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Child Custody, Religious Practices, and Conscience

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CHILD CUSTODY, RELIGIOUS PRACTICES, AND CONSCIENCE

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This article asks to what extent considerations relating to religion should figure in custody disputes. One inquiry is whether the kind of religious life that a parent plans for his or her child should figure in the decision whether to grant custody to that parent. The article focuses on a religious life that involves very substantial deprivation—no after-school activities, no television, no pets, no reading except schoolwork and the Bible—from an ordinary secular perspective. A second inquiry is whether one parent of a divorced couple should be able to prevent the other parent from exposing a child to various religious activities that may conflict with the child's dominant religious upbringing. A subquestion is whether courts should enforce earlier agreements about how children should be raised. The overall perspective of the article is that courts should accord parents significant freedom of religious exercise, but should intervene if they think serious mental or emotional harm to a child is likely.

INTRODUCTION

Parental struggles over child custody raise thorny questions about the law's treatment of religious convictions and practices. The two main settings for these disputes are when one divorcing parent claims that the other's religious practices constitute a reason to refuse that parent custody and when one parent seeks to control what the other does with the child in regard to religion—for example, stopping her from taking the child to religious services. The basic issues of principle are similar for the two kinds of cases.

The serious issues in both categories arise only with religious practices in which a married couple could freely have their children participate. Other religious activities—child sacrifice is an extreme example—

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are criminal for anyone. Beyond this, the law forbids children's participation in certain adult activities, such as ordinary work.[1] And, under general standards regarding abuse of children, state authorities would stop parents from pressing their children into harmful activities such as a religious vigil in which participants remain awake for seventy-two hours. For these activities in which officials would restrict parents acting together, a member of a divorced couple can prevent the other from involving their child, and a court may regard such behavior by a parent as one reason not to award custody to that parent. We reach the debatable questions about how religious practices should figure in judicial determinations when we turn to the wide range of activities in which a united couple could include their child. In this article, I suggest that when courts deal with religious practices in these contexts they should neither treat them like every other subject about which parents disagree nor refrain altogether from making judgments about effects on children. Rather, they should take religious practices as a basis to deprive a parent of custody, or to restrict the parent's liberty only if the practices pose a serious threat of harm for the child.

I. CUSTODY DISPUTES AND RELIGIOUS CONSCIENCE

I discussed this topic at the illuminating conference on Religion and Conscience, whose papers are published in this volume. Because the body of my article does not often mention conscience, it may help at the outset to explain in a summary way how my subject connects to broader concerns about relations of religion, conscience, and the state.

I assume that people may believe they should do things as a matter of conscience either on religious or non-religious grounds. That, for many people, conscience may be informed independently of any standard religious beliefs or practices is obvious. I do not consider a view as religious just because it is held as a matter of conscience; thus, I recognize that some claims of conscience are non-religious.

I further assume that not all claims to have one's religious practices accepted amount to claims of conscience. For example, I may wish to have Sunday off from work in order to attend church, but my conscience

1. Even parents who consider work a religious responsibility will be held to have violated child labor laws if their small children do ordinary work. *See* Prince v. Massachusetts, 321 U.S. 158 (1944). In *Prince*, the Court stated that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . ." *Id.* at 167. For a case in which a court denied visitation rights until father ceased daily marijuana use, although father's use was part of his Rastafarian religious practices, see State *ex rel.* Hendrix v. Waters, 951 P.2d 317 (Wash. Ct. App. 1998).

need not be violated if permission is refused—I may think worship at another time is an acceptable alternative. It is extremely hard to say when a belief that one should do something amounts to a claim of conscience, both because exactly what the term "conscience" signifies is far from clear and because, however the term is understood, messy reality presents circumstances that do not fall neatly on one side of the border or the other. What is clear, however, is that many of the claims made by divorcing parents about the religious upbringing of their children can be seen as claims of religious conscience.

A crucial question related to religious conscience is whether government may justifiably accommodate religious claims but not analogous non-religious ones and, more narrowly, justifiably accommodate religious claims of conscience but not analogous non-religious claims of conscience. One might address this question theologically, philosophically, from the perspective of cultural history, constitutionally, or in terms of wise legislation or non-constitutional judicial decision.

It is very important, I believe, to distinguish between judgments about basic principles and judgments about acceptable practical implementation. For example, suppose our judgment as a matter of abstract principle—based on secular political philosophy, theology, or a non-originalist form of constitutional analysis—is that no favoritism for religious over non-religious conscience is justified.

Nevertheless, when we turn to whether the law should recognize particular claims of conscience, we might find some powerful claims based on religion—such as an unwillingness to work on the Sabbath—for which no non-religious analogue presented itself. We might then wonder whether a legislature or court might, in practice, limit a particular accommodation to religious conscience despite the general principle calling for equal treatment.

My first illustration sharply poses these issues. More specifically, it presents the question of whether in disputes over custody the religious upbringing a parent proposes for a child should enjoy a status different from other aspects of how the parent plans to raise his child. My answer is that it *should* have a different status.

Problems of the status of religious conscience lurk in the background of the second sort of example I present, but my main focus then is on two other problems. First, how should the law respond when divorcing parents have opposing views about the religious upbringing a child receives, a situation that may amount to conflicting claims of religious conscience? Second, what relevance does a prior agreement that a child will not engage in a particular religious practice have if a parent now has a religiously informed conviction that he should engage the

child in that practice? In other words, can people legally bind themselves *not* to act as their religious consciences now instruct them? I conclude that courts should hesitate to restrict parental liberty, but that such restriction is nevertheless sometimes called for.

II. CONTESTS OVER CUSTODY

When divorcing parents cannot agree who will have custody of their children, the courts must achieve a resolution. The dominant standard courts now employ is "the best interests of the child,"[2] embodied in many state statutes.[3] When a court decides who will receive primary custody and who will settle for visitation rights,[4] it determines which of two home environments will be more conducive to a child's healthy development. What directly concerns us here is how far the court may take religious practice into account in making this determination.

Judges traditionally gave some "credit" to a parent who was a regular churchgoer, believing that church attendance signaled a parent's sound morality and that a life including religious practice would be better for a child. Just how much judges should credit such religious affiliation is now a substantial question.[5] Under a principle that the state should not sponsor or assist religion, judges cannot give credit for religious practice because it reflects a true view about God. But judges can treat positively the creation of an environment that will help a child to develop morally and socially, and they can regard participation in religious activities as *one* avenue to develop moral and social responsibility.[6]

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2. *See, e.g.*, Morris v. Morris, 412 A.2d 139, 141 (Pa. Super. Ct. 1979). Shauna Van Praagh, among others, has suggested that in cases in which religion plays a role, a court's inquiry should be more complicated than assessment of the child's best interest. *See, e.g.*, Shauna Van Praagh, *Religion, Custody, and a Child's Identities*, 35 OSGOODE HALL L.J. 319 (1997).

3. *See, e.g.*, KY. REV. STAT. ANN. § 403.270 (Michie 1999). Occasionally, a formulation also refers to the interests of others, but this is a minor deviation from the emphasis on the child's interests. Arizona's statute refers to "[t]he mental and physical health of all individuals involved." ARIZ. REV. STAT. ANN. § 25-403 (West Supp. 2004) (stating that this is one of the "relevant factors" which shall be used by the court to determine the "best interests of the child"). If a court is seeking in part to promote the health of all individuals involved, it is possible that a resolution that seems best overall will be less than optimal for the child.

4. If parents cannot reach agreement about custody, an arrangement of joint custody may not work well since that arrangement requires substantial cooperation between the divorcing parents.

5. Some statutes actually refer to the religious or spiritual needs of the child, *see, e.g.*, ALASKA STAT. § 25.24.150 (Michie 2004); S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1985), but at least one court has indicated that it could consider religion only if it could do so under a "harm" standard, *see* Bonjour v. Bonjour, 592 P.2d 1233, 1239–40 (Alaska 1979).

6. Judges probably cannot constitutionally assume that religious practice is more conducive to moral development than a non-religious participatory association that seeks to support

A. Potential Harm from Religious Upbringing

The situation that draws our attention is rarer. One parent claims that the other's religious practices will actually harm the child, based upon broad cultural standards of healthy development. Given the constitutional principles of free exercise and non-establishment, what relevance, if any, should judges assign to such religious practices? What approach reflects appropriate neutrality among competing religious views and groups? And should any protection that religious beliefs and practices receive also be extended to non-religious beliefs and practices?

The 1967 dispute of *Quiner v. Quiner* starkly posed the central issues about reliance on religious practices.[7] A California court addressed the fundamental question of whether a wife's religious beliefs and practices could count negatively in the battle over custody. We can sharpen the modern relevance of the dispute by altering some features of the actual case, assuming that a court is making an initial decision about custody under a "best interests of the child" standard, and that factors other than those related to religious belief and practice tip slightly in the mother's favor.[8]

When the Quiners married, both belonged to a group called the Plymouth Brethren. Disagreement arose and the group split, with Mr. Quiner joining a faction that did not accept the majority's move toward exclusivity and separation. Mrs. Quiner remained with the more exclusive group, which her father helped lead. Mrs. Quiner believed she had to be "separate" from her husband who "had chosen to be out of the fellowship." She could neither eat meals nor have sexual intercourse with him. She acknowledged that she would instruct her son, John Edward, in her religious faith and that, if he accepted the faith, he would "separate" from his "spiritually unclean" father. Nevertheless, she would teach her son to love his father and to respect and obey him.

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morality, however.

7. Quiner v. Quiner, 59 Cal. Rptr. 503 (1967).

8. In the actual case, John Edward, the child, had already been with his father from the ages of two-and-a-half to five, in accord with the trial court's award of custody. *See id.* at 504. The appellate court treated the then-existing law as requiring a grant of custody of a child of tender years to a fit mother, barring truly extraordinary circumstances. *See id.* at 509–10. That approach is now regarded as violating the Equal Protection Clause, under which women and men must be treated equally in respect to custody. *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Mothers continue to receive custody of small children in the vast majority of circumstances, but courts do not invoke any nearly automatic principle. *See, e.g.*, Timothy S. Grall, *Custodial Mothers and Fathers and Their Child Support: 2001*, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS 1 (Oct. 2003), http://www.census.gov/prod/ 2003pubs/p60-225.pdf. Finally, appellate courts generally defer to the discretion of trial courts that have decided on custody, accepting determinations different from those they would have made.

The children of the "Exclusive Brethren" were told not to eat in the school cafeteria but to eat a box lunch alone, separate from their schoolmates. The children could not affiliate with any outside organization or participate in any extracurricular activity, they could not visit and play with other children, they could not have toys or pets, they could not watch television or listen to the radio, and they were discouraged from reading anything except school work and the Bible. Adult members did not vote or participate in civic or government activities, and they did not have television sets or radios in their homes.

Mrs. Quiner attended religious meetings six nights per week and three times on Sunday, and she would take her child to many of these. According to the Encyclopedia of Religion and Ethics, women were not allowed to speak at these meetings.[9] As early as the age of six, a child might be converted to full membership. The trial court remarked, "such a schedule leaves practically no time for defendant to spend in the normal activities of mother and child in training, recreation and otherwise attending to her child's needs."[10] Mr. Quiner, who also had Protestant fundamentalist beliefs but did not live "separate" with all its limitations on ordinary life, argued that he would be the better custodial parent.

The issue posed by *Quiner* is not simple. In custody disputes, the state does not have the option of "staying out"; a court must decide in favor of one parent or the other.[11]

Four conceivable bases, all connected to religion, might be relied on by a judge to award custody to Mr. Quiner. (1) Mrs. Quiner's separatist beliefs are bizarre and unsound. (2) Internal aspects of the practice of that religion, including the rule that only males speak at assembly meetings, teach implicit lessons contrary to the ideals of democratic citizenship and gender equality. (3) Separation as practiced is so severe that a child will be ill prepared for ordinary life. (4) Mrs. Quiner's attitudes create severe risks that her son will want to avoid contact with his father, or will suffer emotionally from the pull of her beliefs against his father's love.

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9. *Quiner*, 59 Cal. Rptr. at 506 n.1 (citing 2 ENCYCLOPEDIA OF RELIGION AND ETHICS 843, 847 (James Hastings ed.)).

10. *Id.* at 509.

11. In this respect, disputes over custody resemble disputes between conflicting factions over who owns church property, which I discuss in Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843 (1998).

B. What May Courts Take Into Account?

We can dispose of the first and second possible grounds fairly quickly. Secular courts may not decide that some religious beliefs are intrinsically sounder than others.[12] Nor should courts base decisions on judgments about how well worship services and organizational principles comport with democratic ideals. Although, in fact, some church practices do comport better with social ideals of fairness and equality than others, legal institutions should not get in the business of favoring religious groups based on such judgments about the effect of their internal practices on the broader society.[13]

The third and fourth potential grounds are more promising. Mrs. Quiner has indicated that she will raise John Edward to have minimal contact with other students and with the external, general culture. One might reasonably conclude that a child who does not participate in any extracurricular activities, is not exposed to television or radio, and reads little other than school assignments and the Bible will be less well prepared for ordinary life than a child given the more usual upbringing Mr. Quiner offers. Of course, the child may be well prepared for life within the "Exclusive Brethren," but suppose he leaves?

For this aspect of the inquiry, the track record of the "Exclusive Brethen" might be relevant, as it apparently was in the leading case of *Wisconsin v. Yoder*[14] for the Amish who wanted to withdraw their children from school. If most children reared in this and similar groups remain within the fold, a risk of poor preparation for ordinary life might be tolerable. But if most children eventually leave such groups, the chances are high that John Edward's rearing will leave him less well prepared for the life he will finally choose.[15]

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12. However, when courts decide cases on the basis of secular interests, they undoubtedly reflect views in the society about religious truth to some degree. Courts would not order blood transfusions for children over the objection of Jehovah's Witness parents if most people in society really believed that receiving the blood of another person would lead one to be damned. I discuss the inappropriateness of the state taking a position about religious truth and some of the complexities of that idea in KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? ch. 5 (2005) and in KENT GREENAWALT, RELIGION AND FAIRNESS: FREE EXERCISE, ch. 3 (forthcoming 2006).

13. My comments in the text skirt the difficult question of whether it should count against a parent seeking custody that his or her religion teaches a pervasive inferiority of one gender (typically women).

14. 406 U.S. 205 (1972). The Court's treatment of the Amish as a very successful social unit seems partly to rest on its ability to retain members.

15. It is troubling, however, that a parent's right to custody might turn on general statistics about the ability of separatist groups to retain members.

We can imagine two quite different judicial responses, each of which might be characterized as "not taking religion into account." A court might disregard all aspects of Mrs. Quiner's plans for her son that are connected to religion.[16] That approach would best protect her religious exercise against negative or hostile judgments but might ill serve the son's interests as those are understood from a non-religious point of view. A contrasting way "not to take religion into account" would be to consider Mrs. Quiner's plans with "blinders" about their religious source—for example, assessing her proposals not to have her son watch television or read outside material detached from their religious motivation. This approach, however, would afford Mrs. Quiner minimal protection and yield an unrealistic assessment of how the various deprivations would operate in her son's life.

Instead of choosing between these stark alternatives, a court might adopt an intermediate approach, one that would not treat Mrs. Quiner's religiously based choices just like any other unusual plans but would take them into account if their negative effects were likely to be significant. An intermediate approach is less clean conceptually than the other two, but I shall argue that it makes the most sense.

Accepting Mrs. Quiner's claim that an award of custody to her husband "penalized her for her religious beliefs,"[17] the *Quiner* court construed the federal and state constitutions to forbid any legal penalty "imposed upon a person because of any religious beliefs which are not immoral, illegal or against public policy."[18] The court held that it would be opening a "Pandora's box" if it could "weigh the religious beliefs" of each parent to decide which is in the best interests of the child.[19] Unable to conclude that John Edward would not grow up to be a constructive, happy, law-abiding citizen, the court commented:

> [p]recisely 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)

16. This approach would be qualified, of course, for any activities a court would forbid to married couples with a unified view.

17. Quiner v. Quiner, 59 Cal. Rptr. 503, 510 (1967).

18. *Id.* at 510–11. The court emphasized that had the Quiners stayed together they would certainly have been free to raise their son as Mrs. Quiner planned to raise him.

19. *Id.* at 517.

> upon the physical, mental and emotional well-being of a child, must be forcibly kept from judicial determinations.[20]

A court would later be able to intervene if John Edward was taught not to love and respect his father, or if it found actual evidence that his "emotional and mental well being has been affected and jeopardized."[21]

The dissenting judge objected to a result that "with practical certainty, will produce tragically harmful effects inimical to the welfare of the . . . boy."[22] Pointing out that once psychological damage is actually done, a lifetime of remedial care may not undo it, he argued that custody should be awarded on the basis of "reasonable probabilities."

A judge would undoubtedly consider the restricted social life and separation from his father that Mrs. Quiner proposed for her son were these not tied to her religious convictions and group practice. Imagine a mother who said, without any religious basis or associational tie, that she would teach her child to withdraw from social contacts, to refrain from reading books, and to separate from his father. That would count against custody for the mother.[23]

A judge would be unlikely to treat a member of a non-religious association that believed in a simple life and argued withdrawal from external social contacts as the court treated Mrs. Quiner. A judge would find it hard to comprehend how a non-religious group could develop such an extreme philosophy of withdrawal, and a modest review of history would suggest that secular groups practicing various forms of a simple life have not long survived.

Quiner effectively qualifies the usual "best interests of the child" approach. Its implied rule of law is, "we will award custody according to what will probably be in the best interests of the child, except that we will not make judgments about projected plans for a child that relate to a parent's religious beliefs and practices, even when the risks of undesirable outcomes (including social withdrawal and possible separation from the father) can be identified without reference to the religious beliefs and can be assessed according to a non-religious cultural understanding about a healthy upbringing." So perceived, the principle of the case is debatable, and raises a delicate issue about baselines.

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20. *Id.* at 516.

21. *Id.* at 518.

22. *Id.* (Herndon, J., dissenting).

23. Judges might decide that activities that are ordinarily undesirable can be positively valuable in a religious setting, but that is not the court's rationale in *Quiner*. If Mrs. Quiner belonged to a non-religious expressive association with similar practices, she might argue that the state should not penalize social beliefs and the practices that follow from them, but a court would not regard itself as disqualified from assessing likely effects on the child.

If one begins from the premise that courts should take into account all factors that can be evaluated on a non-religious basis, it would be most "neutral" to consider the likely effects of isolating a child from secular society. Under this view, for judges to give some weight to such plans would not inhibit religion or entangle the state with religion because all possible effects would be judged without reference to religion. If, instead, one begins from the premise that parents should have wide latitude to determine the religious activities of their children, one will regard a judge's reliance on factors related to religious practice as inhibiting religious exercise. Although no one would stop the parent from practicing her religion, she would be effectively forced to choose between gaining custody and adhering to an unconventional faith that includes her children.[24] A rule that treats factors like a prohibition on reading secular books negatively, whatever their source, provides an incentive to parents to choose "safe" religions.

Any judicial attempt to consider practices apart from their religious setting raises an independent difficulty: either the court will make an unrealistic appraisal or it will find itself investigating the religion. Practices imposed on a child by an isolated parent will operate quite differently from practices that are aspects of life within a close-knit religious community.[25] And a judge would be hard put to evaluate practices as they actually operate without assessing religious elements because religious assumptions are so deeply embedded in the practices.[26]

These difficulties support the *Quiner* court's conclusion not to treat religious factors like other factors, but its principle of disregarding factors deriving from religion, in the absence of evidence of actual harm, is not the soundest approach. A better approach is to look at such factors, but to give them weight *only* when they point strongly against custody for the parent with the unusual religious beliefs and practices.

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24. The parent might follow a religious faith on her own, affording the child a more "normal" life, but one can see that this would be almost impossible for a member of the Exclusive Brethren, even if her religious principles allowed her to provide a normal life for her child.

25. A judge might ask, "How would these practices look in a non-religious community?," but this is not going to be a very helpful inquiry if all the communities that actually engage in the practices are religious.

26. One can evaluate how often children die because their parents refuse blood transfusions, but one cannot evaluate the effect of separation from the external community without considering the support given by an internal community.

C. *An Intermediate Approach That Focuses on Serious Threatened Harm*

In a case that called the approach of *Quiner* "improvident," another court held "that the requirement of a reasonable and substantial likelihood of immediate or future impairment [of the child's physical or mental well-being] best accommodates the general welfare of the child and the free exercise of religion by the parents."[27] This kind of intermediate approach avoids the nearly absolutist approach of *Quiner*, but regards religious practices as something more than factors to be thrown into the mix with everything else that is relevant.[28]

According to one writer, state courts have adopted three different approaches to the threshold of harm that must be crossed before they will consider factors that relate to parental religious practices.[29] Under a "temporal welfare" approach, courts consider any practices that affect a child's well-being in ordinary life. That would certainly include much of Mrs. Quiner's plans for John Edward. Under a "threatened harm" approach, courts consider factors that threaten a child's physical or mental well-being. Under an "actual harm" approach, as adopted by the *Quiner* majority, a court considers only religious practices that have already caused physical or mental harm.

Drawing a line at "actual harm" as contrasted with "threatened harm" does not make sense if one has in mind a discrete harmful occurrence that may or may not happen. A striking example is the refusal of Jehovah's Witnesses to seek or allow blood transfusions for their children. Let us suppose that one parent seeking custody is a Jehovah's Witness and the other is not. Should the risk of the child's not receiving a transfusion count against custody for the Jehovah's Witness? One court said that this possible harm, a hypothetical future event, was not a sufficient basis to deny custody.[30] Suppose after custody is awarded to the Jehovah's Witness, the child needs a transfusion and one parent tries to prevent the child from receiving one. Should that alter a judge's ap-

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27. *In re* Marriage of Hadeen, 619 P.2d 374, 382 (Wash. Ct. App. 1980). *See also In re* Marriage of Short, 698 P.2d 1310, 1313 (Colo. 1985); Morris v. Morris, 412 A.2d 139, 144 (Pa. Super. Ct. 1979).

28. A case that approximates this position is Petersen v. Rogers, 433 S.E.2d 770 (N.C. Ct. App. 1993), *rev'd* 445 S.E.2d 901 (N.C. 1994). *See also* Pater v. Pater, 588 N.E.2d 794 (Ohio 1992).

29. Gary M. Miller, *Balancing the Welfare of Children with the Rights of Parents:* Peterson v. Rogers *and the Role of Religion in Custody Disputes*, 73 N.C. L. REV. 1271, 1285–86 (1995).

30. Garrett v. Garrett, 527 N.W.2d 213, 220–21 (Neb. Ct. App. 1995).

praisal of custody if the child survives?[31] Unless the incident shows an increased likelihood of a need for a future transfusion, the judgment about custody should not change since the child's need for another transfusion remains only a contingent future possibility. One transfusion incident does not tell us whether the child in the future will be safe with the Jehovah's Witness parent.

What this analysis reveals about discrete harms of brief duration is that the real issue should not be "actual harm" or "threatened harm," but degree of probability of future harm. If a serious harm is highly probable to occur in the future, a court should take it into account. The no-transfusion harm will arise only if (1) a child needs a transfusion, (2) the parent will stick to her guns and not consent to it,[32] and (3) hospital authorities will not be able to intervene and get a court to order the transfusion over the parent's objection. If this danger should not count, the reason is its low probability, not that it lies in an uncertain future.

Analysis of emotional harm is different because predicting how life's events will affect people's emotional well-being is hard. One might think that judges cannot predict emotional harm with sufficient accuracy to justify their assuming that religious practices may have a negative effect.[33] But, for two reasons, a sharp distinction between actual and probable harm is too neat. First, experts often disagree whether actual harm has occurred. A court relying on less than certain evidence may base a decision about actual harm on a probability that is no greater than is a high likelihood of future harm. Another reason to act if future harm is highly probable is the difficulty of reversing emotional harm that has already occurred. When judges estimate *both* actual emotional harm and highly probable emotional harm from religious practices, their evaluations, and those of experts, may be influenced by opinions about the religious practices. This risk, however, cannot be wholly avoided. Requiring a high likelihood of serious harm is a better safeguard than responding only after harm already has occurred.

Whether a religious parent is connected to a religious group may not matter for the threshold determination of how a judge should treat factors connected to religious practice, but it will loom large in a final evaluation of those factors. For example, John Edward (the child at the center of the *Quiner* case) would grow up with the support of a like-thinking group.

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31. The child might survive despite not having received a transfusion or because a court ordered a transfusion over the parent's objection.

32. An actual incident does provide a strong indication of what a parent will actually do when the need for transfusion arises.

33. On the view of the *Quiner* court, only a finding of actual harm would be reliable enough.

Imagine the emotional strain for a child who is required to separate in almost every aspect of life and has no close association with anyone other than a single reclusive parent devoted to an idiosyncratic religious path. Further, the child's chances of eventually rejecting that way of life would be much greater without the group.[34] The parent who is connected to a religious group will, and should, fare better in court than individuals who lack associational ties, or whose only associational ties are non-religious.[35]

Child custody determinations are governed by a mix of common law, statute, and constitutional law. Courts long developed their own approaches to custody disputes, but the "best interests of the child" standard is now widely prescribed by statutes. Courts deciding how to treat religious factors in light of that standard must assess statutory policy, surviving common law understandings, and federal and state constitutional principles. Under the Federal Constitution, the primary principles that apply are drawn from the Free Exercise and Establishment Clauses.

D. Constitutional Concerns

The Free Exercise Clause guarantees freedom of religious practice. The Establishment Clause precludes government from sponsoring any religion, or religion in general. In examining constitutional restrictions on what a court might otherwise be inclined to do, I shall consider free exercise and establishment concerns in order. The serious free exercise question is whether some accommodation to religious exercise is required, as the *Quiner* court assumed. If a state court uses a compelling interest test under its own constitution, custody determinations will not be allowed to impair the free exercise of religion unless the standards are necessary to serve a compelling interest that cannot be served by alternative means. A standard that treats factors derived from religion like all other factors does indeed impair the exercise of religion, and the state lacks a compelling interest in using that approach[36] since it can ade-

34. Another consideration, although not one a court is likely to rely upon explicitly, is that an individual who arrives at such beliefs on her own is much more likely to be viewed as emotionally unstable than someone who has participated in group life. In Mrs. Quiner's case, the leadership of her father provided a natural explanation of why she was attached to her group.

35. It is hard to imagine a non-religious association with attitudes similar to those of Mrs. Quiner. Were there one, a court could probably assume it would not have much staying power; this is one of those areas in which a court might reserve special treatment for religious groups.

36. One might say that the state has a compelling interest in the child's welfare, but that interest can be served by a less restrictive means. I assume in this discussion that the relevant compelling interest standard is not as stringent as the standard used in equal protection and

quately protect the child's important interests under a "threatened harm" standard.[37] A state requiring a high likelihood of serious harm should succeed in arguing that this approach is necessary to serve a compelling interest.

Legal analysis of federal free exercise rights under prevailing doctrine is a jumble. *Employment Division v. Smith*, the landmark case that denied members of the Native American Church any free exercise right to use peyote in worship services, held that religious claimants should be treated like all others subject to statutory prohibition unless they receive a statutory exemption, fall within a class of unemployment compensation cases, or raise a hybrid claim.[38] A religious parent, however, could plausibly argue that *Smith* does not apply to custody determinations. Her claim to have religious factors disregarded is far removed from unemployment compensation, but the *Smith* Court intimates the possibility that free exercise protection may apply to situations in which officials make individualized judgments about exemptions. Someone in Mrs. Quiner's situation could contend that since judges make highly individualized judgments about custody, her situation resembles that of Ms. Sherbert, who successfully claimed in *Sherbert v. Verner* that she could not be denied unemployment compensation because her religious convictions did not allow her to work on Saturday.[39] On that theory, a court should take Mrs. Quiner's religious exercise into account. However, because custody judgments do not concern exceptions from ordinary legal requirements, this argument is a stretch.

A religious parent might argue that her claim involves parental rights over the upbringing of children as well as freedom of religion and thus falls within the embrace of *Wisconsin v. Yoder*, the case permitting Amish parents to withdraw children from ordinary school after eighth grade despite a state statute requiring attendance until the age of sixteen.[40] But a parent like Mrs. Quiner seeks to have a court disregard fac-

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free speech contexts under the same label. *Sherbert v. Verner* and succeeding cases established that a state may not deny unemployment compensation to someone whose unwillingness to work on Saturday or whose unwillingness to perform certain work is based on religious conviction. 374 U.S. 398 (1963).

37. Against the argument that a "threatened harm" standard is unnecessary, because a narrower, less restrictive, "actual harm" standard will do, the answer is that the difficulties of identifying and undoing actual physical or mental harm provide a state ample basis to use the threatened harm standard, if it chooses.

38. 494 U.S. 872 (1990).

39. 374 U.S. 398 (1963).

40. 406 U.S. 205 (1972). The *Smith* Court treated *Yoder* as a hybrid case. *Smith*, 494 U.S. at 881.

tors normally relevant for custody determinations; for this issue, she does not have a separate parental right apart from religious exercise.[41]

The free exercise exemptions left standing by *Smith* are so hard to justify that one cannot sensibly determine whether the religious parent claiming custody should fit within one of the categories *Smith* does not purport to cover.[42] Since I believe that *Smith* itself is misconceived, I would regard a broad construal of its exceptions as desirable; its overruling would be preferable.[43] In the meantime, state courts should use a compelling interest approach (or something similar) for their own free exercise provisions and should insist that trial judges in custody disputes use a "threatened harm" for religious factors, rather than treating those factors like any other consideration.[44]

Under the threatened harm approach, religious factors are treated differently from other factors. Does this unconstitutionally establish religion? Such approaches do "favor" religion in some ways, but there are two strong answers to this establishment challenge.

First, religion is not *relevantly* favored. If a judge does not take into account a factor that he otherwise would, such as not having television, radio, or computer in the household, that does not encourage anyone to take a particular religious view. Almost no one will adhere to a religion as a cover for not having a television that he really does not want for secular reasons. The sense in which religion is favored is only that what would otherwise count negatively is disregarded. Second, even if a

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41. To be more precise, she has parental rights to raise her children, but none of those bear on how factors should be considered in a contest with another parent who has the same basic parental rights.

42. Future results will depend on whether the Court wants to push *Smith* to its logical conclusion or back away from it.

43. I have defended this judgment in other writings. For a thorough examination of this proposition, see KENT GREENAWALT, RELIGION AND FAIRNESS: FREE EXERCISE (forthcoming 2006).

44. A similar result may be reached under the Religious Freedom Restoration Acts which a number of states have adopted. There are two arguments that the temporal welfare approach, which treats religious factors that bear on temporal welfare like non-religious factors, violates the Establishment Clause. One argument is that the approach inhibits religion by pushing parents to deny their true faith if that religion is judged bizarre by others, and to adhere to safer religions. Under standard establishment analysis, this effect should be regarded as remote and indirect, rather than a forbidden primary effect since the standard itself makes no reference to religion. *If* the effect is regarded as primary, the law is more conveniently seen as denying the free exercise of religion in any event, so long as any free exercise test is used other than the neutrality approach of *Smith*. The second argument that the "temporal welfare" approach is an establishment is that judges and other officials must make impermissible (entangling) judgments about religion in order to decide if practices are likely to affect a child's temporal welfare. I have suggested that the difficulties of these inquiries is a reason to avoid the temporal welfare approach, but the degree of entanglement may not be undue, in a constitutional sense, if judges stick scrupulously to likely effects measured in non-religious terms.

threatened harm approach significantly favors religion, it should qualify as a permitted accommodation to free exercise, one that responds to what would otherwise be a government constraint on the exercise of religion.[45]

III. RESTRICTING PARENTAL ACTIONS

Apart from determining custody, a court may be called upon to respond when one parent objects to the other's exposing their child to a different faith,[46] or seeks to compel the other to take the child to religious services, or tries to stop the child's participation in a religious practice that causes harm unrelated to religion.[47] The "independent harm" situations resemble those we have just considered, except that, instead of requesting custody, the objecting parent wants a court to constrain the custodial parent.[48] For example, Mr. Quiner might ask a court to require Mrs. Quiner to give John Edward access to schoolmates and television.

A. Dictating Terms Compared with Denying Custody

Should a court feel freer to dictate such terms of custody than to deny custody to Mrs. Quiner in the first place? In one sense, the court's intervention is less troublesome, because Mrs. Quiner will be less drastically affected; she will keep John Edward subject only to some conditions. But in the initial custody battle, a judge had to decide which of two environments was preferable; he was not compelling anyone to raise a child in a certain way. A judge who tells Mrs. Quiner what she must do with John Edward interferes more directly with her life, including her religious practices and her conscientious beliefs about how to raise her child.

People may differ over the weight of these two countervailing factors—less drastic consequences and greater interference—but a stringent threatened harm standard is the best approach to custodial conditions, as well as to the underlying dispute over who has custody. The reasons for and against taking proposed religious practices into account are similar

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45. The precise boundary between permissible accommodations and impermissible favoritism (amounting to establishment of religion) is a complex topic I do not engage here. My preliminary thoughts and some references are set out in Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 380–88.

46. *See, e.g.*, Pater v. Pater, 588 N.E.2d 794 (Ohio 1992).

47. In these two situations, it is typically the custodial parent who seeks to restrict the activities of the non-custodial parent.

48. *See, e.g.*, Abbo v. Briskin, 660 So. 2d 1157 (Fla. Dist. Ct. App. 1995).

for the two kinds of determinations, and the desirable approach is the same. Thus, a judge should forbid a parent from engaging a child in religious practices only when they pose a high likelihood of physical or emotional harm.[49]

B. Exposure To More Than One Faith

When one parent tries to "enforce" a particular religious upbringing for the child, a court may face issues about conflicts between religious viewpoints and about the relevance of prior agreements and established practices. One parent (usually the one with custody) may insist that the other not take the child to the services of a different faith, fearing this will cause stress and undermine the child's religious upbringing. How harmful is it for children to be exposed to two religions? This depends greatly, one supposes, on parental attitudes, the child, and the two religions. Children can accommodate two religions more comfortably if they are open and inclusive rather than closed and exclusive. A child would need an unusual degree of detachment to maintain equanimity if she is regularly barraged by two religions, each of which stridently asserts that the other's members follow the anti-Christ and are doomed for eternity. In all likelihood, judges should not unilaterally determine that exposure to two religions will be harmful, unless a child shows signs of emotional disturbance.[50]

C. The Relevance of Agreements and Their Coverage

A court's task is complicated if the complaining parent relies on an explicit agreement about the child's religious education or an established family practice. A judge adhering to either of these might regard herself as deferring to judgments about harm made by the parents themselves or as enforcing parental understandings as she would other contractual undertakings. But we need to be very careful about the justification for each of these rationales.

Many of the dimensions of this problem can be developed from the facts of *Zummo v. Zummo*.[52] The parents had agreed orally before their

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49. Determination of conditions of custody can connect to the decision of who has custody. For example, if a custodial parent refused to forego the practice a court has forbidden as potentially harmful, that would be a significant basis to shift custody.

50. *See* Munoz v. Munoz, 489 P.2d 1133, 1135 (Wash. 1971) (en banc). Courts should not be delving into the details of the two religions to a degree that would enable them to say that exposure to both will be destructive.

52. 574 A.2d 1130 (Pa. Super. Ct. 1990).

marriage that they would raise their children as Jewish. During the marriage the family participated in the Jewish faith, and the children attended no other services. Upon divorce, the Jewish mother, Pamela, received custody. The father, David, wished to take his children to Roman Catholic services. Pamela, concerned that inconsistent religious teachings would "confuse and disorient" them, sought a prohibition against David's taking the children to non-Jewish services. In such a case, the court faces an initial difficulty in assessing what the parental agreement was meant to cover, the circumstances of its application, and the particular activities it required and forbade.

The fundamental question about applicable circumstances is whether an agreement about the marriage was intended to survive a divorce. David may have accepted the children not being exposed to any religion other than Judaism because he saw this as conducive to a compatible, unified family. Once the family is broken by divorce, he may feel that taking the children to Catholic services helps give them a sense of his identity and causes no harm. Pamela may rejoin that all this shows is that David now regrets his prior agreement. Often it will be far from clear whether someone understood his original oral agreement and his practice within a unified family as designed to survive divorce. And it will often not be clear just what the two partners would have agreed to if they had explicitly focused their attention on a possible divorce.

This doubt about intent is overcome if the parents have a written premarital agreement that explicitly covers divorce, or if the agreement to raise the children in one faith is part of the divorce settlement itself.

Can the problem of intent be overcome in a different way—namely, by a conclusion that the parental agreement and family practice show that the parents regarded exposure to two religions as harmful and that courts can fairly rely on that judgment? Usually not. In some instances, positive evidence that the parents together had made such a judgment may be forthcoming, but I strongly suspect that this is atypical. The common circumstance is that one partner feels deeply about having the children raised in his or her faith and the other partner, perhaps less intense about religion, accedes. A variation on this theme is one partner's membership in a church that will not recognize a marriage unless the other partner agrees to raise children in that faith. In these instances, the acceding partner need not reach a judgment that exposure to two faiths will be harmful for children. Rather, believing that his loved one will not marry him unless he agrees, or motivated by an aim to eliminate a potential source of marital tension, he accepts the strong wish of his partner about religious upbringing. Divorce nullifies these reasons. A court can rarely infer with confidence that the partners together have reached a

judgment that exposure to two religions would, in conditions of divorce, be harmful for the children.[53]

When one turns from the circumstances in which it applies to the particular actions it forbids, interpreting an agreement or practice may not become easier. If a father has visitation rights one weekend a month, and a child is to be "raised as a Roman Catholic," *must* he take the child to a Catholic Church on his Sundays with the child? If not, may he take the child to a Presbyterian Church? Suppose he says he is only exposing the child to that religion, not raising him as a Presbyterian. If he should not take the child to his church, may he tell the child what he believes, including his disbelief in transubstantiation and the authority of the Pope?

The divorce in one case provided that the children were to be raised as Jewish, but the non-Jewish custodial mother nevertheless enrolled her son in a Roman Catholic school.[54] The father sought to compel her to transfer the child to public school. Most married couples who practice a form of Judaism would hesitate to send their children to Roman Catholic schools, but some do so. Would one or both parents have thought their agreement to raise a child as Jewish precluded enrollment in a Catholic school? That is very hard to say.

Many agreements are imprecise about such details. Of course, agreements of all sorts are vague and courts interpret them as best they can, but the special difficulty here is that courts may be unable to interpret imprecise agreements without trying to understand what is crucial for the religion in which the child is to be raised. In the case we have been examining, that might mean delving into the particular form of Judaism and what is taught in the Roman Catholic school to determine the degree of incompatibility.

One way out of this difficulty is to treat such agreements as unenforceable, but this approach would bar enforcement of some agreements that are both clear in substance and clearly meant to be applied by civil courts in circumstances of divorce. A better way to handle this problem is not to restrict the liberty of a parent unless the agreement definitely entails that restriction or a parent's aim is to undermine the agreement. That would mean allowing the child's enrollment in Catholic school unless the judge were convinced that the parents meant to bar such schooling or that the mother's aim was to combat the child's Jewish up-

53. Of course, a divorce itself imposes a considerable emotional strain on children, but the non-custodial parent is unlikely to think that strain will be much increased if he is allowed to take a child to his place of worship.

54. *See* Gottlieb v. Gottlieb, 175 N.E.2d 619 (Ill. App. Ct. 1961).

bringing. A court in serious doubt whether an agreement limits a parent's freedom should decide against restricting that parent.

Enforcement of agreements about religious upbringing raises still more fundamental problems about the state's role. Suppose the noncustodial father in a case like *Zummo* specifically agreed that he would not take a child to Catholic services, that he would not influence the child in any way in favor of Roman Catholicism, that he would have the child raised exclusively as Jewish, *and* that this agreement would cover circumstances of divorce. For a court to regard such an agreement as legally effective, it must concern itself with intended legal effect, possible duress, and continuing constraint on religious liberty.

The most straightforward question is whether the agreement was intended for secular legal enforcement. When couples sign agreements to satisfy church authorities who will not sanction marriages to nonmembers unless they agree to raise children in the faith, a non-member may subscribe to a written agreement to satisfy the church, but without intending to be legally bound. The non-member may gain some support for his position that such an agreement is not of legal effect from the disinclination of courts generally to enforce such agreements so long as couples remain married.

Parties can assure that a court will recognize intent to accomplish a legally binding agreement by saying so in the agreement itself. For this purpose, it should not matter whether the original initiative comes from a church or from one member of the marrying couple, so long as the intent of binding legal effect is explicit. Non-enforcement of such agreements during marriage has only peripheral relevance. Courts rightly take the position that married couples must look mainly to themselves to work out problems; for courts to intervene in the affairs of couples who remain married would tend to undermine marriage bonds. Once the marriage has broken, and courts are entwined in the divorcing couple's affairs, this reason not to enforce a specific agreement evaporates.

A second question is whether the agreement was the product of some kind of duress. For example, one member of a couple may have had a strong desire or need to be married, and the other may have extracted unfair concessions. A parent seeking to enforce the agreement will have a strong response to most contentions about duress. No one has to get married. If a man wants to be married so badly that he gives up things he would otherwise want, that does not constitute duress.[55]

55. The strongest argument for duress may occur when a woman is pregnant, wants to be married to the father when she has the baby, and must agree to unpalatable conditions to achieve that. One can also imagine a situation in which the pregnant woman is planning an abortion and the prospective father desperately wants the child to be born, perhaps because he

This conclusion is supported by the enforcement of premarital agreements about property that leave a divorced spouse with many fewer assets than he or she would otherwise have received.

D. Is Holding a Parent to an Agreement an Acceptable Constraint on Religious Liberty?

The most troubling issue of all is whether a person should be bound to what he has agreed to years earlier when the agreement concerns his exercise of religion. Imagine that at the time he got married, David Zummo was an indifferent Catholic, who hardly cared about the religious identity of his children. During the marriage, he has a religious experience and becomes devout. His change in respect to religion becomes one of the sources of tension within the marriage. Should he now be restricted by what he had agreed to years earlier, or would that interfere with his exercise of religion?

Without doubt, enforcement of an agreement constitutes a limit on a parent's exercise of religion, which includes some influence over the upbringing of his children. A restricted parent, in effect, is forced to surrender that aspect of his exercise of religion. But it does not follow that such restricting agreements should never be enforced. Matters of degree are important, as are conflicting religious liberties.

The degree of restriction on free exercise can vary significantly. If a parent is told that he can never discuss or explain his own religious ideas when he is with his child that constitutes a very severe restriction. If he is told only that he may not take the child to specific religious services, the restriction is less severe. What if he is told that during his visitation time he *must* take the child to services of a faith not his own, one he may now abhor? At first glance, forcing a parent to take a child to religious services seems more of an impingement on free religious exercise than forbidding the parent to take the child. But we need to be realistic about what "taking" a child means in context. If the parent must sit through services of an alien faith, that is a serious restriction. But all the parent may have to do is "drop off" and "pick up." That seems a modest deprivation of the parent's *religious* liberty, especially if the agreement clearly covers the child's attending services that occur during visitation times.[56]

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believes abortion is a terrible sin. He may agree to conditions he does not like to achieve the child's birth.

56. Otherwise, visitation days might have to be formulated so the custodial parent can ensure that the child gets to services. In *Carrico v. Blevins*, the court said that a non-custodial mother could not be required to take her son to church during her visitation days because "the

We should not look at the religious liberty interests as one-sided, or as lacking temporal dimension. Suppose, before marrying, Pamela has firmly resolved that her children will be raised as Jewish. She regards that as a vital exercise of *her* religion. She has expected to marry a religious Jew, but she falls in love with David Zummo, a Catholic. She is torn about marriage, but she never wavers on the point that her children must be Jewish. David proposes a resolution. He will agree that the children will be Jewish whatever happens. Pamela is satisfied she can marry the man she loves and carry out her religious imperative in respect to her children. If courts refuse to enforce such agreements, they maximize the present liberty of each adult to do what he or she thinks best, but they do so at some sacrifice of the original liberty of one partner to reach an agreement that will carry forward his or her concept of a religious imperative or religiously desirable outcome.

I do not mean to suggest that the two liberties always carry the same force. In some rough sense, I think the religious liberty of people at the time they act should be given a priority over the liberty to lock in a desired outcome by an agreement. In general, people should be able to act according to their present religious understandings. But it is too simple to say, as some courts have, that religious freedom is inalienable and cannot be bargained anyway.[57] A weak restriction of present liberty, e.g., dropping off and picking up a child at religious services, may fairly be imposed in order to satisfy a strong religious expectation that one partner has carried forward from an earlier time.[58]

Courts that declare they will never enforce agreements about the religious upbringing of children go too far, but formal and informal agreements, often vague in content and unspecific about their implications for divorce, are hardly the key to resolving disputes over the exposure of

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state may not require a citizen to attend any religious worship." 402 S.E.2d 235, 237 (Va. Ct. App. 1991). The case did not involve any prior agreement about religious practice. *See also* Lundeen v. Struminger, 165 S.E.2d 285 (Va. 1969).

57. *See* Zummo v. Zummo, 574 A.2d 1130, 1146–48 (Pa. Super. Ct. 1990). For an older case refusing to enforce a prior contract about the religious training of a child, see Stanton v. Stanton, 100 S.E.2d 289 (Ga. 1957).

58. A legal economist might inquire whether, if courts do not stand ready to enforce such agreements, the consequence will be that people will not enter desirable marriages, because they cannot get needed assurances. I think this scenario is fanciful. The vast majority of people entering marriages are convinced, despite dispiriting divorce statistics that *their* marriage will survive. They rely on the good faith of their spouses. Further, given possibilities of evasion by a non-custodial parent, a person is not likely to rely heavily on civil law enforcement in any event. The legal fate of such agreements probably has little to do with whether they are reached and whether prospective marriages occur. The issue about enforcement is one of fairness, not of influencing patterns of marriage.

children to religions.[59] Some agreements, if they are specific enough about what is at issue, plainly contemplate divorce, and do not impair anyone's religious liberty to a substantial degree, deserve enforcement because that is what the parties have agreed to. Other agreements may have some bearing on how a court should evaluate harm.

Very often, however, courts will be left to evaluate the harm of exposing children to competing religious ideas and practices. As difficult as distinguishing the emotional harm of divorce from the emotional harm of exposure to conflicting religions may be, especially when parents may invest some of the negative emotional charge of the divorce into their comments about the two religions, courts should not assume exposure to different religions will be harmful *unless* there is evidence that harm is occurring.[60] There is room for mistake, and even abuse, in this approach, but it is preferable to any other.

E. Constitutional Considerations

I have not focused here directly on constitutional limits, but something like this approach to restrictions on parental activities should be viewed as required under the Free Exercise and Establishment Clauses together for reasons essentially the same as those I offered with respect to disputes over which parent will be awarded custody. One aspect of that approach would be that when courts focus on what parents do with their children, considerations relating to religion may be treated differently from other aspects of the children's upbringing.

CONCLUSION

In this article, I have looked at two different kinds of custody contests in which judges must rule on the effects of religious practices to which parents are drawn by religious conviction, often by religious conscience. In one situation, a judge must decide which parent of a divorcing couple will receive custody. One of the parents claims that the religious upbringing the other would give the child would have detrimental consequences assessed by ordinary social standards. In the case we ex-

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59. *Cf.* Jocelyn E. Strauber, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 DUKE L.J. 971 (1998).

60. If, on surface examination, a judge can see that two religions are so hostile to each other he cannot imagine a child comfortably being mainly reared in one and having substantial exposure to the other, perhaps that could be a basis to restrict. But the better rule is not to allow judges to rely solely on the doctrines and practices of the religions, however harshly incompatible they seem.

amined in depth, Mrs. Quiner proposed a highly restrictive religious environment for her son, one that might compromise his capacity to learn broadly and engage in social interactions outside the faith and might also threaten his love and respect for his father. The court ruled that the proposed upbringing could not count against Mrs. Quiner, because to do so would violate her free exercise rights. I have argued that although the court was right not to throw proposed religious practices into the mix with everything else, it should have considered whether Mrs. Quiner's religious practices threatened significant harm for her son, rather than awaiting demonstration of actual harm. I defended this "intermediate" standard against possible constitutional objections.

When divorcing couples disagree over what one parent may or must do in respect to religious practices of their child—such as whether a custodial mother may send her Protestant son to a Roman Catholic school or a non-custodial father may take his Jewish child to church or must take the child to Jewish services—I have suggested that, in general, courts should afford liberty to each parent to act as his or her religious conviction or conscience dictates, unless the exposure to two religions is evidently harmful to the child. This conclusion is based largely on skepticism about the ability of judges to tell when exposure to two religions will be harmful for a child. When parents have explicitly agreed about the religious upbringing a child should receive, a judge may enforce the agreement, even if it necessitates a parent taking the child to services that offend the parent. Courts, however, should be hesitant to conclude that agreements reached before or during marriage were designed to be legally enforceable and to survive divorce. They should also hesitate to find that such an agreement shows what both parents thought would be a desirable upbringing in circumstances of divorce.

This examination of custody disputes teaches a broader lesson about the religion clauses of our federal Constitution and its state counterparts. Sometimes, at least, religion and religious conscience are special. They should not be treated by the law just like non-religious aspects of family life.