lords decided to the contrary, holding that the chancery courts had jurisdiction to intervene against the power of the father in favor of the child's welfare. The authority of the courts of equity to override parental rights in special circumstances has not been questioned since Wellesley's Case. What has been debated are the grounds upon which it can be justifiably stated that the child's welfare has priority over parental rights.

One of the most controversial areas where the common law right of paternal preference has been pitted against the paramount interests of the child's welfare, involves the religious training of children. The common law doctrine of religio sequitur patrem

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50. Id. at 282.
stated the rule of paternal preference for religious training. This rule of paternal preference in religious matters continued well after the Shelley and Wellesley cases established the authority of the chancery courts to intervene in other circumstances in behalf of the child's welfare. The inflexibility of the common law rule as applied to religious training is illustrated by the chancery decision in Hawksworth v. Hawksworth. In Hawksworth, a Roman Catholic father died leaving a Protestant widow, and a six month old daughter. The mother raised the child as a Protestant for eight years, before the father's Catholic relations instituted an action demanding that the child be raised as a Catholic. The Vice Chancellor recognized that ordering the child to be raised as a Catholic would likely not be in the child's best interests, but concluded that he had no discretion in the matter:

Were I at liberty to follow my own opinion, I should have no hesitation in acceding to [counsel for Mrs. Hawksworth'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 recognize 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. . . . [A]s it is, however much I regret the conclusion, the law must prevail, and the child must be brought up in her father's faith.55

The Vice Chancellor's decision was affirmed on appeal. The authority of the father even after his death was expressly given priority over the best interests of the child:

I can quite conceive that many persons might think that it would be for the interests of the child in such cases that

54. 6 L.R. 539 (Ch. App. 1871). See also In re Meades, 5 Ir. R. Eq. 98, 103 (1871), where the court held 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." See also Austin v. Austin, 55 Eng. Rep. 634, 637 (M.R. 1865).
55. 6 L.R. at 540-41 n.1.
the mother should be allowed to educate the child in her own religion; but that is not the rule of law. The rule of law is, that the religion of the father is to prevail over the religion of the mother, even in such a case, and that rule of course we cannot alter.

The harshness of this common law rule was occasionally modified on the basis of the child's welfare. In *Stourton v. Stourton*, the religious preferences of a nine year old boy, who was interviewed privately by the justices, was considered in refusing to follow the common law rule. On facts similar to *Hawksworth*, a son born one week after his father's death was raised for almost the next ten years by his mother as a member of the Church of England. The Lord Justices stated that had the Catholic relations sought to have a guardian appointed at the time of the father's death, who would have raised him as a Roman Catholic "before his mind had become religiously influenced and biassed," it certainly would have been granted. However, the Lord Justices denied the petition under the circumstances of the case, reasoning that "the child's tranquility and health, his temporal happiness and, if that can exist apart from spiritual welfare, his spiritual welfare also . . . was to be given priority over the common law rule.

Chancery courts also gave priority to the child's welfare by holding parental rights could be abandoned or forfeited. In *Andrews v. Salt*, for example, the court approved of the Hawksworth rule that the court "cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy and contented, and possibly be better provided for by its mother's relations." Nonetheless, the court

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56. *Id.* at 545.
57. 44 Eng. Rep. 583 (Ch. 1857). *See also* In re *W.*, 2 Ch. 557, 568-70 (1907), where a 13 year old son was permitted to be raised as a Christian rather than as a Jew, the faith of his father, even though the 11 year old daughter who had expressed no preference was to continue to be raised in the Jewish faith. *See also* In re *Grimes*, 11 Ir. R. Eq. 465, 471, 474-76 (1877).
59. *Id. Contra,* In re *Montagu*, 28 Ch.D. 82, 83-84 (1883), where the custodial mother, who was a Roman Catholic, was ordered to raise the children as Protestants, the faith of the father.
61. L.R. 8 Ch. App. 622.
62. *Id.* at 638. *See also* In re *Agar-Ellis*, 24 Ch. D. 317, 338-39 (1883): [T]he natural law . . . points out that the father knows best as a rule what is good for his children than the court of justice can. . . . As soon as it becomes obvious that the rights of the family are being abused to the detriment of the interests of the infant, then the father shows that he is no longer the natural guardian. . . . When that case arrives the Court will not stay its hand; but until that case arrives it is not mere disagreement with
held that the deceased Roman Catholic father had abandoned his right where the Catholic guardian appointed by the father in his will had permitted the child to be raised as a Protestant until she was nearly nine years old. In both the Stourton and the Salt cases the courts of chancery refused to apply the common law rule where the result would not have been in the child's interest, though the court in Salt felt compelled to justify its equitable result in the language of forfeiture rather than the priority of the child's welfare.

Thus the inflexibility in the common law rule of paternal control over religious matters expressed in Hawksworth was gradually modified by equitable principles. More recently, the welfare of the child was given preference over parental rights by the House of Lords in Ward v. Laverty. In Laverty the deceased father's Roman Catholic relation sought custody of three orphaned children who were in the custody of the deceased mother's Protestant relations, so that they could be raised in their father's faith. The court stated that the common law rule was "subject to this condition, that the wishes of the father only prevail if they are not displaced by considerations relating to the welfare of the children themselves. It is the welfare of the children, which...forms the paramount consideration in these cases." This deterioration of the rule of paternal preference was completed in J.V.C. where Lord Upjohn held that the priority of the child's welfare over parental rights as recognized in Laverty applied whether the dispute was between parents or between parents and other relations or strangers. Parents' rights over the religious training of their children have thus been subordinated to the paramount interest of the child's welfare.

the view taken by the father of his rights and the interests of his infant that can justify the Court in interfering. If that were not so we might be interfering all day and with every family. . . . [T]here are very few families in the country. . . . in which a wiser person than the father might not do something better for that child than is being done by the father, who however has an authority which never ought to be slighted.


64. Id. at 108. The Guardianship of Infants Act, 1925, 15 & 16 Geo. 5, c.45, § 1, for example, modified the common law in providing that both parents have equal authority regarding the upbringing of their children. Guardianship of Minors Act, 1971, c. 3.

65. [1969] A.C. 668. In this case the court overruled In re Carroll, [1931] 1 K.B. 317, where the mother of an illegitimate child was held to have a legal right to require that her child be brought up by a Roman Catholic institution even though the court stated that the child's welfare would have been better served by leaving her at the Protestant institution to which the mother had previously delivered the child. [1969] A.C. at 725.
iii) **Statutory Modifications of the Common Law Rule**

The modification of the common law rule of paternal preference suggested in the *Shelley* and *Wellesley* cases has been consolidated in England by a series of nineteenth and twentieth century statutes. The amendment to the Custody of Infants Act of 1839\(^66\) permitted the chancery courts to award custody to the mother if the children were less than seven years old. This statute may have been "the origin of the 'tender years doctrine' in England and may have influenced some American decisions."\(^67\) This tendency toward treating the parents equally continued in the Guardianship of Infants Act 1886\(^68\) which extended the father's common law rights to the custody and control of children equally to the mother. In this century the gradual movement away from the status-oriented rule of paternal preference toward the rule giving preeminence to the child's welfare, has taken statutory form in the Guardianship of Infants Act of 1925\(^69\) and the Guardianship of Minors Act of 1971.\(^70\) The Acts established the welfare of the child as the "first and paramount consideration" in child custody cases.

Thus the English law of child custody has evolved from a status-oriented rule of near absolute power in the father to the custody and control of his children, to a rule where mother and father equally shared control, to an equitable rule that places the child's welfare as the primary, if not exclusive, concern in child custody and control cases. The emergence and dominance of the "child's welfare" as the decisional standard in custody cases in England has correspondingly meant that parental rights have been on the wane.\(^71\)

At first blush the relevancy of English child custody law to the American law on the subject seems remote. The feudal structure out of which the property-oriented rule of paternal preference arose was never part of our tradition. The English common law was "received" by the newly-formed states after the Revolution

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\(^{66}\) An Act to Amend the Law Relating to the Custody of Infants, 1839, 2 and 3 Vict. c. 54, § 1.

\(^{67}\) *Foster and Freed, supra* note 30, at 326.

\(^{68}\) Guardianship of Infants Act, 1886, 49 & 50 Vict., c. 27. *But see* In re Scalan, 40 Ch. D. 200, 214 (1888) where Stirling, J. held that the rule that the father in his lifetime has the absolute right to decide what religious education his children shall receive, and upon his death the guardians are obligated to raise the children in the religious faith of their father, was unaffected by the Guardianship of Infants Act, 1886, 49 & 50 Vict., c. 27.

\(^{69}\) Guardianship of Infants Act, 1925, 15 & 16 Geo. 5, c. 45, § 1.

\(^{70}\) Guardianship of Minors Act, 1971, c. 3.

only insofar as it fit the circumstances of the respective states. Equitable modifications of the common law rule were not binding in any legal sense. They arose out of chancery courts, which because of their prerogative origin, were viewed with disfavor in this country. It can hardly be suggested that the parliamentary acts modifying the common law rule had any applicability to the states. Finally, the English development has not been tempered by the American tradition of a written constitution, and the rights-oriented jurisprudence associated with that tradition.

English development of the law of child custody is nonetheless relevant to the American law. English authority was relied upon extensively and was often restated in American commentaries and treatises. Courts referred to the English common law cases in dealing with custody matters, despite the fact that they were not legally binding. In addition, while Americans objected to chancery jurisdiction during the colonial period, they often embraced equity law in modification of the common law.\textsuperscript{72} The English statutes also influenced the development of some American doctrines, such as the "tender years" presumption. Finally, a comparison between the English and American law is useful in noting the differences the presence of constitutional limitations has made. It will be suggested that parental rights, which were under the common law derivative of property relations in England, have been more appropriately viewed as an aspect of personal liberty in this country. As a result of this distinctive constitutional interpretation of the nature of parental rights in the United States, the parallel emergence of the best interests standard in this country is qualified in a manner that is absent in England. Parental rights are given a priority based on moral and equitable principles that are lacking in the modern English law of child custody. It is the opinion of this writer that this difference of perspective is legally and morally justifiable, and well worth preserving.

IV. THE HISTORY OF AMERICAN LAWS ON CHILD CUSTODY

Early pronouncements on the American law of child custody, though often referring to the English common law rule of paternal preference as the natural law on the subject, never applied that rule as rigorously as it had been applied in England. In competition with this rule was the emerging "tender years doctrine" giving the mother a preference in custody disputes over the control of at

\textsuperscript{72} See Katz, The Politics of Law in Colonial America in LAW IN AMERICAN HISTORY 265-66, 273-84 (Fleming and Bailyn ed. 1971).
least young children, and the developing "best interests doctrine" which subordinated the interests of both parents to the child's welfare. As jurists and commentators attempted to reconcile these conflicting rules and doctrines, they realized that the family is peculiarly the center of many constitutional rights which have priority over non-constitutional doctrines. As a result, the history of American child custody law can be viewed as an amalgam of developing common and statutory law on parent and child relationships tempered by constitutional constraints.

Justice Story's Commentaries on Equity Jurisprudence,73 in stating the law of child custody, relies heavily on English authority. However, his primary objective was to argue that the state has power under both parens patriae and the police power to intervene against the natural rights of the father to the custody and control of his children. Story's analysis of the law of parent and child begins by acknowledging the "right of the father to have the care and custody of his children. That right in a general sense is not to be disputed."74 In support of this common law right he cites Coke on Littleton, grounding the right in the feudal doctrines of guardianship by nature and nurture.75 He also implies the doctrine has an ancient origin and is based on natural law and natural rights.76

Notwithstanding the rule of paternal preference, Story states that the father's right is not absolute.77 Indeed, most of his attention is devoted to discussing the legal relationship between parent and child and justifying the legitimacy of equity jurisdiction in child custody cases. He admits that the origin of the jurisdiction is obscure and controversial.78 He argues, however, that the actual exercise of such jurisdiction for one hundred and fifty years, taken

73. 3 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1742-84 (14th ed. 1918) [hereinafter cited as STORY, COMMENTARIES]. See also 2 J. KENT, COMMENTARIES ON AMERICAN LAW 188-253 (11th ed. 1867) [hereinafter cited as KENT, COMMENTARIES].
74. STORY, COMMENTARIES, supra note 73, § 1760 at 377-78. Story notes, in comparison, that the "custody of an illegitimate child belongs to the mother." Id., § 1760 at 378 n.1. Kent similarly states the rule as follows: "The father (and on his death, the mother) is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education." 2 KENT, COMMENTARIES, supra note 73, at 218.
75. 1 E. Coke, COMMENTARY UPON LITTLETON § 123 at 88b (17 ed. 1817); See 3 STORY, COMMENTARIES, supra note 73, § 1757 at 374 n.3.
76. Id., § 1767 at 380-81.
77. Id., § 1764 at 379. See also 2 KENT, COMMENTARIES, supra note 73, at 218-19: "But the courts of justice may, in their sound discretion, and when the morals, or safety, or interests of the children strongly require it, withdraw the infants from the custody of the father or mother, and place the care and custody of them elsewhere."
78. 3 STORY, COMMENTARIES, supra note 73, § 1743 at 361-62.
together with the House of Lord's affirmation of the jurisdiction in Wellesley's Case "is conclusive in favor of its rightful origin." He adds 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 explains the parens patriae power in terms of the trust relations of parent and child. The notion is that the father does not own his children, as he may own Blackacre, but rather society entrusts their care to him because he is the most likely candidate to rear them properly. When it becomes clear that a father is an unnatural parent who does not naturally treat his children with proper parental concern, then the state is justified in revoking its trust and appointing an alternative guardian. This doctrine follows the reasoning of the English line of cases of Blisset, Shelley, and Wellesley, and can be characterized as an embryonic best interest doctrine. The doctrine departs radically from the earlier common law rule which, similar to the Roman doctrine of patria potestas, vested almost absolute power in the father. Story summarizes the broad jurisdictional authority of the courts to intervene on the basis of equitable principles 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 children, and appoint a suitable person to act as guardian and to take care of them and to superintend their education.

79. Id., § 1765 at 380; see notes 32 and 52 and accompanying text supra.
80. Id., § 1748 at 364.
81. Id., § 1757 at 374-75 (where Story cites substantial English and American authority suggesting that the child's welfare is the primary concern in custody cases).
In addition to the above substantial qualification of the rule of paternal preference, Story mentions the "tender years doctrine" as having viability in this country. For example, he suggests that in the case of a young daughter, the mother may "under all the circumstances be the most suitable to take care of her person and education . . . ." 82

In outlining the equitable limitations on the natural right of the father, Story carefully noted that the exercise of such jurisdiction is of "extreme delicacy, and of no inconsiderable embarrassment and responsibility." 83 As a jurist, however, he limited parental authority not only on the basis of the state's parens patriae power, but also on the basis of the state's police power. Story articulated a parens patriae argument as a qualification to the father's right to custody in United States v. Green, 84 where he stated that the paternal right was

for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education . . . . It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody. 85

In United States v. Bainbridge 86 he also relied on the state's police power to qualify the authority of the father. There a father filed a writ of habeas corpus to obtain custody of his minor son who had enlisted in the navy without his father's consent. Story denied the writ on the basis of the state's superior authority, subject to constitutional limitations, to limit parental rights as required by the public interest:

Be the right of parents, in relation to the custody and services of their children, whatever they may, they are rights depending upon the mere municipal rules of the state, and may be enlarged, restrained, and limited as the wisdom or policy of the times may dictate, unless the legislative power be controlled by some constitutional prohibition. 87

Story's recitation of the law of child and parent represents the

82. Id., § 1758 at 376. Story is obviously influenced here by the 1839 English amendment to the Custody of Infants Act, but insists that the courts of equity have inherent power to decide on the basis of the "tender years" presumption. Kent also notes that the "tender years" doctrine, recognized statutorily in England, has found judicial support in this country. 2 Kent, Commentaries, supra note 73, at 218 n.(b).
84. 26 F. Cas. 30 (C.C.D. R.I. 1824) (No. 15, 256).
85. Id. at 31.
86. 24 F. Cas. at 946.
87. Id. at 949. Story there notes that "poor law" legislation had long since es-
early American law on the subject. Each of the legal principles he mentioned received judicial support in various cases. In early decisions, referring to the father's "Natural rights" some courts refused to interfere with the father's custody and control of his children. Other courts adopted the "tender years" presumption and gave preference to the mother. Still others expressed the rule stated by Story in *United States v. Green*, that the primary concern for the courts in custody cases is the welfare of the child.

During the later part of the nineteenth century some states, following the British pattern, legislated standards for deciding custody issues. Currently, most states provide a decisional standard for custody disputes, other than the discretion of the court. At least ten states simply provide the "best interests" of the child, or the "general welfare" of the child as the standard. Nine jurisdictions identify a few general factors that are deemed to be in the child's best interest. Six states and the District of Columbia have adopted the Uniform Act, which is essentially a "best interests" established the authority of the state to deprive parents the custody of their children, in the public interest. See also notes 37 and 38 and accompanying text supra.

88. See, e.g., People ex rel. Barry v. Mercein, 3 Hill (N.Y.) 399 (1842), where the court held that by the law of the land the claims of the father are superior to those of the mother.

90. It has been suggested that the first American statement of the tender years doctrine was given in Helms v. Franciscur, 2 Bl. Ch. 544 (M. 1830). See Foster and Freed, supra note 30, at 329-40; 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, 13 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."


test with explanatory factors identified.\textsuperscript{96} Still other jurisdictions have modified the Uniform Act to include additional factors.\textsuperscript{97} Finally, some jurisdictions provide an extensive listing of factors to be relied upon in determining the best interests of the child.\textsuperscript{98} Although these statutes often mention the wishes of the parents as a factor in custody cases, the clear focus is the interests of the child and not parental rights. Thus, by statute, the law of child custody has evolved away from the absolute right of the father to a point where, except for constitutional considerations, the interests of the children are paramount. This development closely follows the English experience, where parental rights have been continually waning in favor of the child's welfare.\textsuperscript{99} The important difference in this country is that in addition to common law and statutory development of the law of child custody, a great deal of constitutional litigation has hammered out a theory of parental rights which, rather than being dependent upon property or guardianship concepts, is an aspect of personal liberty. The courts in dealing with child custody problems, therefore, have to balance, if not reconcile, parental constitutional rights even as they pursue the child's best interest as required by statute or common law rule.

V. CONSTITUTIONAL RIGHTS AND THE FAMILY

Child custody law in this country, although heavily influenced by the common law and statutory development of the "best interests" standard, is also subject to constitutional constraints. The Supreme Court's decisions in the area of family rights have been grounded on various constitutional theories and have included some of the most controversial decisions rendered by the Court.\textsuperscript{100} Presently however, there can be no doubt but that various family relationships, including the parental right of custody and control of their minor children, are constitutionally protected against unreasonable state intervention. Reconciling the discretionary authority


\textsuperscript{97} Idaho Code § 32-717 (Supp. 1981); Ohio Revised Code Annotated § 3109.04 (Baldwin 1971); Illinois Revised Statutes ch. 40, § 602 (Smith-Hurd 1980); Indiana Code Annotated § 31-1-11.5-21 (Burns 1980); Kentucky Revised Statutes Annotated § 403.270 (Baldwin 1969); Michigan Compiled Laws Annotated § 722.23 (West Supp. 1981); Minnesota Statutes Annotated § 518.17 (West Supp. 1981); Nebraska Revised Statutes Annotated § 40-4-9 (1978); North Dakota Century Code § 14-09-06.2 (Interim Supp. 1979).


\textsuperscript{99} See note 71 supra.

of the courts under the various "best interests" standards with constitutional constraints is one of a court's most difficult problems. Nowhere is this problem more acute than in custody cases where the personal or religious beliefs of a parent may be viewed by the court as inconsistent with the best interests of the child. Where the constitutional rights of a parent clash with the best interests of a child, it is not clear in this country as it is in England that the latter overrides the former. An investigation of the cases on parental rights establishes their priority in many cases and suggests the necessity of formulating an explanatory model where individual rights can be reconciled with justifiable intervention by the state in limited circumstances.

The constitutional foundation for family rights is provided in Meyer v. Nebraska\(^{102}\) and Pierce v. Society of Sisters\(^{103}\). In Meyer a school teacher at a parochial school maintained by Zion Evangelical Lutheran Congregation had been convicted of violating a statute proscribing the teaching of any modern language other than English in the first eight grades. In reversing the conviction, the United States Supreme Court held the statute to be violative of the due process provisions of the fourteenth amendment. In the Lochnerian tradition,\(^{104}\) the Court held that certain governmental deprivations of liberty are unconstitutional regardless of the adequacies of the legislative or judicial procedures followed in enforcing the restriction. Among the various aspects of liberty guaranteed by the fourteenth amendment, the court included the following:

> 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.\(^{105}\)

Based upon this constitutional reasoning, the court held that the parents had a fundamental right to engage an instructor for the

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102. 262 U.S. 390 (1923).
103. 268 U.S. 510 (1925).
105. 262 U.S. at 399.
purpose of teaching their children to read the bible in German. This fundamental personal right overrides the "desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters . . . ". Although the Meyer decision contained an element of religious freedom, it was decided on the basis of substantive due process and personal liberty.

Shortly after Meyer was decided, the Supreme Court in Pierce invalidated an Oregon compulsory public school education law, again on the basis of substantive due process and parental rights. There the Court held that the right of the parents to control the education of their children could not be overridden by the state's interest in standardizing its children's education:

[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.

As with Meyer, the Pierce case, though grounded on substantive due process, involved in part the right of parents to control the religious training of their children. That is, the defendant Society of Sisters taught as part of its curriculum "[s]ystematic religious instruction and moral training according to the tenets of the Roman Catholic Church . . . ." The implication of the case is that religious teachings can be included in the educational curriculum of children, even though the result would necessarily be that all the children in the state are not receiving equal educational opportunities.

Taken together, Meyer and Pierce firmly establish parental rights to control the education of their children. The opinions do not imply that the state will never be justified in regulating minimum educational standards for children, but only that efforts at state intervention which threaten the "natural rights" of parents must meet a heavy burden of justification such as "strict scrutiny"

106. Id. at 402.
107. 268 U.S. at 535.
108. 268 U.S. at 532. In the companion case Pierce v. Hill Military Academy, 288 U.S. 510 (1925), the same parental rights were extended to those sending their children to military academies.
or "substantial reasonableness." In *Meyer* and *Pierce* the state's interests in the regulation was characterized strictly in terms of the state's police power, which traditionally is limited to promoting "public health, safety, morals, or general welfare." The holdings provide that the state's general interest in the health, safety, morals and welfare of its citizens is not sufficiently jeopardized by either the teaching of foreign languages at the primary school level or the lack of standardization of primary school education, to justify overruling the natural rights of parents to control the education of their children.

*Meyer* and *Pierce*, however, are silent about the extent of the state's *parens patriae* power to protect the well being of children, irrespective of the effect on the general welfare. Also, the cases have been criticized because they are grounded in the language of substantive due process, which was used by the courts during the early part of this century to invalidate progressive legislation ranging from minimum wage laws for women, to maximum hour regulations for bakery employees. The argument is that since the judicial effort to protect economic rights by use of the due process clause was abandoned by the Court in the late 1930's, the "creation" of family rights out of the same doctrine is somehow tainted. The demise of economic rights, however, has not been followed by the erosion of family rights. Rather, family rights have been increasingly expanded under various constitutional doctrines since the time of *Meyer* and *Pierce*.

The heir apparent to the substantive due process reasoning of the *Meyer* and *Pierce* cases is the right of privacy recognized in a controversial line of cases from *Griswold* *v.* *Connecticut* to *Roe*

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109. See Note, *State Intrusions into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1387-90 (1974). Here the author argues that the test for review is one of strict scrutiny to the effect that "only the most grievous threats to the state's collective interests could justify infringement of parental rights." *Id.* at 1389. Kleinfield, *The Balance of Power Among Infants, Their Parents and the State*, 4 FAM. L.Q. 409, 415-18 (1970) suggests these cases require that the state meet a test of "substantial reasonableness" in regulating schooling.


113. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins*).

114. Justice Black, for example, in his dissent in *Griswold v. Connecticut*, 381 U.S. 479, 516 (1965), impeaches the authority of *Meyer and Pierce* on this type of reasoning, in stating that "I merely point out that the reasoning stated in *Meyer and Pierce* was the same natural due process philosophy which many later opinions repudiated . . . ."

115. 381 U.S. 479 (1965).
In Griswold a majority of the justices recognized a right to marital privacy arising out of the due process clause. Similarly, in Roe the majority grounded the right of abortion in the due process clause. Furthermore, the court has continued to rely on the due process clause in other "family rights" cases.

Equal protection arguments have also been successful in invalidating state intervention into the family. In Orr v. Orr, for example, an Alabama statute permitting alimony awards only to women was invalidated on equal protection grounds. In Stanley v. Illinois the Court invalidated a statute that deprived an unwed father of custody rights on the basis of both the due process and equal protection clauses. The Supreme Court has yet to consider the issue, but at least one state family court has invalidated a statute giving maternal preferences in custody disputes on the basis of equal protection.

Finally, the free exercise and establishment clauses have been successfully urged in defense of family autonomy and against state intervention. The principal case favoring family autonomy in religious training matters is Wisconsin v. Yoder. In Yoder the Supreme Court invalidated a state compulsory high school educa-

117. 381 U.S. at 493 (Goldberg, J., concurring); id. at 500 (Harlan, J., concurring in the judgment); id. at 502-03 (White, J., concurring). But see id. at 516 (Black, J., dissenting).
118. 410 U.S. at 153.
119. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 394-95 (1978) (Stewart, J., concurring) (where the Court characterized the right to marry as fundamental, in invalidating a statute requiring persons to comply with child support obligations as a condition for receiving permission to remarry); Moore v. City of E. Cleveland, 431 U.S. 494, 495-96 (1977) (plurality opinion) (Powell, J.) (where the fundamental right of an extended family, consisting of a grandmother and her two grandsons, to reside together for their "mutual sustenance" was given constitutional protection against a local zoning ordinance which was structured in terms of "nuclear family"). Justice Powell in his decision in Moore stated that the precedents "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." 431 U.S. at 503 (plurality opinion) (Powell, J.).
121. Id. at 282-83.
122. 405 U.S. 645.
123. Id. at 649. See also Caban v. Mohammed, 441 U.S. 380 (1979).
tion statute as violative of the fundamental rights of Amish parents to raise their children in an Amish atmosphere.\textsuperscript{126} Unlike \textit{Meyer} and \textit{Pierce} the Court considered both the state's police power and its \textit{parens patriae} power and held that neither overrode parental rights in the control and care of their minor children with respect to religious education. In \textit{Yoder}, Amish parents refused to send their fourteen and fifteen year old children to public or private schools after completing the eighth grade.\textsuperscript{127} The parents kept them out of school because they believed "in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life."\textsuperscript{128} The Court stated that to uphold such a regulation, the state would have to establish "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."\textsuperscript{129} In other words, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."\textsuperscript{130}

In considering the competing interests, the Court discussed "the power of the State as \textit{parens patriae} to extend the benefit of secondary education to children regardless of the wishes of their parents."\textsuperscript{131} The Court went beyond the police power analysis present in \textit{Meyer} and \textit{Pierce}, and held that the \textit{parens patriae} claim must fail because the conduct did not pose some substantial threat "to the physical or mental health of the child . . . ."\textsuperscript{132} The Court also rejected the argument that under the police power the state had a compelling interest in requiring compulsory education to the age of sixteen, to avoid having the children become a burden on society, or to enable them to participate effectively in our democratic process. The Court stated that no harm "to the public safety, peace, order or welfare has been demonstrated or may be properly inferred."\textsuperscript{133}

The Court's rejection of both the police power and the \textit{parens patriae} arguments favoring compulsory education at the secondary school level thus establishes that the state has a substantial

\begin{footnotes}
\textsuperscript{126} \textit{Id.} at 234.
\textsuperscript{127} \textit{Id.} at 207.
\textsuperscript{128} \textit{Id.} at 209.
\textsuperscript{129} \textit{Id.} at 214.
\textsuperscript{130} \textit{Id.} at 215.
\textsuperscript{131} \textit{Id.} at 229.
\textsuperscript{132} The Court here is distinguishing \textit{Prince v. Massachusetts}, 321 U.S. 158 (1944) (where a child labor law was upheld against a free exercise claim); \textit{see} note 183 and accompanying text \textit{infra}.
\textsuperscript{133} 406 U.S. at 230.
\end{footnotes}
burden in demonstrating an "interest of sufficient magnitude" or "of the highest order" or "strong interest" to override parental rights to the control of the religious education of their children. Indeed, Chief Justice Burger's opinion for the Court seems to imply that parental rights in the free exercise context are even more extensive than they would be if simply based upon personal preference:  

34 The Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim . . . more than merely a "reasonable relation to some purpose within the competency of the state" is required to sustain the validity of the State's requirement under the First Amendment.  

Yoder establishes yet another constitutional basis for protecting the family against state intervention: the free exercise provisions of the first amendment.  

What is clear from these "family rights" cases is that the family relationship is entitled to the upmost respect by the courts and the legislatures. The parental right to direct the rearing of children has been variously described by the Supreme Court as "fundamental," basic in the structure of our society," and "cardinal." Justice Blackmun, dissenting in Lassiter v. Dept. of Social Services of Durham County, North Carolina summarized the preeminence of parental rights as an aspect of personal liberty:  

This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. "[F]ar more precious . . . than property rights," . . . parental rights have been deemed to be among those "essential to the orderly pursuit of happiness by free men," . . . and to be more significant and priceless than "liberties which derive merely from shifting economic arrangements." . . . Accordingly, although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental lib-

134. _Id._ at 216, 233.  
135. _Id._ at 233.  
139. 101 S. Ct. 2153 (1981). The majority held that the Constitution provides an indigent litigant an absolute right to appointed counsel only if his physical liberty is at stake. _Id._ at 2159. In the case of a parental status termination, whether due process requires the appointment of counsel is to be decided on a case-by-case basis. _Id._ at 2162. Justices Blackmun, Brennan, Marshall and Stevens dissented.
erty interest worthy of protection under the Fourteenth Amendment. . . . Within the general ambit of family integrity, the Court has accorded a high degree of constitutional respect to a natural parent's interest both in controlling the details of the child's upbringing . . . and in retaining the custody and companionship of the child . . . .140 Accordingly, doubts as to the existence of a fundamental right of parents to the custody and control of their children must be laid aside in this country.

The standard of review applicable in disputes concerning parental rights and their conflict with either the state's police or parens patriae power is less clear. Language in the opinions vary from the "compelling state interests" and "strict scrutiny" terminology traditionally associated with equal protection to the "flexible balancing" approach commonly associated with substantive due process.141 Yoder further suggests that the standard is increased in those cases where parental rights grounded in due process are combined with rights to religious freedoms. Axiomatically, if parental rights are "fundamental," "cardinal," and "basic" then courts should adhere to the strictest method of review in evaluating whether the state's interest is sufficiently compelling to override such rights in particular cases. To do less would be a mockery of the notion of ordered liberties characteristic of a constitutional democracy.

VI. RECONCILING BEST INTERESTS AND PARENTAL RIGHTS IN THE AREA OF RELIGIOUS BELIEFS AND CONDUCT

Previous analysis had demonstrated the evolution of the law of child custody both in England and the United States from a common law rule of paternal preference, subsequently modified by courts of equity and legislation elevating the "best interests" or "general welfare" of the child. The development of the constitutional rights of parents in this country as a limitation to the state's power to intervene in family affairs, has occurred largely in the setting of threatened state intrusion on the privacy of the nuclear

140. Id. at 2165-66 (Blackmun, Brennan, and Marshall, J.J., dissenting).
141. For an excellent discussion of the differences between these two tests and their applicability to "family rights" cases, see The Constitution and the Family, supra note 101 at 1193-97. For a discussion that the strict scrutiny standard should be applied to conflicts between state interests and parental rights, see Note, State Intrusions into Family Affairs: Justifications and Limitations, 26 STAN. L. REV. 1383, 1387-90 (1974).
family. Where the nuclear family has already been fragmented the courts are often confused regarding the extent to which they are constitutionally obligated to respect parental rights. Nowhere is this confusion more apparent than in the Burnham type case where religious beliefs are relied upon as part of the “best interests” equation in resolving custody disputes. The tendency of some courts in custody cases to disregard the clearly established rights of the parents to control the religious training of their children has been characterized as a “flagrant abuse of the courts' power, and a clear infringement of parents’ rights.”

An examination of the cases where religious factors have been considered in custody disputes suggests that the constitutional rights of parents to control the religious training of their children is not extinguished upon divorce.

Judicial confusion over the difference of perspective between abandoning parental rights and reconciling them with a state's professed interest in the child's “best interests” is illustrated in dictum in Morris v. Morris. The court's inadequate explanation of why parental rights established in such cases as Yoder may be abandoned in custody disputes is as follows:

In matters of custody, the family unit has already been dissolved, and that dissolution is accompanied by a weakening of the shield constructed against state intervention. A parent cannot flaunt the banner of religious freedom and familial sanctity when he himself has abrogated that unity. Consequently, the courts have consistently held that while religious beliefs must not constitute the sole determinant in a child custody award, the court may consider those beliefs in rendering a decree.

If the above statement suggests that parental rights somehow evaporate when the courts are dealing with something different than a nuclear family, it is an understatement of the constitutional law on the subject. If it implies that within a nuclear family reli-
religious beliefs and practices are beyond governmental interference, it is an overstatement of the constitutional protection afforded parents in the control of their children.\textsuperscript{146} It is a correct statement of the law that courts have consistently held that religious beliefs cannot be the “sole determinant” in custody cases, but that does not take the analysis far enough. The question is under what circumstances may the courts constitutionally consider religious beliefs at all, recognizing that even in such cases those factors cannot be solely determinative.

To understand the law applicable to custody disputes, cases involving a related but distinct issue of control over the religious training of children as between custodial and non-custodial parents must be distinguished. Contrary to the English common law rule of\textit{ religio sequiter patrem},\textsuperscript{147} American courts have held that the custodial parent has discretionary control over the religious training of the child, and that it is constitutionally impermissible for the courts to attempt to control such training.\textsuperscript{148} These cases have been misapplied in custody cases to suggest religious beliefs

\begin{itemize}
\item[\textsuperscript{146}] See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944) (where a child labor law was upheld despite a parental claim of right to control the religious training of his children). \textit{See} text accompanying note 182 \textit{infra}.
\item[\textsuperscript{147}] Hawksworth v. Hawksworth, 6 L.R. 539, 545 (Ch. App. 1871). \textit{See} notes 54-65 and accompanying text \textit{supra}.
\item[\textsuperscript{148}] \textit{See} Pfeffer, \textit{Religion in the Upbringing of Children}, 35 B.U. L. REV. 333, 356-60 (1955) (footnotes omitted). The court in Boerger v. Boerger, 26 N.J. Super. 90, —, 97 A.2d 419, 422 (1953) noted that the \textit{Hawksworth} doctrine “received relatively little support in the United States.” \textit{Cf.} Hernandez v. Thomas, 50 Fla. 522, —, 39 So. 641, 645 (1905), (where the common law rule of paternal preference was followed). It has been noted, for example, that “[j]udicial parroting” of dictum in Denton v. James, 107 Kan. 729, 193 P. 307 (1920), a case standing for the rule that the court will not interfere with the custodian’s preferences regarding the religious education of the child, is responsible for “what appears to be a line of authority holding that religion is not to be a consideration in custody proceedings.” \textit{Note}, \textit{Religion—A Factor in Awarding Custody of Infants?}, 31 S. CAL. L. REV. 313, 314-15 (1958). \textit{Denton} involved a dispute between a maternal and a paternal grandmother who was also a parent by adoption, over custody and control of the grandchild's religious training. The court held that even though it would be in the child’s best interests to be raised by the maternal grandmother who shared the religious beliefs of the natural mother, the religious differences of the paternal grandmother would not make her unfit as a parent. Thus, inasmuch as the custody issue had been resolved separately by the adoption, the adoptive parent had exclusive authority over the child’s religious training. Accordingly, the court stated that “[b]ecause of the settled views of this court concerning the nature of the parental relation, and the rights flowing therefrom, the question of religion cannot be regarded as entering into this case.” 107 Kan. at —, 193 P. at 311. Rather than precedent for the rule that religion cannot be considered in a case involving an original custody dispute, \textit{Denton} merely stands for the American rule that the custodial parent is vested with the religious training of children. See also Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (1953); Wojnarowicz v. Wojnarowicz, 48 N.J. Super. 349, 137 A.2d 618 (1958); Paolella v. Phillips, 27 Misc. 2d 763, 209 N.Y.S.2d 165 (1960).
\end{itemize}
can never be considered in initially awarding custody. Other religious training cases which recognized the non-custodial parent's right to teach religious ideas while exercising visitation rights, subject to the custodial parent's prior right to protect the child from harmful exposure to conflicting beliefs, have also been misapplied in custody cases.

149. See, e.g., Jackson v. Jackson, 181 Kan. 1-5, 309 P.2d 705, 711-12 (1957), where the Kansas Supreme Court relied on Denton in a custody case without noting the differences between religious training and custody dispute cases.

150. One often-cited case recognizing a constitutional right in the non-custodial parent to teach religious beliefs contrary to those taught by the custodial parent is Munoz v. Munoz, 79 Wash. 2d 810, 489 P.2d 1133 (1971). In Munoz the trial court, following the traditional rule that the custodial parent has exclusive control over the religious training of the child under custody, ordered the father to refrain from teaching his three children religious doctrines contrary to the faith of the custodial mother, who was a member of the Church of Jesus Christ of the Latter Day Saints. On appeal the Washington Supreme Court held the ruling overly broad because no evidence had been adduced that exposure to conflicting religious beliefs would have any adverse affect upon the well-being of the children. Without such a finding, the court held the father could not be deprived of his constitutional rights. Id. at 489 P.2d at 1134-36.

The Munoz analysis was followed in Compton v. Gilmore, 98 Idaho 190, —, 560 P.2d 861, 863-64 (1977), and Murga v. Murga, 103 Cal. App. 3d 498, 506, 163 Cal. Rptr. 79, 82 (1980). Murga additionally established that a "court will not enjoin the non-custodial parent from discussing religion with the child . . . in the absence of a showing that the child will be thereby harmed." 103 Cal. App. at 506, 163 Cal. Rptr. at 82. Other jurisdictions have followed this rule. See Harris v. Harris, 343 So. 2d 762, 764 (Miss. 1977); Goodman v. Goodman, 180 Neb. 83, 88-89, 141 N.W.2d 445, 449 (1966); Angel v. Angel, 140 N.E.2d 86, 88 (Ohio Comm. Pleas. 1956); Robertson v. Robertson, 19 Wash. App. 425, —, 575 P.2d 1092, 1093 (1978).

151. The custodial parent's prior right to the religious training is illustrated by Morris v. Morris, 412 A.2d 139 (Pa. Super. Ct. 1979). In Morris the mother refused to allow the father to exercise his visitation rights because he insisted on taking their four-year-old daughter with him when he made door-to-door solicitations on behalf of the Jehovah's Witnesses. Appealing the trial court's order that he not take the daughter with him on any door-to-door solicitations, the father argued on the authority of Munoz that the order violated his constitutional rights of privacy and the free exercise of religion. Id. at 141. The court in considering the constitutional claims of the father expressly denied any ability to evaluate the merits of the religious teachings, but stressed that in considering the child's best interests it could investigate the effect of contradictory teachings: "[W]e readily acknowledge the inadequacy of a legal forum to resolve which, if any, creed is superior in effecting that goal [spiritual salvation]—it is beyond dispute that a young child reared into two inconsistent religious traditions will quite probably experience some deleterious physical or mental effects." Id. at 142. Thus, for the limited purpose of investigating the effects of inconsistent religious teachings on the mind of a four-year-old, the court stated that "it is legitimate for a court to examine the impact of the parents' beliefs on the child." Id. at 142. The court in Morris distinguished the Munoz line of cases, there no evidence was presented of the deleterious effects of contradictory teachings on the mind of the child. Id. at 144. In Morris, by comparison, a psychiatrist had testified that even without evaluating the respective doctrines of the Jehovah's Witnesses and Catholicism, the child would likely be harmed if he were exposed to both simultaneously. Id. at 146. This evidence of threatened harm to the child was held to be sufficient to outweigh the father's constitutional rights as a non-custodial parent. Id. at 146-47.
The Nebraska Supreme Court in Burnham, for example, quoted language from a religious training case, Morris v. Morris,\textsuperscript{152} that "it is legitimate for a court to examine the impact of the parent's beliefs on the child"\textsuperscript{153} as authority for the constitutionality of relying on religious beliefs in making the initial custody award. It does not follow that since the effects of contradictory teachings may be considered in subordinating the rights of a non-custodial parent to the rights of the custodial parent, that the respective beliefs of parents may be evaluated in initially deciding custody. In the former instance the substance of the religious beliefs are not considered at all, but rather the effects of teaching contradictory beliefs whatever they may be. In such a case the required neutrality of the courts to the specific religious beliefs may be maintained; whereas if the actual beliefs were considered as they necessarily would have to be if the rule were extended to cases where custody is at issue as Burnham suggests is permissible, neutrality would be impossible. Burnham's reliance on Morris, therefore, is misplaced and partially explains the incorrect result achieved by the court in that case.

In custody and training cases the constitutional rights of the respective parents are not diluted as a consequence of nuclear family breakdown. Rather, for the first time, the rights of each parent have to be taken into account along with the rights of the child and the interests of the state. The reconciliation of these rights and interests is a complex legal problem, which has not always been coherently addressed by the courts. A conceptual understanding of the factual circumstances in which religious factors may be constitutionally relied upon in deciding custody and control issues is required.

A close reading of custody cases suggests that with few exceptions religious beliefs and practices are constitutionally protected and may not be relied upon in awarding custody despite the intuitive impression that the "best interests" standard requires that the state ensure that the child has as "normal" a childhood experience as possible.

A. The Religious Needs of the Child May be Considered in Custody Cases

Religious factors may be considered in custody cases where the child has actual religious needs and one parent can better

\textsuperscript{153} Burnham v. Burnham, 208 Neb. at 503, 304 N.W.2d at 61, (quoting Morris v. Morris, 412 A.2d at 142 (Pa. Super. Ct. 1979)).
serve those needs. There is judicial authority that some form of religious instruction is basic to a child's well-being, and custody dispositions have been affected by a parent's refusal to teach a child any religious beliefs. It is suggested, however, that giving preference to religious training, as compared with moral training in general, effects an establishment of religion and is unconstitutional. That is, unlike the Shelley case a parent ought to be able to profess atheism in this country without risking the loss of the custody of his children. The atheist, however, should be prepared to take upon himself or herself the responsibility of the moral, as compared with spiritual, training of the children that traditionally would be part of a Sunday school teaching. That is, the Court in Yoder recognized that while the parents have constitutional rights to control the religious training of their children, they also have an obligation to "prepare [them] for additional obligations." This includes moral as well as any other developmental training.

Apart from the general need of children to receive some form of religious or moral training, a mature child may have developed an actual religious need that can be better served by one parent. In such a case, religious beliefs may constitutionally become a part of the custody hearing in the process of matching the religious affiliations of parent and child.

The courts have generally allowed mature children to express a religious preference, and have considered such preference in awarding custody. We have seen in cases such as Stourton that the courts of chancery on occasion considered religious preferences of a child in overriding the common law rule of paternal preference. This examination of the religious preference of a mature child has been approved in this country in cases such as Matter of Vardinakis. The court in Vardinakis justified the rule on the rationale that it merely reflects the child's wishes regarding his choice of parents, which in a mature child is almost always considered as part of the best interests equation:

154. See, e.g., In re Marriage of Moorhead, 224 N.W.2d 242, 244 (Iowa 1974) (where the court considered the fact that the father took the children to Sunday school, whereas the mother never went to church, as a factor in evaluating the child's best interests and awarding custody to the father); Dean v. Dean, 32 N.C. App. 482, —, 232 S.E.2d 470, 471-72 (1977) (where the fact that the custodial wife failed to take the children to church was considered as part of the best interests equation in depriving the mother of custody.

155. See note 51 and accompanying text supra.


RELIGION IN CHILD CUSTODY

In choosing the religion of one parent rather than the other, the child is frequently either consciously or unconsciously also choosing one parent rather than the other and is indicating to the court in the clearest way possible with which parent he has most sympathy and the greatest sense of security. The positive choice of a religion by an intelligent child of 13 or 14 years must, therefore, be seriously considered in determining what is best for his own welfare.158

The difference between a judicially-inferred general need for some religious training, which should not be relied upon in custody cases, and the actual needs of a mature child which may be considered as part of the best interests equation, was recently discussed in Bonjour v. Bonjour.159 The trial court in Bonjour relied upon the Alaska "best interests" statute,160 which specified "religious needs" as a factor to be considered in custody cases, in awarding the child to the "religious" father, rather than the non-church-going mother.161 On appeal the Alaska Supreme Court considered the constitutionality of the "religious needs" provision of the statute. The court noted that the courts often rely on the mature religious predilections of a child, and therefore, the statute's "religious needs" factor is not unconstitutional.162 The court, however, narrowly circumscribed the factual setting in which "religious needs" may be constitutionally relied upon in custody cases:

We stress, however, that the court must make a finding that the child has actual, not presumed, religious needs, and that one parent will be more able to satisfy those needs than the other parent. By actual religious needs, we refer to the expressed preference of a child mature enough to make a choice between a form of religion or the lack of it.163

The court noted that while no minimum age could be set, a child of fifteen years of age would be of "sufficient intellectual and emotional development to warrant a court in giving serious consideration to the child's expressed needs with respect to religion. . . ."164

Applied to the facts of the case, the Supreme Court of Alaska stated that since the trial court had not interviewed the young

158. 160 Misc. at 17, 289 N.Y. Supp. at 361.
160. See note 98 and accompanying text supra.
161. 592 P.2d at 1236-37.
162. See id. at 1236.
163. Id. at 1239-40.
164. Id. at 1240 n.14, noting that in Wojnarowicz v. Wojnarowicz, 48 N.J. Super. 349, 137 A.2d 618 (1958), children aged three, five, and seven were too young to be interviewed regarding their religious preferences.
child, and had made no finding regarding the child's actual religious needs, to presume an "organized religious" environment would serve the child's best interests better than a non-religious environment violated the establishment clause of the first amendment. Referring to the three pronged test of the establishment clause formulated in Wolmann v. Walter, the court suggested that to interpret the "religious needs" provision of the statute as a general preference for an organized religious environment, would violate the establishment clause by interpreting the statute as having (1) a religious rather than a secular legislative purpose, (2) a primary religious rather than secular effect, and (3) would foster excessive government entanglement with religion.

This analysis is in accord with the dictum in the "religious training" cases discussed above, where it was suggested that while courts may consider a mature child's religious needs for the purpose of matching him with a parent who could assist in the fulfillment of those needs, the courts cannot prescribe or proscribe religious training sanctioned by a fit custodial parent. To the extent a mature child also has constitutionally afforded rights by the free exercise clause of the first amendment, the Bonjour analysis is consistent with those rights. The difference between the two

166. 592 P.2d at 1242.
167. Pfeffer, in reviewing the cases, suggests that "[a]pplication of the free exercise and religion clause of the First Amendment to children within their parents’ custody is meaningless and serves no useful purpose." Pfeffer, Religion in the Upbringing of Children, 35 B.U.L. Rev. 333, 354 (1955). He suggests that while the courts speak in terms of the rights of children, they are actually focusing on the rights of parents or others, with whom the child's interests are in accord. Where there is a conflict between the parent and the child regarding the child's religious upbringing, he argues that the courts will defer to the parent's control over the matter as was done in Prieto v. St. Alphonsus Convent of Mercy, 52 La. Ann. 631, 27 So. 153, 169 (1900) (where the mother was allowed to have her daughter who wanted to become a nun expelled from the convent). Thus Pfeffer argues that where a court interviews a child regarding his religious preferences it does so not because it is constitutionally required to accede to the child's preferences, but because such a preference is relevant to the child's temporal happiness. Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979), is really a best interests case, since the child had not formed serious religious convictions. It is suggested, however, that Pfeffer and the Prieto case are wrong, and that a mature child with serious religious convictions ought to be afforded the protection of the free exercise clause. For a discussion of the rights of children in other areas such as freedom of expression, equal protection, procedural due process and privacy, see The Constitution and the Family, supra note 101, at 1358-77. Of course, the parent's constitutional right to control the child's religious training may supersede the child's right until the child's maturity has reached a certain level. Here again what we would have is a problem reconciling constitutional rights, rather than a case where the children have no rights.

The most problematic area for children's rights involves the abortion cases. It is not clear to this author why an unborn child has no constitutional rights. For a stimulating philosophical debate on the abortion issue, see Thomson, A Defense of
analyses would be that, while in the "best interest" analysis reliance on religious needs of a mature child would be constitutionally permissive, in a free exercise analysis it would be constitutionally mandatory.

The "religious needs" of a child may also become a factor in custody disputes, where the prospective parents differ not in their beliefs, but in their capacity to service the child's religious needs. In *T. v. H.* for example, the parents and the child were Jewish, but the father was residing in New Jersey near Jewish temples, Hebrew schools and extra-religious facilities for Jews, whereas the mother had moved to "Gentile" Idaho where the nearest temple was eighty miles away. There the court on appeal affirmed the trial court’s award of custody to the father, reasoning that "[r]eligious education, considered in the best interests of children, may become an important factor in deciding custody."

Though constitutionally sound when limited to cases with similar facts, these "religious needs" cases are a source of confusion in custody cases when their holdings or dictum are transplanted to other circumstances. The court in *Burnham*, for example, inappropriately applied the "religious needs" dictum of *Bonjour* to justify considering the religious beliefs of a parent where the religious needs of the four-year-old daughter were not in issue. That is, *Burnham*, in justification of its reliance on religious factors in awarding custody, relies heavily on the following *Bonjour* dictum: "To hold that a court may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child." As we have seen, this dictum adequately states the law that religious factors may be considered where the religious needs of a mature child are demonstrated. This dictum was not meant to imply that religious beliefs may be relied upon in all circumstances. Indeed, in *Bonjour* the Alaska Supreme Court reversed the trial court for doing what the Nebraska Supreme Court did in *Burnham*; namely, relying on religious factors without proof that the child had corresponding religious needs. *Bonjour*, then, stands for exactly the opposite rule of law for which the court in *Burnham* uses it. The court in *Burnham*, therefore, was confused as a result of its lack of attentiveness to the authority it relied upon, and the opinion will serve to further


169. Id. at —, 245 A.2d at 223.
confuse other courts which fail to closely examine the facts of these custody cases where religious factors are at issue.

Contemporary statutes dealing with child custody matters also take into account the preferences of a mature child, and often attempt to "match" the religion of the parent or the prospective custodian with that of the child. Some custody statutes, for example, include the wishes of a mature child as part of the best interests equation. Other best interest statutes make a choice of parents by an older child mandatory, unless the court decides it would not be in that child's best interests. In addition, many jurisdictions have "religious protection" statutes which require that the courts, when dealing with dependent, neglected, or delinquent children, match the religion of the parents or the child with the prospective custodian, when practicable. A standard statute provides as follows:

In placing a child under any guardianship or custody other than that of the parent, the juvenile court shall, when practicable, select a person or an institution or agency governed by persons of like religious faith as that of the parent of such child, or in case of difference in religious faith of the parents, then if the religious faith of the child, of if the religious faith of the child is not ascertained, then of either of the parents.

Some of these statutes simply provide that the religion of the parents should be considered as far as practicable; others are in

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173. This formulation has been adopted in the following jurisdictions: HAWAII REV. STAT. § 16-1814(3) (1976); NEV. REV. STAT. § 62.220 (1973); OHIO REV. CODE ANN. § 2151.32 (Baldwin, 1978); R.I. GEN. LAWS § 14-1-41 (Supp. 1980); S.C. CODE § 14-21-630 (1977); WYO. STAT. § 14-6-229(g) (1977).

terms of the religion of either the child or the parent, or solely the child. Some states, on the other hand, have repealed their religious matching statutes.

The constitutionality of these "religious protection" statutes have been unsuccessfully challenged on establishment grounds. The constitutionality of a New York "religious protection" statute, for example, was considered in Dickens v. Ernesto. The New York Constitution required that a child "shall be committed or re-manded or placed [for adoption], when practicable, in an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child." In addition, the pertinent sections of the New York Family Court Act provided that in the case of adoption the religious preference of the parents shall "so far as consistent with the best interests of the child, and where practicable . . ." be given effect. The plaintiffs, as adoptive applicants, challenged these provisions as providing an establishment of religion prohibited by the first amendment. In upholding the provisions, the court stated that they have a secular purpose, serving the best interests of the child, and the "matching" provisions neither inhibited nor advanced religion. Finally, since the provisions were neutral as far as religious or non-religious beliefs, their permissive application did not foster "excessive government entanglement." The court also dismissed the petitioners' free exercise and equal protection challenges to the statutes. Challenges to the facial unconstitutionality of the New York "religious protection" statute more recently were defeated in two Wilder cases.

In summary, the religious needs of the child may be constitutionally considered in custody disputes. In "matching" those needs with the prospective custodians, however, the courts cannot evaluate the normalcy or orthodoxy of the religious beliefs. That is, the courts in religious needs cases, similarly to the religious training cases, must maintain strict impartiality regarding the sub-

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177. See, e.g., MO. ANN. STAT. § 210.160 (Vernon 1952), repealed 1965 Mo. Laws § 1, at 360.
179. N.Y. CONST. art. VI, § 32.
180. N.Y. [JuD.] LAW § 116(g) (McKinney).
stantive merits of the respective religions. The object of the court's
inquiry in either case is not the selection of the religious or non-
religious beliefs that the court believes would best serve the
child's developmental interests, but rather in the one case to im-
partially match the religious preferences of the child and the pro-
spective custodian, and in the other, to avoid unnecessary
confusion by preventing the child's exposure to conflicting
doctrines.

B. RELIGIOUS BELIEFS OR ACTIVITIES WHICH VIOLATE VALID
STATUTES MAY BE CONSIDERED IN CUSTODY CASES

Prince v. Massachusetts 183 established the principle that the
state can regulate the conduct of children, even where the conduct
is religiously motivated and sanctioned by the child's custodian,
where the child's welfare is at issue. In Prince an aunt as custo-
dian of a nine year old girl permitted the minor to sell religious
literature for the Jehovah's Witnesses, in violation of a Massachu-
setts statute governing child labor. In defense of a criminal action
brought against her the aunt challenged the constitutionality of
the statute on the basis of both the free exercise clause, and the
claim of parental right to control the rearing of children as estab-
lished in Meyer v. Nebraska and Pierce v. Society of Sisters. 184

In upholding the statute, the Court admitted that "[i]t is cardi-
nal with us that the custody, care and nurture of the child resides
first in the parents. . . . And it is in recognition of this that these
decisions [Meyers and Pierce] have respected the private realm of
family life which the state cannot enter." 185 Nonetheless, the state
acting as parens patriae may restrict the rights of parenthood in
things affecting the child's welfare. 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 espe-
sially in public places, and the possible harms arising from other
activities subject to all the diverse influences of the street." 186 In
support of its holding the Court stated that while "[p]arents may
be free to become martyrs themselves . . . it does not follow they
are free, in identical circumstances, to make martyrs of their chil-
dren before they have reached the age of full and legal discretion
when they can make that choice for themselves." 187

184. See notes 102-10 and accompanying text supra.
185. 321 U.S. at 166.
186. Id. at 168.
187. Id. at 170.
The principle of the *Prince* case appears legitimate. Parental or custodial rights should in certain instances be limited by the state's police power as well as its *parens patriae* power to protect the welfare of the child even against the custodian. The decision in *Prince*, however, is troubling. Justice Murphy, dissenting, argued that parental and free exercise rights required the state to prove the reasonableness of the legislation, which burden he believed had not been met. In addition, Justice Murphy argued that the minor child had a free exercise right, that placed a substantial burden on the state to prove immediate danger to those protected by the statute:

> If 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.\(^{188}\)

Thus Justice Murphy acknowledged the power of the state to enforce either its police or *parens patriae* power in protecting children or others, but insisted that before the state could override constitutional rights that the threatened evil must be "grave, immediate [and] substantial."\(^{189}\)

Justice Jackson also wrote a separate opinion in which Justices Roberts and Frankfurter joined. For Justice Jackson, the 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."\(^{190}\) Applied to the facts of this case, Justice Jackson argued that the state could constitutionally limit religious activities such as selling literature to nonbelievers, since money-raising activities are "Caesar's affairs" and can be reasonably regulated.\(^{191}\)

Each of the justices supported the principle that the state could regulate the family and religious practices in certain narrowly defined circumstances. The two sources of power mentioned in *Prince* include the state's power in securing the public welfare, and the state's *parens patriae* power to protect defenseless children. The majority wrote in terms of *parens patriae*,\(^{192}\) but cited

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188. *Id.* at 174 (Murphy, J., dissenting) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).
189. *Id.* at 175.
190. *Id.* at 177 (Jackson, J., separate opinion).
191. *Id.* at 177-78.
192. Other *parens patriae* examples cited by the majority restricting parental control included compulsory education laws and laws regulating as well as prohibiting child labor. 321 U.S. at 166 (footnotes omitted).
police power examples as well, such as Jacobson v. Massachusetts\textsuperscript{193} wherein the Court upheld a compulsory vaccination law against a free exercise challenge as a valid exercise of the police power.\textsuperscript{194} Justice Jackson's separate opinion challenges the use of parens patriae as a justification for interfering with free exercise rights in this case. The differences between these two justifications for intervening in contravention of constitutional rights are substantial. The police power, as noted by Justice Jackson, is limited to the state's interests in protecting third parties or the public in general. Under the parens patriae power, the state has an interest in protecting the child even though the activity does not threaten anyone else.\textsuperscript{195} Prince has been confined "to a narrow scope" in both Sherbert v. Verner\textsuperscript{196} and Wisconsin v. Yoder.\textsuperscript{197} State intervention founded on the violation of a statute under parens patriae should be restricted to where the child's religious participation makes him subject to imminent and substantial harm, or the activity substantially impairs the child's ability to be prepared for the "additional obligations" referred to in Pierce\textsuperscript{198} and affirmed as setting a boundary to parental discretion in Yoder.\textsuperscript{199} On the other hand, the state may legitimately intervene on the basis of its police power only when third persons are endangered by the religious practice or belief.

Applied to custody disputes, where a parent's religious beliefs require participation in illegal activities, then these beliefs may be constitutionally considered in awarding custody. As indicated above, however, the activities must (1) threaten third persons or the general public, (2) threaten imminent and substantial harm to the child, or (3) substantially impair the child's abilities to meet

\textsuperscript{193} 197 U.S. 11 (1905).
\textsuperscript{194} 321 U.S. at 166 n.12.
\textsuperscript{195} The courts sometimes confuse or combine police and parens patriae powers in justifying state intervention. For example, in Waites v. Waites, 567 S.W.2d 326 (Mo. 1978), the court in dictum stated that inquiry into a parent's religious beliefs is per se impermissible, but inquiry as to religious activities that impinge upon the child's development is permissible. One example the court discusses is "where religion is being used as a subterfuge, as, for example, an alleged religious tenet which advocates shoplifting as a means of helping the needy. Inquiry into the exposure of the child to the practice of shoplifting would be justified and proper." \textit{Id.} at 333. In this example it is not clear whether the inquiry is permissible to protect third parties under the police power, or the child under parens patriae, or more probably both.

For a discussion of the difference between parens patriae and the police power, see \textit{The Constitution and the Family, supra} note 101, at 1198-1202.

\textsuperscript{196} 374 U.S. 398, 402-03 (1963).
\textsuperscript{197} 406 U.S. at 229-30 (1972).
\textsuperscript{198} 268 U.S. at 535 (1925).
\textsuperscript{199} 406 U.S. at 233-34 (1972).
the "additional obligations" he will experience throughout his life, if they are to be constitutionally proscribed against free exercise challenges. If a statute is any broader in its restriction on religious freedoms it is unconstitutional and should not be used as a justification for overriding parental rights.

C. RELIGION AS A FACTOR IN CHILD CUSTODY CASES WHERE THE BELIEFS OR ACTIVITIES POSE IMMINENT AND SUBSTANTIAL HARM TO THE CHILD

A well-established limitation to parental control over the religious training of children is the power of the state under parens patriae to intervene in family affairs where the physical or mental well-being of the child is imminently and substantially threatened by religious activities or beliefs. This limitation is closely related to the Prince qualification discussed above, but differs in that the courts, rather than the legislature, proscribe certain conduct as operating substantially and imminently against the best interests of the child.

Probably the most oft cited example of this limitation is the blood transfusion cases. The cases establish the rule that, where a child's life is at stake, the court has power to intervene in custody disputes in favor of the parent or custodian who will take advantage of available medical resources to save the child's life. The cases differ on the degree of imminence and substantiality of danger required to justify depriving a parent of custody.

In Battaglia v. Battaglia,200 a parent was deprived of custody simply because of religious beliefs opposing blood transfusions. In Battaglia the court held that where the religious convictions of a Jehovah's Witness mother threaten the child's "right to survival and a chance to live" the court had an obligation as parens patriae to intervene in the child's behalf. The court, however, did not discuss the necessity of a blood transfusion, the imminence of danger to the child, or alternatives to protecting the child without depriving the mother of custody.

The constitutional inadequacy of the Battaglia rule has been expressed in another line of blood transfusion cases where "imminency" and "substantiality" of harm are considered as threshold tests before religious beliefs may be considered in awarding cus-

The Maine Supreme Court expressed this rule in Osier v. Osier. In Osier the trial court followed the Battaglia rule and awarded custody to the father because the mother’s beliefs as a Jehovah’s Witness threatened the physical well-being of the child. The Maine Supreme Court reversed and remanded because the trial court had given undue weight to the fact that the mother, as a Jehovah’s Witness, would not consent to a blood transfusion for the son, without a factual finding that that belief posed an “imminent” and “substantial” threat to the healthy child. The court suggested that even if imminency and substantiality can be proven, the courts must seek the least restrictive alternative in protecting the son; which may not entail the deprivation of custody. The court summarized this two stage analysis as follows:

[First, in order to assures itself that there exists a factual situation necessitating such infringement, the court must make a threshold factual determination that the child’s temporal well-being is immediately and substantially endangered by the religious practice in question and, if that threshold determination is made, second, the court must engage in a deliberate and articulated balancing of the conflicting interests involved, to the end that its custody order makes the least possible infringement upon the parent’s liberty interests consistent with the child’s well-being.]

The Osier rule is constitutionally preferable to the Battaglia rule given the inherent power of the court under parens patriae to “order compulsory medical treatment of children for any serious illness or injury...” That is, the “imminence of harm” re-

203. Id. at 1030.
204. Application of President & Directors of Georgetown Col., 331 F.2d 1000, 1007 (1964) (dictum). The court in the Georgetown case id. at 1007 n.15, cited the following examples of court orders involving the medical treatment of minors:

The courts of the District of Columbia issue such orders both for necessary surgery, e.g., In re Two Year Old Girl, D.C. Juv. Ct., No. 44-753-J (January 23, 1964), and for necessary blood transfusions refused on religious grounds, e.g., In re One and a Half Months Old Girl, D.C. Juv. Ct. No. 41-633-J (June 7, 1963); In re two Day old Infant, D.C. Juv. Ct., No. 37-25-OJ (June 24, 1962).

See also Jehovah’s Witnesses v. King County Hospital, 278 F. Supp. 488 (W.D. Wash. 1967), aff’d per curiam, 390 U.S. 598, rehearing denied, 391 U.S. 961 (1968), where a three-judge court upheld legislation authorizing the courts to order blood transfusions necessary to save the lives of children, over the religious objections of parents or guardians; People v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952) (blood transfusion ordered where an infant suffering from an RH blood condition needed the transfusion to avoid death or substantial mental impairment); Custody of Minor, — Mass. —, 379 N.E.2d 1053 (1978), where court order of chemotherapy treat-
required to justify intervention is lacking where the court has continuing authority to compel the recalcitrant parent to submit the child to necessary medical treatment. Unless there is evidence that the parent will refuse to comply with such a court order, a parent may be given custody notwithstanding the potentially dangerous belief that would prohibit transfusions. This least-restrictive-alternative approach in dealing with risks posed by parents with potentially dangerous religious beliefs was followed in *Stapley v. Stapley.*

In *Stapley,* part of the order which gave custody of the children to a Jehovah's Witness mother, vested the authority to make serious medical decisions in the non-custodial father. The order required

[T]hat when and if any of the minor children of the parties become ill or injured and require medical treatment, the [mother] shall forthwith notify the [father] of such illness or injury. The [father] shall be entitled to participate in the decision of selecting a physician, hospital and course of treatment. In the event a whole blood transfusion is recommended by a licensed physician as being in the best interests of any of the minor children, the [father] shall be entitled to exclusively make the decision to authorize or not, said whole blood transfusion. In the event the [mother] attempts or does interfere with such decision by the [father] or fails or refuses to permit him to exercise the aforesaid rights, the permanent care, custody and control of each and all of the minor children of the parties shall thereafter vest in the [father].

This order continued until the father was able to obtain a modification, vesting custody in him, partially because the mother exhibited a pattern of disobeying court orders, which arguably increased the danger to the child.

Focusing on "imminency" and "substantiality" of harm as necessary prerequisites to the state intervening against a parent's religious beliefs, has also been followed in other "physical harm" cases. In the case of *Green v. Green,* for example, the court...
stated that it would refrain from compelling medical treatment until the child's life is in imminent danger. The imminency and severity of the physical threat, therefore, are critical factors in determining whether religious factors can influence custody proceedings.

The imminency-and-severity tests together with the least-restrictive-alternative approach is also applicable to threatened psychological or emotional harm. However, considerations are complicated by the difficulty of assessing the impact of religious beliefs and activities on the mental well-being of the child. Nonetheless, it is suggested that the constitutional standard is the same where either the physical or mental well-being of the child is threatened; intervention requires a factual showing of imminent and substantial threat to the child’s well being and even then is not justifiable unless there are no less restrictive alternatives available. If the parental rights cases from Meyer through Yoder are clear on any one point, it is that the state has no power to intervene against parental control simply to ensure that the child's development will be “normal.” Likewise, in custody cases where unorthodox religious beliefs are involved, the court cannot constitutionally prefer one parent simply because that parent's religious beliefs are more conducive to the child's “normal” development.

Mental or emotional harm caused by the unorthodoxy of religious beliefs was considered in Quiner v. Quiner.209 In Quiner the mother belonged to a separatist religious group called the “Exclusive Brethren,” whose members were required not to have fellowship with non-members. Children were permitted to attend public schools, but prohibited from participating in “athletic, dramatic, musical, social, literary, scientific, political and other extra-scholastic activities.”210 They could not play with other children in their homes, or join “Boy or Girl Scouts, Camp Fire Girls, Little League, Y.M.C.A. and other similar youth groups.”211 Children could not have toys, nor could they participate in public or private entertainment, and neither radio, television or recorded music was permit-
ted in their homes. Christmas was not celebrated, children were not permitted to have pets, all forms of literature, and news media, was discouraged, except the Bible, and all forms of medical insurance were opposed.212

The father sought custody of the couple's son, who was two and one-half years old at the time of the initial proceedings and five by the time the appeal was heard, on the ground that the mother's "separatist" beliefs would result in psychological and cultural harm against his best interest, and would likely alienate him from his father who was a "fundamentalist" Protestant but not a member of the "Exclusive Brethren." The trial court, after finding both parents devoted and fit, awarded the child to the father on the ground that the mother's unorthodox religious beliefs would deprive the son of an opportunity for a normal development. The court specifically found as follows: "'The best interest of the child, especially the child's mental welfare, will be best served by granting custody to the [father]. In the socially and intellectually impoverished environment available to the child in the [mother's] custody, he could not achieve or approach his potential mental development.'"213

The court of appeals, however, reversed on the ground that the mother could not be penalized by depriving her of custody on the basis of her zealous espousal of the principle of separation.214 In support of its holding the court stated that the "Constitutions of the United States and of the State of California guard with strict jealousy any legal penalty, however slight, imposed upon a person because of any religious beliefs which are not immoral, illegal or against public policy."215 The court acknowledged the the effect of a religious teaching, as distinguished from a mere belief, could be considered in custody disputes but noted that no evidence had been presented that the "separatist" beliefs or restrictions "had actually taken place and had impaired the physical, emotional and mental health and well-being of the child."216

Moreover, the court noted that even though the son would be raised by the mother "differently from the accepted mores . . . we cannot say that [he] will not, even though or because he is ex-

212. *Id.* at —, 59 Cal. Rptr. at 508-509.
213. *Id.* at —, 59 Cal. Rptr. at 508.
214. *Id.* at —, 59 Cal. Rptr. at 510. The court noted that "[d]eprivation of the custody of a child is not a slender punishment: it is a heavy penalty to pay for the exercise of a religious belief, neither illegal nor immoral." *Id.* at —, 59 Cal. Rptr. at 517.
215. *Id.* at —, 59 Cal. Rptr. at 510-11.
216. *Id.* at —, 59 Cal. Rptr. at 511.
posed to the principle of separation, grow up into a constructive, happy, law-abiding citizen, and contribute to the 'rich cultural diversities' which have helped make this country great."217 Because the court did not know the effect of religious teaching, it required a showing of "actual impairment of physical, emotional and mental well-being contrary to the best interests of the child" before the court had the "power to tell parents who teach nothing secularly immoral, unlawful or against public policy, how to shape the minds of their children, particularly on the subject of religious belief.

Precisely because a court cannot know one way or another, with any degree of certainty, the proper or sure road to personal security and happiness or to religious salvation, which latter to untold millions is their primary and ultimate best interest, evaluation of religious teaching and training and its projected as distinguished from immediate effect (psychologists and psychiatrists to the contrary notwithstanding) upon the physical, mental and emotional well-being of a child, must be forcibly kept from judicial determinations. Numerous profound thinkers have fixed convictions that all religion is bad, particularly so in the rearing of children. 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 the precise conclusion as to which one is for the best interests of a child, we open a Pandora's box which can never be closed. By their very nature religious evaluations are subject to question, disbelief, and difference of opinion.218

Quiner, then, stands for the rule that it is unconstitutional to rely on the unorthodoxy of religious beliefs which have not actually impaired the child's well being in deciding custody issues.

Other courts have required less imminence of harm before allowing intervention. In In re Marriage of Hadeen219 the court held that a lesser "requirement of a reasonable and substantial likelihood of immediate or future impairment best accommodates the general welfare of the child and free exercise of religion by parents."220 Despite this lower standard, the court reversed and remanded the trial court's award of custody of four of five daughters to the father, because the award had been influenced by the

217. Id. at —, 59 Cal. Rptr. at 512-13 (footnotes omitted).
218. Id. at —, 59 Cal. Rptr. at 516-17. In dissent, Associate Justice Fleming argued that the principle of "separation" involved an activity as well as a belief, and the court should not have to wait until the child was emotionally scarred before it could intervene in his behalf. Id. at —, 59 Cal. Rptr. at 518 (Fleming, J., dissenting).
220. Id. at —, 619 P.2d at 382. The court stated that the "Quiner requirement of actual impairment" was too strict.
mother's involvement in a fundamentalist Christian sect. The court held that absent a finding that the mother's involvement with her church "posed a threat to the mental or physical welfare of the children, it would be improper to consider the religious involvement of the mother as an ingredient in the decision as to the award of custody."221

Thus while Hadeen differs from Quiner on the degree of imminence required to justify intervention the two cases are in accord with the general rule that "religious decisions and acts may be considered in a custody decision only to the extent that those decisions or acts will jeopardize the temporal mental health or physical safety of the child."222

Where religious beliefs may pose a threat to a child's physical or mental well-being, then, the courts may investigate those beliefs. The approach required by the Maine Supreme Court in Osier most effectively accommodates the best interests of the child and the constitutional rights of the parents. In cases where threatened harm resulting from religious beliefs is alleged, the court should make a factual finding regarding the imminence and substantiality of the threat. If the threat is imminent and substantial, the court may consider those beliefs in making the custody award. However, if there is an alternative less restrictive then depriving the parent of custody, then the court must pursue that less restrictive infringement on the parent's constitutional rights. The Stapley approach, for example, of vesting control over medical decisions in the other parent or a physician would diminish the imminence and the substantiality of the threat, while allowing the parent to retain custody.

It is obvious that in Burnham223 the Nebraska Supreme Court did not require any factual finding that the mother's religious beliefs posed an imminent and substantial threat to the four-year-old child. Moreover, the supreme court failed to appreciate the less restrictive alternative contained in the trial court's order which prohibited the mother from removing the child from the county, thereby foreclosing the threat of the mother sending the child out of state when she became older. The Burnham decision, therefore, does not satisfy this exception to the rule that religious factors should not be relied upon in deciding custody cases.

221. Id. at —, 619 P.2d at 382-83.
222. Id. at —, 619 P.2d at 382.
D. RELIGIOUS BELIEFS ONLY AFFECTING A CHILD'S SENSE OF CITIZENSHIP OR THE NORMALCY OF HIS OR HER SOCIAL DEVELOPMENT CANNOT BE CONSTITUTIONALLY RELIED UPON IN CUSTODY CASES DESPITE THE SEEMING APPLICABILITY OF THE BEST INTERESTS STANDARD

Some commentators\textsuperscript{224} and courts\textsuperscript{225} have suggested that there are two divergent lines of cases on the subject of whether religion may be constitutionally relied upon in custody cases. One line places religion beyond the scope of judicial inquiry, and the other allows it to be considered as a factor, although not the sole factor, in applying the best interests standard. The above discussion has refuted the first line of cases, and clearly establishes that religious factors may be constitutionally relied upon in custody cases in the enumerated circumstances. In all other cases, it is suggested that religious factors cannot be relied upon \textit{at all} in deciding custody disputes.

Courts have often recognized that there are many circumstances where it is inappropriate to rely on religious factors in deciding custody issues. Where the facts do not justify relying on religious beliefs at all in applying the best interest standard, the courts have occasionally lapsed into constitutional verbiage and opined that religious factors cannot be relied upon under any circumstances in custody cases. This overstatement of the rule is responsible for much of the confusion regarding the "two lines" of cases. Religious training cases are the source of some of the confusion in this area. The other type of case responsible for this exaggeration of the breadth of parental rights is where religious beliefs simply jeopardize the child’s training in civic obligations or normal social development. Courts failing to limit their holdings to those narrow fact situations have implied that such an exclusionary rule applies across the board to all circumstances, hence the suggestion that there are two lines of authority on the subject.

The fact pattern responsible for the broadest exclusionary language involves cases where the religious beliefs of Jehovah's Witnesses oppose either civic obligations, such as saluting the flag and defending the country, or social opportunities, such as joining social or fraternal organizations. The cases make it clear that where religious beliefs merely affect the normalcy of the home environment, particularly as regards civic duties and social opportunities, it would be unconstitutional to consider such beliefs as part of the


best interests equation in deciding custody issues. However, the cases do not go as far as the proposition for which they are

226. One of the earliest cases cited in this "line" of authority is Reynolds v. Rayborn, 116 S.W.2d 836 (Tex. Civ. App. 1938). There the court reversed and remanded the trial court's findings that the child was neglected because the father as a Jehovah's Witness had taught her not to salute the flag. The court held that "however reprehensible to us such conduct may be, their constitutional right must be held sacred; when this ceases, religious freedom ceases." Id. at 839.


The Cory case, involving a strict "separatist" religion and perhaps the most compelling of the cases favoring judicial intervention raised the question of whether religious beliefs could so deprive the child of social opportunities as to justify reliance as part of the best interest analysis. There the appellate court stated that except where religious beliefs "conflict with the laws of the land" they cannot be relied upon in custody cases. 161 P.2d at 389. In support of its holding the court quoted Justice Jackson's oft-cited dictum in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 161 P.2d at 391, quoting 319 U.S. 624, 642 (1943). See also Jackson v. Jackson, 181 Kan. 1, 309 P.2d 705 (1957), discussed in Note, Religion—A Factor in Awarding Custody of Infants?, 31 S. CAL. L. REV. 313 (1958).

In the most recent case in this line of authority, Waites v. Waites, 567 S.W.2d 326 (Mo. 1978), the same result was reached. An award of custody had been granted to the father, the trial court relied primarily on the religious beliefs of the mother, who was a Jehovah's Witness. The Missouri Supreme Court stated the issue as follows: "We are squarely faced in the instant case with the question of what role, if any, can the factor of religion play in the judicial resolution of a child custody dispute consistent with the framework of our federal and state constitutions." Id. at 331. The court responded by stating that the establishment clause prohibits judicial reliance on religious factors in custody cases:

Yet, however much in favor of religion we may be, in a custody dispute between parents of different and conflictual religious persuasions, "we can not, under the system of law which we are appointed to administer, look at that [and choose one religion over the other]. The state of which we are citizens and officers, does not regard herself as having any competency in spiritual matters. . . . The law does not profess to know what is a right belief."

Id. at 332, quoting In re Laura Doyle, 16 Mo. App. 159, 166 (1884).

Applied to the facts of that case, the court held as follows:

We hold that no judicial officer may determine child custody based on approval or disapproval of the beliefs, doctrine, or tenets of the religion of either parent or their interpretation thereof. . . . Inquiry into religious beliefs per se is impermissible; inquiry into matters of child development as impinged upon by religious convictions is permissible. . . .

567 S.W.2d at 333.

Judge Bardgett, in a concurring opinion, disagreed "with the statement in the majority opinion which appears to foreclose any inquiry into religious beliefs." Id. at 335 (Bardgett, J., concurring). He argued that the trial court could constitutionally receive evidence on religious beliefs touching upon the rearing of children, for a limited investigation such as whether the religious tenets would cause serious harm to the children. In this case, however, the trial court had abused that inquiry by relying on the beliefs of Jehovah's Witnesses as to attitudes of citizenship to establish that as a class they are unfit to have custody of children. Id. at 336.
often cited; to preclude judicial inquiry into religious beliefs for other reasons as previously discussed. In this sense they support a single-consensus rule that religious beliefs can be constitutionally relief upon only in limited fact situations, namely: (1) where a non-custodial parent's religious beliefs would cause substantial harm to the child if taught simultaneously with the religious beliefs of the custodial parent, (2) where the child has developed actual religious needs, (3) where religious beliefs or activities violate constitutionally valid laws, or (4) where religious beliefs or activities threaten imminent and substantial harm to the child's well-being and there are no less restrictive alternatives than deciding custody on the basis of those beliefs or activities.

VII. THE RIGHTS OF PARENTS CONSIDERED FROM A MORAL PERSPECTIVE

Resolution of the conflict between the rights of parents and the power of the state to intervene in matters involving the care and control of minor children entails moral as well as legal implications. Are parents morally entitled to exert control over their children? If so, what are the moral limits to such control? Although these moral issues are complex and their resolution controversial, it is suggested that persuasive arguments exist that parents ought to be allowed extensive but not complete authority over the care and custody of their minor children.

Radical critics of liberal society disagree, and assert a moral argument condemning the institution of the family and impliedly the notion of family rights. They view the family as a barrier to the abolition of social classes and the practical achievement of social equality because of the alleged parochial biases and allegiances that the family relationship fosters. In addition, critics claim that many parents lack adequate training or abilities to rear morally and socially productive children. By abolishing the family, conditions of equality may be better perpetuated and the public interest thereby served.

These moral indictments of the family and the notion of parental rights deserve attention if we are to argue in favor of the moral legitimacy of the family. That is, we must formulate a moral argument to explain why communes, kibbutzim, or other publicly-controlled alternatives to the family are not morally preferable. If such an argument cannot be stated, then the tendency away from parental rights in favor of a public-interested resolution of custody conflicts may not be objected to from a moral perspective. And insofar as legal rules, particularly constitutional rights, are depen-
dent upon an underlying sense of moral legitimacy, if parental rights cannot be morally justified then their continued legal validity must be vulnerable to attack.

It has been demonstrated that the courts have felt morally obligated to recognize the legitimacy of parental rights as part of our cultural and legal heritage and as an important part of personal liberty.\(^\text{227}\) To the extent that moral arguments may be based on consensus opinion or traditional values, then, family rights have moral legitimacy in this country.\(^\text{228}\) Such an attempt to justify the moral legitimacy of family rights on consensus views, however, is arguably an inadequate response to the radical criticisms of the family.

Further moral arguments in defense of the family have been made by liberal theorists. One line of support for the family balances the moral advantages of the family against the disadvantages. These theorists justify its continuance on the weightier advantages of the family. Other theorists insist that the family is an important source of self respect and basic rights which are to be given moral priority over whatever social consequences that follow from discontinuation of the family institution. Each of these perspectives merit consideration.

The “balancing” perspective which can be characterized as an ambivalent defense of the family is found in John Rawls’ *Theory of Justice*.\(^\text{229}\) Rawls is sympathetic to the radical criticisms of the family. He states that the important liberal “principle of fair opportunity can be only imperfectly carried out, at least as long as the institution of the family exists.”\(^\text{230}\) Rawls suggests, therefore, that viewed strictly from the principle of fair equality of opportunity, the requirements of justice tend toward abolishing the family.\(^\text{231}\)

Despite the fact that Rawls aims at the family as a source of social injustice, he cannot pull the trigger. In a qualified defense of the family, he argues first that institutional constraints may be implemented which will counteract the social injustices associated

\(\text{\textsuperscript{227}}\) See text at note 126-29 *supra*, where the courts are noted to have characterized parental rights as fundamental, neutral and basic.

\(\text{\textsuperscript{228}}\) For an argument that where difficult moral issues are raised, such as in the family law area, the courts ought to follow traditional values, see *The Constitution and the Family, supra* note 101, at 1177-87.

\(\text{\textsuperscript{229}}\) J. RAWLS, A THEORY OF JUSTICE (1972).

\(\text{\textsuperscript{230}}\) Id. at 74. Rawls notes repeatedly that the moral principle that those similarly endowed ought to have an equal opportunity to succeed in society is undermined by the presence of the family. *See, e.g.,* id. at 74, 301.

\(\text{\textsuperscript{231}}\) Id. at 511-12.
with the family, and second that the several moral advantages present in the family may outweigh any disadvantages. First, the emotional ties commonly present between family members increases the likelihood that each will act justly with other members without being required to do so by institutional constraints. According to Rawls,

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 difference principle has precisely this consequence.

Rawls manifests the sense of responsibility existing between family members by selecting "heads of families" as the members of society to rationally choose the principles of justice. Family heads will "care about the well-being of some of those in the next generation. . . ."

Second, the family represents practical advantages for the moral training that it provides for 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 in their care and control. Acting appropriately, at least at the early stages of moral development, requires those in authority to love the children in their care. Parents are the most likely candidates to exercise authority over children because they are most likely to love their own children. Parental love gives the child self respect, and provides an important basis for further moral development. Rawls states this connection as follows:

When the parents' love of the child is recognized by him on the basis of their evident intentions [doing for him as he would for himself according to his rational self-love], 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.

This loving relationship between parent and child is the first condi-

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232. The inequalities of opportunities that arise because of the perpetuation of family relationships would be meliorated by Rawls' "difference principle," which requires social inequalities to be justified as benefitting the least advantaged group. See id. at 75-83.
233. Id. at 105.
234. Id. at 128.
235. Id. at 464.
tion for the moral development of the child.\textsuperscript{236} The second condition is that the parents must enunciate clear and intelligible rules that the child can comprehend. These rules exemplify the morality which the parents enjoin, and make its underlying principles explicit to the children as time goes on.\textsuperscript{237} For these reasons Rawls believes parents ought to be given, if only temporarily, the prerogative of authority over their children. Their "affection, example, and guidance" is critical to the moral development of children and cannot be substituted by "loveless relationships maintained by coercive threats and reprisals."\textsuperscript{238} Once this early moral development takes place and basic associational rights and duties are recognized, further moral training can be directed by alternate institutional sources. Eventually the child is able to work out his own standards of cooperation adapted to the particular complex social relations he or she experiences.

The family then, according to Rawls, aids in making the child morally autonomous, and ought to be given deference for that purpose. Ironically, Rawls' qualified defense in favor of retaining the family even in the just society is a consequentialist argument; the family is morally defensible insofar as it facilitates the achievement of social justice. On the other hand, the family may be abolished if "other arrangements . . . prove to be preferable."\textsuperscript{239}

Other liberal theorists have articulated a "rights-oriented" defense of the family which goes beyond Rawls' "balancing" analysis. Robert Nozick, for example, notes with curiosity if not distress 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.\textsuperscript{240}

For Nozick, the problem of balancing never arises because rights which have priority are present in family relationships. The voluntary love and care present in family relationships, are instances of historical relationships.\textsuperscript{241} As such they are morally protected against intervention by the state upon the libertarian principle that one has a right not to be interfered with so long as one is not interfering with anyone else.

\textsuperscript{236} Id. at 464, 465.
\textsuperscript{237} Id. at 465-66.
\textsuperscript{238} Id. at 466.
\textsuperscript{239} Id. at 463.
\textsuperscript{240} R. Nozick, Anarchy, State and Utopia 167 (1974).
\textsuperscript{241} Id. at 168.
Nozick acknowledges that the parental right of non-interference with the care and control of children is not unlimited. Once a child exists he has claims or rights against even those who created him regardless of their purpose in creating him. These rights include a requirement that parents respect the potential independence of their children, and avoid actions that would jeopardize their eventual autonomy from parental control. Constraints on parental discretion, however, are not justified by a public-interest rationale as present in Rawls’ argument, but rather are rights oriented.

This same rights-oriented approach to parental rights is also supported by Charles Fried’s writings. Fried responds to Rawls’ ambivalence regarding the morality of continuing the family institution in a just society by noting that in a liberal society we recoil against proposals to abolish the family because “the family is in fact a complex moral object at the intersection of a number of negative rights (personal, political, and legal), and a number of primary and secondary positive rights, and a congeries of simply adventitious circumstances.”

Fried does not detail the “congeries of simply adventitious circumstances,” but it is reasonable to suppose that he has in mind the many ways the family contributes to the well-being of society along the lines discussed by Rawls. Moreover, he finds it unnecessary to work out a defense of parental authority based on positive rights. Positive rights from a primary perspective include claims to the community’s scarce resources, and from a secondary perspective include arrangements arising out of freely contracted obligations. In arguing for the moral validity of parental rights, positive rights need not be relied upon because the determination of fair shares, their collection and distribution, and all contractual obligations are always morally “subject to categorical, inviolable negative rights.” Fried’s and Nozick’s priority of negative rights can be contrasted with Rawls’ apparent willingness to abolish the family if the net social advantages of the family are outweighed by such negative factors as the diminishment of fair equality of opportunity. For both Fried and Nozick, if the family can be supported by a basic rights analysis, then it would be morally wrong to abolish the family regardless of any public interest balancing analysis. Rather, parental rights could only be limited by more basic rights present in the child.

242. Id. at 38-39, 287-91.
244. Id. at 131.
For Fried, parental rights are supported by the most basic rights, the right to physical integrity and the right to freely choose one's life plan. He characterizes this preeminence of parental rights as follows: "The guiding conception, I suggest, is that the right to form one's child's values, one's 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."245

Fried answers the question of why the power to form the basic values of a child should rest wholly in persons not shown to be the most competent to exercise it by asserting that the parent's preferred position is "based on the facts of human reproduction."246 That is, the significance of sexuality to personal integrity, the "pervasive physiological changes of great subtlety associated with pregnancy and birth," all create a special bond between parent and child. This special bond results in the parent rearing and respecting the child.

Fried summarizes the source of parental rights and their critical role in supporting the parent's sense of self respect as follows:

[T]he physical facts are importantly implicated in the resulting social bond. The mother experiences the baby as peculiarly 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 parents' personality.247

Further, the child's individuality is also enhanced by allowing the parent to control the child's early rearing. The child becomes aware that he has not been bred by parents specially selected for that purpose, and his training has not been structured by socially determined sources. Allowing the parents to transmit their unique personal characteristics affirms the individuality of both parent and child: "Belonging at first to our parents, whom we will replace,

245. Id. at 152.
246. Id. at 153.
247. Id. at 155.
we have a chance of believing we belong to ourselves."\(^{248}\)  

And as with Nozick, the basic rights of children provide minimal constraints against abusive parental discretion. Thus, from a moral perspective, 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."\(^{249}\) Each of these minimal constraints are justified on the basis of their preserving the integrity of the child as a potentially independent person. Except for these basic constraints, the "child's most intimate values and determinants," are the prerogative of the parent because the "society has no special right to choose them, since society, after all, is only the hypostasis of individual, choosing persons."\(^{250}\)  

Each of the above arguments insists that parental rights have moral as well as legal legitimacy. They are deeply embedded in our culture and traditions, justifiable on the basis of a balancing of moral advantages and disadvantages, and supported by the self-respect that each is entitled to as an autonomous person. In this sense the constitutional history in this country supporting parental rights is morally defensible. The courts, therefore, must carefully circumscribe those instances where intervention by the state against parental discretion is justified. It is justified in a moral sense when the rights of others, in most cases the rights of the children involved, are jeopardized. The state cannot intervene simply to enforce social conformity.  

These moral arguments supporting parental rights reinforce the constitutional history of parental rights in this country.\(^{251}\) They provide varied moral arguments legitimating parental control over the custody and care of children. They establish moral limits to parental authority, which limitations are tracked quite closely by the exceptions also discussed above. The limitations are required not because the state is more adequately prepared to conduct the moral training of children, nor to ensure fair equality of opportunity, but because the rights of others may be in competition with parental rights. The rights of children may override parental rights in the following circumstances: First and foremost, the child's rights may prevail where the parent's religious beliefs or activities seriously threaten the survival of the child, or preclude the child ever achieving his potential as an autonomous indi-

\(^{248}\) Id.  
\(^{249}\) Id. at 152.  
\(^{250}\) Id. at 154.  
\(^{251}\) For a comparative study of parental rights over the care and control of children, see Blakesley, Parental Authority and Custody in France, in Louisiana and other States of the United States, 4 B.C. INT'L & COMP. L. Rev. 283 (1981).
individual. Thus a parent is not morally obligated to give his or her child every opportunity available to other children in the state, but he or she cannot foreclose development entirely. Second, a child's actual needs, whether physical, intellectual or religious, may have priority over the parent's control over these matters. The child is initially completely dependent on the parent for the satisfaction of almost every need. As the child matures he or she is able to satisfy many of his or her needs and the parent becomes progressively less responsible for such needs. At some point the child achieves independence and the parent's control is eliminated. In this continuum of increasing independency the child may develop needs that the parent is incapable of servicing. Where these needs are serious and morally legitimate, they may justify setting aside parental control over these matters. In the area of religion, for example, where the maturing child develops religious needs for parent's control over religious matters must diminish as a matter of respect for the child's autonomy. Third, where parents conflict on matters such as religious training, the child's immature intellectual abilities may require, as a matter of right, that only one parent be allowed to control such training.

The rights of others may also override parental rights. If the religious beliefs of parent and child threaten harm to others, then those beliefs or activities may be restrained. This restriction is consistent with every social theory that does not advocate anarchy. The potential for abuse here, however, is significant. If the threatened harm to others is open ended and general, then parental rights are likely to evaporate in the verbiage of public interest. Thus the law of child custody outlined herein is morally as well as legally defensible.

VIII. CONCLUSION

Child custody law in this country must be viewed as an amalgam of concern about the best interests of the child as well as the constitutional and moral rights of the parents. Of course in custody disputes the rights of natural parents as well as psychological parents may be at issue. The existence of competing rights, however, does not mean that the courts may simply cancel one against the other and rely totally on a best interests analysis. Rather, these competing rights, as well as the rights of the child and third parties must be reconciled.

The rights of parents to control the religious training of children occurs within a framework in which the best interests of the child are reconciled with the respective rights of the parents. It
has been suggested that religious factors may be considered in custody cases only where (1) the child's actual religious needs require it, (2) the religious beliefs or activities of parent and child illegally threaten other parties, or (3) the religious beliefs or activities of a parent threaten imminent and substantial harm to the child. In other cases where the religious beliefs or activities are unorthodox, and arguably impair the normalcy of the child's development, or undermine the child's equal opportunity to achieve all that society has to offer, reliance on those factors in awarding custody would be immoral and unconstitutional.

It has been suggested that the Nebraska Supreme Court's decision in *Burnham v. Burnham*\(^\text{252}\) is an example of an immoral and unconstitutional deprivation of a parent's right to control the religious training of her child. To the extent it is relied upon by other courts as authority for disregarding parental rights in custody cases, it will undermine an important tradition in this country of affording each person equal respect in the area of religious beliefs.

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\(^{252}\) 208 Neb. 489, 304 N.W.2d 58 (1981).